

**THE RIGHT OF PROPERTY IN THE ITALIAN LEGAL SYSTEM AND IN THE
EUROPEAN CONVENTION OF HUMAN RIGHTS: A CONFLICT TO BE
RESOLVED**

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PART I
EVOLUTION OF THE RIGHT OF PRIVATE PROPERTY IN THE
ITALIAN LEGAL SYSTEM

1. PRIVATE PROPERTY IN THE CIVILE CODE

With the “historical” decisions 348 and 349 of 24 October 2007, the Constitutional Court deciding on compensation for expropriation, ruled on the *vexata quaestio* of the relationship between the European Convention of Human Rights and national law.

The 1865 Italian Civil Code is totally focused on the concept of property², understood as a right which having had its feudal privileges removed by the Great Revolution, guarantees individual freedom³. Article 436 of 1865 Code («La proprietà è il diritto di godere e disporre delle cose nella maniera più assoluta...») is the sublimation of a subjective situation, but at the same time the beginning of its decline, since a precise definition could not withstand the rapid cultural and economic change, which would transform property (especially land) into properties⁴.

In the 1942 Civil Code a unitary idea of property would be reformulated, but the warning signs of the differentiation of the institute were evident.

² G. Pisanelli in G. Pisanelli, A. Scialoja e P. S. Mancini, *Commentario del codice di procedura civile*, I, Napoli, 1875, 494 ss. believes that property is the only subject of the Code of 1865.

³ R. Savatier, *Droit civil au droit public*, Parigi, 1950, 40.

⁴ S. Pugliatti, *La proprietà nel nuovo diritto*, Milano, 1954; P. Rescigno, *Proprietà (dir. priv.)*, in *Enc. Dir.*, XXXVII, Milano, 1988, 254 ss.; A. Baldassarre, *Proprietà (dir. cost.)*, in *Enc. Giur.*, XXV, Roma 1991; S. Mangiameli, *La proprietà privata nella Costituzione*, Milano, 1986. For a detailed analysis: A. Moscarini, *Proprietà privata e tradizioni costituzionali comuni*, Milano, 2006.

The concept of property was evolving because the goods involved in such a right were increasing, making the arguments made only on land ownership obsolete. The strong “physical” connotation of property vanishes in the copyright of property, in the category of enterprise, in property and corporate foundations, to arrive at the complete “dematerialization” of the concept in other “abstract” forms of property. Property takes on aspects of relativity, is dismembered, broken up, socialized and the most authoritative commentators of the Civil Code immediately realized that the concept of property had dissolved into a variety of different properties statutes⁵.

But the most significant difference between the previous 1865 Code concerns the very substance of the right. In fact, art. 832 of the Civil Code subjects property to the limits and to the observation of the obligations established by the legal system, differently from the 1865 Code provisions, where the owner is allowed to do anything that is not prohibited by laws and regulations: the absoluteness of property rights begins in this way to crumble, beginning to shape “limits” and “obligations”, which conform to it from within.

For the first time, property is not represented only as a juridical situation of power, being characterized by possible obligations that the legislature may introduce to limit a right no longer considered absolute by its very nature⁶.

⁵ For F. Vassalli, *Per una definizione legislativa del diritto di proprietà* in *Studi giuridici*, II, Milano, 1960, 329 ss. “non vi è una sola proprietà, che vi sono piuttosto delle proprietà, in quanto l’interesse pubblico è che l’appropriazione dei beni comporti statuti diversi in armonia con gli scopi perseguiti, i quali variano assai”.

⁶ Of great importance is the position of S. Romano, *Sulla nozione di proprietà*, in *Riv. trim. dir. proc. civ.*, 1960, 337 ss., also in *Scritti minori*, II, Milano, 1980, 935 ss. For the author the powers of a subject caused to the legal capacity are antecedent respect to the legal relationships that determine subjective situations. So that the power is not incorporated in the law, but precedes it. The private autonomy can therefore be understood both as an exercise of power devices that such use of subjective rights: the separation of powers and rights explains and justifies the multiplicity of legal provisions on property, understood as separation of powers and individual right.

2. THE CONSTITUTIONAL LAW

In the Constitution the two problematic aspects just examined emerge again and that is, the content of the right and its diversification as to the object.

Article 42 of the Constitution presents a unitary concept of private property, but with a very innovative value, whose substantial content is difficult to define⁷.

The place of property in the section of economic relations and the attribution to the legislator's power to regulate private property seems not to constitute a "minimum content", so much so that the guarantee given to property would be reduced according to the doctrine of "the obligation given to the legislator to preserve some categories of goods which can be obtained by individuals or, even less, to admit in the future where an institute can continue to be given the name of the property"⁸. On the other hand, however, art. 42 "recognizes" (in addition to protecting) ownership, recalling the words and intentions of a pre-existing right to its legislative recognition, recalling to mind thus a natural-law concept of ownership⁹.

From this interpretation, even if taken literally, art. 42 of the Constitution, the absence of a selfish value of the private property right and its link with the realization of public interests is clear, especially through the attribution to the law of the power to dispose of the content of the right, also introducing limits intended to guarantee the public interest.

So differently from what was established by the Weimar Constitution, the interest of the private owner is not even explicitly mentioned in the text of paragraph 2 of art. 42

⁷ A. Moscarini, *Proprietà privata e tradizioni costituzionali comuni*, cit., 74 ss.

⁸ According to the reconstruction revived by P. Rescigno, *Proprietà (dir. priv.)*, cit.

⁹ Coli, *La proprietà privata e l'iniziativa economica*, in *Commentario sistematico alla Costituzione italiana* (diretto da P. Calamandrei e A. Levi), I, Firenze, 1950, 341 ss.

nor can it be considered implicit since the constituent asks the legislator, as its purpose, for the social function and greater accessibility of the property right.

In the second place, also in the new constitutional context, the expansion of the category of goods subject to the right of private property is dealt with in greater detail compared to the text of the Code. In fact, a new category of goods subject to economic evaluation emerges which, while still being the subject of traditional property rights (Art. 810 Cod. Civ.), is lacking in the essential feature of the asset, once recognizable in its corporeality.

The change in the object of the right modifies the content of the right itself, its modes of acquisition and limits, but this is valid also for immaterial goods, in as much as subject to economic evaluation, as part of the constitutional provision on private property. However, the particularity of intangible goods makes an adaptation of the property scheme necessary¹⁰, as the wide-spread fruition of them requires new instruments of protection of their economic value¹¹, differently from what happens for the protection of material goods, for which it is necessary to guarantee the physicality of the object.

The most recent social evolution aggravates the interpretative uncertainty about private property, because of the rapid arrival on the juridical scene of the necessity to protect common goods, whose preservation - as a guarantee of human survival itself - requires a re-evaluation of the concept of property. When the Civil Code and the Constitution refers to property they obviously think about the ownership of an asset for exclusive use, but things which are the objects of wide-spread and collective rights are not

¹⁰ G. Auletta, *Azienda, opere dell'ingegno e invenzioni industriali*, in *Commentario al Codice civile* (a cura di G. Scialoja e G. Branca), Bologna, 1958.

¹¹ For D. Messinetti, *Oggettività delle cose incorporali*, Milano, 1970, you cannot use the property in relation to intangible assets, having for this purpose use the concept of belonging.

compatible with the juridical categories of individual rights, determined by bourgeois legislators for individual goods.

Basically, if the nineteenth-century revolutions, affirming the inviolability of private property rights, intended to protect the human personality, the current situation requires more and more - with the same purpose of guaranteeing personality rights - to find adequate forms of protection for common goods, identifying the persons entitled to exercise them.

The new challenge is therefore to find ways in which individuals and groups can defend assets, of which nobody can be the “owner”, in as much as they are assets to which everybody collectively has a right¹².

3. THE CLAUSE OF THE SOCIAL FUNCTION

The greater uncertainty of the interpretation regarding art. 42 of the Constitution is not due to the identification of the goods to be protected, but to the formula of “social function”, used by the Constituent Assembly as the “purpose” of the legislative regulation of the institute. The “social function” is an idea that draws on different and varied cultural matrices, which, starting from the Catholic community movement and up to the social democracy of Weimar, also takes cues from the cooperative solidarity ordering guidelines.

Obviously, the formula used by the Constituent is affected by these significant cultural traditions and reproduces its intrinsic contradictions, because the Catholic way of thinking – in the wake of natural law reflections – it is not at all opposed to private property, but considers the social function is a moral obligation, which, from the legislative

¹² P. Rescigno, *Disciplina dei beni e situazioni della persona*, in *Quaderni fiorentini per la storia del pensiero giuridico moderno*, 1976-1977, n. 5-6, t. 2, 861 ss.

point of view, should be translated into measures in favor of small property and of a greater sharing with the less fortunate: not, therefore, the denial of the property right, but greater access to it. However, the appearance of the social function as a moral obligation annuls its normative content, so as to make the prescription legally irrelevant¹³.

Despite these contradictions, a normative meaning of social function needs to be identified to avoid reducing it, according to previous interpretations, to a useless formal ornament.

The most widely accepted theory is that the social function is a radical innovation of property. From the link between social function (Article 42 of the Constitution) and the duty of solidarity (Article 2 of the Constitution) a precise characterization of the social function emerges: a limit of the property right (not traceable to the principle of *alterum non laedere* in art. 2043 of the Civil Code) is detectable in the duty to exercise one's own rights without causing an excessive sacrifice of third party interests. In effect, property shall be used in a correct way, according to precise limits, independently related to the social function and duty of solidarity¹⁴.

Some criticism has been made in this direction, not so much regarding its hermeneutic grounds, which recognize its validity, but rather of its presumed futility

¹³ F. Vassalli, *Per una definizione legislativa del diritto di proprietà*, in *Studi giuridici*, II, 107, states that “*una funzione sociale [...] è propria di ogni potere riconosciuto dal diritto obiettivo [...]. Aggiungere alla disciplina legale l'invocazione della 'funzione sociale' sarebbe forse togliere sicurezza e stabilità ad un rapporto giuridico d'importanza fondamentale*”.

¹⁴ S. Rodotà, *Note critiche in tema di proprietà*, in *Riv. trim. dir. proc. civ.*, 1960, 1252 ss.; S. Rodotà, *Le fonti di integrazione del contratto*, Milano, 1969. According to Rodotà, Article 2 of the Constitution states “*la necessità di un agire corretto in base alla solidarietà*”. See also, L. Mengoni, *Obbligazioni “di risultato” e obbligazioni “di mezzi”*, in *Riv. dir. comm.*, 1954, I, 393, nota 35. U. Natoli, *La proprietà. Appunti delle lezioni*, I, Milano, 1965, according to which the social function allows “*la possibilità [...] del comportamento del proprietario si arresti al limite della antisocialità*” (*op. cit.*, 137),

because, presented in this way, the social function would look very similar to fairness in social relations, or at least to the principle of proportionality, perhaps limiting the disruptive force of the principle, which would have wanted to introduce an element of duty, such as an internal limit to property right¹⁵.

For this purpose, the formula used in art. 153 of the Charter of the Weimar Constitution and in the present German Constitution of “property that obliges” seems much more precise and becomes “service for the common good”, as this statement allows the “violent breaking of the principle of non-involvement in the obligations of the structure of subjective right”¹⁶. From this principle, the German doctrine inferred three levels of limits¹⁷: the first, of a merely negative character, resolves itself in the prohibition to invade the sphere of another’s property, and the second is the need to endure, in certain cases provided for by law, the limitation or the extinction of property, while the third bind presents a duty to act, when standards require the owner to do so, for example, forcing him to maintain the building’s facades or to look after the cultural heritage.

If, therefore, the property does not require a duty of third-party cooperation, the social function however “succeeds in placing a duty in the structure of the real situation” (which is then the way to give a concrete sense to legislative formulas like that of art. 832 cc)¹⁸.

With the social function, private property is not denied, but is placed in a community vision (not collectivist) of the legal system, in which rights and duties complement each other.

¹⁵ P. Rescigno, *Proprietà (dir. priv.)*, in *Enc. Dir.*, XXXVII, Milano, 1988.

¹⁶ P. Rescigno, *Proprietà (dir. priv.)*, cit.

¹⁷ F. Kübler, «*Eigentum verpflichtet*» - eine zivilrechtliche Generalklausel?, in *Arch. civ. Pr.*, 1960-1961, 236 ss.

¹⁸ P. Rescigno, *Proprietà (dir. priv.)*, cit.

The same term “function” denotes property right as addressed to a purpose, which must be “social”, that is measured on the proper relationship with the community of which it is part. So the Constitution finds itself in the inherent contradiction between the “social” need to guarantee private property (and indeed make it accessible to everybody) and the intention to weaken the absoluteness, to ensure a “social” exercise.

A vigorous debate in the literature and journalism of private law has been opened about this aspect, which has as its object the possibility of identifying a minimum content of property, untouchable by the legislator.

In particular, the question is focused on the separation of the *jus aedificandi* from the property right, that is on the legitimacy of expropriation binds, including indirect or implicit ones.

The *querelle* developed from the first case of the Constitutional Court on property binds imposed by town-planning (case n. 5/1968), proposing immediately a clear distinction between those who present the *jus aedificandi* as connected to property right¹⁹, and those who consider the right of conforming land as the object of public power in town-planning²⁰.

In this debate, the question regarding the inalienability of human rights can be traced back to private property: the possible link between social function and development of the personality, would bind the former to the inalienable duties of social solidarity, as an

¹⁹ A.M. Sandulli, *Profili costituzionali della proprietà privata*, in *Riv. trim. dir. proc. civ.*, 1972, 473 ss.

²⁰ M. S. Giannini, *Basi costituzionali delle proprietà privata*, in *Pol. dir.*, 1971, 475 ss. Also in *Scritti*, VI, Milano, 2005; A. Predieri, *Riserva della facoltà di edificare e proprietà funzionalizzata delle aree fabbricabili*, in Aa. Vv., *Urbanistica, tutela del paesaggio ed espropriazione*, Milano, 1969.

assumption according to art. 2 of the Constitution, about the realization of fundamental human rights²¹.

Indeed, the constant doctrine and the jurisprudence of the Constitutional Court do not give private property such a connotation, because it belongs to the realm of property rights, although the importance of the ownership of private goods cannot be denied, which allows the quality of personal life, the dignity and the freedom of the people to be improved.

The reason given by the doctrine is that fundamental rights are universal, while property rights, such as any asset, belong to individuals, who, indeed, exclude others from the enjoyment of the right. Thus, for the first this is “the key to equality”, for the latter it is the logic of differentiation and exclusion; the former cannot, in principle, be modified by the majority because the majority cannot possess what belongs to each and everybody, instead the latter are, anyway, available, at least within certain conditions, it must be added, to the political majority in that, although belonging to the form of state, are not exempt from the power of the legislator nor completely guaranteed against possible constitutional revision”²².

²¹ For inspiration Catholic, E. Mounier, *De la propriété capitaliste à la propriété humaine*, *Oeuvres*, I, Paris, 1961, 417 ss.

²² A. Moscarini, *Proprietà privata e tradizioni costituzionali comuni*, Milano, 2006, 101, that invokes L. Ferrajoli. *Diritti fondamentali. Un dibattito teorico*, Roma, 2002.

PART II
THE PROTECTION OF PROPERTY IN THE
EUROPEAN CONVENTION ON HUMAN RIGHTS

1. ARTICLE. 1 OF THE PROTOCOL AND THE LEGAL INTERESTS PROTECTED

Fundamental rights are subjected to a multilevel regulation²³. The interaction and the overlap between legal systems, far from a hierarchical system, create relations of integration/differentiation, as well as conflicts and mutual adjustments, which - in the field of private property – find their maximum expression: so by examining the constitutional, EU and ECHR jurisprudence, it will be possible to verify more in general the relationship existing between different legal systems²⁴.

Article 1 of the First Protocol attached to the ECHR Convention, signed in Paris on 20 March 1952, states that “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of

²³ G. Morbidelli, *Corte costituzionale e corti europee: la tutela dei diritti (dal punto di vista della Corte del Lussemburgo)*, in *Dir. proc. amm.*, 2006, 290; S. Bonatti - S. Civitarese Matteucci, *Proprietà immobiliare (vincoli e limiti)* in *Trattato di Diritto amministrativo europeo* (diretto da M. P. Chiti e G. Greco), III, 2007, 1555 ss.

²⁴ See also: M. L. Padelletti, *La tutela della proprietà nella Convenzione europea dei diritti dell'uomo*, Milano, 2003; D. Siclari, *Brevi riflessioni sulle novelle in tema di indennità espropriativa alla luce delle recenti pronunce della Corte costituzionale e della “legge finanziaria per il 2008” (l. 244 del 24 dicembre 2007)*, in C. Salazar e A. Spadaro (a cura di) *Riflessioni sulle sentenze 348-349/2007 della Corte Costituzionale*, Milano 2009, 331 ss.

property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties”.

In the article three distinct but clearly linked provisions can be found: the right to the respect of property law, the conditions of legitimacy of expropriation for public utility, the right of the States to regulate the use of property in relation to the general interest or to ensure the payment of taxes or other contributions or penalties. In the case *James v. UK* 21 February, 1986, the Court of Strasbourg states that the different formulas used in the two paragraphs - “*utilité publique*” in 1 par. and “*intérêt général*” in 2 par. – show a different normative content which allows the single States “*plus de latitude*” to regulate the use of the goods. More specifically, in the sentence *Iatridis v. Greece* 25 march 1999 it states explicitly that art. 1 of Protocol contains three different norms: the general respect for property established by the first part of paragraph 1; the conditions for expropriation fixed by the second part of the first paragraph and finally the regulation on the use of goods in the common interest provided for by the second part.

The discussion about the meaning of property in the Convention can only be made on the basis of the case law of the Court’s interpretation.

In the Convention there is not even one explicit reference to the constitutional traditions of the State Partners, but the general nature of the normative content of article 1 allows the Court to recall this principle, or do without it, but always with the aim of expanding the scope of the legal interests protected, strengthening protection, pursuant to art. 1 par. 1, the property right, even where the above-mentioned assumptions do not exist²⁵.

Overcoming thus the legislator’s intention, which in the Convention intended to bring back the common traditions of the Partner States, the Court creates an autonomous concept of property, which extends to protecting the patrimonial factual interests.

²⁵ M. L. Padelletti, *La tutela della proprietà nella Convenzione europea dei diritti dell’uomo*, cit., 273.

2. PROPERTY PROTECTED IN THE COURT'S CASE LAW

The case law of the Court focuses, therefore, more on the notion of goods than that of right²⁶.

In the case *Marckx v. Belgium* 13 June 1979, what must be understood as an asset and as a property right is defined. As then stated in the cases *Iatridis v. Greece* 25 March 1999 and *Beyeler v. Italy* 5 January 2000, the notion of property must not be evaluated in the light of national law²⁷, but is presented as any substantial interest provided that it is not a question of “theoretical, or illusory, but concrete and effective”²⁸. The Court specifies that, according to the Convention, the notion of goods is connected both to “present goods” and to those for which there exists a “legitimate hope” of obtaining them, while the expectation to have a property right applied which, in fact, has not been exercised for a long time, is not considered as goods²⁹. The expropriation of cultural heritage is much more controversial and, according to the prevalent case history should be adequately compensated (*Kozacioğlu v. Turkey* 31 July 2007), although art. 1 does not guarantee in all cases the right to full compensation.

²⁶ F. Fracchia – M. Occhiena, *I beni privati e il potere pubblico nella giurisprudenza della Corte costituzionale*, cit., 13 ss., note that the minimum core of the property is good: there would therefore be a clear distinction between the protection of the property as a minimum core of the right and the imposition of restrictions related to social function.

²⁷ And such is the interest of a Polish exiled deported, who wants the restitution of the property of his ancestors (*Broniowski c. Polonia* 22 June 2004).

²⁸ In the case *Azas v. Greek* 19 September 2002, is protected using *de facto* of some land.

²⁹ Case *Principe Hans-Adam II of Liechtenstein v. Federal Republic of Germany* 12 July 2001. In this regard, see also *Jokela v. Finland* 21 May 2002, for a good object of succession; *Efstathiou and Michailidis Motel America v. Greek* 10 July 2003; *Beneficio Cappella Paolini v. San Marino* 13 July 2004; *Lupaş v. Romania* 14 December 2006.

The Court does not make an effort to define a general notion of the concept of ownership, as it is sufficient, for its own purposes, to make the concept of goods coincide with that of ownership. It follows that the property is identified with the “thing” subject to the right more than with the right itself. In this way, the Court defines its own idea of goods - and therefore of property - independently from the legal classification given by the domestic laws, in relation to the same case-in-point.

The freedom of interpretation adopted by the Court is thus confirmed, which widens the concept of protected goods - and therefore of property - moving independently in comparison with the national legal systems and using the principles common to the Member States only when they are useful for the reconstruction of an autonomous notion of the concept of goods and, exactly, of the same property case-in-point³⁰.

3. THE THEORY OF THE MARGIN OF APPRECIATION AND THE RULE OF LAW

Article 1 distinguishes between the expropriation of property for the public interest (paragraph 2) and the power of conformation with the property law for purposes of general interest (paragraph 3): the main difference is that the discipline of the expropriation is already in the Convention, while the regulatory power is delegated to national laws and, therefore, to individual states.

The extinction of the right through expropriation may take place for the existence of a public interest, in accordance with the principle of legality and respect for the general principles of international law: the Court formally recognizes that compliance with these conditions should be assessed by individual states, but reserving itself the assessment of the

³⁰ R. Hostiou, *La Cour européenne des droits de l'homme et la théorie de l'expropriation indirecte*, in *Revue trimestrielle des droits de l'homme*, n.70/2007, 385 ss.

adequacy of the legislative parameter used, it ends up becoming a judge of national laws on expropriation.

In fact, as the boundary between expropriation and regulation is very fragile, the Court tends to put all its effects on the same level, and also to subject the regulatory power, conferred on the Member (paragraph 3), to the expropriation regime (paragraph 2), qualifying as indirect or substantial expropriation all of the cases which result in effects equivalent or similar to those produced by direct measures of expropriation.

Gradually, the Court develops its jurisdiction over the property, widening not only the notion of good, but also evaluating the discretionary space left to the national legislature in property regulation: formally obsequious of the discretionary powers of the states, it reduces the boundaries and subjecting it to obligations and requirements.

The first significant judgment on the concept of expropriation is the famous *Sporrong e Lönnroth v. Sweden* 23 September 1982, which concerns an urban constraint renewed for more than twenty-three years by the City of Stockholm on assets of the applicants. That this is an innovative judgment is the fact that it was passed with 10 votes in favor and 9 against, as the dissenting judges believed that despite the fact that a serious violation of the right to property was justified by the public interest in the town-planning, as specified in the first subparagraph of Article. 1.

The Court's case law began to state the case of expropriation made in the case *Loizidou cv. Turkey* 18 December 1996, when the Turkish occupants of Cyprus actually prevent the claimant to enter his property. But the case-histories increase in number: it is illegal to deprive a farmer of 60% of his property without adequate compensation, equivalent to the profit that the claimant loses through expropriation, or through an expropriation for unrealized social works. (*Lallement v. France*, 11 April 2002) o (*Motais de Narbonne v. France* 2 July 2002); or if the reimbursement is made with great delay and without taking into consideration the fact that the whole property, including the non-expropriated part, is no longer usable (*Tsiridakis v. Greece*, 17 January 2002); or again in

the case of confiscating a piece of property to build a military barracks (*Satka v. Greece*, 27 March 2003).

The Court's jurisprudence has been refined over time, finding further arguments. According to the Court, there is no violation of art. 1 when the expropriation occurred in an illegitimate manner (*Hatzikakis v. Greece*, 11 April 2002; *Katsaros v. Greece*, 6 June 2002) either when the compensation has not been assessed (*Konstantopoulos v. Greece*, 10 July 2003; *Interoliva Abee v. Greece*, 10 July 2003), or when there has been an actual expropriation (*Papamichalopoulos v. Greece*, 24 June 1993; *Tsomtsos v. Greece* 15 November 1996; *Katkaridis v. Greece*, 15 November 1996, *Papachelas v. Greece*, 25 March 1999; *Savvidou v. Greece*, 1 August 2000; *Malama v. Greece*, 1 March 2001, *Karagiannis v. Greece*, 16 January 2003; *Nastou v. Greece*, 16 January 2003; *Yiltaş Yildiz Turistik Tesislerj a.s. v. Turkey*, 24 April 2003; *I.R.S. v. Turkey*, 20 July 2004).

Violation of the right does not always lead to the possibility reintegration measures, as national legal systems are also able to establish measures for compensation. So in the case *Ex king of Greece v. Greece*, 28 November 2002, the Court rejects the request of restitution of property, as the nature of the breach often prevents such a remedy, nor has the Court the power to impose it on individual States. In these cases, however, it is up to the Court to determine if the compensation is reasonable, having obviously distinguished between lawful expropriation and illegal occupation (in this sense, too, *Rompoti & Rompotis v. Greece*, 25 January 2007).

Thus we have confirmation that the Court, while stating that the Member States have a wide margin of appreciation in the regulation of private property for the purpose of public interest, ends up, through the control of reasonableness and proportionality of the national legislation, by establishing itself the conditions for holding the single act of regulation of private property as legitimate.

In conclusion, through the creation of an independent notion of property and the evaluation about the rationality of the parameters of national regulation of private property,

the Court matures its own idea of private property, extending protection from the individual national legal systems.

The first and principal condition of expropriation is that it is done on “conditions specified by law”. The issue addressed by the Court is what is meant by statutory reserve, if, that is, with the aim prescribed by art. 1, a law in the formal sense is necessary, and if, secondly, the interpretation of the legislation must be regarded as national jurisprudence.

On the first point, there is no doubt that the notion of law is to be understood in a substantive way, according to the constitutional order of individual states, while much more uncertain is the possible attribution of a normative value to the case .

The Court has refined over the years, its case-law on the principle of legality.

At first, the Court set out the principle of legality as the autonomous title of condemning the states, but only notes the excessive length of proceedings concerning expropriation, in violation of the principle of fair trial enshrined in Article. 6 of the Convention, and only then does it identify it as a specific constituent element of the offence. Therefore it has infringed Article. 6 and not Art. 1 for actual protracted occupancy (*Gök v. Turkey* 27 July 2006) or for the delayed execution of an expropriation agreement (*Guerrera and Fusco v. Italy* 3 April 2003; *Guillemin v. France* 21 February 1997; *Tunç v. Turkey* 24 May 2005; *Zwierzyński v. Poland* 19 June 2001; *Zazanis v. Greece* 18 November 2004).

PART III
THE CONFLICT BETWEEN THE EUROPEAN COURT AND ITALIAN
LEGAL ORDER

1. THE SPECIFIC CASE OF “OCCUPAZIONE ABLATORIA” IN THE
NATIONAL LEGAL SYSTEM

The jurisprudence of the CEDU Court, as regards the matter of violation of art.1, was formed precisely on the case of “*occupazione ablatoria*” in Italian law, that is the discretionary power to sacrifice private interest for the common good.

The expropriation proceedings in the Italian legal system has always had a detailed legal regulation, since the law n. 2359 of 1865. In the relationship between authority and freedom, the rule favored private property, especially as to the extent of compensation, which was equivalent to the market value of the property.

In that same legal text, which regulates expropriation, the legislator establishes particular cases (Articles 64 et seq.) in which the administration can occupy private property for temporary needs of works (for example, to install a building site) or for reasons of “*force majeure*”³¹.

This power of occupation is then extended to all works of public utility, when the administration declares non-deferability and urgency (Article 39 r.d. 8 February 1923, n. 422), the institute extends when the legislator establishes that the declaration of public utility is equal to a declaration of urgency *ex lege* (l. 3 January 1978, n. 1).

³¹ R. Caranta, *Espropriazione per pubblica utilità (procedimento)*, in *Enc. Dir.*, V agg., Milano, 2001; A. Gambaro, *Occupazione acquisitiva*, in *Enc. Dir.*, IV agg., Milano, 2000.

The theoretical distinction between emergency occupation and expropriation³² does not prevent the creation of a real expropriation proceeding as an alternative to the traditional one, that preponderates over the “ordinary”, considered more complex by administrations³³.

The law n. 865 of 1971 extends the concept of emergency occupation, providing that this can happen - for a period not exceeding five years and with compensation – within which period the decree of expropriation will be issued.

The owner who suffers occupation has the right to an indemnity, which he may request immediately to the competent court, without waiting for an offer from the administration.

The problem concerns the consequences faced by the administration in case the occupation is not followed - within the period fixed – by the measure of expropriation, when in any case public works have been started or completed on the land.

The jurisprudence and doctrine are beginning to distinguish between occupation *sine titulo ab initio* and occupation which subsequently became illegal for the annulment of the original bond³⁴.

³² M. S. Giannini, *Osservazioni sui provvedimenti di occupazione*, in *Foro amm.*, 1953, I, 1, 25; Id., *Diritto amministrativo*, II, Milano, 1970, 1236; F. Pugliese, *L'occupazione preliminare nel procedimento di espropriazione*, Napoli, 1984; G. Verbari, *Occupazione (diritto pubblico)*, in *Enc. Dir.*, XXIX, Milano, 627 ss.

³³ D. Sorace, *Espropriazione per pubblica utilità*, in *Dig. disc. pubbl.*, VI, Torino, 1991, 194. In tal senso anche E. Casetta – G. Garrone, *Espropriazione per pubblico interesse*, in *Enc. giur.*, XIII, Roma, 1989; F. Pugliese, *Occupazione nel diritto amministrativo*, in *D. disc. pubbl.*, X, Torino, 1995, 263 ss.; M. Conticelli, *L'espropriazione*, in *Trattato di diritto amministrativo* (a cura di S. Cassese), *Diritto amministrativo speciale*, II, Milano, 2003, 1994. About this point: F. Salvia, *Garanzie delle norme e garanzie del sistema: il caso della proprietà*, in *Dir. amm.*, 2007, 47; S. Licciardello, *Espropriazioni e giurisdizione*, Torino, 2007.

³⁴ M. Calogero – A. Totano, *L'occupazione acquisitiva nel quadro del procedimento espropriativo*, Padova, 1998.

The conflict of jurisdiction on this point was resolved by the famous sentence of the Cassazione Sezioni Unite n. 1464, 16 February 1983, according to which the owner loses his right at the moment of “irreversible transformation” of the land.

On the public law side, the solution indicated was immediately rejected, because it ended up by replacing the regular expropriation proceedings, thus endangering administrative legality and confirming an insufferable privilege to the benefit of the administration, relieving it of liability³⁵.

This orientation did not convince the Court of Human Rights which condemned the Italian State because of the long lapse of time before paying compensation for expropriation (judgment *Zubani v. Italy* August 7, 1986). Therefore, the national legislature passed the law 27 October 1988 n. 458, according to which the owner of land that has been expropriated illegally may claim compensation for the damage, but not the restitution of the property on which the public work was built (an opinion confirmed in judgment no. 188 of 1995 of the Constitutional Court).

The problem persisted as regards the extent of compensation due, for while the case law of the Supreme Court prevents the reconveyance of the property, on the assumption of full compensation for the damage, the legislator, with the Financial Law of 1992 (Article 5 *bis* of Legislative Decree n. 333 of 11 July 1992) provides for a reduction of compensation, as it equalizes it to compensation in case of lawful expropriation³⁶.

³⁵ D. Sorace, *Espropriazione per pubblica utilità*, cit., 194.

³⁶ Reflections of the doctrine, both in the field of private law than on the administrative law: L. Mengoni, *Proprietà e libertà*, in *La Costituzione economica a quarant'anni dall'approvazione della Carta fondamentale*, Milano, 1990, 12 ss.; D. Sorace, *Indennizzi espropriativi e Costituzione: una tematica da riconsiderare*, *ibidem*, 322 ss.

The Constitutional Court deems this rule illegitimate (judgment of 2 November 1996 n. 369) and the legislator introduced (Article 3, paragraph 65, of the Law of 23 December 1996, n. 662) the paragraph 7 *bis* of Article 5 *bis* of D.L. 333/92, establishing that damages for occupations preceding the 30 September 1996 correspond to the equivalent of the value provided for the lawful expropriation (half-sum between market value and revalued cadastral income, reduced by 40%) with the exception of the above deduction and contextually increased by 10%. The Constitutional Court, in its judgment 148 of 30 April 1999, judged such a provision legitimate.

2. THE EVOLUTION OF THE RULE OF LAW IN THE JUDGMENTS OF THE COURT OF HUMAN RIGHTS ON “OCCUPAZIONE ABLATORIA”.

The jurisprudence of the Court of Human Rights regarding property has evolved on the matter of acquisition occupation. Again in the case *Beyeler c. Italy* 5 January 2000, the rule of law has no independent role: it is nevertheless defined as “*l’existence de normes de droit interne suffisamment accessibles, précises et prévisibles*”.

Only gradually did violation of the principle of legality provided for by art. 1 become the an independent criterion for judging the illegitimacy of national decisions.

The Italian Government, in the law-suits on “*occupazione acquisitiva*”, that is a kind of abusive occupation for the public good, argued that the rule of law would be respected where the principle of legality, while not required by a rule, is a constant interpretation by courts.

The Court does not agree with this decision. In fact the Court without ruling on the configurability of the case law as a source of law, reiterates that the rule of law presupposes the existence of rules “*suffisamment accessibles, précises et prévisibles*”.

This orientation was repeatedly confirmed in subsequent cases (*Elia v. Italy* 2 August 2001). Emblematic is the well-known case *Scordino v. Italy*³⁷, which has consolidated the evolution of the Court's case law. In the judgment of 15 July 2004, the Court found a violation of the first paragraph of Art. 1, but not of the second.

In its subsequent judgment of 17 May 2005, the Court stated that the constant jurisprudence can rise to the principle of law, provided that constant interpretation is able to provide the citizen with legal certainty. In the present case, it appears, however, that the same jurisprudence is rather contradictory and, for this reason alone, there is no violation of the principle of legality, understood - pursuant to art. 1 of the Additional Protocol - as rules of law sufficiently accessible, precise and predictable.

Even in the case *Iuliano v. Italy* 14 December 2006, the government claims that the notion of law includes explicit or implicit general principles, but now the Court merely refers to its previous and well-established case-law, according to which the rules must be *suffisamment accessibles, précises et prévisibles*.

3. THE SUBSEQUENT CASE-LAW ON THE GENERAL LAW ON EXPROPRIATION OF 2001

In the face of these repeated decisions of the European Court, the legislature had to take note of an abnormal situation.

The new law on expropriation n. 327 8 June 2001 took note of the orientation of European case law, and also in order to balance the demands of the European Court regarding legality, introduced a provision on "*occupazione ablativa*".

³⁷ *Scordino v. Italy* sez. I, 15 July 2004; sez. I, 29 July 2004; sez. IV, 17 May 2005; *Grande Chambre*, 29 March 2006; sez. IV, 6 March 2007.

Article. 43 of d.p.r. 327/2001 provided that the authority which would use a property for the public interest, “*modificato in assenza del valido ed efficace provvedimento di esproprio e dichiarativo della pubblica utilità*” (even when these acts, originally existing, have been annulled) may provide for the acquisition for its heritage with damages. The owner can request restitution, but if the judge considers it impossible, he decides for the amount of compensation.

The return of the asset (Article 46) may only happen if the public work was not carried out or begun within ten years from the date of the expropriation or whether implementation was impossible.

The passing of the law on expropriation appears to part of the doctrine³⁸ and to the national courts as the remedy to the lamented lack of a legal basis for “*occupazione ablativa*”³⁹.

So in the jurisprudence of the Cassazione, an orientation has developed according to which, after the approval of the General Law on expropriation, “*occupazione ablativa*” would no longer be in conflict with the European Convention, because the interpretation by

³⁸ N. Centofanti, *Diritto a costruire. Pianificazione, Urbanistica. Espropriazione*, II, Milano, 2005, 1471 ss. *Contra*, A. Perini, *Il testo unico in materia di espropriazione* (a cura di G. Sciullo, con la collaborazione di R. Ferrara e G. Sala), Torino, 2004, 525; F. Saitta, *Espropriazione per pubblica utilità - Report 2011*, in *Ius publicum*, 2011; A. Gromitsaris, *Expropriation, Tankings, Report 2011 Germany*, in *Ius Publicum*, 2011.

³⁹ A. Romeo, *Occupazione acquisitiva e (possibile) lesione del diritto di proprietà*, in Aa.Vv., *Codice delle cittadinanze* (a cura di R. Ferrara, F. Manganaro, A. Romano Tassone), Milano 2006, 144 ss., has doubts about the sanatoria of a unlawful act recognizing as the solution adopted is, however, substantially in contrast with the judgments of the Strasbourg Court. Equal criticism of the guarantees for the dispossessed are expressed by S. Ruscica, *Poteri ablativi dell'amministrazione e protezione del proprietario*, *ivi*, 164 ss.

the national case-law since 1983 has become constant, satisfying the requirement of “predictable”, required by the European Court as a guarantee of the principle of legality⁴⁰.

The discipline of the institute on “*occupazione appropriativa*” would seem thus based on rules sufficiently accessible, precise and foreseeable⁴¹, so as not to be possibly considered in contrast with the principles in the European Convention on human Rights, in particular with due respect for property, guaranteed by art. 1 of the Protocol⁴².

The doctrine is opposed to this interpretation not only because it violates the principle of legality, but also because it perpetuates an outdated nineteenth-century conception of the civil irresponsibility of the administration. The provision of law would replace regular expropriation, allowing the administration an exemption from liability. The preventive function of liability rules that consists in the measurement of compensation would disappear: the higher the amount of damages the more the liability rule plays an preventive function, dissuading associates from continuing such harmful conduct⁴³.

⁴⁰ Cassazione civile, 14 April 2003, n. 5902 in *Riv. giur. ed.*, 2003, I, 1189 with note of Mari; Cassazione civile, sez. un., 6 May 2003, n. 6853, in *Riv. giur. ed.*, 2004, I, 554 with note of Masselli.

⁴¹ Cassazione civile, sez. I, 15 July 2004, n. 13113, in *Giust. civ. Mass.*, 2004, 7-8 e in *Foro amm. CDS*, 2004, 1999; Cassazione civile, sez. I, 17 November 2004, n. 21750, in *Giust. civ. Mass.*, 2004, 11.

⁴² Cassazione civile, sez. I, 11 June 2004, n. 11096, in *Foro it.*, 2005, I, 466; Cassazione civile, sez. I, 17 November 2004, n. 21750; Cassazione civile, sez. I, 15 February 2005, n. 3033, in *Riv. giur. ed.*, 2005, 4 1196; Cassazione civile, sez. I, 11 March 2005, n. 5380, in *Riv. giur. ed.*, 2005, 1872; *contra*, in the direction that the “occupazione acquisitiva” conflicts with the ECHR: Corte appello Firenze, 22 March 2005, in *Giur. merito*, 2005, 1649 with note of R. Conti.

⁴³ P. G. Monateri, *La responsabilità civile. Le fonti delle obbligazioni*, in *Trattato di diritto civile* (diretto da R. Sacco), Torino, 1998, 313.

That case-law of the Supreme Court reopens a discussion both between national judges and the Court of Human Rights and between the Court of rights and the national Courts themselves⁴⁴.

Regarding the first interpretative conflict, the European Court, in the face of the new judgments of the Cassazione, have confirmed more firmly than in the past that in all cases of illegal occupation there is violation of Article. 1 of the Protocol⁴⁵.

The Italian government is still trying to distinguish between occupation *sine titulo ab origine* and occupation with an initial legitimate title, which subsequently became unlawful because of the lack of expropriation within the terms provided.

The Court does not accept this distinction, on the basis that, however, there was no adequate restoration for the expropriated, and that the property title of the administration would still be an unlawful act (*Fiore v. Italy* 13 October 2005; *Dora Chirò v. Italy* 11 October 2005).

⁴⁴ G. Milo, *Giudici italiani e Corte europea dei diritti dell'uomo di fronte al diritto di proprietà*, in *Riv. it. dir. pubbl. com.*, 2003, 1485 ss.; F. Buonomo, *La tutela della proprietà dinanzi alla Corte europea dei diritti dell'uomo*, Milano, 2005; R. Conti, *L'occupazione acquisitiva. Tutela della proprietà e dei diritti umani*, Milano, 2006.

⁴⁵ *Acciardi and Campagna v. Italy* 19 May 2005; *Donati v. Italy* 15 July 2005; *Ciarletta v. Italy* 15 July 2005; *Colacrai v. Italy* 13 October 2005; *Serrao v. Italy* 13 October 2005; *De Pascale v. Italy* 13 October 2005; *Bigotti v. Italy* 13 October 2005; *Colazzo v. Italy* 13 October 2005; *Lantieri v. Italy* 15 November 2005; *Dominaci v. Italy* 15 November 2005; *Istituto diocesano sostentamento del clero v. Italy* 17 November 2005; *Pia Gloria Serpilli v. Italy* 17 November 2005; *Bigotti c. Italia* 17 November 2005; *Capone v. Italy* 6 December 2005; *Di Cola v. Italy* 15 December 2005; *Scozzari v. Italy* 15 December 2005; *Giacobbe v. Italy* 15 December 2005; *Sciarrotta v. Italy* 12 January 2006; *Genovese v. Italy* 2 February 2006; *Prenna v. Italy* 9 February 2006; *Immobiliare Cerro v. Italy* 23 February 2006; *Izzo v. Italy* 2 March 2006; *Gianni v. Italy* 30 March 2006; *Maselli v. Italy* (n. 2) 11 July 2006; *Lo Bue v. Italy* 13 July 2006; *Zaffuto v. Italy* 13 July 2006; *Stornaiuolo v. Italy* 8 August 2006; *Mason v. Italy* 24 July 2007.

The last and final step was taken by the Court in three cases in May 2005 (*Scordino v. Italy*, *Acciardi and Campagna v. Italy*, *Pasculli v. Italy*), in which the Court does not pronounce the illicit nature of the “*occupazione acquisitiva*” in each case examined, but points out the illegality of the institution, which does not allow the legal certainty of private property⁴⁶.

Even after the judgment of 6 March 2007, again in the case *Scordino v. Italy*, the Court states that the expropriation *sine titulo*, originating in case law, is contrary to the rule of law and that, therefore, the quantification of the just compensation must be based on the actual market value of the property, as well as revaluation and interest, thus expressing a negative opinion on the institute and not only on individual pending cases⁴⁷.

Until, in the judgment *Gianni v. Italy* 31 May 2007, the Court took note of a friendly settlement between the parties, which would demonstrate the intention of the Italian State to conform with the judgments of the Court, recognizing its effectiveness.

⁴⁶ F.G. Scoca, *Modalità di espropriazione e “rispetto” dei beni (immobili) privati*, in *Dir. amm.*, 2006, 519 ss.; Id., *Indennità di espropriazione: la diversa sensibilità della Consulta e della Corte di Strasburgo*, in www.federalismi.it 11/2006.

⁴⁷ See R. Conti, *L'Italia ancora in ritardo sugli standard europei di tutela dei diritti umani*, nota sent. Cedu, 5 ottobre 2006, in *Urb. app.*, 2007, 35 ss.; L. Marzano, in *Urb. app.*, 2007, 328; A. Guazzarotti, *Gli effetti della CEDU e la teoria dei “mondi paralleli”*, in *Quad. cost.*, 2006, 155 ss.

4. THE NORMATIVE VALUE OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS IN THE ITALIAN LEGAL SYSTEM

From the analysis of the individual cases relating to “*occupazione acquisitiva*” some more general observations about the relationship between domestic law and the European Convention of Human Rights can now be formulated⁴⁸.

The protection of fundamental rights is a battleground between the Court of Human Rights and national constitutional courts, especially since the Strasbourg Court, assuming the role of international judge, tends to be considered as the supreme organ of guarantee⁴⁹.

The conflict between the Italian Constitutional Court and Court of Human Rights is based on the role that the European Convention on Human Rights has within domestic law.

The opinion historically established in the jurisprudence of the Constitutional Court is that the rules of the ECHR, being treaty rules, do not have the same force as constitutional norms, having been introduced into our legal system by ordinary law (Constitutional Court. 104/69, 123 / 70)⁵⁰.

More specifically, the Court in its judgment no. 188/80 states that the rules introduced by the ECHR find no constitutional grounds, neither in art. 10 (“*l’ordinamento giuridico italiano si conforma alle norme del diritto internazionale generalmente*

⁴⁸ S. Gambino - G. Moschella, *L’ordinamento giudiziario fra diritto comparato, diritto comunitario e CEDU*, in *Politica dir.*, 2005, 543 ss.

⁴⁹ S. Panunzio, *I diritti fondamentali e le Corti in Europa*, Napoli, 2005, 30.

⁵⁰ L. Montanari, *Giudici comuni e Corti sopranazionali: rapporti tra sistemi*, in *La Corte costituzionale e le Corti d’Europa* (a cura di P. Falzea, A. Spadaro, L. Ventura), Torino, 2003, 119 ss., in part. p. 130.

riconosciute”) nor in art. 11 of the Constitution (“*L’Italia ... consente, in condizioni di parità con gli altri Stati, alle limitazioni di sovranità necessarie ad un ordinamento che assicuri la pace e la giustizia fra le Nazioni; promuove e favorisce le organizzazioni internazionali rivolte a tale scopo*”). Therefore “*in mancanza di specifica previsione costituzionale le norme pattizie, rese esecutive nell’ordinamento interno della Repubblica, hanno valore di legge ordinaria*”, so “*le norme internazionali pattizie, ancorché generali, dall’ambito di operatività dell’art. 10 Cost. (sent. 48/79; 32/60; 104/69; 14/64) mentre l’art. 11 Cost. neppure può venire in considerazione non essendo individuabile, con riferimento alle specifiche norme pattizie in esame, alcuna limitazione della sovranità nazionale*” must be excluded.

Given this vision of the Court’s, national courts are trying to introduce the principles of the ECHR, considering them as “*parametro interposto*” between the contested ordinary rule and art. 10 of the Constitution: instead of challenging a rule for its direct contrast with the ECHR, the courts try to enforce the violation of art. 10 of the Constitution, which, in its turn, legitimizes the ECHR, considered generally recognized rules of international law⁵¹.

The Court does not accept that reasoning. According to the Court, in fact, the automatic adaptation of our legal system takes place according to customary international rules and not - as in the case in point - to the pact regulations that, recognized by ordinary law, assume the same power (Cases 32/60 323/89; 342/1999), although it is not clear why among the generally recognized rules of international law only the customary and not those connected to a pact should be considered.

The question was raised again after the constitutional reform of 2001, because now art. 117 paragraph 1 states that “*la potestà legislativa è esercitata dallo Stato e dalle*

⁵¹ On the adaptation of the internal rules to the Treaties: B. Conforti, *Diritto internazionale*, Napoli, 2007, 288.

Regioni nel rispetto della Costituzione, nonché dei vincoli derivanti dall'ordinamento comunitario e dagli obblighi internazionali”.

The Supreme Cassazione, in the light of the new art. 117 of the Constitution, raised some questions of constitutionality before the Constitutional Court, because Article 117, referring to the fulfillment of international obligations, would introduce into our legal system a compliance with art. 1 of the ECHR Protocol.

Consequently, the 5 *bis* d.l. 11 July 1992 n. 333 (conv. l. 8 August 1992 n. 359), establishing a reduced expropriation compensation, would be detrimental to the right of property for violation of the binds arising from international obligations⁵², now protected by Article. 117 of the Constitution, paragraph 1. The impossibility, therefore, of applicability of the national rule in conflict with the ECHR will oblige the Italian Court to ask for an opinion on its constitutionality⁵³.

The Constitutional Court is required, therefore, to decide on compensation again and, this time, assessing whether the renewed Article 117 of the Constitution - with reference to international obligations - has attributed to the European Convention on Human Rights a new normative efficacy within domestic legislation⁵⁴.

⁵² Cassazione civile, sez. I, 20 May 2006, n. 11887, in *Giust. civ.*, 2006, 2018.

⁵³ Cassazione civile, sez. I, 19 October 2006, n. 22357, in *Resp. civ. e prev.*, 2007, 291.

⁵⁴ *Ex multis*, see also: B. Randazzo, *Giudici comuni e Corte europea dei diritti*, in *Riv. it. dir. pub. com.*, 2002, VI, 1303 ss.; A. Guazzarotti, *I giudici comuni e la CEDU alla luce del nuovo art. 117 della Costituzione*, in *Quad. cost.*, 2003, 25 ss.; A. Guazzarotti, *La CEDU e l'ordinamento nazionale: tendenze giurisprudenziali e nuove esigenze teoriche*, in *Quad. cost.*, 2006, III, 491 ss.

5. THE 2007 JUDGMENTS OF THE CONSTITUTIONAL COURT ON PROPERTY

In this complex interpretative context the two “historic” decisions of the Constitutional Court n. 348 and n. 349 of 24 October 2007 are posed⁵⁵.

With judgment n. 348, the Court declares the unconstitutionality of Article 5 *bis*, par 1 and 2, of decreto-legge 11 July 1992, n. 333 which establishes the criterion for calculating compensation for expropriation.

While with judgment n. 349, the Court declares the unconstitutionality of Article 5 *bis*, par. 7 *bis*, decreto-legge 11 July 1992, n. 333, which provides for, in case of illegal occupation for reasons of public utility (“*occupazione acquisitiva*”) occurring before 30 September 1996, the same indemnity criterion for legitimate occupation (though with the exclusion of the 40% reduction of 40% and 10% revaluation).

The question, analyzed in both judgments, concerns the compensation due in two different hypotheses of expropriation (sent. 348) or of illegitimate occupation (sent. 349),

⁵⁵ See also, R. Conti, *La Corte costituzionale viaggia verso i diritti CEDU: prima fermata verso Strasburgo*, in *Corr. giur.*, 2008, 2, 205 ss.; B. Randazzo, *Costituzione e Cedu: il giudice delle leggi apre una « finestra » su Strasburgo*, in *Giorn. dir. amm.*, 2008, 1, 25 ss.; V. Mazzarelli, *Corte costituzionale e indennità di esproprio: «serio ristoro» e proporzionalità dell'azione amministrativa*, *ibidem*, 32 ss.; M. Pacini, *Corte costituzionale e occupazione acquisitiva: un adeguamento soltanto parziale alla giurisprudenza Cedu*, *ibidem*, 37 ss.; R. Dickmann, *Corte costituzionale e diritto internazionale nel sindacato delle leggi per contrasto con l'art. 117, primo comma, della Costituzione*, in www.federalismi.it; C. Zanghì, *La Corte costituzionale risolve un primo contrasto con la Corte europea dei diritti dell'uomo ed interpreta l'art. 117 della Costituzione: le sentenze n. 348 e 349 del 2007*, in www.giur.cost.org; S. Mirate, *Indennità di esproprio e risarcimento da occupazione acquisitiva: la Corte costituzionale inaugura il giudizio di “convenzionalità” ex art. 117 Cost.*, in *Resp. civ. e prev.*, 2008, 1, 65; L. Cappuccio, *La Corte costituzionale interviene sui rapporti tra convenzione europea dei diritti dell'uomo e Costituzione*, in *Foro it.*, 2008, I, cc. 47 ss.; F. Ghera, *Una svolta storica nei rapporti del diritto interno con il diritto internazionale pattizio (ma non in quelli con il diritto comunitario)*, *ibidem*, cc. 50 ss.; si vedano anche i commenti redazionali di R. Romboli e A. Travi, *ibidem*, cc. 39 ss.

now viewed in relation to of the numerous judgments of the European Court of Human Rights , condemning the Italian State for the insufficient value attributed to compensation, especially in the case of “*occupazione acquisitiva*”.

The Court is, on this occasion, before a crossroad of interpretation, which regards its own function as guarantor of the Constitution: whether to recognize the supra-ordinate role of the European Convention on Human Rights, losing its power of interpretation of the constitutional or to deny the importance of the case law of the Court of Human Rights.

The Court, in order to settle the matter without contradicting its previous case law, therefore, uses the new art. 117 of the Constitution as a parameter in relation to Article interposed. 1 of the Additional Protocol of the ECHR, because art. 117 introduces - as constraints in the legislative process – those “deriving from EU and international obligations”, differentiating from each other, so that even the international obligations become the criterion of the legitimacy of internal rules.

According to the Court, the new pronouncements to the art. 117 has “constitutionalized” international obligations, in the same manner in which agreements shall determine them, but, because of this, it allows the Court to assess conformity to the Constitution ⁵⁶.

In fact, the rules invoked as a parameter of constitutionality (in this case, the ECHR), “are subordinated to the Constitution, but intermediate between this and ordinary law” (sent. 348). It is therefore - as stated explicitly in sent. 349 - a dynamic reference to the international norm.

However, the legal force of the ECHR remains uncertain within domestic law, because it would have a supra-legislative, but not constitutional, role. This leaves many conceptual doubts, since it does not seem clear whether the ECHR, which was introduced

into our legal system by ordinary law, as reaffirmed by the Constitutional Court itself, can acquire a supra-legislative force: in fact, this would be possible only if “the adaptation made with a constitutional law, which expressly states the prevalence of rules thus created over primary sources”⁵⁷.

The Court has resolved the question considering that the interpretation of the ECHR by the Court of Strasbourg is always covered by the evaluation of the Constitutional Court, as regards compliance with the national Constitution. The interpretation of the Court of Human Rights is not sufficient, therefore, to assume, in the present case, that the provision contested is illegitimate in relation to expropriation compensation, but there is always need for a judgment by the Constitutional Court on the conformity of such an interpretation to the constitutional parameter.

In general, the sentence no. 349 states that “this Court and the Court of Strasbourg ultimately have different roles, although orientated towards the same objective and to protect fundamental human rights as well as possible In this way, a correct balance between the need to ensure compliance with international obligations required by the Constitution and that of avoiding that this might result in another way is a weak point in the Constitution itself”.

Following the same line of argument, in judgment n. 348, the unconstitutionality is enshrined because the interpretation of the Strasbourg Court would correspond to the interpretation of the Constitutional Court on Article 42 of the Constitution.

Having introduced the normative strength of the ECHR by referring to art. 117 of the Constitution in respect of international obligations, the compensation resulting from the

⁵⁷ L. Montanari, *Le tecniche di adattamento alla CEDU come strumento di garanzia dei diritti: un'analisi comparata delle soluzioni adottate negli ordinamenti nazionali*, in Aa. Vv., *I diritti fondamentali in Europa*, Milano, 2002, 535.

sacrifice of private property is considered inadequate according to the constitutional parameters.

This is certainly a “forced interpretation”, to which the Court necessarily resorts: in order not to deny its role as interpreter of the Constitution, the Court denies - in the specific case of protection of private property - an obvious discrepancy between private property as understood in Article 42 of the Constitution. And art. 1 of the Additional Protocol to the Convention on Human Rights (*rectius*: the Court’s interpretation of the rights under Art. 1 of the Additional Protocol to the Convention on Human Rights).

The determination of an adequate expropriation compensation is still entrusted to the legislator, as the Court declares the illegitimacy of that particular mode of computation of the allowance set by the rule as unconstitutional, but leaves it to the legislature to determine how it should be calculated.

Indeed, neither the judgment of the Constitutional Court nor the numerous decisions of the Court of Human Rights explicitly state that the proper compensation is equal to the market value of the property. Sentence n. 348 reaffirms it in no uncertain terms, noting that “the legislature does not have a duty to proportion fully expropriation compensation to the market value of the property ablated” because “art. 42 of the Constitution lays down the rule to recognize and guarantee the right to property, but emphasizes the “social function” connected to the duty of solidarity (Article 2 Cost). On this occasion, the Court notes the correctness of that interpretation of the Court of Human Rights that makes a distinction between an “isolated expropriation” or a set of expropriations due to the laws of socio-economic reform: the former has a lesser social function compared to the latter and, therefore, are more eligible for higher compensation than the latter.

Instead, in the case of *occupazione acquisitiva*, sentence n. 349 declares that the illegality of the administration’s conduct leads to the payment of a sum equivalent to the market value of the asset, according to an established interpretation of the Strasbourg Court.

Despite these interpretative openings, a substantial difference between the Constitutional Court and Court of Human Rights on the legality of *occupazione acquisitiva* still remains, or rather, of the non-entitled use of a private property asset. Starting from the judgments of 2005, the Court of Human Rights finds - as we have seen - that acquisitive occupation contradicts the principle of legality and cannot thus be considered a lawful way of property transfer, as illegality and certainly not good administration is encouraged. The Constitutional Court, however, limits itself only to ruling on the extent of compensation as “both referral orders do not raise the issue of the compatibility of acquisitive occupation as such, with the aforementioned art. 1, but criticize the provision contested only in so far as it regulates the financial repercussions” (par. 8, sent. 349).

The regulation prepared by art. 43 d.p.r. 327/2001 therefore remains unaltered, which provides for the non-entitlement of an asset used for public interest: the judicial institute of *occupazione acquisitiva* with its perverse effects (especially with regard to the limiting of action) is certainly overcome, but a strange form of acquisition of the right to ownership for the administration still persists.⁵⁸

The two above-mentioned judgments, even with these limitations, represent a breakthrough not only for the discipline of the specific object on which it is sentenced, but also for the different relationship they create between the European Convention of Human Rights, according to the interpretation given to them by the Strasbourg Court, and by internal law⁵⁹.

⁵⁸ A Perini, *Il testo unico in materia di espropriazione*, cit., 525.

⁵⁹ For V. Sciarabba, *Nuovi punti fermi (e questioni aperte) nei rapporti tra fonti e corti nazionali ed internazionali*, in www.associazionedeicostituzionalisti.it, the “eminent interpretative function” recognized by the Constitutional Court with the case-law of Strasbourg (sent. n. 348, par. 4.6), “confers binding force to the interpretation of the ECHR given by the European Court”. On this point, with different opinions see: A. Ruggeri, *La CEDU alla ricerca di una nuova identità, tra prospettiva formale - astratta e prospettiva assiologico - sostanziale d'inquadramento sistematico (a prima lettura di Corte cost. nn. 348 e 349 del 2007)*, in

6. EVENTS SUBSEQUENT TO THE CONSTITUTIONAL COURT JUDGMENTS

The judgments of the Court could not fail to provoke further regulations and new jurisprudential orientation.

With the Law of 27 December 2007, n. 422 (Financial law 2008), itself accepted the invitation of the Constitutional Court, changing the rules of compensation for expropriation: par. 89 of art. 2 modifies paragraphs 1 and 2 of art. 37 d.p.r. 327/2001, providing that the compensation for expropriation for building areas is equal to the market value of the property, reduced by 25% for expropriations aimed to implement economic and social reform measures. This compensation shall be increased by ten percent when a sale agreement has been concluded or when the agreement has not been concluded for reasons not attributable to the expropriated or because the discounted value of the compensation offered is less than eight tenths of the final offer.

The legislator has adapted itself to the information provided by the case law of the ECHR and endorsed by the judgments of the Constitutional Court, according to which a distinction must be made between single expropriations and those resulting from economic and social reforms, even if it seems difficult (and still residual) to identify such categories.

With regard to compensation for expropriation of single building areas, the criterion of the market value of the property will be returned to, envisaged by the 1865 law on expropriation, but certainly with social implications of a different type from that of the rule, since the current individual expropriations affect, in general, smallholders and not - as in the past - landowners who earned a prosperous position. More surprising and of questionable constitutionality appears the increase of ten per cent of compensation in the

www.forumcostituzionale.it; C. Pinelli, Sul trattamento giurisdizionale della CEDU e delle leggi con essa configgenti, in www.associazionedeicostituzionalisti.it.

case of conclusion of the surrender, since, in this case, a compensation even higher than the market value would be obtained⁶⁰.

There remain, therefore, some relevant application problems, but this does not diminish the “historic” value of the Constitutional Court judgments, which inaugurate an adjustment of our legal system to the Convention on Human Rights, which then become more and more penetrating⁶¹.

The matter has had a follow-up. Article 43 of d.p.r. 327/2001 was declared unconstitutional (judgment n. 293/2010) by the Constitutional Court for its breach of the legge-de-lega 8 march 1999, n. 50⁶².

The legislator thus proceeded to issue a rule of the same content. Article. 42 bis of d.p.r. 327/2001 provides that “*valutati gli interessi in conflitto, l’autorità che utilizza un bene immobile per scopi di interesse pubblico, modificato in assenza di un valido ed efficace provvedimento di esproprio o dichiarativo della pubblica utilità, può disporre che esso sia acquisito, non retroattivamente, al suo patrimonio indisponibile e che al proprietario sia corrisposto un indennizzo per il pregiudizio patrimoniale e non patrimoniale, quest’ultimo forfetariamente liquidato nella misura del dieci per cento del valore venale del bene*”.

⁶⁰ D. M. Traina, *La nuova disciplina dell’indennità di espropriazione per le aree edificabili: dall’incostituzionalità “per difetto” all’incostituzionalità “per eccesso” (in caso di cessione volontaria)*, in www.giustamm.it, 2, 2008.

⁶¹ A. Guazzarotti – A. Cossiri, *La CEDU nell’ordinamento italiano: la Corte costituzionale fissa le regole*, in *Forum Quaderni costituzionali*, 2008.

⁶² F. Patroni Griffi, *Prime impressioni a margine della sentenza della Corte costituzionale n. 293 del 2010, in tema di espropriazione indiretta*, in www.federalismi.it; S. Pieroni, *Il de profundis della acquisizione coattiva ‘sanante’... sarà vera fine?*, in www.federalismi.it.

7. CONVENTION AND ADMINISTRATIVE POWER OF THE STATES

Apart from the specific case of compensation for expropriation, the matter of the influence of the ECHR on the internal evolution has been greatly developed.

First, after the entry into force of the Treaty of Lisbon amending the Treaty on the European Union, the problem of the immediate binding of the ECHR has been posed again. The current art. 6 of the Treaty provides the Union's accession to the European Convention on Human Rights, recognizing the nature of the general principles of European Union law guaranteed by the Convention, applicable to the fundamental rights. The innovation was immediately transposed by administrative jurisprudence (Tar Lazio, Sez. II-*bis*, 18 May 2010, n. 11984, see also Cons. St., sez. IV, 2 march 2010, n. 1220), according to which the direct application of the Convention on Human Rights, now having become European law, allows the court direct non-application of the provision deviating from the Convention.

In this hypothesis⁶³, it was claimed that the accession of the European Union, pursuant to art. 6, par. 3, is limited only to recognizing that the fundamental rights guaranteed by the Convention "are part of the Union's law as general principles", but does not attribute this to the similar nature of the Treaties, as is the case, pursuant to art. 6, par. 1, for the Charter of Nice. In addition, such participation would no longer be effective, as it should be, pursuant to the Protocol n. 8 of future agreements between the European Union and the Council of Europe.

The Constitutional Court, in case n. 80/2011, reiterated that the national Court cannot fail to apply domestic rules in conflict with the ECHR, because the Convention has not become European law.

We believe the question should be examined also from another point of view.

⁶³ A. Celotto, *Il Trattato di Lisbona ha reso la CEDU direttamente applicabile nell'ordinamento italiano?* (in *marginale alla sentenza n. 1220/2010 del Consiglio di Stato*), in www.giustamm.it

The analysis of the relationship between national law and ECHR has exclusively focused on the relationship between laws and jurisdiction, deepening the relations between the Constitutional Court and Court of Human Rights, and between this and the national Courts⁶⁴.

Less examined was the relationship between the decisions of the Court of Strasbourg and national administration. The question of what attitude the national administration should take for an interpretation of the ECHR by the Court deviates from the internal norm, must be posed. If, that is, the decisions of the ECHR constitutes a limit to the discretion of the administration.

It would be too easy to state that the national administration is bound to the internal rule even if different from that of the ECHR, because not only the primacy of the Convention in the field of human rights would be taken into due consideration, but also the administrative and accounting consequences that the State would suffer if the administrations, deciding on similar cases to those of the Court's opinion, do not comply to what it decided, should be considered.

Some particularly significant examples will help to explain this concept better. In the case of *Saadi v. Italy* (*Grand Chamber*, 28 February 2008), the Court of Human Rights states that a Tunisian sentenced in Italy for international terrorism cannot be extradited to his country of origin, where inhumane treatment in prison is practiced. In another case, the Court recognizes a girl, who had been denied access for refusing to provide a photo without a veil for a identity card, the right to enrol at a university (*Araç v. Turkey*, 23 September 2008). In a further case, in the name of the right to education, it was decided that an 11 year old girl should be allowed to do physical education even without removing the Islamic veil

⁶⁴ F. Gallo, *Rapporti fra Corte costituzionale e Corte EDU*, Bruxelles, 24 maggio 2012, in www.cortecostituzionale.it; S. Ninatti, M. Gennusa, *L'Italia e la CEDU – Report annuale 2011*, in *Ius Publicum* 2011; M. Pacini, *Diritti umani e pubbliche amministrazioni - Report annuale 2013*, in *Ius publicum*, 2013.

(*Dogru v. France*, 4 December 2008). Also in the field of education, the Court states that the inclusion of rom children, members of ethnic minorities, in classrooms distinct from the ordinary is incompatible with the Convention (*Sampanis and other v. Greece*, 5 June 5 2008). In the protection of prisoner rights, the Court considers that the application of the aggravation in art. 41-*bis* of our prison system is contrary to the Article 8 ECHR, when it involves the monitoring of correspondence sent to international organizations for the protection of human rights (*Zara v. Italy*, 20 January 2009) or to the doctor (*Szuluk v. Britain*, 2 June 2009).

The question which it is intended to pose is how the national administration should behave in the case in which a case similar to those decided by the Strasbourg Court must be evaluated: referring to the above-mentioned examples, it must be asked whether the Home Office can allow extradition to Tunisia; or whether a school director or a regional school office can arrange for the creation of separate classes for children of ethnic or religious minorities; or whether, even though the aggravated prison regime is still in force, the penitentiary administration can inspect a prisoner's post addressed to an international organization for the protection of human rights.

The question can hardly be settled in accordance with the classical principles of interpretation of the relationship between the sources, or trilateral relations between the Strasbourg Court-Constitutional Court-the national courts, since in this case the power of the national court and the ways in which it relates to the ECHR (conforming interpretation, non-application etc.) are not disputed, but rather what the relationship between a court such as the Court of supranational rights and the national administration is.

Returning, therefore, to the question formulated above (can the national administration decide in a different manner from a decision of the Court of Human Rights on a single similar case?) It seems to me that the administration's decision, if not bound to the specific interpretation by the Court, may find a (new) limit to the discretion, requiring the administration, at least, to justify any decision different from the one adopted by the Court of Strasbourg.

Always as an example, if a person condemned to a specific prison regime of the 41-*bis* of the Prison Act wants to send a letter to an organization for the protection of human rights, the director could not submit it to censorship, knowing that the Court of Human Rights has condemned the Italian State in a similar case.

The national administration is required, therefore, to make a “compatible interpretation” of the wording of internal regulations, as indicated by the decisions of the Court of Strasbourg in each single case.

Paradoxically, it could be said that the application of ECHR judgments, unlike the chronological sequence for the recognition of the primacy of EU law over national law, following the opposite direction, already forcing administrations to adapt to the Court of rights decisions, even if the Constitutional Court still does not recognize the obligation of the national court.

This hypothesis could find an explanation in the fact that the judgments of the Strasbourg Court concern individual cases and do not contain general declarations. Therefore, even if we admit that they must be “filtered” by the Constitutional Court to verify compliance with constitutional requirements, must not, however, be subjected to this filter if the national administration wants to use them to create a single case similar to the one already decided, without any judgment on the constitutionality of the internal rule. The weakness of ECHR judgments against internal rules (which prevent national courts from refusing to apply the rules which the ECHR cannot affect) is their strength against national administrations, which, deciding the constitutionality of rule on a particular case and not on general criteria, are obliged into take account the interpretation given by the Court of Strasbourg for a similar single case.

Therefore, the theory of the previous court, the subject of controversy in the relationship between the Strasbourg Court and the national courts, should guide the national administrations in their decisions on concrete cases similar to the judgments of the Court.

From a more general point of view, a reverse path to the one that led to the primacy of EU law over national law would be constituted; in the latter case, the

contracting power of non-applying the provision is given first to the national court and then to the administration, if in the object of our current focus such an obligation affects first the administration and then the judges (already present, according to some, or however, implemented by the final entry into the EU of the ECHR, according to others).