JUDGMENT NO. 71 YEAR 2015

In this case, the Court heard four referrals questioning the constitutionality of Art. 42-*bis* of the T.U. on Expropriations, which established an extraordinary mechanism to allow the public administration to adopt an acquisition measure concerning real property already occupied or modified for public interest purposes. The Court declared two of the referrals, coming from the *Tribunale Amministrativo Regionale* of Lazio, to be inadmissible for lack of relevance, and ruled on the constitutional questions raised by the Joint Civil Divisions of the Court of Cassation. The Court declared these questions unfounded, citing the facts that the provision entailed a reinforced duty to provide justification by indicating current and exceptional reasons of public interest and the absence of reasonable alternatives, that it called for both pecuniary and non-pecuniary damage, that it conditioned the transfer of ownership on payment of monies owed within a set timeframe, and that it required communication of the adoption of an acquisition measure to the Court of Accounts. The Court rejected the referrals' constitutional challenges, holding, *inter alia*, that the principles of reasonableness and equality are not violated where a power afforded to the public administration does not result in the excessive sacrifice or restriction of constitutionally relevant interests, and proportionality exists between the means chosen and the objective needs to be satisfied or the ends pursued. The Court found that the provision contained sufficient protections of the private right of ownership, providing for both pecuniary and non-pecuniary compensation, with a security clause allowing an owner to present evidence of greater damage than that provided for, and that administrative precedent provided several modes of recourse for preventing the administration from having an unlimited time window in which to issue the measure, despite the absence of term limits in the provision. Finally, the Court noted that the challenged provision was different from one that was previously contested by the ECtHR, and that it responded to the observations of the Strasbourg Court.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 42-*bis* of Decree of the President of the Republic [hereinafter "d.P.R."] no. 327 of 8 June 2001 (Consolidated law of legislative and regulatory provisions governing expropriations in the public interest – Text A), which was introduced by Article 34(1) of Decree-Law no. 98 of 6 July 2011 (Urgent provisions for financial stabilization), converted, with amendments, by Article 1(1) of Law no. 111 of 15 July 2011, initiated by the Court of Cassation, Joint Civil Divisions, with two referral orders of 13 January 2014, and by the Regional

Administrative Tribunal [TAR] for Lazio, Second Division, with the Referral Orders [hereinafter "R.O."] of 12 May and 5 June 2014, registered, respectively, as nos. 89, 90, 163, and 219 of the Register of Referral Orders 2014 and published in the Official Journal of the Republic nos. 24, 42, and 50, first special series of 2014.

Considering the entries of appearance of the Municipality of Porto Cesareo, of S.C. et al. and of Corrida, S.r.l., as well as the interventions by D.G.G. as universal successor to C.R., of SEP – Società Edilizia Pineto, S.p.a., and of the President of the Council of Ministers;

having heard from judge rapporteur Nicolò Zanon at the public hearing of 10 March 2015 and in chambers on 11 March 2015;

having heard from Counsel, Giuseppe Lavitola on behalf of SEP – Società Edilizia Pineto S.p.a., Luca Di Raimondo on behalf of S.C., et al., Giovanni Pallottino and Francesco Nardocci for Corrida, S.r.l., and State Attorney Gabriella Palmieri on behalf of the President of the Council of Ministers.

[omitted]

Conclusions on points of law

1. – The questions raised by the Court of Cassation, Joint Civil Divisions, and by the Regional Administrative Tribunal [TAR] for Lazio, Second Division, with four distinct referral orders largely overlapping in content (R.O. nos. 89, 90, 163, and 219 of 2014, respectively), concern Article 42-*bis* of d.P.R. no. 327 of 8 June 2001 entitled "*Testo unico delle disposizioni legislative e regolamentari in materia di espropriazione per pubblica utilità – Testo A*" (Consolidated law of legislative and regulatory provisions governing expropriations in the public interest – Text A) [hereinafter "T.U. on Expropriations"], which regulates the "Use of property, without title, for public interest purposes."

1.1. – The cases deal with the same provision, the constitutionality of which is challenged under the same parameters, on the same grounds, and using largely the same reasoning. Therefore, since they pose identical questions, they are properly joined and decided in a single judgment.

1.2. – Concerning the inadmissibility of the intervention by SEP – Società Edilizia Pineto S.p.a. – in the petition by the Court of Cassation, R.O. no. 89 of 2014, we reaffirm what was decreed by the order read during the public hearing, which is annexed to this judgment.

1.3. – It is necessary to again declare the inadmissibility of the intervention in both petitions coming from the Court of Cassation (R.O. nos. 89 of 2014 and 90 of 2014) by D.G.G., which is not a party to those proceedings *a quibus*, but to other proceedings that discuss the legitimacy of expropriation procedures that could fall under the challenged provision.

Indeed, according to the longstanding case law of this Court, only parties to the main proceedings and third parties with a qualified interest, which is directly inherent to the substantive legal relationship at issue in the underlying case, and not merely regulated by the challenged rule or rules (among many, see Judgment nos. 162 of 2014, 293 of

2011, 118 of 2011, and 138 of 2010; Orders nos. 240 of 2014, 156 of 2013, and 150 of 2012), may participate in an interlocutory appeal concerning constitutionality.
The substantial relationships brought by the third party in the main proceedings are completely different from the subject that gave rise to the constitutional petitions of R.O. nos. 89 and 90 of 2014, notwithstanding the fact that, as presented by the third party, they may fall under the challenged provision.
Furthermore, allowing for the admissibility of interventions by third parties who have an interest that is only analogous to the one that was the subject of the main dispute would run contrary to the interlocutory nature of the judgment concerning constitutionality, given the fact that third-party access to the Constitutional Court would then be possible without prior examination by the referring judge to determine the relevance of the issue, and establish that it is not manifestly unfounded (for all, Judgments nos. 119 of 2012 and 49 of 2011 and Order no. 32 of 2013).

2. – Like the analogous Article 43 of the T.U. on Expropriations, declared unconstitutional as *ultra vires* by this Court with Judgment no. 293 of 2010, challenged Article 42-*bis* deals with regulation of the use of real property by the public administration, without title, for public interest purposes, which property is modified without a valid act of expropriation or declaration of public utility.
In its principal features, the provision provides that the authority that uses the real property may arrange for non-retroactive acquisition into its inalienable assets, in exchange for the payment of pecuniary and non-pecuniary compensation, the latter liquidated at the fixed value of ten percent of the monetary value of the property. Five percent interest per year on the monetary value is calculated as reparation for any potential period of occupation without title, except where evidence of more significant damage is presented.
The new rules are valid not only where the act of expropriation is absent, but also in the case that the act giving rise to the categorization of the property prior to the expropriation, the act that declared the public utility of the works, or the decree of expropriation was later annulled.
The provision establishes that the acquisition measure may also be adopted while an annulment proceeding for any one of the acts just mentioned is pending, but on the condition that the administration that adopted the previous, challenged act retracts it.
The acquisition measure must contain an indication of the circumstances that led to the improper use of the area and, if possible, the date on which improper use began, and must be specifically supported by the present and exceptional reasons of public interest that justify its enactment, and evaluated in light of conflicting private interests. The "absence of reasonable alternatives" to the adoption of the measure must also be highlighted. The payment of compensation, liquidated with the measure, must be made within thirty days, and notifying the owner of the act effects the transfer of the right of ownership, conditioned upon payment of the amount owed to the owner, or its deposit.
The authority that enacts the measure must, moreover, provide communication to the Court of Accounts within thirty days, via transmission of a complete copy of the measure.
These provisions apply to facts that occurred prior to the provisions' entry into force, and also where acquisition measures have been subsequently retracted or annulled (the requirement to renew the assessment that the public has a prevalent interest in the acquisition still remains).

3. – Concerning the requirement that the question not be manifestly unfounded, the referring judges all maintain that the challenged provision conflicts with several constitutional parameters.
3.1. – First, Article 42-*bis* allegedly violates Articles 3 and 24 of the Constitution, by affording privileged treatment to the public administration responsible for a wrongful act that, were it committed by any other kind of entity, would give rise to a duty of "reparation/restitution" under Articles 2043 and 2058 of the Civil Code. The challenged provision would endow the public administration with a faculty to modify – after the damage to another's legal rights is already done, and by its own unilateral manifestation of will – the characterization and scope of its responsibility, as well as the kind of sanctions (from full reparation to mere compensation) established as a general matter by the principle of *neminem laedere*, notwithstanding the fact that it operated outside of its administrative function. In this way, the public administration would gain an advantage from an illegal situation created by itself, moreover depriving the harmed private party of the protection of restitution to which it previously was entitled.
It is also alleged that the mere compensation provided under the challenged provision would be unjustifiably lower than the amount that would be due in a legitimate expropriation of the very same property.
The provision, moreover, allegedly transforms the previous reparation regime into mere compensation for a lawful act, and, therefore, it would become a mere nominal debt not automatically subject to currency reevaluation.
It is further alleged that the remedy that would still have been reparatory in nature, that is, the consideration for any period of illegitimate occupation predating the adoption of an acquisition measure, would be determined on the basis of a more restrictive parameter than that used to calculate the analogous compensation for legitimate temporary occupation of property.
3.2. – Secondly, the referring judges question the compatibility of the challenged provision with Articles 42, 97, and 113 of the Constitution.
They observe that the declaration of a work's public utility is the principal and fundamental guarantee of citizens and, at the same time, the underlying reason that justifies their sacrifice. Without it, they claim, the administration lacks the authority to proceed with an expropriation. According to the referring judges, Constitutional principles require that the reasons of general interest that justify the exercise of expropriation power (in the cases provided for by law), be predetermined by the administration by means of a dedicated procedure, which would identify the public interest and result in the adoption of a declaration of public utility, which would be preliminary to, independent from, and instrumental to the subsequent expropriation proceeding.
In the referring judges' view, the reasons of general interest required under Article 42, third paragraph, of the Constitution should emerge gradually and prior to the sacrifice of the right of ownership, at a time when the evaluation of public and private interests may effectively indicate the optimal decision, under the principles of impartiality and proportionality (Article 97 of the Constitution). At a time, that is, when no violation has yet been committed against the right of ownership, and potential alternatives to expropriation have not been prevented by an already irreversibly compromised factual situation.

The referring judges allege that Article 42-*bis*, on the other hand, by omitting the declaration of public utility, authorizes expropriations in the absence of a prior determination of reasons of general interest, considering it sufficient that the owner's loss of the property is justified by the situation created *de facto* by the administration's *contra ius* actions.

The referring judges raise a further question of constitutionality, once again concerning alleged contradiction with Article 42 of the Constitution, pointing to the provision's lack of fixed term limits for the beginning and end of the procedure, exposing the right to ownership to the danger that there are no temporal limitations on the administration's ability to issue an acquisition measure.

3.3. – The referring judges also question the conformity of the challenged provision with Article 117, first paragraph, of the Constitution, claiming that it contradicts the principles contained in the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, ratified and executed with Law no. 848 of 4 August 1955 [hereinafter "ECHR"], according to the interpretation that the Strasbourg Court [hereinafter "ECtHR"] gives of Article 1 of the First Protocol. According to the referring judges, the ECtHR declared the practice of "indirect expropriation," in which the transfer of ownership from the private owner to the public administration occurs because of an assessment of a situation of illegality or wrongfulness committed by the latter, with the effect of legalizing it, allowing the administration to take advantage and to go beyond the rules established on matters of expropriation, and with the risk of an unforeseeable and arbitrary result for the interested parties, to be "radically opposed" to Article 1.

The ECtHR, the referring judges observe, has always held that such an occurrence creates problems in light of the principle of legality protected under the ECHR, not only when justified by case law alone, but also when permitted through legislative provisions. This is because the principle of legality is not satisfied by the mere existence of a provision allowing indirect expropriations, but requires the existence of sufficiently accessible, precise, and predictable internal legal rules.

3.4. – Lastly, the referring judges question the conformity of the challenged provision with Article 111, first and second paragraphs, and 117, first paragraph, of the Constitution, in relation to Article 6 of the ECHR, as interpreted by the Strasbourg Court.

The ECtHR has repeatedly held the application of *ius superveniens* in pending proceedings to be legal only in cases of "imperative reasons of general interest," on pain of violating the principle of legality as well as the right to a fair trial. This is because, in such cases, the legislative power introduces new provisions specifically targeted to impact the outcome of a pending dispute (particularly one to which the public administration is a party), inducing a judge to decide a matter on a basis different from the one that the opposing party could legitimately have expected at the moment when the dispute was begun.

The challenged provision allegedly violates these principles in that, although the first paragraph specifies that the act of acquisition is not intended to have retroactive effect, the eighth paragraph gives the administration the possibility to use the measure *ex tunc*, regarding facts that occurred prior to the act's entrance into force and even when a prior measure of acquisition was subsequently retracted or annulled, as a way of giving an occupying administration a legal way out of an illegal situation that came to be over the years.

Following this reasoning, the provision would allegedly run contrary to Article 111, first and second paragraphs, of the Constitution, where it provides for its applicability to proceedings already underway, violating the principles of fair trial, in particular the condition of equality of the parties before the judge, which would harmed by the interference of the legislative power in the administration of justice, with the purpose of affecting the resolution of a limited and determined category of dispute.

4. – As a preliminary matter, the issues raised with two referral orders (R.O. nos. 163 and 219 of 2014) from the TAR for Lazio, Second Division, must be declared inadmissible for lack of relevance.

Indeed, in both cases, no measures of acquisition were made by the public administration concerning expropriations under T.U. Article 42-*bis*.

On the contrary, in both its referral orders, the referring TAR stated that it would be limited to ordering the respondent public administration to proceed with providing restitution to the claimant for the illegitimately-occupied areas, restored to their previous condition, and to making full reparation for the damage of illegitimate occupation, and that it would still be possible for the administration to "paralyze such a decision through the adoption of measures arranging for the *ex nunc* acquisition of the property into its inalienable assets."

At issue here, therefore, is a purely hypothetical set of circumstances that have not actually occurred, eliminating the need to apply the challenged provision in the concrete case.

5. – Still preliminarily, it is necessary to examine the objections of inadmissibility brought by the Avvocatura generale dello Stato [Office of the State Attorney, hereinafter "Avvocatura generale"] and the Municipality of Porto Cesareo (a party to the *a quo* proceedings) in R.O. no. 89 of 2014.

5.1. – The Avvocatura generale argues that subject matter jurisdiction is determined under Article 133, first paragraph, of the Code of Administrative Procedure (Legislative Decree no. 104 of 2 July 2010, on "Execution of Article 44 of Law no. 69 of 18 June 2009, granting power to the government to reorganize administrative procedure"), which, at letter *f*), gives the administrative judge exclusive jurisdiction over all disputes concerning the acts and measures of public administrations in matters of construction and land use, except those concerning the determination and payment of compensation resulting from the adoption of acts of expropriation or takings.

It follows that, only where the compensation provided for under Aricle 42-*bis* may be qualified as "indemnity," would the *traslatio iudicii* proposed by the referring judge be possible, provided that the constitutional doubts raised were overcome.

The State defense, however, argues that, beyond the term used by the provision (in strict connection with the noun used in the third paragraph of Article 42 of the Constitution), systematic analysis of the applicable law results in an obligatory regime of full reparation, resulting in exclusive jurisdiction for the administrative judge, regardless of whether the question of constitutionalityis founded or unfounded. Therefore, the issue raised by the judgment *a quo*, relating to resolution of the jurisdictional dispute, would lack relevance.

5.1.1. – The objection is unfounded.

The determination of relevance, according to longstanding constitutional case law, is reserved to the referring judge, and this Court's intervention is limited to determining the existence of a sufficient reason, one that is not patently erroneous or contradictory,

and cannot extend to an autonomous review of the elements that led the judge *a quo* to certain conclusions.
In other words, what matters for evaluating relevance in a judgment on constitutionality is the evaluation that the referring judge must make with regard to the possibility that the pending proceeding may or may not be settled independently by resolution of the issue raised, the Court being able to interfere in this evaluation only if it appears, at first sight, to be utterly lacking in foundation (among many, Judgments nos. 91 of 2013, 41 of 2011, and 270 of 2010). This is not the situation in the case at bar, since the referring judge justified the merely compensatory (and not fully reparatory) qualification of the restitution provided for in the challenged provision for the pecuniary and non-pecuniary harm caused to the private party (in line, moreover, with the course taken – albeit not unanimously – by administrative case law: Council of State, Fourth Division, Judgment no. 4318 of 29 August 2013, and Sixth Division, Judgment no. 1438 of 15 March 2012).
5.2. – The *Avvocatura generale* presents a further claim of grounds for inadmissibility for lack of relevance, pointing to the scant description provided of the concrete case that gave rise to the request for resolution of the jurisdictional dispute. Indeed, the referring judge did not specify whether the affair originated from a "usurpative" theory of occupation, or from an "acquisitive" occupation of the property. According to the settled case law of this Court, the private party would only be entitled to restitution of the property in the first case.
5.2.1. – This objection is also unfounded.
Despite its cursory language, the referral order specifies that there was actually a declaration of public utility of the work, but that the term dates had expired, therefore bringing the case back under the umbrella of so-called acquisitive occupation.
5.3. – The Municipality of Porto Cesareo also objects to the admissibility of the question of constitutionality.
The referring judge maintains that if Article 42-*bis* were expunged, the private party could expect to receive restitution of the illegitimately occupied property.
In the Municipality's view, such restitution would no longer be viable, in light of the final decision rendered in the TAR's earlier judgment (no. 1614 of 25 June 2010), which expressly rejected the possibility. This is true, moreover, given the *de facto* renunciation of full restitution by the claimant, as demonstrated by the content of the arguments added during the still-pending administrative proceeding, which seek only the determination of compensation according to the measure under Article 42-*bis* of the T.U. on Expropriation, which was adopted by the Municipality of Porta Cesareo during the pendency of the case.
The Municipality argues that the private party would obtain no benefit from the elimination of the challenged rule.
5.3.1. – The objection is unfounded.
The jurisdictional dispute was put forward – by the respondent Municipality itself – because the private party had also requested a recalculation of compensation specifically under Article 42-*bis* of the T.U. on Expropriations, which entered into force while the case was pending. As the referral order stresses, if the challenged provision were to be declared unconstitutional, the economic remedy would be determined under the reparatory scheme found in Article 2043 of the Civil Code, regardless of the affirmation of the right to restitution of the property.
In other words, the relevance of the question arises from the fact that, if the claim of unconstitutionality is sustained, the case would remain before the administrative judge,

charged by the claim to determine the economic remedy, which would take the form of full reparations. If it is rejected, a *translatio iudicii* would place it before an ordinary judge, in order to determine the amount of mere compensation envisaged by Article 42-*bis* of the T.U. on Expropriations.

5.4. – The Municipality further opposes inadmissibility for lack of relevance on other grounds, these being the right to full reparation for damages (according to the principles found in Articles 2043 and 2059 of the Civil Code), rather than mere compensation, , in that damages were already calculated comprehensively, in the enforcement of the holding in Judgment no. 1614 of 2010 of the TAR for Puglia, Lecce Division, under which the calculation of mere compensatory damages would allegedly be higher than what would be due under the challenged provision.

5.4.1. – This objection is also unfounded, since it relates to the merits of the controversy that gave rise to the jurisdictional dispute, and it is in the context of this dispute that the competent judicial authority will carry out its analysis.

6. – The questions raised by the Court of Cassation, Joint Civil Divisions, with Orders R.O. nos. 89 and 90 of 2014, are unfounded under Articles 3, 24, 97, and 113 of the Constitution. Under Articles 42, 111, first and second paragraphs, and 117, first paragraph, of the Constitution, these questions are unfounded for the reasons laid out herein.

6.1. – Article 42-*bis* was introduced in the T.U. on Expropriations by Article 34, first paragraph of Decree-Law no. 98 of 6 July 2011 (urgent measures for financial stabilization), and converted, with modifications, by Article 1, first paragraph of Law no. 111 of 15 July 2011, after this Court, in Judgment no. 293 of 2010, declared Article 43 of the same T.U. on Expropriations, which regulated a similar area, unconstitutional for excessive delegation.

6.2. – A brief description of the context, including the legal one, in which Article 43 and later Article 42-*bis* of the T.U. on Expropriations were inserted provides a helpful point of departure.

In addressing a series of problems arising from administrative expropriation proceedings, judicial case law dealing with constitutionality has outlined the legal concepts of "appropriative" and "usurpative" occupation.

In brief, the former was characterized by an anomaly in the expropriation procedure, because it did not conclude with a formal act of taking, while the latter was connected with modification of private property without a declaration of public utility. In the first case (ever since the Court of Cassation, Joint Civil Divisions' Judgment no. 1464 of 26 February 1983), the acquisition of the property derived from an inversion of the civil law concept of accession found in Civil Code Article 935 *et seq*., because of the irreversible modification of the property. According to this analysis, the irreversible designation of the illegitimately occupied private property effected the full acquisition of title to the property by the public entity, and the concomitant extinguishing of the private party's ownership right. The Court of Cassation, Joint Civil Divisions, in its subsequent Judgment no. 3949 of 10 June 1988, defined the concept of "acquisitive occupation," limiting it to cases in which there had been a valid declaration of public utility that permitted the public interest to prevail over the private one.

"Usurpative occupation," on the other hand, which was not accompanied by a declaration of public utility (either as an original matter or because the act was annulled or its term limits expired), as such did not result in an acquisitive effect in favor of the public administration.

6.3. – In holding Article 43 of the T.U. on Expropriations unconstitutional as *ultra vires*, this Court (in Judgment no. 293 of 2010) stated that intervention by the public administration in takings proceedings, as regulated by the cited provision, exceeded the concepts of appropriative and usurpative occupation, as defined in the case law, since it provided for a general curative power, attributed to the same administration responsible for the offense, even despite a final holding which would have required specific restitution of the violated ownership right.
In the same decision, this Court questioned the compatibility of the "curative acquisition" mechanism, as governed by the then-challenged provision, with the case law of the Strasbourg Court. The ECtHR has often observed, albeit only in passing, that so-called indirect expropriation violates the principle of legality, because it is unable to ensure a sufficient level of certainty, and it allows the administration to use a *de facto* situation deriving from "illegal actions" to its own advantage. This occurs both when said situation resulted from a judicial interpretation and when it derived from a law (with express reference to Article 43 of the T.U. on Expropriations), in that the indirect expropriation cannot, in any case, amount to an alternative to an expropriation adopted according to "good and due form" (*Sciarrotta et al. v. Italy*, 12 January 2006).
6.4. – It is appropriate, therefore, for constitutional scrutiny of the challenged provision in the case at bar to be preceded by its comparison with Article 43 of the T.U. on Expropriations, which requires the Court first to determine whether the new acquisitive mechanism is regulated differently from the one found in former Article 43, and then to assess the strength of the challenges brought by the referral orders.
6.5. – Article 42-*bis* of the T.U. on Expropriations certainly reintroduces the possibility for an administration that uses a private good for public interest purposes without title to avoid having to make restitution of the property to the owner (and/or restoring it to its previous condition), by means of a coercive act of acquisition into its inalienable assets. Said act replaces the ordinary ablative procedure provided for by the T.U. on Expropriations, and offers a sort of simplified expropriation procedure, which absorbs both the declaration of public utility and the expropriation decree into itself, thereby streamlining the entire procedure *uno actu*, where the prerequisites specified by the provision are met.
As the State points out, however, the new acquisitive mechanism differs in significant ways from Article 43 of the T.U. on Expropriations.
The new provision, resolving an interpretative conflict that had arisen in the case law on Article 43, expressly provides that the acquisition of ownership of the property on the part of the public administration must occur *ex nunc*, only at the moment in which the act of acquisition is emanated (which prevents the use of the mechanism where a final holding has already ordered restitution of the property to the private party).
Furthermore, the challenged provision imposes on the acting public administration a specific, "reinforced" duty to provide justification, obliging it to specify the circumstances that led to the illicit use of the area and, if possible, the start date of said use.
In particular, the justification must present the "current and exceptional" reasons for the public interest, which justify the emanation of the act, assessed in light of the conflicting private interests, and must, in addition, highlight the absence of reasonable alternatives to its adoption.
Once again, the calculation of compensation must consider not only pecuniary damages, but also non-pecuniary damages, these latter at the fixed rate of ten per cent of the

monetary value of the property. This certainly amounts to addition relief compared to the sum that could be expected under the former regulation.
The transfer of ownership, furthermore, is conditioned upon payment of the monies owed, which must be made within thirty days of the adoption of an acquisition measure.
The new mechanism applies not only in the complete absence of an act of expropriation, but also where the act giving rise to the prerequisites for expropriation, or the declaration of public utility of the work, or the expropriation decree has been annulled – or challenged to that end, in which case the public administration must retract them in order to avoid liability.
The so-called judicial acquisition previously provided for by Article 43, third paragraph, under which the acquisition of property by the public administration could take place by dint of an administrative judicial ruling, designed to paralyze a private party's action for restitution, has not been re-proposed.
Of no secondary importance is the requirement in the overall structure of the new mechanism (absent from former Article 43) that the authority that adopts an acquisition measure must provide notice to the Court of Accounts within thirty days, by transmission of a complete copy.
At issue, then, is a mechanism different from the one governed by Article 43 of the T.U. on Expropriations.
It is necessary now to individually address the challenges put forward by the referral orders, in light of the individual parameters they invoke.
6.6. – The first challenge pertains to the alleged violation of Articles 3 and 24 of the Constitution. The parameter as found in Article 3 is invoked by the referring judges under the two-pronged allegation that it violates the principle of equality – with elements also involving the violation of Article 24, *sub specie* of restricting the right of defense – and of the inherent unreasonableness of the challenged provision.
The challenge is unfounded.
6.6.1. – Concerning the first prong of the issue, thus raised, the referring judges claim that the provision would give privileged treatment to the public administration compared with any other party that had committed an illicit act, even in the absence of a previous effective exercise of administrative function, and, therefore, on the mere basis of the legal characterization of the author of the conduct.
Under the framework established by constitutional case law, a violation of the principle of equality occurs only where substantially identical situations are treated in unjustifiably different ways, but not when the diversity of treatment corresponds to non-similar situations (among many, see Judgment no. 155 of 2014 and Orders nos. 41 of 2009 and 109 of 2004), always under the general limits of the principles of proportionality and reasonableness (Judgment no. 85 of 2013).
In the case at bar, the referring judges fail to consider that, even if the prerequisite for applying the provision is "the illicit use of the area" – that is, a situation created by the public administration overreaching its power (due to the absence of a prior declaration of the public utility of the work or its annulment or loss of validity) – nevertheless, the adoption of the acquisitive act, with non-retroactive effect, is certainly the expression of a power that the challenged provision expressly attributes to the public administration. By adopting said act, the administration reenters into the confines of administrative legality, exercising an administrative function considered worthy of privileged protection, according to the public utility of the aims pursued, even though they arose following the commission of a wrong to the detriment of a private citizen.

Under this reasoning, disregarded by the referring judges, the situation appears to conform to this Court's case law, according to which "[…] the P.A. has a position of preeminence based on the Constitution not as a subject, but inasmuch as it exercises powers attributed specifically and exclusively to it, in their own, typical forms. In other words, it is not the subject that is protected, but rather its function, and effectiveness is assured for the individual manifestations of the P.A. for the attainment of the various public ends assigned to it" (Judgment no. 138 of 1981).
As a result, Article 24 of the Constitution is likewise not violated, contrary to the referring judges' claim. This Constitutional provision is intended to safeguard the right to judicial protection (Order no. 32 of 2013), thus assuming a procedural value (Orders nos. 244 of 2009 and 180 of 2007).
In particular, Article 24 of the Constitution, like Article 113, describes the principle of the effectiveness of the right of defense, the former as a general matter, and the latter with regard to protection against acts of the public administration, and both parameters are intended to safeguard the adequacy of the procedural instruments placed at the disposition of the legal order for the judicial protection of rights, operating exclusively on the procedural plane (on this, among many, see Judgment no. 20 of 2009).
It follows that the violation of this constitutional parameter exists only in cases of "substantial impediment of the exercise of the right of action guaranteed by Article 24 of the Constitution" (Judgment no. 237 of 2007) or of the imposition of such significant burdens that the protection itself is irreparably compromised (Order no. 213 of 2005), and does not exist in cases where, as in the present matter, the challenged provision does not eliminate the possibility to benefit from judicial protection (Judgment no. 85 of 2013). Said protection is, however, partially "molded" so as to, in any case, guarantee a serious economic remedy, excluding restitution actions alone; however, these actions would not be properly suitable in cases of conduct no longer qualified as wrongful.
In conclusion, the right to judicial protection, which is vouchsafed by the cited constitutional provision (Judgment no. 15 of 2012), is not violated by the challenged provision.
6.6.2. – According to the referring judges, following another line of reasoning, the principle of equality is violated by the alleged fact that the compensation provided for under the challenged provision would be unjustifiably lower than under an ordinary expropriation of the same real property.
In reality, the provision gives the private owner the right to obtain a remedy for pecuniary damages in an amount equal to the monetary value of the property (as occurs in expropriations carried out according to the ordinary form), and, in addition, a sum in compensation for non-pecuniary damages, quantified in an amount equal to ten per cent of the monetary value of the property.
We are dealing, then, with an additional sum that is not provided for in expropriations carried out in the ordinary form, which is directly prescribed by the law, in a certain and predictable amount. It bears noting, too, that private citizens in this case, in derogation from the ordinary rules, are relieved of the associated burden of proof.
Concerning the payment owed for the period of illegitimate occupation preceding the acquisition measure, it is true that it is determined on the basis of a more restrictive parameter with respect to the one used to determine the analogous full compensation for temporary (legitimate) occupation of real property, but the third paragraph of the challenged provision contains a security clause, based on which it is still possible to provide proof of a different extent of the damage.

6.6.3. – The referring judges request a further evaluation of conformity with the principle of equality, since the challenged provision allegedly provides for a system in which the private property held *sine titulo* would be perpetually exposed to the sacrifice of expropriation, while, in the ordinary expropriation procedure, exposure to the risk that an acquisitive measure will be emanated is temporally limited to the period of effectiveness of the declaration of public utility.

The challenged provision, indeed, does not set any term limits for the public administration's exercise of the power granted to it. But the referring judges did not take into consideration the various solutions, outlined by administrative case law, for reacting against the inertia of the public administration that carried out the offense: indeed, depending on the interpretive trend, the burden of giving formal notice has sometimes been placed on the owner, in order to later challenge an administration's silence/rejection. In other cases, the administrative judge was allotted the power to specify a timeframe in which the administration had to choose between adoption of the measure described in Article 42-*bis* and the restitution of the property to the owner.

It is possible, therefore, to choose a suitable interpretation from among the several that have been articulated, to avoid the prejudice found in the claimed perpetual exposure to the acquisition power, without in any way stretching the letter of the provision (for all, among the most recent, see Judgment no. 235 of 2014).

6.6.4. – Finally, the referring judges allege that Article 42-*bis* of the T.U. on Expropriations is inherently unreasonable and violates Article 3 of the Constitution.

In the first place, the provision allegedly transformed the previous reparation regime into mere compensation for a lawful act, which consequently assumes the nature of a nominal debt, which is not automatically subject to currency reevaluation.

In addition, the assured economic remedy would allegedly always be lower than that under an expropriation carried out in the ordinary way for the same real property, since: a) where the property has been classified for building purposes, the ten percent increase under Article 37, second paragraph, of the T.U. on Expropriations, not mentioned by the challenged provision, does not apply; and b) if the property is agricultural land, Article 40, first paragraph, requiring consideration of any farming actually carried out on the property and "of the value of the built structures legally constructed, including those relating to the exercise of agricultural enterprise," does not apply.

It is well known that the reasonableness inquiry, in areas characterized by wide legislative discretion, requires the Court to verify that the balancing of constitutionally relevant interests was not carried out in such a way that one of them is excessively sacrificed or restricted, making it incompatible with the Constitutional requirement. The decision must be made "by means of considerations regarding the proportionality of the means chosen by the legislature in its incontestable discretion with respect to the objective needs to be satisfied or the ends it intends to pursue, taking into account the concrete circumstances and limitations" (Judgment no. 1130 of 1988).

In light of these preconditions, these challenges are also unfounded.

Concerning the altered nature of the remedy, the provision provides for the payment of compensation, but it is determined in an amount that corresponds to the monetary value of the property with reference to the moment of its transfer of ownership, such that sums that require later reevaluation are not considered.

As for the remaining challenges, it hardly bears pointing out that the increase of ten percent provided for at Article 37, second paragraph, of the T.U. on Expropriations does not apply to every procedure, but only in cases where a transfer agreement has been

concluded (or when it has not been concluded for reasons not caused by the dispossessed, or because the dispossessed was offered a provisional compensation that, having been made, turns out to be less than eight tenths of the definitive one), without considering that the addressees of the acquisition measure are still entitled to an additional amount equal to ten percent of the monetary value of the property, in compensation for non-pecuniary damages.

It remains to be considered that the inapplicability of Article 37, first paragraph, of the T.U. on Expropriations (which is not, furthermore, referenced in the challenged provision for lands designated for building) also excludes the twenty-five percent reduction of the compensation – which is available for legitimate expropriations – imposed when the transaction is finalized to effect economic-social reform interventions.

Finally, the referring judges – based solely on a literal reading and ignoring a systematic vision – neglected to acknowledge the feasibility of an interpretation that, making a general reference to the 'pecuniary value of the property,' allows it to include any amounts that may correspond to the value of farming exercised on the property or to the value of legitimately constructed buildings and structures, including those relating to the exercise of farming, provided for by Article 40 of the T.U. on Expropriations.

The same objection may be made concerning the challenge alleging that the challenged provision does not allow for the hypothesis of partial expropriation, and, for this reason, would not permit consideration of the diminished value of the residual property, compensation for which is already provided for under Law no. 2359 of 25 June 1865, on "Expropriations for reasons of public utility" (Article 40, now found in Article 33 of the T.U. on Expropriations).

6.7. – The referring judges allege that the challenged provision is incompatible with Article 42 of the Constitution.

In particular, Article 42 of the Constitution – regulating the expropriation power as being of exceptional character, only available in cases where the law provides for it and upon the necessary occurrence of "reasons of general interest" – allegedly dictates that these conditions be pre-determined by the administration in a dedicated procedure, before the ownership right is sacrificed. The identification of the public interest, culminating in the adoption of the declaration of public utility, would, therefore, have to result from a preliminary phase, independent and instrumental with respect to the later expropriation procedure in the strict sense, that is, at a moment when it is possible to make an effective balancing between the public and private interests, in order to find the optimal choice, when potential alternatives to expropriation are not prevented by a factual situation that has already become irreversibly compromised.

The question, so put, is unfounded for the reasons laid out here below.

On the one hand, the challenged provision ultimately deals with an expropriation procedure, and as such cannot fail to include certain essential characteristics. However, on the other hand, it cannot be ignored that it is an "exceptional" procedure, which must necessarily relate to the factual situation it is intended to resolve, and in which a prior declaration of the work's public utility would be at odds with public works that are already completed. The challenged provision evidently presupposes a modification that has already been made to a piece of property, which is used for reasons of public utility: in light of this, it is incongruous to demand that the adoption of acquisition measures follow after the close of a procedure carried out in a logically and temporally distinct phase, precisely as in expropriation procedures carried out under the ordinary form.

Rather, the expropriation procedure in question, even if necessarily "simplified" in its form, is "complex" in its outcomes, providing for the adoption of a measure "specifically justified in reference to the current and exceptional reasons of public interest that justify its emanation, balanced against the conflicting private interests, and indicating the absence of reasonable alternatives to its adoption."

The adoption of the acquisition measure presupposes, in fact, a balancing of the conflicting interests, which differs qualitatively from that evaluation typically carried out under normal expropriation proceedings. And the absence of reasonable alternatives to the adoption of the acquisition measure should be understood in the rich sense, in strict correlation with the exceptional public interest reasons referred to by the provision under scrutiny, to be considered against the interests of the private owner. It is not merely a matter of making a general evaluation of the excessive difficulty or onerousness of the alternatives available to the administration, according to a general principle already laid out under Article 2058 of the Civil Code. In order to conform to the Constitution, the extent of administrative discretion is delimited in light of the legal obligation to diminish the *sine titulo* occupation and to adapt the *de facto* situation to the legal one, which latter remains unchanged even following irreversible transformations of the property. It follows that the adoption of the acquisitive act is permitted exclusively where it constitutes an *extrema ratio* for the satisfaction of "current and exceptional public interest reasons," as we read in Article 42-*bis* of the T.U. on Expropriations. Therefore, it is permitted only when other options have been excluded, as the result of an effective balancing with conflicting private interests, including voluntary transfer of the property through purchase and sale, and where total or partial restitution of the property, restored to its prior condition, to the private party whose ownership right has been wrongfully harmed is not reasonably possible.

Only under this view are the "reasons of general interest" underlying Article 42 to be appraised – even in the absence of a prior declaration of public utility or in the case that one is made, but annulled or loses its effectiveness. According to Article 42, the right of ownership may be compromised "only when the limit of the 'social function' requires it […]: the social function that expresses, aside from the list of powers attributed to the owner in his interests, the duty to participate in the satisfaction of general interests, in which the very notion of the right of ownership takes shape as it is nowadays understood, and as it was adopted by our Constitution" (Judgment no. 108 of 1986).

Only by adopting this interpretive reasoning can the granting of takings power (in this exceptional form) be considered legitimate, in the wake of constitutional case law, which imposes the requirement under the ordinary law of indicating "factors and criteria suitable to clearly delineate the breadth of the Administration's discretion" (Judgment no. 38 of 1966).

6.8. – The referring judges further claim that Article 42-*bis* of the T.U. on Expropriations violates the principle of due process, inferable from Article 97 of the Constitution. They base their claim on the argument that the acquisition measure would permit transfers of ownership in the absence of a procedural sequence involving the participation of the private party. The principle of legality of administrative action would also be harmed, considered against the effective judicial protection found under Article 113 of the Constitution.

This question, too, is unfounded.

It is necessary, first of all, to recall that the principle of "due process" (under which private individuals should be able to present their arguments, particularly before

measures limiting their rights are adopted) cannot be said to have absolute constitutional guarantees (Judgments nos. 312, 210, and 57 of 1995, no. 103 of 1993, and no. 23 of 1978; Order no. 503 of 1987).
This fact certainly does not diminish the role this principle has assumed in our legal system, especially after the promulgation of Law no. 241 of 7 August 1990 (New rules of administrative procedure and right of access to administrative documents), and later modifications, on the basis of which, "the addressee of an act must be notified of the commencement of the procedure and be allowed to make his own representations, and also has the right to obtain a decision with reasons, and to appeal to the courts" (Judgment no. 104 of 2007).
In the area of expropriations, this Court has long held that interested private parties must be placed "in a condition to present their arguments, both to protect their own interests and to cooperate with public interests" (Judgment no. 13 of 1962; see also Judgments nos. 344 of 1990, 143 of 1989, and 151 of 1986).
For its part, the measure regulated by the provision at issue could not, first of all, exempt itself from the application of the cited, general rules concerning the participation of the private party in the administrative process, as is, indeed, recognized by administrative case law, which requires that the start of the process be communicated.
However, and above all, by virtue of the effective balancing of conflicting interests required under the present provision, the private party will be further positioned so as to be capable of accentuating their participatory role, potentially availing themselves of the "reasonable alternatives" to adoption of the announced acquisition measure, first among which is restitution of the property.
6.9. – The referring judges also suggest that the provision under review fails to conform with Article 117, first paragraph, of the Constitution, alleging that the provision contradicts the principles of the ECHR, as interpreted by the Strasbourg Court, according to two distinct lines of reasoning.
First, Article 42-*bis* allegedly violates the rule found at Article 1 of the ECHR First Protocol, which is "in radical contrast" with the phenomenon of so-called "indirect expropriations."
Second, Article 42-*bis* allegedly violates the rule found under ECHR Article 6, since the ECtHR has repeatedly held that applying *ius superveniens* in already-pending cases is only legitimate where there are "imperative reasons of general interest."
The provision allegedly alsoviolates Article 111, first and second paragraphs, of the Constitution where, arranging for its applicability to pending judgments, it contradicts the fair trial principle, with particular reference to the condition of the equality of the parties before the judge.
6.9.1. – These claims can be examined jointly, leading to the conclusion that they are unfounded, for the reasons laid out below, and for those already described, as well as in relation to the different parameter found under Article 42 of the Constitution, at above point 6.7.
It is, indeed, true that the provision also applies to facts that occurred before it entered into force, for which facts there are cases pending, and also where an acquisition measure already existed and was later retracted or annulled. It is also true, however, that this provision responds to the same primary need that underlies the introduction of the new mechanism (and underlay former Article 43): the need to definitively eliminate the phenomenon of "indirect expropriations," which brought about what the ECtHR labeled

a "*défaillance structurelle*" (in its Judgment in *Scordino v. Italy*, 6 March 2007), in violation of Article 1 of the First Protocol annexed to the ECHR.
Nor should it be omitted that with Article 42-*bis* of the T.U. on Expropriations – as was already the case, moreover, with former Article 43 – the acquisition of ownership by the public administration is no longer tied to judicial scrutiny, characterized, as such, by margins of unpredictability highlighted critically by the ECtHR. Above all, as stated above (at point 6.5), Article 42-*bis* contains significant innovations when compared with former Article 43, which render the mechanism compatible with the case law of the ECtHR as far as so-called indirect expropriations are concerned, and, on the contrary, respond to the need to find a definitive and balanced solution to the phenomenon, by means of the adoption of a formal measure on the part of the public administration.
The differences from the earlier acquisition mechanism lie in the non-retroactive character of the acquisition (which prevents the mechanism from being used where a final holding has already ordered restitution of the property to the private party), the need to renew the evaluation of the currentness and importance of the public interest in carrying out the acquisition, and, finally, the strict duty to provide justification that surrounds the adoption of the measure.
Even in light of the alleged violation of Article 111, first and second paragraphs, and 117, first paragraph, of the Constitution, this duty to provide justification, on the basis of the relevant provision, which requires "the absence of reasonable alternatives to its adoption," must be interpreted, as stated above at point 6.7, to mean that the adoption of the act is permitted – once other options have been excluded, including a voluntary transfer of the property through purchase and sale and under the requirement to perform an effective balancing with conflicting private interests – only when partial or full restitution of the property, restored to its previous condition, to the private party whose right of ownership has been improperly affected is impossible.
Indeed, only if it is thus interpreted does the provision allow for:
– recognizing the existence of "imperative reasons of general interest" for situations that came about prior to its entry into force, legitimizing the application of *ius superveniens* in pending cases. These reasons entail the inescapable necessity to eliminate a situation of structural *deficit*, that was stigmatized by the ECtHR;
– arranging for, in situations that follow its entry into force, the application of the provision as *extrema ratio*, preventing it from constituting a simple alternative to expropriation procedures carried out "in good and due form," according, once again, to ECtHR case law;
– concluding that the condition established by the ECtHR in the above-cited *Scordino* Judgment of 6 March 2007, which required the Italian State to "remove the legal obstacles which systematically and in principle prevent restitution of the land" has been respected;
– preventing the public administration – in harmony, once again, with the recommendations of the ECtHR – from taking advantage of a *de facto* situation for which it itself is responsible;
– eliminating the risk of arbitrariness or unpredictability of administrative decisions, which would be to the detriment of interested parties.
Finally, the provision found in paragraph 7 of Article 42-*bis* of the T.U. on Expropriations must be duly appraised, on the basis of which, "[t]he authority that issues the acquisition measure […] must provide communication, within thirty days, to

the Court of Accounts." This referral to potential consequences for officials who, during the expropriation, diverge from the rules of due diligence found in the law, responds to an invitation made by the ECtHR (again in *Scordino v. Italy*, 6 March 2007), according to which, "the respondent State should discourage practices which are incompatible with the rules of expropriation in good and due form, by adopting dissuasive provisions and by holding liable those responsible for such practices."

ON THESE GROUNDS
THE CONSTITUTIONAL COURT

having joined the judgments,

1) *declares* the intervention of D.G.G. in the present judgment of constitutionality to be inadmissible;
2) *declares* the question of the constitutionality of Article 42-*bis* of d.P.R. no. 327 of 8 June 2001 (Consolidated law of legislative and regulatory provisions governing expropriations in the public interest – Text A) raised under Articles 42, 111, first and second paragraphs, and 117, first paragraph, of the Constitution by the Court of Cassation, Joint Civil Divisions, with the orders indicated in the headnote, to be unfounded, for the reasons given above;
3) *declares* the question of the constitutionality of Article 42-*bis* of d.P.R. no. 327 of 2001, raised under Articles 3, 24, 97, and 113 of the Constitution by the Court of Cassation, Joint Civil Divisions, with the orders indicated in the headnote, to be unfounded;
4) *declares* the question of the constitutionality of Article 42-*bis* of d.P.R. no. 327 of 2001, raised under Articles 3, 24, 42, 97, 111, first and second paragraphs, 113, and 117, first paragraph, of the Constitution by the Regional Administrative Tribunal for Lazio, Second Division, with the orders indicated in the headnote, to be inadmissible.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 11 March 2015.