



UNIVERSITA' DEGLI STUDI DI PERUGIA
DIPARTIMENTO DI DIRITTO PUBBLICO

*"L'effettività dei diritti alla luce della giurisprudenza della Corte europea
dei diritti dell'uomo di Strasburgo"*



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

CASE OF BEYELER v. ITALY

(Application no. 33202/96)

JUDGMENT

STRASBOURG

5 January 2000

In the case of Beyeler v. Italy,

The European Court of Human Rights, sitting, in accordance with Article 27 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”), as amended by Protocol No. 11¹, and the relevant provisions of the Rules of Court², as a Grand Chamber composed of the following judges:

Mr L. WILDHABER, *President*,

Mrs E. PALM,

Mr A. PASTOR RIDRUEJO,

Mr L. FERRARI BRAVO,

Mr G. BONELLO,

Mr P. KÜRIS,

Mr R. TÜRMEŒ,

Mr J.-P. COSTA,

Mrs F. TULKENS,

Mrs V. STRÁŒNICKÁ,

Mr M. FISCHBACH,

Mr V. BUTKEVYCH,

Mr J. CASADEVALL,

Mrs H.S. GREVE,

Mr A.B. BAKA,

Mr R. MARUSTE,

Mrs S. BOTOUCHAROVA,

and also of Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 8 and 9 September and 1 December 1999,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights (“the Commission”) on 2 November 1998, within the three-month period laid down by former Articles 32 § 1 and 47 of the Convention. It originated in an application (no. 33202/96) against the Italian Republic lodged with the Commission under former Article 25 by a Swiss national, Mr Ernst Beyeler, on 5 September 1996.

2. The Commission's request referred to former Articles 44 and 48 and to the declaration whereby Italy recognised the compulsory jurisdiction of

1-2. *Note by the Registry.* Protocol No. 11 and the Rules of Court came into force on 1 November 1998.

the Court (former Article 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 1 of Protocol No. 1 and Articles 14 and 18 of the Convention.

3. The Swiss Government, having been informed by the Registrar on 25 May 1999 of their right to intervene (Article 36 of the Convention and Rule 61 of the Rules of Court), indicated on 2 July 1999 that they did not intend to take part in the proceedings.

4. In accordance with the provisions of Article 5 § 4 of Protocol No. 11 taken together with Rules 100 § 1 and 24 § 6, a panel of the Grand Chamber decided on 14 January 1999 that the case would be examined by the Grand Chamber of the Court. The Grand Chamber included *ex officio* Mr B. Conforti, the judge elected in respect of Italy (Article 27 § 2 of the Convention and Rule 24 § 4), Mr L. Wildhaber, the President of the Court, Mrs E. Palm, Vice-President of the Court, and Mr J.-P. Costa and Mr M. Fischbach, Vice-Presidents of Sections (Article 27 § 3 of the Convention and Rule 24 §§ 3 and 5(a)). The other members appointed to complete the Grand Chamber were Mr A. Pastor Ridruejo, Mr G. Bonello, Mr P. Kūris, Mr R. Türmen, Mrs F. Tulkens, Mrs V. Strážnická, Mr V. Butkevych, Mr J. Casadevall, Mrs H.S. Greve, Mr A.B. Baka, Mr R. Maruste and Mrs S. Botoucharova (Rule 24 § 3).

Subsequently Mr Conforti, who had taken part in the Commission's examination of the case, withdrew from sitting in the Grand Chamber (Rule 28). The Italian Government ("the Government") accordingly appointed Mr L. Ferrari Bravo, the judge elected in respect of San Marino, to sit in his place (Article 27 § 2 of the Convention and Rule 29 § 1).

5. The applicant designated the lawyers who would represent him (Rule 36 § 3).

6. The Registrar received the Government's memorial on 11 May 1999, after an extension of the time-limit granted for that purpose, and the applicant's memorial on 21 May 1999.

7. In accordance with the decision of the Grand Chamber, a hearing took place in public in the Human Rights Building, Strasbourg, on 8 September 1999.

There appeared before the Court:

(a) *for the Government*

Mr V. ESPOSITO, <i>magistrato</i> , on secondment to the Diplomatic Legal Service, Ministry of Foreign Affairs,	<i>Co-Agent</i> ,
Mr G. RAIMONDI, <i>magistrato</i> at the Court of Cassation,	
Mr A. SACCUCCI, trainee lawyer of the Permanent Delegation of Italy to the Council of Europe,	<i>Counsel</i> ;

(b) *for the applicant*

Mr P. LALIVE,

Mrs T. GIOVANNINI, both of the Geneva Bar,

Mr H. PETER,

Counsel,

Adviser.

The Court heard addresses by Mr Lalive, Mr Esposito and Mr Raimondi and also Mrs Giovannini's replies to questions put by one of its members.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Period from 1954 to 1978

8. In an order of 8 January 1954 the Ministry of National Education (*Ministero per la pubblica istruzione*, which at the time had responsibility for works of cultural or artistic interest) declared the painting *Portrait of a Young Peasant*, painted in Saint-Rémy-de-Provence (France) in 1889 by the painter Vincent van Gogh, to be a work of historical and artistic interest within the meaning of section 3 of Law no. 1089 of 1 June 1939. On 20 January 1954 the order was served on the owner of the painting, Mr Verusio, an art collector living in Rome.

9. Early in 1977 the applicant decided to buy the painting through an intermediary, Mr Pierangeli, a Rome antiques dealer.

10. On 28 July 1977 Mr Verusio therefore sold the work to Mr Pierangeli for the agreed price of 600,000,000 Italian lire (ITL).

11. On 29 July 1977 the applicant gave instructions for that amount, plus ITL 5,000,000 as remuneration at the customary rate, to be transferred to Mr Pierangeli in exchange for the document confirming the purchase. Mr Pierangeli's account was credited with the amount on 12 August 1977.

12. Meanwhile, Mr Verusio had on 1 August 1977 declared the sale of the painting to the Ministry of Cultural Heritage ("the Ministry"), as required by section 30 of the aforementioned Law no. 1089 of 1939. The declaration had been signed only by Mr Verusio, but mentioned Mr Pierangeli's name as the other party to the contract. There was no mention of the end buyer (the applicant) or the place of delivery.

13. The two-month time-limit laid down by section 32 of Law no. 1089 of 1939 expired without the Ministry having exercised its right of pre-emption.

14. On 21 November 1977 Mr Pierangeli requested a licence from the Palermo Export Office to send the painting to London. The painting was placed in the temporary custody of the Sicilian Regional Art Gallery pending a decision from the Ministry as to whether it wished to exercise its right of pre-emption which arose under section 39 of Law no. 1089 of 1939 on an exportation.

15. In a note of 3 December 1977 the Ministry stated that it did not intend to purchase the painting as it was not of sufficient interest to justify the State's acquiring it. However, on 5 January 1978 the authorities refused Mr Pierangeli's application for an export licence on the ground that it would be seriously detrimental to the national cultural heritage for the painting to be exported.

16. On 22 March and 8 April 1978 the Ministry authorised the painting's return to Mr Pierangeli.

B. Period from 1983 to 1986

17. On 1 December 1983 Mr Pierangeli made a declaration to the Ministry stating that he had purchased the painting on behalf of the applicant. On 2 December 1983 the applicant and Mr Pierangeli informed the Ministry that the Peggy Guggenheim Collection in Venice wished to buy the painting for 2,100,000 United States dollars (USD) and reiterated that Mr Pierangeli had purchased the painting in 1977 on behalf of the applicant. At the same time they invited the Ministry to indicate whether it intended to exercise its right of pre-emption under Law no. 1089 of 1939.

18. In a note of 9 January 1984 the Ministry informed the parties that it was unable to exercise its right of pre-emption validly since there had been no contract and a mere unilateral declaration of an intention to sell was insufficient. In its note, which was sent to both Mr Pierangeli and the applicant, the Ministry did not describe the applicant as being the owner or refer to the declaration made on 1 December 1983.

19. On 28 February 1984 Mr Petretti, acting for and on behalf of the applicant and Mr Pierangeli, applied to the Fine Arts Department in Rome and to the Ministry for a licence to move the painting to Venice so that the Peggy Guggenheim Collection could inspect it with a view to its purchase. On 7 March 1984 the Ministry refused permission for the painting to be moved on the ground that there was a risk that it would suffer irreparable damage.

20. In early 1985 Mr Pierangeli, in his capacity as "holder of the painting for and on behalf of Mr Ernst Beyeler", in turn requested permission to transfer the painting to Venice as the Peggy Guggenheim Collection had asked to inspect it. On 30 January 1985 the Minister of Cultural Heritage served on Mr Petretti (the applicant's representative), certain departments of the Ministry and State Counsel's Office a request that

it be informed whether or not the owner of the painting had decided to move it to Venice. On 21 February 1985 Mr Petretti, acting for and on behalf of the applicant alone, confirmed that his client agreed to the painting's being moved. At that juncture, following an informal request from the Ministry, he also produced a copy of the declaration of 1 December 1983. On 26 February 1985 the applicant wrote to the Ministry in connection with the technical arrangements for the painting's transfer. On 9 April 1985 the Ministry gave permission for the painting to be moved to Venice.

21. In a note to Mr Pierangeli of 4 October 1985 the Ministry referred to the communication of 2 December 1983 and requested the documents showing that Mr Pierangeli had bought the painting on behalf of the applicant.

22. On 23 April 1986 the Minister ordered that the painting be sent to Rome for temporary custody in the Modern and Contemporary Art Gallery. The order, in which express reference was made to the communication of 2 December 1983, was issued after the relevant authorities had expressed concern about the conditions in which the painting was being kept, particularly in the light of the uncertainty as to who was the real owner and the failure by the Peggy Guggenheim Collection in Venice to comply with its undertakings.

23. The applicant applied for the first time to the Lazio Regional Administrative Court ("the RAC") for judicial review of the order of 23 April 1986.

24. On 30 April 1987 Mr Peter, who had replaced Mr Petretti as the applicant's lawyer, sent a letter to the director of the Fine Arts Department in Rome assuring him that the applicant had no intention whatsoever of infringing Italian law and referring, among other things, to the authorities' fears that the painting might be illegally exported.

25. On 12 June 1987 Mr Peter asked the Modern and Contemporary Art Gallery in Rome for authorisation to check the painting's condition at the gallery on his client's behalf (the lawyer referred to his client as the "owner of the painting"). On 19 October 1987, with the agreement of State Counsel's Office, a meeting was therefore held at the Modern and Contemporary Art Gallery in Rome. It was attended by, among others, the applicant, his new lawyer, the director of the gallery and an expert from the Peggy Guggenheim Collection (as recorded in the minutes). The director said that uncertainty had arisen (as she explained to the applicant's lawyer in a letter of 20 November 1987) as a result of the above-mentioned application to the RAC. In a letter of 23 December 1987 the applicant informed the director that he intended to discontinue those proceedings on account of, among other things, the fact that in the meantime the director of the gallery had allowed him, as owner of the painting, access to it at his simple request. A copy of that letter was also sent to the Fine Arts Department in Rome.

C. 1988

26. In January 1988 the Ministry sought clarification from Mr Peter about the applicant's alleged ownership of the painting. The applicant replied by sending a copy of the communications of 1 and 2 December 1983. He also stated that there had been no subsequent transfer of title between Mr Pierangeli and himself as he had acquired ownership of the painting directly.

27. It is apparent from two letters sent by the applicant's lawyer to the relevant Director-General of the Ministry on 5 and 26 February 1988, the contents of which have not been contested by the Government, that the Ministry had informed the applicant alone on at least two occasions (one of which was during a meeting with one of Mr Beyeler's lawyers at the Director-General's office on 28 January 1988) that the Italian State was interested in purchasing the painting, but stressed that it had a limited budget for that purpose.

28. A letter of 22 February 1988 sent by Mr Peter to the Director-General of the Ministry shows that on 19 February the latter had telephoned Mr Peter asking for the applicant's permission, as owner of the painting, to exhibit it in the Modern and Contemporary Art Gallery in Rome. The contents of that telephone conversation and of the letter referring to it have not been contested by the Government, although the Court has not been provided with a full transcript of the conversation.

29. In a letter of 26 February 1988 the applicant told the Ministry, referring to their earlier conversations on the subject, that he was willing to sell the painting to the Italian State for USD 11,000,000 and stated that it was a much lower price than that being proposed in negotiations with individuals interested in buying the painting. On 14 April 1988 the applicant drew the Ministry's attention to the fact that it had not responded to his offer within the time-limit he had indicated in his letter of 26 February.

30. On 2 May 1988 the applicant sold the painting to the Peggy Guggenheim Collection in Venice for USD 8,500,000.

31. The following day the parties served notice of the sale agreement on the Ministry, as required by section 30 of Law no. 1089 of 1939 and Article 57 of Royal Decree no. 363 of 30 January 1913.

32. In a note of 1 July 1988 the Ministry informed the parties that it could not ascribe to the declaration the effects provided for under the aforementioned provisions since the applicant did not have valid title to the painting. In particular, the Ministry considered that the declaration of the sale in 1977 by Mr Verusio to Mr Pierangeli and the declaration of 2 December 1983 conflicted with the purpose of section 30 of Law no. 1089 of 1939 and did not satisfy the requirements of Royal Decree no. 363 of 1913.

33. On 5 July 1988 the applicant asked the Ministry to return the painting, which was still in the custody of the Modern and Contemporary Art Gallery in Rome. The request was made pursuant to Article 37 of Royal Decree no. 363 of 1913, which provides, *inter alia*, that a work of art kept in accordance with the provisions of the decree may be returned to the owner if he can guarantee that it will be kept in good condition. The Ministry did not reply, however.

34. On 4 August 1988 Mr Peter replied to the note of 1 July, pointing out, among other things, that from as early as 1984 the Italian State had treated the applicant as the lawful owner of the painting, in particular by giving him permission to move the painting from Rome to Venice and by intimating that it wished to buy it from him.

35. On 16 September 1988, in response to an informal request from the Italian authorities, the applicant sent them the bank statements showing that Mr Pierangeli had purchased the painting on the applicant's behalf.

36. In an order of 24 November 1988 the Ministry exercised its right of pre-emption in respect of the 1977 sale. It contended that the notice served on 28 July 1977 was invalid as the communications of 3 August 1977 and 2 December 1983 did not contain the information required for the sale to be valid under Article 57 of Royal Decree no. 363 of 1913. The Ministry considered that on those dates it had not been in a position to establish the true identity of the contracting parties as the applicant had not signed the declaration giving notice of the contract and had thus prevented it from deciding in the light of all the facts whether to exercise its right of pre-emption. In addition, it said that the public interest in acquiring the painting was justified by the dearth of works by Vincent van Gogh in Italian museums and the need to ensure compliance with the statute that had been infringed. It observed, further, that the fact that the real purchaser of the painting, Mr Beyeler, was of foreign nationality took on particular importance for the purpose of protecting the painting.

Accordingly, the Ministry concluded

(a) that the documents relating to payment for the painting made by Mr Beyeler to Mr Verusio, through Mr Pierangeli, proved that the painting had been sold directly by Mr Verusio to Mr Beyeler;

(b) that, under section 61 of Law no. 1089 of 1939, the right of pre-emption provided for in sections 31 and 32 subsisted;

(c) that it should exercise its right of pre-emption; and

(d) that payment of the price stipulated in the 1977 agreement, namely ITL 600,000,000, should be made to the title-holder.

37. The order was served on Mr Verusio and the applicant on 30 November and 22 December 1988 respectively.

D. Proceedings relating to the applicant's various applications to the Lazio RAC

38. Meanwhile, the applicant and the Solomon Guggenheim Corporation had on 18, 19 and 20, 29 October 1988 respectively sought an order from the RAC annulling the note of 1 July 1988. The applicant maintained in particular that the Ministry had acted *ultra vires*, that the relevant provisions of Law no. 1089 of 1939 had been infringed and that in this case the Ministry had made an incorrect assessment of what was in the public interest. The applicant also submitted that section 61 of that statute was unconstitutional.

39. On 16 and 17 January 1989 the applicant lodged a further application, challenging the failure to reply to his request of 5 July 1988 for the painting to be returned.

40. On 30 January 1989 the applicant applied to the RAC to have the ministerial order of 24 November 1988 set aside. He complained, *inter alia*, that the impugned decision had been made *ultra vires*, that the reasoning was insufficient and self-contradictory, that the inquiry conducted by the Ministry had been inadequate, that there had been a breach of the relevant provisions of Law no. 1089 of 1939 and Articles 1705 and 1706 of the Italian Civil Code concerning agency and that the decision had not been made in the public interest as it was incomprehensible that a public interest should exist in 1988 when none had existed in 1977. The applicant argued that he had in any event now acquired title by adverse possession. He also complained that the impugned order had been made because he was a foreign national. He alleged, too, that there had been a violation of Article 1224 of the Italian Civil Code, which concerns damages arising out of pecuniary obligations, in that the price paid had not been revised.

41. Lastly, the applicant asked the RAC to refer to the Constitutional Court the question whether the relevant provisions of Law no. 1089 of 1939 were consistent with Articles 3, 24, 42 and 97 of the Italian Constitution.

42. The RAC ordered the joinder of the various applications before dismissing them all in a judgment of 16 November 1989, which was served on the applicant on 26 January 1990.

43. The court held that the declaration made on 3 August 1977 had not contained all the essential information required by Article 57 of Royal Decree no. 363 of 1913 and accordingly had to be regarded as “null and void”. It had not been signed by the real buyer and the place of delivery in Italy had not been indicated. In addition, the RAC held that the communications of 1 and 2 December 1983 could not have started time running for the purposes of the two-month limitation period as they had not been made by the seller and did not satisfy the requirements of Article 57 of the royal decree. The uncertainty as to who the real owner of the painting was had consequently prevented the two-month limitation period from

starting to run, bearing in mind, too, that the authorities had had to make inquiries to establish who the owner was and that it was for the person declaring the sale to prove ownership. The RAC considered that the parties had had a duty to declare the sale and that their failure to do so meant that the two-month time-limit was no longer applicable. The authorities' right of pre-emption, which was no longer subject to a time-limit, had thus become "permanent".

44. The RAC also found that the relevant authority had given valid reasons for finding that there was a legitimate public interest in the acquisition of the work (in particular, the fact that there were no major works by Vincent van Gogh in the State's collections and the need to protect the public interest from unfair conduct by the parties). In addition, it considered that the fact that the State had twice declined to exercise its right of pre-emption in 1977 was irrelevant as what was in the public interest had to be assessed in the light of the current position and requirements. In that regard it observed that not all the information needed for the purposes of identifying the owner of the painting had been made available to the Ministry, which had thus not been in a position until September 1988 to decide in the light of all the facts whether to exercise its right of pre-emption.

45. The RAC further found that, although the applicant's nationality had been one of the factors the Ministry had taken into account when deciding whether to exercise its right of pre-emption, it had not been the main factor.

46. As regards the applicant's claim for compensation for the failure to revise the value of the painting, the RAC held that section 31 of Law no. 1089 of 1939 conferred no discretion on the authorities since it provided, *inter alia*, that they had to pay the owner of the work only the agreed price stipulated in the deed of transfer, even in the event of pre-emption under section 61 (which refers to section 31). The RAC found, however, that the applicant could have asked for the value of the painting to be revised by bringing an action in damages in the ordinary civil courts.

47. As to the applications concerning the failure to reply to the applicant's request of 5 July 1988, the RAC considered that they were no longer relevant in view of the pre-emption order made on 24 November 1988.

48. Lastly, the RAC declared the constitutional issues raised by the applicant manifestly ill-founded as in the instant case the exceptional nature of the work and the improper conduct of the parties had justified extending the right of pre-emption indefinitely, which had the effect of restricting the property right.

E. Proceedings in the *Consiglio di Stato*

49. The applicant lodged an appeal with the *Consiglio di Stato*. Among other things, he argued that the administrative courts had no jurisdiction in the instant case as the authorities had exercised powers which they did not possess and had failed to exercise properly those they did possess.

50. In a judgment of 19 October 1990 the *Consiglio di Stato* dismissed the appeal and upheld the judgment of the RAC in its entirety. It held that the instant case related to a defective declaration, not a failure to make a declaration, and that it was within the jurisdiction of the administrative courts because it concerned the exercise of existing powers. It went on to confirm that since the 1977 declaration did not contain all the essential information required by Royal Decree no. 363 of 1913 – notably the identity of all the contracting parties – the authorities were entitled to exercise their right of pre-emption under section 61 of Law no. 1089 of 1939 at any time, that right being subject to a limitation period only if a fresh declaration were made in accordance with the law. The *Consiglio di Stato* also held that the applicant could not have acquired the painting definitively by adverse possession.

51. The *Consiglio di Stato* considered that the authorities had not erred in considering the applicant to be the person on whom they should serve the pre-emption order and that in the present case the right of pre-emption of the authorities was different from the one existing under the general law. It had amounted to an actual expropriation measure, the transfer of the work being merely the condition allowing the authorities to expropriate it lawfully. The *Consiglio di Stato* held as follows:

“Therefore, even acknowledging that, as the appellants maintain, Mr Pierangeli had purchased the painting from Mr Verusio as Mr Beyeler's indirect agent, the fact remains that it is the latter's position which is affected in the final analysis by the agreement signed.

...

The administrative authorities thus committed no error of fact as regards the identification of the real purchaser on whom the order announcing their intention of exercising their right of pre-emption had to be served, as well as on Mr Verusio...

Further, the fact that the right of pre-emption provided for in section 30 of Law no. 1089 of 1939 has to be exercised against the real owner, and in any event against the end purchaser in a line of transactions complicated by the intervention of an agent, is also closely linked to the special nature of pre-emption...

Pre-emption, as provided for in sections 31 et seq. of Law no. 1089 ..., does not operate in the same way as the civil-law transaction of the same name ..., so that the mechanism by which the right of pre-emption is actually exercised must therefore be considered as belonging to the more general category of measures of dispossession (in respect of which the deed of transfer is merely a pre-condition for the exercise of the

right of pre-emption). The validity of the transfer is not therefore a decisive factor, given that the exercise of the right of pre-emption does not have the effect of substituting the authorities for the vendor in negotiations between individuals, but rather the – opposite – effect of annulling the sale and constituting an acquisition...

... it is ... rather an actual act of expropriation, which can concern only the real owner of the property, this being the only person against whom the act of dispossession can be validly exercised..."

“Anche, quindi, a voler ritenere, come pretendono gli appellanti, che il Pierangeli abbia acquistato il dipinto dal Verusio quale mandatario senza rappresentanza del Beyeler, è pur sempre a quest'ultimo che devono ricondursi gli effetti finali del concluso contratto.

...

E' da escludere, pertanto, che vi sia stato errore di fatto da parte dell'Amministrazione relativamente alla individuazione del soggetto effettivo acquirente e nei cui confronti andava esercitata la prelazione ed al quale andava notificato il relativo decreto, oltre che al Verusio...

D'altra parte, che la prelazione di cui all'art. 30 della legge n. 1089/1939 debba esercitarsi nei confronti del proprietario effettivo e comunque del destinatario finale di una fattispecie acquisitiva complessa quale è il mandato, si ricollega anche alla ... particolare natura dell'istituto.

La prelazione, di cui all'art. 31 e segg. della legge indicata ... non opera alla stregua dell'omonimo istituto civilistico ..., sicché il provvedimento, con cui, in concreto, si esercita la prelazione deve essere ricondotto alla più generale categoria degli atti ablatori (rispetto al quale il negozio di alienazione costituisce mera condizione legittimante del potere), con la conseguenza che non assume valore determinante la validità dell'atto di alienazione presupposto, dal momento che nessuna sostituzione dell'amministrazione al soggetto alienante nel negozio posto in essere da privati avviene col provvedimento della prelazione dal quale, anzi, oltre che un effetto propriamente costitutivo (acquisitivo) discende un (ulteriore) effetto caducatorio del negozio di alienazione medesima...

... trattasi ... piuttosto di un vero e proprio atto espropriativo, che non può non riguardare se non il proprietario effettivo del bene stesso, unico a poter essere utilmente inciso dall'atto ablativo..."

52. The *Consiglio di Stato* observed further that the conduct of the authorities could not be considered to be contradictory: as the RAC had already pointed out, the authorities had approached the matter carefully and ultimately had not decided to exercise their right of pre-emption until they were certain, on the basis of documentation in their possession, that the painting had been purchased on behalf of Mr Beyeler and paid for by him. The *Consiglio di Stato* also pointed out that the nationality of the applicant had increased the Ministry's determination to exercise its right of pre-emption.

53. The *Consiglio di Stato* also held that the issues raised by the applicant as to the unconstitutionality of sections 31, 32 and 61 of Law no. 1089 of 1939 were manifestly ill-founded. Those issues concerned in particular Article 3 of the Constitution, which embodies – among other things – the non-discrimination principle, Article 42, which guarantees the right of property and, lastly, Article 97, which establishes the principle of sound public administration. As to Article 3, the *Consiglio di Stato* observed that in the instant case the special nature of the situation resulting from an invalid declaration of sale justified different treatment. As regards Article 42, it considered – with regard to transfers of title to protected works – that private individuals had duties of good faith and transparency. Lastly, as regards Article 97, it found that the State's delay in exercising its right of pre-emption should be attributed to the improper conduct of the parties.

F. Appeal to the Court of Cassation

54. The applicant then appealed to the Court of Cassation, arguing that his case came within the jurisdiction of the ordinary civil courts, not the administrative courts. He submitted again that sections 31, 32 and 61 of Law no. 1089 of 1939 were unconstitutional in the light of Articles 3 and 42 of the Italian Constitution.

55. In an order of 11 November 1993 the Court of Cassation held that the constitutionality issues did not appear to be manifestly ill-founded.

56. The Court of Cassation ruled firstly that if the authorities could exercise their right of pre-emption at any time the seller's rights would always be restricted, thus creating continual uncertainty as to the legal position with regard to the work. The Court of Cassation observed in that regard that, even if the first declaration had been invalid, the right of pre-emption could nonetheless have been exercised once the authorities had received all the information required under the statute (pointing out in that connection, as the *Consiglio di Stato* had already noted, that the Ministry had not exercised its right of pre-emption until it was certain that the painting had been purchased on behalf of Mr Beyeler and in consideration of a sum of money paid by him). The authorities had not been certain of that until the Ministry had received the bank statements relating to the 1977 sale. The Court of Cassation noted that the pre-emption order had been issued and served on the parties more than two months later.

57. The Court of Cassation then found that even supposing that the pre-emption order did amount to an actual expropriation measure, as the *Consiglio di Stato* had said, the applicant had been treated differently from anyone else whose property had been expropriated. Compensation to which owners of property over which the State exercised its right of pre-emption were entitled was calculated on a different basis from the one used to

calculate compensation payable in other cases of expropriation; furthermore, there was no right of judicial review. Although the agreed price stated in the transfer document might constitute sufficient compensation where the pre-emption occurred within the two-month period laid down by the statute, that was no longer true where the right of pre-emption was exercised several years later, as had happened in the instant case. The applicant had also been treated differently from a person who had failed to make a declaration of transfer. The court considered, having regard to section 31(3) of Law no. 1089 of 1939, that where, in the latter type of case, it was impossible to determine the agreed price, the State would have to pay the owner compensation equivalent to the market value of the work.

58. It observed, lastly, that if the Constitutional Court held that the provisions in issue were unconstitutional, one of the consequences would be that the ordinary courts dealing with such cases would have jurisdiction and the applicant would be able to challenge the impugned decision in those courts and rely on the Italian authorities' delay in exercising their right of pre-emption.

59. The Court of Cassation stayed the proceedings before it and ordered the case to be referred to the Constitutional Court.

G. Proceedings in the Constitutional Court

60. In a judgment of 14 June 1995 the Constitutional Court declared the constitutionality issue raised by the Court of Cassation unfounded. It stressed, firstly, the special nature of the provisions of Law no. 1089 of 1939, which were intended to “protect assets related to the fundamental interests of the cultural life of the country”. The special nature of such assets had accordingly justified the authorities' being granted different, more restrictive powers than those they had in respect of other property. Consequently, there had been no discriminatory treatment as the property was different in kind from that concerned in ordinary expropriation proceedings. Nor was there any difference in treatment between cases where an invalid declaration was made and cases where the sale had not been declared, as, even in the latter case, the compensation payable would be the price agreed at the time of the sale. If the agreed price on an undeclared sale was not known, it had to be determined on the basis of any available evidence.

61. Furthermore, as regards the appropriate price payable by the State when it exercised its right of pre-emption late, the Constitutional Court reiterated that that issue could not be decided on the basis of the criteria used to determine the amount of compensation in ordinary expropriation proceedings, as the proceedings were of a different kind and the amount paid in situations such as the one in the instant case was, in any event, dependent on a contractual element that had been freely decided by the

parties. It followed from this latter point that, under normal circumstances, namely in cases where the right of pre-emption was exercised within the prescribed time-limit, the price, despite being less than the market value, would nonetheless not be derisory or symbolic. Lastly, the Constitutional Court noted that section 61 of Law no. 1089 of 1939 was to be found in the part of the statute dealing with “penalties”. A crucial factor was, therefore, the fact that the owner's economic loss was a consequence of an irregularity or of a failure on his part to declare the sale of the property, thus rendering the sale nugatory and entitling the State to exercise its right of pre-emption at any time. However, as it did not amount to a real criminal or administrative penalty, it was right that the authorities should have a discretion to exercise their right of pre-emption at any time. Moreover, individuals could rectify the position at any time by filing a late declaration.

H. Referral of the case to the Court of Cassation

62. Following the decision of the Constitutional Court, the Court of Cassation dismissed the applicant's appeal in a judgment of 16 November 1995, deposited with the registry on 11 March 1996. It held that the administrative courts had jurisdiction in the case and that, both as regards the exercise by the State of its right of pre-emption at any time and the allegation that service of the pre-emption order had been defective, the case concerned issues that related to the way in which the authorities had exercised their powers, not to the exercise of powers which they did not possess.

63. Among other things, the Court of Cassation considered that, in the absence of any legal provision in that respect, it would have been arbitrary for the compulsory two-month time-limit to run from the time at which the (unspecified) departments of the authorities had learnt of the sale on the basis of undetermined factors or circumstances. However, the Court of Cassation found that the right of pre-emption had properly been ruled to be exercisable at any time and against anyone in possession of the property (reiterating that the authorities had not exercised their right of pre-emption until they had been certain that the painting had been purchased on behalf of the applicant). Moreover, it pointed out that the argument concerning the reference in section 61 to section 32 (which, *inter alia*, provided for a two-month time-limit) was irrelevant as section 32 contained procedural provisions that also applied to State pre-emptions that were not subject to any time-limit, such as the rule that the State acquired title to property when the pre-emption order was made or the rule that the provisions of a sale agreement did not bind the State.

I. The theft of the painting and its retrieval

64. During the night of 19/20 May 1998 the painting, which was still in the Rome Gallery of Modern and Contemporary Art, was stolen in an armed robbery along with two other paintings. It was found by the *carabinieri* and Italian police on 6 July 1998.

II. RELEVANT DOMESTIC LAW

65. Under Article 1706 of the Italian Civil Code, the sale of movable property through an agent acting in his own name but on behalf of his principal (indirect agency) has the effect of automatically transferring title to the property to the principal, who can then claim it from the agent.

66. In respect of works of art which are of interest for the artistic heritage of the nation, transfers and other legal transactions are subject to certain conditions. Section 30 of Law no. 1089 of 1 June 1939 provides that the owner or person in possession, in any capacity whatsoever, of property considered to be of cultural or artistic interest within the meaning of section 3 must declare to the Ministry responsible for works of cultural interest (from 1974 the Ministry of Cultural Heritage – *Ministero per i beni culturali e ambientali*) any transaction, whether for consideration or by way of gift, transferring full or partial title to or possession of the work (“*Il proprietario e chiunque a qualsiasi titolo detenga una delle cose che abbiano formato oggetto di notifica a norma degli artt. 30 e 31 della legge n. 1089 del 1 giugno 1939 è tenuto a denunciare al Ministro per l'educazione nazionale ogni atto, a titolo oneroso o gratuito, che ne trasmetta, in tutto o in parte, la proprietà o la detenzione*”).

67. Sections 31(1) and 32(1) of Law no. 1089 of 1939 provide that the Ministry may exercise a right of pre-emption over the work within two months from the date of the declaration referred to above, at the agreed price as set out in the deed of transfer if the transfer is for value (section 31(1): “*Nel caso di alienazione a titolo oneroso, il Ministro per l'educazione nazionale ha facoltà di acquistare la cosa al medesimo prezzo stabilito nell'atto di alienazione*”; section 32(1): “*Il diritto di prelazione deve essere esercitato nel termine di mesi due dalla data della denuncia*”). In the event that the work of art should be sold at the same time as other works for an aggregate price, that price is automatically determined by the Minister or, if the seller contests the price, by a board composed of three members, one of whom is appointed by the seller (section 31(3)).

68. Section 36 provides that the owner or person in possession of such a work must declare any intention to export it. In that event the Ministry may exercise a right of pre-emption over the work within ninety days from the date of the declaration, at a price determined by the Ministry if the work is

to be exported to a member State of the European Union and for the value indicated in the declaration in other cases (section 39).

69. Section 61 also provides that “transfers, agreements and other legal transactions made in breach of the provisions laid down in this Law or in non-compliance with the terms and conditions prescribed shall automatically be void” and that the Ministry may still exercise its right of pre-emption under sections 31 and 32 (section 61: “*Le alienazioni, le convenzioni e gli atti giuridici in genere, compiuti contro i divieti stabiliti dalla presente legge o senza l'osservanza delle condizioni e modalità da esse prescritte, sono nulli di pieno diritto. Resta sempre salva la facoltà del Ministro per l'educazione nazionale di esercitare il diritto di prelazione a norma degli artt. 31 e 32*”).

70. The statute also provides that, until the adoption of an implementing decree (none has yet been adopted), the provisions of Royal Decree no. 363 of 30 January 1913 shall continue to apply (section 73). Article 57 of the royal decree prescribes, *inter alia*, the content of the declarations referred to above, for example, they must contain a brief description of the subject matter of the contract, the type and the terms and conditions of transfer, the names, addresses and signatures of the contracting parties and an indication of the date and place in Italy at which the property sold shall be delivered to the purchaser. Under that provision, a declaration which does not contain all that information in full and precise terms shall be considered to be null and void.

71. Section 63 of Law no. 1089 of 1939 prescribes a prison sentence of one year and a maximum fine of ITL 75,000,000 for, *inter alia*, failure to make the declaration prescribed by section 30.

72. Lastly, sections 66 et seq. of the royal decree govern expropriations of movable and immovable property and refer in a number of places to Law no. 2359 of 25 June 1865 relating to expropriations in the public interest. In that context Article 67 of the royal decree provides that a public-interest declaration is made by the Minister of Education after the Council for Antiquities and Fine Arts (*Consiglio superiore per l'antichità e le belle arti*) has given its approval and observations have been received from the *Consiglio di Stato*.

III. THE UNESCO CONVENTION OF 14 NOVEMBER 1970

73. The Unesco Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property was signed in Paris on 14 November 1970 and came into force on 24 April 1972 (in Italy on 2 January 1979). Article 4 provides:

“The States Parties to this Convention recognise that for the purpose of the Convention property which belongs to the following categories forms part of the cultural heritage of each State:

(a) cultural property created by the individual or collective genius of nationals of the State concerned, and cultural property of importance to the State concerned created within the territory of that State by foreign nationals or stateless persons resident within such territory;

(b) cultural property found within the national territory;

(c) cultural property acquired by archaeological, ethnological or natural science missions, with the consent of the competent authorities of the country of origin of such property;

(d) cultural property which has been the subject of a freely agreed exchange;

(e) cultural property received as a gift or purchased legally with the consent of the competent authorities of the country of origin of such property.”

PROCEEDINGS BEFORE THE COMMISSION

74. Mr Ernst Beyeler applied to the Commission on 5 September 1996. He complained that there had been a violation of Article 1 of Protocol No. 1 and of Articles 14 and 18 of the Convention on the ground that the Italian Ministry of Cultural Heritage had exercised a right of pre-emption over a Van Gogh painting which, he alleged, he had lawfully purchased.

75. The Commission declared the application (no. 33202/96) admissible on 9 March 1998. In its report of 10 September 1998 (former Article 31 of the Convention), it expressed the opinion

(a) that there had not been a violation of Article 1 of Protocol No. 1 (twenty votes to ten);

(b) that there had not been a violation of Article 14 of the Convention (twenty-three votes to seven); and

(c) that there had not been a violation of Article 18 of the Convention (unanimously).

The full text of the Commission's opinion and of the two dissenting opinions contained in the report is reproduced as an annex to this judgment¹.

FINAL SUBMISSIONS TO THE COURT

76. At the hearing on 8 September 1999 the Government asked the Court to hold that there had not been a violation of Article 1 of

1. *Note by the Registry*. For practical reasons this annex will appear only with the final printed version of the judgment (in the official reports of selected judgments and decisions of the Court), but a copy of the Commission's report is obtainable from the Registry.

Protocol No. 1 and that there was no reason to examine the applicant's complaint of a violation of Article 14 of the Convention.

77. The applicant asked the Court to find a violation of Article 1 of Protocol No. 1 and Article 14 of the Convention and award him just satisfaction under Article 41. He did not, however, repeat his complaint of a violation of Article 18 of the Convention.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1

78. The applicant alleged a violation of Article 1 of Protocol No. 1, contending, in particular, that the Italian authorities had expropriated the painting – of which he claimed to be the lawful owner – in breach of the conditions laid down by that provision, which is worded as follows:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The 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.”

A. Submissions of those appearing before the Court

1. *The applicant*

79. The applicant submitted that it was clear from the facts that from 2 December 1983, when he made the declaration, he had on a number of occasions been treated by the Italian authorities as the actual owner of the painting. It was also clear from the decisions of the Italian courts, in particular the judgments of the *Consiglio di Stato* and the Court of Cassation, that he had been deemed to be the sole person, in law and in fact, on whom the pre-emption order should be served, in his capacity as owner of the painting. The applicant concluded from this that he did have rights protected by Article 1 of Protocol No. 1, irrespective of the position under domestic law.

80. The applicant also asserted that the measure complained of amounted to an expropriation, as the decisions of the Italian courts showed.

81. He thus argued that the measure in question had infringed the rule of law. He maintained, in support of that submission, that the procedure prescribed by Law no. 2359 of 25 June 1865 for determining the amount of compensation payable in the event of an expropriation in the public interest had not been followed at all. In addition, there had been other irregularities relating to the declaration that the painting was a work of public interest, as that declaration had been made without obtaining the opinion of the Council for Antiquities and Fine Arts or the *Consiglio di Stato*, both of which had to be consulted under Article 67 of Royal Decree no. 363 of 1913.

82. The applicant submitted further that he could not be accused of failing to comply with the formalities since his omission had been duly rectified by the declaration of 2 December 1983. Moreover, the authorities were hardly in a position to criticise him on that account since they had themselves failed to comply with a number of formalities (for example, by failing to serve the pre-emption order on Mr Pierangeli). The authorities' excessive formalism was, the applicant argued, contrary to the principles of international law reiterated by the Court, and there could be no justification for withholding the protection guaranteed by the first paragraph of Article 1 of Protocol No. 1 on the ground that there had been a failure to comply with administrative formalities. Moreover, the relevant provisions of domestic law were far from being sufficiently clear and precise to guarantee legal certainty.

83. The applicant also disputed the contention that the pre-emption measure had been in the public interest. He observed in that regard that the measure appeared to have been motivated purely by an intention to penalise his allegedly improper conduct, whereas the public interest as such had never even been mentioned. At all events the applicant had intended to sell the painting to a private museum of great renown which was located in Venice and thus within Italian territory. It was therefore difficult to see how the public interest would be better served by exhibiting the painting in a public museum than a private one, particularly as the Peggy Guggenheim Collection in Venice was, the applicant argued, capable of looking after works of art equally as well – if not better than – the Italian State, given that the latter had been a victim of a number of thefts including moreover that of the painting in question, which had been stolen from the Modern and Contemporary Art Gallery in Rome. Furthermore, since 1984 the authorities had been corresponding directly with Mr Beyeler, who had satisfied all the requirements made of him; that, in the applicant's submission, proved that the safekeeping of the painting – which was not in any way threatened – had not necessitated the exercise of the right of pre-emption. Moreover, the Ministry had previously waived its right of pre-emption in 1977, for lack of sufficient funds, and, in 1978, had refused a request to export the painting. That refusal had, the applicant maintained, prevented him from exhibiting

the painting in a museum which he had been wanting to open for many years near Basle.

84. The applicant submitted that it could not be considered to be in the public interest for a State to possess a work by a foreign painter who had no connection whatsoever with that State and had never lived there, which was the case of Van Gogh with regard to Italy. To conclude otherwise would have unacceptable consequences for a great many private museums and collections. As was the case with regard to the prohibition on exports of cultural property, the public interest should not be assessed from a purely nationalistic and egotistical standpoint, thereby disregarding another – no less worthy – interest, that of the free international movement of works of art and of international cultural exchanges, particularly in Europe. The Italian authorities had, the applicant alleged, through administrative manipulation, appropriated a work of art belonging to the cultural heritage of another country and thereby breached the principle in a democratic society that the rule of law should prevail over arbitrary acts by the authorities.

85. The applicant submitted lastly that the Italian State had indisputably made a financial gain at his expense. The compensation paid to him bore no reasonable relation to the value of the work, as it was required to do under the Court's case-law, and that evident disproportionateness was also contrary to general principles of international law laid down by, *inter alia*, well-established international case-law. Thus, any expropriation of a non-national's property should not, among other things, be discriminatory and adequate compensation should be paid for it. The principle of unjust enrichment, applied by international case-law on many occasions, had also been undermined.

2. *The Government*

86. As before the Commission, the Government submitted as their principal argument that the applicant had never acquired ownership and could not claim to have lawfully acquired a right *in rem* of any kind over the painting, since the contract on which he based his claims was automatically null and void. As long as the time-limit for exercising the right of pre-emption did not start running, the sale agreement in question could not transfer title to the applicant, so that when the right of pre-emption was exercised it did not affect a right which the purchaser had acquired, but merely thwarted his expectation of completing the purchase.

87. The Government then submitted that at the outset the applicant had undeniably breached the rules by failing to declare that he was the end purchaser on the 1977 sale. It was in the public interest that there be an obligation to file a full declaration and it was unacceptable for an individual to circumvent that aim for personal reasons connected to the purchase arrangements. In that connection the Government emphasised the fact that it

was in the public interest for the State to control transfers of works of art which were important for the national artistic heritage and added that in order to do so the State had to be fully informed of the nature of such transfers. The Government also maintained that the painting, which had been brought into Italy in 1910, was part of Italy's artistic heritage for the purposes of Article 4 of the Unesco Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (see paragraph 73 above).

88. The Government went on to observe that the applicant's conduct had been ambiguous over the years. In that connection they pointed out that it was difficult to see why he had considered it necessary to hide his identity when he had purchased the painting in 1977, given that Mr Verusio – an art collector himself – had been in an ideal position to assess the value of the painting objectively; nor was it clear why the applicant had not disclosed his identity at the latest immediately after the sale had been completed in 1977, but had waited several years before doing so – and then in a manner devoid of any effect in law. Such was also the case regarding the declaration of 2 December 1983, which gave the impression that Mr Pierangeli, who was associated with the proposed purchase of the painting, was holding himself out as still having rights *in rem* over it.

89. Further, none of the steps taken by the authorities could be interpreted as their having *de facto* treated the applicant as the owner. Quite apart from the contents of the ministerial order of 23 April 1986, the domestic courts had been in no doubt that the original sale was null and void as a result of the applicant's omission. Nor could the Italian authorities' conduct be construed as an acknowledgment that the painting was in the applicant's custody. The Government had arrived at the same conclusion as the Commission, namely that the applicant could not be considered as having had a legitimate expectation.

90. The Government (stressing that Mr Verusio had been one of the parties to the dispute in the domestic courts) then observed that since the exercise of the State's right of pre-emption entailed paying the original sale price to the vendor, the usual criteria for the payment of compensation on an expropriation, whether under Italian law or Article 1 of Protocol No. 1 in the event of an expropriation in the public interest, were inapplicable.

91. The Government observed further that the loss sustained by the person in question as a result of the fact that the right of pre-emption was not exercised until long after the sale was merely the consequence of his own improper conduct. That situation, which arose as a result of the nullity of the sale and the suspension of the two-month time-limit, did indeed amount to a penalty, but was the only means available to the State to compel individuals to submit a declaration in conformity with the statutory requirements. Furthermore, allowing the State to maintain its right to exercise a right of pre-emption was intended to prevent transgressors from

obtaining an unfair advantage over persons who complied with the law. It was not true, the Government submitted, that in such a situation the individual remained subject to the State's power of pre-emption indefinitely for, having regard to the conclusions reached by the Constitutional Court, a late declaration by the vendor and purchaser could put an end to such uncertainty and start the two-month time-limit running; however, the applicant had failed to rectify the situation in that way. That clearly showed that the applicant was directly responsible for the economic loss which he alleged he had sustained.

92. The Government submitted, lastly, that in any event the applicant had failed to institute proceedings in the civil courts for the price paid in 1977 to be revised, as he was entitled to do, and – accordingly – had not exhausted domestic remedies.

3. The Commission

93. The Commission noted the conclusions of the Italian courts to the effect that the applicant had acquired no right *in rem* over the painting and considered that it could not call them into question. There was no evidence in the case file to suggest that they were arbitrary or manifestly contrary to the relevant provisions of domestic law. It concluded that the applicant could not be regarded as the owner of the painting.

94. The Commission also considered that the applicant could not be regarded as entitled to assert a “legitimate expectation” to succeed in his claims to the painting merely on grounds of the lapse of time and his repeated contacts with the relevant authorities, which had never expressly stated that the applicant was the “owner” of the work and had on a number of occasions expressed their doubts in that connection.

B. The Government's preliminary objection

95. The Government raised before the Court an objection it had not raised before the Commission based on non-exhaustion of domestic remedies, arguing that the applicant could have applied to the civil courts for the amount paid in 1977 to be revised.

96. In accordance with its established case-law “[the Court] will consider a preliminary objection provided that the State concerned has already raised that objection before the Commission – in principle when the question of admissibility is initially examined – in so far as the nature of the objection and the circumstances permitted” (see the *Akkuş v. Turkey* judgment of 9 July 1997, *Reports of Judgments and Decisions* 1997-IV, p. 1307, § 23).

97. It is apparent from the case file that that condition was not satisfied in the instant case. The Government are therefore estopped from relying on this objection.

C. Applicability of Article 1 of Protocol No. 1

98. As the Court has stated on a number of occasions, Article 1 of Protocol No. 1 comprises three distinct rules: “the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest The three rules are not, however, 'distinct' in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule” (see, among other authorities, the *James and Others v. the United Kingdom* judgment of 21 February 1986, Series A no. 98, pp. 29-30, § 37, which reproduces in part the analysis given by the Court in its *Sporrong and Lönnroth v. Sweden* judgment of 23 September 1982, Series A no. 52, p. 24, § 61; see also the *Holy Monasteries v. Greece* judgment of 9 December 1994, Series A no. 301-A, p. 31, § 56, and *Iatridis v. Greece* [GC], no. 31107/96, § 55, ECHR 1999-II).

99. The Court notes that the parties disagreed as to whether the applicant had a property interest eligible for protection under Article 1 of Protocol No. 1. Accordingly, the Court must determine whether Mr Beyeler's legal position as a result of purchasing the painting was such as to attract the application of Article 1.

100. The Government and the Commission were of the opinion that the applicant had never become the owner of the painting. In that connection the Court points out that the concept of “possessions” in the first part of Article 1 has an autonomous meaning which is not limited to ownership of physical goods and is independent from the formal classification in domestic law: certain other rights and interests constituting assets can also be regarded as “property rights”, and thus as “possessions” for the purposes of this provision (see *Iatridis* cited above, § 54). The issue that needs to be examined is whether the circumstances of the case, considered as a whole, conferred on the applicant title to a substantive interest protected by Article 1 of Protocol No. 1. The Court considers that that approach requires it to take account of the following points of law and of fact.

101. Under Article 1706 of the Italian Civil Code the sale of movable property, such as the painting at issue, through an indirect agency arrangement automatically transfers title to the property to the principal, who can then claim it from the agent (see paragraph 65 above). Where the property is considered to be of cultural or artistic interest, those rules are qualified by the authorities' right of pre-emption which has to be exercised

within the time-limit laid down by Law no. 1089 of 1939 (see paragraph 67 above). Section 61 of that statute provides that transfers and other legal transactions effected in breach of the rules laid down by the statute or without complying with the prescribed terms and conditions shall be null and void (see paragraph 69 above).

102. The *Consiglio di Stato* held, in its judgment of 19 October 1990, that the Ministry's exercise of its right of pre-emption fell into the category of expropriation measures and that that form of expropriation was made against the "real owner" of the property. On the facts, it held that the administrative authorities had not erred in serving the pre-emption order on the applicant as the end purchaser (see paragraph 51 above). The Court of Cassation, for its part, reiterated in its order of 11 November 1993 and its judgment of 16 November 1995 the *Consiglio di Stato's* finding that the authorities had not exercised their right of pre-emption until they were certain that the painting had been purchased by the applicant (see paragraphs 52, 56 and 63 above).

103. The Court notes that in 1988 the pre-emption order was served on the applicant as the title-holder on the 1977 sale and that the sum paid at that time was paid to him, which contradicts the Government's submission that on the exercise of a right of pre-emption the price is paid to the vendor (see paragraphs 36 and 90 above).

104. Between the purchase of the work and the exercise by the State of its right of pre-emption, that is, during the period in which the applicant was implicitly subject to the pre-emption rules, the applicant was in possession of the painting for several years. Furthermore, on a number of occasions the applicant appears to have been considered *de facto* by the authorities as having a proprietary interest in the painting, and even as its real owner:

(a) on 30 January 1985 the Ministry asked Mr Petretti, the lawyer acting for Mr Pierangeli and the applicant, to inform it whether or not the owner of the painting had decided to move it to Venice, and on 21 February 1985, after Mr Petretti, who was then acting for and on behalf of the applicant alone, had confirmed that his client agreed to the painting's being moved, the Ministry gave permission for it to be moved to Venice (see paragraph 20 above);

(b) the minutes of the inspection of the painting on 19 October 1987 were drawn up in the presence of the applicant and his lawyer, but in the absence of Mr Pierangeli (see paragraph 25 above);

(c) in January and February 1988 the Ministry contacted the applicant alone, informing him, among other things, that the Italian State was interested in purchasing the painting (see paragraphs 27 and 28 above).

105. In the Court's view, those factors prove that the applicant had a proprietary interest recognised under Italian law – even if it was revocable in certain circumstances – from the time the work was purchased until the right of pre-emption was exercised and he was paid compensation (a

measure classified by the *Consiglio di Stato* as falling into the category of expropriation measures – see paragraph 51 above). This interest therefore constituted a “possession” for the purposes of Article 1 of Protocol No. 1 (see also, *mutatis mutandis*, the Gasus Dossier- und Fördertechnik GmbH v. the Netherlands judgment of 23 February 1995, Series A no. 306-B, p. 46, § 53). That provision is therefore applicable to the instant case.

106. Having regard to the foregoing, the Court does not consider it necessary to rule on whether the second sentence of the first paragraph of Article 1 applies in this case. The complexity of the factual and legal position prevents its being classified in a precise category. The Court does not therefore need to give an opinion on the Italian courts' view that under the relevant domestic provisions the 1977 sale should be considered as null and void. Nor does the Court need to rule on the issue whether under Italian law the applicant should be considered the real owner of the painting (see, *mutatis mutandis*, *Iatridis* cited above, § 54, and the Matos and Silva, Lda., and Others v. Portugal judgment of 16 September 1996, *Reports* 1996-IV, p. 1111, § 75). Moreover, the situation envisaged in the second sentence of the first paragraph of Article 1 is only a particular instance of interference with the right to peaceful enjoyment of property as guaranteed by the general rule set forth in the first sentence (see, for example, the Lithgow and Others v. the United Kingdom judgment of 8 July 1986, Series A no. 102, p. 46, § 106). The Court therefore considers that it should examine the situation complained of in the light of that general rule.

D. Compliance with Article 1 of Protocol No. 1

1. Whether there was any interference

107. In the light of the foregoing conclusions, the Court considers that the measure complained of, that is, the exercise by the Ministry of Cultural Heritage of its right of pre-emption, undoubtedly amounted to an interference with the applicant's right to the peaceful enjoyment of his possessions. In order to be compatible with the general rule set forth in the first sentence of the first paragraph of Article 1, such an interference must strike a “fair balance” between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (see the Sporrang and Lönnroth judgment cited above, p. 26, § 69). Furthermore, the issue of whether a fair balance has been struck “becomes relevant only once it has been established that the interference in question satisfied the requirement of lawfulness and was not arbitrary” (see *Iatridis* cited above, § 58).

2. *Compliance with the principle of lawfulness*

108. The Court reiterates that an essential condition for an interference to be deemed compatible with Article 1 of Protocol No. 1 is that it should be lawful. “[T]he first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful” (see *Iatridis* cited above, § 58). The Court has limited power, however, to review compliance with domestic law (see the *Håkansson and Sturesson v. Sweden* judgment of 21 February 1990, Series A no. 171-A, p. 16, § 47), especially as there is nothing in the instant case from which it can conclude that the Italian authorities applied the legal provisions in question manifestly erroneously or so as to reach arbitrary conclusions (see, *mutatis mutandis*, the *Tre Traktörer AB v. Sweden* judgment of 7 July 1989, Series A no. 159, pp. 22-23, § 58). In that connection the Court also observes that the applicant's allegations of non-compliance with the procedure set forth in Article 67 of Royal Decree no. 363 of 1913 (see paragraph 81 above) do not appear to be relevant, since that provision refers to public-interest declarations made prior to expropriations effected in accordance with a procedure analogous to that provided for in Law no. 2359 of 1865, and not to declarations that a work is of interest for the artistic heritage of the nation, which are dealt with in section 3 of Law no. 1089 of 1939.

109. However, the principle of lawfulness also presupposes that the applicable provisions of domestic law be sufficiently accessible, precise and foreseeable (see the *Hentrich v. France* judgment of 22 September 1994, Series A no. 296-A, pp. 19-20, § 42, and the *Lithgow and Others* judgment cited above, p. 47, § 110). The Court observes that in certain respects the statute lacks clarity, particularly in that it leaves open the time-limit for the exercise of a right of pre-emption in the event of an incomplete declaration without, however, indicating how such an omission can subsequently be rectified. Indeed, this seems to have been implicitly acknowledged by the Court of Cassation in its judgment of 16 November 1995 (see paragraph 63 above). That factor alone cannot, however, lead to the conclusion that the interference in question was unforeseeable or arbitrary and therefore incompatible with the principle of lawfulness.

110. The Court is, nonetheless, required to verify that the manner in which domestic law is interpreted and applied – even where the requirements have been complied with – does not entail consequences at variance with the Convention standards. From that stance, the element of uncertainty in the statute and the considerable latitude it affords the authorities are material considerations to be taken into account in determining whether the measure complained of struck a fair balance.

3. *The aim of the interference*

111. Any interference with the enjoyment of a right or freedom recognised by the Convention must, as can be inferred from Article 18 of the Convention (see paragraph 128 below), pursue a legitimate aim. The principle of a “fair balance” inherent in Article 1 of Protocol No. 1 itself presupposes the existence of a general interest of the community. Moreover, it should be reiterated that the various rules incorporated in Article 1 are not distinct in the sense of being unconnected and that the second and third rules are concerned only with particular instances (see paragraph 98 above). One of the effects of this is that the existence of a “public interest” required under the second sentence, or the “general interest” referred to in the second paragraph, are in fact corollaries of the principle set forth in the first sentence, so that an interference with the exercise of the right to the peaceful enjoyment of possessions within the meaning of the first sentence of Article 1 must also pursue an aim in the public interest.

112. In the instant case the Court considers that the control by the State of the market in works of art is a legitimate aim for the purposes of protecting a country's cultural and artistic heritage. The Court points out in this respect that the national authorities enjoy a certain margin of appreciation in determining what is in the general interest of the community (see, for example, *mutatis mutandis*, the James and Others judgment cited above, p. 32, § 46).

113. As regards works of art by foreign artists, the Court observes that the Unesco Convention of 1970 accords priority, in certain circumstances, to the ties between works of art and their country of origin (see Article 4 of that convention – paragraph 73 above). It notes, however, that the issue in this case does not concern the return of a work of art to its country of origin. That consideration apart, the Court recognises that, in relation to works of art lawfully on its territory and belonging to the cultural heritage of all nations, it is legitimate for a State to take measures designed to facilitate in the most effective way wide public access to them, in the general interest of universal culture.

4. *Whether there was a fair balance*

114. The concern to achieve a “fair balance” between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights is reflected in the structure of Article 1 as a whole and entails the need for a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see, among other authorities, the Sporrong and Lönnroth judgment cited above, p. 26, § 69; the Pressos Compania Naviera S.A. and Others v. Belgium judgment of 20 November 1995, Series A no. 332, p. 23, § 38; and, lastly, *Chassagnou and Others v. France* [GC], nos. 25088/94,

28331/95 and 28443/95, § 75, ECHR 1999-III). In the context of the general rule enunciated in the first sentence of the first paragraph of Article 1, ascertaining whether such a balance existed requires an overall examination of the various interests in issue, which may call for an analysis not only of the compensation terms – if the situation is akin to the taking of property (see, for example, the *Lithgow and Others* judgment cited above, pp. 50-51, §§ 120-121) – but also, as in the instant case, of the conduct of the parties to the dispute, including the means employed by the State and their implementation.

(a) Conduct of the applicant

115. The Court notes that at the time of the 1977 sale the applicant did not disclose to the vendor that the painting had been purchased on his behalf; he was thus able to buy the painting at a lower price than he would in all certainty have had to pay if his identity had been disclosed to the vendor. In the applicant's submission, sales through an agent are common practice in the art market. However, after the sale the applicant failed to declare to the authorities that he was the end purchaser – that is, the real terms on which title to or possession of the property had been transferred – for the purposes of Law no. 1089 of 1939. On 21 November 1977 Mr Pierangeli, who had already been fully reimbursed by the applicant and had confirmed to him that he had purchased the painting on his behalf, requested in his own name a licence to export the painting, without informing the authorities of the identity of the real owner (see paragraphs 11 and 14 above).

116. The applicant then waited six years (from 1977 to 1983) before declaring his purchase, contrary to the relevant provisions of Italian law of which he was deemed to be aware. He did not approach the authorities until December 1983 when he was intending to sell the painting to the Peggy Guggenheim Collection in Venice for 2,100,000 United States dollars (see paragraph 17 above). Throughout that entire period the applicant deliberately avoided any risk of a pre-emption order being made by omitting to comply with the requirements of Italian law. The Court therefore considers that the Government's submission that the applicant had not acted openly and honestly carries some weight, especially as there was nothing to prevent him from informing the authorities of the true position before 2 December 1983 in order to comply with the statutory requirements.

(b) Conduct of the authorities

117. The Court does not put in question either the right of pre-emption over works of art in itself or the State's interest in being informed of all the details of a contract, including the identity of the end purchaser on a sale through an agent, so that the authorities can decide in the full knowledge of the facts whether or not to exercise their right of pre-emption. In that

connection the Court notes the Italian authorities' submission that the purchaser's nationality was a factor which could be of some importance, regard being had to the nature of the art market and to the interest in keeping certain works of art in the country.

118. If the Government's reasoning is to be followed, the relevant authorities could, as early as 1 December 1983, when the declaration was made (see paragraph 17 above), have relied on the applicant's failure to disclose his identity earlier. They could have considered that the two-month time-limit under Law no. 1089 of 1939 had not expired and exercised their right of pre-emption by paying the 600,000,000 Italian lire paid by the applicant. It should be noted that the applicant invited the Ministry as early as 2 December 1983, when Mr Pierangeli and the applicant informed it that the Peggy Guggenheim Collection in Venice was intending to purchase the painting, to indicate whether it wished to exercise its right of pre-emption (*ibid.*).

119. However, after receiving in 1983 the information missing from the declaration made in 1977, that is, the identity of the end purchaser, the Italian authorities waited until 1988 before giving serious consideration to the question of ownership of the painting and deciding to exercise their right of pre-emption. During that time the authorities' attitude towards the applicant oscillated between ambivalence and assent and they often treated him *de facto* as the legitimate title-holder under the 1977 sale. Furthermore, the considerable latitude left to the authorities under the applicable provisions, as interpreted by the domestic courts, and the above-mentioned lack of clarity in the law made the situation even more uncertain, to the applicant's detriment. That situation allowed the authorities in 1988 to justify exercising the right of pre-emption much later than both the allegedly invalid sale in 1977 and the time (at the end of 1983) when they became aware that the applicant was the true title-holder under the original sale. As the Court of Cassation noted in its order of 11 November 1993, if the authorities could exercise their right of pre-emption at any time the seller's rights would always be restricted, thus creating continual uncertainty as to the legal position with regard to the work (see paragraph 56 above).

5. Conclusion

120. The Court considers that the Government have failed to give a convincing explanation as to why the Italian authorities had not acted at the beginning of 1984 in the same manner as they acted in 1988, regard being had in particular to the fact that, under section 61(2) of Law no. 1089 of 1939 (see paragraph 69 above), they could have intervened at any time from the end of 1983 onwards and in respect of anyone "in possession" of the property (and thus without needing first to determine who the owner of the painting was). That is, moreover, apparent from the judgment of the Court of Cassation of 16 November 1995 (see paragraph 63 above). Thus, taking

punitive action in 1988 on the ground that the applicant had made an incomplete declaration, a fact of which the authorities had become aware almost five years earlier, hardly seems justified. In that connection it should be stressed that where an issue in the general interest is at stake it is incumbent on the public authorities to act in good time, in an appropriate manner and with utmost consistency.

121. That state of affairs allowed the Ministry of Cultural Heritage to acquire the painting in 1988 at well below its market value. Having regard to the conduct of the authorities between December 1983 and November 1988, the Court considers that they derived an unjust enrichment from the uncertainty that existed during that period and to which they had largely contributed. Irrespective of the applicant's nationality, such enrichment is incompatible with the requirement of a "fair balance".

122. Having regard to all the foregoing factors and to the conditions in which the right of pre-emption was exercised in 1988, the Court concludes that the applicant had to bear a disproportionate and excessive burden. There has therefore been a violation of Article 1 of Protocol No. 1.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

123. The applicant submitted that he had been discriminated against in that the authorities had expressly stated that the applicant's Swiss nationality made the measure all the more justified. The applicant argued that his nationality should not have been a relevant factor in the circumstances of the case.

124. The Government contended that since the complaint based on Article 1 of Protocol No. 1 was ill-founded there was no reason to examine the complaint based on a violation of Article 14 of the Convention.

125. Article 14 provides:

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

126. In the light of its conclusions in respect of Article 1 of Protocol No. 1, the Court considers that there is no reason to examine separately whether the applicant was the victim of discrimination on the ground of his nationality contrary to Article 14.

III. ALLEGED VIOLATION OF ARTICLE 18 OF THE CONVENTION

127. In his application to the Commission the applicant also alleged that there had been a violation of Article 18 of the Convention in that the

expropriation of his painting had been the result of an abuse of a right and a misuse of authority, but he did not repeat that complaint before the Court.

128. Article 18 of the Convention is worded as follows:

“The restrictions permitted under [the] Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.”

129. The Court considers that, in the light of its conclusions regarding Article 1 of Protocol No. 1, no separate issue arises under Article 18 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

130. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

131. The applicant claimed compensation for non-pecuniary damage in the sum of 1,000,000 United States dollars (USD) for the harm done to his reputation as an internationally renowned art collector as a result of being treated like a criminal by the Italian authorities. Such damage was particularly serious in a sensitive domain such as international trade in art, in which relations of mutual trust and consideration played a very important role. The applicant, his gallery and his foundation had subsequently been excluded from the Italian art market.

132. As regards pecuniary damage, the applicant requested the restitution of the painting or, failing that, compensation in the amount of its value at the time of the alleged expropriation, namely USD 8,500,000, less the compensation already paid pursuant to the expropriation order of 24 November 1988, plus interest accrued from that date of USD 3,934,142.90.

133. The applicant claimed, lastly, 912,025.60 Swiss francs, which included the costs incurred in the domestic courts and before the Commission and the Court.

134. The Court considers that the question of the application of Article 41 is not ready for decision. Accordingly, it shall be reserved and the subsequent procedure fixed having regard to any agreement which might be reached between the respondent State and the applicant (Rule 75 § 1). The Court allows the parties six months in which to reach such agreement.

FOR THESE REASONS, THE COURT

1. *Dismisses* unanimously the Government's preliminary objection;
2. *Holds* by sixteen votes to one that there has been a violation of Article 1 of Protocol No. 1;
3. *Holds* unanimously that there is no need to give a separate ruling on the question whether the applicant suffered discriminatory treatment contrary to Article 14 of the Convention;
4. *Holds* unanimously that no separate issue arises under Article 18 of the Convention;
5. *Holds* unanimously that the question of the application of Article 41 of the Convention is not ready for decision; accordingly,
 - (a) *reserves* the said question in whole;
 - (b) *invites* the Government and the applicant to inform it, within the forthcoming six months, of any agreement that they may reach;
 - (c) *reserves* the further procedure and *delegates* to the President of the Grand Chamber the power to fix the same if need be.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 5 January 2000.

Luzius WILDHABER
President

Paul MAHONEY
Deputy Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Mr Ferrari Bravo is annexed to this judgment.

L.W.
P.J.M.

DISSENTING OPINION OF JUDGE FERRARI BRAVO

(Translation)

I very much regret having to write this dissenting opinion, especially as I have serious doubts as to the moral basis for the arguments advanced by both parties to the dispute.

Mr Beyeler, an art dealer at the material time (he became a collector-patron much later), purchased from Mr Verusio a Van Gogh painting called *Portrait of a Young Peasant* which since 1954 had been declared a work of art “of historical and artistic interest”. In order to avoid paying too high a price, he purchased the work through an intermediary, Mr Pierangeli, behind whom he hid at the time of the purchase in 1977 and behind whom he remained hidden for many years, at least until the end of 1983. That did not, however, prevent him from attempting to export the work – entirely illegally – to England, which resulted in the painting being sent to Palermo.

Later, towards the end of 1983, Mr Beyeler tried to sell the painting to the Peggy Guggenheim Collection in Venice and it was then that he partly began to disclose his identity by requesting the Ministry of Cultural Heritage, not directly, but with or through Mr Pierangeli, to decide whether or not it intended to exercise its right of pre-emption provided for in Law no. 1089 of 1939, a strict statute, granted, but one universally known in the art market.

Mr Beyeler persisted in that line of action without doing the simplest thing of all, which was to state in black and white that it was he who had purchased the painting and was therefore the owner and, accordingly, make the necessary declarations.

In the meantime, the price went up to 8,500,000 United States dollars (USD) (but Mr Beyeler nonetheless asked the Ministry to pay him USD 11,000,000 for exercising its right of pre-emption).

In 1988 confused negotiations were conducted and, finally, on 24 October 1988 the Ministry exercised its right of pre-emption and paid, it would appear to Mr Beyeler, a derisory sum, namely the 1977 purchase price.

Then there is the Italian Ministry of Cultural Heritage whose arguments are set out by the Government. Here again, the results are damning because it is true that from 1983 the Ministry had grounds for suspecting that behind the scenes the buyer of the painting was Mr Beyeler. However, Mr Beyeler's position was obscured by the fact that he had not carried out the formalities prescribed by Italian law. Moreover, it should be noted that even by 1988 it was not entirely clear that he had complied with them.

The Ministry thus took advantage of that situation by paying a ridiculously low price.

From that viewpoint the old Latin maxim, *In pari causa turpitudinis, melior est condicio possidentis*, is applicable.

I am extremely puzzled, but would say that, despite everything, the Italian Government are right, because the Ministry's arguments are based not only on circumstances of fact, but also – and above all – established and unequivocal case-law, with regard to the painting in question. On the basis of that case-law, all the courts to which Mr Beyeler applied consistently found against him. *Ordinary courts*: District Court, Court of Appeal, Court of Cassation; *administrative courts*: Administrative Court, *Consiglio di Stato*; *Constitutional Court*, to which the case was referred by the Court of Cassation. In that regard it is most regrettable that the judgment of the European Court focuses on the order of the Court of the Cassation referring the case to the Constitutional Court, an order which, obviously, expressed reservations on which the Court of Cassation had to rule. Following the judgment delivered by the Constitutional Court, the Court of Cassation found against Mr Beyeler.

In this case, which was clear-cut both in terms of the case-law and the legislation, what does our Court do?

It seeks out a violation of Article 1 of Protocol No. 1, in other words it proposes a considerable extension to the scope of that provision, an extension which it vainly attempts to base on the *Gasus Dosier- und Fördertechnik GmbH v. the Netherlands* case (judgment of 23 February 1995, Series A no. 306-B), which was in any event concerned with a different issue – namely, rights *in rem* over a very expensive machine – and not an object such as a painting, the non-pecuniary value of which is immense.

It serves no purpose for the Court to state in its judgment that the Italian authorities had treated the applicant as owner, since the reality was that they had been “careful” to ascertain whether the person claiming to be the owner of the painting agreed or disagreed to its being moved on a number of occasions.

I am therefore inclined to find the Court's conclusions very weak and to consider that the Italian Government's arguments should, despite everything, have been accepted.