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The right to housing: a threat for property rights?

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1. Introduction

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I would like to begin by highlighting the importance of language and words related to matters of property, because, as you know, civil law and common law are quite different (historically, conceptually and traditionally). Therefore, the use of English to describe Italian and continental European laws on property could be misleading.

Anyhow, what is the "right to housing"?

Generally speaking, we can identify two different types of rights, connected to housing.

A man's right to stay (or to live) in a house, and the property right of a house. These two rights can work together if the owner of the house actually lives in it. However, if this is not the case, these two rights could potentially clash.

The right to housing almost immediately seems to relate exclusively to a non-ownership situation, legitimizing requests to access the right to be housed and consequently the duty on behalf of public powers to provide for it: suffice to read art. 25 of the universal declaration of human rights ("Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including …housing") or art. 11 of the international Covenant on economic, social and cultural rights, or article 31 of the European Social Charter ("With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed: to promote access to housing of an adequate standard; to prevent and reduce homelessness with a view to its gradual elimination; to make the price of housing accessible to those without adequate resources.")

The United Nations Committee on Economic, Social and Cultural Rights has underlined that the right to adequate housing should not be interpreted narrowly. Rather, it should be seen as the right to live somewhere in security, peace and dignity.

Please note the emphasis put on the "broad interpretation" of this right: it could be viewed as an invitation to a judicial activism in enforcing the right to housing all over the world. Possibly, this invitation could represent the core of the issue that you want to focus on.

According to the Office of the United Nations High Commissioner for human rights, the right to adequate housing contains freedoms (for example: protection against forced evictions), and entitlements (for example: equal and non-discriminatory access to adequate housing). Therefore, adequate housing must provide

much more than four walls and a roof. The question is, how much more…

Nevertheless, international legal sources are a huge fascination for Italian judges, and frequently a broad interpretation of Italian statutes is based upon such sources, as required, after all, by art. 117, first paragraph, of the Italian Constitution.

In order to create an appropriate framework to understand this issue, in Europe and in Italy, we also need to look at the content of the Constitutions, particularly the Italian one, and the European Convention on human rights.

Above all, we really need to consider the decisions of the various different Courts, constitutional and European. A key factor of this process is the judges' interpretation.

Sometimes, these interpretations can go way beyond a correct analysis of the text of the Constitution and the law, jeopardizing the final outcome of the judicial response.

In my opinion a broad interpretation is dangerous, because the broader the interpretation the more restricted the property rights.

I confess I am a textualist. As justice Antonin Scalia so eloquently puts it, textualism is "what makes a government a government of laws and not of men" (A. Scalia, A Matter of Interpretation. Federal Courts and the law, Princeton University Press, 1997, p. 25).

From this perspective, textualism is a protection against every dependence on any extratextual source in determining statutory meaning, particularly when, as it happens here, ethic, moral and political ideas are involved in juridical matters.

The text of legal provisions is binding for judges, in its reasonable understanding.

I am well aware of the aspect of "what is reasonable understanding?". But the development of our legal systems has extremely overestimated the relevance of the judicial activism. Civil law is not a judge-made law (as common-law is). In our legal system judges are bound by the legal text, even if they don't like it. Surely, if they think that a statutory provision is unconstitutional they have to carry the case to the Constitutional Court. So they can't decide alone.

Unfortunately, this sometimes happens, under the umbrella of the so called constitutional reading of the text of laws ("*interpretazione costituzionalmente conforme*"). Legislative provisions should be interpreted in a way that avoids placing their constitutionality in doubt. But, in my opinion, this goal must be accomplished within the limits of the text, and all words of the legislative provisions are always presumed to bear their ordinary meaning.

Sometimes, in the so called "constitutional reading" of a text, judicial activism becomes judicial creation of a new law.

2. Property and right to housing under the Italian Constitution

It is vital to consider that the Italian Constitution doesn't mention the right of property as a fundamental right, like, for example, freedom of religion, speech and the press. As stated in article 42, property is recognized and protected by the law, and the law can also establish its limits, in particular to ensure its social function.

The Italian Constitution doesn't explicitly mention the right to housing among our fundamental rights. Instead, in article 47, the Constitution states that "The Republic has to facilitate the financial conditions for people to become home owners". This doesn't mean that all Italians must become home owners, but simply that Government will put in place economical, legislative and financial measures to facilitate the reaching of this goal.

The Constitution's text is subject to interpretation by the Constitutional Court, by all judges and by the legislative power.

Decisions taken by the Constitutional Court obviously are the main starting point .

In the decision n. 217 of 1988, the Court stated that the right to housing is an integral part of the democratic system built by the Constitution. "Among the duties that the State must abide by – and here I'm quoting the decision - there has to be the creation of the minimal conditions of a Welfare State, in order to guarantee an essential right such as the right to housing to the majority of the population as a reflection of the universal image of human dignity": an imaginative and poetical way to describe a constitutional text.

Moreover, in decision n. 49 of 1987, the Court already recognized as a public duty the prevention of people falling into homelessness.

Hence, in the decision n. 404 of 1988, the Court pointed out that these statements were primarily related to article 47 of the Italian Constitution, therefore to the conditions for people to access to ownership of a house. But it specified that these statements also had a broader meaning, because they relate to the human right to housing protected by article 25 of the Universal Declaration of Human Rights and by art. 11 of International Covenant on Economic, Social and Cultural Rights.

It's important to note that decision n. 404 of 1988 was the decision that stated as unconstitutional the Italian law not permitting, in case of death of the tenant, the automatic transferring of the entitlement in favor of the domestic partner (*convivente more uxorio*).

As you see, we are speaking about decisions of the eighties. Our issue is not a recent one.

So, for the Italian Constitutional Court the right to housing seems to be part of an overall concept of fundamental rights mentioned in article 2 of the Italian Constitution.

The constitutional Court has upheld some laws that are strongly in favour of people in dire need: for example to guarantee housing to people in a financially weak position by providing council housing, or to uphold laws establishing limits on rents or rates that can be charged by property owners on tenants (rent control laws).

It could be interesting to mention the very different approach held by the U.S. Supreme Court in rejecting challenges on limits provided by rent control laws (An overview in E. Chemerinsky, Constitutional law, Fifht edition, Wolters Kluwer, New York, 2015, p. 685 ff.). Objections were based upon the "takings clause" established in the Fifth Amendment ("nor shall private property be taken for public use, without just compensate on"). Government or statutory limits on the rents that can be charged by property owners on tenants obviously limit the profits that can be received from the property. The Supreme Court has always rejected these objections and found there is not a "taking" because the limits imposed by the law leave an economically viable use of the property.

You see: it is a very different ground. Limits on the rent that can be charged by property owners are constitutional not because there is the right to housing, but because the limits leave economically viable use of the property!

Moreover, one of the core issues in Italy in the past, but not at present, has been the matter of the limitation of forced evictions. As you can see, in the event of forced evictions, there is a conflict between the landlord and the tenant. The first one has the right to get his house back, for whatever reason: after all it belongs to him. But the second figure, as we see, is covered by the right to housing. For this reason a statute law that stops all forced evictions for a specific period becomes constitutionally problematic. And this constitutional problem must be solved by the C. C. by balancing different interests involved. Usually, the Court's position is that this kind of law is not in conflict with the Constitution only if the stoppage is justified by serious difficulties in finding new housing solutions for those in need, and only if the stoppage is strictly temporary. On the other hand, should this stoppage be lengthy or, even, permanent, we would be faced with a complete depletion of the Land-

lord's right, in violation of article 42 of the Constitution.

In the end, the right to housing, in the spirit of the Italian Constitution, seems to be linked to the existing financial conditions. If this is the case, rather than being a fundamental right in a traditional sense, it is a "social right", that can only be guaranteed in relation to the availability of public funds.

But, on the contrary, if – as the Constitutional Court also says - the right to housing is "a reflection of the universal image of human dignity", therefore it must be considered as a fundamental right in a traditional sense, independent from any financial issues. The question remains.

3. Protection of property under the European Convention of Human Rights

Now, let's turn to the European Convention of Human rights. Properties are guaranteed in Article 1 of Protocol n. 1 (1952):

> 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 the law and by the general principles of international law.
>
> 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.

You may notice that the protection of the right to property provided by the European Convention of Human rights is stronger than the protection provided by art. 42 of the Italian Constitution.

I can mention some judgments released by the ECHR: for example, two cases held in 2004 against Poland.

The two judgments are very similar.

The Grand Chamber held that there had been a violation of Article 1 of Protocol No. 1 (protection of property) to the Convention concerning the fact that the applicant could not:

a) use her property;
b) charge adequate rent for its lease.

According to the Court:

> It was true that the Polish State, which inherited from the communist regime an acute shortage of flats available for lease at an affordable level of rent, had to balance the exceptionally difficult and socially sensitive issues involved in reconciling the conflicting interests. It had to secure the protection of the property rights of landlords and respect the social rights of tenants, who were often vulnerable individuals. Nevertheless, the legitimate interests of the community in such situations called for a fair distribution of the social and financial burden involved in the transformation and reform of the country's housing supply. That burden could not, as in the applicant's case, be placed on one particular social group, the landlords, however important the interests of the other group or the community as a whole.

The Grand Chamber found that the violation was part of a systemic problem, the malfunctioning of Polish housing legislation. It further called on Poland to find a remedy at national level which would allow homeowners to make a profit from their property while also ensuring the availability of accommodation for the less well-off.

As you see, these decisions are more focused on property rights, than the Italian one's.

But the question remains: can a new judicial activism of the ECHR put the right to housing under the umbrella of article 8 of the Convention in the near future (art 8: "everyone has the right to respect for his private and family life, his home and his correspondence")?

4. Illegal occupancy and "necessity": a threat for Property rights?

As I mentioned previously I think that one of the biggest threats for property rights could come from some broad interpretations of the laws. In such cases judges supposedly apply the Constitution but actually they transfer their personal convictions (political, cultural and so on) to the text, thereby transforming the meaning of the law.

As an example of this threat we can cite the interpretation of the "necessity" established in art. 54 of the Italian criminal code, in case of trespassing, or illegal occupancy of a private or public building.

Trespassing is punishable by Italian criminal law, unless the subject has been forced to act because of the necessity to save himself or others from clear and present danger of a serious personal damage, not self-created and not otherwise avoidable.

The problem is how to interpret the latter. In the past, the Italian Supreme Court (*Corte di Cassazione*) stated that the need to have a roof over one's head was not a necessity in terms of article 54 of the criminal code. In other words, it wasn't, unless the illegal occupancy occurred as a result of a life threatening situation. This was in fact an accurate textual interpretation. But more recently the Court applied a different approach, by using the so called "constitutional reading" (*interpretazione costituzionalmente orientata*) of article 54, which led it to recognize that the term "necessity" can also include actions aimed at having a roof over one's head. Why? Simply because having a roof represents a primary basic need for everyone (Cass. Pen. Sez. II, n. 35580 dated june 27th and n. 44363 of 2014).

In other words, the Court considered that serious personal damage includes not only physical damages but also situations that threaten fundamental rights such as the right to housing.

This is a typical example of a bad "constitutional reading" of a legislative provision.

As you can see, this result is obtained thanks to a very broad and free reading of the words used by the Constitution and the law: firstly, you have to demonstrate that right to housing is protected by art. 2 of the Italian Constitution; secondly, you have to demonstrate that in article 54 of the Italian criminal code "necessity" can also include actions aimed to protect that right… The road ahead is a long one…

Fortunately, in the latest cases that I am aware of, the Italian Supreme Court has stated that a temporary critical health condition doesn't permit a permanent occupation of a building, because it would be misleading in order to obtain a lodging. Necessity, simply put, can be used only in the event of clear, present and temporary danger and not as a solution to the need of accommodation: critical housing situations don't equate to "necessity", and thus could be solved by asking for public assistance.

Recently, the legislation in Italy has provided some measures against illegal occupancy. For example, a law of 2014 states that illegal occupants can neither apply for legal residence

nor to be connected to the utilities. Moreover another provision states that illegal occupants can't be part of procedures related to designation of council housing for five years from the moment they are declared illegal.

Last but not least, considering the current situation, we have to mention the right to housing of legal immigrants: they have the right to access council housing, just as Italian citizens do. On the contrary, illegal immigrant don't have the same right. And even if someone says that's unconstitutional (because the right to housing is a man's right and not a resident's one), I think this is not the case: why should I try to be a legal resident if non legal immigrant benefit from my same rights?

5. Conclusion

Going back to the title of this paper, there is no clear-cut answer to the question if the right to housing could be a real threat for property rights. Better still: it could be, if constitutional or legal provisions are interpreted in a broad way, and colored by personal, political, cultural and ideological ideas.

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L'Istituto Bruno Leoni (IBL), intitolato al grande giurista e filosofo torinese, nasce con l'ambizione di stimolare il dibattito pubblico, in Italia, promuovendo in modo puntuale e rigoroso un punto di vista autenticamente liberale. L'IBL intende studiare, promuovere e diffondere gli ideali del mercato, della proprietà privata, e della libertà di scambio. Attraverso la pubblicazione di libri (sia di taglio accademico, sia divulgativi), l'organizzazione di convegni, la diffusione di articoli sulla stampa nazionale e internazionale, l'elaborazione di brevi studi e briefing papers, l'IBL mira ad orientare il processo decisionale, ad informare al meglio la pubblica opinione, a crescere una nuova generazione di intellettuali e studiosi sensibili alle ragioni della libertà.

Cosa Vogliamo

La nostra filosofia è conosciuta sotto molte etichette: "liberale", "liberista", "individualista", "libertaria". I nomi non contano. Ciò che importa è che a orientare la nostra azione è la fedeltà a quello che Lord Acton ha definito "il fine politico supremo": la libertà individuale. In un'epoca nella quale i nemici della libertà sembrano acquistare nuovo vigore, l'IBL vuole promuovere le ragioni della libertà attraverso studi e ricerche puntuali e rigorosi, ma al contempo scevri da ogni tecnicismo.

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