Corte costituzionale

JUDGMENT NO. 348 OF 2007

Franco BILE, President

Gaetano Silvestri, Author of the Judgment

JUDGMENT NO. 348 YEAR 2007

This case involved a challenge to the sums payable as compensation for the expropriation of building land at amounts below the market value of the properties concerned, averring a breach of their rights under the ECHR. The Court held that, in accordance with the amended Article 117(1) of the Constitution, the ordinary courts did not have the power to set aside legislation where incompatible with the Convention. Moreover, although international law may not be used to set aside Constitutional law, the Court "must always aim to establish a reasonable balance between the duties flowing from international law obligations, as imposed by Article 117(1) of the Constitution, and the safeguarding of the constitutionally protected interests contained in other articles of the Constitution", although on the facts, "there is no indication, on the basis of the above findings, of any incompatibility between Article 1 of the First Protocol to the ECHR, as interpreted by the Strasbourg Court and the Italian constitutional order, with particular reference to Article 42 of the Constitution". The Court therefore struck down the contested legislation on the grounds that "The legitimate sacrifice which may be required in the public interest cannot have the practical effect of eliminating private property rights".

THE CONSTITUTIONAL COURT

Composed of: President: Franco BILE; Judges: Giovanni Maria FLICK, Francesco AMIRANTE, Ugo DE SIERVO, Paolo MADDALENA, Alfio FINOCCHIARO, Alfonso QUARANTA, Franco GALLO, Luigi MAZZELLA, Gaetano SILVESTRI, Sabino CASSESE, Maria Rita SAULLE, Giuseppe TESAURO, Paolo Maria NAPOLITANO,

gives the following

JUDGMENT

In proceedings concerning the constitutionality of Article 5-*bis* of decree-law No. 333 of 11 July 1993 (Urgent measures for the recovery of the public finances), converted into law, with amendments, by law No. 359 of 8 August 1992, lodged pursuant to the referral orders of 29 May and of 19 October 2006 (2 orders) of the Court of Cassation, registered respectively as Nos. 402 and 681 in the register of orders 2006 and No. 2 in the register of orders 2007 and published in the *Official Journal* of the Republic, No. 42, first special series 2006 and Nos. 6 and 7, first special series 2007.

Considering the entries of appearance by R.A., A.C., and M.T.G., as well as the intervention by the President of the Council of Ministers;

having heard in the public hearing of 3 July 2007 the Judge Rapporteur Gaetano Silvestri;

having heard barristers Felice Cacace and Francesco Manzo for R.A., Nicolò Paoletti for A.C., Nicolò Paoletti and Alessandra Mari for M.T.G. and the *Avvocato dello Stato* Gabriella Palmieri for the President of the Council of Ministers.

The Facts of the Case

1. − By order registered on 29 May 2006 (r.o. No. 402 of 2006), the Court of Cassation raised the issue of the constitutional legitimacy of Article 5-*bis* of decree-law No. 333 of 11 July 1992 (Urgent measures for the recovery of the public finances), converted into law, with amendments, by law No. 359 of 8 August 1992, due to a breach of Article 111(1) and (2) of the Constitution, in the light of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) signed in Rome on 4 November 1950, ratified by Law no. 848 of 4 August 1955 (Ratification and implementation of the Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and of the Additional Protocol to the Convention, signed in Paris on 20 March 1952), as well as of Article 117(1) of the Constitution, in relation to the aforementioned Article 6 ECHR and Article 1 of the First Protocol to the Convention, signed in Paris on 20 March 1952, also ratified by Law No. 848 of 1955.

The provision is contested insofar as, in the determination of compensation payable for the expropriation of building lands, it provides for calculation based on the average between the value of the property and the revalued cadastral income, also providing for its application to proceedings already in progress at the date of entry into force of law No. 359 of 1992.

1.1. − The referring court points out that in the principal proceedings, the private individual R.A., a former owner of property expropriated in the context of a low-income and public housing plan for the municipality of Torre Annunziata, who had also signed a voluntary act of cession on 2 April 1982, appealed against the judgment of the Court of Appeal of Naples of 6 December 2001 disputing the liquidation of compensation thereby ordered, averring that it was not in line with the value of the property, also complaining of the failure to adjust the liquidated sum for inflation.

In appeal proceedings, appearances were entered by the municipality of Torre Annunziata, which filed a cross-appeal, and the Independent Institute for Public Housing for the Province of Naples.

In a written submission, the appellant R.A. claimed that Article 5-*bis* of decree-law No. 333 of 1992 was unconstitutional, a provision applied for the purposes of the quantification of compensation, on the grounds that it breached Articles 42(3), 24 and 102 of the Constitution, as the criterion provided for therein did not guarantee serious relief to the owners of expropriated lands and its application in proceedings already in progress constituted an "undue interference of Parliament in the outcome of court proceedings". On this matter it pointed out that the European Court of Human Rights had consistently found the aforementioned Article 5-*bis* to violate Article 1 of the First Protocol to the European Convention.

The appellant's challenge extends to Article 37 of presidential decree No. 327 of 8 June 2001, (Consolidated law of legislative and regulatory provisions governing expropriations in the public interest), insofar as it amounts to a provision, in force to date, confirming the disputed criterion for calculation.

1.2. − The referring court disputes the relevance of the provision cited by the appellant, as it applies only to expropriation proceedings initiated after 1 July 2003, according to the provisions contained in Article 57 of presidential decree No. 327 of 2001. In the case before the court, by contrast, proceedings were commenced in 1988.

At the same time, the Court of Cassation considers the question of the constitutionality of Article 5-*bis* of decree-law No. 333 of 1992, converted into law, with amendments, by law No. 359 of 1992, to be relevant and not manifestly unfounded.

1.3 – Concerning the relevance of the question raised, the referring court emphasises that the present case "indisputably" concerns building lands, to which the aforementioned Article 5-*bis*(1)and (2) are applicable. In particular, it emphasises how the essence of the dispute concerns the "price of the voluntary cession", or more precisely, "of the adjustment due compared to the amount previously agreed, applying law No. 385 of 1980". The lower court notes, in relation to this matter, that the price of the voluntary cession must be commensurate with the compensation for expropriation; it follows from this that in the principal proceedings the determination of compensation

for expropriation is still in dispute and that the eventual *ius superveniens*, containing a new criterion for determining compensation for the expropriation of building lands, should without doubt apply.

1.4. − As far as the absence of manifest unfoundedness is concerned, the Court of Cassation considers that it must reformulate the wording of the question proposed by the private appellant, identifying the relevant constitutional references as Articles 111 and 117 of the Constitution. This line of thought was followed in the light of a parallel examination of the jurisprudence of the European Court of Human Rights and of constitutional case law on compensation for expropriation.

As far as the former is concerned, particular reference is made to the judgments of 29 July 2004 and 29 March 2006, both given in the case *Scordino v. Italy*, by which the Italian state was found to have breached the provisions of the European Convention on Human Rights. In the 2004 judgment, the European Court censured the application by national courts of Article 5-*bis* to proceedings already in progress, condemning the retroactive effect of the provision in question as prejudicial to certainty and transparency in the legal regulation of the expropriator entities, as well as of individual rights in relation to each person's property. In fact, the application of this criterion to proceedings already in progress breached the legitimate expectations of the expropriated individuals, who had initiated proceedings for compensation according to the criterion of the venal value of the property, according to the provisions of Article 39 of law No. 2350 of 25 June 1865 (Expropriation in the public interest), made applicable again following the finding that the provisions which in general tied compensation to the agricultural value of the lands (judgment No. 5 of 1980 and No. 223 of 1983) were unconstitutional.

In a judgment from 2006, by contrast, the Strasbourg Court found there to be a structural and systematic violation, on the part of the Italian Parliament, of Article 1 of the First Protocol to the European Convention, pointing out that the quantification of compensation in an irrational manner compared to the value of the property had brought about a structural violation of human rights. The Strasbourg Court went on to emphasise how, pursuant to Article 46 of the Convention, the Italian state had the duty to put an end to the aforementioned structural problems through the adoption of appropriate legal, administrative and financial measures.

On the internal front, the referring court stresses how the contested provision has on various occasions been examined by the Constitutional Court, which found it to be compatible with Article 42(3) of the Constitution, insofar as it introduced an indirect criterion which guaranteed relief to expropriated individuals which was "not negligible" compared to the social function of the property (judgments No. 283, No. 414 and No. 442 of 1993). In relation to the application to proceedings in progress, the Constitutional Court also rejected the complaints, finding, in particular in judgment No. 283 of 1993, that whilst the non-retroactivity of laws may indeed be a general principle underpinning the legal order, it has not been elevated − except in criminal matters − to the status of constitutional law. In the case before the court, given the absence of legislative provision on this matter at the relevant time (following the Court's annulment decisions in judgments No. 5 of 1980 and No. 223 of 1983) and the consequent application by default of the criterion of the venal value, the retroactive effect of the legislation could not be considered to be in conflict with the requirements of reasonableness.

In the light of this assessment it was clear, in the opinion of the lower court, that the question had to be proposed today with reference to different standards (identified as Articles 111 and 117 of the Constitution), according to previously unexpressed argument of the supervening incompatibility of the contested provision with the principles of a fair trial and the respect for the international law obligations taken on by the state, through the reference to the provisions of Article 6 ECHR and Article 1 of the First Protocol, by virtue of interposed principles.

1.5. − The Court of Cassation then makes a series of observations justifying its recourse to a reference to the constitutional court, emphasising how it was a matter for Parliament to put in place the means necessary to avoid structural and systematic violations of human rights, as censured by the European Court in the *Scordino* judgment of 29 March 2006 mentioned above.

In particular, the referring court assumes that national courts cannot set aside Article 5-*bis*, substituting it with their own criterion based on their own assessments or reviving the previous legislation.

The inability of the court to set aside the provision of internal law in conflict with the Convention is due, according to the Court, also to other factors. In the first place, with reference to the ECHR provisions, it is not possible to identify a mechanism capable of

establishing the subordination of particular national legislation to international law along the lines of the limitations on sovereignty permitted under Article 11 of the Constitution, deriving from the legislative sources of Community law. Indeed, the theory of the "Communitisation" of the ECHR, pursuant to Article 6(2) of the Maastricht Treaty of 7 February 1992, does not appear to be tenable insofar as the respect for fundamental rights, which are recognised by the Convention, constitutes a directive for Community institutions and "not a Community rule directed to the Member States". As confirmation of this view, the referring court points to the negative opinion expressed by the Court of Justice when the adherence of the European Community to the ECHR was proposed (Case C-2/94 of 28 March 1996). The opinion was based on the finding that adherence would involve the incorporation of the Community into a distinct institutional system, as well as the integration of the body of provisions of the ECHR into the Community legal order. The Luxembourg court expressed a similar view in declaring that it had no jurisdiction to provide interpretative guidelines for the assessment by the national courts of the conformity of national law with the fundamental rights contained in the ECHR, "where such legislation is concerned with a situation which does not fall within the field of application of Community law" (ECJ, Case C-299/95 of 29 May 1998).

The lower court also invokes the principle of the subjection of the courts to the law enshrined in Article 101 of the Constitution, which prevents it from finding itself to have the power (*a fortiori*, the duty) to set aside internal legislation, since this would entail the attribution to the courts of a legislative revisory role entirely extraneous to our constitutional system, in which the repeal of state laws remains "tied to the cases contemplated in Articles 15 of the preliminary provisions to the Civil Code and Article 136 of the Constitution", whilst the failure to respect the rule of conformity would amount to a violation of the law susceptible to challenge before the Court of Cassation (Court of Cassation judgment No. 1340 of 26 January 2004 is cited), even though there is no shortage of voices which call for further dilution of the binding effect of the judgments of the European Court of Human Rights (Court of Cassation, judgments No. 8600 of 26 April 2005 and No. 1824915 of September 2005).

In fact, according to the referring court, there is said to be an interpretative restriction of the national courts where the internal provision mirrors the provisions of the

Convention (as in the provisions governing fair compensation for unreasonably long trials), for which the precedents of the Strasbourg Court are a mandatory reference, or where the Convention provisions are directly applicable, and in any case clear, and there is no interpretative conflict between the national courts and the European court (Court of Cassation judgment No. 10542 of 19 July 2002 is cited). On the other hand, were Article 5-*bis* to be set aside, the court would be confronted by the problem of the substitution of the criterion contained therein with that provided for under previous legislation, or with a criterion left to the discretion of the court.

On this issue, the lower court expresses perplexity, in the event of Article 5-*bis* being set aside, on the application of the default provision contained in Article 39 of law No. 2359 of 1865, which refers to the venal value of the property and which is cited in the judgment of 29 July 2004 of the Strasbourg court as a criterion on which the legitimate expectations of the appellants were based at the time when proceedings were initiated. The said provision, in fact, does not constitute a "normative tendency within the legal order", since it is not essential for the social role which property is recognised as having in the Fundamental Charter, according to a consistent line of constitutional case law (the court cites the following judgments: No. 61 of 1957, No. 231 of 1984, No. 173 of 1991, No. 138 of 1993 and No. 283 of 1993), whilst Article 5-*bis*, as already mentioned, was held to comply with the Constitution also in relation to its retroactive effect. Finally, if the contested provision were to be set aside, the courts would be called upon to identify a criterion for determining compensation which, whilst not in line with the market value of the property seized – given the use of the law on property ownership in the public interest – was in any case capable of ensuring a *quid pluris* compared to the criterion contained in Article 5-*bis*, thus carrying out an operation "clearly falling within margins of discretion which are reserved to Parliament alone", also given the requirement to provide the funds to cover them.

The referring court emphasises how ECHR case law itself is not unequivocal regarding the identification of the venal value of the property as the only criterion for calculating compensation admissible in the light of Article 1 of the First Protocol. In fact, whilst in the judgment of 29 March 2006 cited above the European Court asserted that only compensation equal to the value of the property can reasonably be compared with the sacrifice imposed, excluding cases resulting from situations involving

exceptional changes to the constitutional order (citing the judgment of 28 November 2002, *ex King of Greece & Ors. v. Greece*), the Court however "has usually accepted that the fair balance between the requirements of a general nature and the need to safeguard the rights of individuals does not mean that the compensation must correspond to the market value of the expropriated property" (the judgments in *James and ors. v. UK* of 21 February 1986, and *Les saint monasteres v. Greece* of 9 December 1994, as well as the *Scordino* judgment of 29 July 2004 mentioned above are cited).

As regards the Court's findings with reference to Article 11 of the Constitution, the denial of the "Communitisation" of the ECHR and, therefore, the practicability of the setting aside of the internal provision would also entail the exclusion of the use of the aforementioned parameter for the purposes of the examination of constitutionality.

According to the referring court, the invocation of the *dictum* of the European Court is also not possible by reference to the requirement that municipal law comply with international law which, under the terms of Article 10 of the Constitution, applies to the legal order as a whole; first, the rule mentioned above does not apply to treaty law, and secondly, the alignment of compensation for expropriation with the market value of the property is not a principle generally recognised by states.

Finally, according to the referring court, any action by the courts could not be justified on the grounds that it would substitute legislative inaction, since the latter has recently reaffirmed the compensation regime introduced with Article 5-*bis*, transposing it into the current Article 37 of presidential decree No. 327 of 2001. On this point, the lower court notes that, as early as 1993, the Constitutional Court (in judgment No. 283) invited Parliament to draft a law capable of guaranteeing serious relief, considering Article 5-*bis* to be compatible with the Constitution on account of its urgent and provisional character, apparent also in the preamble to the provision which states: "until the passing of a consolidated law governing all expropriations".

Therefore, the "inadequacy *in abstracto*" of the compensation criterion contained in Article 5-*bis* providing redress for the loss of property in building lands in the public interest, definitively enshrined by the case law of the European Court of Human Rights, along with the acquired permanent status of the legislation reaffirmed by Parliament in 2001 in Article 37 of presidential decree No. 327, makes a renewed examination of its constitutionality necessary.

The arguments which show that the path of non-application by the national courts is not viable at the same time also demonstrate that the contrast cannot be resolved through interpretation.

1.6. – On this basis, the lower court goes on to set out the reasons why the disputed provision is at odds with the constitutional principles cited. In particular, recalling again the decisions of the Constitutional Court on Article 5-*bis*, it asserts that, on the one hand, that provision has not been examined in the light of Article 111 as amended by constitutional law No. 2 of 23 November 1999 (Inclusion of the principle of a fair trial in Article 111 of the Constitution), whilst on the other hand, the contents of the constitutional provision at issue, having regard to its programmatic aspects (first and second paragraphs), are largely yet to be examined, just as the relationship "of origins of the new formulation of the constitutional provision in the European Convention on Human Rights" also needs to be clarified.

Even if, as is known, the original intention of "constitutionalising" Article 6 of the Convention has been subject to modification during the course of Parliamentary procedures, in the opinion of the referring court the view that the reconstruction of the new constitutional principles must be carried out precisely in the light of the case law of the European Court should also be followed. Accordingly, in the search for the normative meaning of Article 111 of the Constitution, as amended, it could be possible to rely on the interpretation given by the Strasbourg Court to the similar provision contained in Article 6 of the Convention. On this issue, the judgments given in *Scordino v. Italy* concerning compensation for expropriation have confirmed that the principle of the equal position of the parties before the court implies that Parliament is not permitted to interfere in the administration of justice with a view to influencing the resolution of an individual case or a limited and specific category of disputes.

The lower court points out that the court proceedings which gave rise to the judgments of the European Court cited and those which raised the present issue of constitutionality are materially identical: in both cases in fact, the expropriated individuals initiated court actions on the assumption that the elimination from the legal order (due to Constitutional Court judgments No. 5 of 1980 and No. 223 of 1983) of the detrimental criteria for assessing compensation provided for in law No. 385 of 29 July 1980 (Temporary provisions regulating compensation for expropriation of building

areas as well as amendments to the time limits provided for in laws No. 10 of 28 January 1977, No. 457 of 5 August 1978 and No. 25 of 15 February 1980), had resulted in the revival of the criterion of the venal value, with the consequence that the act of voluntary cession was void due to the indeterminacy of the object and the emergence of a right to compensation in line with the above value.

Since the lower court on the other hand had to determine the "price of the cession" to associate with the compensation for expropriation, it had to apply the supervening Article 5-*bis* of decree-law No. 333 of 1992, converted into law, with amendments, by law No. 359 of 1992, and in consequence ordered the expropriator municipality to pay the difference as an adjustment of the sum previously paid.

The result was that the expropriated owners found the sum which they sought to obtain through their court action reduced by 50 percent "with proceedings already underway".

On the above grounds the Court of Cassation considers that the contested provision breaches Article 111(1) and (2) of the Constitution, also in the light of Article 6 ECHR insofar as, in providing for the application to proceedings underway of the rules for establishing compensation for expropriation contained therein, violates the right to a fair trial, and in particular the requirement of the equality of the parties before the court.

1.7. – The referring court assumes that the disputed Article 5-*bis* also violates Article 117(1) of the Constitution in the light of the provisions of the European Convention on Human Rights as interpreted by the Strasbourg Court.

In fact, the new formulation of the constitutional provision, introduced by the law reforming Title V of Part II of the Constitution, is argued to have filled "a legislative gap". For this reason, according to the referring court, the *sedes materiae* is not decisive in "reframing" the innovative effect of Article 117(1) of the Constitution, limited it to the mere division of legislative competence between the state and the regions. By contrast, it "appears [that the provision in question] must contain the principle underlying the legislative framework, including that contemplated in the second paragraph concerning the exclusive areas of competence of the state, which includes legislation governing compensation for expropriation".

Therefore, according to the lower court, the provisions of the European Convention, and in particular Article 6 ECHR and Article 1 of the First Protocol, are interposed rules

in the present constitutionality proceedings "through the authoritative interpretation given by the Strasbourg court". In particular, the supervening incompatibility of Article 5-*bis* with the ECHR and thus with Article 117(1) of the Constitution concerns the issues highlighted by the European Court, or the "violation of the right to a fair trial" and the "incompatibility of the compensatory measures with the respect which must be given to property rights".

2. – The President of the Council of Ministers entered an appearance in proceedings, represented and advised by the *Avvocatura Generale dello Stato* (State Legal Advisory Service), requesting that the questions of constitutional legitimacy be declared unfounded.

2.1. – The tax authorities argue that the *thema decidendum* is as follows: *a*) "whether, in the event of differences between European jurisprudence and national legislation the former prevails, and therefore what the fate of the latter should be"; *b*) "whether, in the event of an affirmative answer to the first question, the solution also applies in relation to constitutional rules".

Before addressing the matters raised, it is in the opinion of the *Avvocatura Generale dello Stato*, necessary to establish whether the case law of the European Court can really be interpreted as requiring signatory states to consider the scope of the provisions of the Convention as being reduced or expanded "as a kind of exclusive body of rules prevailing both over procedures involving the drafting of international treaties as well as over direct interpretation by the national courts, which however apply the same rules [ECHR] insofar as transposed by national law No. 848 of 4 August 1955".

The tax authorities dispute that, even though it is claimed by the European Court, this power is provided for in the Constitution. Article 32 of the Second Protocol to the ECHR, ratified in Italy by law No. 296 of 28 August 1997 (Ratification and implementation of Protocol No. 11 to the Convention for the protection of human rights and fundamental freedoms, restructuring the control machinery established thereby, done in Strasbourg on 11 May 1994) limits the jurisdiction of that court "to all questions concerning the interpretation and application of the Convention and its protocols". In the opinion of the *Avvocatura Generale dello Stato*, the provision in question was enacted in order to guarantee the independence of the Strasbourg court, which "cannot be transformed into a legislative source binding beyond the trial and capable even of

limiting the institutional power of national parliaments or of our Court of Cassation or even of the Constitutional Court".

The Strasbourg Court's claim to produce binding treaty norms is argued not to be compatible with the general international legal order and moreover with the system of the Vienna Convention, ratified in Italy by law No. 112 of 12 February 1974 (Ratification and implementation of the Convention on the law of treaties, with annexes, adopted in Vienna on 23 May 1969), according to which the interpretation of any treaty must be literal and objective.

Accordingly, the public defence argues that the questions before the court are valid only if rules derived from the case law of the European Court are recognised as having the value of interposed principles. Otherwise, there would be no reason to doubt that, pursuant to Articles 25 and 42 of the Constitution, Parliament could introduce retroactive legislation, applying also to proceedings in progress, creating compensatory regimes limiting the rights of individuals with the requirements of the collectivity, thereby avoiding having to pay compensation for expropriation at to the market price of the properties.

2.2. - The public defence challenges the line of reasoning of the referring court also in relation to the principles cited.

According to the *Avvocatura Generale dello Stato*, Article 111 of the Constitution, once purged "of any suggestion of the priority of the 'lessons' of the ECHR for ordinary and constitutional legislation or for the case law of the Court of Cassation or the Constitutional Court itself", by no means establishes that which the lower court believes it does. A "fair trial" does not impinge upon the prerogatives of Parliament, and in particular does not prevent it from making substantive changes with retroactive provisions, which the courts are bound to apply in accordance with the provisions of Article 101 of the Constitution. Moreover, the tax authorities note, neither does Article 6 ECHR, which inspired the amendment to Article 111 of the Constitution, contain references to the prohibition on retroactive legislation in non-criminal matters; this prohibition therefore exists only in the case law of the European Court, which however, according to the arguments already submitted, lacks all power to create Convention rules.

Similar reasoning can be applied to Article 117(1) of the Constitution, which requires respect for restrictions imposed by the Community legal order and by international law obligations, precisely where the above rules entail restrictions on the exercise of Parliament's legislative powers.

The tax authorities point in this context to Article 1 of law No. 131 of 5 June 2003 (Provisions amending the legal order of the Republic in line with constitutional law No. 3 of 18 October 2001), which provides that the legislative power of the state and the regions may be limited by restrictions "deriving [...] from reciprocal agreements to limit sovereignty, in accordance with Article 11 of the Constitution, by the Community legal order and by international treaties". None of this, according to the *Avvocatura Generale dello Stato*, applies to the ECHR, either with reference to retroactive legislation applying immediately to proceedings in progress, to which therefore the provisions of national law alone apply, or with reference to the rights of the expropriated owner. On this point, the intervener argues that Article 1 of the First Protocol, in contrast to the findings of the Strasbourg Court, limits itself to affirming the principle that the sacrifice of private property is admissible only in the public interest and subject to the conditions provided for by law and the general principles of international law. The provision of the Convention cited therefore in no way requires that the compensation payable to the expropriated owner must correspond to the venal value of the property.

2.3. – In conclusion, the tax authorities argue that the venal value of urban lands does not exist *in rerum natura*, but is directly related to planning instruments and accordingly determined in accordance with the possibility of using the area, with the consequence that a system of compensation which imposes a drastic reduction in the value of the property is not so distant from the reality of economic exchanges.

3. – R.A. entered an appearance in proceedings, the principal appellant in the proceedings before the lower court, generally reiterating all the challenges, objections and arguments submitted in the various degrees of proceedings, and in particular the objection of unconstitutionality formulated before the Court of Cassation, reserving the right to make additional written submissions.

4. – On 19 June 2007 the appellant also submitted a written statement in which it insisted that the question be declared well-founded.

4.1. – In particular, after having summarised the entire court proceedings leading to the lower court's judgment, the appellant argues that the measure awarding compensation for expropriation provided for in the contested provision does not have the characteristics of "serious relief", and was still objectionable on the grounds that it was at odds with Article 42(3) of the Constitution, irrespective of the outcome of the proceedings before the court (judgments Nos. 283 and 442 of 1993). In fact, in the judgments cited, the Constitutional Court had upheld the disputed provision only because it was of a "provisional and exceptional" nature.

4.2. – As far as the application of the contested provision to proceedings in progress is concerned, the appellant argues that this would breach Articles 24 and 102 of the Constitution. Amendments to substantive provisions during the course of proceedings and the consequent variation of the "qualitative and quantitative dimension" of the law invoked constitutes an undue interference of Parliament in the outcome of court proceedings, breaching the reservation contained in Article 102 of the Constitution. This would in the case before the court not concern mere retroactivity, but a full-blown interference in the exercise of the independence of the judiciary by Parliament, "with the stated purpose of limiting the (legitimate) burden placed on the state authorities".

Moreover, the claim of unconstitutionality submitted with reference to Article 42(3) of the Constitution should be extended to Article 37 of presidential decree No. 327 of 2001, which contains a criterion for calculating compensation for expropriation which results in a reduction of around 50 percent compared to the real value of the property. This provision does not however satisfy the requirements of provisional nature and urgency which had applied to Article 5-*bis*, since it was clearly a definitive provision.

Finally, concerning the finding that the arguments brought by the lower court against the breach of the additional principles indicated in the appellant's submissions do not preclude them from the present proceedings, the appellant invites the Constitutional Court to extend its own scrutiny also to these principles.

5. – By order of 19 October 2006 (r.o. No. 681 of 2006), the Court of Cassation raised the issue of the constitutionality of Article 5-*bis* of decree-law No. 333 of 1992, converted into law, with amendments, by law No. 359 of 1992, on the grounds of a possible breach of Article 111(1) and (2) of the Constitution in relation to Article 6 of the Convention for the protection of human rights and fundamental freedoms and

Article 1 of the First Protocol to the Convention, as well as of Article 117(1) of the Constitution in relation to the aforementioned Article 1 of the First Protocol.

The provision is objected to insofar as, in the determination of compensation for the expropriation of building lands, it provides for a calculation based on the average between the value of the property and the revalued cadastral income, providing also for its application to proceedings in progress at the date of the entry into force of law No. 359 of 1992.

5.1. – The referring court states that in the principal proceedings, the municipality of Montello appealed against the judgment of the Court of Appeal of Brescia, which – after having ascertained that the area owned by A.C., occupied since 21 May 1991 and expropriated on 8 May 1996, could be considered land for building by private individuals – had awarded compensation for expropriation pursuant to Article 5-*bis* of decree-law No. 333 of 1992, converted into law, with modifications, by law No. 359 of 1992.

The appellant municipality claims that the classification of the expropriated area as building land was mistaken and, in the alternative, that a reduction of 40 percent was not applied, and finally that the motivation underlying the calculation of the value of the pre-existing buildings was insufficient. The private individual concerned entered an appearance and in turn lodged a cross-appeal against the quantification of the compensation for expropriation, as well as the failure to take account of the effect of inflation on the amounts awarded; it also requests that Article 5-*bis* be set aside insofar as inconsistent with Article 1 of the First Protocol (averred to have been "Communitised" by Article 6 of the Maastricht Treaty of 7 February 1992), finally invoking a change in the direction of case law by virtue of which "compensation is paid as a money debt, with the result that there are no grounds for modifying the compensation payable to the expropriated party". In subsequent written submissions, the cross-appellant formulated, in the event of a failure to accept the request for non-application, its objections to the constitutionality of Article 5-*bis*, due to violation of Articles 2, 10, 11, 42, 97, 111 and 117 of the Constitution, in the light of Article 1 of the First Protocol and Article 6 ECHR.

5.2. – In the first place, the Court of Cassation cites the arguments submitted in relation to a similar issue of constitutionality concerning the aforementioned Article 5-

bis, raised by the same Court in an order of 29 May 2006 (r.o. No. 402 of 2006), reserving the right only to supplement them "regarding the contrast between the internal legislation and the provisions of the European Convention cited".

The lower court accordingly moves on to an examination of the case law of the Strasbourg Court, also cited by the appellant in support both of its request for the internal provision to be set aside, as well as of the objection of unconstitutionality. The examination is carried out on the basis of the contents of the judgment given on 28 July 2004 in *Scordino v. Italy*, followed in the same dispute by the definitive judgment given by the *Grande chambre* on 29 March 2006 on the appeal lodged by the Italian government.

In the light of the above, the referring court points to the analogous nature of the facts at issue in the proceedings before the court and those which gave rise to the decision of the *Grande chambre* cited: in fact, the question of public interest is of low relevance also in the present proceedings, since the expropriated areas are destined for the construction of a car park and the creation of "green areas".

5.3. – The Court of Cassation goes on to assess the issue of the non-application of Article 5-*bis*, expressly requested by the cross-appellant, since such recognition is a prerequisite for the admissibility of the present question of constitutionality.

The lower court takes note of the fact that the Court of Cassation, by order No. 12810 of 2006 (r.o. No. 402 of 2006) and order No. 11887 of 20 May 2006 (r.o. No. 401 of 2006) cited above, which referred a similar question concerning the amount of compensation for damages caused by unlawful occupation resulting in compulsory purchase (Article 5-*bis*(7-*bis*)), has held that the national courts cannot set aside national laws in the absence of a specific and directly enforceable regulation of compensation criteria on the supra-national level.

This conclusion is also supported by the referring court, which recalls that the judgment of the European Court of 29 March 2006 in *Scordino v. Italy* ordered the Italian state to adopt the "legislative, administrative and financial" measures necessary for the adaptation of the national system with the supra-national provisions (para 237), thereby implicitly specifying that its own judgment does not have "repealing effects".

As far as the directly enforceable character of the provisions contained in the Convention is concerned, the lower court considers that a distinction must be drawn

between the rights protected by it, which are also "recognised" by the signatory states as "fundamental" under internal law (Article 1), and the means and procedures for the protection of these rights, which is left to the individual signatory states. In the event of a violation, including by individuals carrying out public functions, Article 13 of the Convention provides for an appeal to the internal courts of each state, without prejudice to intervention as a last resort by the Strasbourg Court on individual appeals pursuant to Article 34 of the Convention, and the consequent ordering of the state in breach to pay fair compensation pursuant to Article 41. The rule contained in Article 46 of the Convention has similar effects, according to which "the high signatory parties undertake to respect the definitive judgments of the Court in disputes in which they are parties", thereby excluding any immediate repealing effect on internal legislation.

The referring court also points out that law No. 12 of 9 January 2006 (Provisions relating to the implementation of the judgments of the European Court of Human Rights) identifies the Government and Parliament as the organs to which the judgments of the European Court must be transmitted, as the only authorities with authority to implement the obligations flowing from them. It stresses finally that Article 56 of the Convention provides for the possibility of the Convention not applying uniformly throughout the territory of the signatory states due to "local requirements" with the result that within the Convention system the manner of protection and application of these principles in the territories of the individual states are a matter for the internal legislation of each, although the recognition of the rights guaranteed in the agreement is mandatory for all signatory states.

It is therefore clear that individual courts have no power to set aside legislation; moreover, in proceedings concerning compensation for expropriation there is also a requirement to guarantee financial coverage for changes to the system caused by the choice of a different criterion for compensation, pursuant to Article 81 of the Constitution.

The lower court reiterates, drawing on its own previous judgments, that it is impossible to place the provisions of the ECHR on the same level as Community regulations directly applicable within the internal legal order (citing Court of Cassation judgment No. 10542 of 19 July 2002). It also accepts the view that the reference contained in Article 6(2) of the Maastricht Treaty concerning the respect for

"fundamental rights as guaranteed by the European Convention [...] and as they result from the constitutional traditions of the Member States, as general principles of Community law", does not preclude the possibility of differences between the court with jurisdiction over the protection of such rights (the Strasbourg Court) and that which is on the other hand called upon to interpret Community legislation, i.e. the Luxembourg Court of Justice, which has precluded its own jurisdiction in the area of fundamental rights (ECJ, 29 May 1997, Case C- 199/95, *Kremzow*).

Moreover, the referring court adds, prior to the modifications of Articles 46 and 56 ECHR introduced by Protocol No. 11, ratified in Italy by law No. 296 of 1997, the Constitutional Court itself seemed to have adopted positions which were not incompatible with the direct applicability of the provisions of the Convention (citing judgments No. 373 of 1992 and No. 235 of 1993). It was only subsequently, also in the light of the amendment to Articles 111 and 117 of the Constitution, that the Court became minded "to give indirect importance to treaty provisions as sources of obligations by which Italy is bound" (citing judgment No. 445 of 2002 and order No. 139 of 2005).

Ultimately, any recognition that the rights protected by the supra-national agreement were directly enforceable would not mean that inconsistent national legislation could be repealed, unless and until Parliament specified remedies to guarantee the said rights (citing Court of Cassation judgment No. 254 of 12 January 1999). Nevertheless, the lower court continues, the rights protected by the ECHR exist from the moment of ratification, or even before if guaranteed under internal law, and so the successors of the original holders may request protection from the national courts once national legislation has been amended.

The referring court finally observes that, even if the Italian courts were to set aside Article 5-*bis*, they could not impose the venal value of the property expropriated as fair compensation. This is because, whilst on a supra-national level this criterion has on various occasions been considered "the only criterion as a rule applicable", within internal law the Constitutional Court has held that the concept of "serious relief" is compatible with a reduction of the full price of the property seized, being an individual sacrifice to the public interest.

5.4. – Having excluded the possibility of setting aside Article 5-*bis*, the Court of Cassation goes on to the recognition of the preliminary questions concerning the classification of the expropriated areas as building land, deriving from this classification the relevance of the contested provision for the case before the court.

Reasserting the status of the expropriated areas as building land, the lower court considers the question of legitimacy raised to be "certainly relevant", since for the expropriation in question, compensation was set according to the criteria contained in Article 5-*bis*.

The Court of Cassation stresses that, even without the reduction by 40 percent, the private individual complains that the compensation awarded pursuant to the contested provision does not constitute serious relief for the loss suffered. On the contrary, the appellant municipality of Montello complains that the trial court calculated the value of the land for the purposes of determining compensation. This shows, in the opinion of the referring court that the principal judgment cannot be made without applying Article 5-*bis*.

5.5. – As far as the manifest unfoundedness of the question is concerned, the lower court examines the judgments with which the Constitutional Court has settled disputes concerning the aforementioned Article 5-*bis* of decree-law No. 333 of 1992, converted into law, with amendments, by law No. 359 of 1992. Reference is made in particular to judgments No. 283 and No. 442 of 1993, in which the court accepted the constitutionality of criteria for determining compensation for expropriation of building lands on the basis of their "avowedly temporary character, until the passing of a consolidated law governing all expropriations" and justifying it due to "the particular urgency and importance of the 'goals' which [...] Parliament intended to pursue" during the economic downturn affecting the country (judgment No. 283 of 1993). As is known, the contents of the provisions were transposed into Article 37 of presidential decree No. 327 of 2001, which rendered these criteria for calculating compensation "definitive", and hence their "provisional nature" which had lain at the basis of the judgment of unfoundedness can be said to have lapsed.

In judgment No. 283 of 1993 cited above, the Constitutional Court, in contrast to the European Court, recognised the provisions enacted by Parliament with Article 5-*bis* as having the character of fundamental principles and rules of socio-economic reform, and

indeed held the provision in question to be unconstitutional due to violation of Articles 3 and 42 of the Constitution, only insofar as it did not provide for a "new offer of compensation" for proceedings in progress, the acceptance of which by the expropriated party would exclude the application of the 40 percent reduction. As regards the retroactive application of Article 5-*bis*, the court confirmed that the principles of non-retroactivity of legislation contained in Article 11 of the preliminary provisions to the Civil Code is not incorporated into the Constitution, at the same time excluding a contrast between the disputed provision and Article 3 of the Constitution. Today on the other hand, in the opinion of the referring court, the principle of a fair trial enshrined in the amended Article 111 of the Constitution also guarantees the principle of equality between the parties, and hence it appears also for this reason to be necessary to subject the provision to a renewed examination of constitutionality.

The lower court assumes that, through its application to the determination of compensation in proceedings in progress "prior to the future opposition to the figure still not contemplated for reasons imputable to the expropriating party" (citing judgment No. 67 of 1990 of the Constitutional Court), the disputed provision has caused an interference by Parliament in the trial to the detriment of the expropriated party. In the absence of the aforementioned provision in fact, this party could have claimed and obtained a higher amount, where administrative or court proceedings in progress had been concluded before entry into force.

The referring court recalls on this point the assertion contained in the *Scordino* judgment of 29 March 2006, according to which the interference of Parliament in proceedings in progress violates Article 6 of the Convention, in the light of Article 1 of the First Protocol, since the likelihood of the loss by one of the parties of compensation with retroactive effect is not justified by a relevant reason of public interest.

Turning to the merits of the criterion for calculating compensation contained in the disputed provision, the referring court notes that the European Court has now definitively confirmed in numerous judgments that the compensatory redress provided for in relation to lawful and unlawful acquisitions related to expropriation proceedings is incompatible with Article 1 of the First Protocol, irrespective of whether carried out in the public interest. The referring court considers therefore that the contested rule must be examined again in the light of the text in force of the first paragraph of Article 117 of

the Constitution, finding that the entire body of ordinary legislation, and therefore also the pre-existing provisions in force prior to constitutional law No. 3 of 18 October 2001 (Amendments to Title V of Part II of the Constitution), be examined and if appropriate declared unconstitutional due to "supervening" incompatibility with new principles introduced into the Fundamental Charter (citing judgment No. 425 of 2004).

6. – The President of the Council of Ministers, represented and advised by the *Avvocatura Generale dello Stato*, intervened in proceedings arguing that the questions were unfounded, in that they raised matters entirely coinciding with those considered in the proceedings which resulted with the order of 29 May 2006 of the Court of Cassation (r.o. No. 402 of 2006). Accordingly, reference is made to the points set out above in paragraph 2 in their entirety.

7. - A.C. entered an appearance in proceedings, respondent and cross-appellant in the proceedings before the lower court, arguing that the Court should declare the questions inadmissible – since it should be a matter for the national courts to set aside internal legislation at odds with the provisions of the European Convention – and in the alternative that the questions be accepted.

7.1. – The private party submits that the clash between the internal provision and the ECHR norm must be resolved by setting aside the former. On this matter it refers to Protocol No. 11 of the Convention, which reformulated the control mechanism created under the Convention, providing that the individual citizens of the signatory states may directly petition the European Court (Article 34 of the Convention, as amended by Protocol No. 11) and that "1. The High Contracting Parties undertake to abide by the decision of the Court in any case to which they are parties. 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution" (Article 46 of the Convention, as amended by Protocol No. 11).

The private party notes how the entire control mechanism is based on the principle of subsidiarity, by virtue of which the European Court "may only deal with the matter after all domestic remedies have been exhausted" (Article 35 of the Convention). Therefore, national courts are bound to apply internal law in conformity with the Convention, "it being a matter for the European Court on the other hand, as a last resort and following the exhaustion of internal remedies, to determine whether the manner in which national

law is interpreted and applied has effects which are compatible with the principles of the Convention".

On this point, the private party stresses how Resolution 1226 (2000) of the Parliamentary Assembly of the Council of Europe affirmed that the signatory states are bound to ensure, amongst other things, "the direct application in the national courts of the Convention and the judgments of the European Court which interpret and apply it". Resolution Res (2004)3 of 12 May 2004 of the Committee of Ministers of the Council of Europe also stakes a similar claim in relation to judgments which identify a structural problem underpinning the violation, as do Recommendation Rec (2004)5, also of 12 May 2004, of the Committee of Ministers of the Council of Europe on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the Convention, as well as Recommendation Rec (2004)6, again of 12 May 2004, in which the Committee of Ministers reiterated that, following judgments of the Court which identify structural or general deficiencies in national law or practice, signatory states are bound to reassess the effectiveness of existing internal remedies and, if necessary, set up effective remedies in order to avoid repetitive cases being brought before the Court.

The private party also invokes the judgment of 29 March 2006 of the Strasbourg Court in *Scordino v. Italy*, in relation both to the inadequacy of the general criterion contained in Article 5-*bis*, applied irrespective of the type of project which is to be carried out, as well as the effect of the interference of Parliament in court proceedings resulting from the application of the above rule to proceedings in progress. According to the European Court, this effect cannot be justified on the financial grounds which the Italian Government invoked in its appeal to the *Grande chambre*. It also presented an excerpt from this judgment which refers to judgments No. 223 of 1983, No. 283 and No. 442 of 1993 in which the Constitutional Court invited Parliament to adopt a legislative framework which guarantees "serious relief" to private individuals, and found Article 5-*bis* to be compatible with the Constitution "on account of its urgent and temporary nature". Besides, the intervener notes, since the criterion contained in the provision cited has been transposed into the consolidated law governing expropriations (presidential decree No. 327 of 2001), the Strasbourg Court has not failed to point out that the prospect of numerous and well-founded appeals is clearly predictable.

In the light of the above, if the conformity of the legal order with the principles affirmed in the judgment cited must be guaranteed by the national courts, as stated by the Committee of Ministers of the Council of Europe in Recommendation Rec (2004)5 cited above, and if the European Court has ascertained in a judgment constituting "an interpretative *res judicata*" pursuant to Article 46 of the Convention that the relevant internal provision is the cause of a structural violation of one of more provisions of the Convention itself, then that rule, in the opinion of the private party, must be "set aside" by the national courts. The setting aside of the contrasting internal provision is argued to be a direct and immediate consequence of the principle of subsidiarity in Article 46 of the Convention, such that a definitive statement of principles concerning the ECHR system must be made that is similar to those which the Constitutional Court laid down in relation to Community law in judgment No. 170 of 1984.

The different conclusion reached by the referring court is furthermore in contrast with the assumption, confirmed by the same court, of the binding force of the provisions of the Convention and of the case law of the European Court.

On the basis of the arguments set out above, A.C. concludes its submissions inviting the court to declare the question of constitutional legitimacy to be inadmissible.

7.2. – In the alternative, the private party insists on a declaration of unconstitutionality of the contested provision due to violation of Article 117(1) of the Constitution, presenting arguments similar to those contained in the referral order.

8. – On 20 June 2007 the private party A.C. submitted a written statement in which it reiterated its arguments already presented in its entry of appearance.

8.1. – In particular, the written statement points out that the position adopted by the President of the Council of Ministers in the present proceedings contrasts with the "clear obligation on the Italian state to implement the *Scordino* judgment [of 29 March 2006] by adopting measures of a general character capable of eliminating the structural violation ascertained by the European Court, as well as, more generally with the solemn international law obligation previously adopted by the Italian state to cooperate effectively and loyally with the Council of Europe to ensure the proper functioning of the mechanism for the protection of human rights centred on the European Convention on Human Rights and the European Court of Human Rights".

In relation to this matter, the private party stresses how Article 1 of law No. 12 of 2006, introducing letter *a*-bis) into paragraph 3 of Article 5 of law No. 400 of 23 August 1988 (Regulation of the activity of government and organisation of the Presidency of the Council of Ministers) identified precisely the Presidency of the Council of Ministers as the body charged not only with promoting "such actions falling under governmental competence as may be required by the judgments of the European Court of Human Rights issued against the Italian state", but also with communicating "such judgments in a timely fashion to the Houses for examination by the competent permanent Parliamentary commissions" and with presenting "annually to Parliament a report on the state of implementation of the aforementioned judgments".

For the reasons set out above the private party considers it necessary to declare Article 5-*bis* unconstitutional, "enabling Italy to comply with its own international law obligations, to remain within the confines of international legality, and to reintroduce order into the legal system".

8.2. – As regards the existence of a presumed contrast between the case law of the European Court and that of the Constitutional Court, the private party submits that this is only an apparent divergence, caused by the difference between the standards hitherto adopted by the two courts in reaching judgments. It is therefore necessary to "interpret (and apply) the provisions relevant in the present constitutionality proceedings according to the same standards of protection of human rights used by the European Court"; in fact – it goes on to note – if the judgment is made on the basis of the standards mentioned above, the outcome cannot be but identical.

However, the interpretative differences between the constitutional courts of the member states and the Strasbourg Court "are not at all unusual, but are rather rooted in the very mechanism for the protection of human rights provided for in the Convention and the principles of subsidiarity and solidarity on which it is based".

8.3. – The private party then moves on to discuss the more recent case law of the European Court concerning "structural violations", pointing out the conditions in the presence of which there is a "structural problem" and not a mere "isolated" violation of the European Convention.

In particular, it argues that to date "it has more been specifically the constitutional courts of the signatory states – applying the principles of subsidiarity and solidarity –

which have remedied structural problems highlighted in the judgments of the European Court". On this point, reference is made to numerous judgments of the European Court, which have been followed by various judgments of the constitutional courts of the signatory states, aiming to resolve the structural problems highlighted by the Strasbourg Court.

In come cases, moreover, the ascertainment of the existence of a structural violation of the ECHR has led the state involved to amend its own constitutional charter.

With particular reference to Italy, reference is made to the *Sejdovic* case (judgment of the *Grande chambre* of 1 March 2006), which made an amendment to Article 175 of the Code of Criminal Procedure necessary pursuant to the finding of a structural violation under Article 46 ECHR, the amendment to Article 111 of the Constitution, passed in order to give effect to the judgment of the European Court which found there to be violations of the right to a fair trial, and finally judgments No. 152 and No. 371 of 1996 of the Constitutional Court, which followed in the wake respectively of the ECHR judgments in *Cantafio v. Italy* of 20 November 1995 and *Ferrantelli/Santangelo v. Italy* of 7 August 1996.

8.4. – As far as the question before the Court today is concerned, the private party observes that the protection of the right to private property provided for in Article 1 of the First Protocol does not differ in content from the protection conferred by Article 42 of the Constitution, given that both rules require a fair balancing of the interests of the individual with those the Community.

According to that party, the requirement of a "fair balance" means that "each time that the rights and interests of an individual are sacrificed in the implementation of a single public works project, the compensation must be equal to the overall venal value of the property, whilst it is only in exceptional cases, in which the deprivation of property involves an indeterminate number of individuals and is intended to implement fundamental political, economic and/or social reforms, that compensation could, where appropriate, be lower than the overall value of the property, provided that, also in these cases, compensation always and in any event be in a reasonable proportion to that value".

Accordingly, in the opinion of the private party, the overall compensation for the loss suffered by the owner is perfectly compatible with the principle contained in Article 42

of the Constitution, as is shown by the fact that the criterion followed until 1992 was that provided for in Article 39 of law No. 2359 of 1865, which refers to the market value, the only exception being that contained in law No. 2892 of 15 January 1885 (Amelioration of the city of Naples). Moreover, this is only an apparent exception, since law No. 2892 of 1885 essentially concerns the expropriation of building land, and hence compensation was determined "on the basis of the average between the venal value and the cumulative rents of the previous decade, since they had given a certain return for each year of rental", and was driven by a logic tied to the particular situation of the city of Naples (buildings with low value due to degradation, which however generated high returns due to over-population and high rents). The criterion provided for therein did not therefore lead to penalising results for the expropriated parties who would have received lower compensation had the general criterion of the venal value been applied.

On the other hand, the criterion provided for in the disputed Article 5-*bis* does not create "the necessary and inderogable fair equilibrium between the human rights of the individual and the interests of the collectivity", thereby taking on a "substantially 'punitive' character".

9. – By order registered on 19 October 2006 (r.o. No. 2 of 2007), the Court of Cassation raised the issue of the constitutionality of Article 5-*bis* of decree-law No. 333 of 1992, converted into law, with amendments, by law No. 359 of 1992, due to a breach of Article 111(1) and (2) of the Constitution, in the light of Article 6 of the Convention for the protection of human rights and fundamental freedoms and Article 1 of the First Protocol of the Convention, as well as Article 117(1) of the Constitution, in the light of the aforementioned Article 1 of the First Protocol.

The provision is contested by the parties insofar as, in the determination of compensation for expropriation of building land, it provides for a calculation based on the average between the value of the property and the revalued cadastral income, also providing for its application to proceedings in progress at the date of entry into force of law No. 359 of 1992.

9.1. – In the proceedings before the lower court, the private party M.T.G., formerly the owner of lands located in the municipality of Ceprano, occupied in 1980 and expropriated in 1984, appealed against the definitive judgments of the Court of Appeal of Rome of 22 November and 18 December 2000, disputing the quantification of

compensation for expropriation determined pursuant to Article 5-*bis*, as well as the rejection of the application for payment of legal interest and adjustment for inflation. The appellant requests that the aforementioned Article 5-*bis* be set aside on the grounds that it contrasts with Article 1 of the First Protocol and Article 6 ECHR, also invoking changes in case law concerning the quantification of compensation for expropriation as a credit of value rather than money. The municipality of Ceprano lodged a cross-appeal against the same judgment, averring, as a principal and all-embracing argument, that the lower court had recalculated compensation in a manner favourable to the appellant, after the same court had, in a non-definitive judgment of 28 January 1991, rejected the application for damages for the occupation of the property and passed judgment on the basis of that rejection. The cross-appellant also complains of the failure to apply Article 16 of decree-law No. 504 of 30 December 1992 (Reorganisation of the finances of territorial bodies pursuant to Article 4 of law No. 421 of 23 October 1992) instead of Article 5-*bis* in determining the compensation for expropriation.

In a subsequent written statement, the principal appellant presented, in the event of a failure to accept the request for its non-application, a challenge to the constitutionality of Article 5-*bis*, due to violation of Articles 2, 10, 11, 42, 97, 111 and 117 of the Constitution, in the light of Article 1 of the First Protocol and Article 6 ECHR.

9.2. – The lower court proceeds as a preliminary matter to the recognition of the grounds of the cross-appeal concerning the inadmissibility of the challenge to compensation, since its acceptance would entail the inapplicability of Article 5-*bis* to proceedings in progress. Having resolved this preliminary issue, i.e. the question of the unfoundedness of the grounds of appeal, the court goes on to examine the question of the constitutionality of Article 5-*bis*, as averred by the appellant.

The line of reasoning which led the Court of Cassation to raise the question in the terms indicated in the headnote is however wholly identical to that addressed in order No. 681 of 2006, and therefore reference may be made to the points made above in paragraph 5.

9.3. – As regards the relevance of the question, the lower court states that, since the status of the expropriated areas as building land is indisputable, the provision contained in Article 5-*bis* applies *ratione temporis* in the principle proceedings, and not Article 37 of presidential decree No. 327 of 2001, also invoked by the appellant, which applies

only to proceedings commenced after 1 July 2003. Proceedings challenging the evaluation were commenced in 1987, following the outcome of expropriation measures which began in 1980. The temporal reference is, in the opinion of the referring court, decisive in ascertaining the relevance of the alleged contrast of Article 5-*bis* with Article 111 of the Constitution, in the light of Article 6 ECHR. The retroactive application of the relevant criterion for the determination of compensation entailed, in the case before the court, a modification of the condition of equality of the parties to the proceedings in favour of the expropriator, and therefore a breach of the legitimate expectations of the private party, which had decided to initiate legal proceedings counting on the application of the more favourable regime then in force.

10. – The President of the Council of Ministers intervened in proceedings, represented and advised by the *Avvocatura Generale dello Stato*, arguing that the issues were unfounded, making submissions entirely concordant with those presented in the proceedings which concluded in the orders of 29 May 2006 (r.o. No. 402 of 2006) and of 19 October 2006 (r.o. No. 681 of 2006) of the Court of Cassation. Reference is therefore made to the points set out in paragraph 2.

11. – In a written statement submitted on 25 January 2007, M.T.G., the principal appellant in the proceedings before the lower court, entered an appearance, arguing that the questions should be declared inadmissible and in the alternative that they be accepted and the contested provision be declared unconstitutional.

The written statement of the private party coincides entirely with that submitted in the proceedings which resulted in r.o. No. 681 of 2006, and therefore reference is made to the points set out in paragraph 7.

12. – On 20 June 2007 M.T.G. submitted an additional written statement with documentation attached.

The written statement contests the contents of the entry of appearance by the President of the Council of Ministers and the arguments contained therein concerning the unfoundedness of the questions posed by the referring court, presenting additional arguments in support of those already submitted in its own entry of appearance.

The written statement advances, in practically identical terms, the arguments contained in the corresponding submission of the private party A.C. in the proceedings

which resulted in No. 681 of 2006, and accordingly reference is made to the points set out in paragraph 8.

The statement also points out the even more serious detriment to the expropriated owners which would be produced through the application to the case before the court of the criterion for compensation contained in Article 5-*bis*, since the property in question is expropriated land destined for public residential housing. Under the terms of law No. 179 of 17 February 1992 (Provisions regulating public residential housing), passed prior to the introduction of Article 5-*bis* the recipients of public housing may freely cede these dwellings to third parties, at any price, after a period of five years after the allocation. This means that the impoverishment suffered by the owner of the expropriated land will go to benefit private individuals, since the houses built there may re-enter the market five years after the allocation, with the consequence of making the compensation criterion provided for in the contested provision even more unacceptable insofar as unjustified.

Conclusions on points of law

1. – In three distinct referral orders, the Court of Cassation raised the question of the constitutionality of Article 5-*bis* of decree-law No. 333 of 11 July 1992 (Urgent measures for the recovery of the public finances), converted into law, with amendments, by law No. 359 of 8 August 1992 due to a breach of Article 111(1) and (2) of the Constitution, in the light of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), signed in Rome on 4 November 1950, ratified by law No. 848 of 4 August 1955 (Ratification and implementation of the Convention for the protection of human rights and fundamental freedoms signed in Rome on 4 November 1950 and the Additional Protocol to the Convention, signed in Paris on 20 March 1952), and of Article 1 of the First Protocol to the Convention, signed in Paris on 20 March 1952, as well as Article 117(1) of the Constitution in the light of the aforementioned Article 6 ECHR and Article 1 of the First Protocol.

The provision is challenged by the parties insofar as, in determining the compensation for expropriation of building land, it provides for a calculation based on the average between the value of the property and the revalued cadastral income, also

providing for its application to proceedings in progress at the date of the entry into force of law No. 350 of 1992.

2. – Since the proceedings concern the same object and raise the same constitutional question, they may be joined and decided upon in the same judgment.

3. – In the first place, it is necessary to evaluate the version presented by the private party A.C. of the relationship between the ECHR system and the duties flowing from alleged structural violations confirmed in definitive judgments of the European Court and the national courts.

3.1. – According to A.C., any conflict between national law and the ECHR system must be resolved by the ordinary courts setting aside the former. Reference is made in relation to this issue to Protocol No. 11 of the ECHR, ratified in Italy by law No. 296 of 28 August 1997 (Ratification and implementation of protocol No. 11 to the Convention for the protection of human rights and fundamental freedoms, restructuring the control machinery established thereby, done in Strasbourg on 11 May 1994). Article 34 of that Protocol provides for the possibility of individual appeals directly to the European court by citizens of signatory states, whilst pursuant to Article 46 individual states undertake to respect the definitive judgments of the Court in disputes to which they are party.

Reference is also made to Resolution 1226 (2000) of the Parliamentary Assembly of the Council of Europe, in which the high contracting parties are invited to adopt the measures necessary to implement the definitive judgments of the Strasbourg Court, and also to Resolution Res(2004)3 of 12 May 2004 of the Committee of Ministers of the Council of Europe on judgments revealing an underlying systematic problem, Recommendation Rec(2004)5, also of 12 May 2004, of the Committee of Ministers of the Council of Europe on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the Convention, as well as Recommendation Rec(2004)6, again of 12 May 2004, in which the Committee of Ministers reiterated that, following Court judgments which point to structural or general deficiencies in national law or practice, the signatory states are bound to review the effectiveness of existing domestic remedies and, if necessary, to set up effective remedies in order to avoid repetitive cases being brought before the Court.

3.2. – The arguments submitted act as a basis for the private party's request that the question be declared inadmissible on the grounds that the ordinary courts have the duty

to set aside internal provisions which the European Court has found to cause a structural violation of the Convention.

3.3. – The argument that the question is inadmissible cannot be accepted.

This court has previously held that Community provisions "must have full binding effectiveness and direct application in all the Member States, without any requirement for the implementation or amendment of national laws, as instruments having the force and value of law in every state of the Community, such as to enter simultaneously into force everywhere and to achieve the equal and uniform application in relation to all addressees" (judgments No. 183 of 1973 and No. 170 of 1984). The constitutional basis of this effectiveness has been identified in Article 11 of the Constitution, which provides for the possibility of limitations of national sovereignty which are necessary to promote and advance international organisations charged with ensuring peace and justice among nations.

The line of case law referred to does not concern ECHR provisions, as even before sanctioning the direct applicability of Community provisions in the internal legal order, this court had precluded the relevance of Article 11 of the Constitution for the former, "because it is not possible to identify in the specific treaty provisions under examination any limitation on national sovereignty" (judgment No. 188 of 1980). The distinction between the provisions of the ECHR and EC law must be repeated in the present proceedings in the terms stated in the consolidated case law of this court; whilst the former, albeit occupying a role of great significance in that they protect and foster the rights and fundamental freedoms of people, are still ultimately international treaty norms that are binding on the state, they do however not produce effects on the internal legal order which can found the jurisdiction of the national courts to apply those provisions in disputes before them, at the same time not applying any conflicting internal provisions.

The amended text of Article 117(1) of the Constitution introduced in 2001 with the reform of Title V of Part II of the Constitution confirms the above principle in the case law of this court. The constitutional provision invoked here draws a significant distinction between restrictions which derive from the "Community legal order" and those flowing from "international law obligations".

This is not only a terminological but also a substantive difference.

By adhering to the Community treaties, Italy became part of a broader supra-national "legal order", ceding part of its sovereignty, including legislative powers, in the fields covered by those treaties, subject only to the limit of the mandatory nature of the principles and fundamental rights guaranteed in the Constitution.

The ECHR on the other hand does not create a supra-national legal order and does not therefore produce provisions directly applicable in the signatory states. It therefore has the status of a multilateral international treaty – albeit with special characteristics which will be discussed below – creating "obligations" for the signatory states, but not the incorporation of the Italian legal system into a broader system with organs capable of passing legislation which is binding, *omisso medio*, on all internal authorities of the Member States.

The lower court correctly found that it had no jurisdiction to resolve the alleged contrast between the contested provision and the ECHR as interpreted by the Strasbourg Court, and move on to set aside the internal provision allegedly incompatible with the latter. The Resolutions and Recommendations cited by the intervener are directed to the signatory states and can neither bind this court nor support the view of the direct applicability of the ECHR to internal legal relationships.

3.4. – This court also accepts the view – expressed in the referral orders – that the ECHR provisions, as treaty provisions, do not fall within the ambit of Article 10(1) of the Constitution, in accordance with the consolidated case law of the Court on this question. The expression "generally recognised rules of international law" in the constitutional provision cited refers only to customary law and provides for its automatic incorporation into the Italian legal system. Treaty norms contained in bilateral or multilateral international treaties therefore fall outwith the normative scope of Article 10, even where they are general. The ECHR falls under this category, with the result that it is "impossible to regard the provisions in question as a test for establishing constitutionality in themselves (judgment No. 188 of 1980), or as interposed rules pursuant to Article 10 of the Constitution" (order No. 143 of 1993; followed, *ex plurimis*, in judgments No. 153 of 1987, No. 168 of 1994, No. 288 of 1997, No. 32 of 1999, and order No. 464 of 2005).

4. – The question of the constitutionality of Article 5-*bis* of decree-law No. 333 of 1992, converted into law, with amendments, by law No. 359 of 1992, raised with reference to Article 117 of the Constitution, is well-founded.

4.1. – The question, as framed by the referring court, centres on the alleged contrast between the contested provision and Article 1 of the First Protocol to the ECHR, as interpreted by the European Court of Human Rights, insofar as the criteria for calculating the compensation due to the owners of building land areas expropriated in the public interest would lead to the payment of sums not reasonably related to the value of the property seized.

The principle invoked in the documents underlying the present proceedings is Article 117(1) of the Constitution, as amended by constitutional law No. 3 of 18 October 2001 (Amendments to Title V of Part II of the Constitution). The referring court in fact recalls that the constitutionality of that provision has already been examined by this court, which rejected the claim that it was unconstitutional at the time proposed in relation to Articles 3, 24, 42, 53, 71, 72, 113 and 117 of the Constitution (judgment No. 283 of 1993). The judgment cited has subsequently been confirmed by other judgments of this court in similar terms. The referring court does not today request the Constitutional Court to amend its own consolidated case law on the question before the court, but points out that the amended text of Article 117(1) of the Constitution makes necessary a new assessment of the contested provision in relation to this principle, not yet in existence when the previous constitutional case law was formulated.

4.2. – Given the framing of the question by the referring court in these terms, it is in the first place necessary to reconsider the position and role of the ECHR with a view to verifying, in the light of the new constitutional provision, their impact on the Italian legal order.

Article 117(1) of the Constitution requires the exercise of the legislative power of the state and the regions to comply with international law obligations, which undoubtedly include the European Convention on Human Rights. Prior to its introduction, the inclusion of international treaty rules into the Italian legal system was, in accordance with the previous reasoning of the constitutional court, traditionally dependent on an act of ratification, which normally had the status of an ordinary law which could hence potentially be modified by other subsequent ordinary laws. A natural corollary of this

arrangement is that the provision could not be regarded as creating a test for constitutionality (*ex plurimis*, judgments No. 188 of 1980, No. 315 of 1990, No. 388 of 1999).

4.3. – Significant margins of uncertainty remained, due to the difficulty in identifying the extent of the ECHR provisions, which on the one hand concerned the protection of fundamental rights, and therefore supplemented the values and fundamental principles protected by the Italian Constitution itself, but on the other hand maintained their formal status as simple sources of ordinary legislation. Even disregarding the ability of Parliament to amend or repeal them at will, as atypical sources (as confirmed in judgment No. 10 of 1993 of this court, not however followed by other judgments framed in similar terms), the problem of the legal effects of a possible conflict between them and a later legislative provision remained.

This situation of uncertainty has led several judgments of the ordinary courts directly to set aside legislative provisions which contrast with the ECHR, as interpreted by the Strasbourg Court. The idea that the particular conflict can be eliminated by the normal criteria for compensation provided for by law has gained ground in certain judgments of the lower courts, but also in some appellate judgments (Court of Cassation, 1st Section, judgment No. 6672 of 1998; Court of Cassation, Joined Sections, judgment No. 28507 of 2005). In other words, it was considered possible to conclude, on the basis of an alleged priority status of the ECHR, that the subsequent internal law amending or repealing a provision produced by that source was ineffective due to the greater passive force of the ECHR, and that this ineffectiveness could justify the ordinary courts' failure to apply it.

Today this court is called upon to clarify this normative and institutional problem, which has significant practical implications for the everyday practice of legal practitioners. In addition to the points made above in paragraph 3.3 (for a more detailed discussion see judgment No. 349 of 2007), it must be added that whilst the new version of Article 117(1) of the Constitution on the one hand places beyond doubt the greater resilience of the ECHR to subsequent ordinary legislation, on the other hand it brings the Convention within the jurisdiction of this court, since eventual contrasts will not generate problems of the temporal succession of laws or assessments of the respective hierarchical arrangement of the provisions in contrast, but questions of constitutional

legitimacy. The ordinary courts do not therefore have the power to set aside ordinary legislation in contrast with the ECHR, since the alleged incompatibility between the two takes the form of a question of constitutional legitimacy due to an eventual violation of Article 117(1) of the Constitution, falling under the exclusive jurisdiction of the Constitutional Court.

Any argument tending to introduce, even indirectly, in practice a kind of "automatic adaptation" along the lines of Article 10(1) of the Constitution will in any case contrast with the system set out in the Italian Constitution – discussed above in paragraph 3.4 – and reiterated on various occasions by this court, that the effects of the constitutional provision cited do not apply to treaty norms (*ex plurimis*, judgment No. 32 of 1960, No. 323 of 1989, No. 15 of 1996).

4.4. – Assuming that Article 117(1) of the Constitution, as amended, is not a mere reproduction in a different form of pre-existing constitutional provisions (in particular Articles 10 and 11), it must also be presumed that this provision does not apply only to relations between the state and the regions. The use of the systematic interpretative approach in isolation from others and above all in contrast with the above provision, is not sufficient to limit the persuasive effect of international law obligations, as far as state legislation is concerned, only to the network of relationships with regional legislative authorities. The duty to respect international law obligations has an all-embracing and unequivocal impact on the contents of state legislation; the validity of the latter cannot change depending on whether it is considered in order to determine the sphere of legislative competence of the state and the regions, or on the other hand whether it is examined in the light of its general normative potential. The law – and the provisions contained in it – is always the same and must be interpreted uniformly, insofar as the institutional instruments provided for the application of the law allow for the attainment of such an objective.

Moreover, even if the normative scope of Article 117(1) of the Constitution were restricted exclusively to the system of relations between Parliament and the regional authorities as described in Title V of Part II of the Constitution, it could not be denied that it would restrict the legislative power of the state both over the matters mentioned in the second paragraph of that article, falling under the exclusive jurisdiction of the state, as well as those indicated in the third paragraph, where jurisdiction is shared.

Since, following the reform of Title V, the state possesses exclusive or shared jurisdiction only over the matters listed in the second and third paragraphs, with all other matters falling under the residual jurisdiction of the regions, the applicability of Article 117(1) would extend to all forms of legislation, including both state and regional, irrespective of its origin, even if considered only within the context of Title V.

4.5. – The structure of the constitutional provision in relation to which the present question is raised is similar to that of other constitutional provisions, which become applicable *in concreto* when placed in a close relationship to other non-constitutional provisions necessary to give a substantive content to a principle which limits itself to setting out in general terms a quality which the laws referred to in it must possess. The necessary provisions in such cases have a lower status than the Constitution, but higher than ordinary legislation. Although its capacity to designate a unitary category is sometimes disputed, irrespective of the use of the expression "interposed sources", prevalent in academic literature and in a rich series of decisions of this court to indicate this type of provision (*ex plurimis*, judgments No. 101 of 1989, No. 85 of 1990, No. 4 of 2000, No. 533 of 2002, No. 108 of 2005, No. 12 of 2006, No. 269 of 2007), it must be accepted that the principle contained in Article 117(1) of the Constitution becomes operative *in concreto* only if the "international law obligations" which restrict the legislative power of the state and the regions are specified. In the particular case before this court, the principle is supplemented and made operative by the provisions of the ECHR, the role of which in this case is therefore to give substance to the state's international law obligations.

4.6. – Compared to other international law treaties, the ECHR has the particular characteristic of having provided for the jurisdiction of a court, the European Court of Human Rights, which is charged with the role of interpreting the provisions of the Convention. In fact, Article 32(1) provides: "The jurisdiction of the Court shall extend to all cases concerning the interpretation and application of the Convention and its Protocols which are referred to it in accordance with Articles 33, 34 and 47".

Since legal norms live through the interpretation which is give to them by legal practitioners, and in the first place the courts, the natural consequence of Article 32(1) of the Convention is that the international law obligations undertaken by Italy in signing and ratifying the ECHR include the duty to bring its own legislation into line with the

Convention, in line with the meaning attributed by the court specifically charged with its interpretation and application. It is therefore not possible to speak of the jurisdiction of a court overlapping with that of the Italian courts, but of a pre-eminent interpretative role which the signatory states have recognised in the European Court, thereby contributing to clarifying their international law obligations in that particular area.

4.7. – The arguments set out above do not imply that the ECHR, as interpreted by the Strasbourg Court, acquires the force of constitutional law and is therefore immune to assessments by this court of its constitutional legitimacy. It is precisely because the provisions in question supplement a constitutional principle, whilst always retaining a lower status, that it is necessary that they respect the Constitution. The special nature of these provisions, which are different from both EC and treaty law, means that the examination of constitutionality cannot be limited to the possible violation of fundamental principles and rights (*ex plurimis*, judgments No. 183 of 1973, No. 170 of 1984, No. 168 of 1991, No. 73 of 2001, No. 454 of 2006) or of supreme principles (*ex plurimis*, judgments No. 30 and No. 31 of 1971, No. 12 and No. 195 of 1972, No. 175 of 1973, No. 1 of 1977, No. 16 of 1978, No. 16 and No. 18 of 1982, No. 203 of 1989), but must extend to any contrast between "interposed rules" and the Constitution.

The requirement that the provisions which supplement the constitutional principle themselves respect the Constitution is absolute and inderogable in order to avoid falling into the paradox of a legislative provision being declared unconstitutional on the basis of another interposed provision, which in turn breaches the Constitution. In all questions flowing from claims of incompatibility between interposed rules and internal ordinary legislation, it is necessary to establish at the same time that both respect the Constitution, and more specifically that the interposed rule is compatible with the Constitution, as well as the constitutionality of the contested provision in the light of the interposed rules.

Where an interposed source is found to be in breach of a provision of the Constitution, this court has a duty to declare the inability of the Constitution to supplement that principle, providing, according to established procedures, for its removal from the Italian legal order.

Since, as mentioned above, the provisions of the ECHR live through the interpretation given to them by the European Court, the examination of constitutionality

must give consideration to the norm as a product of interpretation, and not the provisions considered in themselves. It must also be emphasised that the judgments of the Strasbourg Court are not unconditionally binding for the purposes of the verification of the constitutionality of national laws. Such controls must always aim to establish a reasonable balance between the duties flowing from international law obligations, as imposed by Article 117(1) of the Constitution, and the safeguarding of the constitutionally protected interests contained in other articles of the Constitution.

In summary, the complete effectiveness of interposed rules is conditional on their compatibility with the Italian constitutional order, which cannot be modified by external sources, especially if these are not created by international organisations in relation to which limitations on sovereignty have been accepted such as those provided for in Article 11 of the Constitution.

5. – In the light of the methodological principles discussed above, the examination of constitutionality requested by the referring court must be carried out in such a way as to ascertain: *a*) whether there is effectively a contrast irresolvable through interpretation between the contested provision and the ECHR, as interpreted by the European Court and regarded as a source supplementing the measure of constitutionality contained in Article 117(1); *b*) whether the provisions of the ECHR invoked as an supplement to that principle, as interpreted by the European Court, are compatible with the Italian constitutional order.

5.1. – Article 5-*bis* of decree-law No. 333 of 1992, converted into law, with amendments, by law No. 359 of 1992, lays down in paragraph 1 the criteria for calculating compensation for expropriation in the public interest of building land areas, consisting in the application of Article 13(3) of law No. 2892 of 15 January 1885 (Amelioration of the city of Naples), "substituting in any case the cumulative rents of the previous decade with the revalued cadastral income mentioned in Articles 24 et seq of the consolidated law on income taxes, approved by presidential decree No. 917 of 22 December 1986". The amount thereby calculated is reduced by 40 percent. The second paragraph adds that, in the event of voluntary cession on the part of the expropriated party, the reduction mentioned above does not apply.

The constitutionality of the contested provision has already been considered by this court in judgment No. 283 of 1993.

In declaring this question to be unfounded, this court refers to its previous case law, consolidated over the years, on the concept of "serious relief", illustrated in particular in judgment No. 5 of 1980. The latter judgment held that "whilst the compensation guaranteed to the expropriated party by Article 42(3) of the Constitution need not amount to a complete reparation of the loss suffered – since it is necessary to balance the right of the private individual with the public interest which the expropriation aims to satisfy – it cannot however be determined at a negligible or merely symbolic level but must constitute serious relief. In order for this to be possible, it is necessary when setting the compensation to refer to the value of the property in relation to its essential characteristics, as a function of its potential economic use, and in accordance with the law. Only in this way is it possible to ensure the reasonableness of the relief due to the expropriated individual and to avoid it being merely apparent or negligible compared to the value of the property".

According to this judgment, the principle of serious relief is breached when "in determining compensation, the characteristics of the property to be expropriated are not considered and a criterion other than its value is adopted".

5.2. – The effect of the judgment cited immediately above (and of the subsequent judgment No. 223 of 1983) was that of reintroducing the criterion of the venal value, as provided for in Article 39 of law No. 2350 of 25 June 1865 (Expropriations in the public interest) prior to the introduction in 1992 of the contested provision.

In relation to the latter, in its judgment No. 283 of 1993 cited above, the court confirmed the principle of serious relief, holding that, on the one hand Article 42 of the Constitution "does not guarantee the expropriated individual the right to compensation exactly related to the venal value of the property and, on the other hand, the compensation cannot be (in negative terms) merely symbolic or negligible, but must be (in positive terms) reasonable, serious, and adequate".

Since, in accordance with the now consolidated line of case law, "an entirely abstract assessment that is detached from the essential characteristics of the property seized" must be precluded, this court has found "indirect" criteria to be admissible, leaving the identification of the principles other than that of the venal value to the discretion of Parliament. The court has pointed out that the "balancing between the general interest furthered by the expropriation and the private interest, expressed through the private

property, cannot consist in an unwavering and rigid quantitative criterion, but is affected both by its historical context considered as a whole, as well as the specific context characterising the expropriation proceedings, as Parliament is not bound to identify a single criterion for determining compensation that is valid in all expropriation proceedings".

As clearly emerges from the judgment cited, this court has also recognised, in addition to the principle of serious relief – which precludes a pure and simple conflation of compensation for expropriation with the venal value of the property – the synchronic and diachronic relativity of the calculation criteria which may be followed by Parliament. In other words, the adequacy of the criteria for calculation must be assessed against the historical, institutional and legal background existing when passing judgment. Neither the criterion of venal value (despite remaining in force from 1983 to 1992), nor any of the "indirect" criteria selected by Parliament may be absolute or definitive. Their location within the system and their compatibility with constitutional principles are subject to variations related to the passage of time and changes in the institutional and normative context, which are not without consequence in any assessment of the constitutionality of the provisions contained therein.

The court concluded, stating that "even an overall context characterised by an unfavourable economic climate – which Parliament has sought to confront with a broad-sweeping economic and financial policy – may confer a different weight on the conflicting interests which must be balanced by Parliament. This essential relativity of the values in play requires a sectoral assessment related to the reference context at the time when the comparison between the result of the balancing operation undertaken by Parliament through the choice of a particular "indirect" criterion and the requirement of adequacy of compensation pursuant to Article 42(3) of the Constitution is carried out".

5.3. – The referring court points out precisely this relative aspect to the assessments, which requires that the balancing operation between the conflicting constitutionally protected interests be assessed within the context of its temporal background and normative space. Two distinct questions must be analysed: *a*) the impact of the changed normative context on the compatibility of the contested provision with the protection of the right to property; *b*) the relationship between the contingent historical (economic

and financial) situation existing at the time when judgment No. 283 of 1993 was passed and the outcome of the proceedings examining the constitutionality of that provision.

5.4. – In relation to the first point, it should be noted that Article 1(1) of the First Protocol to the ECHR has been subject to continuing interpretative development by the Strasbourg Court, which has endowed the provision with a content and scope considered by that court to be incompatible with Italian legislation on compensation for expropriation.

Following protracted court proceedings in *Scordino v. Italy*, on 29 March 2006 the *Grande Chambre* laid down certain general principles: *a*) an interference with the right to the peaceful enjoyment of possessions must strike a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (paragraph 93); *b*) in determining whether this requirement is met, the Court recognises that the State enjoys a "wide margin of appreciation" with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law providing for the expropriation (paragraph 94); *c*) the compensation is not fair unless it consists of a sum "reasonably related to the value of the property"; whilst on the one hand a complete absence of compensation is justifiable only in exceptional circumstances, on the other hand the ECHR does not guarantee full compensation in all circumstances (paragraph 95); *d*) in the event of "isolated expropriation", even where this occurs in the public interest, only full compensation can be regarded as reasonably related to the value of the property (paragraph 96); *e*) "legitimate objectives in the "public interest", such as those pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value" (paragraph 97).

Since the criteria for calculating compensation for expropriation provided for under Italian law would result in the payment in all cases of a sum significantly below the market (or venal) value, the European Court has declared that Italy is under a duty to put an end to a systematic and structural breach of Article 1 of the First Protocol to the ECHR, also in order to avoid additional rulings against the Italian state in a significant number of materially identical disputes pending before the Court.

5.5. – In order to establish whether and to what extent the above judgment of the European Court has effects on the Italian legal order, it is necessary to analyse the criterion for calculating compensation for expropriation provided for in the contested provision.

The compensation payable to the expropriated owner, according to the above provision, is equal to the average of the venal value of the property and the revalued cadastral income relating to the previous decade, with an additional deduction of 40 percent from the figure thereby obtained.

It must in the first place be pointed out that this amended the original criterion provided for in law No. 2892 of 1885 which, being aimed at the amelioration of a big city, rightly provided for the use, in calculating the average, of the sum resulting from the "cumulative rents" of the previous decade. There was a clear and declared aim to compensate the owners of run-down properties in the urban area, giving consideration to the fact that they were largely dilapidated, but heavily populated by tenants paying high rents. The goal was thereby to compensate owners for the loss of a concrete income consisting of the rents which they received. Compensation calculated in this way may even have been higher than the venal value of the property considered in itself.

The replacement of cumulative rents with cadastral income had the effect of lowering compensation compared to that provided for in the law for the amelioration of Naples, with the practical result that, generally speaking, the sum obtained on the basis of the average provided for by law is around 50 percent of the venal value of the property. This is also further reduced by 40 percent, avoidable only through the voluntary cession of the property.

5.6. – Both the case law of the Italian Constitutional Court and that of the European Court are in agreement in finding that the point of reference in determining compensation for expropriation must be the market (or venal) value of the property seized. There is also agreement in principle – disregarding the different terminology used – on the fact that there is no requirement for compensation for expropriation and the market value to coincide, since the owners of building land areas may be required to sacrifice their own rights the public interest.

Compared to the previous case law of this court, it should be pointed out that there is an apparent contrast between the judgments rejecting the unconstitutionality of the

provision now before the court again (principally No. 283 of 1993) and the decisive stance adopted by the Strasbourg Court on the incompatibility between the calculation criteria laid down in that provision and Article 1 of the First Protocol to the ECHR.

In reality, as mentioned above, in declaring the question of Article 5-*bis* of decree-law No 333 of 1992, converted into law, with amendments, by law No. 359 of 1992 to be unfounded, this court pointed to the transitional character of that provision, justified by the serious economic downturn affecting the country and specified – as mentioned in paragraph 5.2 – that the assessment of the adequacy of compensation must be carried out in relative terms, giving consideration to the historical and economic background and the institutional context.

Regarding the first issue, it must be pointed out that the stated provisional criterion provided for in the contested provision has today become definitive, in accordance with Article 37 of presidential decree No. 327 of 8 June 2001 (Consolidated law of legislative and regulatory provisions governing expropriations in the public interest) – not brought into question by the referring court *ratione temporis* – which contains an identical provision, in accordance moreover with its nature as consolidative legislation. In this way, one of the conditions which led the court to find the contested provision to be unconstitutional falls away. Nor can it be found that an "unfavourable economic downturn" can carry on indefinitely, conferring *sine die* on the legislation an exceptional status which if prolonged for too long, would lose that status and enter into contradiction with its very premise. Whilst significant problems in balancing the public finances remain to date – and there is no indication that they may be resolved in the short term – they do not have the extraordinary and acute nature of the situation of the public finances in 1992, which led Parliament and Government to adopt drastic safeguard measures subsequently not repeated.

A "reasonable, serious and adequate" compensation (as specified in judgment No. 283 of 1993) cannot take the market value of the property as a mere starting point for subsequent calculations using factors extraneous to that figure, considered in such a way as to leave behind the initial assessment, and reaching results decidedly far from it. Whilst cadastral income maintains an albeit tenuous link with the market value (with the practical result however, in most cases, of halving compensation), the further deduction of 40 percent is devoid of any not purely arithmetical reference to the value of the

property. However, such deductions are precluded in the event of a voluntary cession and it is therefore not a criterion, albeit "indirect", of the assessment of the property, but an effect of the behaviour of the expropriated individual.

5.7. – It must be concluded from the above that the contested provision – which provides for compensation varying in practice between 50 and 30 percent of the market value of the property – does not pass the examination of constitutionality as regards the "reasonable link" with the venal value, required by the case law of the Court of Strasbourg and moreover consistent with the "serious relief" required by the consolidated case law of this court. The above compensation is lower than the minimum acceptable limit of compensation due to expropriated owners, also bearing in mind the fact that the already reduced amount due to owners is further eroded by taxation, which – as the referring court points out – applies at a level around 20 percent. The legitimate sacrifice which may be required in the public interest cannot have the practical effect of eliminating private property rights.

There is no indication, on the basis of the above findings, of any incompatibility between Article 1 of the First Protocol to the ECHR, as interpreted by the Strasbourg Court and the Italian constitutional order, with particular reference to Article 42 of the Constitution.

It must however be reiterated that Parliament is not under any duty to set compensation for expropriation at the full market value of the property seized. Article 42 of the Constitution stipulates that the law must recognise private property rights, but emphasises their "social function". The latter must be closely related by Parliament and by the interpretation of the courts to Article 2 of the Constitution, which places on all citizens inderogable duties of economic and social solidarity. Too high levels of compensation costs for building land areas intended for use in the public interest could prejudice the effective protection of fundamental rights provided for in the Constitution (*inter alia* health, education, housing) and could act as an excessive break on the creation of the infrastructure necessary for an efficient exercise of private economic initiative.

Parliament will consider whether the balance between the individual rights of owners and the social function of private property must be fixed and uniform, or whether, in accordance with the thinking of the European Court, it must be struck in a nuanced

manner, depending on the quality of the public interest goals pursued. It is certainly not possible to equate individual expropriations pursuing limited goals with expropriation plans aimed to make possible structured programmes of economic reform or to improve conditions of social justice. In fact, excessive cost levels for expropriation could make initiatives of this type impossible or too onerous; this effect is on the other hand not created by compensation, even where more substantial, for "isolated expropriations" mentioned by the Strasbourg Court.

It is possible to arrive at a fair means falling within the "margin of appreciation" within which, according to the case law of the Strasbourg Court, individual states may depart from the general standards provided for in the ECHR, as interpreted by the decisions of that court. This moreover complies with the "relativity of values" affirmed, as mentioned above, by the Italian Constitutional Court. Fixed and undifferentiated calculation criteria risk treating identically different situations in relation to which the balancing must be carried out by Parliament, bearing in mind the social scope of the public goals being pursued, as defined and classified by the law in general terms.

It is moreover clear that the criteria for determining compensation for expropriation for building land areas must be based on a calculation of the value of the property, emerging not from its potential exploitation *in abstracto*, but according to the town planning provisions and limitations in force in the areas concerned.

6. – The declaration of unconstitutionality of the contested rule in the light of Article 117(1) of the Constitution renders superfluous all further arguments on the alleged breach of Article 111 of the Constitution, concerning the applicability of that provision to proceedings in progress at the moment of its entry into force since, pursuant to Article 30(3) of law No. 87 of 11 March 1953, it can no longer be applicable from the day after the publication of the present judgment.

7. – In accordance with Article 27 of law No. 87 of 1953, paragraphs 1 and 2 of Article 37 of presidential decree No. 327 of 2001, which contain provisions identical to those declared to be in breach of the constitution in the present judgment, must in consequence be declared unconstitutional.

on those grounds

THE CONSTITUTIONAL COURT

hereby,

declares that Article 5-*bis*(1) and (2) of decree-law No. 333 of 11 July 1992 (Urgent measures for the recovery of the public finances), converted into law, with amendments, by law No. 359 8 August 1992 is unconstitutional;

declares, pursuant to Article 27 of law No. 87 of 11 March 1953 that, in consequence, Article 37(1) and (2) of presidential decree No. 327 of 8 June 2001 (Consolidated law of legislative and regulatory provisions governing expropriations in the public interest) is unconstitutional.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 22 October 2007.

Signed:

Franco BILE, President

Gaetano SILVESTRI, Author of the Judgment

Gabriella MELATTI, Registrar

Deposited in the court registry on 24 October 2007.

The Registrar

Signed: MELATTI