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**Property and Fundamental Rights,  
between Courts Judgements and  
Constitutional Norms**

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## **Property and Fundamental Rights, between Courts Judgements and Constitutional Norms**

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### **Abstract**

This paper concerns the evolution (of the interpretation) of constitutional rights, considering the relevance of human dignity, solidarity and equality in private law debate and, in particular, the relationships between person and economic rights on the basis of international Conventions and Declarations of rights. Recent doctrines maintain that “fundamental” means “universal”, while rights which tend to exclude, such as property, are not fundamental, since, differently from liberty rights, they don’t have any universal application (they are not referred to everybody in general). On the contrary, social rights are universal rights since they can belong to each individual, without difference of any kind. This enquire has a particular significance in Italian law, considering that the Italian Constitution regulates property and economic liberty in Part IV (“Rapporti economici”), rather than in Part I “Principi fondamentali”. This may mean a different importance of these rights in comparison to fundamental rights tout court (expressly protected by art. 2 of Italian Constitution). It’s also interesting, for example, to consider the possibility of “non pecuniary” damages that Courts acknowledge to individuals in case of injury to private property; evaluating these issues, it’s possible to investigate about the existence of a fundamental/human core in property rights. The research aims to analyse law debate concerning fundamental rights according to the concept of multi-level citizenship, considering the direct effect of constitutional norms in private law relationships.

**Key words:** Fundamental rights, Constitutions, Property, Economic Rights

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## Introduction

Individuals are at the heart of legal system both as authors and as recipients of normative precepts. As stated by the well-known aphorism of Ermogeniano *Hominum causa omne ius constitutum est*, this statement finds confirmation in art. 1 of Italian Civil code, which emphasizes, placing in opening the discipline of natural and legal persons, that individuals, both as individuals and as collective entities, are centrally located within the legal system.

Historically, the modern notion of subjectivity is a recent acquisition of legal culture: the individualist and liberal idea that all men are subjects of law, holders of rights and duties, without distinction or discrimination, is a result of the French Revolution and the Industrial Revolution.

At this historical moment, we find the genesis of fundamental rights, the rights of freedom, natural rights and the rights of folks, following the proclamation of the legal values of freedom and equality. And in fact, at the end of the 18<sup>th</sup> century, the National Constituent Assembly enacted the French *Déclaration des droits de l'homme et du citoyen* (1789) that recalled a series of “natural and unavoidable” rights, such as personal freedom, private property, personal safety, freedom of religion, communication and equality before the law. This *Déclaration* represents a fundamental step as for human rights history<sup>1</sup>.

The peculiarity of the French Declaration was to protect individual rights, referring in particular to aspects of public, state-individual relations - unlike the *Code civil* of 1804, which, despite being a direct consequence of the French Revolution, has been defined the *Code of property*<sup>2</sup>, rather than the Code of personality rights, since it doesn't offer any opportunity for a conceptual arrangement of the category of human rights. For this reason, the rights solemnly proclaimed after the French Revolution, more than real personality rights were rights of freedom *tout court* as to ensure an enfranchisement from absolutist State of the individual organization.

In Italy, the introduction of the Constitution of 1948 marks an important step as for the protection and recognition of person rights. It sets, in fact, among *Principi fondamentali* (i.e. “fundamental principles”: artt. 1-12) both the protection of inalienable rights and the demand for fulfillment of the mandatory political, economic and social duties (see art. 2 of Italian Constitution).

This document was issued after the conclusion of 2<sup>nd</sup> World War, so, it is, undoubtedly, placed in a particular historical context and, for this reason, it represents a normative reaction to the tragic events that preceded it: through the affirmation of principles like human dignity, solidarity and equality, which would lay as a guarantee against future attacks to the physical and spiritual sphere of human beings.

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<sup>1</sup>LEFEBVRE, G. (1958). *La rivoluzione francese*. Milano: Mondadori.

<sup>2</sup>DOGLIOTTI, M. (1982). *Le persone fisiche*, in *Trattato di dir. privato*. Torino: Utet.

It certainly represents an answer to the degradation and deprivation of human rights and dignity in itself considered. Thus, it introduces principles and general clauses, almost as safety valves to ensure the protection of liberty, equality and the development of human personality: it is enough to mention, again, art. 2 or art. 3 in which, after noting that substantive equality in our country still can't be said to be present, the Constitution assigns the task to the Republic to remove obstacles to make it effective<sup>1</sup>. From a global view of the Republican Constitution, it emerges, therefore, at the base of the system the values of individualism, of solidarity and as a final goal the protection and development of the individual personality, as a condition for the material and spiritual progress of society (art. 4).

### **Property and Personality in 19<sup>th</sup> Century Law Scenario**

There is a strong correlation between property rights<sup>2</sup> and the protection of human rights<sup>3</sup>. This correlation, which is now a subject of debate, historically is ascribed to the genesis of the modern concept of private property<sup>4</sup>.

The right of ownership is born with the French *Code civil* of 1804, as an expression, on an economic side, of the protection of individual liberty. Property in 19<sup>th</sup> century codifications is characterized by full and absolute protection, because of its correspondence, from an ideological point of view, to the sphere of personal freedom<sup>5</sup>.

The *Code Napoleon* realizes a removal of medieval restrictions (existing on property) according to natural law theory (postulated by the Enlightenment) and fulfils a reconstruction of property as a right formally and potentially accessible to everybody<sup>6</sup>. Article 544 of *Code Napoleon* is called the fundamental charter of individualism<sup>7</sup> (Anna De Vita states: “la Rivoluzione dell’89 significò la vittoria dell’individualismo contro la società rappresentata dal principe”<sup>8</sup> and there are a lot of quotations which, no less emphatically, affirm the historical importance of this *Code*).

In contrast to the medieval diversity of ownership rights, the name of property was recognized only to that appropriation characterized by a limitlessness of the powers of the titular: the release of property from feudal

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<sup>1</sup>MARTINES, T. (1994). *Diritto costituzionale*. Milano: Giuffrè.

<sup>2</sup>DAVIES, M. (2007). *Property. Meanings, Historiee, Theories*. New York: Routledge – Cavendish.

<sup>3</sup>VAN BANNING, T.R.G. (2001). *The Human Right to Property*. Utrecht: Intersentia.

<sup>4</sup>DAVIES, M. (2007). *Property. Meanings, Historiee, Theories*. New York: Routledge – Cavendish.

<sup>5</sup>GAZZONI, F. (1996). *Manuale di diritto privato*. Napoli: Esi.

<sup>6</sup>COCO, G.S. (1965). *Crisi ed evoluzione del diritto di proprietà*. Milano: Giuffrè.

<sup>7</sup>RODOTA', S. (1990). *Il terribile diritto. Studi sulla proprietà privata*. Bologna: il Mulino.

<sup>8</sup>DE VITA, A. (1974). *La proprietà nell'esperienza giuridica contemporanea. Analisi comparativa del diritto francese*. Milano: Giuffrè.

burdens brought out a whole structure based on the “right”, without mandatory elements.

A new absolute concept of property succeeds to the old feudal one. Property gets sacred and inviolable for Charters of rights and constitutions, the only restrictions could be of a public nature (through regulations on construction, hygiene, police) or of a private nature (concerning the relationship between the owners), but however, exceptional and not due to extension.

The limitlessness of the right of the owner corresponds essentially to different needs: on a political side, it is the result of individualistic vision of the bourgeoisie of the early 19<sup>th</sup> century. There was a tendency to protect owners from any external interference both of other individuals and of public authorities.

On the economic level, the limitlessness of power was considered instrumental to a better exploitation of ground, which was at that time the only source of wealth. The phrase of Portalis (one of the protagonists in the drafting of the *Code civil*) is well-known: “*Au citoyen appartient la propriété et au souverain l’empire*”. This affirmation expresses an agreement, a mediation: the non-interference of public authorities in the exercise of the right to property responds with a non-interference of individuals in the management of public affairs<sup>1</sup>.

With regard to this survey, we should also consider philosophical elements hidden under this construction, considering properties inherent to man and considering every limitation, a limitation of personal freedom. Thus, here we can catch a strong correlation between ownership and person in the 19<sup>th</sup> century legislation.

In the context of the liberal culture of 19<sup>th</sup> century, the sphere of personality was considered only in an indirect way according to that way of seeing, the person could realize his freedom only through property<sup>2</sup>.

From a technical point of view, personality rights were traditionally shaped on property rights and hence the logic of having, where the rights of personality relates to the category of being, shows the aporias highlighted by doctrine. The result was in fact a construction of an individual right (the right of personality) which sees the same legal entity to act as a holder and as an object of law.

It would, however, misleading to indicate the *Code civil* as indiscriminate glorification of property: the property coming out from the French Revolution is the symbol of the status of the property owner, indicating the presence of a changement, but here the owner is not the noble, but the bourgeois, who becomes wealthy no longer through hereditary succession, but with the exercise of liberal professions, the conduction of traffic, trade and industry activity. The important distinction of *Code civil* is between fair and unfair property, that is between ownerships worthy of protection and properties

<sup>1</sup>ALPA, G. (1997). *Istituzioni di diritto privato*. Torino: Utet.

<sup>2</sup>PINO, G. (2003). ‘Teorie e dottrine dei diritti della personalità. Uno studio di meta-giurisprudenza analitica’. *Materiali per una storia della cultura giuridica* 2003/1: 237-274.



destined to disappear: only the first found a legal justification, the properties of the bourgeoisie as emerging dominant class.

The Italian *Civil Code* of 1865 reflects in many way the French *Code civil*, defining in fact in articles 436 and 440 the right to property as “the right to enjoy and dispose of things in the most absolute way, as long as it is not made a use prohibited by law or regulations” and also, establishing that “the property extends to space and to that is above or below the surface”.

Even in the Italian Civil Code of 1865, as in the French one, there was a negative statement in the definition of the right to property (the only limit the owner encountered was the use prohibited by the laws and regulations). It has already been pointed out that the role of these codes was of great importance for the recognition of the value of the rights of the individual, because it was said that the absolutism of the right to property actually represented an abolition of privilege and an affirmation of the values of equality and freedom: a system of particular prerogative was replaced by a system of standardized prerogatives, i.e. rights that they were not previously insured to particular category of individuals, but declared accessible to all citizens.

### **The Shift to Italian Civil Code of 1942**

In 1942, in Italy we had a new Civil Code which, in many ways, is a reform of the traditional schemes developed by 19<sup>th</sup> century codes, but there can be found also elements of conservation, even though these elements are less than the innovative ones. This evolution emerges in a particular way in the regulation of property.

Italian law doctrine, for instance, has seen the passage of the Civil Code of 1865 to that of 1942 as a succession of two different definitions of properties: the first having the juridical status of subjective right, the second characterized by an accent on the content of the law, which focuses on what are the rights of the owner and (negatively) on the exclusion of all others from enjoying the same benefits accruing to the owner<sup>1</sup>.

The provisions of article 832 of the Civil Code of 1942 emphasizes the ambiguity of the natural right of property. If before law exalted the comforting aspect of virtual limitlessness, now it stresses the corresponding characteristic of a virtual finiteness<sup>2</sup>.

Although it is possible to find in the Civil Code in force profiles of the 19<sup>th</sup> century liberal ideology, they can't be compared to the innovations, since greater is the importance of the new conception of property and property relationships in the new Code.

And well, however, on this assumption, there is no agreement in doctrine, in fact there are some authors who tend to see the Civil Code of 1942, primarily as a code essentially conservative and repetitive content of the

<sup>1</sup>PUGLIATTI, S. (1954). *La proprietà nel nuovo diritto*. Milano: Giuffrè.

<sup>2</sup>DE VITA, A. (1974). *La proprietà nell'esperienza giuridica contemporanea. Analisi comparativa del diritto francese*. Milano: Giuffrè.

previous<sup>1</sup>. The fact that the Code defines the powers of the owner, rather than the objective definition of the property, is seen as a natural consequence of the accession to corporative conceptions (which inspired the Civil Code of 1942).

According to ALPA, in particular, it is not historically correct to rely solely on the wording of the rules in order to emphasize the differences between two proprietary models, in fact, though different in wording, the normative model of the 19<sup>th</sup> century and the Civil Code in force are not so far apart<sup>2</sup>.

Two aspects, however, for the same Author determine the difference with the 19<sup>th</sup> century model: the first is the concept of property introduced by special laws by the 1<sup>st</sup> World War, while the second finds expression only after the advent of the republican regime with the approval of the Constitution of 1948 and concerns the concept of social function.

Unlike the Civil Code of 1865 (which reflected the ideologies that ensured man a central role in the legal system), the new concepts, which form the background to the Code of 1942, have strengthened the position of the State, so that, at some point, it is also doubt that the individual had no autonomy in the social structure. Doubt that, in terms of the use of dynamic activities and assets in production, has been solved in the sense of the prevalence of economic private initiative (Dich. VII of the Charter of Labour).

Thus, there is a change of perspective in the loss of centrality of the combination of individual and property for the benefit respectively of company and work that have been placed at the center of the legal universe, probably in homage to that principle productivity that permeates the fascist Code<sup>3</sup>.

Property has always its important role; however, it is instrumental and dynamic, it works with business and private economic initiative: this also means that the company is considered, not as something which must be connected to property, but it is a different concept and entrepreneur is not always the owner<sup>4</sup>.

Italian Code of 1942, in article 832, fully recognizes the right to property, but while the Code of 1865 spoke of absoluteness, it talks of fullness: indeed, the individual is required (although protected towards State and third parties through the recognition of a right that remains full and exclusive) to observe the obligations imposed by the legal system and to respect law limits. Therefore, there is a functionalized connotation of ownership, thus we can affirm that even in Civil Code of 1942 there is the concept of social function, which is to be identified in the increase of productivity as the greater chance for the community to take advantage of private assets<sup>5</sup>.

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<sup>1</sup>ALPA, G. (1997). *Istituzioni di diritto privato*. Torino: Utet.

<sup>2</sup>*Ibidem*.

<sup>3</sup>PERLINGIERI, P. (1990). *Il diritto civile nella legalità costituzionale*. Napoli: Esi.

<sup>4</sup>*Ibidem*.

<sup>5</sup>*Ibidem*.

The concept of social function of property emerged during the preparatory law works among the various definitions of properties that were proposed. In particular art. 18 of the draft prepared by the Royal Commission stated: “The property is the right to enjoy and dispose of it in an exclusive way, in accordance with the social function of the law itself. The owner must also comply with the limits imposed by the laws and regulations and the rights of third parties on the same thing”. This definition attracted the interest of scholars and critics, it is important because it shows how the concept of social function, later introduced in the Republican Constitution, was also present to our Coders<sup>1</sup>. The project of the Royal Commission, as it is known, was not approved because it was considered more appropriate for a political program rather than for a code.

### **Economic liberties and Constitution**

In order to better define the relationship between property and person, as for Italian law, it's necessary to consider the Constitution of 1948.

For a long time, there were many logical obstacles in our legal culture for the configurability of personal rights as a conceptual category. In particular, it is with the Republican Constitution that there is a different perception of the needs and rights of the individual - in the light of the instances of “personalism” and solidarity ex art. 2 Cost. - with the progressive, parallel acquisition by doctrine of a new attention towards the non pecuniary-economic aspects in horizontal relationships.

In this perspective, we may consider the philosophy of the “depatrimonializzazione” of private law, i.e. the overall reading of private law norms in the light of Constitutional principles, which protect (not only - or even not primarily - economic but) mainly human interests.

With the Republican Constitution, indeed, the interpretation of legal precepts changes radically in a broad sense (beyond, of course, the formal consequences linked to the introduction of a rigid Constitution) with reference to the entire legal system and, particularly, with reference to the hierarchy of values, which is set to achieve a primary goal: the protection of the inviolable rights of the person.

Our Constitution states, therefore, full protection to these principles, which, however, are not limited only to the rights of man individually considered, but comprehend also the rights of intermediate communities (through which human personality develops) and social rights.

In the Italian Constitution of 1948, economic relationships are contained in a corpus of provisions containing rules and principles of conciliation between the various ideological currents. In economic relations, we find, among the others, labor, economic initiative and private property. Property is then placed in a peculiar position, it is no longer declared inviolable or sacred,

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<sup>1</sup>RODOTA', S. (1990). *Il terribile diritto. Studi sulla proprietà privata*. Bologna: il Mulino.

is not present among the “Principi fondamentali” (articles 1-12), nor between the rights of freedom, it is regulated in article 42, which contains in its four paragraphs, innovative rules in comparison to the past.

It's clear, therefore, the fact that property, as individual right, becomes different than the past, considering its location out of the framework of fundamental rights and freedoms. The secularization of property doesn't derive simplistically from its position in the economic relations rather than in the fundamental principles or rights of freedom: it derives from the content of the provisions devoted to it. From the wording of article 42 Cost., already in first instance, it is clear the intention of the Constituent Assembly to demystify private property, where the first paragraph begins by stating: “Property is public or private” and then formulating an equation that ignores a primary role to private property<sup>1</sup>.

In the second paragraph, it states: “Private property is recognized and guaranteed by law, which prescribes the manner of acquisition, enjoyment and limitations in order to ensure its social function and make it accessible to everyone”, therefore, private property is recognized and guaranteed, provided that it is ensured the social function of the concrete exercise of individual and concrete methods of implementation, corresponding to a duty to participate in the general interests (in this context, see., for example, the decision of Italian Constitutional Court, 26.4.86, n. 108). In the same sense, the Supreme Court says that the peaceful enjoyment of private property, if can also be ascribed to the implicit content of the constitutional guarantees located in articles 41 and 42 of the Constitution, represents a protection conditioned by the limits of the utility or the social function and lies, therefore, in a recession than higher-level interests (Supreme Court, 27.3.04, n. 6174).

The rule contained in art. 42 of the Constitution, paragraph 2, is indeed innovative: the owner can not enjoy his goods, if not to the extent that enjoyment is justified by a public interest and, conversely, property can always be compressed when it is socially useful<sup>2</sup>.

It is to note the way in which social function works, conforming properties: according to constitutional directives is the law which must, by limiting the right of the owner or by requiring it to do or not to do something, ensure social function and not the owner who must exercise his right to the achievement of social goals (Constitutional Court. n. 6/66, 20/67, 55 and 56/68; Constitutional Court., n. 260/76; Constitutional Court., n. 82/82; Constitutional Court., n. 344/95; Constitutional Court., n. 167/99; Constitutional Court., n. 179/99; Constitutional Court., n. 411/01; Constitutional Court., n. 148/03, Constitutional Court. n. 167/99).

In this context, there is a new significance for the connection between property and person: Italian Constitution puts as an essential goal of the system the development of human persons and property is guaranteed because it is considered the result of the transformation of nature by human

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<sup>1</sup>*Ibidem.*

<sup>2</sup>GAZZONI, F. (1996). *Manuale di diritto privato*. Napoli: Esi.

labor and it is therefore the projection of this right of freedom; in this sense, property is a kind of innate natural right and constitutes an essential element of human dignity. There is a correlation between the themes of human dignity and property, although the analysis of the evolution of the latter shows how it tends to reflect a transformation of the right, from an absolute dimension to another characterized by limitations, restrictions and obligations.

It's indicative also the comparison between the principle of solidarity present in the Civil Code and that of the Constitution of 1942, while the solidarity of the Code is linked with productivity and economic purpose, the solidarity of the Italian Constitution is linked to the protection of human dignity.

Therefore, in this perspective, not only property will be linked to social interests, but also contracts, as instruments for human realization, will have a particularly intense protection (the one contained in article 2 of the Constitution), in the sense that each contract is to be respected by *omnes*, for the principle of solidarity and collaboration present in our constitutional system (art. 2).

### **Property, Business Freedom and Fundamental Rights**

Once considered the above depicted panorama, it's easy to understand why uncertainties arise with reference to the combination of property (as well as economic initiative freedom) and human rights.

Fundamental rights, in fact, according to the interpreters, are characterized by a goal which postulates a connection with the person's values and, for this reason, in order to include economic rights in the category of fundamental rights, it must be shown that they have such connection too.

Property, in particular, finds a specific protection in international charters of rights<sup>1</sup>: first of all, the Declaration of Human Rights of 1948 provides (in article 17) for each individual the right to own property alone as well as in association with others and that no one could be arbitrarily deprived of it. In this sense, we must also quote art. 1 of the Protocol of 1952 annexed to the European Convention on Human Rights (1950)<sup>2</sup>, which states: "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".

In principle, the uncertainties (in terms of qualification of economic rights) derive from the fact that property and business freedoms refer, rather than to an intrinsic human value, to a monetary or material core and, for this reason, interpreters (but also the judges of Italian Constitutional Courts: see

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<sup>1</sup>VAN BANNING, T.R.G. (2001). *The Human Right to Property*. Utrecht: Intersentia.

<sup>2</sup>EHLERS, D. (2007). *European Fundamental Rights and Freedoms*. Berlin: De Guyters Rechtswissenschaften.

judgments n. 55 of 1968 and n. 22 of 1971), generally exclude that private property and enterprise freedom are inviolable rights in the strict sense<sup>1</sup>.

However, this does not mean that economic rights can't be considered fundamental rights in a wide sense, in particular, in light of the fact that they still represent a tool of protection of individuals against public authorities.

In this perspective, for example, we can read the provisions of the Charter of Fundamental Rights of the European Union of 2000 that puts Freedom to conduct a business (art. 16) and Right to property (art. 17)<sup>2</sup> in Chapter II devoted to Freedoms<sup>3</sup>.

The discrimen between economic and human rights can then be identified in the absolute inviolability of human rights *tout court* (see Italian Corte di Cassazione judgments: Cass., 9.03.79 n. 1463, Cass., S.U., 6.10.79 n. 5172; see also Constitutional Court., 26.07.79 n. 87 and 88; Cass., 18.11.97, n. 11432) against the possibility for public authorities to put in place measures, in the cases provided by law, which expropriate private property.

The common constitutional basis and the link to human dignity have also led to further combinations of person and property: the European Court of Human Rights has recognized the possibility of compensation for non-pecuniary damage for those who have suffered unlawful violation of the right to property (see, for example, ECHR, *Belvedere Hoteliers c. Italy and Ventura. Italy* of 30 May 2000 and *Guiso Gallisay. Italy* on 22 December 2009)<sup>4</sup>.

This approach is however not shared by Italian Supreme Court, who considers non-pecuniary damage only the lesion of interest inherent human interests and not marked by economic significance (Cass., 11.11.08, n. 26972). In the opposite direction, there is the orientation of administrative Supreme Court that, ruling on a case of illegal occupation of land for the construction of works of urbanization, recognizes the non-pecuniary damages pursuant to art. 42-bis of Presidential Decree 327/2001 (Council of State, sect. V, 2.11.2011, n. 5844).

### **Property as a Constitutional and Communitarian Right**

It's also interesting to remember a decision of Tribunal of Naples (14.02.11) as for compensation of non pecuniary damages. In this case, the judge has affirmed that depriving a home, and with it the people who live in it, of hot water and heating for a year and a half is an injury that causes a compensable non-pecuniary damage. The judge recalls a judgment of Tribunal of Florence (n. 147 of 21.01.11) which recognizes a moral protection to property. In order to protect non-pecuniary interests, the Court

<sup>1</sup>BALDASSARRE, A. (1989). *Diritti inviolabili*. Enc. giur. Trecc., XI. Roma: Treccani.

<sup>2</sup>VAN BANNING, T.R.G. (2001). *The Human Right to Property*. Utrecht: Intersentia.

<sup>3</sup>EHLERS, D. (2007). *European Fundamental Rights and Freedoms*. Berlin: De Gruyter Rechtswissenschaften.

<sup>4</sup>CONTI, R. (2012). *Diritto di proprietà e CEDU*. Padova: Exeo.

of Florence arrives at the affirmation according to which the right to property is a human right, with the consequence that becomes compensable even the illegal conduct of the third party who has compromised the utility associated to the economic use of property (in fact, home is not only a financial asset, but also a place of realization of family affection, personal recollection and so on).

Florence Court recognized a non-pecuniary damage for the violation of the right to property, falling it within the category of fundamental rights related to the individual (as interpreted in several judgments of the European Court in Strasbourg and in consideration of the relationships between domestic law and supranational law outlined by Italian Constitutional Court in the judgments n. 348 and 349 of 2007).

Although property is not an absolute right, according to the judge, it is effectively protected in the same way as a fundamental right guaranteed by the Constitution, whose restrictions must succumb to the right balance between public interest and private interest. It is not doubt that in case of violation of property exceeding a (consistent) threshold of offensiveness, the injury is worthy of protection even in a system that requires a minimum degree of tolerance according to the constitutional principle of solidarity. The florentine judge showed how to make a balance between the severity of the injury and the seriousness of damage, with the result that, if the injury is not futile, non-pecuniary damages are due only in the event that exceeded the level of tolerability under the duty of tolerance (article 2 of Italian Constitution).

The neapolitan judge follows the argumentation of the florentine judgment, but his reasoning differs as for the qualification of property: the inclusion of the protection of property within the texts devoted to fundamental rights serves to highlight how property is instrumental to the protection of freedom<sup>1</sup>: a man, according to this reasoning, can't be considered free unless he is given the opportunity to be owner, while, furthermore, the Charters of Rights, which protect property as a fundamental right, imply that any laws which deny private property would be considered outside the scope of EU law.

For this reason, it is not so much property due to protection but the right to become a owner of something, and, therefore, even more not only the right to be owner of real estate but to be holder of assets also different in nature: ownership does not necessarily coincide with property in a technical sense.

In conclusion, Naples Court considers that the prejudice to family serenity and to enjoyment of everyday life, must be counted among “the interests constitutionally protected even indirectly” through the provision by the Charter of Fundamental Rights of the European Union (art. 7).

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<sup>1</sup>See, in this sense, also VAN BANNING, T.R.G. (2001). *The Human Right to Property*. Utrecht: Intersentia.

We have so two different decisions in Naples and Florence, which, however, turn to the same results as for protection to private property in case of injury.

## Conclusion

Now, at the end of this paper we have to tackle the difficulty of a definition of economic rights, whether they can be considered fundamental rights – as international Charters maintain – or not.

It is therefore necessary to resolve the problem of the relationship between different Charters of rights (i.e. national Constitutions and international documents). This problem assumes particular importance with reference to property rights, having to ascertain how to resolve the possible conflict between the protection available ex art. 17 of the Charter of Fundamental Rights of the European Union, that laid down by the European Convention on Human Rights and that found in the Constitutions of the EU member countries<sup>1</sup>.

In this context, it's useful to consider artt. 52 and 53 of the Charter of Fundamental Rights of the European Union. The first foresees: "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection". Thus, we find a parameter that does not allow to weaken the protection afforded by the ECHR<sup>2</sup>.

On the other side, art. 53 maintains that the protection of fundamental rights of the same Charter can't be lower than that offered by ECHR.

We wonder what's the task of national judges considering this plurality of law instruments. To national Courts, it is reserved primarily the interpretation of national law, in consonance with the ECHR and EU Charter of rights, but also the task of making live these latter into domestic law, re-engaging them in the regulatory framework and this is important also considering that the European Court of Human Rights can be applied to only after recurring to national Courts (art. 12, ECHR).

Therefore, a multi-level protection of fundamental rights means interaction of several law prescriptions through a constant interaction in terms of subsidiarity between different systems, one being able to assist in the case of failure of the other. In this perspective, it's not useful to search for a hierarchy among Charters of rights, since they all together concur to a strong protection of fundamental rights. The concept of property resulting from ECHR and EU

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<sup>1</sup>For EU, see EHLERS, D. (2007). *European Fundamental Rights and Freedoms*. Berlin: De Gruyter Rechtswissenschaften.

<sup>2</sup>CONTI, R. (2012). *Diritto di proprietà e CEDU*. Padova: Exeo.



Charter of rights is a renewed fundamental right or, better said, a more humanized right (in comparison to art. 42 of Italian Constitution for example)<sup>1</sup>.

We must, in conclusion, take note that the various paths of legality, as for property, have implemented significantly the warranties of the owner, who is not only subjectively and objectively identified differently from 19<sup>th</sup> century law tradition, but also enjoys a protection both towards State and towards private parties; property has now a new form of protection, actually unthinkable until a few years ago.

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<sup>1</sup>*Ibidem.*