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*Articoli e Saggi*

# The Supranational Concept of Property in the light of the ECtHR Case Law and the Charter of Fundamental Rights of the European Union: Some Critical Remarks on Recent Developments

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## 1. *Research aim. The quest for a common supranational concept of 'property'. Introductory remarks*

This paper aims to analyse a crucial issue arising from the ECtHR's well-established case law, namely the legitimacy of a restriction on the right to the peaceful enjoyment of one's possessions enshrined in Article 1 of Protocol No. 1 to the Convention. It will then concentrate upon the relationship between Article 1 and the legal framework set out by the Charter of Fundamental Rights of the EU as the main supranational instrument specifically devoted to the protection of Human Rights at a EU level[1].

For the above purpose, the term 'property' refers exclusively to 'private property', unless stated otherwise[2].

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* Alberto Buonfino wrote paras 1 and 4, while Elisa Grillo wrote paras 2 and 3. Concluding remarks laid down in para 5 have been written jointly by the Authors.

[1] B. Rainey, E. Whicks and C. Ovey, *Jacobs, White & Ovey The European Convention of Human Rights*, 6th ed, Oxford, 2014, 496.

[2] Alternative experiences of property rights, such as, for instance and from a historical viewpoint, the Yugoslav model of 'social property' – by which State property is formally abolished, all capital assets become

Of course, to national legal scholars (at least, the ones operating in civil-law areas), the classical concept of 'property' is deeply rooted in the provisions laid down in the field of (domestic) private law[3], whereas the very idea of ownership itself in most cases stems directly from a given constitutional framework[4].

Aside from such traditional definitions of private property, the need to secure previously undetected and/or intangible forms of property – which has proven significant over the twentieth-century – has led national legal systems to provide for specific legal frameworks regarding, *inter alia,* the protection of intellectual property.

This has been – and to some extent – still is, an itinerary largely common to all national civil-law systems, whose catalogue of (human) rights has grown considerably in recent decades.

From a supranational standpoint, the protection of private property on a non-domestic basis has indeed been fraught with complexities stemming from the supranational support for human rights provided by many international instruments[5]. The influence of the intervention of a supranational stratus pertaining human rights has been twofold. On the one hand, it has broadened the scope of legal protection of certain rights while providing a substantial, highly influential contribution to emerging rights on the other, thereby widening the catalogue traditionally established within national legal orders.

The right to property makes no exception for the seminal influence exerted by these supranational standards, as a uniquely complex and rather controversial issue.

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'social property' and enterprises are granted (only) the right to use socially-owned resources, without any reference to individual property (see M. Uvalić, *Investment and Property Rights in Yugoslavia. The long transition to a market economy*, Cambridge, 1992, 60) – will not be taken into account, even though these experiences did play a significant role in undermining the conventional foundations of the right to property in the original 1950 text of the European Convention on Human Rights (ECHR).

[3] I.e., for the Italian Case, Article 832 of the Italian Civil Code; from a French perspective, see Article 544 of the Code Civil.

[4] See Article 41 of the Italian Constitution, stating that «Private property is recognised and guaranteed by the law, which prescribes the ways it is acquired, enjoyed and its limitations so as to ensure its social function and make it accessible to all». A specific legal basis as to property and inheritance rights is also to be found within the Constitutions of former socialist republics which have recently joined the EU. For instance, Art. 48 of the Croatian Constitution refers to the right of ownership, as does Art. 33 of the Slovene Constitution. Art. XIII of the Hungarian Constitution, Art. 64 of the Polish Constitution and Articles 44 and 46 of the Romanian Constitution enshrine the same rights. As to Common Law systems, it is worth noting that most Commonwealth countries include a right to property in a constitutional bill of rights (see T. Allen, *The Right to Property in Commonwealth Constitutions*, Cambridge, 2000, 1).

[5] See H. Hannum, *Reinvigorating Human Rights for the Twenty-First Century*, *Human Rights Law Review*, 2016, 6, 431 according to whom «Both critics and some supporters of the human rights movement have expressed concern over what Eric Posner terms the 'hypertrophy' of rights: «The more human rights there are, and thus the greater variety of human interests that are protected, the more that the human rights system collapses from an undifferentiated welfare-ism in which all interests must be taken seriously for the sake of the public good».

From a historical viewpoint, it was not until the aftermath of World War II that a new sensitivity to ownership as a 'fundamental right' began to emerge, as a legal scholar plainly puts it, as a «matter of universal concern»[6].

It is because of the strong emphasis placed by the post-war supranational framework upon social and economic development that, from 1945 onwards, international standards on Human Rights started to include references to private property, albeit in ways reflecting a significant – if not harsh – degree of controversy.

Early international standards containing specific provisions on property include, among others, the Universal Declaration of Human Rights (UDHR), adopted in 1948 by the UN General Assembly, Article 17 of which enshrines a comprehensive standard to protect property.

As far as the European Convention on Human Rights is concerned, it is well worth noting that, although the Council of Europe formally adopted the Convention in 1950, its original text contained no specific reference to property rights. The debate sparked in Council of Europe proceedings owing to substantial differences in each Contracting Party's view of the political, social and economic significance meant that no specific provision devoted to this issue was able to be included[7].

The right to property has been the victim of a veritable 'ideological struggle' reflecting the indented socio-political panorama of the Contracting Parties and has thus been dubbed the «problem child» (Anderson) of the supranational rights and freedoms enshrined in the ECHR[8].

The right to property was eventually covered by the Conventional text when the controversy between Eastern and Western Member States finally ended and Protocol 1 to the ECHR was approved in 1952, although the definition provided by this has been deemed inadequate and excessively weak, establishing an economic and social entitlement rather than a proper right[9].

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[6] T. Van Banning, *The Human Right to Property*, Antwerpen - Groningen - Oxford, 2001, 35.

[7] As argued by C. Rozakis, *The right to property in the Case Law of the European Court of Human Rights*, Keynote speech delivered by the Major of Athens on behalf of the Author at the Athens Property Day, 30 January 2016 (www.uipi.com): «[t]he right to property was one of the most controversial provisions in the context of discussions on the drafting of the Convention. The states that had the most objections to the inclusion of this right in the Convention were the states with socialist ideas of their governments, who doubted that the right to property was a fundamental human right. And they [the States] succeeded in not including a provision for the Property Right in the Convention».

[8] Insightfully, D. Anderson, *Compensation for Interference with Property*, *European Human Rights Law Review*, 1999, 4/VI, 543-5. The inclusion of a right to property in the Convention has led to major 'political' clashes with regard to the judicial powers related thereto. As to the UK's stance towards conventional property rights, it has been noted that «the idea that an international tribunal [the ECtHR] might have sweeping powers of review over social and economic legislation was anathema to government ministers and advisers» (see T. Allen, *Property and the Human Rights Act 1998*, Oxford, 2005, 1)

[9] See H. Mountfield, *Regulatory Expropriations in Europe: The Approach of the European Court of Human Rights*, *New York University Environmental Law Journal*, 2003, 11, 1.

This is due to the wording of the provision, which tends to strike a balance between the Eastern European legal *Weltanschauung*, grounded in socialist ideas, and the liberal social and economic beliefs held by its Western European counterpart.

The English version of Article 1 states that «Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law».

The second Paragraph provides that the preceding provisions shall not, however, «in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties».

As this provision plays a pivotal role in our analysis, it is worth pointing out that – from a literal standpoint – its wording entails significant concerns for legal operators. The legal terminology in both the official French and English versions of the Convention contain a certain degree of vagueness.

The English wording of Article 1 refers to «possessions» and to «property», whereas its French counterpart contains a reference to «biens» and «propriété».

To a certain extent, it is true that, in principle, legal translation unavoidably conveys the same degree of uncertainty as any other translation, for – as Umberto Eco claimed rather strongly – «every sensible and rigorous theory of language shows that a perfect translation is an impossible dream»[10].

This case provides both legal scholars and translators with a sound confirmation of Eco's statement.

As the Authors seek to highlight hereinafter, issues concerning property as a fundamental right within the scope of Protocol 1 of the ECHR must deal with both a linguistic translation of the term 'property' and a technical/spatial modification of it.

By linguistic translation, we mean the process of transforming the wording of Article 1 from an official language into another. By technical/spatial modification, we mean the shift of the domestic concept of property towards the common supranational structure laid down by the ECHR.

With reference to the issue of linguistic translation, even though the ECtHR's case law has constantly refrained from establishing a specific definition of either 'property' or 'possession', it has nonetheless always considered the French terms to be synonymous with the English ones and vice-versa[11].

[10] U. Eco, *Experiences in translation*, Toronto, Buffalo, London, 2001.

[11] Unlike other supranational organisations. See, for instance, the Inter-American Court of Human Rights (IACtHR) which, based on Article 21 of the Inter-American Convention on Human Rights (IACHR), has identified a sufficiently detailed definition of the term 'property'. Pursuant to the mentioned provision, «1.

With regard to the spatial modification of the term, as we will see, in the absence of a proper definition in the ECHR, ECtHR case law has been steadily promoting the identification of the «possessions» (biens) falling under the scope of Article 1, Protocol 1, thus trying (successfully) to broaden the protection of the right to property on a case-by-case basis and building «the most developed and complex jurisprudence on the protection of property in international human rights law»[12].

Legal scholars have argued that the very notion of property as a 'conventional right' protected under Article 1 owes much to the traditional definition of property as a 'vested right' laid down at the level of international law[13]. In this sense, to be covered by conventional protection, property must have already been acquired[14].

A significant (and to a considerable extent groundbreaking) innovation set forth by ECtHR is that it has moved forward the concept of 'property' or 'possession' from its traditionally agreed-upon definition of 'vested right' to an increasingly all-encompassing definition.

In so doing, the ECtHR has consequently designed an autonomous and rather broadened concept of 'law', taking it as a criterion when applying the conventional right to property enshrined in paras 1 and 2 of Article 1[15].

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Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law. 3. Usury and any other form of exploitation of man by man shall be prohibited by law». Building on this legal basis, the Court has ruled that «[p]roperty can be defined as those material things which can be possessed, as well as any right which may be part of a person's patrimony; that concept includes all movables and immovables, corporal and incorporal elements and any other intangible object capable of having value» (see *The Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua* (Judgment) Inter-American Court of Human Rights, Series C no. 79 (31 August 2001), at para 144. See also U. Kriebaum, C. Schreuer, *The Concept of Property in Human Rights Law and International Investment Law*, in Breitenmoser, *Human Rights, Democracy and the Rule of Law, Liber amicorum Luzius Wildhaber*, Zürich - Baden Baden, 2007, 743-762.

[12] S. López Escarcena, *Interference with Property under European Human Rights Law*, *Leuven Centre for Global Governance Studies, Working Paper No. 63* - May 2011.

[13] See for instance, PCIJ, 12 December 1934, Series A/B No. 63, at para 88.

[14] L. Sermet, *The European Convention on Human Rights and property rights*, Human rights files, No. 11 rev, Council of Europe Publishing, 1999, 11.

[15] According to ECtHR's case-law, Art. 1, Protocol 1 entails three 'rules'. In *Sporrong and Lönnroth v Sweden* Application No. 7151/75 and No. 7152/75, 23 September 1982, at para 61, the Court has stated that «Article (P1-1) comprises three distinct rules. The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognises that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph. The Court must determine, before considering whether the first rule was complied with, whether the last two are applicable». This reasoning «has been repeated time and time again in the Court's subsequent judgments» (see M. Carss-Frisk, *A guide to the implementation of Article 1 of Protocol No. 1 to the European Convention on Human Rights*, Council of Europe, 2001-2003, 21). The mentioned rules have been very recently applied in *G.I.E.M. S.r.l. and o. v Italy*, 28 June 2018, at para 289.

Again, from a literal perspective, the mentioned provisions refer to «conditions provided for by law» (para 1) as well as to the need to ensure that «the preceding provisions shall not […] in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property». As a result, a fairly accurate definition of what should be intended as 'law' according to the conventional wording seems of paramount importance. The meaning of the term 'law' will thus be discussed in para 2.

Inasmuch as a continental/European perspective is concerned, the protection of the right to property shall not overlook the judicial interpretation of the 'four freedoms' set forth by the European Court of Justice (ECJ) based on the conventional provision laid down in Article 1.

In fact, the approach of the ECJ to the right to the peaceful enjoyment of one's possessions offers a hint of the different rationale characterising ECtHR case law as opposed to the judicial interpretation of a comparable EU right.

The widened scope of the EU system with respect to the protection of supranational fundamental freedoms, following the entry into force of the Lisbon Treaty, has involved an in-depth legal enforcement of the core individual rights laid down in the Charter of Fundamental Rights.

ECtHR's quest for a broadened definition of property will be the focus of para 3, whereas the ECJ's own perspective will be evaluated in para 4.

We will then move on – in para 5 – to suggest some conclusive remarks on the status of the right to property from a supranational perspective, taking into account both the ECHR and the EU legal frameworks, weighing their similarities, examining their differences, before finally looking at the mutual influence each system exerts on the other.

## 2. *The conventional meaning of 'law'*

The pivotal role of an accurate definition of the term 'law' in any discourse on conventional rights becomes self-evident to legal operators wishing to cope with the ECHR system or to grasp (as is the case here) the peculiar meaning of the right to property.

It is in fact pursuant to the Conventional concept of 'law' that the Court interprets the notion of the right to property as laid down in Article 1 of Protocol 1. The need for a commonly understood concept is the foundation of the ECtHR's assessment of whether one's property or possession has an adequate legal basis under national law, thus enabling the applicant to claim legal protection under Article 1 of Protocol 1[16].

[16] See *Kopecký v Slovakia*, 28 September 2004 at para 48.

When determining that the subject of the applicant's claim is legitimate pursuant to a conventional viewpoint, the Court considers whether the restriction of the fundamental right should be deemed lawful.

For instance, an expropriation measure is considered legitimate if it fulfils the following three conditions (as stated in the mentioned Article 1, second paragraph): (i) it is carried out 'subject to the conditions provided for by law', without any arbitrary action on the part of the national authorities, (ii) it is implemented 'in the public interest' and (iii) it strikes a fair balance between the owner's rights, on the one part, and the interests of the community, on the other[17].

The term 'law' used by the ECtHR is broadly defined, seeking to encompass the different sources of law existing in the various national systems. To this end, the Court conceives the principle of legality in such a way as to take into account the common elements, which constitute the core of 'law' under national legal frameworks[18].

In carrying out its scrutiny, the Court should primarily assess the case based on the national sources of law applicable in the Contracting State concerned. At the same time, the ECtHR should equally verify whether the applicable national law meets the quality requirements defined by the Convention[19]: this sort of crosscheck is necessary in order to ensure the effectiveness of the review by the ECtHR, in light of the principle of legality as interpreted by the Court itself.

The Court assessment on the existence of an adequate legal basis takes into account both «written or unwritten law» (for example, the national case-law) and involves qualitative requirements, notably those of accessibility and foreseeability[20] of the relevant provision applied.

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[17] See *Akhverdiyev v Azerbaijan*, 29 January 2015 at para 81. The scrutiny regarding the 'fair balance' clause has proved to be particularly dense in terms of the general principles involved. As it is stated in the case-law, «[i]n so determining, the Court recognises that the State enjoys a wide margin of appreciation with regard to the means to be employed and to the question of whether the consequences are justified in the general interest for the purpose of achieving the objective pursued» (*Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, at para 149; Most recently, with reference to the proportionality of confiscation measures, *G.I.E.M. S.r.l. and o. v Italy*, 28 June 2018, at para 292. The proportionality assessment needed to ensure the 'fair balance' rule should be carried out taking into account the means employed and the aim pursued (see *Jahn and o. v Germany*, 30 June 2005 at paras 83-95). This fair balance will be upset in case the person concerned has to bear an individual and excessive burden (see *Sporrong and Lönnroth*, cit., paras 69-74, and *Maggio and o. v Italy*, 31 May 2011 at para 57).

[18] Moreover, the pivotal role of the meaning of 'law' is duly recognised by the ECtHR itself when it refers to the 'rule of law' as one of the fundamental principles of a democratic society being «inherent in all the Articles of the Convention» (see *Amuur v France*, 25 June 1996 at para 50 and *Iatridis v. Greece*, 25 March 1999 at para 58).

[19] G. Lautenbach, *The concept of the rule of law and the European Court of Human Rights*, Oxford, 2013, 122.

[20] «[law] should be accessible to the person concerned and foreseeable as to its effects (see, among other authorities, *VgT Verein gegen Tierfabriken*, cited above, § 52; *Rotaru v Romania* [GC], at 52, ECHR 2000-V; Gawęda v Poland, at 39, ECHR 2002-II; and *Maestri v Italy* [GC], at 30, ECHR 2004-I)». See *Centro Europa 7 S.R.L. and Di Stefano v Italy*, 7 June 2012, at para 140.

Thus, the ECtHR does not necessarily require a 'law' (i.e.: a specific provision) to be either of a constitutional, primary or secondary level of the hierarchical order of the rules, nor to be drafted by a specific authority or to imply a certain application[21].

According to the Court's established case law the following can theoretically qualify as law in a conventional perspective: statutes, enactments of lower rank[22] such as regulations[23], codes of ethics, international provisions, as well as administrative acts and internal documents and circulars.

Such a broad interpretation of the meaning of 'law' also applies to cases arising from both common law and civil law legal orders[24]. However, Contracting States are free to define the 'minimum requirements' of a 'law' under their national system.

For example, the ECtHR might consider that a circular or a given administrative practice[25] shall be interpreted as 'law' within the conventional horizons of meaning in cases in which a national Court has made reference to that act or practice in its rulings. However, circulars are commonly defined[26] as documents provided by government departments «on behalf of ministers, setting out policies, principles, and practices for the exercise of ministerial powers delegated to public officials». In most cases, this means that circulars provide mere administrative guidelines and, consequently, have no legal effect. However, in some other cases, legal effects could be recognised depending on the interpretation of the legislation in terms of which it was issued[27]. Only when a specific circular has legal effect it is subject to judicial review as law[28].

In some civil law systems, such as in Italy, administrative circulars are not considered as sources of law, as they usually serve to steer the national authorities towards a certain application of a given legal provision. Consequently, national judges generally consider them mere internal 'behavioral' indicators to evaluate whether or not the public administration has acted reasonably.

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[21] G. Lautenbach, *The concept of the rule of law*, cit., 82.

[22] See *Kafkaris v Cyprus*, 12 February 2008, at para 139.

[23] See *Barthold v Germany*, 25 March 1985, at para 46.

[24] J.F. Renucci, *Article 9 of the European Convention on Human Rights: Freedom of Thought, Conscience and Religion*, Council of Europe, 2005, 44: «the concept of "law" is construed broadly by European judges: it is taken to mean all existing law, whether statues, regulations and case-law, including international conventions applying in the domestic system».

[25] See Georgia v Russia, 3 July 2014, at para 122.

[26] See (2009-01-01). government circulars. *Oxford Reference*. Retrieved 27 Apr. 2018, from http://www.oxfordreference.com/view/10.1093/oi/authority.20110803095901899.

[27] In these terms *Patchett v. Leathem* [1949] 65 TLR; *Gillick v West Norfolk* and *Wisbech Area Health Auhority* [1986] 1 AC 112 (HL).

[28] A. McHarg, *Administrative discretion, administrative rule-making and judicial review, Current Legal Problems*, Volume 70, Issue 1, Oxford, 2017, 267, spec. para *Regulating Administrative Rule-Making*.

It follows from the foregoing that, even when national judges refer to internal circulars in their decisions, the ECtHR should not consider them as an adequate legal basis justifying the restriction of a fundamental right, as they lack the necessary national requirements to be acknowledged as a 'source of law'.

Notwithstanding this, it is common knowledge that – in some cases – the Court has ruled otherwise, including circulars within the broad scope of its definition of law[29].

This broad interpretation has been deemed necessary, since, as an Author puts it, it is vital not to exaggerate the distinction between common-law countries and continental systems: the "law" must therefore be understood in its substantive and not-formal sense[30].

However, it is apparent, from a domestic standpoint, that acts lacking the essential requirements to qualify as sources of law according to a given national legal order should not be defined as such by the ECtHR, as these acts are not sufficiently predictable[31], which should be deemed a fundamental requirement of any 'constitutional' legal basis.

Moreover, these cases raise also questions on the remaining policy freedom that national States should have, according to the ECHR, in regulating the use or exercise of property. In fact, if national States lose their capacity for defining exactly which are the legal acts that should or should not affect the right to property (though in its broader meaning), they lose the core of the (much debated) "margin of appreciation" traditionally recognised by the ECtHR[32].With reference to this, it should also be noted that the margin of appreciation has been defined «as the measure of discretion allowed to the Member States in the manner in which they implement the Convention standards, taking into account their own particular national circumstances and conditions»[33].

This means that, even if the ECtHR has determined that a right can be restricted by a norm that has not necessarily been codified or legislatively enact-

[29] See *Vereinigung Demokratischer Soldaten Österreichs and Gubi v Austria*, 19 December 1994 at para 31. See also *Kruslin v France*, 24 April 1990 at para 29 and *Frerot v France*, 12 June 2007, at para 40. Contrarily, in *Silver and o. v Uk*, 25 March 1983, at para 87 the Commission held that «the Standing Orders and Circular Instructions which the British Home Secretary issues to prison governors failed the accessibility test since they were not published, were not available to prisoners, nor were their contents explained in cell cards».

[30] J.F. Renucci, *Article 9 of the European Convention on Human Rights: Freedom of Thought, Conscience and Religion*, cit., 45.

[31] G. Lautenbach, *The concept of the rule of law*, cit., 84.

[32] See Handyside v. United Kingdom, 7 December 1976, at paras 47-48.

[33] Y. Arai-Takahashi, *The defensibility of the margin of appreciation doctrine in the ECHR: value-pluralism in the European integration*, in *Revue Européenne de Droit Public*, 2001, 1162 ss. See also R.ST.J. Macdonald, *The margin of appreciation in the jurisprudence of the European Court of Human Rights*, in *Collected Courses of the Academy of European Law*, 1992, 95 ss. who states that «the doctrine of margin of appreciation illustrates the general approach of the European Court of Human Rights to the delicate task of balancing the sovereignty of Contracting Parties with their obligations under the Convention».

ed and should not be strictly identified with either a statute or an act of the legislature[34], the national States should still be able to exclude an administrative act from their "sources of law".

It follows from the above that a certain level of discretion should be granted to domestic authorities in choosing the source of law where the restriction/regulation of rights could be established. The European Convention allows plural and different sources of law as valid norms as to the restriction of rights, but this range of flexibility should be considered with caution, since it is capable to interfere with the different and coexisting traditions of European legal systems[35].

## 3. *The definition of property under the ECHR legal framework: A case-by-case approach*

It is widely acknowledged that, in recent decades, the ECtHR's case-by-case approach has widened the meaning of the right to property, meaning not only the ownership of movables or land[36], but basically all other acquired rights are to be secured in a conventional perspective.

The Court generally states that the concept of 'possessions' referred to in the first Paragraph of Article 1 of Protocol No. 1 has an autonomous meaning[37], which is fully independent from the formal classification given within domestic law[38].

This category usually includes cases concerning retirement benefits rights, immovable property or other goods such as rights arising from the relationship between private individuals, such as shares[39] or bank account deposits, as well as

[34] P. Contreras, *National Discretion and International Deference in the Restriction of Human Rights: A Comparison Between the Jurisprudence of the European and the Inter-American Court of Human Rights*, in *11 Nw. J. Int'l Hum. Rts*. 2012, 28-29.

[35] S. Greer, *The margin of appreciation: interpretation and discretion under the European Convention of human rights*, *Council of Europe*, 2000, 16 and P. Contreras, *National Discretion and International Deference in the Restriction of Human Rights: A Comparison Between the Jurisprudence of the European and the Inter-American Court of Human Rights*, cit., 40.

[36] Recently in *G.I.E.M. S.r.l. and Others v. Italy*, 28 june 2018, paras 276-304.

[37] U. Kriebaum, C. Schreurer, *The Concept of Property in Human Rights Law and International Investment Law*, in *Human Rights, Democracy and the Rule of Law*, Liber Amicorum Luzius Wildhaber, 2007, 5-10.

[38] Recently for e.g. in *O'Sullivan McCarthy Mussel Development Ltd v. Ireland*, 7 June 2018, para 85 ss. where the Court statues that «the concept of "possession" within the meaning of Article 1 of Protocol No. 1 has an autonomous meaning which is not limited to ownership of material goods and is independent from the formal classification in domestic law: certain other rights and interests constituting assets can also be regarded as "property rights", and thus as "possessions" for the purposes of this provision (see, among many authorities, *Brosset-Triboulet and Others v. France* [GC], no. 34078/02, § 65, 29 March 2010)».

[39] E.g. in *Industrial Financial Consortium Investment Metallurgical Union v. Ukraine*, 26 June 2018, para 169 ss.

rights deriving from public law relationships[40] or patents and intellectual property in general (i.e. copyrights, etc.).

However, ECtHR's case law has moved even further, to include under the scope of protection of Article 1 to Protocol 1 ECHR claims or expectations, as the prospects of a future gain.

If they are legitimate, in the sense that they are founded in an adequate legal basis under national law, these expectations enable the applicant to claim legal protection under Article 1[41].

In order to single out these expectations from mere 'hopes' of no conventional value, the Court asserts that conventional protection applies only to a person's existing possessions. Thus, future income cannot be considered to constitute a 'possession' unless it has already been earned or is definitely payable.

The Court has stated that «the hope that a long-extinguished property right may be revived cannot be regarded as a "possession"; nor can a conditional claim which has lapsed as a result of a failure to fulfil the condition»[42].

In some cases, 'legitimate expectation' may involve situations in which the persons concerned are entitled to rely on the fact that a specific legal act will not be retrospectively invalidated to their detriment[43]. Such legal acts can consist of,

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[40] See, for example *Osovska and Others v. Ukraine*, 28 June 2018, about a debt arising from a judicial decision, which is considered by the Court as a possession protected under art. 1 Prot. 1. But also the refusal to issue a building permit has been retained under art. 1 Prot. 1 in KIPS DOO and *Drekalović v. Montenegro*, 26 June 2018, para 127-137, (specifically para 131) where the Court states that the refusal to issue a building permit must be regarded as an interference with the applicants' right to the peaceful enjoyment of its property.

[41] L. Sermet, *The European Convention on Human Rights and property rights*, cit., 14, especially where the Author highlights that «the fact that legitimate expectations are now protected, on certain conditions, as property, and that the Convention bodies have no hesitation in defining claims as property, underlines the autonomous nature of the concept and illustrates the way in which it has been broadened».

[42] See *Bélàneé Nagy v Hungary*, Grand Chamber Application No. 53080/13, 13 December 2016, at para 2. The case concerned a woman who was granted a disability pension. Many years later, pursuant to a modification of the method of determining the level of disability, but apparently without any substantial change in her health, her entitlement to this pension was withdrawn. During the years thereafter, her condition was assessed as being insufficiently serious for retrieving the pension (2010). Then, in 2012, a new law entered into force, replacing the disability pension with a disability allowance and introducing additional eligibility criteria and Ms Béláné Nagy submitted a request for this allowance and her health condition was now considered to meet the requisite level for entitlement. However, as she had not been in receipt of a disability pension on 2011 and had not accumulated the requisite number of days covered by social security required by the new law, she did not obtain the benefit. The Court recognized that even States have a certain margin of appreciation in regulating citizens' access to disability benefits, they cannot deprive entitlements of 'their very essence'. See also *Centro Europa 7 S.r.l. e Di Stefano v Italy*, 7 June 2012, at para 172.

[43] *Noreikienė and Noreika v Lithuania*, 24 November 2015, at para 36. In this case the local authorities assigned a plot of land to Ms Noreikienė and Mr Noreika. Some years later, the county administration authorised Ms Noreikienė to purchase the land for a nominal price and many, about ten years later, she signed a land purchase agreement and the plot was subsequently registered in the Land Registry in the couple's joint name. However, a third party brought a civil claim seeking restoration of his ownership rights to the land arguing that he had already submitted request for restitution of property and, as such, the land had been assigned and later sold to the applicants unlawfully. The plots in question were thus returned to the state and the applicants were

for instance, a contract, an administrative decision granting an advantage or recognising a right[44], or a judicial decision[45].

In such cases, the 'legitimate expectation' is based on a reasonably justified reliance on a legal act, which has a sound legal basis and affects property rights[46].

Following this line of reasoning, the withdrawal of a license to carry out business activities was recognised as a legitimate expectation protected under Art. 1 of Protocol No. 1[47] ; in the same sense, a temporary prohibition concerning mussel seed fishing that deprived the applicant company of the use of its various licences was deemed as interfering with the peaceful enjoyment of property rights. In that case, the Court[48] confirmed that these administrative acts gave rise to a legitimate expectation of effectively enjoying the rights associated with ownership. The licences were therefore to be regarded as 'possessions' protected under Art. 1 of Protocol No. 1 and, as a consequence, the termination of a valid

awarded the equivalent. The Supreme Court refused to hear the applicants' appeal, holding that the appeals did not raise any important legal issues. The ECHR found a violation of art. 1 of Protocol No. 1, retaining that the applicants had a «legitimate expectation» of being able to continue to enjoy that possession because they were bona fide owners and their expectation was based on a reasonably justified reliance on administrative decisions which have a sound legal basis and bear on property rights.

[44] Such as in *Hasani v Croatia*, 30 September 2010, at para 20, where a legislative amendment was enacted stating that working mothers no longer had the right to maternity leave and maternity allowance until the child's third year, but only for the child's first year. Pursuant to that amendment, the administrative body terminated the applicant's right to maternity leave and maternity allowance, but the Court noted that thus decision interfered with the applicant's previously established right to receive maternity allowance, as property right generated by the first administrative decision providing the applicant with an enforceable claim for maternity allowance.

[45] See *Gratzinger and Gratzingerova v Czech Republic*, 10 July 2002, at para 73, and *Velikoda v Ukraine*, 3 June 2014, at para 20.

[46] L. Sermet, *The European Convention on Human Rights and property rights*, cit., 17 concludes that «In other words, Article 1 may be considered to protect three categories of property: acquired property; property falling under the head of legitimate expectation, because sufficiently established; and property resulting from rights to restitution».

[47] The Court considers the interests associated with exploiting the licence as property interests attracting the protection of Article 1 of Protocol No. 1 also in *Tre Traktörer AB v Sweden*, 7 July 1989, at para 53; *Capital Bank AD v Bulgaria*, 24 November 2005, at para 130; *Rosenzweig and Bonded Warehouses Ltd v Poland*, 28 July 2005, at para 49; *Bimer S.A. v Moldova*, 10 July 2007, at para 49.

[48] See in *O'Sullivan McCarthy Mussel Development Ltd v. Ireland*, cit., spec. para 87, where the Court refers to the survey of its relevant case-law set out in *Malik v. the United Kingdom*, 13 March 2012, para 91-94. In this case, concerning the grants of licences or permits to carry out a business, the Court has indicated that the revocation or withdrawal of a permit or licence interfered with the applicants' right to the peaceful enjoyment of their possessions, including the economic interests connected with the underlying business. In this regard, the Court observed in particular in Tre Traktörer AB case (cited above, note n. 41) that the maintenance of the licence was one of the principal conditions for the carrying on of the applicant company's business, and that its withdrawal had adverse effects on the goodwill and value of the restaurant (at paras 43 and 53 of the Court's judgment). For some previous judgments, see *Fredin v. Sweden* (no. 1), 18 February 1991, § 40, Series A no. 192, with reference to an exploitation permit for a gravel pit; and, *mutatis mutandis*, see also *Rosenzweig and Bonded Warehouses Ltd. v. Poland*, § 49, 28 July 2005, which involved a licence to run a bonded warehouse.

licence to run a business amounted to an interference with the right to the peaceful enjoyment of possessions[49].

Similar considerations could be found also in another recent judicial decision concerning the prolonged delay on the part of the municipal authorities to comply with a final judgment ordering them to initiate a privatisation procedure by offering to sell a floor of a shopping centre to an applicant who was previously the tenant[50].

In this case, the Court stated that the applicant had been deprived for a long time of an opportunity to buy the property under preferential conditions and potentially develop a commercial activity in it.

Moreover, these expectations are legitimate in the Court's case law if national law provides for a sufficient legal basis for the interest, which means «for example where there is settled case-law of the domestic courts confirming its existence», whereas no legitimate expectation can be said to exist where there is a dispute as to the correct interpretation and application of domestic law and the applicant's submissions are subsequently rejected by the national courts[51].

According to this reasoning, the ECtHR found a legitimate expectation in relation to the deprivation of the pension entitlements for a period of work, which was (unlawfully) not deemed as being under a permanent contract[52].

A number of doctors filed an application before Italian administrative Courts to obtain recognition of the existence of a permanent employment relationship between them and the University for the purpose of securing the corresponding social security entitlement, as other doctors in the same positions had done previously.

While the Administrative Court of First Instance recognised their right, the Council of State subsequently ruled in favour of the appealing University based on a judicial revirement.

The original applicants of first instance thus complained that their judicial application had failed to satisfy the conditions of admissibility because of the change in the approach of the Courts.

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[49] In the aforementioned case *O'Sullivan McCarthy Mussel Development Ltd v. Ireland*, cit. (para 88) the Court observed that Article 1 of Protocol No. 1 applies even where the license in question is not actually withdrawn, but considered to have been deprived of its substance (as well as in cases *Centro Europa 7 S.r.l.* and *Di Stefano v. Italy,* 7 June 2012, 177-178).

[50] *Velkova v Bulgaria*, 13 July 2017, at para 61.

[51] *Bélàneé Nagy v Hungary*, Grand Chamber, 13 December 2016, at para 10; *Centro Europa 7 S.r.l. e Di Stefano v Italy*, cit., at para 173. But more recently see also *Radomilja and Others v. Croatia*, 20 March 2018, at para 142, where the Court confirmed that «where a proprietary interest is in the nature of a claim, it may be regarded as an "asset" only if there is a sufficient basis for that interest in national law (*for example, where there is settled case-law of the domestic courts confirming it*), that is, when the claim is sufficiently established as to be enforceable».

[52] *Mottola and Others v Italy*, 4 February 2014, at paras 40-45; *Staibano and Others v Italy*, 4 February 2014, at paras 40-45.

It is worth noting that, in this case, the right under Article 1 of Protocol 1 had been indirectly violated because of the change in the approach of the Courts as regards the conditions of admissibility of the claim; this had triggered an autonomous violation of Article 6 ECHR, which prevented the applicants from obtaining access to the court and, consequently, from securing recognition for their claim.

By stating that the applicants were entitled of a legitimate expectation the Court adopted a far stricter approach to the principle of legality, because it recognised a possession protected under Article 1 Prot. 1 as violated by the national judgment, even though those claims had never been involved in that judgment. In fact, according to the procedural administrative code, the judges would have been unable to examine the merit of the applicants' claims, as they were inadmissible. Moreover, because the Contracting State concerned was Italy, a civil law country, it sounds even more groundbreaking to settle the existence of a legitimate expectation on the basis of the previous national case-law from similar cases.

In another recent case the ECtHR held that the transfer to State ownership, without compensation, of a fishing valley located in the Venice lagoon used by a company, was in breach of the Conventional right to property[53].

This case concerned a declaration to the effect that a part of the Venice lagoon, which the applicant Company had purchased and had been using for fish farming, was part of to the public maritime domain.

In this case, the ECtHR found a legitimate expectation even though – under domestic law – the applicant's claim arose from a contract, which was declared void by national Courts.

In fact, the applicant could find its legitimate expectation in the practice of granting individuals title to the fishing valleys and tolerating their continued occupation and use; the company acted as the owner without the authorities ever having taken action[54].

Unfortunately, from a domestic perspective, this is difficult to understand, as finding the adequate national legal basis under the applicant's claim that – in this case – was based on an invalid title is extremely difficult. Once more, it could be argued the Court's need to fully exploit the ECHR, by seeking a legal basis that could be sufficient to support the position brought before the ECtHR itself; however, it has to be noted that these reasonings could undermine the predicted foreseeability of the law on which human rights are based.

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[53] See *Valle Pierimpiè Società Agricola S.p.a v Italy*, 23 September 2014, at paras 46-51.

[54] Accordingly, the Court held that the incorporation of *Valle Pierimpiè* into the public maritime domain constituted an interference with the applicant's right to the peaceful enjoyment of its possessions amounting to a 'deprivation' of property for the purposes of the Convention.

This conclusion, in addition, would seem to match with some recent judgements pronounced by the Court[55], reiterating that the Court's power to review compliance with domestic law, especially when «the case turns upon difficult questions of interpretation of domestic law», is limited «unless the interpretation of the national courts is arbitrary or manifestly unreasonable»[56]. Otherwise, the Court's role is confined to ascertaining whether the effects of that interpretation are compatible with the Convention and this statement implies that it cannot be said that an applicant has a sufficiently established claim amounting to an "asset" for the purposes of Article 1 of Protocol No. 1, «where there is a dispute as to the correct interpretation and application of domestic law» and «where the question whether or not he or she complied with the statutory requirements is to be determined in judicial proceedings»[57].

It is in the first place for the national authorities to interpret and apply domestic law, «even in those fields where the Convention "incorporates" the rules of that law». That was true in a case where a national court excluded – due to procedural reasons[58] – the existence of the requirements for acquiring ownership by adverse possession because of the passing of a certain uninterrupted period of time[59]; that should be true as well in cases in which the national courts establish or declare as null and void the legal title of property.

Unluckily, in the end, ECtHR's case law does not seem to be assessed on this position; for instance, in another recent judgment the Court[60] recognised that,

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[55] *Radomilja and Others v. Croatia*, cit., para 144, but also in *Christian Baptist Church v. Poland*, 5 April 2018, where the applicant church claimed to be a legal successor of the previous owner but its instance was rejected since it lacked the necessary feature authorizing it to claim property. The applicant claimed that it was a legislative amendment of the relevant law which had played a decisive role in the dismissal of its request, but the national court stated that the applicant could not be granted property because it did not fulfill the basic legal requirement laid down in the relevant provisions and in a previous case concerning identical circumstances the Constitutional court added that the legislative amendment had not significantly changed the situation of the complainant since it lacked the necessary feature authorising it to claim property both before and after the amendment.(para 70).

[56] *Radomilja and Others v. Croatia*, cit., at para 149.

[57] *Radomilja and Others v. Croatia*, cit. 148; *Čakarević v. Croatia*, 26 April 2018, at 48.

[58] In *Radomilja and Others v. Croatia*, cit. at para 83 it was explained that the domestic courts had «in line with the applicants' submissions», dealt only with the question of the duration of the applicants` adverse possession and not with the issue – then emphasized before the Grand Chamber – whether a certain period (between 1941 and 1991) should have been included in the calculation.

[59] But also in *Christian Baptist Church v. Poland*, cit., at para 69 the Court stated that no «legitimate expectation can be said to arise where there is a dispute as to the correct interpretation and application of domestic law and the applicant's submissions are subsequently rejected by the national courts» and rejected the claims as a consequence.

[60] In *Čakarević v. Croatia*, 28 Aprile 2018, at 55-57, the Court stated that the grant of the benefit in question depended on various statutory conditions, the assessment of which was the sole responsibility of the social security authority. In particular, to the Court, an individual should be entitled to rely on the validity of a final (or otherwise enforceable) administrative decision in his or her favour, and on the implementing measures already taken pursuant to it, provided that neither the beneficiary nor anyone on his or her behalf has contri-

although domestic courts found that (as a matter of domestic law) the applicant had no protection against the authorities' reclaim of the funds already received – which according to them constituted unjust enrichment – «several circumstances» permitted to recognise the applicant's legal position as protected by a 'legitimate expectation' for the purposes of the application of Article 1 of Protocol No. 1.

Those circumstances were, synthetically, the *bona fide* of the applicant, the exclusive responsibility of the public authority on the decision, the 'questionable' retroactive effect of the administrative act and «the lapse of time [that] justifies concluding that the individual's interest in the *status quo* had become vested in a sufficiently established manner for being recognised as capable of engaging the application of Article 1 of Protocol No. 1». These cases raise significant doubts on the compatibility of certain legal systems, like the Italian legal framework, with the Convention, since (in the Italian legal system) in case an illegitimate administrative decision granting economic benefits is adopted, it must be annulled (*ex tunc*) because, otherwise, it means a possible cause of liability for damage to the treasury for public officials.

## 4. *The assessment of the breach of property rights according to the ECFR and its judicial applications*

As previously noted (*supra*, para 1), the review of legality carried out by the ECtHR with respect to Article 1, Protocol 1 to the Convention offers a hint of the different rationale that characterises the ECtHR's case law as opposed to the judicial interpretation of the 'four freedoms' set forth by the ECJ based on this Conventional provision.

As far as the protection of human rights is concerned, a whole set of rules aimed at protecting essential individual rights is also enshrined within the legal framework set forth in the EU Charter of Fundamental Rights (ECFR), «solemnly proclaimed» at Nice in 2000, even though the legal consequences arising from the relationship between the two different regulatory legal instruments (ECHR and the ECFR itself) are controversial.

It is apparent that the issue at stake is one of particular relevance when discussing the scope and characteristic features of the 'rule of law' from a supranational perspective, as the implementation of two separate, parallel legal systems may influence judicial interpretation or even, in some cases, lead to complica-

buted to such a decision having been wrongly made or wrongly implemented. Moreover, the Court stated that «while an administrative decision may be subject to revocation for the future (*ex nunc*), an expectation that it should not be called into question retrospectively (*ex tunc*) should usually be recognised as being legitimate, at least unless there are weighty reasons to the contrary in the general interest or in the interest of third parties».

tions deriving from the fact that legal orders similarly devoted to the enforcement of human rights (or economic freedoms related thereto) are naturally – if not legally – interconnected.

Legal scholars have long struggled to reach consensus on the scope and role of the ECFR and the rights conferred therein, since its solemn proclamation did leave many unsolved issues with respect to the binding nature of the ECFR, as opposed to the fully enforceable rights and principles laid down in the (then) EU and EC Treaties.

Following the entry into force of the Lisbon Treaty, stating *inter alia* that «the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union […] which shall have the same legal value as the Treaties» (Article 6, TEU), the landscape of European Union's primary law has changed quite radically.

In fact, the introduction of the rights enshrined in the ECFR entails that fundamental rights have to be considered on an equal footing with the traditional market-oriented liberties set out in the amended primary legislation (TEU, TFEU).

As the Lisbon Treaty acknowledges that the ECFR has the same legal value of the Treaties, the question regarding the latter's relationship with the rights and principles laid down by the Council of Europe – now equally recognised as a substantive part of the EU's institutional and legal *acquis* according to Article 6, para 3, TEU – becomes central to any account of ECHR's activities.

As we will see, this is even more important in the case of the right to property, as art. 345 TFEU maintains very clearly that «[t]he Treaties [i.e. EU primary legislation] shall in no way prejudice the rules in Member States governing the system of property ownership».

By stating that 'the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law', placing «the individual at the heart of its activities»[61], the ECFR very clearly establishes a legal framework regarding the protection of fundamental rights that may somehow overlap, to a certain literal extent, with the legal landscape set forth by the Council of Europe's conventional system.

From a strictly political perspective, any discourse on the introduction of fundamental rights provisions in the European supranational system cannot avoid that the implementation of the Charter reveals itself to be part of the «often slippery notion of European Constitutionalism»[62]; in this sense, its meaning has to be reviewed taking into account the widely recognised shift towards the enhance-

[61] See the Preamble to the EU Charter of Fundamental Rights.

[62] G. De Búrca, J.B. Aschenbrenner, *European Constitutionalism and the Charter*, in Peers, Ward (eds), *The European Union Charter of Fundamental Rights*, Oxford, 2004, 3.

ment of a more definite and finally settled constitutional framework of the EU, even though the outcomes that have followed the unsuccessful attempt, in 2004, to create a European constitution have proven out unsatisfactory in this respect[63].

At any rate, a broader viewpoint on the significant political developments of the '90s, on the basis of which the ECFR was drafted, allows the commentators to situate it in a very peculiar legal context: in fact, by the '90s, the traditional economic implications of the EC Treaty had begun to be considered as acquired, while the emerging pressure for a steady democratic legitimisation of the EU system as a political framework (which ultimately led to the mentioned constitutional failure) entailed a decisive makeover of its basic principles.

In other words, it may be said that the constitutional process creating the basis for the implementation of the fundamental guarantees enshrined in the EU Charter is a part of a much wider quest for fundamental rights. The same political trend that had previously made it possible – for instance, within the UN legal order, as well as within the framework laid down by the Council of Europe – to identify a series of core rights imbued with «immense iconographic significance»[64] common to many domestic and supranational legal systems[65].

Aside from its ideal (or ideological) implications, the implementation of the Charter from a strictly legal perspective has traditionally entailed significant systematic problems, since the enforcement of guarantees enshrined therein had to be secured at a supranational level, taking into consideration that the Nice Proclamation was originally considered by many as a mere behavioral model for Member States and European institutional bodies.

In its original pre-2009 form, the ECFR established a symbolic framework of commitments to self-regulation, essentially providing a set of soft-law rules to be applied to both public parties and private individuals.

In fact, the fundamental rights landscape set out in the Charter was considered to have no autonomous or legally binding effect before the aforesaid entry into force of the Lisbon Treaty. This ultimately introduced radical changes in the EU Institutions' attitude towards the rights and commitments agreed to in 2000, as well as to their effective implementation within the supranational legal order.

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[63] Prominent legal scholars acknowledged that «[a]mong the profound changes in the European Union which the Constitution would have wrought, it would have introduced far-reaching new arrangements for the protection of fundamental rights». See F. G. Jacobs, *The impact of European Union's accession to the European Convention on Human Rights* in P. Stöbener, I. Pernice, J. Kokott and C. Saunders, *ECLN Conference Berlin 2005: the future of the European judicial system in a comparative perspective*, Baden Baden, 2006, 291.

[64] See T.K. Hervey, J. Kenner, *Economic and Social Rights under the EU Charter of Fundamental Rights - A legal perspective*, Oxford, 2003, 4.

[65] See the 1948 UN Universal Declaration of Human Rights, whose Preamble bears striking similarities to the ECFR's ideal background. See also Harris, O' Boyle, Bates and Buckley, *Law of the European Convention on Human Rights*, Oxford, 2014, 5.

Such a strengthened approach to fundamental rights has consequently led the EU to broaden the scope of traditional market-based freedoms in the light of the essential guarantees set forth in the Charter, suggesting a general shift from a mere economic-based Union to the idea of a political entity which is legally entitled to promote the enhancement of human rights[66].

Though the final outcome of the EU legal system is, in many ways, consistent with the said top-priority political need to provide for a clear response to the alleged lack of democratic representation within the European Union, it is fraught with systematic shortcomings with respect to the implementation of a supranational case law harmoniously convergent with the judicial activities traditionally carried out by the ECtHR.

The different approaches adopted by the Council of Europe on the one hand, and by the EU legal order on the other, may be assessed using the right to property as an example of the systematic disparities of these two regulatory frameworks pertaining to fundamental freedoms.

As far as the right to property is concerned, the relevant provision laid down in Article 17 of the ECFR states that: «[e]veryone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions»[67]. Furthermore, pursuant to such provision, «no one may be deprived of his or her possessions, except in the

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[66] See S. de Vries, *EU and ECHR:* 'Conflict or Harmony?', in *Utrecht Law Review,* 2013, 9 at 78, «Although fundamental rights had already been discovered and recognized by the ECJ as general principles of Community law as long ago as the 1960s with cases like Stauder and International Handelsgesellschaft,1 it is the Lisbon Treaty that brings the expansion of the protection of fundamental rights at the level of the European Union to a climax». Nonetheless, the present situation regarding the relationship between the two Courts seems to be quite complicated also at a national level: as T. Lock puts it, «[a]s long as the EC itself is not a member to the Convention, the Convention rights have only got an indirect influence on the scope of fundamental rights in the European Community so that the Community itself cannot be held responsible for possible infringements of these rights. The Member States, however, are bound by both: Community law and the ECHR. This means that when implementing Community law, the Member States must generally comply with the ECHR». See T. Lock, *The EJC and the ECtHR: the Future Relationship between the Two European Courts*, in *The Law & Practice of International Courts and Tribunals* 2009, 8, 376-377.

[67] Again, the definition of 'what is property', thus falling under the Charter's scope, is fraught with complexities. For instance, as to television broadcasting, the ECJ has stated that «In those circumstances, the question arises as to whether the guarantees provided in Article 17(1) of the Charter extend to audiovisual broadcasting rights acquired contractually. The protection granted by that article does not apply to mere commercial interests or opportunities, the uncertainties of which are part of the very essence of economic activity (Joined Cases C-120/06 P and C-121/06 P *FIAMM and Others* v *Council and Commission* [2008] ECR I-6513, paragraph 185 and the case-law cited), but applies to rights with an asset value creating an established legal position under the legal system, enabling the holder to exercise those rights autonomously and for his benefit». The Court's final assessment is that «in the light of that European Union legislation, which the Member States are required to transpose into their respective national laws, a contractual clause, such as the one at issue in the main proceedings, cannot confer an established legal position on a broadcaster, protected by Article 17(1) of the Charter, enabling it to exercise its broadcasting right autonomously, […], in the sense that it could demand compensation exceeding the additional costs directly incurred in providing access to the signal, contrary to the mandatory provisions of Directive 2007/65» (see ECJ, case C-283/11, *Sky Österreich v. Österreichischer Rundfunk*, 22 January 2013, paras 34 and 38). Following the same reasoning, the protection of property does not

public interest and in the cases and under the conditions provided for by law», subject to fair compensation being paid in good time for the loss[68]. The use of property may be regulated by law «in so far as is necessary for the general interest». Pursuant to Article 17, para 2, «[i]ntellectual property shall be protected»[69].

From a literal standpoint, it is apparent that the above definition bears many remarkably striking similarities to the concept set forth by Article 1, para 1 of Protocol 1 to the ECHR[70].

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cover the obligation to repay unduly paid (state) aids, as pinpointed by the ECJ (see ECJ, case C-273/15, *ZS 'Ezernieki' v. Lauku atbalsta dienests*, 26 May 2016, para 47).

[68] In this sense, the ECJ has pointed out that the right to a fair compensation is enshrined in the ECFR, regardless of what is specified within the relevant pieces of EU secondary legislation. It follows from the above that even in case the applicable legal framework does not explicitly provide for it, the compensation shall not be automatically excluded. See ECJ, joined cases C-78/16 e C-79/16, *Pesce and Serinelli v. Italy*, 9 June 2016, para 86.

[69] See, for instance, ECJ, case C-427/15, *New Wave CZ, a.s. v. ALLTOYS spol. s r.o.*, 18 January 2017: «it must be recalled that the right of information provided for in Article 8(1) of Directive 2004/48 [on the enforcement of intellectual property rights] is a specific expression of the fundamental right to an effective remedy guaranteed in Article 47 of the Charter of Fundamental Rights of the European Union and thereby ensures the effective exercise of the fundamental right to property, which includes the intellectual property right protected in Article 17(2) of the Charter (see, to that effect, judgment of 16 July 2015, *Coty Germany*, C-580/13, EU:C:2015:485, paragraph 29)». See also ECJ, C-160/15, *GS Media BV*, 8 September 2016, para 32: «the harmonisation effected by it is to maintain, in particular in the electronic environment, a fair balance between, on one hand, the interests of copyright holders and related rights in protecting their intellectual property rights, safeguarded by Article 17(2) of the Charter of Fundamental Rights of the European Union ('the Charter') and, on the other, the protection of the interests and fundamental rights of users of protected objects, in particular their freedom of expression and of information, safeguarded by Article 11 of the Charter, and of the general interest». As to the fundamental rights status of intellectual property as an 'economic right' whose definition and scope are not clearly set out in the Charter, it is worth noting that intellectual property rights are likely to be overruled by classical property rights in the process of balancing fundamental rights. See P. Torremans, 'Art. 17(2), in S. Peers, T. K. Hervey, J. Kenner and A. Ward, *The EU Charter of Fundamental Rights*, Oxford, 2014, 503. See also P. Torremans, Intellectual Property and Human Rights, Wolters Kluwer, 2008 and C. Geiger, *Intellectual Property Shall be Protected!? Article 17(2) of the Charter of Fundamental Rights of the European Union: a Mysterious Provision with an Unclear Scope,* in *European Intellectual Property Review,* 2009, 115. The uncertainty of the 'intention and effects' of such provision are highlighted by J. Griffiths, L. McDonagh, *Fundamental rights and European IP law - the case of art 17(2) of the EU Charter*, in C. Geiger, *Constructing European Intellectual Property Achievements and New Perspectives*, 2013, Edward Elgar Publishing, 75-93. From a supranational standpoint, it is interesting to point out that intellectual property as a fundamental right lacks a thorough definition: a more specific reference to intellectual property rights than the one discussed in the present essay, once more in a mere 'economic' sense (and in an infra-state framework), is included within Art. 66 of the revised Treaty of Chaguaramas establishing the Caribbean Community including the CARICOM Single Market and Economy (entered into force in 2006).

[70] Which provides the following: «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». Among the said similarities, it is worth noting that both the ECHR system and the ECFR framework (through the respective judicial bodies) refer to the principle of proportionality as the keystone of a correct balancing process between the general interest and the position of the addressee. Namely, the ECJ has applied a proportionality test with reference to 'property' rights, based the status of proportionality as a general principle of EU Law: for instance, in case of imminent risk of financial losses and the ensuing instability of the banking system within the EU-area «measures providing in particular for the taking over, by a domestic bank, of the insured deposits of another domestic bank, for the conversion of uninsured deposits of the first bank into shares with full voting and dividend rights and for the temporary freezing of another part of those uninsured deposits do not constitute a disproportion-

A number of relevant differences may nonetheless be highlighted, since a reference to «the general principles of international law» is found only within the conventional system, whereas the concepts of 'public interest' laid down in the Convention and that of 'general interest' referred to in the legal order set out by the ECFR (see Article 17, para 2) seem to imply that these two frameworks might guarantee a different degree of protection for that same right to property[71]. Moreover, the reference made by the Charter to 'fair compensation' does not find any corresponding entitlement to compensation within the conventional system.

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ate and intolerable interference impairing the very substance of the depositors' right to property. Consequently, they cannot be regarded as unjustified restrictions on that right guaranteed by Article 17(1) of the Charter of Fundamental Rights of the European Union» (see ECJ, Joined Cases C-8/15 P to C-10/15 P, *Ledra Advertising Ltd and Others v. European Commission and European Central Bank (ECB)*, 20 September 2016, para 71-73 and 75). The weighing of the right enshrined in Art. 17 ECFR and environmental protection, «it should be noted that, in accordance with Article 52(1) of the Charter, rights guaranteed under the Charter may be subject to certain limitations, as long as they are provided for by law, respect the essence of those rights and freedoms, are necessary and genuinely meet objectives of general interest recognised by the European Union» (EJC, C-442/14,23 November 2016 paras 98 and 100). The same is to be said with reference to foreign and security policies: «il y a lieu de rappeler que le droit de propriété fait partie des principes généraux du droit de l'Union et se trouve consacré par l'article 17 de la charte des droits fondamentaux (voir arrêt du 13 septembre 2013, Makhlouf/Conseil, T-383/11, EU:T:2013:431, point 96 et jurisprudence citée). Cependant, selon une jurisprudence constante, ce droit fondamental ne jouit pas, en droit de l'Union, d'une protection absolue, mais doit être pris en considération par rapport à sa fonction dans la société. Par conséquent, des restrictions peuvent être apportées à l'usage de ce droit, à condition que ces restrictions répondent effectivement à des objectifs d'intérêt général poursuivis par l'Union et ne constituent pas, au regard du but poursuivi, une intervention démesurée et intolérable qui porterait atteinte à la substance même du droit ainsi garanti (voir arrêt du 13 septembre 2013, Makhlouf/Conseil, T-383/11, EU:T:2013:431, point 97 et jurisprudence citée)» (EGC, T-154/15, 26 October 2016 paras 18 and 19). Referring to information society issues and the freedom to conduct a business, the ECJ has stated very clearly that «[w]here several fundamental rights protected under EU law are at stake, it is for the national authorities or courts concerned to ensure that a fair balance is struck between those rights (see, to that effect, judgment of 29 January 2008, Promusicae, C-275/06, EU:C:2008:54, paragraphs 68 and 70)» (ECJ, C-484/14, *Mc Fadden v. Sony Music*, 15 September 2016, para 83).

As indicated (*supra*, para 2), the use of a proportionality test is not at all unknown within the ECtHR's judicial reasoning. In the case *Depalle v France* Application No. 34044/02, 29 March 2010 para 83, the Court – based on its established 'fair balance' case-law, states that «[a]ccording to well-established case-law, the second paragraph of Article 1 of Protocol No. 1 is to be read in the light of the principle enunciated in the first sentence. Consequently, an interference must achieve a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The search for this balance is reflected in the structure of Article 1 of Protocol No. 1 as a whole, and therefore also in the second paragraph thereof: there must be a reasonable relationship of proportionality between the means employed and the aim pursued. In determining whether this requirement is met, the Court recognises that the State enjoys a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question (see *Chassagnou and Others v. France* [GC], § 75, ECHR 1999-III). The requisite balance will not be achieved if the person concerned has had to bear an individual and excessive burden».

[71] With reference to the proportionality test, it is not clear whether the ECtHR's assessment must be carried out taking necessarily into account the criteria traditionally set out by the ECJ (i.e. adequacy, necessity [least restrictive means] and proportionality *stricto sensu*). Problems arising from the application of the principle to fundamental rights issues are discussed in J. Cianciardo, *The Principle of Proportionality: The Challenges of Human Rights*, Journal of Civil Law Studies, 3, 2010, 181-186.

Unfortunately, the differences between the two legal instruments are not limited to the definition of the 'right to property', since a wide range of rights find legal protection under the two supranational schemes.

The EU is well aware of the need to create an organised systematic framework concerning the competencies to be recognised to the ECHR legal scheme. To this end, the ECFR provides for a specific provision, which aims to set out a competency threshold to the application of the rights conferred by the EU system itself.

Pursuant to Article 53, para 3, «[i]n 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 included in the said Convention. This provision shall not prevent Union law providing protection that is more extensive.

This means that a restriction of a fundamental right that is also protected within the ECHR can only be justified if that restriction would also be permissible under the ECHR, even though the EU may widen the rights conferred upon the citizens by providing a 'more extensive protection'.

As far as a convergent interpretation of the two supranational legal frameworks is concerned, this expression may be unsatisfactory, as it does not make any reference to the relationship between the EU system and ECtHR case-law[72].

A general assumption that ECtHR case law has to be considered a binding instrument for the implementation of EU protected rights may also be questionable, given the ECJ's competencies as established by the EU primary legislation, as the ECJ is not primarily a human rights organisation.

As to the Treaties themselves, Article 6, para 1, TEU, unmistakably sets forth that «[t]he provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties».

With reference to the Charter's contribution to the protection of the right to property, a recent judgment issued by the ECJ states that «whilst Article 345 TFEU, […] expresses the principle that the Treaties are neutral in relation to the rules in Member States governing the system of property ownership, that arti-

[72] According to T. Lock, *The EJC and the ECtHR: the Future Relationship between the Two European Courts*, cit., 384, «on the one hand, it is unlikely that the drafters of Article 52(3) wanted a mere reference to the 50-year-old text of the ECHR, especially considering that the ECHR has for a long time been dynamically interpreted as a "living instrument" by the ECtHR and thus been rendered a great deal more precisely. On the other hand, if one were to accept that the case law of the ECtHR will bind the interpreters of the Charter; this would mean that every further step in the development of human rights protection by the ECtHR would automatically become part of EU law». It is worth mentioning that the EJC case law as well as the phrasing of the EU Charter do refer to the ECtHR, even though they do not, for the time being, set forth a specific framework on the interpretation of EU case law with reference to the ECtHR judicial approach. See, for instance, ECJ, Joined Cases C-8/15 P to C-10/15 P, *Ledra Advertising Ltd and Others v. European Commission and European Central Bank (ECB)*, 20 September 2016, para 47, cit., where the ECJ makes a specific reference to property rights as guaranteed by Art. 1 of Protocol No. 1.

cle does not, however, mean that rules governing the system of property ownership current in the Member States are not subject to the fundamental rules of the FEU Treaty (judgment of 22 October 2013, Essent and Others, C-105/12 to C-107/12, EU:C:2013:677, paragraphs 29 and 36 and the case-law cited, and Opinion 2/15 (Free Trade Agreement with Singapore) of 16 May 2017, EU:C:2017:376, paragraph 107)».

Thus, following the Court's reasoning, «although Article 345 TFEU does not call into question the Member States' right to establish a system for the acquisition of immovable property which lays down specific measures applying to transactions […], such a system remains subject *inter alia* to the rule of non-discrimination, and to the rules relating to freedom of establishment and free movement of capital (see, to that effect, judgment of 23 September 2003, Ospelt and Schlössle Weissenberg, C-452/01, EU:C:2003:493, paragraph 24 and the case-law cited)»[73].

Nonetheless, the above-mentioned system laid down by the EU legal order does indeed entail many elusive or ambiguous consequences as to its scope (i.e. its interactions with national legal frameworks), and its relationship with the ECHR, given the foreseen upcoming accession of the EU to the Conventional guarantees established by the ECHR[74].

As it has been argued, 'a comparison between these different legal areas reveals that, although the questions that are dealt with by the ECtHR and the ECJ are often very similar, the approach of the two courts may still differ to a considerable extent'[75]. It therefore remains to be seen whether this traditionally variable approach may lead to a clash of jurisdictions with respect to the protection of the fundamental rights enshrined in the ECHR.

In fact, the wording of the rights laid down in the two instruments is not always the same, «nor are the rights protected therein identical»[76]. With reference to the guarantees established by the ECFR, it should be noted that the vast majority of the rights is overwhelmingly of constitutional nature, whereas other provisions tend to strengthen – as stated in the Preamble – more traditional guarantees such as 'free movement of persons, goods, services and capital, and the freedom of establishment'. It is of note that, by ensuring the 'four freedoms' in this way, the ECFR is likely to promote them to a higher, more general level than the merely economic one to which they were originally confined. Considering that the ECFR

[73] ECJ, case C-52/16, «SEGRO» Kft. V. Vas Megyei Kormányhivatal Sárvári Járási Földhivatala and Günther Horváth v. Vas Megyei Kormányhivatal, 6 March, 2018, para 51.

[74] With this regard, Article 6, para 2, TEU states that «The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties», even though the related protocol has not entered into force yet.

[75] S. de Vries, *EU and ECHR:* Conflict or Harmony?, cit., 78

[76] S. Douglas Scott, *The relationship between the EU and the ECHR five years on from the Treaty of Lisbon*, University of Oxford, *Legal Research Paper Series*, 2015, 20, 17.

has now the same legal value of the Treaties, its liberties must be therefore implemented in a legally binding way which was not possible in the pre-Lisbon era.

The general trend of a coherent interpretation of fundamental rights is to be found – regardless of the identification of a common legal basis – in many judgments issued by the ECJ with reference to many conventional rights[77]. As far as the ECtHR is concerned, its 'due regard' of EU case law is also widely attested[78].

In a systematic perspective, though, these cross-references, to be considered a steady but intermittent dialogue between Courts, do not prevent the risk of a 'legal confrontation' of the supranational Tribunals in the event that the EU acceding to the conventional order makes it unavoidable to assess the systematic implication of 'parallel' case law.

In this line of reasoning, the ECJ has stated that whilst fundamental rights recognised by the ECHR constitute general principles of the EU law and whilst Article 52(3) of the ECFR provides that the rights proclaimed in the Charter which correspond to rights guaranteed by the ECHR «are to have the same meaning and scope as those laid down by the ECHR», the latter does not consti-

[77] For instance, in ECJ, joined cases C-92/09 and C-93/09, Volker v Land Hessen 9 November 2010 at para 52, the Court states, *inter alia* «the right to respect for private life with regard to the processing of personal data, recognised by Articles 7 and 8 of the Charter, concerns any information relating to an identified or identifiable individual (see, in particular, European Court of Human Rights, Amann v. Switzerland [GC], no. 27798/95, § 65, ECHR 2000-II, and Rotaru v. Romania [GC], no. 28341/95, § 43, ECHR 2000-V) and the limitations which may lawfully be imposed on the right to the protection of personal data correspond to those tolerated in relation to Article 8 of the Convention». With regard to the same conventional right, the ECJ has also ruled that «it follows from Article 52(3) of the Charter that, in so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, their meaning and scope are to be the same as those laid down by the ECHR. However, that provision does not preclude the grant of wider protection by European Union law. Under Article 7 of the Charter, «[e]veryone has the right to respect for his or her private and family life, home and communications». The wording of Article 8(1) of the ECHR is identical to that of the said Article 7, except that it uses the expression "correspondence" instead of "communications". That being so, it is clear that the said Article 7 contains rights corresponding to those guaranteed by Article 8(1) of the ECHR. Article 7 of the Charter must therefore be given the same meaning and the same scope as Article 8(1) of the ECHR, as interpreted by the case-law of the European Court of Human Rights (see, by analogy, Case C-450/06 Varec [2008] ECR I-581, paragraph 48)» (see ECJ, case C-400/10, J. McB. V L.E.).

[78] See the document drafted in 2012 by the Directorate General for Internal Policies, *Main trends in the recent case law of the EU Court of Justice and the European Court of Human Rights in the field of fundamental rights*. According to the Report, «[t]he ECtHR case law includes references to the EU Charter as well as to other EU law provisions. According to the HUDOC database of the ECtHR, the Charter has been explicitly quoted in eight judgments and three decisions» (as to 2012). From a national standpoint, Constitutional Courts may refer to the EU-based right to property as a whole, citing Article 17, ECFR and Article 1 of Protocol 1 ECHR jointly. See Constitutional Court of Austria, G44/2017 ua, 29 September 2017, para 2.4.4: «Die im Antrag geltend gemachte Garantie des Art 17 GRC entspricht Art 1 1. ZPEMRK» («The guarantee of Article 17 CFR claimed in the application corresponds to Article 1 of Protocol 1 ECHR»); Constitutional Court of Hungary, 3140/2013, 24 June 2013, para 2, 13 and 19.

tute, as long as the European Union has not acceded to it, a legal instrument formally incorporated into EU law[79].

Thus, the ECJ concludes that «Articles 17, 7, 10 and 11 of the Charter secure in EU law the protection conferred by the provisions of the ECHR relied on by the appellants and that it is appropriate, in this instance, to base the examination of the validity of the basic regulation solely on the fundamental rights guaranteed by the Charter»[80].

This viewpoint is of the utmost importance when seeking an answer to the concept of 'law' as interpreted by the ECtHR: the very definition of the term is going to be presumably widened the EU acceding to the Council of Europe's Conventional system, while continuous cross-references by the Courts are crucial, albeit sometimes contradictory, in detecting the 'area' of what has to be considered a 'source of law'.

## 5. *Dual action or differentiated integration within supranational legal frameworks? Concluding remarks*

It follows from the above that the reason behind the ECtHR's flexible approach in the aforementioned evaluation seems to rest on the need to ensure the maximum possible effective judicial protection of human rights. However, the outcome of the Court's ruling on the subject risks creating uncertainty among national authorities, at the expense of the qualitative requirements of the law and uniform interpretation, as well the consistency of the judicial safeguards of the fundamental rights protected both under ECHR and EU law, as the case of property rights demonstrates.

Following this line of reasoning it should be considered that the ECJ imposes a higher degree of foreseeability[81] than the ECtHR regarding those provisions, which cause a fundamental freedom to be restricted in order to be considered lawful under the heading of the principles of legal certainty and proportionality. This is true especially as regards those provisions, which grant discretionary powers to public authorities. Moreover, the ECtHR seems to have assumed a central role to guarantee protection to human rights that nowadays are clearly included

[79] See ECJ, C-398/13 P, *Inuit Tapiriit Kanatami and others v. European Commission*, 3 September 2015, para 45.

[80] See ECJ, C-398/13 P, *Inuit Tapiriit Kanatami and others v. European Commission*, 3 September 2015, cit., para 46, which refers «to this effect, [to] judgments in *Otis and Others*, C-199/11, EU:C:2012:684, paragraph 47, and *Ziegler* v *Commission*, C-439/11 P, EU:C:2013:513, paragraph 126 and the case-law cited)».

[81] As it results from A. Woltjer, *The quality of the law as a tool for judicial control,* in L. Besselink, F. Pennings and S. Prechal, *The Eclipse of the legality principle in European Union*, The Hague, London, Boston, 2011, 99.

in the legal framework of the ECFR, but which are yet to be coherently implemented in the EU system.

It can therefore be said that this judicial framework is in constant flux, since the definition of the term 'law' is questioned by the two supranational Courts. The concept of what should be considered 'source of law' is constantly being improved and shall continue to be improved, as well as deeply problematised, in the light of the EU's accession to the ECHR.

The hope shared by the Authors is that a more structured implementation of a 'double-headed' system of human rights protection may help sketching a clear and coherent redefinition of the relationship between the two relevant legal frameworks[82].

As the example of the right to property shows quite clearly, only a thorough and integrated redefinition of the rights conferred to individuals whithin the ECHR and the ECFR, much more than a parallel and often disconnected case-law, could possibily lead to a unified approach by the relevant supranational judicial authorities. In fact, a (not necessarily) peaceful coexistence of the two distinct legal frameworks pertaining to the 'same' property right may be seen as an example of the threat posed by a not always coherent 'double-headed' system of safeguards of human rights.

[82] On recent developments regarding the accession of the EU to the ECHR, see E. Ravasi, *Human Rights Protection by the ECtHR and the EC: a comparative analysis in light of the equivalency doctrine,* Leiden, 2017, 394.

*The Supranational Concept of Property in the light of the ECtHR Case Law and the Charter of Fundamental Rights of the European Union: Some Critical Remarks on Recent Developments*

The paper examines the interaction between the ECHR and the EU systems as to the protection of the right to property, also in the light of the provision set out in Art. 17 of the European Charter of Fundamental Rights. To this end, the Authors take into account the meaning of 'law' and 'property' within the different legal frameworks, as well as examples drawn from ECJ and ECtHR judgments. The Authors argue that there is no sufficient correspondence between the concept of 'property' as a fundamental right protected by the ECtHR and the one formulated by the ECJ, as the latter imposes a higher degree of foreseeability regarding those provisions, which cause a fundamental freedom to be restricted. The overall result of the analysis is also problematised in the light of the EU's accession to the ECHR.

*Il concetto di proprietà alla luce della giurisprudenza della Corte europea dei diritti dell'uomo e della Carta dei diritti fondamentali dell'Unione europea: alcuni rilievi critici sui recenti sviluppi*

Lo scritto esamina il rapporto tra la Convenzione europea dei diritti dell'uomo e l'ordinamento euro-comunitario, con particolare riferimento alla protezione del diritto di proprietà e alla luce dell'art. 17 della Carta dei diritti fondamentali di Nizza. A tal fine, gli Autori ricostruiscono il concetto di 'legge' e quello di 'proprietà' nell'ambito convenzionale ed europeo, anche attraverso esemplificazioni giurisprudenziali tratti dalle relative Corti. Gli Autori ritengono che non vi sia ancora sufficiente corrispondenza tra il concetto di proprietà come richiamato dalla Corte europea dei diritti dell'uomo e quello protetto dalla Corte di Giustizia UE. Quest'ultimo pare infatti imporre maggiori garanzie in capo al soggetto inciso. Le conclusioni sono altresì influenzate dalla problematica accessione dell'UE al sistema del Consiglio d'Europa.