



---

6-1-2003

## Constructive Expropriation and the Framework of Deferential Progressivism

Jeremy Greener

Follow this and additional works at: <https://digitalcommons.lmu.edu/ilr>



Part of the [Law Commons](#)

---

### Recommended Citation

Jeremy Greener, *Constructive Expropriation and the Framework of Deferential Progressivism*, 25 Loy. L.A. Int'l & Comp. L. Rev. 725 (2003).

Available at: <https://digitalcommons.lmu.edu/ilr/vol25/iss3/11>

This Notes and Comments is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles International and Comparative Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact [digitalcommons@lmu.edu](mailto:digitalcommons@lmu.edu).

# CONSTRUCTIVE EXPROPRIATION AND THE FRAMEWORK OF DEFERENTIAL PROGRESSIVISM

## I. INTRODUCTION

The Convention for the Protection of Human Rights and Fundamental Freedoms<sup>1</sup> (Convention) states that every person and entity within a contracting State is entitled to basic property rights.<sup>2</sup> Such rights are not illusory and have been asserted in numerous cases before the European Court of Human Rights (Court).<sup>3</sup> Most property rights litigation before the Court is sparked by expropriations.<sup>4</sup> The term “expropriation” is synonymous with eminent domain.<sup>5</sup> Eminent domain has been defined as “[t]he power of the nation or a sovereign state to take, or to authorize the taking of, private property for a public use without the owner’s consent. . . .”<sup>6</sup> While not the most common precipitant of expropriation litigation, constructive expropriation is quite likely the most legally-problematic precipitant.<sup>7</sup> Once this cumulonimbus swells in its expropriatory firmament, it is usually

---

1. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) [hereinafter Human Rights Convention].

2. *Id.* Protocol No. 1, art. 1.

3. See Subject Matter of Judgments Delivered by the Court in 1999, European Court of Human Rights, at [http://www.echr.coe.int/Eng/EDocs/SUBJECT\\_MATTER\\_1999\\_TABLE\\_eng.htm](http://www.echr.coe.int/Eng/EDocs/SUBJECT_MATTER_1999_TABLE_eng.htm) [hereinafter 1999 Judgments]; Subject Matter of Judgments Delivered by the Court in 2001, at [http://www.echr.coe.int/Eng/EDocs/SUBJECT\\_MATTER\\_2001\\_TABLE.pdf](http://www.echr.coe.int/Eng/EDocs/SUBJECT_MATTER_2001_TABLE.pdf) [hereinafter 2001 Judgments].

4. See 1999 Judgments, *supra* note 3; 2001 Judgments, *supra* note 3.

5. BALLENTINE’S LAW DICTIONARY 442 (3d ed. 1969).

6. *Id.* at 398.

7. The modus operandi of constructive expropriations will be explored in detail in the course of this article. It is helpful to begin contemplating the basic contours of constructive expropriation, however. For now, it should suffice to point out that a constructive expropriation is an expropriation that results from “the unlawful taking of possession” upon the expiration of a set period of time or the fulfillment of a condition precedent. *Carbonara v. Italy*, no. 24638/94 Eur. Ct. H.R. 2000-VI ¶ 26.

only a matter of time before legal scholars find themselves amidst a wash of ostensibly-conflicting, juridical interests. Nevertheless, as the Court demonstrates in *Carbonara v. Italy*, a contrapuntal balance between such interests promises to lead the drenched legal scholar to fair weather.

In *Carbonara v. Italy*, the European Court of Human Rights examined the application of a common law constructive expropriation rule that deprived landowners (Applicants) of their land under Italian law. Both the constructive expropriation and a retroactively-applied statute of limitations for expropriation damage claims failed to meet “the requirement of lawfulness” under the Convention.<sup>8</sup> The Applicants’ right to “peaceful enjoyment of. . . possessions”<sup>9</sup> under Article 1 of Protocol No. 1 of the Convention (Article 1) had thus been violated.

This Note examines the Court’s decision in *Carbonara v. Italy* and praises the decision as a foundation for deferential, legal progression. Part II introduces the case, exploring its factual and procedural background as well as its legal contours. Part III provides a detailed inspection of the Court’s decision. Part IV sets forth the argument that the Court’s decision in *Carbonara v. Italy* properly struck a careful and crucial balance between national, legal autonomy on one hand, and extrinsically-imposed, legal stability on the other hand. In its narrow decision, the Court created a deferential, yet persistent, paradigm of international property protection through which arbitrary, domestic laws eventually could be recognized and modified within the respective contexts of the states that spawned them.

## II. COUNTERCLOCKWISE: A CONSTRUCTIVE EXPROPRIATION DILEMMA

### *A. Facts and Procedure*

On May 27, 1970, the Town Council (Council) in Noicattaro, Italy, received an expedited possession decree, authorizing it to take informal possession of the Applicants’ land for the purpose of building a school.<sup>10</sup> The order expired two years from the date of issuance. The Council was supposed to formally expropriate the

---

8. *Id.*

9. Human Rights Convention, *supra* note 1.

10. *Carbonara*, no. 24638/94 Eur. Ct. H.R. 2000-VI ¶ 6.

Applicants' land prior to the date of expiration so that the Applicants could receive compensation.<sup>11</sup> However, the school was not completed until October 28, 1972, after the possession decree expired.<sup>12</sup> The Council never expropriated the Applicants' land and the Applicants brought an action in the Bari District Court on May 3, 1980.<sup>13</sup> The Bari District Court held that while the Applicants' ownership had been transferred to the Council upon completion of the school via constructive expropriation, the Applicants were entitled to compensatory damages for loss of their land.<sup>14</sup>

On July 21, 1989, the Council appealed to the Bari Court of Appeal. It argued that the Applicants were barred from gaining compensatory damages by a five-year statute of limitations that began running on October 28, 1972 and expired prior to the date of the Applicants' complaint.<sup>15</sup> The Bari Court of Appeal ruled in favor of the Council and the Applicants appealed to the Court of Cassation on January 22, 1992.<sup>16</sup> The Applicants argued, *inter alia*, that the retroactive application of a statute of limitations that had only become legally applicable to constructive expropriation in 1983, unconstitutionally violated their property rights. The Court of Cassation rejected the Applicants' arguments. Consequently, on November 3, 1998, the Applicants lodged a complaint with the Court,<sup>17</sup> alleging that the constructive expropriation rule and the five-year statute of limitations, as applied in their case, violated their Article 1 property rights.<sup>18</sup>

### B. Relevant Laws

Before delving into the Court's decision in Part III, it is beneficial to examine the national and international laws relevant to the Applicants' constructive expropriation case. A basic understanding of relevant domestic law will help place international legal issues within their appropriate contexts.

---

11. *Id.* ¶ 7.

12. *Id.* ¶ 9.

13. *Id.* ¶¶ 10-11.

14. *Id.* ¶ 13.

15. *Id.* ¶¶ 15-16.

16. *Carbonara*, no. 24638/94 Eur. Ct. H.R. 2000-VI ¶¶ 16-17.

17. *Id.* ¶ 1.

18. *Id.* ¶ 45.

## 1. Domestic Law

Under Italian law, upon the issuance of an expedited expropriation order, local governments such as the Council can take possession of private land before formally expropriating it. The order cannot exceed five years, and it lapses if a local government does not take possession of specified land within three months of its issuance. If a local government takes possession of private land under an expedited possession order, the land must subsequently be formally expropriated so that the owner of the land may collect expropriation compensation.<sup>19</sup> While formal expropriation is required by statute where land is taken via an expedited expropriation order, local governments may nonetheless gain ownership of land taken pursuant to such an order through constructive expropriation.

First emerging in the courts in the 1970s, the constructive expropriation doctrine diverged in different evolutionary directions.<sup>20</sup> In 1983, a judgment by the Court of Cassation unified the doctrine under a single constructive expropriation rule.<sup>21</sup> In *Carbonara*, the Court expounded upon the operations of the constructive expropriation rule:

Under the rule, the public authorities acquire title to the land from the outset before formal expropriation if, after taking possession of the land and irrespective of whether such possession is lawful, the works in the public interest are performed. If, initially, the land is possessed without authority, the transfer of property takes place when the works in the public interest are completed. If the taking of possession was authorised from the outset, property is transferred on the expiry of the authorised period of possession. In the same judgment, the Court of Cassation stated that, on a constructive expropriation, the owner is entitled to compensation in full as the acquisition of the land has taken place without title. . . . However, compensation is not paid automatically: the owner must lodge a claim for damages. . . . subject to a five-year limitation period. . . . [which begins from] the date the land is irreversibly altered.<sup>22</sup>

---

19. *Id.* ¶ 19.

20. *Id.* ¶¶ 20-24.

21. *Id.* ¶ 25.

22. *Id.*

Land is “irreversibly altered”<sup>23</sup> at such time as a local, governmental authority completes public works upon it.<sup>24</sup> Thus, through constructive expropriation, local governments could gain title to private land by illegally possessing such land and completing a public work on it. They could also gain title to private land by continuing to possess it after the lawful period of possession had expired. When assessing the constructive expropriation process, it is important to consider the statute of limitations that applies in expropriation cases.

Prior to 1983, no statute of limitations existed for expropriation compensation claims. The five-year statute of limitations for torts was only applied to expropriation compensation claims as of 1983.<sup>25</sup> It was the application of the statute of limitations relative to constructive expropriation that the Court in *Carbonara* examined against the backdrop of international law.

## 2. International Law

The Applicants’ challenge to the constructive expropriation rule as applied in their case rested upon an assertion of Applicants’ property rights under the Convention for the Protection of Human Rights and Fundamental Freedoms. Under the relevant provisions of Article 1 of Protocol 1 of the Convention, individuals within the Convention States are guaranteed “the peaceful enjoyment of. . . [their] possessions.”<sup>26</sup> Article 1 defines the relevant way in which the “peaceful enjoyment of possessions” can be violated: “No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by the law and by general principles of international law.”<sup>27</sup> In order for a government deprivation to violate Article 1, an applicant must be “deprived” of property that was that applicant’s possession.<sup>28</sup>

---

23. *Belvedere Alberghiera v. Italy*, no. 31524/96 Eur. Ct. H.R. 2000-VI ¶ 26.

24. *Id.* ¶ 25.

25. *Carbonara*, no. 24638/94 Eur. Ct. H.R. 2000-VI ¶ 26.

26. Human Rights Convention, *supra* note 1.

27. *Id.*

28. See *Beyeler v. Italy*, 33 Eur. H.R. Rep. 52 ¶ 105. See also Beate Rudolf, *European Court of Human Rights- Regulation of Cultural Property- Preemptive Right of State to Acquire Works of Art- Compensation for Deprivation of Possessions- UNESCO Convention on Cultural Property*, 94 AM. J. INT’L L. 736, 739-740 (2000).

If the applicant is deprived of a possession under Article 1, the Court applies a number of judicial tests to analyze circumstances and to determine whether the deprivation was preliminarily “lawful.”<sup>29</sup> While a preliminarily unlawful deprivation results in a per se violation of Article 1,<sup>30</sup> a “lawful”<sup>31</sup> deprivation may still violate Article 1 if it fails to strike a justifiable balance between the interest of the applicant and the public interest in the deprivation.<sup>32</sup>

### III. ELIMINATING THE BUGS AND PRESERVING THE LEGAL INVENTION

#### A. *The Bulwark*

The *Carbonara* Court restricted the significance of its holding to the application of the constructive expropriation rule in the Applicants’ particular case. The Court began its analysis by setting forth the structural requirements of the relevant parts of Article 1:

‘[T]he 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 three rules are not, however, ‘distinct’ in the sense of being unconnected. The second. . . [is] concerned with particular instances of interference with the right to property and should therefore be construed in the light of the general principle enunciated in the first rule.’<sup>33</sup>

The Court thus made it clear that the second sentence of Article 1 elucidates the relevant requirements necessary for compliance with the general guarantee of “peaceful enjoyment of possessions” under the first sentence of Article 1. Sentence two of Article 1 states that “[n]o one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by general principles of international law.”<sup>34</sup> In

---

29. *Carbonara*, no. 24638/94 Eur. Ct. H.R. 2000-VI ¶ 63.

30. *Belvedere*, 33 Eur. H.R. Rep. 52 ¶ 62.

31. *Carbonara*, no. 24638/94 Eur. Ct. H.R. 2000-VI ¶ 63.

32. See *Holy Monasteries v. Greece*, 20 Eur. H.R. Rep. 1 ¶¶ 70-71.

33. *Carbonara*, no. 24638/94 Eur. Ct. H.R. 2000-VI ¶ 68.

34. Human Rights Convention, *supra* note 1.

determining whether the application of the constructive expropriation law violated the Applicants' rights to "peaceful enjoyment of possessions" under Article 1, the Court assessed whether the constructive expropriation had met the requirements of sentence two of Article 1.

### B. *The Diagnostic*

The Court first inquired whether the Applicants had been deprived of a possession as defined by Article 1. If the Applicants had not been deprived of a possession to which they were entitled as contemplated by sentence two of Article 1, the Applicants would not have grounds to bring suit on the basis that they were deprived of "peaceful enjoyment of possessions" under sentence one of Article 1.<sup>35</sup> Consistent with past precedent,<sup>36</sup> the Court concluded that a determination of whether the Applicants had been subject to a cognizable deprivation under Article 1 had to hinge on "the realities of the situation complained of."<sup>37</sup> Thus, an informal deprivation arising from the combined effects of multiple circumstances could constitute a cognizable deprivation of a possession under Article 1. With this precept in mind, the Court examined the circumstances surrounding the Applicants' dispossession.

#### 1. The Cogs of Dispossession

The Court found that for the purposes of Article 1, the Applicants had been deprived of their possessions via the application of the constructive expropriation rule in conjunction with the retroactively-applied, five-year statute of limitations:

The Court notes that in the present case the Court of Cassation held, in a decision that was final and in which it applied the constructive-expropriation rule, that there had been a transfer of property in favor of the Noicattaro Town Council; as a consequence of that decision the applicants were deprived of the possibility of obtaining damages. In those circumstances, the Court finds that the effect of the judgment of the Court of Cassation was to deprive the applicants of their possessions

---

35. *Sporrong v. Sweden*, 5 Eur. H.R. Rep. 35, ¶ 57. See also *Holy Monasteries*, 20 Eur. H.R. Rep. 1 ¶ 56; *James v. United Kingdom*, 8 Eur. H.R. Rep. 123, ¶ 37.

36. See *Brumarescu v. Romania*, 33 Eur. H.R. Rep. 862, ¶ 75. See also *Sporrong*, 5 Eur. H.R. Rep. 1 ¶ 63.

37. *Carbonara*, no. 24638/94 Eur. Ct. H.R. 2000-VI ¶ 60.



within the meaning of the second sentence of the first paragraph of Article 1 of Protocol No. 1.<sup>38</sup>

Despite the Applicants' perceived inability to collect compensation, the Council argued that the Applicants had been compensated for their land in a prior settlement agreement that compensated them for other expropriated lands. However, in light of the land measurements listed in the agreement, the Court agreed with the Applicants that the parcel number of the contested land had been included merely by virtue of a misnomer.<sup>39</sup> Consequently, the Court found that the Applicants had received no compensation for their land. In failing to compensate the Applicants, the Council had deprived the Applicants of the pecuniary value their land, a possession under Article 1. After determining that the Applicants had been deprived of a possession under Article 1, the Court proceeded to determine whether the terms of the deprivation violated the requirements of sentence two of Article 1.

## 2. Arbitrary Artifice

In order for a deprivation of a possession to comply with sentence two of Article 1, as a threshold matter, such a deprivation must meet the "requirement of lawfulness."<sup>40</sup> However, sentence two of Article 1 is vague in its definition of the lawfulness requirement, stipulating that deprivations of possessions must be "subject to the conditions provided for by law and by general principles of international law."<sup>41</sup> Despite this ambiguity, the lawfulness requirement has been interpreted by the Court with specificity.

Although some scholars criticize the Court's asymmetrical interpretation,<sup>42</sup> the Court construes the lawfulness requirement differently for parties who are nationals within an expropriating country than for foreign holders of land within an expropriating country. Deprivation of land belonging to foreigners must be in

---

38. *Id.* ¶ 61.

39. *See id.* ¶¶ 36-44.

40. *Carbonara*, no. 24638/94 Eur. Ct. H.R. 2000-VI ¶ 64.

41. Human Rights Convention, *supra* note 1.

42. *See* Greta Gainer, *Nationalization: The Dichotomy Between Western and Third World Perspectives in International Law*, 26 *How. L.J.* 1547, 1564 (1983).

accordance with “the general principles of international law.”<sup>43</sup> Nationals such as the Applicants, on the other hand, are protected by a lawfulness requirement that is composed of two elements:

[The] 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. The rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention. . . and entails a duty on the part of the State or other public authority to comply with judicial orders or decisions against it. . . [T]he requirement of lawfulness means that rules of domestic law must be sufficiently accessible, precise and foreseeable.<sup>44</sup>

Accordingly, for a government deprivation of private possessions to comply with Article 1, it must comply with domestic judicial authority. That is to say, it must comply with the relevant domestic rule of law. Under the lawfulness requirement, government deprivations of possessions are also subject to extrinsic, international assessment. The second element of the lawfulness requirement mandates that such deprivations arise out of domestic law that is “sufficiently accessible, precise and foreseeable.”<sup>45</sup> Having established the dictates of the lawfulness requirement, the Court deliberated on whether the Council’s constructive expropriation of the Applicants’ land was in conformity with such dictates.

The Court’s decision as to whether the Council met the lawfulness requirement under Article 1 when it expropriated the Applicants’ land pivoted on the facts of the Applicants’ case. While the Council argued otherwise,<sup>46</sup> the Court found that the five-year statute of limitations for damages was only applied to constructive expropriations as of 1983.<sup>47</sup>

The public works on the Applicants’ land were found to have been completed after the Council’s possessory authority had

---

43. Human Rights Convention, *supra* note 1. See also *James v. United Kingdom*, 8 Eur. H.R. Rep. 123 ¶ 59; Alfred P. Rubin, *Book Review: Recueil des Cours de l’Academie de Droit International de La Haye, 1982.*, 81 AM. J. INT’L L. 771, ¶ 15 (1987); Patrick M. Norton, *A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation*, 85 AM. J. INT’L L. 474, 475 (1991).

44. *Carbonara*, no. 24638/94 Eur. Ct. H.R. 2000-VI ¶¶ 63-64. See also *Beyeler*, 33 Eur. H.R. Rep. 52 ¶ 109.

45. *Carbonara*, no. 24638/94 Eur. Ct. H.R. 2000-VI ¶ 64.

46. *Id.* ¶ 53.

47. *Id.* ¶ 26.

lapsed. The school, that is to say the public work, on the Applicants' land, was completed on October 28, 1972, after the Council's expedited expropriation order had expired.<sup>48</sup> The Council had thus gained ownership of the Applicants' land through illegal possession. Because of such illegal possession, the Applicants were entitled to compensation.

Pursuant to the constructive expropriation rule as of 1983,<sup>49</sup> the five-year statute of limitations for expropriation compensation commenced on the date that the public work on the Applicants' land was completed, it commenced on October 28, 1972. The Court of Cassation's retroactive application of the 1983 statute of limitations for constructive expropriation compensation claims thus barred the Applicants from seeking and receiving compensation for their expropriated land after October 28, 1977. With these facts in mind, the Court proceeded to balance the circumstances of the Applicants' case against the lawfulness requirement of Article 1.

The Court noted some concern for whether the Council's deprivation by way of constructive expropriation led to a violation of domestic legal authority.<sup>50</sup> However, unlike the Court's decision in *Belvedere v. Italy*,<sup>51</sup> the Court's decision in *Carbonara* did not hinge on the first element of the lawfulness<sup>52</sup> requirement, but instead on the second element.<sup>53</sup> The Court's decision thus centered on its determination of whether the retroactive application of the five-year statute of limitations to the constructive expropriation of the Applicants' land was "sufficiently accessible, precise and foreseeable" under Article 1.

The Court noted that the Applicants' claim period expired before the statute of limitations defining such a period even came into effect in constructive expropriation cases such as the Applicants'. Obviously the application of a statute of limitations which had no bearing on constructive expropriations until 1983 was not foreseeable to Applicants in 1972. However, in rendering its decision, the Court looked beyond the mere inception point at

---

48. *Id.* ¶ 16.

49. *Id.* ¶ 25.

50. *Id.* ¶ 66.

51. *Belvedere*, no. 31524/96 Eur. Ct. H.R. 2000-VI.

52. *Carbonara*, no. 24638/94 Eur. Ct. H.R. 2000-VI ¶ 64.

53. *Id.*

which the statute of limitations for tort damages was applied to constructive expropriations.

Upon deliberation, the Court firmly found that the Council's deprivation did not comply with the lawfulness requirement. It reasoned that the Applicants only had certainty as to whether the statute of limitations would apply when the Court of Cassation rendered a final appeals decision in 1993: "The Court considers that that situation could not be regarded as 'foreseeable' as it was only in the final decision, the judgment of the Court of Cassation, that the constructive-expropriation rule could be regarded as being effectively applied."<sup>54</sup> Until the constructive expropriation rule that was to apply in the Applicants' case was foreseeable and precise, it was *a fortiori* not "accessible."<sup>55</sup> The Court thus found that the constructive expropriation rule was applied in an "arbitrary"<sup>56</sup> manner inconsistent with the lawfulness requirement of sentence two of Article 1.

### 3. Recognizing the Fatal Flaws

As the constructive expropriation in the Applicants' case did not meet the threshold lawfulness requirement of sentence two of Article 1, under precedent,<sup>57</sup> it was unnecessary to assess the constructive expropriation by balancing the Applicants' specific property interests against the public's interest in the expropriation.<sup>58</sup> As the lawfulness requirement of sentence two of Article 1 was not met by the constructive expropriation, the Court held that the Council's taking of the Applicants' land violated the Applicants' "peaceful enjoyment of . . . [their] possession . . ."<sup>59</sup> under sentence one of Article 1.

In rendering its decision, the Court generally acknowledged the problematic nature of the constructive expropriation rule,<sup>60</sup> but

---

54. *Id.* ¶ 69.

55. *Id.* ¶ 64.

56. *Id.* ¶ 72.

57. *Id.* ¶ 62. See also *Sporrong*, 5 Eur. H.R. Rep. 35 ¶ 69; *James v. United Kingdom*, 8 Eur. H.R. Rep. 123 ¶ 44; *Beyeler*, 33 Eur. H.R. Rep. 52 ¶ 107; *Lithgow v. United Kingdom*, 8 Eur. H.R. Rep. 329 ¶ 110.

58. *Carbonara*, no. 24638/94 Eur. Ct. H.R. 2000-VI ¶ 62. See also *Holy Monasteries*, 20 Eur. H.R. Rep. 1 ¶ 70.

59. Human Rights Convention, *supra* note 1.

60. *Carbonara*, no. 24638/94 Eur. Ct. H.R. 2000-VI ¶¶ 64-66.

confined its decision to the application of the constructive expropriation rule in the Applicants' "instant case."<sup>61</sup>

#### IV. THE PLASTICITY OF DEFERENCE AND VINDICATION

The *Carbonara* Court rendered a proper decision that was aptly wrought in its scope, substance, and tenor. In confining its holding to the specific infraction before it, the Court did not render a binding judgment as to the validity of Italy's constructive expropriation law in the aggregate. The decision in *Carbonara* is a well-crafted paradigm, receptive to individual needs, but simultaneously deferential to the autonomous and progressive evolution of domestic law.

In its decision, the *Carbonara* Court displayed the proper deference for national law subject to international legal review. National autonomy is an important facet of international law. The philosopher Hegel writes that nations are the highest units of authority, wholly subject to their own authoritative mandates:

'[S]tates are. . . in a state of nature in relation to each other,' and for this reason there is no universal will binding upon them. The 'rights of states are actualized only in their particular wills,' in so far as there are no constitutional powers over them. There is no one to judge between states.<sup>62</sup>

Although international law imposes some consensual, extrinsic expectations upon the authority of nations, the quintessentially autonomous nature of the national unit recognized by Hegel is still paramount.

The quotidian legal, economic, social, and political dilemmas faced by nations must be assessed and resolved by respective national units. Such national units are uniquely qualified to understand the hopes, fears, and aspirations of their national citizens. Indeed, nations are the political units responsible for passing laws in the interest of their citizens, and for the enforcement of those laws. In short, it is the national unit which is most qualified to create a legal framework by which its citizens will be protected and its structural integrity preserved.

While nations should not be given unbridled discretion to trample on the rights of their citizens, the national unit necessarily

---

61. *Id.* ¶ 69.

62. SAMUEL ENOCH STUMPF, *SOCRATES TO SARTE A HISTORY OF PHILOSOPHY*, 337-38 (McGraw-Hill, Inc. 1988).

deserves a great deal of deference when placed in the purview of international law.<sup>63</sup> The Convention is not devoid of national deference:

Article 1 of the Protocol... acknowledges the police power of the states, as a limiting provision on the rights of the individual...[S]tates enjoy a large amount of discretion in determining what actions fall within the police power. The principle of state sovereignty is correctly given great weight by the human rights principles, leaving determinations like political, economic and social matters to the competence of states.<sup>64</sup>

The *Carbonara* Court's decision recognizes the importance of such national autonomy. The Court restricts its decision to the specific application of the constructive expropriation rule in the Applicants' case, and it refuses to pass binding judgment on the general viability of the Italian law. Noting that the retroactive application of the five-year statute of limitations to the constructive expropriation of the Applicants' land involved domestic law, the Court placed legal self-determination in the hands of the Italian government.

In *James v. United Kingdom*, the Court examined domestic laws aimed at socio-economic redistribution of private homes through compulsory sales. In that case, the Court noted that there was no basis for allowing for "the validity of [domestic] laws to be challenged for nonobservance of fundamental rights."<sup>65</sup> In dealing with a law that was not per se violative of Article 1, based upon the facts presented, the Court *a fortiori* properly refused to invalidate the law as a whole under Article 1. The *James* rationale fortifies the decision in the *Carbonara* case. As the constructive expropriation rule was not "manifestly without reasonable foundation" on the facts presented and as the laws of "a democratic society... may reasonably differ widely,"<sup>66</sup> it would have been reckless for the *Carbonara* Court to have invalidated the constructive expropriation law.

63. See *James v. United Kingdom*, 8 Eur. H.R. Rep. 123 ¶ 46.

64. Jon A. Stanley, *Keeping Big Brother Out of Our Backyard: Regulatory Takings as Defined in International Law and Compared to American Fifth Amendment Jurisprudence*, 15 EMORY INT'L L. REV. 349, 382-84.

65. *James v. United Kingdom*, 8 Eur. H.R. Rep. 123 ¶ 85. See also *Holy Monasteries*, 20 Eur. H.R. Rep. 1 ¶ 90.

66. *James v. United Kingdom*, 8 Eur. H.R. Rep. 123 ¶ 46.

The *Carbonara* Court's decision allowed the Italian government to direct the development of its own law in a manner that was not only optimal for isolated individuals, but also for "individuals [who] are rooted in, and part of, larger communities."<sup>67</sup> The national unit, as the aggregate of such communities, is best suited to apprehend communal needs and to tailor apt legal solutions to fulfill such needs. If the Court invalidated the constructive expropriation law on the facts in *Carbonara*, it would have substituted its "its own conception of what was in the public interest"<sup>68</sup> in place of the discretionary authority of national judges who were uniquely qualified to define national law. In abstaining from an invalidation of Italy's constructive expropriation law, the Court's decision allowed national law to evolve within a national context but also informed the domestic government of an inequitable law. While the *Carbonara* decision did not invalidate Italy's domestic law of constructive expropriation, the decision provided a mechanism through which individual interests were vindicated and domestic legal progression was catalyzed.

Through its restricted, binding effect and its dicta, the *Carbonara* Court's decision ensured that individual rights were protected and helped to expedite the progressive development of domestic law. In invalidating the application of the constructive expropriation rule in the Applicant's specific case, the Court provided for the vindication of individual human rights, irrespective of whether domestic law had been properly refined. In so doing, the Court afforded protection to individual rights during a period of incomplete, domestic, legal evolution. Not only did the *Carbonara* Court's decision protect individual human rights from the trespasses of evolving, domestic law, it also helped to progressively inform the evolution of domestic law.

The Court properly refused to invalidate or to reconstitute Italy's constructive expropriation rule as a general body of law. The Court did note the troublesome nature of the general rule, however:

The Court observes that the case-law on constructive

---

67. Michael R. Antinori, *Does Lochner Live in Luxembourg?: An Analysis of the Property Rights Jurisprudence of the European Court of Justice*, 18 FORDHAM INT'L L.J. 1778, 1785 (1995).

68. *Id.* at 1821.

expropriations has evolved in a way that has led to the rule being applied inconsistently. . . a factor which could result in unforeseeable or arbitrary outcomes and deprive litigants of effective protection of their rights and which, as a consequence, is inconsistent with the requirement of lawfulness. . . The Court has reservations as to the compatibility with the requirement of lawfulness of a mechanism which, generally, enables the authorities to benefit from an unlawful situation. . .<sup>69</sup>

While the Court's statements are dicta, such statements issued in conjunction with a circumstantial invalidation of constructive expropriation are not devoid of instructive puissance. Through its criticism of the constructive expropriation rule and its invalidation of a telling instance of the rule's application, the Court helped to clarify the potential problems associated with the Italian constructive expropriation rule. The Court's decision placed a nation on notice of perceived shortcoming in its course of legal development, while leaving discretion over developmental corrections in the able hands of that nation.

It is important to note that the *Carbonara* Court's model of deferential protection and instruction is particularly well-suited to inform domestic legal progression. This is because it is a model that is capable of gauging the importance of particular legal changes and of adjusting the frequency of its guidance accordingly. Under the *Carbonara* model, laws that are particularly problematic will likely result in a greater number of decisions by the Court. Accordingly, the more problematic a domestic law is, the more vociferous the Court's aggregated message will be. Excessive circumstantial invalidations and continual directive criticism will likely encourage relevant nations to progressively reconstitute problematic laws until such laws clearly comport with basic human rights. Finally, the model of international jurisprudence set forth in the *Carbonara* decision provides the proper balance of flexibility and persistence necessary to enforce effectively, human rights within national contexts.

## V. CONCLUSION

The Court's decision in *Carbonara* was properly restricted to the facts of the Applicants' case. By invalidating the application of the constructive expropriation rule with the five-year statute of

---

69. *Carbonara*, no. 24638/94 Eur. Ct. H.R. 2000-VI ¶¶ 65-66.



limitations in the Applicants' case, rather than invalidating the constructive expropriation doctrine *in toto*, the Court created an aptly-functioning paradigm of deferential progressivism. Under this paradigm, domestic, legal evolution is fittingly placed in the hands of national governments, which are ideally situated to determine their respective legal needs. While domestic law may not properly protect individual rights at a given stage of evolution, the *Carbonara* Court's decision demonstrated the Court's ability to protect such rights through the Convention on a circumstantial basis.

Although the Court was deferential to national autonomy, its case-specific decision helped put national authorities on notice regarding the problematic nature of a domestic law. The Court's ability to enumerate and criticize domestic law in its dicta also helped put national authorities on notice regarding specific problems with and potential solutions for a domestic law. Under the *Carbonara* Court's paradigm, specific legal invalidations and critical dicta increase in prevalence relative to the magnitude of given problems created by respective domestic laws. The *Carbonara* decision thus provided a protective and instructive international, legal framework for domestic, legal evolution. This formula for nurturing legal development balanced national and international legal demands against individual human rights in an amalgamation that can only be described as legal progression.

Jeremy Greener\*

---

\* J.D. candidate, Loyola Law School, Los Angeles, 2004; A.B. English, Brown University, 2000. *Nihilo ex nihilo*, as they say. I would like to dedicate this article to my mother, Julie Greener, and to my grandmother, Pat Licker, for their unceasing love and guidance. Without their support, this article would, as so many other things in my life, not have been possible. I would also like to dedicate this article to my mentor, Wallace Stevens, and to the late Lord Keswick. Their contributions have been and continue to be resplendent sources of inspiration. Thanks also to Kate Benjamin and to all of the members of the *Loyola of Los Angeles International and Comparative Law Review* for their extensive assistance.