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The Problem of Squatting in Italy: A New Approach by the Courts

Case Study

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ABSTRACT:

There is a chronic inability of the Italian Government to enforce rapid and effective protection from infringements of property rights, as demonstrated by the problem of squatting. Despite the lack of official data, it appears that about 50,000 buildings all over the country are subjected to squatting. This research explores the reasons for such an inadequate reaction by a State that, although qualifies itself as "welfaristic", it has no problem in burdening law-abiding citizens with the costs of hardship of those most in need. Unfortunately, this situation has so far received the approval of Italian courts, which have been reluctant to defend the owners' good reasons. But, as the research points out, in contrast with the dominant jurisprudence, new case-law (from the *Tribunale* of Rome and the *Corte Suprema di Cassazione*) has emerged that sentences the Government to pay damages in case of squatting, if the proper institutions have failed to prevent or suppress it. It is a case-law that, albeit open to criticism, makes clear that property rights are entitled to protection accorded to them by the Constitution and other international laws. It seemed as if the Italian Government had understood that but lately it has approved several measures that go in the opposite direction. After a brief introduction on the constitutional concept of property rights (and on the misconceptions surrounding the "social function" of property enshrined in article 42 of the Italian Constitution), the research focuses on the aforesaid case-law and the most recent legislative interventions about squatting.

KEYWORDS:

squatting; "social function" of property; judicial engagement; judicial protection of property rights; general duty of "do harm to no one".

INTRODUCTION

Squatting is the action of occupying an abandoned or unoccupied building, usually residential, that the squatter does not own, rent or otherwise have lawful permission to use. Neuwirth (2004) suggested that there are at least 1 billion (one in seven) squatters worldwide, and if the current trends continue, this will increase to 2 billion by 2030 (one in four), and 3 billion by 2050 (one in three). Although squatting is usually a common phenomenon in developing countries and least developed countries, it is no accident in some industrialized countries either. While in the former case, a lower level of protection of property rights is understandable, in the latter it is not. To quote the title of a famous essay (Ely, 2008), "Property rights are the guardian of every other right: without them, there is no certainty of individual, political and economic liberties." For, as Pipes (1999) showed, first comes the recognition of private property, and then come freedom and democracy.

Among industrialized countries, squatting is a particularly pressing problem in Italy. It appears that about 50,000 buildings are squatted and the reaction by Government is typically too slow and ineffective (for a recent assessment see Portonera, 2019). It can be surprising to learn that a State who takes pride in qualifying itself as "welfaristic" may tolerate squatting as a mean to address the urgent challenge of homelessness; and that in doing so it may burden the law-abiding citizens with

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the costs of the hardship of those most in need. It seems like the great share of wealth that Italians pay in taxes (total tax revenue in 2018 was 42,4% of GDP) is not enough to absolve the "fundamental duties of political, economic, and social solidarity" inscribed in Article 2 of the Italian Constitution. But, to borrow Justice Holmes' line, "Taxes are what we pay for civilized society." So why do the Italian taxpayers have to be exposed also to the risk of losing their homes?

The main finding of this research is that the disparaging of property rights has been aided by an infelicitous attitude of the Italian Courts. On one hand, the courts have been inclined to loosely apply the laws on squatting (so that they could rule in favor of the squatters, instead of the homeowners) and, on the other hand, have declined to call on the Government to fulfill its law-enforcing duties. As a result, the Italian Courts have equally sinned by judicial *activism* (by sacrificing the rule of law on the altar of social justice) and by judicial *restraint* (by refusing to review governmental acts that were in violation of people's rights). Currently, this dominant jurisprudence has been challenged by several decisions of a first instance Court (*Tribunale* of Rome) and of the Italian Supreme Court (*Corte di Cassazione*). This is a lesson for every country in the world: without a judiciary firmly committed to applying faithfully the laws as they are written, there is no insurance that our rights will be respected.

This case study is divided into 8 sections: (1) Methodology and literature review; (2) Preliminary notes about squatting and constitutional protection of property in Italy; (3) Synthesis of the legal framework (*Law in Books*) and the dominant jurisprudence (*Law in Action*); (4) Analysis of the most recent case-law; (5) Political evolutions about squatting; (6) Conclusion and policy recommendations; (7) References; and (8) Acknowledgements.

METHODOLOGY & LITERATURE REVIEW

This research will be conducted according to the methodology expounded in Mengoni (1985): the problem will be understood in reference to the overall legal system in place. In order to do that, we will start with the concept of private property inscribed in the higher laws (the Italian Constitution and other internal norms). We will analyze the legal framework as it is, and as it is applied by the Government and the Courts (Pound, 1910). The literature review will include provisions from government agencies, academic publications and news coverage.

THE CONSTITUTIONAL NOTION OF PROPERTY IN ITALY

As already stated, squatting is a particularly pressing problem in Italy. According to data provided by Confedilizia, an organization dedicated to protect and advance Italian homeowners' rights, there are about 7,000 residential buildings subjected to squatting in Rome (the great part of which are social housing), about 100 in Catania, 200 in Genova, 3,000 in Palermo, over 100 in Reggio Calabria, 24 in Turin and 19 in Venice. However, this data is incomplete since the authorities have never done a thorough survey of squatted buildings. In any case, it appears that a number of about 50,000 reflects the reality of the problem (Portonera, 2019, 339). On top of that, the situation worsens because Government is typically slow to react to squatting, and the Courts are inclined to rule in favor of

squatters, instead of owners. To understand why in Italy property rights are viewed as expendable in order to achieve social pacification, we must first take a look at the constitutional notion of property and the misconceptions that, in our opinion, surround the concept of "social function" of property.

Article 42 of the Italian Constitution states that "private property is recognized 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". Although the use of the verbs "to recognize" and "to guarantee" should be read as proof of the pre-existence of this right to the State, in coherence with the analogous linguistic choices made by other norms of the Constitution (such as Article 2) (Coli, 1950), the political actors and some quarters in the judicial and the academic worlds are prone to undermine the right's substance. Surely, the troubled formation process of the article helped. In fact, the Italian Constituent Assembly (*Assemblea Costituente della Repubblica Italiana*)¹ of 1946-1948 was dominated by the Christian Democracy (*Democrazia Cristiana*), a socially conservative but economically progressive party, and the alliance between the Socialist Party (*Partito Socialista*) and the Communist Party (*Partito Comunista*), who were fervent advocates of abolition of private property. At this time, the National Democratic Union (*Unione Democratica Nazionale*), a coalition of classical liberal forces – once the cornerstone of every government since the Italian unification – had fallen to its lowest electoral ebb. In one of the many compromises that characterize the Italian Constitution, the social-communist bloc renounced its maximalist position, approving the enshrinement in the supreme law of the protection of private property wanted by the moderate faction in the Christian Democracy and by the classical liberals; and in return, it welcomed the notion of the "social function" of property.

By leveraging this notion, influential academics promoted a "functionalization" of property, aimed at undermining the proprietary logic rather than erasing it (at least, not completely) (see, e.g., Rodotà, 1981). Along these lines, it is no surprise that the same academics tried to expunge property rights from so-called "fundamental" rights by arguing that they are disciplined in the sub-section ("*titolo*") of the Constitution dedicated to economic relations: "where no juridical situation is assisted by the attribute of sanctity" (Rodotà, 1981, 317). However, this expulsion did not emerge as the overall winner from the battle of ideas, since it had been effectively contrasted by other scholarly opinions. According to one of the most prominent administrative law scholars, Massimo Severo Giannini (1971, 459-460), the fact that "property rights are among the fundamental rights of the individual is derived from the localization of article 42 in the [amplifier] section dedicated to the rights and the duties of citizens". Other jurists have pointed out that the "social function" is an "external" constraint on property, not an "internal" one, hence property rights are the power to use and to enjoy goods as one pleases (Santoro Passarelli, 1980, 666; Mangiameli, 1986, 86-87, 119-120; Gambaro, 2017, 181).

Even more significant has been the case-law of the Italian Constitutional Court, which since the 1960s identified a "minimum and essential" core of property rights, and has ruled as unconstitutional those

¹ Since its Unification in 1861, Italy had been a kingdom ruled by the House Savoia. At the end of WWII, a referendum was held to determine whether to keep the monarchic form of State or to adopt the republican one. The Republic won with the 54.3% of the popular vote. The Constituent Assembly was elected at the same time and had been assigned the task to write a constitution for the new Republic. Out of 556 total members, 207 were elected with the Christian Democracy, 115 with the Socialist Party and 104 with the Communist Party. The National Democratic Union won only 41 seats.

"constraints [...] that affect] the use of the object so profoundly as to make it unusable" (judgment no. 6/1966) or that discourage "every appeal [to the owners] in new investments in their lands, disincentivizing and mortifying their possessions precisely in their social and production function" (judgment no. 153/1977). As to the "social function" of property, the Constitutional Court stated that article 42 "enables the legislature to dictate constraints to private property [...], provided that these do not result in nullifying the substance of [said] rights" (judgment no. 220/1982). Furthermore, the Constitutional Court aligned itself with the guidelines established by the European Court of Human Rights (ECHR) in *Sporrong and Lönnroth v. Sweden* (1982) and subsequent decisions,² recognizing the illegitimacy of governmental acts or facts that infringes the exercise of property rights without a preliminary balancing between the individual right and the collective interest. In sum, by assessing its case-law, it is safe to assume that the Constitutional Court has offered a well-balanced interpretation of article 42, showing an overall understanding of property rights and faithfulness both to the text and the original meaning of the Constitution (Portonera, 2019, 336).

SQUATTING: THE LAW IN BOOKS AND THE LAW IN ACTION

Squatting is a crime under article 633 of the Italian Penal Code (hereinafter: p.c.). The article states: "Whoever invades arbitrarily others' land or buildings, public or private, in order to occupy them or otherwise profit from them, is punished, to the complaint of the injured person, with imprisonment for up to two years or with a fine from 103 € [113.41 \$] to 1,032 € [1,136.28 \$]. Imprisonment from two to four years and a fine from € 206 [226.82 \$] to € 2,064 [2,272.56 \$] are applied and the procedure is carried out in absence of complaint if the fact is committed by more than five people or if the fact is committed by a manifestly armed person".

The *law in action* is quite different from the *law in books*. In fact, the effectiveness of the article 633 p.c. has been lessened by a *jurisprudence constante* built upon the doctrine of "necessity" (expressed in the Italian criminal law by article 54 p.c.). Defendants seeking to rely on "necessity" argue that they should not be held liable for their actions as a crime because their conduct was necessary to prevent some greater harm. Under article 54 p.c., there must be the danger of serious bodily harm (the danger must be present and not caused voluntarily by the offender), and the committed fact must not be otherwise avoidable. The Supreme Court has requested a rigorous evaluation of each element required by article 54 p.c. But the inferior courts have usually adopted a less demanding standard, therefore acquitting squatters, even when the danger was not present or the fact could have been avoided (see Boccalatte, 2017). In short, they showed a predisposition to *judicial activism* by loosely applying the laws on squatting, and therefore sacrificing the rule of law on the altar of social justice.

² In a fashion that resembles the federal and state legal system in the United States, European countries have developed a system of multilevel protection of fundamental rights. Every nation has its own Constitution and its Constitutional Court (with the final authority to interpret the former), but above them there are the European Court of Justice (ECJ) (which is an institution within the European Union) and the ECHR (which is independent by the EU). In particular, the ECHR has created a quasi-constitutional European order of human rights. The decisions made by both the ECJ and the ECHR are binding for national governments and courts.

As already mentioned above, the political actors have been unable to ensure a swift and efficient reaction to squatting. They have even been unable to maintain a clear position on the subject. In 2014, the Parliament enacted a norm (decree-law no. 47 of 28 March 2014, converted by law no. 80 of 23 May 2014) that, in the case of squatted buildings, forbids the enjoyment of utilities (such as electricity, natural gas and water) and precludes the requesting of residency within the building (so that squatters cannot have access to several public services, such as public education or some healthcare services). On top of that, squatters are barred for five years from the social housing list. It was a strong decision in favor of property rights aimed at discouraging squatting. But oddly enough, the same Parliament delegated the power to the Government³ to eliminate article 633 p.c. (delegation-act no. 67 of 28 April 2014), therefore decriminalizing squatting. The Government did not choose to exercise that power: proof of the political inability to take a clear stance on squatting.

A situation of administrative disorder at the local level also added to legislative uncertainty. Several mayors disregarded the 2014 law by reconnecting utilities to some squatted buildings in the name of protecting the right to health. This kind of opposition pushed Parliament to pass a new law (no. 48 of 18 April 2017) under which the 2014 law will not be applied whenever there are minors or people in need of assistance within the squatted buildings (as usually happens). In just 3 years (2014-2017), the political choice to protect property rights and to deter squatting turned out to be nothing more than a mere illusion.

THE NEW APPROACH BY THE COURTS: A CASE OF JUDICIAL ENGAGEMENT

It is safe to assume that the tolerant attitude showed by both the judiciary and the political actors towards infringement of property rights is understandable in light of the "degradation" (Rescigno, 1971, 35) that said rights have suffered in our juridical and social culture (Portonera, 2019, 343). Nonetheless, in the last couple of years, something seems to have changed. In fact, a new case-law has emerged from the *Tribunale* of Rome, a first instance court, and from there has made its way up to the *Suprema Corte di Cassazione*, the Italian Supreme Court.⁴ With these judgments, the judges have refuted the *restraint* that had usually characterized their decisions about the liability of government in cases of squatting. They have adopted an approach that could be fairly described in terms of *judicial engagement*.

Judicial engagement is an exercise of judicial review power aimed at ensuring that individuals will receive an honest and reasoned explanation in court whenever they allege a plausible abuse of government power. While a "restraint" judge does not question the motive of governmental actions, even when they are constitutionally defective, and an "activist" judge tends to substitute his personal judgment to the one made by the elected branches even when the latter is constitutionally sound, an "engaged" judge places the burden on the Government to demonstrate that its actions are justified by a constitutionally proper end. (In other words, *judicial engagement* requires "the

³ Under article 76 of the Italian Constitution, the Parliament may delegate the law-making power to the Government for a limited time and for specified purposes.

⁴ Not to be confused with the Constitutional Court. The Supreme Court ensures the correct application of the law in the inferior courts, while the Constitutional Court rules on the constitutionality of laws.

recognition that the 'due process of law' includes a judicial assessment of whether a restriction on either personal or economic liberty is genuinely rationally related to an end that is within the proper scope of [governmental] powers, or whether the restriction is instead irrational, arbitrary, or discriminatory" [Barnett, 2012, 860]).

The case-law in question is grounded in the affirmation of the tortious liability of Government whenever it fails to prevent or to suppress infringements of property rights.⁵ The pioneer judgment is no. 21347/2017, pronounced by the *Tribunale* of Rome. In this case, several buildings were squatted since September 2014 and although a final and enforceable judicial decision was given ordering the eviction of the squatters, it remained unenforced owing to social considerations (a failure to find alternative accommodation for the occupants due to a lack of resources) and fears of public-order disturbances. The *Tribunale* sentenced the Ministry of the Interior to pay compensatory damages liquidated in 266,672.76 € (\$294,275.83) per month, from the moment in which squatting had started until the moment in which the squatters would be evicted. With the subsequent judgment no. 14924/2018, rendered in a different case, the *Tribunale* confirmed its new approach to the problem of squatting, ruling that if the Government (to be precise, the Presidency of the Council of Ministers and the Ministry of the Interior) does not evict the squatters, it will be sentenced to pay damages to the owner of the squatted building. Here, the *Tribunale* sentenced the Government to pay a total of 28 million € (about \$31 million) in damages.

Unfortunately, these judgments do not seem to be completely well reasoned. In our opinion, their biggest flaw is that they place the economic consequences of squatting only on the Government's shoulders. It is indisputable that inaction by the proper authorities injured the homeowners, but this damage should remain differentiated from one directly caused by the squatters. Otherwise, if the Government is sentenced to pay damages in full, the squatters will escape their liability since it is unlikely that the former could obtain regress from them. (Furthermore, it should not go unnoticed the fact that due to the defendant's nature, the damages will fall upon the blameless Italian taxpayers.) In sum, albeit open to criticism, this case-law offers a remedy as effective as possible to a situation of momentous magnitude determined by the Government's inability to guarantee property rights. It would be advisable to ensure real and effective protection *ex-ante*. But in the event of its deficiency, it is better to have compensatory damages than a right completely devoid of meaning, the *Tribunale* of Rome concluded.

The Supreme Court understood this. In judgment no. 24198/2018, about fifty buildings belonging to two Florence-based companies were squatted: because the Ministry of the Interior did not act in order to evict the squatters, the Supreme Court sentenced it to pay damages. As a result, the Italian court of last resort has solemnly reaffirmed the importance of guaranteeing property rights and the Government's inextinguishable duty to ensure this protection to the best of its ability. In this case, the Ministry of the Interior tried to justify its inaction by invoking the need to protect the public order. The Court rebutted this argument:

⁵ Under article 2043 of the Italian Civil Code, any intentional or negligent fact (such as governmental inaction) that causes an unjust injury to another obliges the person who has committed the fact to pay damages.

"tolerating crime, moreover committed by organized and trained masses in prejudice of defenseless citizens, is a very strange form of protection of public order: this is protected by restoring the violated legality, and not by assuring the offender [...] the enjoyment of the fruit of the crime; no comparison or balancing of interests is allowed when the claims of who broke the law (the squatter) and of who respected it (the homeowner) are in conflict; so that it is unthinkable that for reasons of public order, preference can be given to the former".

It is also noteworthy that the Supreme Court amended the mistake committed by the *Tribunale* of Rome about the entity of compensatory damages by distinguishing between the squatters' and the Government's conducts. The Court ruled that governmental liability derived not from the squatting per se, but from the violation of the obligation to enforce judicial measures issued to protect fundamental rights (such as property rights and economic liberties) recognized both by the Italian Constitution and other international laws. In our opinion (see also Portonera, 2019, 347), this should prevent the referring judge falling into the error of placing full damages on taxpayers' shoulders.

With judgment no. 24198/2018, the Supreme Court anticipated the reasoning of the European Court of Human Rights in *Casa di cura Valle fiorita s.r.l. v. Italy* (2018). The case concerned the applicant company being unable to recover possession of a building in Rome that had been squatted since 2012. Here too, a final and enforceable judicial decision ordering the eviction of the occupants remained unenforced owing to social considerations and fears of public-order disturbances. The Court acknowledged that social considerations and fears of public-order disturbances could justify difficulties with enforcement and a delay in evacuating the premises. At the same time, in view of the individual interests of the applicant company, the Court considered that the authorities, after a reasonable period of time had been spent in attempting to find a satisfactory solution, should have taken the necessary measures to comply with the judicial decision. Consequently, the Court ruled, the national authorities by persisting in their inaction breached the principles of rule of law and legal certainty.

To sum up, the Courts refused to be "restraint" judges (since they did not blindly defer to the choice made by the political actors) without turning into "activist" ones (given that they have applied the law as it is written, and in doing so, they did not substitute their judgment to the one made by the elected branches). In short, both the *Tribunale* of Rome and the *Suprema Corte di Cassazione* have been "engaged" judges.

THE MOST RECENT POLITICAL EVOLUTIONS

At a certain point, it seemed as if the Government had finally acknowledged the effects of the aforesaid case-law. The Ministry of the Interior, headed by Mr. Matteo Salvini, leader of the right-wing party Northern League (*Lega Nord*), issued a *circolare* (an official document) (no. 11001/123/111 of 1 September 2018) addressing the Prefects and inviting them to "take care of evictions with due timeliness, postponing to the next phase any evaluation regarding other concerns". Unfortunately, such a new political stance did not endure. Shortly after the issuing of this *circolare*, the Government, on a proposal coming right from Mr. Salvini, enacted a decree-law – so-called "security decree" (no.

113 of 4 October 2018, converted by law no. 113 of 1 December 2018) – aimed at avoiding the sentencing of the Government to damages, in case of its failure to carry out the eviction. The Government chose the worst possible way to avoid being sentenced to damages. Instead of putting in place effective procedures to ensure rapid evictions, it introduced a limitation on its own liability whenever the impossibility of identifying another accommodation for the squatters or the need to ensure the protection of public and private safety occurred. Once again, here comes the Government invoking social considerations and fears of public-order disturbances as means to indefinitely postpone the due evictions (even when ordered by final and enforceable judicial decisions) and get away with it. However, this time, the “inventive” solution is virtually unconstitutional. In fact, it could turn out to be an infringement of fundamental principles such as equality before law (that includes public entities, under article 3 co. 1 Constitution), judicial protection of a constitutionally guaranteed right (under article 24 Constitution), and impartiality of public administration's actions, which must have as its corollary the effective safeguard of any citizens' rights especially when they are assisted by a legitimate jurisdictional decision (under article 97 Constitution).

During the final editing of this research, Italy underwent a political crisis. In August, Mr. Salvini withdrew his support for the Government that was born only fourteen months before out of an alliance between the Northern League and the populist party, Five Star Movement (*Movimento 5 Stelle*). As a result, a new Government has come into office with the supports of the Five Star Movement and the left-wing parties: the Democratic Party (*Partito Democratico*) and the Free and Equal (*Liberi e uguali*). The new Government is expected to be one of the most leftist in Italy's history. Nonetheless, albeit during its time in opposition, the Democratic Party (as well as the Free and Equal) opposed the acceleration on evictions wanted by Mr. Salvini. It has now designated Mrs. Luciana Lamorgese as the new Minister of Interior. Mrs. Lamorgese is the former Prefect of Milan, who, during her service in the city, made the evictions of squatted buildings one of her top priorities. Hopefully, she will continue her work in favor of legality and property rights as head of internal security and of protection of the constitutional order.

CONCLUSION AND POLICY RECOMMENDATIONS

Due to the inadequacy of the employed tools and the easy justification given by misconceptions regarding “social function” of property inscribed in article 42 of its Constitution, Italy suffers from a chronic inability to deal with the problem of squatting. As a result, an increasingly accentuated conflict has exploded between homeowners, who see their constitutionally guaranteed rights infringed, and squatters, who shield themselves with the doctrine of necessity and are aided by the inefficiencies and delays of law enforcement (Portonera, 2019, 352). To quote the libertarian jurist Bruno Leoni (1961, 21), this has become a “legal war of all against all”, fought in the courtrooms and in the Parliament. The Italian Supreme Court recently reaffirmed the *caveat* of non-equivalence between the conflicting parties: one has the right to be protected, the other has violated the general duty of *neminem laedere* or “do harm to no one”. To add insult to injury, the Government has been historically unable to take a clear stance on the matter. Even when it seemed that it would stand in favor of property rights, the results were disappointing. Regrettably, the Italian judiciary has endorsed this state of affairs for far too long. But, as Alexander Hamilton (1788, 405) explained, “independence

of the judges is [...] requisite to guard the constitution and the rights of individuals from the effects of those ill humours [sic] which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves". Therefore, without an engaged judiciary, there is no insurance that people's rights will be respected. As shown in our research, it seems the Italian judiciary – at least an important part of it – has finally understood this essential notion.

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