Corte costituzionale

JUDGMENT NO. 349 OF 2007

Franco BILE, President

Giuseppe TESAURO, Author of the Judgment

JUDGMENT NO. 349 YEAR 2007

In this case, owners of certain property requested compensation for the state's seizure of property without concluding the required compulsory purchase procedures. The Court rejected the argument that the provisions of the ECHR were directly effective in Italian law by virtue of the ECJ's findings that Convention rights form part of the general principles which it is to uphold. The force of Article 117 is to impose "a duty on Parliament to respect [international law] when enacting ordinary legislation". Ultimately, when weighing up the public interest and the conflicting private property rights, the Court must take into account the ECHR and jurisprudence of the Strasbourg court. The Court therefore struck down the contested provision since it required a sacrifice by private individuals in order to achieve the general interest of the recovery of the public finances.

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*(7-*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, introduced by Article 3(65) of law No. 662 of 23 December 1996 (Measures for the rationalisation of the public finances), initiated pursuant to a referral order of 20 May 2006 of the Court of Cassation in the joined civil proceedings pending between the Municipality of Avellino and others and E. P. *pro se* and in his capacity as representative of G. P., D. P. and others and a referral order of 29 June 2006 of the Court of Appeal of Palermo in civil proceedings pending between A. G. and others and the Municipality of Leonforte

and another, registered as Nos. 401 and 557 in the register of orders 2006 and published in the *Official Journal* of the Republic Nos. 42 and 49, first special series 2006.

Considering the entries of appearance by G. C. as the heir of E. P. and by G. P. and others in their capacity as the heirs of D. P., and by A. G. and others, beyond the applicable time limits, as well as the intervention by A. C., formerly G. s.r.l., by the Council for European Justice in Human Rights [*Consulta per la Giustizia Europea dei Diritti Umani*] CO.G.E.D.U. and by the President of the Council of Ministers;

having heard in the public hearing of 3 July 2007 and in chambers on 4 July 2007 the Judge Rapporteur Giuseppe Tesauro;

having heard the barristers Maurizio de Stefano and Anton Giulio Lana for the Council for European Justice in Human Rights CO.G.E.D.U., Antonio Barra for G. C. in his capacity as the heir of E. P. and for G. P. and others in their capacity as the heirs of D. P. and the *Avvocato dello Stato* Gabriella Palmieri for the President of the Council of Ministers.

The Facts of the Case

1. – By orders of 20 May and 29 June 2006, the Court of Cassation and the Court of Appeal of Palermo raised, with reference to Article 111(1) and (2) of the Constitution and in relation to Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (hereafter ECHR), ratified and implemented 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 Article to Article 117(1) of the Constitution, and in relation to Article 6 ECHR and Article 1 of the Additional Protocol to the Convention, signed in Paris on 20 March 1952 (hereafter Protocol), the question of the constitutionality of Article 5-*bis*(7-*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 – subsection added by Article 3(65) of law No. 662 of 23 December 1996 (Measures for the rationalisation of the public finances).

2. – The Court of Cassation notes that the principal proceedings concern an application made by certain private individuals to the Municipality of Avellino and the Independent Institute for Public Housing [*Istituto autonomo case popolari*] (IACP) of the same city, requesting payment of damages for the harm suffered due to the reverse accession* of certain lands owned by them, on which public housing and other social building projects have been carried out, as well as the payment of compensation for the temporary occupation of the same immoveable property.

In judgment No. 457 of 14 January 1998, allowing the appeal lodged by the public authorities, the Court of Cassation reversed and remitted the appeal judgment, holding that the contested provision, which introduced a reductive criterion for the calculation of compensation for reverse accession, was applicable.

Following remittal of the case, the court to which proceedings were remitted thus awarded damages on the basis of the contested provision; the judgment was appealed against by the private parties which, amongst other things, argued that Article 5-*bis*(7-*bis*) was unconstitutional.

2.1. - After having set out the arguments against the repeal of the contested provision in the light of Article 111 of the Constitution – 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) – or by law No. 89 of 24 March 2001 (Provision of fair compensation in the event of a violation of the right to proceedings of a reasonable length and amendment of Article 375 of the Code of Civil Procedure), the referring court summarises the judgments of this court which have already examined the contested provision, with reference to Articles 3, 28, 42, 53, 97 and 113 of the Constitution.

The order thus analyses the case law of the European Court of Human Rights on the interpretation of Article 1 of the Protocol, which has tended to guarantee an increasingly robust defence of property rights. In particular, it notes that the payment of *fair* compensation has been limited to instances of legitimate expropriation and that the

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* Translator's note: “reverse accession” (in Italian *accessione invertita* or *occupazione appropriativa*) refers to the operation in reverse of the normal rule that buildings accede to the land. In administrative law, reverse accession occurs, subject to the fulfilment of certain conditions, where the state occupies land without completing normal compulsory purchase procedures. The land, previously under private ownership, accedes to the buildings and any servitudes or burdens on the land cease to exist.

unlawful nature of the occupation has been held to be relevant for the purposes of quantifying the compensation, with the result that, where it is not possible to restore the property in kind, the expropriated individual has the right to payment of the venal value.

According to the referring court, the European Court has argued in detail in several judgments that reverse accession violates the provisions of the Convention cited, amongst other reasons, insofar as it does not guarantee to expropriated individuals the right to compensation for the harm suffered in line with the venal value of the property, providing for calculation criteria similar to those applicable to compensation in cases of legitimate expropriation. In fact, the said compensation need not be related to the "full and comprehensive value of the property" only in cases of expropriation planned to pursue legitimate objectives in the public interest, with the latter being identified as measures of economic reform or pursuing social justice, or which are crucial in bringing about changes to the constitutional order.

Subsequently, in the judgments indicated in the referral order, the same court applied these principles also to the criterion contained in the contested Article 5-*bis* and, holding that the fact that this provision formed part of a complex financial measure was irrelevant, ordered the Italian state to pay compensation equal to the difference between the compensation received and the venal value of the property, finding that, on account of the period of time which had passed, there had been a breach of the expropriated party's legitimate expectations to compensation on the basis of the latter parameter. In accordance with this court's judgment No. 5 of 1980 and No. 223 of 1983, the criterion for compensating the expropriation of building lands should in fact have been that of the fair price under a freely concluded sale (Article 39 of law No. 2350 of 25 June 1865 on "Expropriations in the public interest"); hence the applicability of the supervening Article 5-*bis* violated the right of the person to his own property, also because taxation has a further impact on the amount actually received.

Therefore, according to the Strasbourg Court, indirect expropriation or reverse accession – recognised by law (Article 43 of presidential decree No. 327 of 8 June 2001, "Consolidated law of legislative and regulatory provisions governing expropriations in the public interest") and in the case law of the Italian courts – was incompatible with Article 1 of the Protocol and the contested provision breached the

rule of comprehensive reparation for harm caused, aggravating the damage through the retroactive nature of the provision and its application to proceedings in progress.

Ultimately, the contested provision was found to be in breach of Article 1 of the Protocol for the following reasons: in the first place, it breaches the rule of compensation equal to the venal value of the property, for the sole purpose of satisfying budgetary requirements, far from any context of economic or social reforms; secondly, it lays down a reductive criterion, based on a parameter that is unreasonable also for cases of legitimate expropriation; thirdly, it provides for the applicability of the criterion to proceedings in progress, in breach of Article 6 ECHR; fourth, it violates the principle of the rule of law and the right to a fair trial, since the provision impacted upon proceedings already in progress involving public authorities, obliging the courts to reach a decision on grounds different to those on which the other party had legitimately relied upon when initiating proceedings.

2.2. – According to the referring court, even through the contested provision violates the Convention provisions mentioned above as interpreted by the European Court, it is not however possible for it to be "set aside". However, the Court of Cassation has on some occasions held that the national courts are bound to interpret and apply national law, wherever possible, in conformity with the ECHR and the interpretation provided by the Strasbourg Court, whilst at other times has downplayed the binding force of the judgments of the European Court.

The lower court found on the facts that the ordinary courts had no power to "set aside" the national provision, as such a power exists only in the event of a breach of EC law and is based on Article 11 of the Constitution. Nor does Article 6(2) of the Maastricht Treaty provide any basis for concluding the that the ECHR has been "communitised", with the consequence that the interpretation of the Convention is not a matter for the Court of Justice of the European Communities, which has stated that it has no jurisdiction to give the interpretative guidance necessary for the national courts to determine whether national legislation is in conformity with the fundamental rights whose observance the court ensures (in the Community context), such as those deriving from the Convention, "where national legislation is concerned with a situation which does not fall within the field of application of Community law" (judgment in Case C-299/95 of 29 May 1997).

However, the theory of conditionality frameworks [*controlimiti*] could suggest a contrast between the rule which relates compensation for expropriation to the venal value of the property and the constitutional principle that the right to property is regressive compared to the primary interest of social utility. In any case, the said rule cannot be directly applied pursuant to Article 10 of the Constitution since the constitutional provision in question does not concern treaty law, it does not even express a value generally recognised by states and, in any event, even if the national courts could directly act on the interpretation of the European Court, they would not have any power to establish a compensatory framework substituting that set out in the contested provision.

In conclusion, according to the referring court, the contrast between the national provision and the Convention cannot be circumvented through an interpretation *secundum constitutionem* of the former whilst, on the other hand, the national courts cannot set aside the national rule purporting, in the place of Parliament, to coordinate the sources and assert the priority of the Convention over national law.

2.3. – The referral order states that, although this court has declared the retroactive effect of the contested provision not to be unreasonable (judgment No. 148 of 1999), it has not examined this provision with reference to Article 111 of the Constitution.

In the opinion of the lower court, the normative content of the constitutional principle cited has not been completely explored and, although Parliament's intention to constitutionalise the provisions of the Convention was shelved during the drafting phase, this does not preclude the possibility of the case law of the European Court contributing to its correct interpretation, also since the positioning of the ECHR in the hierarchy of sources of law has yet to be clarified. Accordingly, it is important in this case that the Strasbourg Court has found the contested provision to be in breach of Article 6 of the ECHR, since the principle of the equality of the parties before the courts prevents Parliament from interfering in the resolution of an individual case, or of a specific category of disputes. The facts which came before the European Court are said to be materially similar to those at issue in the principal proceedings, in which, following expropriation in 1985 through reverse accession procedures, the owners initiated court proceedings to obtain the compensation due to them by virtue of the principles laid down by the Court of Cassation – based on Article 39 of law No. 2359 of

1865 and on Article 3 of law no. 458 of 27 October 1988 (Joint liability of the state for the expenditure of local authorities in relation to the previously greater burdens of compensation for expropriation) – corresponding to the venal value of the property; the trial court accepted the application, applying the said criterion; during the course of proceedings before the Court of Cassation the contested provision intervened, providing for the application of the new criterion to proceedings in progress and not confirmed by definitive judgment, with the result of reducing, with proceedings already underway, compensation to little under 50 percent compared to that with reference to which the owners had initiated proceedings.

2.4. – According to the Court of Cassation, the contested provision in addition violates Article 117(1) of the Constitution which, in the text amended following the reform of Title V of the Constitution, aims to eliminate a legislative gap from our legal system, created by the provisions of Article 10 of the Constitution, laying down a rule binding also on the national Parliament.

The contested provision is said to breach the principle of a fair trial and the right to private property contained in Article 6 ECHR and Article 1 of the Protocol, as interpreted by the European Court and, in consequence, the aforementioned Article 5-*bis*(7-*bis*) is unconstitutional insofar as in breach of Article 117(1) of the Constitution.

3. – The Court of Appeal of Palermo states that it became seized of the case pursuant to the remittal of proceedings concerning applications for restitution and compensation lodged by certain private individuals, who averred that building lands under their ownership had been subject to expropriation proceedings for the construction of public housing units and had been irreversibly transformed, and that no regular expropriation measure had been adopted; the public authorities entered an appearance arguing that the claim was unfounded and requesting application of the provision contained in presidential decree No. 327 of 2001; the irreversible transformation of the land was also confirmed.

According to the lower court, the legal principle asserted in the referral order states that the expropriation of the property is illegitimate insofar as adopted after the expiry of the deadlines contained in Article 13 of law No. 2359 of 1865, and must be reversed. The action relevant for the proceedings is to be classified as reverse accession, since the transformation of the property was carried out pending a valid declaration of public

utility. Therefore, on expiry of the deadlines mentioned in Article 13 of law No. 2359 of 1865, the property was procured by the public authorities by original acquisition and the plaintiffs have the right to obtain compensation for the harm. The aforementioned Article 5-*bis*(7-*bis*) was found to be applicable in this case whilst, in the opinion of the referring court, at the time when proceedings were initiated at first instance (12 April 1984), the private parties could by virtue of the principles set out in judgment No. 1464 of 1983 of the joined sections of the Court of Cassation and the provisions of Article 39 of law No. 2359 of 1865, legitimately expect to receive compensation for the harm caused equal to the venal value of the property, which however the contested provision reduced by half.

The Court of Appeal of Palermo therefore questions the provision before it with reference to the same constitutional principles indicated by the Court of Cassation and using arguments substantially identical to those contained in the relevant referral order, summarised above.

4. – In the proceedings initiated by the Court of Cassation, the President of the Council of Ministers entered an appearance, represented and advised by the *Avvocatura Generale dello Stato* (State Legal Advisory Service) which requested that the question be declared unfounded, also in a written statement submitted shortly before the public hearing.

According to the tax authorities, the referral order invites this court to determine: *a)* whether, in the event of a conflict between a national provision and the case law of the European Court, the latter prevails; *b)* whether the eventual prevalence of the case law of the said court also applies to constitutional provisions.

In the opinion of that court, it is not possible for the Strasbourg Court to reduce or extend the scope of Convention provisions through interpretation; Article 32 of Protocol No. 11 to the Convention done in Strasbourg on 11 May 1994, ratified and implemented 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), provides that the jurisdiction of the Court covers all questions concerning the interpretation and application of the Convention and its protocols, without however providing for a power to create binding treaty norms, non-existent under the system of

the Vienna Convention, ratified 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), "which requires that all treaties be interpreted literally and objectively".

Accordingly, whilst the European Court has no right to question the legitimacy, under national law, of the retroactive law and the Italian system for calculating compensation, a provision complying with Articles 25 and 42 of the Constitution could not be contested; moreover, Article 111 of the Constitution, in contrast to the findings of the referring court, does not concern substantive provisions, and in any case Article 6 ECHR does not contain a prohibition on the retroactivity of the law in matters other than criminal law.

According to the tax authorities, Article 117(1) of the Constitution refers to "restrictions deriving from the Community legal order and from international law obligations" which, according 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) are those contained in "reciprocal agreements to limit sovereignty, in accordance with Article 11 of the Constitution, the Community legal order and international treaties" and "none of all this is contained in the European Convention on Human Rights in relation to retroactive laws immediately applicable to proceedings in progress, to which national legislation applies solely and in its entirety". Similarly, Article 1 of the Protocol does not provide, as argued by the European Court of Human Rights that compensation for expropriation coincide with the venal value of the property.

Finally, the case law of the Strasbourg Court is also imprecise insofar as the venal value of the property is a factor of the ability to use the area to build, but no zoning instrument leaves intact the full extension of the land without taking into account town-planning requirements. According to the intervener, experience shows "that on a surface of X sqm, the area available for building, disregarding the spaces required for public utilities and for town planning requirements, is equal to X/2" and therefore it is not unreasonable in such cases that the law provide for a drastic reduction in the value per square metre.

4.1. – In the proceedings before the Constitutional Court, the parties to the principal proceedings entered appearances with separate submissions, requesting that the question be accepted, also invoking the arguments which largely coincided with those contained in the referral order.

After having presented historical and theoretical points in favour of the principle that the law cannot breach the common sense of justice, the parties argue that not only the contested provision, but also Article 3 of law No. 458 of 1988 and this Court's judgments No. 384 of 1990 and No. 486 of 1991, as well as several judgments of the Court of Cassation, are not compatible with Article 1 of the Protocol insofar as they deny the right of those who have been subject to reverse accession to maintain their ownership in the property and to obtain compensation equal to the venal value of the property.

The retroactive effect of the contested provision is disputed also by reference to the French Constitution of 1791, the Constitution of the United States of America and a broad historical *excursus*, which attempts to highlight the contrast between the said provision and Article 1 of the Protocol, also violated by the recognition of the figure of reverse accession and the legitimation of an unlawful activity as grounds for the acquisition of property rights by the public authorities.

Therefore, according to the parties, the provision before this Court is an unlawful act which results in the extinction of the property rights of private individuals, and hence violates Article 10(1) of the Constitution, with reference to Article 1(2) of the Protocol, as well as Article 53 of the Constitution.

Finally, the provision is argued to breach Article 10(1) and Article 111(2) of the Constitution also in the light of Article 6(1) of law No. 848 of 1955, without prejudice to the obligation to pay compensation for damages caused by the disregard for the requirement of a reasonable length of proceedings (Article 2 of law No. 89 of 24 March 2001).

4.2. – An appearance was entered in proceedings by a limited liability company, which requested that the question before this court be accepted, averring that it had title and interest to sue insofar as a party to other proceedings concerning compensation for harm caused by reverse accession, stayed pending the outcome of the present proceedings.

4.3. – Finally, the Council for European Justice in Human Rights (CO.GE.DU.) intervened in proceedings, in the person of its legal representative which, also in its written statement submitted shortly before the public hearing, states that it is not a party to the principal proceedings "and would not be directly effected by the legislation at issue in the proceedings in question", since it does not have any particular interest which could be related to expropriation in the public interest. However, the right to intervene is claimed to be based on the fact that the outcome of proceedings would have an impact on its statutory goals and its interest in a judgment which recognises that ECHR provisions have constitutional status.

5. – In proceedings before the Court of Appeal of Palermo an appearance was entered by the President of the Council of Ministers, represented and advised by the State Legal Advisory Service which, in the act of intervention and the written statement submitted shortly before the hearing in chambers, presented arguments identical to those contained in the act of intervention pertaining to proceedings referred by the Court of Cassation and requested that the Court declare the questions to be unfounded.

5.1. – In the proceedings referred by the Court of Appeal of Palermo, the private parties to the principal proceedings also entered appearances after expiry of the relevant time limits.

Conclusions on points of law

1. – The questions raised by the Court of Cassation and by the Court of Appeal of Palermo relate to Article 5-*bis*(7-*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 – subsection added by Article 3(65) of law No. 662 of 23 December 1996 (Measures for the rationalisation of the public finances), which provides that: "Where lands were occupied in the public interest but illegitimately prior to 30 September 1996, the liquidation of damages is regulated by the criteria for determining compensation contained in sub-section 1, with the exception of the 40 percent reduction. In such cases the amount of compensation is also increased by 10 percent. The provisions of the present sub-section apply also to proceedings in progress that have not been concluded by a definitive judgment".

According to the referral order, the provision violates Article 117(1) of the Constitution, in the light of Article 6 of the Convention for the protection of human rights and fundamental freedoms, signed in Rome on 4 November 1950 (below ECHR), ratified and implemented 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 Article 1 of the Additional Protocol insofar as, by providing for the application to proceedings in progress of the provisions of that law governing compensation for damages caused by illegitimate occupation and by setting the relevant compensation at an inappropriate level, it violates the right to a fair trial and the right to private property respectively contained in the aforementioned Articles 6 and 1, as interpreted by the European Court of Human Rights in Strasbourg, and hence violates the corresponding international law obligations taken on by the state.

Moreover, the said provision is also argued to violate Article 111(1) and (2) of the Constitution, in the light of Article 6 ECHR, since the provision for its application to proceedings in progress violates the right to a fair trial, in particular regarding the principle of equality of the parties, which can be considered to have been breached by a legislative intervention aiming to impose a particular solution on a limited and specific category of disputes.

2. – Since the proceedings concern the same provision, disputed with reference to the same constitutional principles, on materially similar grounds with essentially identical arguments, they must be joined and decided in a single judgment.

3. – As a preliminary matter, it is necessary to restate the inadmissibility of the intervention by the Council for European Justice in Human Rights (CO.GE.DU.) and by A. C., formerly G. s.r.l., declared by order which was read out during the public hearing, and which is attached to the present judgment.

Furthermore, the entries of appearance made by the parties in the proceedings before the Court of Appeal of Palermo must be declared inadmissible, since this occurred after the deadline contained in Article 25 of law No. 87 of 11 March 1953 (Provisions governing the constitution and functioning of the Constitutional Court), calculated according to the provisions of Articles 3 and 4 of the supplementary rules of 16 March

1956 governing proceedings before the Constitutional Court, which must be regarded as having mandatory effect (on all points, judgment No. 190 of 2006).

4. – The two referral orders gave a plausible justification for the applicability of the contested provision in both proceedings, also in the light of presidential decree No. 327 of 8 June 2001 (Consolidated law of legislative and regulatory provisions governing expropriations in the public interest), as well as the fact that they refer to cases of reverse accession, governed by that legislation.

Moreover, in accordance with a principle which must be confirmed, questions of constitutional legitimacy may also relate to interpretations of a "principal of law" made by the Court of Cassation (which bind that court in appeal judgments against judgments passed pursuant to remittal), since the regime of preclusions which characterised remittal judgments does not prevent censure of the provision from which the principle in question was drawn (judgments No. 78 of 2007, No. 58 of 1995, No. 257 of 1994, No. 138 of 1993; order No. 501 of 2000).

The questions are therefore admissible.

5. – The questions must be examined within the limits of the *thema decidendum* specified in the referral order, since according to the consolidated case law of this court, any challenges made by the parties to the principal proceedings cannot be taken into consideration in relation to constitutional principles and arguments not mentioned by the lower court (*ex plurimis*, judgments No. 310 and No. 234 of 2006).

6. – The question raised in relation to Article 117(1) of the Constitution is well-founded.

6.1. – Regarding the constitutional principle raised by the lower courts and the arguments contained in both referral orders, the preliminary issue to be considered is that of the consequences of the contrast averred between the national provision and "the duties flowing [...] from international law obligations" and in particular the duties imposed by the provisions invoked of the ECHR and the Additional Protocol.

In general, when interpreting the provisions of the Constitution which refer to rules and duties under international law – for our present purposes, Articles 7, 10 and 11 of the Constitution – this court has consistently asserted that Article 10(1) of the Constitution, which provides for the automatic adaptation of Italian law with the generally recognised rules of international law, applies exclusively to general principles

and the rules of customary international law (on all points, see judgments No. 73 of 2001, No. 15 of 1996, No. 168 of 1994), whilst it does not apply to rules contained in international treaties which do not reproduce principles or rules of customary international law. By contrast, Article 10(2) and Article 7 of the Constitution refer to precisely identified agreements, concerning respectively the legal status of foreigners and the relationship between the state and the Catholic Church, and hence cannot be referred to treaty norms other than those expressly mentioned.

Article 11 of the Constitution, which provides, amongst other things, that Italy "agrees to limitations of sovereignty where they are necessary to allow for a legal system of peace and justice among nations, provided the principle of reciprocity is guaranteed", is on the other hand the provision which has made it possible to recognise EC law as having binding force within our legal order (judgments No. 284 of 2007; No. 170 of 1984).

As far as the provisions of the ECHR are concerned, this court has on various occasions found that, in the absence of a specific constitutional provision and given its internal ratification by ordinary legislation, the ECHR acquires the same status and hence is not classified as constitutional legislation (see, *inter alia*, the continuous line of case law in judgments No. 388 of 1999, No. 315 of 1990, No. 188 of 1980; order No. 464 of 2005). This court has also repeatedly found that mere treaty rules are excluded from the reach of Article 10(1) of the Constitution (in addition to the judgments mentioned above, see also judgments No. 224 of 2005, No. 288 of 1997, No. 168 of 1994).

The irrelevance of this provision for the purposes of the ECHR and, insofar as is relevant for our present purposes, the principle contained in Article 10(2) of the Constitution, is clear from its specific wording. This court has reached different conclusions in judgments which also refer to this principle, essentially due to the similarity between the ECHR provisions and the treaty provisions concerning the treatment of foreigners: and this is precisely the fact which the judgments in question limited themselves to recognising (judgments No. 125 of 1977, No. 120 of 1967).

As far as the ECHR is concerned, this court has in addition found that Article 11 of the Constitution "cannot even be taken into consideration, since no limitation on national sovereignty can be identified in favour of the specific treaty provisions in

question" (judgment No. 188 of 1980), a conclusion which this court wishes once again to confirm. It should also be emphasised that fundamental rights cannot be considered a "field" in relation to which it is possible for the state to relinquish its sovereign powers beyond the granting of jurisdiction limited to the interpretation of the Convention.

Nor can the relevance of the principle contained in Article 11 be made to apply indirectly by virtue of the classification by the Court of Justice of the European Communities of the fundamental rights contained in the ECHR as general principles of Community law.

It is indeed true that, following expressions of opinion by the constitutional courts of certain Member States, the consolidated case law of the Court of Justice has held since the 1970s that fundamental rights, and in particular those contained in the ECHR, are part of the general principles whose observance it guarantees. It is also true that this case law was incorporated into Article 6 of the Treaty on European Union and, more comprehensively, into the Charter of Fundamental Rights proclaimed in Nice by the other three Community institutions, as act still formally devoid of legal value but of recognised importance as an aid to interpretation (judgment No. 393 of 2006). In the first place however, the Council of Europe – which oversees the system for the protection of human rights governed by the ECHR and the activity of interpreting the latter through the Court of Human Rights in Strasbourg – is a legal, functional and institutional reality that is separate from the European Community created by the Treaty of Rome of 1957 and the European Union created by the Maastricht Treaty of 1992.

Secondly, case law may assert that fundamental rights are an integral part of the general principles of Community law whose observance is guaranteed by the Community courts, drawing inspiration from the common constitutional traditions of the Member States and in particular the Rome Convention (see the recent judgment of 26 June 2007 in Case C-305/05, *Ordre des barreaux francophones et germanophone v. Council*, paragraph 29, pursuant to a preliminary reference by the Belgian Constitutional Court). However, these principles are relevant exclusively for the facts of the cases to which that law is applicable: *in primis* Community legislative acts, followed by national legislation implementing Community law, and finally national derogations from Community law allegedly justified by the respect for fundamental rights (judgment of 18 June 1991, C-260/89, *ERT*). The Court of Justice has in fact specified

that it does not have such jurisdiction in relation to legislation which does not fall within the ambit of Community law (judgment of 4 October 1991, C-159/90, *Society for the Protection of Unborn Children Ireland*; judgment of 29 May 1998, C-299/95, *Kremzow*): an eventuality which occurred precisely in the case before this court.

Thirdly, even disregarding the point that the European Union is not at present a party to the ECHR, it is however a fact that all Member States have for some time been members of the Council of Europe and adhered to the system for the protection of human rights which it oversees, with the result that the relationship between the ECHR and the legal systems of the Member States is a relationship that is closely regulated by each national legal system, albeit to different degrees, since there is no common competence attributed to (or exercised by) the Community institutions regarding such matters. Nor finally are the conclusions of the Presidency of the European Council of Brussels of 21 and 22 June 2007 and the treaty amendments contemplated therein and referred to the intergovernmental conference currently capable of modifying the legal framework described above.

It is equally incorrect to maintain that the incompatibility between the national provision and the ECHR can be resolved by the ordinary courts simply setting aside the former. Assuming that this cannot be a result of the general "Communitisation" of the ECHR, for the reasons already mentioned above, it is still necessary to consider whether it is possible to find that such provisions (and in particular Article 1 of the Additional Protocol) are directly effective, along the same lines and with the same implications as directly effective Community law, including in particular the ability of the national courts to apply them directly in the place of national legislation in conflict with them. The answer is that at present no aspect of the structure and objectives of the ECHR, or character of particular provisions of it, makes it possible to conclude that the legal position of individuals could be directly and unconditionally dependent on it, irrespective of the traditional normative framework of the individual signatory states, to the point of enabling the courts to set aside conflicting national legislation. Indeed, the very judgments of the Strasbourg Court are directed to the legislating member state and call for specific action to be taken by it, even where it is an individual who initiates court proceedings against his own state. This is even more apparent where, as in the case before the court, there is a "structural" contrast between the relevant national

legislation and the ECHR as interpreted by the Strasbourg Court, and where a Member State is called upon to draw the necessary consequences.

6.1.1. – The case law of this court includes judgments which have reiterated that the provisions of the ECHR are not classified as such for the purposes of constitutional law, since it is not possible to grant them a status different from that of the instrument – ordinary legislation – which authorised their ratification and incorporated them into Italian law. On the other hand, the very same judgments have also found that, in the cases before the court, the national provisions did not diverge from the Convention provisions (judgments No. 288 of 1997 and No. 315 of 1990), underscoring the "substantive overlap" between the principles enshrined in the Convention and constitutional principles (judgments No. 388 of 1999, No. 120 of 1967, No. 7 of 1967), which rendered "an examination of the problem [...] of the status" of the Convention "superfluous" (judgment No. 123 of 1970). In other cases, the above question has not been expressly considered but, symbolically, the "significant resonance" between the provision before the court and that provided for under international law has been noted (judgment No. 342 of 1999; see also judgments No. 445 of 2002 and No. 376 of 2000). It has on occasion been noted that national law ensures "even broader guarantees" than those provided for in the ECHR (judgment No. 1 of 1961), since "human rights, including those guaranteed by universal or regional conventions signed by Italy, are articulated in, and no less intensely guaranteed by, the Constitution" (judgment No. 388 of 1999 and No. 399 of 1998). Thus the right of individuals to a legal remedy has been traced back to the core inviolable rights of man, guaranteed by Article 2 of the Constitution, justifying such a conclusion "also in the light of the contents of Article 6 of the European Convention on Human Rights" (judgment No. 98 of 1965).

In general terms, the ECHR has also been recognised as an aid to interpretation in relation both to constitutional parameters as well as particular contested provisions (judgment No. 505 of 1995; order No. 305 of 2001), recalling that "normative indications, also of supra-national nature" may be used to support a particular line of reasoning (judgment No. 231 of 2004). Furthermore, in certain cases, when referring to the ECHR, this court has presented arguments indicative of an interpretation in accordance with the Convention (judgments No. 376 of 2000 and No. 310 of 1996), or has recalled ECHR provisions and their underlying rationale in support of its reasoning

(judgments No. 299 of 2005 and No. 29 of 2003), invoking it also in relation to its conformity with the "values expressed" by the Convention, "according to the interpretation given to it by the Strasbourg Court" (judgments No. 299 of 2005 and No. 299 of 1998), as well as emphasising how a right guaranteed by the Constitution is "also protected by Article 6 of the Convention for the protection of human rights [...] as applied in the case law of the European Court in Strasbourg" (judgment No. 154 of 2004).

The isolated finding that the provisions before the court derived from "a source deriving from an atypical jurisdiction" and were as such "not open to repeal or amendment by ordinary legislation" has not subsequently been followed (judgment No. 10 of 1993).

6.1.2. – It is therefore possible to infer from the case law of this court a recognition of the principle of the special relevance of the Convention provisions in the light of their content, which translates into an intention to guarantee, above all through interpretation, the tendency to harmonise the Constitution with the ECHR and incorporate the guarantees contained in the latter, which Parliament is found to respect and to further in ordinary legislation.

The particular relevance of the international law obligations accepted through adherence to the Convention in question was clearly apparent to Parliament. In fact, after the incorporation of the new regulation of the European Court of Human Rights, expressly intended to "restructure the control machinery established by the Convention in order to maintain and improve the efficiency of the protection of human rights and fundamental freedoms provided for in the Constitution" (Preamble to Protocol No. 11, ratified and implemented by law No. 296 of 28 August 1997), Parliament took steps to improve the mechanisms designed to ensure compliance with the judgments of the European Court (Article 1 of law No. 12 of 9 January 2006), including through legislation aimed to ensure that all state authorities cooperate in an effort to avoid sanctionable breaches (Article 1(1217) of law No. 296 of 27 December 2006). Finally, from an organisational point of view, the activity reserved to the President of the Council of Ministers has recently been subject to regulation, providing that the action necessary pursuant to judgments of the Strasbourg Court be overseen by a Department of that office (Decree of the President of the Council of Ministers of 1 February 2007 –

Measures for the implementation of law No. 12 of 9 January 2006, containing provisions relating to judgments of the European Court of Human Rights).

6.2. – Therefore, in the light of the overall regulation provided for in the Convention, as well as the case law of this court, Article 117(1) of the Constitution must be examined and systematically interpreted as a parameter in relation to which the compatibility of the contested provision with Article 1 of the Additional Protocol to the ECHR, as interpreted by the Strasbourg Court, is to be assessed.

It is immediately clear that there was a gap prior to the replacement of the said provision by Article 2 of constitutional law No. 3 of 18 October 2001 (Amendments to Title V of Part II of the Constitution), since the conformity of ordinary legislation with the provisions of public international treaty law was open to control by this court only subject to the limits and in the cases mentioned above in paragraph 6.1. The consequence was that breaches by national legislation of international law obligations contained in treaty law not contemplated by Article 10 and Article 11 of the Constitution entailed the unconstitutionality of the same only in relation to the direct violation of constitutional law (judgment No. 223 of 1996). And this occurred despite one of the characteristic aspects of the legal order founded on the Constitution, consisting of a strong tendency to respect international law and more generally external sources of law, including those referred to in the provisions of private international law; and despite the express relevance of the breach of international law covered by other specific constitutional principles. Moreover, such violations of duties under international law cannot be sufficiently circumvented by the mere tool of interpretation, whilst, as mentioned above, recourse to the "non application" as occurs under Community law is not a possibility for the provisions of the ECHR.

There is therefore no doubt, in the light of the overall framework of constitutional law and the jurisprudence of this court, that the new wording of Article 117(1) of the Constitution has filled a gap and that, in line with the constitutions of other European states, is related to the framework of principles which already expressly guaranteed front-line respect for specific international law obligations taken on by the state, regardless of its systematic incorporation into the Constitution.

This, it must be stressed, does not mean that Article 117(1) of the Constitution can be used to grant constitutional status to the rules contained in international agreements and

implemented by ordinary legislation, as is the case for the ECHR. The constitutional principle at issue entails in fact a duty on Parliament to respect the said rules when enacting ordinary legislation, with the result that any national provision incompatible with the ECHR and thus with the "international law obligations" mentioned in Article 117(1) *ipso facto* violates this constitutional principle. Article 117(1) ultimately created a flexible reference to treaty provisions which may from time to time be relevant, giving life and substantive content to those international law obligations generically evoked and through them to the underlying principle, such as to be commonly classified as "interposed provisions"; and which is in turn, as will be discussed below, subject to an examination of its compatibility with the Convention.

It follows that it is a matter for ordinary courts to interpret national law in accordance with the international law in question, subject to the limits imposed by the literal wording of the provisions. Where this is not possible, or where the court doubts the compatibility of the national law with the 'interposed' Convention provision, it must seize this court with a corresponding question concerning its constitutionality in the light of Article 117(1), as was correctly done by the referring courts in this case.

Moreover, regarding the ECHR it is necessary to give consideration to its special nature compared to the general status of international agreements, which entails its passing beyond the context of a simple body of reciprocal rights and duties of the signatory states. The latter have created a system for the uniform protection of fundamental rights. The application and interpretation of the system of rules is naturally a matter in the first instance for the courts of the member states, which are the ordinary courts in relation to Convention law. Definitive uniformity in application is on the other hand guaranteed by the centralised interpretation of the ECHR attributed to the European Court of Human Rights in Strasbourg, which has the last word and the jurisdiction of which "shall extend to all cases concerning the interpretation and application of the Convention and the protocols thereto which are referred to it subject to the conditions provided for" therein (Article 32(1) ECHR). The member states however have significantly retained the ability to make reservations in relation to particular provisions on ratification, as well as the right to subsequent derogation, such that in the absence of one or the other the total and conscious acceptance of the system and its implications is clear. As far as these characteristics of the Convention are

concerned, the relevance of the latter, as interpreted by “its own” courts, in relation to national law is certainly different compared to that of the general body of international agreements, the interpretation of which remains a matter for the contracting parties, with the exception, in cases of disagreement, of the resolution of the dispute through negotiation or arbitration or in any case a negotiated conciliation mechanism.

This court and the Strasbourg Court ultimately fulfil different roles, even though both share the same objective of protecting as effectively as possible the fundamental rights of man. The interpretation of the Rome Convention and of the Protocols is a matter for the Strasbourg Court, which only guarantees the application of a uniform level of protection throughout the member states. Where a question is raised over the constitutionality of a national provision in the light of Article 117(1) of the Constitution due to a breach – insurmountable through interpretation – of one or more ECHR provisions, this court is on the other hand charged with ascertaining the breach and, where one is found to exist, verifying whether the provisions of the ECHR, as interpreted by the Strasbourg Court, guarantee a protection of fundamental rights that is at least equivalent to the level guaranteed by the Italian Constitution. This does not entail calling into question the interpretation of the ECHR by the Strasbourg Court, as the tax authorities in the case before the court unjustifiably argue, but of verifying the compatibility of the ECHR provisions, as interpreted by the court specifically charged with this task by the member states, with the relevant constitutional provisions. In this way, a correct balance is struck between the need to guarantee respect for international obligations required by the Constitution and to prevent this also resulting in a breach of the Constitution itself.

7. - In the light of the systematic reading of Article 117(1) of the Constitution followed by the referring courts, it is important to recognise the statutory and case law development of the figure of reverse accession, the object of the contested provision.

Originally (law No. 2359 of 25 June 1865 on “Expropriations in the public interest”), the law provided for temporary occupation (Articles 64 and 70), without any transfer of ownership; urgent occupation (Article 71 and 73), initially foreseen in connection to natural disasters, was then generalised to cases of occupation for the completion of projects declared urgent by the Superior Council for Public Works. In practice however, the figure of urgent occupation has become a normal step in the expropriation

procedure, so much so that public works have often been carried out on land occupied using urgency procedures, on the basis of a previous declaration of public interest, which was not however followed by any valid expropriation proceedings.

Such cases are covered by the figure of so-called “reverse accession”, originally developed in case law and enshrined by judgment No. 1464 of 1983 of the Joined Sections of the Court of Cassation, confirmed on various occasions over the following years. In particular, concerning the presumption of the unlawfulness of the occupation in the absence of concluded expropriation proceedings, the implementation of a public works project and the impossibility for ownership in the property constructed to coexist with different ownership in the land, the joined sections confirmed the original acquisition by the public authorities following and in accordance with the effects of the irreversible transformation of the property. The Court of Cassation reached this conclusion by carrying out the balancing of interests which is also contained in the provisions governing accession (Article 934 et seq of the Civil Code) and which in the case before it resulted in the finding that the reasons of the public authorities prevailed insofar as carried out in the public interest. The impact of this judgment in pecuniary terms, however, was to affirm the right of the owner not to compensation for expropriation, but to compensation for harm caused by tort, equivalent at least to the real value of the property, with a five-year prescription period from the moment of the irreversible transformation of the property.

Subsequent judgments of the Court of Cassation substantially confirmed, albeit with some minor variation (for example the time limits for prescription), the main points of the 1983 judgment: a transfer to the state authorities of ownership in the property and compensation of damages corresponding to its market value. The logic behind this principle has been guided above all by its civil law aspect as regards the change in ownership in the property, driven by the requirement of legal certainty, whilst the principle of liability under tort remained clear and there can hence be no alternative to redress for the harm caused, corresponding to the real value of the property accompanied by any ancillary amounts due.

7.1 – Over the following years, Parliament has not always maintained in ordinary legislation the pecuniary effects described above of reverse accession. Insofar as

relevant in the present proceedings, the findings of this court on this point must be remembered.

Initially, Article 3 of law No. 458 of 27 October 1988 provided an express statutory basis for the figure developed through case law of reverse accession, albeit with reference to a specific type of public works project; it also confirmed the principle of complete compensation for the harm suffered by the owner of the property, limiting itself to regulating cases where the expropriation order was declared unlawful by a judgment which had become definitive. Having been called upon to consider the question of the constitutionality of that provision in the light of Article 42(1) and (2) of the Constitution, this court declared the question to be unfounded, holding, significantly, that "in carrying out a complete and adequate assessment of the interests at issue, [Parliament] did not [thereby] limit itself to awarding 'compensation', but provided for complete compensation for the harm suffered", with the result that "the failure to act on a claim for restitution, due to overriding requirements in the public interest, results in protection through compensation (Article 2043 of the Civil Code), guaranteed in its entirety" (judgment No. 384 of 1990; the arguments were repeated in order No. 542 of 1990). The court then declared the same provision mentioned above to be illegitimate, insofar as it did not extend also to cases in which expropriation procedures were not concluded at all, upholding the principle of complete compensation for harm (judgment 486 of 1991). Judgment No. 188 of 1995 reiterated that this legislation was in fact "consistent with the illegitimate aspect of such cases", and resulted in a "right to damages and not to compensation".

Subsequently, Parliament provided in Article 5-*bis* of law No. 549 of 28 December 1995 for the equiparation of redress for damages caused by reverse accession and compensation for expropriation. In judgment No. 369 of 1996, this court contested this equiparation in the light of Article 3 of the Constitution, emphasising that, "whilst the compensation measure – an obligation *ex lege* for lawful acts – constitutes the point of equilibrium between the public interest in the completion of the project and the interest of the private individual in conserving the property, the quantum of damages – an obligation *ex delicto* – must strike a different balance between the public interest in the maintenance of the project already carried out and the reaction of the legal system, uphold the rule of law which was breached through the unlawful manipulation-

destruction of the private property". Therefore, the judgment continues "according to the principle of inherent reasonableness (pursuant to Article 3 of the Constitution), since in cases of reverse accession the public interest is already essentially satisfied by the fact that the property cannot be restored and by the conservation of the public works project, the equiparation of the quantum of damages with the amount of compensation presents itself as an extra factor which excessively tilts the scales between the conflicting public and private interests excessively in favour of the former. This is not to speak of the further negative impacts, well highlighted by the various referring courts, which such a 'privilege' in favour of the state authorities can entail, also regarding the proper conduct and lawfulness of administrative activity and the principle of the liability of state employees for damages caused to private individuals". Finally, according to the above judgment, the "loss of the guarantee of the right to property flowing from so weak a response by the legal system to the unlawful act carried out in breach of it", also violated Article 42(2) of the Constitution.

The case law of this court therefore enunciates the principle that reverse accession "amounts to a mode of acquiring property [...] justified by a balance between the public interest (the conservation of the public works project) and private interests (reparation of the detriment suffered by the owner) the 'constitutional' correctness of which is further" supported "by its presentation, in the final analysis, as a concrete manifestation of the social role of property" (judgment No. 188 of 1995, recalling judgment No. 384 of 1990). However, since the public interest is already essentially satisfied by the non-restorability of the property and the conservation of the public works project, the liquidation of damages cannot disregard the requirement of adequate compensatory protection which, given the way in which that concept has been understood in the case law of the Court of Cassation, entailed the liquidation of the damage caused by the loss of property rights through payment of a sum equal to the venal value of the property, with adjustment for eventual reductions in purchasing power up until the date on which it is liquidated.

Subsequently, Article 3(65) of law No. 662 of 1996 introduced into Article 5-*bis* of decree-law No. 333 of 1992 sub-section 7-*bis*, which had provided that in the event of illegitimate occupation of lands in the public interest prior to 30 September 1996, "the compensation criteria contained in sub-section 1" apply to the liquidation of damages

(i.e. that provided for in relation to the expropriation of building land: the average of the market value and the revalued cadastral value, reduced by 40 percent), abolishing that reduction and specifying that "in such cases compensation is in addition increased by 10 percent".

The issue of the amount payable as liquidation of damages was examined with particular reference to the provision mentioned above in judgment No. 148 of 1999, which it is important to assess in the correct manner. The court found that the complaints concerning – as far as is relevant for our present purposes – Articles 3 and 42 of the Constitution were unfounded, essentially in view of the lack of constitutional support for the rule of comprehensive reparation for damages and the equivalence of the same to the detriment caused, the "exceptional nature of the case" justified "above all by the temporary nature of the contested provision", as well as the need to safeguard an unavoidable and temporally limited measure for the recovery of the public finances.

The compatibility with Article 42 of the Constitution of compensation (significantly) lower than the real value of the property was definitively confirmed in the 1999 judgment above all with reference to a principle which was different from that raised before this court. Moreover, the court reached that conclusion essentially on the basis of the temporary nature of the legislation, as well as short-term financial requirements. Again, judgment No. 24 of 2000 emphasises the temporary nature.

8. – Having specified the legislative and jurisprudential context to the provision contested before this court, it is now necessary to examine the complaint which argues, for the first time, that the provision in question breaches Article 117(1) of the Constitution, insofar as in contrast with international treaty law and, in particular, with Article 1 of the Additional Protocol to the ECHR, as interpreted by the European Court of Human Rights.

On this issue, it must be pointed out that neither referral order raises the problem of the compatibility of the figure of reverse accession as such with the aforementioned Article 1, but rather question the contested provision exclusively regarding its regulation of the pecuniary effects. Accordingly, the *thema decidendum* of the question of constitutionality is only the issue of the compatibility of such pecuniary effects governed by the contested provision with the Convention, which requires that consideration be given to the relevant judgments of the European Court in Strasbourg.

Article 1 of the Additional Protocol provides: “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law”.

The European Court has interpreted this provision in numerous judgments, mentioned in detail and extensively cited in the referral order of the Court of Cassation, giving rise to a now consolidated line of case law, upheld by the *Grande Chambre* of the Court (on all points, see *Grande Chambre*, judgment of 29 March 2006 in the *Scordino* case, which also contained a complete reconstruction of the reasoning confirmed in the judgment), which has also developed in proceedings involving ordinary legislation concerning compensation for expropriation as provided for in the aforementioned Article 5-*bis* (more more detailed argumentation, see judgment No. 348 of the same date).

In summary, as far as the amount of compensation is concerned, the case law of the European Court is now consistent in asserting that, pursuant to the Convention, “a measure which constitutes an interference in private property rights must be ‘fairly balanced’ with the requirements of the general interest of the community and the mandatory requirement to safeguard the fundamental rights of the person”. Accordingly, the said norm does not guarantee in all cases the right of the expropriated party to complete compensation, since “legitimate objectives in the public interest, such as those pursued by measures for economic reform or social justice, may justify redress lower than the actual commercial value”. By contrast, precisely when discussing the provisions contained in the aforementioned Article 5-*bis* of the law before the court, the European Court found that, where the case concerns a “distinct expropriation which was neither carried out as part of a process of economic, social or political reform nor linked to any other particular circumstances”, there is “no legitimate aim in the ‘public interest’ which can justify compensation lower than the market value”, going on to find that, in order to preclude any breach of the Convention provision, it is therefore necessary to “remove all obstacles to the award of compensation bearing a reasonable relation to the value of the expropriated property” (judgment of 29 March 2006, *Scordino*).

Moreover, turning specifically to the regulation of reverse accession, the European Court in the first place reiterated the finding that the interference of the state in cases of expropriation must always occur respecting the "fair balance" between the requirements of the general interest and the requirement to safeguard the fundamental rights of the individual (*Sporrong and Lönnroth v. Sweden*, judgment of 23 September 1982, paragraph 69). In addition, addressing the issue of the specific issue of the adequacy of the legislation challenged before this court, the European Court found that the liquidation of damages for reverse accession at a level higher than that applicable for compensation for expropriation, but by a negligible percentage, did not necessary preclude the violation of the right to property as guaranteed under the Convention (*inter multos*, 1st Section, Judgment of 23 February 2006, *Immobiliare Cerro s.a.s.*; 4th Section, judgment of 17 May 2005, *Scordino*; 4th Section, judgment of 17 May 2006, *Pasculli*); this moreover followed on from express findings over a significant period of time that compensation for harm must be complete and take into account inflation after the date of the unlawful measure (judgment of 7 August 1996, *Zubani*).

The balancing operation carried out in the past with other constitutional principles must now therefore be undertaken giving consideration to the relevance mentioned above of the international law obligations taken on by the state, and that is of the rule laid down in the aforementioned Article 1 of the Additional Protocol, as currently interpreted by the European Court. On this point it should again be emphasised that, in contrast to the situation for other provisions of the ECHR or of the Protocols (for example, on ratification of Protocol No. 4), there has been no reservation or derogation by Italy concerning the provision in question or the jurisdiction of the Strasbourg Court.

In conclusion, given the confirmation of the assertion in the case before the court that monetary redress which does not correspond to the real value of the property is illegitimate, the provisions governing the liquidation of damages provided for in the contested national legislation breach, in a manner insurmountable through interpretation, Article 1 of the Additional Protocol, as interpreted by the European Court; and for this particular reason also violate Article 117(1) of the Constitution.

On the other hand, the international law treaty provision, as interpreted by the European Court, does not breach the relevant norms of our Constitution.

The temporary nature of the criterion for compensation provided for in the contested provision, the short-term financial requirements which underpin it and the theoretical admissibility of a compensation rule not guided by the principle of the comprehensive nature of the compensation of harm are not sufficient to support a finding that, within the context of constitutional principles, the contested provision achieves a reasonable settlement between the respective interests, in such a way as to reduce effectively the importance of the ECHR. This is consistent with the need to guarantee the legality of administrative acts and the principle of the responsibility of public officials for harm caused to private individuals. By contrast, in the light of the relevant constitutional provisions, principally Article 42, it is not possible to avoid concluding that the fair balance between public and private interests cannot be considered to be satisfied by provisions which enable the state authorities to acquire property other than through lawful procedures and to maintain the public works project created, without at least paying complete compensation for the harm caused, corresponding to the market value of the property.

In conclusion, insofar as Article 5-*bis*(7-*bis*) of decree-law No. 333 of 1992, converted into law, with amendments, by law No. 359 of 1992, introduced by Article 3(65) of law No. 662 of 1996 does not provide for complete redress of the harm suffered as a result of reverse accession in favour of public authorities, corresponding to the value of the property occupied, it breaches the international law obligations enshrined in Article 1 of the Additional Protocol to the ECHR and for this reason violates Article 117(1) of the Constitution.

9. – The complaints concerning the additional constitutional questions and principles referred to by the referring courts are moot.

on those grounds

THE CONSTITUTIONAL COURT

hereby,

declares that Article 5-*bis*(7-*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, introduced by Article 3(65) of law No. 662 of 23

December 1996 (Measures for the rationalisation of the public finances) is unconstitutional.

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

Signed:

Franco BILE, President

Giuseppe TESAURO, Author of the Judgment

Gabriella MELATTI, Registrar

Deposited in the court registry on 24 October 2007.

The Registrar

Signed: MELATTI

Annex:
order read out in the hearing of 3 July 2007

ORDER

Whereas in the present proceedings before the Constitutional Court, interventions were made by the Council for European Justice in Human Rights (CO.GE.DU), in the person of its legal representative, and by the limited company Cappelletto Andreina, formerly Giuseppe, in the person of its legal representative, neither of whom participated in the principal proceedings.

Whereas, according to the jurisprudence of this court, only the parties in the principal proceedings may participate in proceedings before the Constitutional Court (with the exception of the President of the Council of Ministers and, for regional legislation, the President of the Regional Council), and exceptions are granted only "in favour of individuals with a qualified interest directly related to the substantive relationship at issue in the proceedings" (see on all points, the order read out in the hearing of 6 June 2006, annexed to judgment No. 279 of 2006; also order No. 251 of 2002);

whereas, accordingly, the impact upon the subjective position of the intervener cannot derive, as for all other substantive situations governed by the contested law, from the judgment of this court on the constitutionality of the law, but from the direct effect which the court's judgment produces on the substantive relationship at issue in the proceedings before the lower court (order read out in the hearing of 6 June 2006, attached to judgment No. 279 of 2006; order read out in the hearing of 21 June 2005, attached to judgment No. 345 of 2005);

whereas, in the case before the court, the CO.GE.DU., by its own admission, is not "directly affected by the legislation at issue in the proceedings before the court", but, in the light of its statutory purpose, invites this court to "provide a general and theoretical classification of the provisions" contained in the European Convention on Human Rights, with the result that it is not a holder of an interest recognised at law as being capable of suffering direct and irreparable detriment by an eventual judgment by this court upholding the constitutionality of the provision;

whereas the intervention by the limited company Cappelletto Andreina, formerly Giuseppe, is also inadmissible, there by contrast being no finding that the same is a

party to proceedings in which the contested provision must be applied, stayed pending the judgment of this court, insofar as any other solution would result in the substantive negation of the incidental nature of the constitutional court proceedings (*inter multos*, judgment No. 190 of 2006, order No. 179 of 2003).

On those grounds

THE CONSTITUTIONAL COURT

declares the interventions by the Council for European Justice in Human Rights (CO.GE.DU.) and by Cappelletto Andreina, formerly Giuseppe, s.r.l. inadmissible

Signed: Franco BILE, President