

All You Need Is Control. Italian Perspectives on Acquisitive Prescription of Immovables

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Abstract

The aim of this paper is to shed some new light on the classic topic concerning the constitutive elements of possession. The cultural diatribe originated with the juxtaposed views of Savigny and Jhering does not seem to have resulted, at least in Italy, in settled positions in the current academic landscape, with subjectivist and objectivist scholars still advocating their preferred interpretation relying on different literal, historical, comparative or systematic arguments. The issue is considered here under a normative approach, widening the scope of the analysis in order to evaluate which of the different theories better suits the rationales that support the application of acquisitive prescription, one of the most important juridical effects of possession. It is surmised that an objective interpretation of possession, deprived of the traditional element of *animus domini*, and merely based on the physical control of a good, is not only more consistent with Italian legislative provisions, but also more effective in supporting the goals generally attributed to the doctrine of acquisitive prescription.

I. Introduction

In the Western legal tradition, factual control of a thing protracted through time grants a legal entitlement on that good in favour of who has exercised it, provided that further conditions are met. In common law countries these issues are addressed under the doctrine of ‘adverse possession’, which technically extinguishes the right-holder’s claim to possession towards the actual possessor. In civil law jurisdictions, the functionally equivalent rule operates according to the mechanism of ‘acquisitive prescription’, commonly intended as an original (ie non-derivative) way of acquiring the right of ownership.¹

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¹ For a comparative overview, *inter alia*, S. van Erp and B. Akkermans eds, *Cases, Materials and Text on Property Law* (Oxford-Portland: Hart, 2012), 702; E. Descheemaeker, ‘The Consequences of Possession’ and R. Hickey, ‘Possession as a Source of Property at Common

Jurists rooted in continental Europe are traditionally accustomed to structure their analysis through hypothetical propositions, whose dependent clause consists in a series of factual or normative requirements (*if A, B, C...*), and whose main clause describes the regulatory consequences that the law attaches to them (... , *then X, Y, Z*).² When this pattern is applied to the peculiar legal effects of ‘acquisition of ownership by prescription’, the paramount condition generally formalised in the civil codes requires the long-term controller to be ‘possessor’. This introduces further complications to the topic, given that the ways of delineating the constitutive elements of possession are far from settled within civil law culture. This clearly emerges from the persisting diatribe that divides intentional theorists (at least implicitly inspired by the teachings of *Savigny*),³ and supporters of more objective approaches (generally departing from counter-arguments elaborated by *Jhering*).⁴

The Italian legal system offers a perfect concretisation of this general picture. On the one hand, Art 1158 *Codice Civile* (the Italian Civil Code) formally defines *usucapione* stating that

‘ownership of immovable goods, as well as limited real rights of enjoyment on the same property, is acquired by virtue of possession for a continuous period of 20 years’.

On the other hand, practitioners and scholars still differently speculate about the exact content of this possession-requirement, in particular whether it should rest on the simple exercise of physical control over a good (*corpus*), or whether it further implies the subjective aim to behave as the owner (*animus domini*).⁵

In dealing with this problem, the academic discussion generally adopts a formalistic approach.⁶ At first, the analysis focuses on arguments that exclusively pertain to the dogmatic, historical or comparative framework of possession, and

Law’, in E. Descheemaeker ed, *The Consequences of Possession* (Edinburgh: Edinburgh University Press, 2014), 1, 77.

² K. Larenz and C.W. Canaris, *Methodenlehre der Rechtswissenschaft* (Berlin-Heidelberg-New York: Springer, 3rd ed, 1995), 71; J.H. Merryman, ‘The Italian Style’ 18 *Stanford Law Review*, 39, 49 (1965).

³ F.C. von Savigny, *Das Recht des Besitzes* (Gießen: Heyer, 1803), 188-190.

⁴ R. von Jhering, *Ueber den Grund des Besitzschutzes. Eine Revision der Lehre vom Besitz* (Jena: Mauke, 1869), 42.

⁵ To confirm the persistent relevance of the topic in the Italian legal system, see among the most recent contributions, A. Nervi, ‘Possesso e detenzione nella circolazione dei beni immobili: incertezze applicative e riflessioni sistematiche’ *Rivista del notariato*, 249, 258-260 (2018); C. Cicero, ‘Il problema del negozio di cessione del possesso’ *Rivista del notariato*, 1082 (2017).

⁶ Y. Chang, ‘The economy of concept and possession’, in Id ed, *Law and Economics of Possession* (Cambridge: Cambridge University Press, 2015), 103, who compares this approach, generally detectable in civil law tradition, with the one adopted in common law: ‘while property scholars in civil law countries are zealous in searching for the general principle and debating the conceptual framework of possession, property scholars in the U.S. are far more interested in dealing with specific possession doctrines’.

only at a second stage is the resulting notion applied by the interpreter as a constitutive element of the different possession-based doctrines scattered in the civil code and in other legislative provisions (eg, *bona fidae* purchase of movables from non-owners, acquisitive prescription, *de facto* control of intangibles, etc). As a corollary, these operational doctrines risk being largely dependent on an abstract and highly decontextualized conceptual substratum, which may not be in tune with the underlying principles and rationales that inspire their concrete application in the legal system.

This contribution deliberately takes a different perspective. It starts from the acknowledgment that none of the hermeneutic approaches with which academics have handled relevant norms on possession has been capable of creating consensus or of being perceived as the only possible, univocally ‘correct’ interpretation of Italian legislative texts. On these grounds, the investigation aims to suggest further arguments relevant for the identification of the *preferable* understanding of the statutory requirements of possession, starting from a descriptive evaluation of how the different theories concretely influence the operational aspects of acquisitive prescription. The traditional research perspective is thence reversed: it is surmised that the analysis of the constitutive elements of possession should not only focus on the internal coherence of abstract legal concepts. Instead, the practical effects of each available hermeneutical solution should be considered, orienting the preference in favour of the interpretation of possessory requirements that appears more coherent with the rationale of possession-based doctrines, such as acquisitive prescription.

The Article proceeds as follows: Section (II) introduces the basic rules of acquisitive prescription of immovables in Italy; Section (III) proposes a basic classification of the most relevant theoretical approaches to the distinguishing features of possession (III.1), and then applies it in a survey of the different positions detectable in Italian scholarship and case law (III.2); Section (IV) turns back to acquisitive prescription, looking first at its standard justifications, and then identifying from these rationales those likely to be applicable to Italian *usucapione*; Section (V) moves from these preliminary results to test which among the available interpretations of possession better suits the legislative aims of acquisitive prescription; Section (VI) summarizes the conclusions of the analysis, arguing in favour of an objective notion of possession.

II. Acquisitive Prescription of Immovables Under Italian Law

The Italian Civil Code recognizes two basic models of acquisitive prescription dedicated to immovables:⁷ a general regime (Art 1158 Civil Code); and a special

⁷ Special rules dedicated to small rural properties (Art 1159-bis c.c.) will not be considered in this paper.

one, characterized by a shortened prescription period (Art 1159 Civil Code).

1. The General Regime of *Usucapione*

The general rule dedicated to acquisitive prescription is laid down in Art 1158 Civil Code. According to its literal requirements, ownership of immovable property, as well as other real rights of enjoyment on the same goods, are acquired by virtue of possession exercised for a continuous period of twenty years. A successful *usucapione* depends on whether the acquisition of possession has been obtained in a peaceful and public way, or through violent or clandestine behaviours. While in the former case computation begins when control of the good is actually obtained by the non-owner, in the latter case the relevant prescription period does not start till the moment when violence or clandestine has ceased (Art 1163 Civil Code). Moreover, possession is relevant for acquisitive purposes only when it has been exercised in a continuous and non-interrupted way throughout the prescription period (Artt 1165-1167 Civil Code).

Under Italian law, the right of ownership, and the associated legal remedies (*rei vindicatio* and *actio negatoria* in the first place)⁸ are not subject to extinctive prescription (Artt 948-949 Civil Code). A logic corollary is that the loss suffered by the former property-holder after a successful elapse of the prescription period merely represents an indirect consequence of the *usucapione* regime.⁹ Consistently, the doctrine is univocally regarded as an original mode of acquiring property,¹⁰ with retroactive effects.¹¹ This means, in more explicit terms, that the possessor is considered to have become the owner not at the expiration of the prescription period, but from the very moment when factual control of the good was originally obtained. It is thence undisputed that if all the constitutive elements are met, acquisition of the right of ownership is effective against the formal owner and other third parties regardless of any record in the public register or any further procedural formality.¹²

⁸ For a comparative analysis of these rules: F. Mezzanotte, 'The Protection of Ownership of Goods in the DCFR. An "Exclusion Strategy" at the Core of European Property Law?' 21 *European Review of Private Law*, 1009 (2013).

⁹ A. Galati, 'Dell'usucapione (Artt. 1158-1167)', in P. Schlesinger and F.D. Busnelli eds, *Il Codice Civile. Commentario* (Milano: Giuffrè, 2013), 99.

¹⁰ Though criticized by authoritative scholars – see P. Rescigno, *Manuale del diritto privato italiano* (Napoli: Jovene, 12th ed, 1997), 276 – this point is undisputed in case law (cf among others, Corte di Cassazione 25 May 2000 no 43, *Foro italiano*, I, 2143 (2000); Corte di Cassazione 14 June 2000 no 8122, *Foro italiano, Repertorio 'Usucapione'*, no 13 (2000)), and absolutely predominant in the academia: see C.M. Bianca, *Diritto civile*, 6. *La proprietà* (Milano: Giuffrè, 2nd ed, 2017), 627 for further bibliographical indications.

¹¹ R. Sacco and R. Caterina, 'Il possesso', in A. Cicu and F. Messineo eds, *Trattato di diritto civile e commerciale* (Milano: Giuffrè, 3rd ed, 2014), 488-489.

¹² R. Sacco, 'Usucapione' *Digesto delle discipline privatistiche sezione civile* (Torino: UTET, 1999), XIX, 569-570.

2. The Special Regime of *Usucapione Abbreviata* (Shortened Acquisitive Prescription)

According to Art 1559 Civil Code, peaceful acquisition of good faith possession of immovables from a non-owner, by virtue of a suitable title that has been duly registered, determines the acquisitive prescription in favour of the possessor ten years after the registration date. This special regime is dedicated to cases where the acquisition of possession is not accompanied by a valid transfer of the legal entitlement, due to a formal lack of power of disposition in the person of the seller, who turns out to be a non-owner.

In this regard, *usucapione abbreviata* requires a 'suitable title': a legal transaction equipped with all the formal and substantial requirements necessary to transfer ownership, and that would have been valid and effective if entered into by the legitimate right-holder. For example, null contracts cannot be considered suitable titles, distinguishable from merely avoidable agreements, which under Italian law are provisionally effective and thus capable of transferring property.¹³ Suitable title may also be represented by a judgement (eg granting specific performance of a duty to enter into a sale contract) or by an administrative order (eg an expropriation decree) potentially apt to transfer the right of ownership.¹⁴

Another essential requirement of the doctrine is good faith, which implies the justified reliance on the assumption that the party from which possession is derived is the legitimate owner of the immovable. Good faith is presumed except in cases of evidence of a wilful conduct (ie actual knowledge that the assignor is not the true owner) or gross negligence (eg cases in which the assignee could have easily determined the ownership of the assignor from a mere examination of the title).¹⁵ To exemplify, good faith is excluded by the presence of a prior registration against the assignor, or by the previous transcript of an obligation to transfer the good in the public register,¹⁶ or when the buyer has explicitly exempted the notary from carrying out ordinary cadastral controls, and/or has not performed them on his/her own initiative.¹⁷

Finally, *usucapione abbreviata* requires a constitutive publicity formality. The period of time relevant for a successful acquisition by prescription starts elapsing the very date of the registration of the suitable title. This rule is consistent with the requirement of good faith by the possessor, given that the accomplishment of the registration formalities represents a valid proof of his/her reliance on the

¹³ Corte di Cassazione 20 April 2001 no 5894, *Foro italiano, Repertorio 'Usucapione'*, no 17 (2002); S. Ruperto, 'Usucapione (dir. vig.)' *Enciclopedia del diritto* (Milano: Giuffrè, 1992), XLV, 1078.

¹⁴ F. De Martino, 'Del possesso: della denuncia di nuova opera e di danno temuto (Art. 1140-1172)', in A. Scialoja and G. Branca eds, *Commentario al Codice Civile* (Bologna-Roma: Zanichelli-Foro italiano, 5th ed, 1984), 74.

¹⁵ Corte di Cassazione 20 July 2005 no 15252, *Foro italiano*, I, 437 (2006).

¹⁶ Corte di Cassazione 5 April 1994 no 3239, *Foro italiano*, I, 582 (1995).

¹⁷ Corte di Cassazione 20 July 2005 no 15252 n 15 above.

validity and effectiveness of the transfer. Moreover, this publicity requirement reflects the peculiar need to balance the position of actual owners (who are under the risk of losing their property after a relatively short period of time), and the general interest of reliability of land registers (given that, after the elapse of the shortened prescription period, their records will reflect the actual legal situation of property-holdership).

3. Overview

The brief survey conducted in this Section highlights some peculiar features of the Italian system of acquisitive prescription of immovables that deserve specific attention in light of the arguments that will be developed in the remaining analysis.

First of all, it must be noted that the general regime of acquisitive prescription operates irrespective of the subjective state of possessors. More specifically, apart from an exceptional provision dictated for movable objects, the good faith of the possessor does not represent a condition which is apt, *per se*, to grant a reduction of the ordinary acquisitive prescription period.¹⁸ This remark is not contradicted by the peculiar norm laid down in Art 1159 Civil Code: when referred to factual control of an immovable, good faith represents at most *one* of the constitutive requirements of the peculiar model of *usucapione abbreviata* there regulated.¹⁹

A second observation concerns the relationship between acquisitive prescription of immovables and land publicity. Registration is not a constitutive requirement in the ordinary regime of acquisitive prescription. As a consequence, the general doctrine of *usucapione* operates independently from the system of public records, so that its effects may be either consistent or inconsistent with the information formally resulting from public registers.²⁰ An acquisitive prescription benefiting the person who has possessed on the ground of a null, but registered, transfer ensures that public records end up reflecting the actual legal status of the immovable. On the contrary, if the doctrine operates after the occupation of a plot of land, the reallocation of ownership to the bad faith possessor would eventually contradict the situation depicted by the publicity system.²¹ This latter outcome

¹⁸ Art 1161, para 1, Civil Code derogates to the general prescription period of twenty years set by Art 1158 Civil Code stating that the ownership of movable property, and other real rights of enjoyment on the same asset, are acquired after only ten years if possession was obtained in good faith. Apart from this norm, the ordinary regime of acquisitive prescription in Italy has a constant structure, based on the fundamental elements of uninterrupted possession prolonged for a given period of time, which varies only according to the nature of the goods: twenty years for immovables, fifteen years for rustic funds, ten years for registered movables: see A. Gambaro, *Il diritto di proprietà* (Milano: Giuffrè, 1995), 846-847.

¹⁹ Cf G. Furgiuele, 'La circolazione dei beni', in N. Lipari and P. Rescigno eds, *Diritto civile* (Milano: Giuffrè, 2009), II/II, 373-374.

²⁰ L. Moccia, *Figure di usucapione e sistemi di pubblicità immobiliare* (Milano: Giuffrè, 1993), 12.

²¹ B. Hoops, 'Legal Certainty is Yesterday's Justification for Acquisitions of Land by Prescription. What is Today's?' 7 *European Property Law Journal*, 189 (2018).

is prevented by the rule on shortened acquisitive prescription, which includes the record of the suitable title of transfer among its mandatory elements, consistently with the general interests of certainty implied in a land publicity system, and with the goal of granting verifiability for all interested third parties.²²

Lastly, the description of the different *usucapione* regimes of immovables regulated by the Italian Civil Code confirms the pivotal role of possession as the ubiquitous requirement for a successful reallocation of ownership through long-term use. Attention will be now dedicated to this fundamental notion to understand how its different interpretations may influence the concrete application and operational rules of acquisitive prescription.

III. Possession as a Legal Concept

It is frequently debated whether possession is to be regarded as a right or a fact.²³ As comparative analysis shows, the answer to this question crucially depends on the contingent solutions adopted in the specific jurisdiction under analysis. Common law models mainly adopt the former approach; civil law countries tend to describe possession as primarily factual.²⁴ Even if one focuses on codified systems of law, it is possible to observe that while most of the continental European legislators explicitly treat possession as a material condition,²⁵ there are also more recent cases of textual provisions defining it as a 'legal status',²⁶ or even presenting its content as typical of a subjective right.²⁷

Irrespective of these different formulations, it is surmised that possession can never be considered as a plain, 'non-legal word', marked by a 'straight forward connection with counterparts of the world of facts'.²⁸ Even in countries such as Italy, where the notion is openly defined in its physical dimension, lawyers cannot disregard its persistent juridical substance. Put differently, even when the word 'possession' is used by legislators to denote a 'fact', its prescriptive effects inevitably diverge from its ordinary meaning. While in the layman's understanding, possession simply represents 'the act or state of actual holding or occupancy',²⁹

²² C.M. Bianca, n 10 above, 637; S. Ruperto, n 13 above, 1082.

²³ For a survey, R.A. Posner, 'Savigny, Holmes, and the Law and Economics of Possession' 86 *Virginia Law Review*, 535 (2000).

²⁴ Recently, Y. Emerich, 'Possession', in M. Graziadei and L. Smith eds, *Comparative Property Law. Global Perspectives* (Cheltenham: Edward Elgar, 2017), 173-174.

²⁵ Eg, in Germany, BGB, § 854; in France, Art 2255 *Code civil*; in Belgium, Art 2228 *Code civil*.

²⁶ Eg in the Netherlands, Art 3:107(1): 'Possession is the legal status in which a person holds an asset for himself'.

²⁷ Eg Art 180 Japan civil code: 'Possessory rights shall be acquired by holding thing with an intention to do so on one's own behalf'.

²⁸ H.L.A. Hart, 'Definitions and Theory in Jurisprudence' 70 *Law Quarterly Review*, 37 (1954).

²⁹ See 'Possession', in J.M. Hawkins and R. Allen eds, *Oxford Encyclopedic English Dictionary* (Oxford: Clarendon Press, 1991), 1131.

lawyers shall instead consider its relevance only within the specific conditions set by the law.³⁰

It is thence crucial to identify the qualifying elements of possession in legal discourse: this is exactly the task to which the following subsections are dedicated.

1. The Distinguishing Elements of Possession

In many legal systems of the civil law tradition, first-year private law students are induced to abandon their pre-judicial property notions as soon as they are instructed that an apparently straightforward position of factual enjoyment of an object may assume at least a twofold meaning in the eyes of the law, being alternatively classified under the different concepts of ‘possession’ and ‘detentorship’.³¹

As for the present analysis, in order to frame the available techniques employed for the juridical qualification of these two legal notions, it appears useful to re-adjust the speculative model formalised by *Jhering* through his ‘scheme of three theories’,³² surmising that possession and detentorship may be alternatively distinguished:

(i) according to the ‘specific intention’ of the factual controller, as inferable from the peculiar circumstances of the case (*concrete Willenstheorie*);

(ii) according to the ‘abstract intention’ of the factual controller, based on the assumption of conformity of the subjective state of who exercises property-like powers over a good and that of the legitimate right-holder (*abstracte Willenstheorie*);

(iii) according to the ‘objective theory’, which defines possession on the basis of purely exterior elements of control over goods, in the absence of any legal title granting *de facto* powers exercised *alieno nomine* (*Objectivitätstheorie*).

On a substantive level, the first two theories rely on a subjective element as the distinguishing feature of possession. Both the possessor and the detentor enjoy material control of the good (*corpus*), but while the former exercises her/his powers with the specific intention of being the owner (*animus domini*), the latter’s behaviour is accompanied by the inner recognition of someone else’s legitimate right (*animus detinendi*). These subjectivist approaches differ in particular on a procedural level. According to the ‘specific intention’ theory, it is up to the controller who claims possession to provide evidence not just of her/his factual control of goods, but also of the correlative subjective element. Under the ‘abstract intention’ regime, the burden of proof is eased through a

³⁰ S. Douglas, ‘Is Possession Factual or Legal?’, in E. Descheemaeker ed, n 1 above, 66, 75-76.

³¹ For a perfect illustration, dedicated to entering students of a transnational law programme, cf B. Akkermans, ‘Property Law’, in J. Hage and B. Akkermans eds, *Introduction to Law* (Cham: Springer, 2014), 75-76.

³² R. von Jhering, *Der Besitzwille: Zugleich eine Kritik der Herrschenden Juristischen Methode* (Jena: Fischer, 1889), 19-20.

rebuttable presumption of *animus domini* in who exercises material powers corresponding to those typically associated with the right of ownership. In this latter case, subjective intention does not disappear, but it is largely inferred from the presence of *corpus*.

The third theory operates on objective terms, as it considers possession nothing more than a conscious factual control over goods (*corpus*). In this perspective, the distinguishing feature of possession if compared to detentorship does not rely, in a positive sense, on the presence of a different intention (in both circumstances coinciding with the mere consciousness of a physical relation between the individual and the thing). Rather, the distinction is based on a negative element: the absence of a formal legal title that operates as a *causa detentionis*, capable of justifying the exercise of material powers over a good on behalf of its legitimate holder.

2. The Distinguishing Elements of Possession Under Italian Law

The Italian Civil Code, dated 1942, defines possession as

‘the factual power over a thing that is exhibited through an activity corresponding to the exercise of the right of ownership or of another real right’ (Art 1140, para 1, Civil Code),

and then further specifies that ‘it is possible to possess through another person, who is the detentor of the good’ (Art 1140, para 2, Civil Code).

Moving from this basic framework, Italian scholars have long debated the distinguishing features of possession and detentorship, with such a heterogeneous variety of arguments and theories that it would be impossible to provide a comprehensive account here. It appears instead sufficient to collect the main hermeneutic approaches elaborated by case law and doctrine, framing them within the conceptual grid that has been previously drafted.³³

a) Subjectivist Approaches

A traditional hermeneutic approach counts Italy among the jurisdictions based on a subjective view on possession, and grounds the distinction with detentorship on the intentional element of *animus*. This position is the one prevailing in classic readings,³⁴ it still enjoys broad support among scholars,³⁵

³³ For the ease of reading, subjective approaches presented under Section III.1, *sub* (i) and (ii) will be dealt together in a single sub-section.

³⁴ See *inter alia*, M. D’Amelio, *Del possesso*, in M. D’Amelio ed, *Commentario del codice civile. Libro della proprietà* (Firenze: Barbera, 1942); R. Sacco, ‘Possesso (dir. priv.)’ *Enciclopedia del diritto* (Milano: Giuffrè, 1985), XXXIV, 491; L. Bigliuzzi Geri et al, *Diritto civile* (Torino: UTET, 1988), II, 352-353.

and it is conveyed in some of the most widespread private law handbooks used in Italian law schools.³⁶

The arguments put forward by Italian scholars to support this theory frequently rely on the cultural influence historically exercised by the subjectivist roots of the Roman law of possession,³⁷ as re-elaborated by Savigny and the Pandectist school, and embraced also by the interpreters of the French *code civil*, whose rules were transplanted in Italy as provisions of the first unitary codification, dated 1865.³⁸ On a more technical level, it is submitted that a *de facto* power over a good could not result in an activity corresponding to the contents of the right of ownership or of another real right (as prescribed by Art 1140 Civil Code) in the absence of a specific intention directing the material behaviour in that direction.³⁹

This last consideration also helps explain the predominance, within the subjectivist trend, of the abstract intentional theory. The requirement of *animus* is generally considered by scholars and courts implicit in exercising powers that are typically associated with the position of a formal right-holder,⁴⁰ and thus ordinarily inferred from objective parameters and exterior conduct.⁴¹ The crucial implications assumed by theoretical discussions on the concrete distribution of the burden of proof in property litigation were indeed already clear to the drafters and first commentators of the Italian Civil Code.⁴² In this regard, preparatory works explicitly testify the need to ‘properly balance subjective and objective elements of possession’, specifying that

‘the individual intention is relevant for the legal system only as it is materialised through an external demeanour, so distinguishing the different kinds of possession’.⁴³

³⁵ Among others, R. Caterina, ‘Il possesso’, in A. Gambaro and U. Morello eds, *Trattato dei diritti reali*, I, *Proprietà e possesso* (Milano: Giuffrè, 2008), 379; C. Tenella Sillani, ‘Possesso e detenzione’ *Digesto delle discipline privatistiche, sezione civile* (Torino: UTET, 1996), XIV, 15-16.

³⁶ See F. Galgano, *Istituzioni di diritto privato* (Milano: Wolters Kluwer-CEDAM, 8th ed, 2017), 96; A. Trabucchi, *Istituzioni di diritto civile* (Milano: Wolters Kluwer-CEDAM, 48th ed, 2017), 719-720; G. Iudica and P. Zatti, *Linguaggio e regole del diritto privato* (Milano: Wolters Kluwer-CEDAM, 17th ed, 2016), 218.

³⁷ Cf A. Gambaro and U. Mattei, ‘Property Law’, in S. Lena and U. Mattei eds, *Introduction to Italian Law* (The Hague: Kluwer Law International, 2002), 286.

³⁸ On the influence exercised by the historical and cultural tradition on the interpretation of the *animus* requirement in Italy, see among others R. Sacco and R. Caterina, n 11 above, 81; R. Sacco, n 34 above, 510; A. Levoni, *La tutela del possesso* (Milano: Giuffrè, 1979), I, 70; D. Barbero, *Sistema del diritto privato italiano* (Torino: UTET, 6th ed, 1962), I, 295.

³⁹ R. Sacco and R. Caterina, n 11 above, 98.

⁴⁰ A. Montel, *Il possesso* (Torino: UTET, 2nd ed, 1962), 33-34; L. Barassi, *Diritti reali e possesso* (Milano: Giuffrè, 1952), 2, §169a.

⁴¹ F. De Martino, n 14 above, 2.

⁴² L. Barassi, n 40 above, §157; F.S. Gentile, *Il possesso* (Torino: UTET, 2nd ed, 1977), 29.

⁴³ Cf Preliminary Report to the Italian Civil Code (*Relazione al codice civile* R.R. no 192).

These considerations support a peculiar reading of the legislative provision set forth by Art 1141, para 1, Civil Code, which states that ‘possession is presumed in s/he who controls the good, unless it can be proven that he/she started exercising his/her powers as a mere detentor’. Though in the absence of any textual requirement of a particular intention, this norm is generally interpreted by subjectivist theorists as one introducing a presumption (not simply of possession but specifically) of *animus domini*, rebuttable only through positive evidence that the *de facto* controller has acknowledged (at least implicitly) the presence of a different right-holder.⁴⁴

b) Objectivist Approaches

A different theoretical perspective, not explicitly recognised by any Italian court, but increasingly gaining support among scholars, disregards the relevance of *animus* as a distinguishing feature of possession.⁴⁵

Together with other systematic arguments, supporters of this view stress that there is no formal legal rule to be found in the current Italian Civil Code from which the relevance of any subjective element relating to who possesses may be openly inferred (differently from the explicit provisions dictated by the former version of the code).⁴⁶ It is thence suggested that possession should only be interpreted on its objective grounds (as a physical control over a good) and distinguished from detentorship not on the basis of a different intention, but rather considering this latter position as based upon a legal title that serves as a *causa detentionis*.⁴⁷

This conclusion is textually anchored in the provision of Art 1141, para 2, Civil Code, according to which detentorship may be turned into possession only when the title (*titolo*) on which control is based is substantially changed, either because of the intervention of a third party⁴⁸ or because of a formal act of

⁴⁴ R. Sacco, n 12 above, 565; F. Galgano, n 36 above, 97.

⁴⁵ See among others, F. Alcaro, ‘Il possesso (Artt. 1140-1143)’, in P. Schlesinger and F.D. Busnelli eds, *Il Codice civile. Commentario* (Milano: Giuffrè, 2nd ed, 2014), 84; S. Patti, *Possesso e prescrizione. Le nuove problematiche* (Padova: CEDAM, 2009), 25-27; more remote references: C.A. Funajoli, ‘L’animus nel possesso e il dogma della volontà’ *Giustizia civile*, 27 (1951); A. Natucci, ‘Titolo e «animus» nella disciplina del possesso’ *Quadrimestre*, 472 (1989).

⁴⁶ Art 686 of the former Italian *Codice Civile* (1865), explicitly required for possessors the intention of controlling the good as their own (*animo di tenere la cosa come propria*).

⁴⁷ This argument is progressively gaining consideration also in institutional treaties (C.M. Bianca, n 10 above, 552-555; B. Troisi and C. Cicero, I possessi, in P. Perlingieri ed, *Trattato di Diritto Civile del Consiglio Nazionale del Notariato* (Napoli: Edizioni Scientifiche Italiane, 2005), 11; A. Masi, ‘Il possesso e la denuncia di nuova opera e di danno temuto’, in P. Rescigno ed, *Trattato di diritto privato*, 8, *Proprietà* (Torino: UTET, 2nd ed, 2002), 540-543) and even influential handbooks (eg A. Torrente and P. Schlesinger, *Manuale di diritto privato* (Milano: Giuffrè, 21st ed, 2013), 335-336; P. Perlingieri and B. Troisi, ‘Le situazioni possessorie’, in P. Perlingieri ed, *Manuale di diritto civile* (Napoli: Edizioni Scientifiche Italiane, 7th ed, 2014), 257-259).

⁴⁸ Eg a contract of sale is concluded with the owner, irrespective of its validity: see Corte di Cassazione 7 December 2006 no 26228, *Foro italiano, Repertorio ‘Usucapione*’, no 6 (2007);

opposition directed against the actual possessor.⁴⁹ This legal title, irrespective of its nature – statutory,⁵⁰ judiciary,⁵¹ or contractual – and even of its formal validity,⁵² is thus regarded as the technical element that distinguishes the material powers of the detentor from those of the possessor. More in detail, arguing *a contrario* to the provision of Art 1140, *causa detentionis* delineates a material activity that, differently from possession, does not correspond to the exercise of the right of ownership or of another real right, but that is instead commensurate with the content of a different (personal) right of enjoyment (eg, a lease, a loan, a deposit, etc).⁵³

In terms of policy considerations, these interpretative attempts appear apt to address some of the major criticisms that have been raised by authoritative scholars towards the most extreme propositions of the subjective approach to possession.⁵⁴ Attention is generally focused on the procedural difficulties inevitably connected with the necessary proof of the state of mind assumed by the controller of a good, and on the connected costs and litigation uncertainties.⁵⁵ Indeed, at a closer look, these issues are not completely solved even if one follows the abstract intention theory: the connected presumption of *animus domini* certainly supports physical controllers in their attempt to claim possession, but it simultaneously increases the procedural burdens for challenging the juridical relevance of the counterparty's factual power.

c) Overview

Corte di Cassazione 5 December 1990 no 11691, *Foro italiano, Repertorio 'Comunione e condominio'*, no 63 (1990).

⁴⁹ Eg, the custodian of a good explicitly declares to its formal right-holder to consider that asset under his/her exclusive ownership, on whatever ground: for a survey of relevant cases, see F. Alcaro, n 45 above, 115.

⁵⁰ Eg, a legislative rule regulating the powers of parents and tutors on the assets formally owned by minors or pupils.

⁵¹ Eg, an adjudication by an administrative or civil court (such as the decision that grants to the divorced partner the right to live in the house formally belonging to her/his former spouse).

⁵² Legal scholars and courts tend to agree on the idea that even an invalid or ineffective title may give successfully rise to a factual position of detentorship: R. Caterina, n 35 above, 400; L. Barassi, n 40 above, 209; G. Dejana, 'Spoglio del locatore a danno del subconduttore consenziente il conduttore' *Foro italiano*, I, 517 (1948); Corte di Cassazione 20 May 2008 no 12751, *Foro italiano, Repertorio 'Possesso'*, no 29 (2010); but in critical terms, see S. Patti, 'In tema di prova della detenzione ai fini della tutela possessoria' *Giurisprudenza italiana*, 96-98 (2010), who, adopting an objectivist approach to possession, describes detentorship as a legal – not merely factual – position (as always based on a legal title), and thence considers as a 'possessor' he/she who exercises factual control on a good on the ground of an invalid contract.

⁵³ R. Omodei Salè, *La detenzione e le detenzioni* (Padova: CEDAM, 2012), 56; G. Liotta, *Situazioni di fatto e tutela della detenzione* (Napoli: Jovene, 1983), 37 and for the interpretation of detentorship as a legal situation: cf S. Patti, n 45 above, 9-27; Id, n 52 above, 96-98.

⁵⁴ Among others, cf Rescigno, n 10 above, 445.

⁵⁵ F. Alcaro, n 45 above, 84; P. Gallo, 'Possesso e detenzione', in Id and A. Natucci eds, *Beni, proprietà e diritti reali* (Torino: UTET, 2001), II, 204.

The survey conducted in this Section leads me to express a preliminary preference for an objective approach to the interpretation of the normative requirements of possession. Looking at the issue from the perspective of the Italian legal system, this inference appears not only more adherent to the formal legislative texts, but also more effective in ensuring a reliable and administrable system of protection of factual positions of control established by individuals over relevant goods. This preliminary conclusion is also consistent with the results of investigations inspired by efficiency-oriented concerns. As recently demonstrated,

‘a concise definition of possession – as actual control with no exception – has an optimal level of generality and economizes on information costs for users of the legal system’.⁵⁶

At the same time, it is undisputable that the history of possessory concepts, as illustrated also by comparative analyses⁵⁷ and supported by the legislative intent of the drafters of the Italian Civil Code,⁵⁸ militates against a complete abandonment of the *animus* requirement. This may well justify the wide array of authoritative commentators still inclined to support the subjectivist approach to possession,⁵⁹ as well as the application by Italian courts of a series of declamatory rules that constantly ground the distinctive feature of detentorship on the absence of the controller’s intention to behave as the legitimate right-holder.⁶⁰

Moving on from these premises, it is now time to turn back to acquisitive prescription – ‘the main effect of possession’⁶¹ – to show that further normative arguments in favour of an objectivist theory can be drawn from its consistency with the fundamental rationales that currently support the operational rules of Italian *usucapione*.

IV. The Justifications of Acquisitive Prescription

⁵⁶ Y. Chang, n 6 above, 124.

⁵⁷ In Italy, cf R. Sacco and R. Caterina, n 11 above, 186.

⁵⁸ F. Alcaro, n 45 above, 23.

⁵⁹ Recently, A. Gambaro, *La proprietà. Beni, proprietà, possesso* (Milano: Giuffrè, 2nd ed, 2017), 468.

⁶⁰ Corte di Cassazione 23 July 2014 no 9671, *Foro italiano, Repertorio ‘Usucapione’*, no 23 (2014); Corte di Cassazione 10 July 2007 no 15446, *Foro italiano, Repertorio ‘Usucapione’*, no 11 (2007); Corte di Cassazione 9 September 2002 no 13082, *Foro italiano, Repertorio ‘Possesso’*, no 17 (2002); Corte di Cassazione 18 January 2001 no 708, *Foro italiano, Repertorio ‘Usucapione’*, no 7 (2002).

⁶¹ In these terms, Y. Emerich, n 24 above, 181. See also J.Q. Whitman, *The Legacy of Roman Law in the German Romantic Era* (Princeton: Princeton University Press, 1990), 183-184, emphasising the crucial influence exercised by the acquisitive prescription effect on the theoretical notion of possession elaborated in Germany by the Historical school, in connection with the agrarian political struggles of the 19th century.

Various justifications have been put forward in the international literature for acquisitive prescription and its functionally equivalent mechanism of adverse possession.⁶² Though strictly interrelated with each other, these rationales will be illustrated here for merely descriptive purposes, distinguishing those that are mainly centred on the position of the individuals potentially involved in a possessory dispute, from those inspired by more general interests of the legal system and society at large. In this survey, standard explanations of acquisitive prescription will be initially presented in general terms (Sections IV.1-IV.3), and a more critical assessment of their basic lines of reasoning will be integrated into the analysis of their possible interactions with Italian law (Section IV.4).

1. The Behaviours of the Parties Involved in Acquisitive Prescription

The basic justifications of acquisitive prescription commonly rely on a series of utilitarian and retributive arguments attached to the behaviour of the right-holder and the factual controller, and specifically concerning their relationship with the asset.

Looking at the topic through the eyes of the paper owner, the doctrine has been interpreted: (i) *ex ante*, as an incentive to monitor his/her goods, and eventually – according to arguments that appear much more disputable⁶³ – to maximise aggregate welfare by promoting active uses of economic relevant resources;⁶⁴ (ii) *ex post*, as a sanction that the legal system imposes, through the loss of the entitlement, on s/he who has ‘slept on her/his rights’, failing to monitor and control the actual state of her/his belongings.⁶⁵

Conversely, when a long time has passed since someone has taken active control of an asset, granting the possessor a property right on that good represents not just an economic reward for her/his productive activity, but it is also consistent with the reliance that is reasonably generated by the absence of any reaction or interference by a different right-holder.⁶⁶ Following *Radin’s* personhood

⁶² According to H. Conway and J.E. Stannard, ‘The emotional paradoxes of adverse possession’ 64 *Northern Ireland Legal Quarterly*, 75, 88-89 (2013), heterogeneous, and even visceral, reactions of the doctrine towards adverse possession (or acquisitive prescription) should not surprise, given its inextricable interrelation with sentimental attachments to property and emotional reaction to its possible loss.

⁶³ Recently, B. Hoops, n 21 above, 197, stressing that in a relevant series of cases, non-use may be socially more valuable than use (eg for issue of environmental protection); for further criticisms towards this argument, see Section IV.4.a.

⁶⁴ *Inter alia*, T.J. Miceli and C.F. Sirmans, ‘An Economic Theory of Adverse Possession’ 15 *International Review of Law and Economics*, 161 (1995); R.C. Ellickson, ‘Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights’ 64 *Washington University Law Quarterly*, 725 (1986).

⁶⁵ L.A. Fennell, ‘Efficient Trespass: The Case for ‘Bad Faith’ Adverse Possession’ 100 *Northwestern University Law Review*, 1059 (2006); T.W. Merrill, ‘Property Rules, Liability Rules, and Adverse Possession’ 79 *Northwestern University Law Review*, 1122, 1130 (1985).

⁶⁶ J.W. Singer, ‘The Reliance Interest in Property’ 40 *Stanford Law Review*, 665 (1988).

theory of property, these interests deserve legal protection in particular if one takes into account the ties that the concrete exploitation of material resources creates with their users, as a way of expression and development of their personality.⁶⁷

2. Legal Certainty

Looking at the general interests of society, a ubiquitous justification for acquisition by prescription is the promotion of certainty. It is commonly stressed that the doctrine serves this goal mainly by reducing overall information and evidence costs.⁶⁸ The more time passes, the more difficult it is to keep track of facts that have occurred in the past. It is thus preferable, not just for the specific individuals involved in a dispute, but also for third parties and for the legal system at large, to rely on the assumption that the positions of the factual and juridical holder of goods are eventually held by the same person.⁶⁹

This, in turn, is said to lower both litigation and uncertainty costs. As for the former, acquisitive prescription should prevent or discourage property lawsuits to be initiated by third parties against the long-time possessor of goods, and allows for the clearance of legal titles,⁷⁰ easing the otherwise difficult burden of proof regarding ownership.⁷¹ Moreover, it is frequently submitted that by quieting potential claims of old time property-holders, acquisitive prescription does not only preserve peace and order among citizens, but it further reduces verification costs incurred by third parties, fostering market transactions with interested purchasers of goods and limiting uncertainty for their potential creditors.⁷²

3. Redistribution

Further, and more controversial, grounds of acquisitive prescription are connected to its potential redistributive effects. In its straightforward version, this argument focuses on the abstract capability of the doctrine to force the transfer

⁶⁷ M.J. Radin, 'Time, Possession, and Alienation' 64 *Washington University Law Quarterly*, 745 (1986).

⁶⁸ In general terms, B. Depoorter, 'Adverse possession', in B. Boukaert ed, *Property Law and Economics* (Cheltenham-Northampton: Edward Elgar, 2010), 184-185.

⁶⁹ See T.W. Merrill 'Ownership and possession', and H.E. Smith, 'The elements of possession', in Y. Chang ed, n 6 above, 18, 88; C.M. Rose, 'Property and Expropriation: Themes and Variations in American Law' *Utah Law Review*, 1, 13 (2000).

⁷⁰ R.A. Epstein, 'Past and Future: The Temporal Dimension in the Law of Property' 64 *Washington University Law Quarterly*, 676 (1986); T.W. Merrill, n 65 above, 1128; J.E. Stake, 'The Uneasy Case for Adverse Possession' 89 *Georgetown Law Journal*, 2451 (2001).

⁷¹ This is particularly true in jurisdiction with negative registration systems: see eg, V. Sagaert, 'Prescription in French and Belgian Property Law after the *Pye* Judgment' 15 *European Review of Private Law*, 265, 270-271 (2007); and *infra* Section IV.4.b.

⁷² See among others, D.G. Baird and T.H. Jackson, 'Information, Uncertainty, and the Transfer of Property' 13 *Journal of Legal Studies*, 299 (1984).

of goods among individuals, solving the antagonistic relationships between the idle owner (claiming the asset as a matter of right) and the actual controller (claiming it as a matter of use or need), in favour of the latter.⁷³

It must be preliminarily noted that this way of reasoning is far from being unproblematic. First of all, social justice concerns cannot explain all cases of acquisition by prescription. As an expression of a policy option favourable to the reallocation of resources from groups of affluent right-holders to weaker sections of the population, these arguments would hardly justify standard applications of the doctrine such as those deriving from good-faith boundary disputes or from invalid property transfers. Moreover, even focusing on cases where economic disparities are actually relevant, one can legitimately doubt that acquisitive prescription might represent, on a vast scale, an adequate means of properly addressing the issue of wealth inequality.⁷⁴

Despite the merits of these remarks, it is here surmised that the redistribution approach deserves further investigation, if not as an argument autonomously apt to provide acquisitive prescription with a generally valid justification, at least as a rationale capable of supporting more traditional ones in some specific operational contexts.⁷⁵

In particular, social justice may coherently integrate the standard explanations of the doctrine when applied in favour of bad faith possessors. In these cases, the loss suffered by the paper owner cannot be properly justified by solely referring to legal certainty, if only because of the fact that acquisitions by prescription may even render the public records less reliable, reallocating the entitlement to the detriment of s/he who publicly appears as the registered right-holder.⁷⁶ As a corollary, the acquisitive effect of prescription risks relying on extremely uncertain grounds, especially when former owners acted reasonably throughout the possession period and cannot be blamed for not having properly controlled their holdings.⁷⁷

Further confirmations of this line of reasoning can be found arguing *a contrario* from liberal approaches to law. Indeed, if one advocates that equality

⁷³ In this terms U. Mattei and A. Quarta, *The Turning Point in Private Law. Ecology, Technology and the Commons* (Cheltenham-Northampton: Edward Elgar, 2018), 42-46; and earlier, E.M. Peñalver and S.K. Katyal, *Property Outlaws: How Squatters, Pirates, and Protesters Improve the Law of Ownership* (New Haven: Yale University Press, 2010); B. Gardiner, 'Squatters' Rights and Adverse Possession: A Search for Equitable Application of Property Laws' 8 *Indiana International & Comparative Law Review*, 119 (1997).

⁷⁴ In this sense, cf extensively B. Hoops, n 21 above, 205.

⁷⁵ T. Davis, 'Keeping the Welcome Mat Rolled-Up: Social Justice Theorists' Failure to Embrace Adverse Possession as a Redistributive Tool' 20 *Journal of Transnational Law & Policy*, 73 (2011), openly looking at adverse possession as a tool for social justice goals; G.M. Duhl, 'Property and Custom: Allocating Space in Public Places' 79 *Temple Law Review*, 241 (2006); J. Singer, *Entitlement: The Paradoxes of Property* (New Haven: Yale University Press, 2000), 140.

⁷⁶ Cf Hoops, n 21 above, 190; and with reference to Italian law, see Sections II.3 and IV.4.b.

⁷⁷ For this observation, moving from the sanctioning function of acquisitive prescription, J. Jansen, 'Thieves and Squatters: Acquisitive and Extinctive Prescription in European Property Law' 1 *European Property Law Journal*, 153, 163 (2012).

issues should not affect the legal regime of property protection, and private law regulation more in general,⁷⁸ it is a logical corollary to consider adverse possession and acquisitive prescription as ‘anachronistic doctrines’,⁷⁹ unacceptable in particular in cases of squatters and intentional land grabbers.⁸⁰ Paradoxically, while in a normative (*de iure condendo*) perspective similar pleas suggest a complete abandonment of acquisitive prescription, they strengthen redistribution concerns as a plausible justification for those positive rules that, in different jurisdictions, currently safeguard acquisition of ownership by prescription even in cases of bad faith possessors.⁸¹

4. The Justifications of Italian *Usucapione*

In Italy, justifications for acquisitive prescription have been traditionally linked to the efficient regulation of the conflict between the formal owner and actual possessor of goods and on the promotion of legal certainty.⁸² The main findings of these analyses will be summarised here, comparing them to the general justifications given to acquisitive prescription in the international debate.

a) *Usucapione* and the Behaviour of the Parties

Since ownership is not subject to any rule of extinctive prescription in the Italian legal system, non-usage is to be considered among the legitimate powers of the owner and cannot lead, *per se*, to the loss of unexploited property, outside the incidental case of a conflicting possession accompanied by all of the requirements for successful acquisitive prescription.⁸³

In the absence of a formal obligation to control or actively use the asset pending on the owner, *usucapione* loses its potential justifications based on the behaviour of parties involved in a property dispute. On the one hand, it would be irrational for the legal system to sanction someone for simply having exercised a right in a legitimate way. On the other hand, it may appear even disputable that aggregate welfare could effectively benefit more from immediate productive activities carried out by the possessor than from simple non-usage and

⁷⁸ For a classic illustration of those arguments: L. Kaplow and S. Shavell, ‘Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income’ 23 *Journal of Legal Studies*, 667 (1994).

⁷⁹ C.N. Brown and S.M. Williams, ‘Rethinking Adverse Possession: An Essay on Ownership and Possession’ 60 *Syracuse Law Review*, 583 (2010).

⁸⁰ R.A. Epstein, n 70 above, 667; R.H. Helmholz, ‘More on Subjective Intent: A Response to Professor Cunningham’ 64 *Washington University Law Quarterly*, 65 (1986).

⁸¹ L.A. Fennell, n 65 above, 1081. For the application of this line of reasoning to the Italian legislative framework, see Section III.4.c.

⁸² For a detailed survey of the different possible rationales of *usucapione*, R. Caterina, ‘Impium Praesidium. *Le ragioni a favore e contro l’usucapione*’ (Milano: Giuffrè, 2001), 9-38.

⁸³ For classic references, F. Santoro-Passarelli, *Dottrine generali del diritto civile* (Napoli: Jovene, 9th ed reprint, 2002), 114-115; U. Natoli, *Il possesso* (Milano: Giuffrè, 1992), 239.

preservation activities, or from exploitation of resources organised through long-term plans by the right-holder.⁸⁴

Acquisitive prescription is thence justified by Italian scholars not as a legal rule aimed at directly influencing the behaviour of specific individuals, but rather as a criterion employed by the legal system for the settlement of a conflict between private parties, only indirectly inspired by the public interest of promotion of wealth-increasing exploitation of resources. Put differently, the doctrine serves more as a parameter of interpersonal conflict resolution (at most, inspired by general policy issues) than as a rule specifically aimed at granting a general public interest against the abandonment (non-use) of goods.⁸⁵

Interpreted in this way, this justification tends to overlap, and eventually fade, into the one connected with legal certainty.

b) *Usucapione* and Legal Certainty

From a general interest perspective, the promotion of legal certainty is the justification of paramount importance for acquisitive prescription in Italy.

The Italian system of property transfer is formally based on the consensualistic principle (Art 1376 Civil Code). Its plain application (based on the *nemo plus iuris in alium transferre potest quam ipse habeat* rule) would logically imply serious problems in providing proof of actual ownership of goods.

As for immovables, these issues are only partially addressed by the negative deeds system of registration operating in Italy.⁸⁶ Indeed, the purchaser of a plot of land is protected against any previous unregistered transactions conveying a conflicting property interest on that same good (according to Art 2644 Civil Code, these latter acts

‘have no effect against third persons who have in any way acquired rights in immovable property on the basis of a transaction recorded prior to the registration of the said acts’).⁸⁷

At the same time, the system does not grant protection for the positive reliance on the information provided by the register. The purchaser, even if in good faith, is not necessarily protected if the entry in the land register turns out

⁸⁴ R. Caterina, n 82 above, 18-20. The utilitarian argument should at least be adjusted in the sense that the potential acquisition of the good incentivises the possessor, during the prescription period, to maintain and preserve the asset, administering it with the same level of care that an owner would show towards her/his goods: cf R. Sacco, n 12 above, 562.

⁸⁵ S. Patti, ‘Perdita del diritto a seguito di usucapione e indennità (alla luce della Convenzione Europea dei Diritti dell’Uomo)’ *Rivista di diritto civile*, II, 663 (2009).

⁸⁶ For a survey, A.M. Garro, ‘Recordation of Interests in Land’ *International Encyclopedia of Comparative Law* (Tübingen: Mohr Siebeck, 2004), VI, 135.

⁸⁷ F. Gazzoni, ‘La trascrizione immobiliare (Artt. 2643-2645-bis)’, in P. Schlesinger and F.D. Busnelli eds, *Il Codice Civile. Commentario* (Milano: Giuffrè, 2nd ed, 1998), 457.

to be based on an invalid or defective title.⁸⁸ This latter issue becomes even more problematic given that, according to Art 2650 Civil Code, in order to be effective, the registration must not just be based on a valid title, but also on a series of continuous registered transfers.

Following these reasons, the formal demonstration of ownership is commonly considered a *probatio diabolica*: the fulfilment of the burden of proof may abstractly impose the alleged owner to trace back the complete chain of property transfers up to an original way of property acquisition, in order to be sure about the uninterrupted sequence of successive, derivative right-holders.⁸⁹ In this regard, acquisitive prescription is commonly perceived as the most important legal tool capable of providing individuals with full certainty about the actual owners of immovable goods.⁹⁰ The elapse of the prescription period performs the fundamental function of title clearance, excluding the need for further investigation on the position of previous right-holders.⁹¹ In particular, thanks to acquisitive prescription, the owner may accomplish his/her burden of proof simply by demonstrating his/her long-term possession of the property;⁹² and even if the minimum time requirement required by the law is not met, s/he can still benefit from the rule which grants to successors in title the right to cumulate their possession period with the one enjoyed by former owners, in order to take advantage of its effects (Art 1146 Civil Code).⁹³

These considerations help explain the relatively scarce attention paid in Italy to the international debate after the judgements of the European Court of Human Rights in *Pye v United Kingdom*.⁹⁴ On a practical level, the arguments raised in that case against the legitimacy of acquisitive prescription have not found any follow-up application in front of an Italian court. While scholars have been obviously invited to reassess the justifications supporting the doctrine of acquisitive prescription, a shared position appears to be that national rules on

⁸⁸ R. Caterina, 'Some Comparative Remarks on JA Pye (Oxford) Ltd v. The United Kingdom' 15 *European Review of Private Law*, 273, 276 (2007).

⁸⁹ Among others, O. Scozzafava, 'La proprietà', in N. Lipari and P. Rescigno eds, *Diritto civile* (Milano: Giuffrè, 2009), II/II, 94; A. Gambaro, n 18 above, 936-938.

⁹⁰ *Ex multis* M. Comporti, 'Usucapione' *Enciclopedia giuridica* (Roma: Treccani, 1994), XXXII, 1; S. Ruperto, n 13 above, 1026.

⁹¹ R. Cooter et al, *Il mercato delle regole* (Bologna: il Mulino, 2nd ed, 2006), II, 33-34.

⁹² U. Mattei, 'La proprietà', in R. Sacco ed, *Trattato di diritto privato* (Torino: UTET, 2001), 386.

⁹³ Cf F. Galgano, *Trattato di diritto civile* (Milano: Wolters Kluwer-CEDAM, 3rd ed, 2015) I, 513; L. Bigliuzzi Geri et al, n 34 above, 153-154.

⁹⁴ Eur. Court H.R., *J.A. Pye (Oxford) Ltd and Another v United Kingdom*, Judgment of 15 November 2005, available at <https://hudoc.echr.coe.int/>, paras 73-75, which considered been a deprivation of possession regulated under former English law on adverse possession as disproportionate, given the absence of any compensation to the owner; Eur. Court H.R. (GC), *J.A. Pye (Oxford) Ltd and Another v United Kingdom*, Judgment of 30 August 2007, Reports of Judgments and Decisions 2007-III, 365, which overruled the first judgement, assessing that the United Kingdom had not violated Art 1 P1-1 ECHR.

usucapione, especially for their role in the proof of ownership, can easily pass the ‘general interest’ test that ensures their compliance with constitutional principles of property protection (Art 1 P1-1 ECHR; Art 42 It Const).⁹⁵ According to the most extreme propositions, the certainty function of acquisitive prescription is so obvious that a theoretical discussion comparing this doctrine to an expropriation would appear ‘almost incredible’, and at most capable of showing ‘the widespread ignorance of elementary notions of civil law’.⁹⁶

Considering the above, the international reader may better understand the tendency – commonly detectable in Italian treatises on possession – to discuss the rationale of the general acquisitive prescription regime in apparently abstract terms, without differentiating the analysis according to the particular position of the *de facto* controller. For example, one might distinguish between transferees of the immovable on the ground of a null sale contract, on the one hand, and squatters or intentional land grabbers, on the other.⁹⁷ In contrast to *usucapione abbreviata* (truly acquisitive in nature, as aimed, *ex ante*, at consolidating in favour of the good faith possessor the effects of a precarious transfer)⁹⁸, the general regime of *usucapione* is commonly justified under an *ex post* perspective, as it is thought to serve primarily the processual interests of the (true) owner in giving proof of his/her title.⁹⁹

Obviously, this does not mean that the rule laid down in Art 1158 Civil Code should not be considered also according to its more explicit legal effects, as a way of acquiring property. Focusing on this potential application of the doctrine through the lens of legal certainty, the particular conditions of possessors acquires stronger relevance. This is especially clear looking at the distinction between

⁹⁵ Cf *inter alia* G. Magri, ‘Usucapione ed acquisto a non domino nel prisma della Convenzione europea dei diritti dell’uomo’ *Rivista di diritto civile*, 1402 (2014); A. Guarneri, ‘Usucapione, acquisti a non domino e Convenzione europea dei diritti dell’uomo’ *Nuova giurisprudenza civile commentata*, II, 339 (2014); F. Viglione, ‘Proprietà e usucapione antichi problemi e nuovi paradigmi’ *Nuova giurisprudenza civile commentata*, II, 464 (2013).

⁹⁶ A. Gambaro, n 59 above, 555. Consistently with these consolidated lines of thoughts, a different reasoning has been ventured (only) for that minor part of the Italian territory (‘Alto-Adige’ and other former Austrian provinces) where land publicity is regulated under a title registration system of German roots (the so called *sistema tavolare*). According to some scholars, this positive system of registration is perfectly suitable to grant full certainty to the legal situation of rights over immovables, and this would limit the possible rationale of acquisitive prescription just to the sanctioning function for the idle owner. Under this view it logically appears more difficult to find a general interest justification supporting the doctrine, with stronger arguments for its contrast with Constitutional principles of property protection: cf G. Petrelli, ‘Trascrizione immobiliare e Convenzione Europea dei Diritti dell’Uomo’ *Rivista di diritto civile*, 329, 345 (2014).

⁹⁷ As relevant examples, see A. Gambaro, n 59 above, 553-555; C.M. Bianca, n 10 above, 295-296, 617-618; E. Guerinoni, ‘L’usucapione’, in A. Gambaro and U. Morello eds, n 35 above, 872; B. Troisi and C. Cicero, n 47 above, 165; P. Gallo, n 55 above, 237; and for critical remarks, R. Sacco and R. Caterina, n 11 above, 464.

⁹⁸ L. Mengoni, *Gli acquisti «a non domino»* (Milano: Giuffrè, 3rd ed reprint, 1994), 90-91; and see above, Section II.2.

⁹⁹ Explicitly, L. Moccia, n 20 above, 27.

users relying on a transfer (invalid, ineffective but) passible of registration, and bad faith possessors absolutely devoid of any formal title to property. While in the former case acquisition by prescription actually fosters certainty, since it makes the legal and factual holder of goods coincide in the same person, in the latter situation the controller's interest in being protected from a late eviction claim must be balanced with the general interest in the reliability of the public records, that, before the elapse of the *usucapione*, correctly indicate the legitimate owner.¹⁰⁰

This remark confirms, with specific reference to Italian law, the general observation that when dealing with bad faith possessors, the justification for acquisitive prescription of immovables should look for further arguments that are capable of integrating those traditionally anchored in legal certainty.¹⁰¹ Moving on from these premises, attention shall now be focused on redistribution issues.

c) *Usucapione* and Redistribution

Though redistribution arguments are substantially absent in Italian case law on acquisitive prescription, they are gaining increased attention in certain sectors of academia.¹⁰²

The irrelevance of social justice concerns in the courts' interpretation of *usucapione*'s requirements holds true notwithstanding the primary value granted to the right to housing in the Italian legal system.¹⁰³ Housing is commonly understood as a fundamental right, connected to the universal principle of human dignity, which inspires the democratic state envisaged by the Constitution.¹⁰⁴ On these grounds, courts are unanimous in assessing that 'the right to a dignified home is, undeniably, one of the fundamental rights of the individual'.¹⁰⁵ Interpreted in this way, the right to housing has been specifically applied as relating to other individual rights and public interests, such as: the right to be assigned housing based on public housing policies (in relation to available resources); the right to the stability of enjoyment of familiar accommodation (relating to legislative regimes of minimum duration of lease contracts and of their payment conditions); and the enjoyment of other associated rights and freedoms.¹⁰⁶

Looking in particular at the situation of squatters, the fundamental value of

¹⁰⁰ Hoops, n 21 above, 191.

¹⁰¹ See Section IV.3.

¹⁰² Cf among recent publications dedicated to the Italian doctrine of possession, C. Abatangelo, *Il possesso derivato. Situazioni possessorie e loro circolazione negoziale* (Napoli: Jovene, 2016), 29; M. Gorgoni, *La circolazione traslativa del possesso* (Napoli: Edizioni Scientifiche Italiane, 2007), 35.

¹⁰³ See E. Bargelli, 'Abitazione (diritto alla)' *Enciclopedia del diritto Annali* (Milano: Giuffrè, 2013), 1; U. Breccia, *Il diritto all'abitazione* (Milano: Giuffrè, 1980).

¹⁰⁴ Corte Costituzionale 25 February 1988 no 217, *Giurisprudenza costituzionale*, 833 (1988).

¹⁰⁵ Corte Costituzionale 2 April 1999 no 119, *Giurisprudenza costituzionale*, 1004 (1999).

¹⁰⁶ Among others F. Bilancia, 'Brevi riflessioni sul diritto all'abitazione' *Istituzioni del federalismo*, 231 (2010); G. Paciullo, *Il diritto all'abitazione nella prospettiva dell'housing sociale* (Napoli: Edizioni Scientifiche Italiane, 2008), 49, 91.

the right to housing has been occasionally taken into account in order to preclude, under specific circumstances, the punishability of their conduct, considering them justified by a state of necessity (under Art 54, Italian Penal Code).¹⁰⁷ Nonetheless, this line of reasoning has never led Italian judges to provide the right to housing with such a strong horizontal effect as to consider squatters not only exempted from criminal prosecution, but even entitled to a property claim over the occupied immovable. In this regard, the Supreme Court has recently specified that a state of necessity can be detected only in the presence of an ‘immediate urgency of saving oneself or others from the current danger of serious harm to the person’, and not when necessity is destined to be prolonged in time (as in cases of chronic poverty, such as those connected with a long-term need for housing). This outcome has been formally based on the argument that

‘the right of the owner cannot be permanently compressed because, otherwise, there would be a substantial deprivation of property outside any legal or conventional procedure’.¹⁰⁸

This last conclusion effectively demonstrates the presence, within the system of entitlement protection, of a potential tension between the traditional idea of an ‘exclusion-based’ right of ownership, and a different conception of property inspired by distributive justice concerns.¹⁰⁹ Among other elements, supporters of this latter model focus their attention on the provision in the Italian Constitution that allows for normative interventions apt ‘to ensure the social function of property and to make it accessible to everyone’ (Art 42, para 2).

This fundamental rule has already played a crucial role in the second half of the last century, supporting the abandonment of an absolute concept of property in favour of a more solidarity-oriented paradigm, in tune with the overall values of the Italian Constitution.¹¹⁰ More recently, the same constitutional provision has attracted renewed attention as the possible basis for the further development of an inclusive model of property,¹¹¹ according to which the relationship between

¹⁰⁷ Corte di Cassazione-Sezione penale 26 September 2007, no 35580, *Foro italiano*, II, 678 (2007), critically analysed by M. Ainis, ‘Se la casa è un diritto’ *Quaderni costituzionali*, 837 (2007). On different grounds, courts have occasionally absolved pacific possessors of immovables from criminal prosecutions considering the prolonged inertia of the owner as an element legitimately perceivable by squatters as a tacit acquiescence to their occupation, and thus apt to exclude the subjective requirement of intentional behaviour (see, recently Corte di Cassazione-Sezione penale 10 August 2018, available at www.pluris-cedam.utetgiuridica.it).

¹⁰⁸ Corte di Cassazione-Sezione penale 26 February 2015 no 8603, available at www.dejure.it.

¹⁰⁹ Cf U. Mattei, ‘Proprietà (nuove forme di)’ *Enciclopedia del diritto Annali* (Milano: Giuffrè, 2012), 1117.

¹¹⁰ Among others, see S. Rodotà, ‘Note critiche in tema di proprietà’ *Rivista trimestrale di diritto e procedura civile*, 1252 (1960); S. Pugliatti, ‘Interesse pubblico e interesse privato nel diritto di proprietà’, in Id, *La proprietà nel nuovo diritto* (Milano: Giuffrè, 1964), 3; P. Perlingieri, *Introduzione alla problematica della «proprietà»* (Napoli: Jovene, 1971).

¹¹¹ U. Mattei, ‘I beni pubblici: un dialogo fra diritto e politica’, in G. Alpa and V. Roppo eds, *La vocazione civile del giurista. Saggi dedicati a Stefano Rodotà* (Roma-Bari: Laterza, 2013),

‘exclusion and access’ in property regulation should not be understood as a rigid ‘rule *vs* exception’ binomial, but rather as an intermingled mixture of powers of control and rights of inclusion over socially relevant resources, irrespective of their formal holdership regimes.¹¹²

Within this cultural trend, acquisitive prescription has been perceived, together with other property-related doctrines, as a possible normative basis supporting a decentralized system of regulatory choices that delegate to the interpreter (eventually, the judge) the possibility of deciding on access to property outside the standard scheme of formal interpretation, also taking into account the respective conditions of the parties involved in the legal dispute.¹¹³

On a deeper level, this policy-oriented approach finds plausible legislative grounds in the fact that under the ordinary *usucapione* regime dedicated to immovables (Art 1158 Civil Code), even bad faith possessors are permitted to prescriptively acquire ownership. Bad faith possessors are also subject to the same time requirement for acquisitive prescription as *de facto* controllers in good faith (twenty years), even though they are aware of exercising their powers to the detriment of a legitimate owner.¹¹⁴

The absence of more burdensome conditions (in particular, a longer prescription period) imposed on bad faith possessors is not a distinguishing feature of Italian *usucapione*, and reflects the paramount importance generally attributed to the justification of the doctrine based on legal certainty (which should be safeguarded irrespective of the subjective position of the possessor). Against this background, it appears nonetheless worth noticing that if the interpreter relies only on this latter argument, s/he may still be tempted to introduce ways of distinguishing among possessors in good and bad faith, giving value to their different intentions and conduct without necessarily affecting the proprietary (third party) effects of acquisitive prescription. As a valid example, one may refer to the rule elaborated in 2017 by the Dutch Supreme Court, which, interpreting the norm of the *Burgerlijk Wetboek* that allows any possessor to prescriptively acquire ownership or other limited proprietary interests (Art 3:105),¹¹⁵ stated that in the case of a *de facto* control exercised in bad faith,

119; and M.R. Marella, ‘La funzione sociale oltre la proprietà’ *Rivista critica del diritto privato*, 557 (2013).

¹¹² S. Rodotà, ‘Postfazione. Beni comuni: una strategia globale contro lo *human divide*’, in M.R. Marella ed, *Oltre il pubblico e il privato. Per un diritto dei beni comuni* (Verona: Ombre Corte, 2012), 311; U. Mattei, ‘Una primavera di movimento per la «funzione sociale della proprietà»’ *Rivista critica del diritto privato*, 531 (2013).

¹¹³ Cf among Italian scholars, U. Mattei and A. Quarta, n 73 above, 42; M.R. Marella, ‘The Commons as a Legal Concept’ 28 *Law and Critique*, 61, 69-70 (2017).

¹¹⁴ See above, Section II.3.

¹¹⁵ Art 3:105, para 1, *BW* – Acquisition by a possessor through an acquisitive prescription: ‘He who possesses an asset (property right) at the moment on which the right of action (legal claim) to end that possession has become prescribed, acquires that asset, even if he did not possess it in good faith’.

former owners may have their loss compensated through ordinary tort law remedies.¹¹⁶

A similar outcome significantly undermines the possible relevance of redistribution arguments in the law of acquisitive prescription. At the same time, it would be extremely difficult to imagine it translated into Italian law, where it would be in contrast to the consolidated interpretation given to *usucapione*. Indeed, a logical corollary deriving from the nature of the doctrine as an original title to property, and from the absence of an extinctive prescription regime for the right of ownership, is that the loss suffered by the former property holder represents an indirect consequence of the possessor's acquisition regime.¹¹⁷ As a consequence, Italian courts and scholars have always considered it impossible for the paper owner, not only to rely on the general remedy of unjust enrichment,¹¹⁸ but also to sue any dispossessor (a non-culpable encroacher as well as an intentional land grabber) in an action for compensatory damages.¹¹⁹

The Italian generalised application of the ordinary regime of acquisitive prescription, irrespective of any inquiry into the subjective status of *de facto* controllers of goods, may thus find additional grounds of justification in social justice arguments. This means, in more explicit terms, looking at the conflict between an idle owner and an active possessor as an adjudication process where prolonged non-usage of resources, on the one hand, and concrete exploitation of available goods, on the other, may work as reliable proxies for a legal intervention inspired (also) by redistributive concerns.

V. The Nature of *Possessio ad Usucapionem* in Italian Law

The fundamental question posed by this Section can be formulated as follows: which of the available interpretations of the essential possessory requirements better fit with the fundamental justifications of acquisitive prescription, as previously illustrated? In light of the survey conducted in Section (IV), it appears legitimate to disregard arguments deprived of any prescriptive value in the Italian legal system, as those centred on the position of specific individuals involved in a property

¹¹⁶ Hoge Raad 24 February 2017, ECLI:NL:HR:2017:309, *Jurisprudentie Onderneming & Recht* 6 (2017) (a possessor in bad faith who acquired ownership through acquisitive prescription might be liable in tort to compensate the former owner for his loss): cf for a detailed and critical analysis of the case, J. Jansen, 'The Dutch Supreme Court and Law Office History. Acquisitive Prescription for Possessors in Bad Faith: The Dutch Experience (1992-2017)', in B. Hoops and E. Marais eds, *New Perspectives on Acquisitive Prescription* (forthcoming), and Id, 'Schadevergoeding uit onrechtmatige daad na verkrijging ex artikel 3:105 BW' *Rechtsgeleerd Magazijn Themis*, 3 (2018).

¹¹⁷ E. Guerinoni, n 97 above, 871.

¹¹⁸ Cf among others P. Sirena, 'L'azione generale di arricchimento senza causa', in N. Lipari and P. Rescigno eds, *Diritto civile* (Milano: Giuffrè, 2009), III/I, 568.

¹¹⁹ A. Gambaro, n 59 above, 555.

dispute (paper owner, *de facto* controller, etc).¹²⁰ Rather, an answer should preliminarily focus on the certainty rationale of *usucapione*, and then develop some further remarks moving from its ‘support justification’ based on the potential redistributive efficacy of the doctrine.

1. Possession Requirements and Legal Certainty

If one looks at acquisitive prescription as a tool aimed at promoting legal certainty and predictability in property relationships, there should be little doubt that a purely objective notion of possession (based on actual control of a good) is more apt than a subjective one (centred also on the inner intent of the controller), saving parties on both information and evidence costs.¹²¹

With regard to informational burdens, this conclusion may appear almost self-evident. A third party – and a judge in first place – can hardly infer solely from the fact that someone exercises material powers on someone else’s land whether the former intends to acquire prescriptively the latter’s ownership, to acquire just a usufruct, or to use it only temporarily. As a corollary, the verification efforts required to inspect the true intentions of the controller are certainly significant, and introduce an undesirable level of unpredictability in the analysis imposed to the interpreter.¹²²

Those concerns were duly taken into account and evaluated by the drafters of the Italian Civil Code. This is perfectly demonstrated by the fact that the discussions during the preparatory works and the normative solutions adopted have been inspired more by policy considerations concerning the practical difficulties in providing courts with proof of the constitutive element of possession than by purely theoretical arguments inspired by the history of legal concepts.¹²³ On these very grounds, the legislative committee has eventually set aside the original proposal of the royal commission, which contained a legislative definition of possession based on the previous version of the code (dated 1865), and thus explicitly based on a subjective intention of the controller of keeping the thing as if s/he were the owner.¹²⁴

Moving on from these premises, and given the absence of any formal reference to an intentional status in the current version of the Italian Civil Code

¹²⁰ See above, Section IV.4.a.

¹²¹ In general, H.E. Smith, n 69 above, 69.

¹²² Explicitly, Y. Chang, n 6 above, 115-117; and also Id, ‘The Problematic Concept of Possession in the DCFR: Lessons from Law and Economics of Possession’ 5 *European Property Law Journal*, 4 (2016).

¹²³ Cf among others F. Alcaro, n 45 above, 21-22; L. Barassi, n 40 above, § 157.

¹²⁴ See Commissione Reale, proposal for Art 533 Civil Code: ‘*Il possesso è il potere di fatto che alcuno ha sopra una cosa con la volontà di avere per sé tale potere in un modo corrispondente al diritto di proprietà o ad altro diritto reale*’ (‘Possession is the factual power that someone has on a thing, with the intention of keeping that power as corresponding to the right of ownership or to a different real right’).

(Art 1140 Civil Code),¹²⁵ one may legitimately question why the interpreter should add further complication to the analysis by hermeneutically introducing a possessory requirement that has been positively erased from the legislative texts.¹²⁶ When applied to the field of acquisitive prescription, this interpretative solution inevitably adds significant ambiguity in the administration of litigation procedures, thus conflicting with the very rationale of legal certainty commonly attached to this doctrine.¹²⁷

This conclusion receives further support if one examines the concrete ways through which Italian judges tend to impose a subjective requirement in the evaluation of possession. It has been already stressed that this result is commonly achieved through a peculiar interpretation of Art 1141 Civil Code, intended as a norm introducing a presumption of *animus domini* (and not of plain possession, as blackletters would seem to suggest) in favour of the physical controller of a good.¹²⁸ In operational terms, a logical corollary of this premise should lead to the direct application of the abstract intention theory, which imposes on the counter-party the burden of providing evidence that the exercise of *de facto* powers on a good was not accompanied by the concrete intention of behaving as the legitimate right-holder.¹²⁹ Apart from the obvious difficulties implied in this processual requirement, it is necessary to stress that only in few cases have courts consistently applied this line of reasoning to its logical conclusions.¹³⁰ With an ambivalent implementation of the rule, in a series of circumstances the proof required to overcome the *animus domini* presumption has not been centred on a subjective status of the controller. Courts have instead considered sufficient for the defendant to give proof that the counter-party started exercising his/her power on the basis of a legal title.¹³¹

It can thus be surmised that the subjective requirement adds unnecessary operational unpredictability and technical inconsistencies to the acquisitive prescription regime in a way that is in contrast to the fundamental rationale supporting this doctrine as a facilitator of legal certainty in the system of property transactions. On the contrary, if *possessio ad usucapionem* is merely based on the exercise of exclusive powers of enjoyment of immovables, then, in the presence of all the other conditions set by the law, a successful acquisition by prescription would operate more easily. This would avoid time-consuming, and inevitably

¹²⁵ See Section II.2.

¹²⁶ Cf E. Carbone, *Animus. Elemento soggettivo e imputazione legale degli effetti* (Napoli: Jovene, 2010), 160.

¹²⁷ See S. Patti, n 45 above, 88-92.

¹²⁸ See Section II.2.a.

¹²⁹ See Section II.1.

¹³⁰ Eg, Corte di Cassazione 29 July 2004 no 14395, *Foro italiano, Repertorio 'Locazione'*, no 87 (2004).

¹³¹ Eg, Corte di Cassazione 10 November 1998 no 11286, *Foro italiano, Repertorio 'Possesso'*, no 24 (1998); Corte di Cassazione 6 June 1990 no 5415, *Foro italiano, Repertorio 'Possesso'*, no 16 (1990).

uncertain, inquiries into the subjective status of who exercises factual control over goods.

2. Possession Requirements and Redistribution

Further arguments in favour of an objective notion of possession can be based, both from a systematic and policy perspective, upon the notion that redistribution issues may (or *should*) be of some relevance to the proper understanding of Italian rules of acquisitive prescription. Indeed, looking at the position of bad faith controllers such as squatters, this hermeneutic approach limits the possibility of having their position as possessor challenged on the ground of material demerits allegedly incompatible with an inner intention to behave as formal right-holders, thus promoting successful acquisitions by prescription.

To better explain, it is useful to consider the substantial interrelation that links together the conditions of good (or bad) faith in possession with the element of *animus domini*. On a theoretical level, while the former requirement implies the ignorance of controlling the good to the detriment of a legitimate owner,¹³² the latter refers to the intention to behave (and to be considered by third parties) as the exclusive right-holder.¹³³ The conceptual autonomy of these subjective situations is thence undisputed, so that *animus domini* is univocally considered compatible not only with the position of a good faith possessor, but also with that of a bad faith one (ie: s/he who, though aware of the legitimate right of a different owner, is nonetheless motivated to keep the object as her/his own).¹³⁴ At the same time, such clear cut dogmatic categorisations tend to blur when a subjective approach to possession is applied in concrete litigation involving acquisitive prescription conflicts, where inner states of mind are inevitably deduced from material, external facts, according to the abstract intention theory. In these contexts, behaviour commonly exhibited by long-term possessors in bad faith may end up being evaluated as factual elements capable of showing the absence of the subjective status of *animus domini*, qualifying the *de facto* controller as a mere detentor, who (at least implicitly) acknowledged the presence of a different right-holder.¹³⁵

To better illustrate this point, let us picture a basic hypothetical situation. Imagine the case of Andrea, a homeless beggar, who moves into an uninhabited house at the outskirts of the city. As years pass without any reaction from the legitimate owner, the control of the good becomes more and more stable,

¹³² See L. Mengoni, n 98 above, 320.

¹³³ Corte di Cassazione 23 July 2014 no 9671 n 60 above; Corte di Cassazione 9 September 2002 no 13082 n 60 above.

¹³⁴ See C.M. Bianca, n 10 above, 584.

¹³⁵ The risk of a possible overlap between an *animus*-based notion of possession and the concretization of the standard of good/bad faith derives from the fact that this latter element is undoubtedly defined by Art 1147 Civil Code in subjective terms: cf B. Troisi and C. Cicero, n 47 above, 126, 129.

materialized through various activities such as the enjoyment of the premises, the maintenance of the building and the care of the garden, the replacement of the locks and the fencing of the property borders. As an occupier with no formal title to the immovable, Andrea does not engage in bureaucratic acts, such as the performance of the various administrative and fiscal duties related to the property. Suppose now a subsequent litigation pending before an Italian court, filed by the formal owner (claiming back the house after three decades of complete absence) against Andrea (objecting on the basis of the elapse of a successful acquisitive prescription period).

In a similar case, though the presence of the *corpus* requirement appears hardly disputable (exclusive powers corresponding to those of the owner have been certainly exercised), a subjectivist approach to possession would most probably lead the judge to consider Andrea as a mere detentor, on the ground of a lack of *animus domini* inferable from the disregard of the rates and taxes pertaining to the immovable. Indeed, the non-fulfilment of this kind of burden has been frequently regarded in case law as a valid indicator of the inner recognition by the controller of the presence of a different right-holder of the good.¹³⁶

As controversial as it may appear when transposed to the concrete outcome of our case-study, one must admit that this line of reasoning represents a rigid, but coherent application of a theoretical approach which includes *animus* among the constitutive elements of possession. At the same time, this conclusion shows that, if brought to its logic corollaries, the element of intention may end up depriving acquisitive prescription of potential and sensible practical applications.

Significantly, these concerns seem shared also by authoritative subjectivist theorists who have proposed to better qualify the position of the controller. In particular, it has been suggested to distinguish between breach of duties that represent essential contents of the property right (from which the absence of *animus domini* could legitimately be inferred), and the mere non-fulfilment of obligations that do not directly pertain to the private law substance of the right of ownership (which should not be taken into account in the assessment of the intention to possess).¹³⁷

In contrast, the analysis conducted in this article leads to submit that the risks of practical outcomes such as those emphasised through our case-study could be more effectively avoided by changing the hermeneutic orientation, with the adoption of an objective understanding of the elements of possession and the abandonment of an intentional requirement that appears to lack a solid basis in the Italian legal system. This solution seems not only apt to remove uncertainties and, possibly, inconsistencies in the assessment of the possession

¹³⁶ See Corte di Cassazione 30 April 9530 no 2014, *Foro italiano, Repertorio 'Usucapione'*, no 24 (2014).

¹³⁷ R. Sacco and R. Caterina, n 11 above, 94.

requirement, but, if considered in light of the redistribution justifications of acquisitive prescription, it may also contribute to increasing the number of proprietary conflicts solved in favour of the actual use – and, possibly, the concrete need – of resources.¹³⁸

VI. Conclusions

A functional theory of possession cannot realistically hope to assess which of the different ways of protecting factual control of goods is *per se* ‘correct’, but should instead confine itself to showing the advantages and disadvantages connected to each of the hermeneutic solutions abstractly available to the interpreter.¹³⁹

Moving on from this methodological suggestion, the aim of this paper was to possibly shed some new light on the classical inquiry into the constitutive elements of possession. The cultural diatribe that originated with the juxtaposed views of Savigny and Jhering does not seem to have resulted, at least in Italy, in settled positions in the current academic landscape, with subjectivist and objectivist scholars still advocating their preferred interpretation relying on different literal, historical, comparative or systematic arguments.

The issue has been here considered under a normative approach, widening the scope of the analysis in order to evaluate which among the different theories better suits the rationales that support the application of acquisitive prescription – one of the most important juridical effects of possession. It is surmised that an objective interpretation of possession, deprived of the traditional element of *animus domini* and merely based on the physical control of a good, is not only more consistent with the Italian legislative provisions, but also more effective in supporting the goals generally attributed to acquisitive prescription in the legal system.

In particular, it can be surmised that by relaxing the requirements for a successful occurrence of *usucapione*, an objectivist approach to possession may also effectively preserve a concrete sphere of application for the doctrine. This is particularly clear in light of a social justice-oriented interpretation of acquisitive prescription, which could prevent the risk of it being (at least partially) supplanted in its practical relevance by other evolving legal principles proposed, primarily by academics, as ways of addressing redistributive issues in property law.

As an effective example, one may consider the cultural development of a

¹³⁸ See S. Stern, ‘David Against Goliath: The Distributive Justification for the Adverse Possession Doctrine’, in B. Hoops and E. Marais eds, n 116 above, who provides a series of case law proxies apt to prevent a confrontation between redistribution arguments and the rule of law.

¹³⁹ For a clear illustration, cf J. Gordley and U. Mattei, ‘Protecting Possession’ 44 *American Journal of Comparative Law*, 293, 334 (1996).

juridical notion of ‘commons’,¹⁴⁰ resources that intrinsically express utilities functional to the exercise of fundamental rights as well as to the free development of the individual, and that, irrespective of their formal holders (public or private legal entities), should be regulated through norms capable of guaranteeing their constant collective enjoyment.¹⁴¹ Though it would be impossible to discuss the point in depth here, the potential functional equivalence between such innovative regulatory techniques and more traditional institutions and rules, such as those defining acquisitive prescription, has been already emphasised by several scholars,¹⁴² and it has more recently found practical confirmation in some notable examples of jurisprudential argumentation.¹⁴³

Revisiting old doctrines through a modern lens is an effective way to preserve their relevance in evolving legal systems. Adopting an objective notion of possession as a constitutive element of acquisitive prescription represents an effective step in that direction.

¹⁴⁰ Obviously departing from the social and economical insights provided by E. Ostrom, *Governing the Commons. The Evolution of Institutions for Collective Action* (Cambridge: Cambridge University Press, 1990), 29.

¹⁴¹ Among others, cf S. Rodotà, *Il terribile diritto. Studi sulla proprietà e i beni comuni* (Bologna: il Mulino, 3rd ed, 2013), 459; U. Mattei, ‘Protecting the Commons: Water, Culture and Nature: The Commons Movement in the Italian Struggle against Neoliberal Governance’ 112 *The South Atlantic Quarterly*, 366 (2013).

¹⁴² See M.R. Marella, n 113 above, 70; A. Quarta, ‘Towards an Access-Based Paradigm of Ownership. A Plea for Inclusion in Property Law’, in B. Hoops et al eds, *Property Law Perspectives V* (The Hague: Eleven International Publishing, 2017), 202; F. Viglione, n 95 above, 477.

¹⁴³ A significant, recent, example is provided by the judgement issued by Tribunale amministrativo regionale Veneto-Venezia 8 March 2018 no 273, available at www.giustizia-amministrativa.it, which has declared unlawful the administrative refusal of a temporarily grant concerning the island of Poveglia (Venice) in favour of a no lucrative association of citizens aiming at retraining it from its state of abandonment. The justification of the opinion does not refer in any way to the fact that the members of the association have during time exercised factual control over the island, but rather focuses on the ‘purposes of undisputable social and collective importance’ implied in the activities aimed at administering its land as a ‘common good’. For further details and case law examples, see A. Quarta and T. Ferrando, ‘Italian Property Outlaws: From the Theory of the Commons to the Praxis of Occupation’ 15 *Global Jurist*, 261 (2015).