COMMENTS

THE GRAND CHAMBER ON CONFISCATION WITHOUT CONVICTION: 'BEYOND CONFISCATION OF PROPERTY, THE WAR OF THE COURTS', THE INTERPRETATION OF JUDGMENTS, AND THE RIGHTS OF LEGAL PERSONS

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Abstract

The ruling of the European Court of Human Rights (ECtHR) of 28 June 2018 addresses once again the issue of the compatibility with the ECHR of the confiscation of property without conviction under the Italian law. Drawing from the specific issues concerning the confiscation of property of legal persons, this paper aims to highlight the need to look more closely at the interpretation of judgments of the ECtHR and their relationship with the Italian Constitutional Court. In this regard, the analysis examines in a comparative perspective the ECtHR's theory of "interpretative authority" and that of "settled case law" developed by the Italian Constitutional Court. These two approaches both address the problem of relations between national and supranational jurisdictions in terms of "interpretative monopolies", by attributing an "axiological superiority" to the normative corpora derived from their respective interpretative powers. Instead, the paper concludes that the ECtHR and the Italian Constitutional Court should find a "new direction" in their relations and, more specifically, rediscover and cultivate a culture of self-restraint.

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TABLE OF CONTENTS

1. Introduction

With its judgment of 28 June 2018, the European Court of Human Rights has once again addressed the issue of the compatibility with the ECHR of the confiscation of property for unlawful site development under Italian law.

It regards a case of confiscation of property, already contemplated under article 19 of Law no. 47 of 1985, now disciplined by Article 44 of Presidential Decree no. 44 of 2001, regulating areas of land that have been divided illegally. Not only may offenders be sanctioned for their crime by having their property confiscated, but under certain circumstances even defendants who have been acquitted, and third parties – whether natural persons or entities with legal personality – may also have their property confiscated.

According to the prevailing Italian case law[1], this confiscation measure is an administrative sanction ordered by a criminal court in lieu of the public administration, linked to the illegitimacy of the division of areas of land, and has the purpose of returning them to the municipal estates regardless of any conviction once it has been established that a site has been unlawfully divided.

The Court of Strasbourg had examined this particular form of confiscation on two previous occasions: first with a judgment

[1] E.g. Cass. III no. 331/97; Cass. III, no. 1880/99; Cass. III, no. 38728/04; Cass. III, no. 10916/05; Cass., no. 20243/09; Cass. III, no. 36844/09; Cass. III, no. 5857/10; this approach was also endorsed by the Constitutional Court with its judgment no. 187 of 1998.

handed down by the Grand Chamber, in *Sud Fondi v. Italy*,[2] in which it established that, according to the Convention, it is necessary to establish a moral link between those who suffer forced deprivation of title and the offence that incurred the sanction, and secondly, with the judgment handed down by an ordinary division, in *Varvara v. Italy*,[3] interpreted by some as requiring a formal conviction to order the confiscation of the illegally divided site legitimately.

Precisely on the basis of this interpretation, the Italian Constitutional Court (with its judgment no. 49 of 2015) did not consider the judgment handed down in *Varvara* (by an ordinary division of the ECtHR) to constitute "settled case law" from Strasbourg. It also deemed it at odds with the judgment of the Grand Chamber handed down in *Sud Fondi*, whose principles were to be deemed respected under Italian law, insofar as it had come to embody in Italian case law the "living law", stating the requirement to ascertain the existence of substantive unlawful conduct, at least in terms of negligence, on the part of a defendant who, while not being found guilty, has nevertheless had their property confiscated.

The question that arose in the wake of these judgments was therefore whether, and to what extent, "confiscation without conviction" such as that relating to Italian urban planning was compatible with the Convention.

In addressing this specific issue, the new ruling of the Grand Chamber (*GIEM Srl and others v. Italy* of 28 June 2018) examines some important issues of a more general nature relating to the interpretation of the judgments of the European Court of Human Rights, their value and relationship with domestic proceedings, and in particular with the Italian Constitutional Court: from this point of view, the judgment is noted for the opinions – concurring or partially dissenting – expressed by some judges of the Strasbourg Court, which are of such range and complexity as to be considered to almost form a sort of "parallel judgment" to the "main" one representing the majority opinion of the judges of the European Court.

[2] ECtHR, 10 May 2012, *Sud Fondi and others v. Italy*.
[3] ECtHR, 29 October 2013, *Varvara v. Italy*.

The steps making up the long reasoning may be very briefly outlined in the following points:

1) Confiscation of property in Italy is essentially a penalty ("*peine*" in the French version) affecting title to property and, as such, must comply with the conventional safeguards on the matter, as specified in the case law of the Court of Justice of the European Communities, in particular Article 7 ECHR,

2) as a penalty, and in order to comply with Article 7, confiscation of property therefore requires a "mental element" or "*élément moral*" on the part of the person upon whom it is imposed (as established in the *Sud Fondi* judgment) and, from this point of view, the development of national case law satisfies the requirements of the Convention insofar as it requires evidence of some unlawful conduct, at the very least in terms of negligence,

3) formal conviction ("*condamnation formelle*") is not an indispensable element under the Convention, as long as the confiscation is imposed in compliance with the guarantees within the meaning of Article 7 of the ECHR and is the result of a procedure that respects the guarantees provided for under Article 6, especially the presumption of innocence and the right to a fair hearing, such that formal conviction is a necessity only if the act of confiscation is ordered in the light of appearance of presumed guilt,

4) from this point of view, there is no contradiction between the *Sud Fondi* and the *Varvara* judgments, the latter going no further than to maintain that confiscation can be imposed only after conviction in the light of appearance of guilt, and that the value of Strasbourg judgments may not be said to depend on the composition of the body that hands them down, considering that all the judgments of the European Court (whether by an ordinary division or the Grand Chamber) have equal binding force,

5) from the point of view of respecting the safeguards enshrined in the Convention, it is therefore not permissible to confiscate the property of legal persons that have not taken part in the proceedings, notwithstanding persons representing a company took part in them, albeit only as natural persons,

6) moreover, automatic confiscation of unlawfully allocated sites from persons who have not participated in the relative proceedings cannot be regarded as compliant with the principle of proportionality, which must be protected from measures that

affect individual property, so Article 1 of Protocol no 1 to the ECHR must also be deemed to have been violated,

7) on the other hand, the presumption of innocence referred to in Article 6, § 2, ECHR cannot be considered to have been violated when a person is declared "substantially" guilty, as happens in the case of those who, although formally acquitted due to the offence becoming statute-barred, are found to have acted in a subjectively unlawful way.

Beyond the important clarifications and the Strasbourg Court's effort to rationalise and systematise in this case, the impression remains that the Court has a twin-track approach, one national and the other European, that seems to prevent effective communication between the various judicial (or better, para-jurisdictional) authorities. The reasons for this dual vision deserve examination in order to understand the causes of a past conflict that might re-surface at any time: only when the underlying reasons for this distance (between national courts and the European Court of Human Rights) have been understood will it be possible, perhaps, to recreate the conditions for mutual understanding and for the rediscovery of how useful it may be to be able to call upon a plurality of institutional points of view on the same phenomenon to ensure the proper functioning of the Convention and the guarantees that must necessarily come with it.

2. Confiscation of property from the national perspective

As already mentioned, confiscation of property is envisaged in Italian law under Article 44 of the Construction Code (Presidential Decree no. 380 of 2001), which reproduces Article 19 of the previous Construction Code (Law no. 47 of 1985) verbatim. It is referred to as a "special confiscation" contained in regulations governing further cases of deprivation of property under the general provision of Article 240 of the Italian Criminal Code. Even though it has the same legal designation – "confiscation" – the various kinds of deprivation of property can be so specific as to often constitute distant "operations" of a different juridical

nature.[4] Thus, while the confiscation referred to in the above-mentioned Article 240 of the Italian Penal Code is largely considered a "safety measure" aimed at acquiring a thing due to its intrinsic dangerousness or the link it has with whoever owns it or with the offender, other "confiscations" provided for in special provisions are considered "sanctions", and still others are deemed "hybrid" measures.[5] This is reflected in the applicable regulations and formal guarantees that differ profoundly in terms of inter-temporal regulation, degrees of mandatory application, the possibility of confiscation without conviction, or applicability also to third parties in good faith.

The urban confiscation[6] in question here provides for the compulsory confiscation of areas where "unauthorised development" has occurred. "Unauthorised development" is defined in Article 30 of the above-mentioned Construction Code (which quotes the analogous text of the previous Article 18 of the Construction Code referred to above): it may be "*materiale*" – when the unlawful act takes the form of intervention or construction altering the territory in such a way as to give it a different appearance from what was envisaged – or "*negoziale*" – when it occurs through the unlawful division of land into lots used for building after subsequent sale. It is "mixed", when both situations occur together.

According to the prevailing case law and in the opinion of some scholars, this kind of confiscation is an "administrative sanction" exceptionally imposed by a criminal court acting in the stead of the public administration when the latter has taken no action despite having similar power. This faculty is grounded in the following circumstances: the historical origin of the law that

[4] For a masterly analysis of the multifaceted nature of the penalty known as "*confisca*" seen through the lens of Italian case law, see Supreme Court, Joint Sections, no. 26654/08, *Impregilo and others*.

[5] See, especially for the bibliographical references, T. Epidendio, *La confisca nel diritto penale e nel sistema delle responsabilità degli enti* (2011).

[6] For an overview of the matter. see S. Vinciguerra, *Appunti in tema di lottizzazione abusiva e confisca*, 4 Giur. it. 1913 (2005); R. Martuscelli, *La lottizzazione abusiva* (2012); M. Pelissero, *Reati contro l'ambiente e il territorio* (2013); P. Tanda, *I reati urbanistico-edilizi* (2016); A: Esposito, *La confisca nei reati urbanistici e ambientali,* in M. Montagna (ed.), *Sequestro e confisca* (2017); V. Aranci-Gargiulo, *Lottizzazione,* in T. Epidendio, G. Varraso (eds.), *Codice delle confische* (2018).

originally only granted this power to the public administration, which continues to hold it under Article 30, paragraphs 7 and 8, of the Construction Code, the fact that the penalty appears in a different place from the criminal sanctions envisaged for the offence, the acquisition of the confiscated assets as municipal property rather than State property (as happens in the case of criminal confiscations), its mandatory nature, revocable in the event of amnesty regarding the offence in administrative law, the need to allow the measure to protect the landscape and the environment despite the frequent expiry of the limitation period for "minor" offences, as a contravention for which shorter times are envisaged.

In the opinion of the majority of scholars[7] and in previous case law[8] however, confiscation constitutes a "safety measure" in criminal law, which courts must apply due to the danger posed by the *res*, in connection with ascertainment of the unlawful character of the development. In support of this thesis, the following were invoked: the title/name of provision, the systematic necessity to differentiate it from the analogous power of the public administration to deprive persons of their property in order to avoid the total overlapping of the two provisions, and justification for applying it to extraneous third parties by virtue of the intrinsic danger posed by the thing which, as such, is outside the ascertainment of subjective responsibility.

Although, due to the intrinsic dangerousness of the thing, the interpretative conclusion of confiscation without conviction can be buttressed also (and perhaps better) by construing it in terms of a security measure, classification as an administrative sanction has prevailed in the case law, fully endorsed by Constitutional Court judgment no. 187 of 1998 (ruling on the analogous Art. 19 previously in force).

On the other hand, the prevalent inference that it is a penalty, albeit administrative, should have led the Italian courts to realise that imposing a sanction on a third party in relation to the crime is a constitutionally dubious act. On the contrary, the case

[7] A. Esposito, *La confisca nei reati urbanistici e ambientali*, cit. at 6; M. Panzarasa, *Confisca senza condanna*?, 3 Riv. it. dir. proc. pen. 1672 (2010); C. Angelillis, *Lottizzazione abusiva: la confisca nei confronti del terzo alla resa dei conti*, 5 Cass. pen. 2566 (2009).

[8] Cass. III, 4292/96; Cass. III, no. 12999/00.

law on legitimacy actually found that there was no conflict with the principle that criminal liability is personal under Article 27 of the Italian Criminal Code inasmuch as the "regulatory" rather than "criminal" nature of the sanction freed it from application of the said constitutional principle of responsibility for one's own actions. It is therefore not surprising that this way of reasoning has come to the attention of Strasbourg, for which (as is well known) formal classification is not decisive, as it looks to the substance in order to avoid fundamental human rights being infringed thanks to "fraudulent labelling".

It was therefore not until Strasbourg's first decision, *Sud Fondi v. Italy*, that the Constitutional Court (with judgment no. 239 of 2009) and then the Supreme Court, affirmed that an interpretation should be adopted that would favour a meaning compatible with both the Constitution and the ECHR, one where confiscation of property must still be subject to the ascertainment of the wilful and personal involvement of the one whose property is confiscated in the offence.

Nevertheless, some inconsistencies remained, and the way (in terms of procedure and related guarantees) this ascertainment had to be carried out remained completely unexplored.

From the Italian perspective, it was considered a sufficient guarantee of the rights of the person to have requested a ruling, albeit incidental, relating to an offence, even if only for negligence regarding the person whose property is confiscated.

3. ... and from the perspective of the ECtHR

The ECtHR perspective on confiscation, on the other hand, adopts a view that focuses on the nature of the provision and the human rights to be safeguarded in relation to it.

In relation to the first aspect (the nature of the provision), it should be stressed that the discussion mainly focuses on the "criminal" nature of confiscation and is argued according to the classic model of the so-called *Engel criteria*.[9] The fact that the

[9] As we know, the "Engel criteria" (as they are called in the parts of the judgment in which they were first used: (ECtHR, GC, 8 June 1976, *Engel and others v. the Netherlands*, consistently taken up by the successive judgments on the subject and, in particular, by the commonly cited ECtHR, GC, 1 February 1984, *Öztürk v. Turkey*) are three criteria identified by the settled case law of the

measure affects private property, bringing into play the guarantees referred to in art. 1 of Protocol no. 1 supplementing the ECHR, is usually addressed later and after recognising the criminal application of the measure, so that the conclusions on the violation of the protocol, despite being autonomous in the abstract, seem in fact to bear the influence of the conclusions reached on the nature of the measure, following a "dual", rather than a "parallel" violations approach.

These criteria seem to have little selective-orientative weight, as shown by the gradual increase in the measures considered "criminal matters", according to the treaty – often acting as an *a posteriori* justification for a decision to apply certain ECHR guarantees to the case before the Strasbourg Court, when the criteria actually used are unclear. In particular, it seems that the "Engel criteria" can justify considering almost all the confiscations contemplated by the Italian legal system (with the possible exception of that of instruments used to commit the offence, or else of intrinsically unlawful things) as punitive measures, with the consequent application of the guarantees provided for them under the Convention, especially those referred to in Article 7 ECHR.

From the second point of view (the extent of the safeguards), two specificities in the approach adopted by the Strasbourg court are of particular relevance: the first proposes a "comprehensive reading" of the substantive and procedural guarantees insofar as the (substantive) need to ascertain the "mental element" cannot disregard the right to take part in a fair hearing by the person against whom proceedings are to be brought; the second concerns the autonomy of legal persons and the limits within which they may be considered represented by natural persons in criminal proceedings.

Court of Strasbourg in determining whether or not there is a "criminal charge": The first criterion is its classification as such in national law; the second is the nature of the measure (which, for example, must not consist merely of forms of financial compensation for damage suffered, but must have a punitive purpose in order to act as a deterrent); the third is the seriousness of the possible consequences on the defendant.

The unitary (substantive-procedural) interpretation of the guarantees highlights an aspect which, as we have seen in the previous section, had been underestimated in Italian case law but which appears to be a fundamental human rights issue, i.e., the way (and the safeguards available to) those subject to confiscation can discuss the ascertainment of the presuppositions of the confiscation against them. This is over simplified in terms of the national specificities of hearings – and the various guarantees available during them – in which the necessary assessments leading to confiscation are carried out. In this regard, the Strasbourg Court, inevitably reflecting the specificities of the cases for which it must ascertain whether the Convention has been violated, limits itself to verifying whether or not the person whose property has been confiscated participated in the proceedings, adding nothing about the way any such participation took place, and, especially, without specifying anything regarding compliance with Article 6 ECHR, the *a posteriori* hearing (i.e. the possibility of speaking before the court only after the measure has been adopted in order to contest it in a separate court case), the possibility of appealing against an unfavourable decision, the possibility of expressly contesting a charge of subjective wrongdoing (wilful misconduct or negligence) other than that sufficient to constitute an offence, or what means of defence are to be considered necessary and what methods of obtaining evidence must be safeguarded.[10]

4. The harmonisation of ECtHR precedents and constraints on national courts: "interpretative authority" vs "settled case law"

From another point of view, it must be observed that the unitary (substantive-procedural) interpretation of the Convention is precisely what allows the European Court to harmonise its precedents (*Sud Fondi* and *Varvara*), criticising and overriding the

[10] These points were examined by the ECtHR in the significantly different case of sanctions imposed by so-called "independent" authorities, giving rise to a case law not without uncertainty on the "compensability" of guarantees through a "full jurisdiction" when impugning a sanction (see, for example, most recently, E. Bindi, A. Pisaneschi, *Sanzioni Consob e Banca d'Italia. Procedimenti e doppio binario al vaglio della Corte europea dei diritti dell'uomo* (2018).

interpretation given by the Italian Constitutional Court also with regard to its statements on the reconstruction of the relationships between national courts and the entire Strasbourg case law.

The ECtHR, in fact, radically rejects the approach adopted by the Italian Constitutional Court in its judgment 49 of 2015, whereby only the "settled case law" of the ECtHR – to be considered such on the basis of a series of "parameters", including Grand Chamber rulings rather than those handed down by ordinary divisions – are binding on Italian courts, clearly stating that all Strasbourg judgments are equally binding.

On this point, the concurring opinions seem, in fact, much more explicit than the Strasbourg Court in explaining the source of the national court's limitations in terms of the theory of the "authority of the *res interpretata*".[11] However, this approach seems to lead to an inextricable conflict and a reciprocal invasion of the spheres of competence of the individual jurisdictions without taking into account the specificities of the cases that take place in them and the limits of the powers of each jurisdiction: claiming interpretative monopolies over the respective "law" (conventional, constitutional, and national) inevitably leads to contrasts that tend to be resolved on the basis of the alleged axiological superiority of the various systems.

Strasbourg case law, in fact, has jurisdiction over the adjudicating violations of the Convention in the cases brought before it, even though ruling on a violation means concretising and specifying the meaning of the Convention through its interpretation (often in the light of the application of domestic law in the national legal system): it is not, therefore, institutionally called upon to declare the illegality of national rules or to interpret them, formulating "principles of law" that a "referring court" has to apply, but only in order to ascertain breaches of the Convention, and it is thus that the monopoly of interpretation attributed to it must be understood insofar as it prevents the organs of the Member States from mitigating the obligation they have assumed to respect fundamental human rights by relying on margins of interpretation of the Convention.

The case law of the Constitutional Court, on the other hand, is that of a body institutionally called upon to declare the possible

[11] Especially the separate opinion of Judge Pinto de Albuquerque.

illegality of rules that an ordinary court must apply in order to decide a case submitted to it and that, because of the principle of the separation of powers (in particular the legislative and judicial powers) and the judge's subjection to the law, he or she may not directly disapply. In so doing, the Constitutional Court interprets and implements the constitutional provisions (functioning as a parameter for the legitimacy hearing) in the light of the interpretation that falls within the jurisdiction of ordinary courts, which, for enforcement purposes, must refer to the national law whose constitutionality has to be ascertained.[12] In so doing, the Constitutional Court may consider the question referred to it to be unfounded, establishing a possible meaning (interpretation) of the provision that is different from the one attributed to it by the ordinary court: however, where the meaning attributed to the provision by the ordinary court is uniformly established by the national courts, constituting an exemplar of the so-called "living law" or "settled case law", the Constitutional Court declares the law illegitimate. It does so in order to avoid hard-to-resolve conflicts between jurisdictions (constitutional and common), precisely because of the different institutional interpretative powers of the ordinary courts (interpreting provisions in order to apply them to the case at hand) and the Constitutional Court (interpreting constitutional provisions in order to decide on the legitimacy of the provisions that ordinary courts must apply).

In its judgment no. 49 of 2015, and faced with an increasingly unstable and frankly ambiguous Strasbourg Court case law, the Constitutional Court decided to adopt the same approach used at national level in order to avoid conflicts with the ordinary courts; it therefore considered only its "settled case law" binding.

In relation to the previous tried and tested relationship between the ECtHR system and the national system established by previous Italian constitutional case law, this approach is much more revolutionary and innovative than some have considered it.

[12] For reasons of brevity and clarity of presentation, I take for granted that it is possible to distinguish between "interpretation" (attribution of a meaning/norm to a text) and "application" (the ability to refer a norm and its effects to a concrete historical fact), which is indeed a much-discussed issue.

Starting with the so-called "twin judgments" of the Constitutional Court[13] – and prior to sentence 49 of 2015, inter-institutional relations were construed in the terms summarised as follows. The norms set out in the ECHR, as international norms subject to ratification and execution by ordinary law in Italy, are "interposed norms" that supplement the criteria set forth in Article 117 of the Italian Constitution. As they are called upon to supplement the constitutional provision of Article 117 of the Constitution, the rules of the Convention have, in the event of conflict with national rules, the usual effects as far as ordinary courts are concerned, consisting in the obligation to interpret them coherently or, should this prove impossible, in the obligation to raise a question of constitutional legitimacy. With respect to the ECtHR, the Italian State has not formalised the ceding of sovereignty as it has in the case of Community law, so the provisions of the Convention cannot give rise to the direct non-application of national law.[14] On the other hand, the ECHR system does not envisage organs empowered to produce legislation in certain areas, as in the case of the European Union, but "only" an *ad hoc* court with specific jurisdiction over the interpretation of the conventional rules in order to establish whether or not Member States have violated them. In compliance with this interpretative monopoly – decisive in giving concrete form to necessarily general norms of principle regarding specific cases and preventing States from evading their contractual obligations by means of captious national interpretations – the Constitutional Court has therefore specified that it has no power to attribute meanings to Conventional provisions other than those attributed to them by the ECtHR. The conventional rules thus supplement the internal constitutional apparatus with content that may not differ from that attributed to it by the Strasbourg Court and which the Constitutional Court cannot review. However, supplementing the constitutional apparatus with the conventional norms according to the meaning attributed to them by Strasbourg may be possible on the basis of two possible variations expressed (respectively) in two judgments which should be thought of as "cousins" rather than

[13] Judgment nos 348 and 349 of 2007.

[14] The complex issue of conventional rules overlapping with those of the Charter of Fundamental Rights of the European Union is not discussed here.

"twins". According to the first, the supplementing is automatic, but the content of the interposed provision, conveyed by Article 117 of the Constitution, should perhaps be weighed against other constitutional provisions on the basis of an assessment by the Constitutional Court itself, so as to be reconciled, albeit possibly losing out, to higher constitutional values (first variation). According to the second view, an interposed norm may be considered incapable of supplementing Article 117 of the Constitution, being prevented from doing so by stronger constitutional values expressed by other provisions of the Constitution (second variation).[15]

Sooner or later, this view had to take into account the instability of the decisions of the Strasbourg Court and the varied nature of the problems of interpretation that may arise in the hermeneutics of a text of a law or a judgment: both problems can be considered physiological in terms of the role of the Strasbourg Court, namely to ascertain individual violations, and it is no coincidence that an attempt has been made to respond to these problems within the system of the Convention through Additional Protocol XVI,[16] recognising that the Court has a further consultative function regarding the clarification of the contents of its own rulings.

With judgment 49 of 2015, the Constitutional Court, seeking a national solution to the problem of the ambiguity of the Strasbourg judgments and their apparently contradictory nature (leading to individual courts arbitrarily cherry picking from the judgments they consider most appropriate to their needs, arrogates to the Constitutional Court itself or, as some believe, also to every ordinary court) the competence to establish which part of the European Court's case law to apply, thus effectively depriving the formal respect of the Strasbourg Court's monopoly over interpreting the rules of the Convention of meaning. Considering that these rules live and take on concrete meaning only insofar as they are applied by the Court of Justice of the European Union, choosing which judgment expresses the Court's

[15] Although often confused with the subject of the "counterlimits" that operate with regard to European Union law, the reserve mechanism of constitutional screening is clearly different in the case of the ECHR.

[16] In force from 1 August 2018 following the expiry of the deadline of France's depositing the tenth instrument of ratification.

"true" interpretation inevitably results in an invasion of the field, and so the protests expressed in the judgment discussed here are understandable, and even more so in some separate opinions, especially if accompanied by the clarification of the axiological superiority of national constitutional values.

It would have been much simpler – and compliant with a principle of self restraint all the more important in a situation involving non-hierarchically organised court systems – to recognise the true basis of the broad scope of Strasbourg rulings, and this would have led to the recognition that this broad scope could not be attributed to the Varvara judgment, which was applicable and binding with respect to the case the Court itself had decided. In fact, while the *Sud Fondi* judgment had established a breach of contract linked to the interpretation established in national case law whereby it was not necessary to establish that those subjected to confiscation had committed an unlawful act, in such a way as to have an impact beyond the case that has been ruled upon and lead to a *revirement* of internal case law to comply with the Convention, the same could not be said of the *Varvara* judgment. This decision did not take into account the new development in the case law, because in the case submitted to it, the Court had made a "pathological" application regarding the living law itself and the norms governing confiscation. Consequently, the statements issued regarding the Varvara judgment had no effect on national cases in which an unlawful act had been (physiologically) ascertained.

In this way, it would appear, the role of each jurisdiction would have been respected, and the jurisdictional conflicts that then occurred would have been avoided. In the writer's view, this point should be considered in the future organisation of relations.

5. Legal "entities" and confiscation

The issue of the autonomy of legal persons – in relation to investigations carried out for the purpose of confiscation in (criminal) proceedings in which natural persons have participated – is a further reason for the interest in – and inspiration to be taken from – the Strasbourg Court's *GIEM* judgment. However, further elaboration and more precise inferences are necessary.

The reasoning of the Strasbourg Court in contemplating confiscation from entities other than natural persons appears, in

fact, to be extremely simple: first of all, it is necessary to verify whether, on the basis of domestic legislation, an entity has a legal personality of its own and whether or not it is a mere smoke screen drawing an unacceptable "veil" over the recovery of assets. Secondly, it must be ascertained whether a legal person can be punished for a crime, given that only in this case can the natural person (administrator or shareholder) be considered as a representative of the company. On the basis of these premises, the Court of Strasbourg, considering that Italy holds to the principle of *societas delinquere non potest*, does not concede that in this case the firm that has had its property confiscated can be considered to have taken part in the proceedings in the person of its director, a natural person. It thus concludes that companies that have had their property confiscated without appropriate participation in the proceedings are victims of a violation of the Convention.

As in other cases (e.g. *Contrada v. Italy*),[17] this simplistic representation of the national legal system in the Strasbourg judgment risks completely undermining the scope of a decision that, on the other hand, touches on a real problem and provides useful indications, which, nevertheless need to be re-examined in the light of legal peculiarities and (national) dogmatic categories neglected by the European Court.

First of all, individual liability and the possibility of answering for crimes within the national legal system are not only connected to legal personality[18] but to the consideration of the entity as a repository of interests in itself, with an organisation in which it is possible to identify a natural person who does not act in the exclusive interest (or to the advantage) of a person or of a third party (natural persons) but of the entity itself. In this connection, no consideration whatsoever is given to the systemic effect of the innovations introduced into Italian law by Legislative Decree no. 231 of 2001 on the liability of entities for offences

[17] ECtHR, 14 April 2015, *Contrada vs. Italy*, on the subject of the so-called "external involvement" in mafia association.

[18] On the subject of individual responsibility with regard to natural persons as well as firms even if they do not have legal personality, see the vast framework outlined by F. Galgano, *Persone giuridiche (art.11-35)*, in A. Scialoja, G. Branca (eds.), *Commentario al Codice Civile* (2006). With reference to Legislative Decree no. 231 of 2001 on the liability of entities for offences arising from criminal acts, the point is already clearly outlined in the report on the draft decree.

arising from criminal acts, which does not provide for liability in the event of contraventions for which confiscation of property is contemplated. Moreover, the formalities provided for by Italian law concerning the way a company may be represented in criminal proceedings are disregarded: either in terms of being a person responsible for an offence arising from a criminal act in the "parallel" proceedings that must be held against it, as a party liable in civil law, as an injured party or claimant, as a party in incidental proceedings against measures regarding it, or as a party in incidental enforcement proceedings.

Even considering these shortcomings – due to the institutional "distance" of the Strasbourg Court from the national laws it adjudicates, and the consequent distortions of perspective (which also underlie the actions of the parties in the proceedings and how their procedural contributions are heard by the courts) – the fact remains that, in the case of confiscation measures, the entity itself is not liable for punishment and, therefore, the administrator accused of the crime cannot be considered its representative. It cannot therefore be said that the firm participated in the proceedings through him or her.

The indications of the Court of Strasbourg thus appear very useful in strengthening safeguards: let us not forget, in fact, that behind the entity (as long as it is not a mere "smoke screen" or "empty box") there are shareholders, employees, creditors, and, in general, a variety of actors who rely not only on the assets of the company but also on its business activities, thanks to which they in turn perform their activities in what is now an increasingly complex and tightknit interconnected market system. This signal must, however, be seen from the perspective of greater compliance with national law, i.e., as a starting point for strengthening the "systemic effect" of the law on the liability of companies in the Italian legal system, insofar as it is possible to proceed with the confiscation of company assets as a sanction for a criminal offence only when the company (if it is not a mere screen) can be considered liable for an offence connected with that crime (and has participated in proceedings relating to this liability). The important systemic repercussions of this conclusion should, however, lead to a serious rethinking of the nature of confiscated assets, which, only in the case of illegal artefacts, should be

considered as the confiscation of intrinsically illicit assets, and this requires a revision of the law on the subject.

6. Conclusions

In conclusion, the issues surrounding "confiscation of property" seem to be very instructive from the point of view of a number of more general aspects relating to the specific theme.

First of all because they highlight the need to look more closely at the theme of the "interpretation of judgments" as an "art" in itself, whose characteristics differ from those of the "interpretation of the law".

Secondly, as they are a stimulus to finding a "new direction" in relations between national and supranational jurisdictions, if only so that there may be a real wish for inter-institutional collaboration and to avoid gradual entrenchment vis-à-vis previous positions, agreeing to abandon them once they are understood to be a source of unsolvable conflict. In particular, it seems that the theory of "interpretative authority", of which the Strasbourg Court is so fond, and that of the "settled case law" so dear to the Italian Constitutional Court have both proved unable to provide a valid understanding of inter-institutional relations or to resolve possible conflicts. Moreover, these two approaches share two related defects: they address the problem of inter-institutional relations in terms of "interpretative monopolies", which ultimately leads to attributing – more explicitly by the Italian Constitutional Court and more indirectly, but equally strongly by Strasbourg – a status of "axiological superiority" to the normative *corpora* derived from their respective interpretative powers. This means either upholding the supremacy of the values of the Italian Constitution or those of the ECHR in the event of conflict. In order to break free from this "dead end", all the jurisdictions involved would do well to rediscover and cultivate a culture of "self restraint" and rigorous respect for differing institutional characteristics. Only strict regard for the specifics of the legitimacy of their interventions can allow the coexistence of jurisdictions that are not organised hierarchically and, at the same time, ensure a pluralistic view of rights tantamount to progress for everyone and that, as such, will be able to come to bear with "natural authority" so to speak, namely authority resulting from

the "congruence" between the "power exercised" and the "institutional form" by which it has been attributed to the individual body. From this point of view, the problem of the binding nature of Strasbourg case law appears easy to solve, thanks to the theory (furthermore a traditional one), of the "serial ascertainment" of violations of the convention, inasmuch as they are connected to the interpretation and application of the national norms present in the system of a given Party State.

Lastly, the confiscation of the property of legal persons appears to be a good starting point for a new and less ideologically conditioned examination of the liability of legal persons for offences connected with a crime in order to give new impetus to a necessary reform of the now outdated Legislative Decree no. 231 of 2001.