

# **‘The Right to Remain and Produce in your Homeland’ in Light of Article 8 of the European Convention on Human Rights, The European Court of Human Rights Case Law and the Italian Constitution**

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*The multi-level protection offered to the right to property is an element of the current Italian and European legal system. Reading Article 8 (respect to private and family life) and Article 1, paragraph 1 (property protection) of the European Convention on Human Rights (hereinafter ECHR) it is possible to state that the protection of someone’s property has gone beyond the physical object. This interpretation, which derives from an approach which underlines the social function of property, has been strengthened by the ECHR that, during the last 20 years, has extended the concept of property. Thanks to it, it is possible to affirm the existence of a right to remain in one’s own land before, during and after an emergency, caused by a natural, health or man-made disaster. Also, through the reading of Articles 41, 42 and 44 of the Italian Constitution it is possible to affirm the existence of this right within the Italian Fundamental Charter. In light of the above evolutions of the jurisprudence and of the interpretation of the concept of property within the Italian Constitution, this article analyses how this principle may apply also to people affected by natural hazards.*

**Keywords:** *Property right; Right to remain in your homeland; Italian constitution; Natural disasters; European Court of Human Rights; Court of Justice of the European Union; European Convention Human Rights*

## **Introduction**

A house is much more than a physical shelter that repairs from the elements<sup>1</sup>. In fact, a home meets the basic need of the human being, like those psychological and social, and offers security, stability and identity to its inhabitants who live there<sup>2</sup> defining who one is<sup>3</sup>. To be deprived of it, for any circumstance, during and after an emergency - caused by a natural, health or man-made disaster<sup>4</sup> - can have

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<sup>1</sup>Fick & Vols (2016) at 40.

<sup>2</sup>Relph (1978).

<sup>3</sup>Samanani & Lenhard (2019) at 1.

<sup>4</sup>Cutter, Barnes, Berry, Burton, Evans, Tate & Webb (2008).

negative effects on both physical health and mental health of the people involved<sup>5</sup>. The thesis proposed in this paper then moves from the observation that the protection offered to the right of property in the contemporary European legal system is multilevel<sup>6</sup>.

Over time, in fact, the notion of property has changed so that from the meaning of property with a singular meaning<sup>7</sup> we now intended 'property' on a pluralistic level, eliminating in its definition the physicality of the *res*<sup>8</sup>.

### **The Cases of *Nonna Peppina* and *Enzo Rendina***

In this perspective, the stories of Nonna Peppina (Giuseppina Fattori) and Enzo Rendina are emblematic as they 'fought' to remain to live in their respective land of origin.

The story of «Nonna Peppina» (Giuseppina Fattori)<sup>9</sup> is linked to the earthquake, resistance and attachment to her homeland. Born and raised in Fiastra 98 years ago (now Giuseppina Fattori has died), after the earthquake that 2016 devastated four regions in Italy<sup>10</sup>, the first home of Nonna Peppina, was heavily damaged. So, in order not to leave her territory, together with her family, she built a wooden house very close to the old and destroyed house. After an anonymous report, however, the building process risked to be interrupted due to two shortcomings: the building permit and the presence of a landscape constraint. The house was built but Peppina was evicted as a result of the seizure of the building occurred under the order of the Criminal Judge of Macerata. Only a specific law, the so-called 'Salva Peppina law'<sup>11</sup> allowed Giuseppina Fattori to win the civil procedure case and return to the small house in San Martino di Fiastra. The criminal proceeding ended in 2019. The judge Vittoria Lupi of the court of Macerata acquitted Giuseppina Fattori who was accused at first instance of building abuse with a fine of almost one thousand euros paid to the Municipality.

The other story is the one of Enzo Rendina, a farmer born in Pescara del Tronto who has always lived there<sup>12</sup>. When the earthquake of 2016 occurred, he remained in Pescara del Tronto, in front of his house destroyed by the seismic events, for 5 months using as a temporary house only a tent given to him by the Protezione Civile (Civil Protection)<sup>13</sup>, in which he had settled in the red zone of

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<sup>5</sup>Nettleton (2001).

<sup>6</sup>Viglianisi Ferraro (2020).

<sup>7</sup>Perlingieri (2011) at 6.

<sup>8</sup>Tenella Sillani (2013) at 1060.

<sup>9</sup>Il Fatto Quotidiano (2021).

<sup>10</sup>In September and October 2016 and in January 2017, three seismic events destroyed the regions of Abruzzo, Lazio, Marche and Umbria in Italy.

<sup>11</sup>Article 2 bis, paragraph 6 of the *decreto legislativo* of 16 October 2017 n. 148.

<sup>12</sup>Il Sole 24 Ore (2017).

<sup>13</sup>The Civil Protection was the first State organisation that provided the evacuees of the earthquake with a temporary house (a tent).

the country<sup>14</sup>. Throughout 2016, Rendina did not abandon the tent in the red zone of Pescara del Tronto until it was the Carabinieri who arrested him and made him leave his house, after the seizure order provided to him by the mayor of Arquata del Tronto, Aleandro Petrucci, who invited Rendina to move to the hotel room, far from Pescara, and prepared for him and the other people who have lost their home during the 2016-17 seismic events<sup>15</sup>. On January 30, 2017, Enzo Rendina was forced to leave his homeland and his house and tried unsuccessfully - in order to avoid the transfer to the hotel- to resist to the officers who had the duty to proceed to the enforcement of the order. However, he was imprisoned for two days in the prison of Marino del Tronto. Subsequently, Rendina underwent a first-degree trial until February 2021. The Court of Ascoli Piceno sentence has decreed an imprisonment of five months for resistance to public officers (article 337 of the Criminal Law Code) and interruption of public service (article 340 of the Criminal Law Code).

### Methodology

It is therefore considered necessary to promote the ongoing investigation, whose scope is to highlight the existence of a 'right to remain in your homeland', due to a systematic analysis of Articles 16 and 17 of the Charter of Fundamental Rights of the European Union (hereinafter CFREU) and Article 8 and Article 1, Protocol 1, of the ECHR<sup>16</sup>. The importance of the two Treaties now mentioned is indisputable as they lay the foundations for a modern reflection on the right to property even<sup>17</sup> within the Italian borders<sup>18</sup>.

On the one hand, Article 16 of the CFREU recognises the freedom to conduct a business in accordance with EU law, national laws and practices. On the other hand, Article 17 of the CFREU protects the right to property by ensuring protection for every individual to own, use, dispose and bequeath legally acquired property. Article 8 of the ECHR, then, protects the private and family life, the domicile and correspondence of each individual, while Article 1, Protocol 1, ECHR establishes, as a fundamental right (of an individual or a legal person), the ownership and peaceful enjoyment of a property. It is worth to say that, in light of the Explanation on the CFREU made by the Presidium of the ECHR, the scope and meaning of what is enshrined in Article 17 of the Charter of Nice is identical to the one enclosed in Article 1, Protocol 1, ECHR<sup>19</sup>. The two articles set out three

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<sup>14</sup> After the earthquake, the all the cities hit by the events were divided into zones given by the intensity of the damages they faced. The most dangerous zone was the 'zona rossa' (red zone) as there the risk of building collapse was more possible.

<sup>15</sup> As State aids for the people involved in the earthquake, the evacuees could either live in temporary house build for them (SAE), receive a monthly allowance if they had found on their own a house (CAS) or the free stay at a hotel on the seaside of the Marche region until their house had been rebuild.

<sup>16</sup> Perlingieri (2005).

<sup>17</sup> Betti (1971) at 167.

<sup>18</sup> La Pergola (1961) at 262.

<sup>19</sup> Council of Europe (1978) at 863.

distinct rules: the first one relates to the peaceful enjoyment of the property<sup>20</sup>; the second one concerns the necessary conditions that must exist in order to deprive an individual of his property<sup>21</sup> and the third one recognises the possibility for states to regulate the matter in accordance with the general interest<sup>22</sup>. Each of these three rules are interconnected each other in accordance with the general principle of the right of enjoyment of property<sup>23</sup>. In order to implement the concrete and correct balance of the protected values with respect to the public interests adopted as their respective counter-limits, in the jurisprudential context it has been adopted the doctrine of the margin of appreciation<sup>24</sup>. By applying this method, the Court of Strasbourg demands to the national authorities the discretion on the legislation necessary to meet the needs of the community but the court will assess their proportionality in relation to case they are dealing with<sup>25</sup>.

In this regard, the current investigation will proceed into focusing on how the court cases of the European Court of Human Rights (hereinafter ECtHR) have impacted into providing a new definition of property pursuant Article 8 and Article 1, Protocol 1, ECHR.

### **Article 8 of the European Convention on Human Rights (ECHR) and its new boundaries**

For instance, it is thanks to a personalistic interpretation of Article 8 of the ECHR, that today it is possible to affirm the existence not only of 'a right to remain in one's homeland' but also of 'a right to be able to produce in one's homeland'<sup>26</sup>. In fact, Article 8 of the ECHR, in putting on the same level the protection of the right to private and family life, the right of domicile and the right to correspondence, does not define them<sup>27</sup>. However, the copious jurisprudence of the Court of Strasbourg makes it possible to trace the boundaries of these rights, starting from the concept of domicile.

#### ***The Durini ECtHR case***

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<sup>20</sup> See Article 17, para. 1, sentence 1 of CFREU together with Article 1, para. 1, sentence 1, Protocol 1, ECtHR.

<sup>21</sup> See Article 17 para. 1, sentence 2 of CFREU together with Article 1, para. 1, sentence 2, Protocol 1, ECtHR.

<sup>22</sup> See Article 17 para. 1, sentence 3 of CFREU together with Article 1, para. 2, sentence 3, Protocol 1, ECtHR.

<sup>23</sup> *Cacciato v. Italy*, para. 21; *Sporrong & Lönnroth v. Sweden*, para. 61; *James et al. v. United Kingdom*, para. 37; *Beyler v. Italy*, para. 98.

<sup>24</sup> *Artaria* (2012) at 282.

<sup>25</sup> *James et al. v. United Kingdom*, para. 36.

<sup>26</sup> Perlingieri (1972).

<sup>27</sup> It should be noted that both the English and French text of the Convention adopt the coordinating conjunction «and» and «et», putting the rights and values guaranteed there on the same level.

For this analysis it is useful to take into consideration the *Durini v. Italia case*<sup>28</sup>. The story concerned the right to succeed and to remain to live in the castle of the Durini family claimed by the heirs Paolina, Adriana and Diamanda due to the link established between them and this place. The story begins in 1918 when Mr. Antonio Durini left his entire assets to a foundation, of which his cousin, Paolina Durini, was president. Antonio's will stated that only male descendants could become presidents of the foundation, which also implied the right to live in the family castle. Because of this testamentary disposition, the right to live in the castle passed to Gian Giacomo Durini, husband of Paola and father of Adriana and Diamanda. Since Gian Giacomo had no sons, after his death on January 7, 1980, Teobaldo Durini succeeded to the right to live in the castle. After the use of all the national judicial remedies, Paola (wife), Adriana and Diamanda (daughters) Durini appealed to the ECtHR complaining, among others, a violation of Article 8 of the Convention and Article 1, Protocol 1, ECHR. The Judges, in considering the appeal inadmissible for procedural reasons and because there was no ground for discrimination in the will of Mr. Antonio Durini, stated that 'even supposing it possible to derive from the Convention Provisions relied on by the applicants the existence of a positive Obligation on the part of the State to intervene in this area, the applicants' Complaints are manifestly ill-founded.'

Moreover, the right to live in the castle (which dates back to the foundation) did not fall within the concept of 'possession' of Article 1, Protocol 1, of the Convention, so that this provision was not applicable to the case. Second, the Court observed that Antonio Durini reserved this right for the older male descendant. Consequently, even assuming that forcing the applicants to leave the castle after the death of Paola's husband and Adriana's and Diamanda's father was an interference with their right to respect for their home under Article 8, paragraph 1, ECHR, such interference would have been justified pursuant Article 8, paragraph 2, ECHR as necessary for the protection of the rights and freedoms of others (of the foundation and of Teobaldo Durini). Therefore, the complaint concerning the infringement of Article 8 of the Convention was also manifestly ill-founded.

It is worth investigating how, in the years following the analysed case, the court has interpreted Article 8 of the ECHR.

### ***The new boundaries of Article 8 ECHR***

In recent years, after the Durini case, the interpretation offered by the ECtHR to the right to 'domicile' pursuant to Article 8 has changed. In fact, today, all the personal and professional relationships of the individual are included in the sphere of protection of the article<sup>29</sup>. The wide scope of the article means that the domicile is not intended exclusively for traditional homes, but also caravans, other mobile

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<sup>28</sup> *Durini v. Italy*.

<sup>29</sup> *Winterstein et al. c. France*, para. 141; *Prokopovich v. Russia*, para. 36.

homes<sup>30</sup> and also the places where a certain person carries out his professional or working activity<sup>31</sup>. In practice, the concept of domicile is expanded in order to include any place, regardless of the title, in which a certain person carries out activities that can be included in his private and family life<sup>32</sup>. The link between the domicile and the person complaining of the violation must be lasting and this person is obliged to prove the continuous relationship both material and affective with the good, not being sufficient the *ius hereditarium* to create this bond<sup>33</sup>.

However, it is thanks to the concept of 'private life', linked to that of domicile, that Article 8 of ECHR provides full protection to those who complain a violation. 'Private (and family) life' within the meaning of Article 8 of the ECHR means a broad concept for which it does not seem possible to give an exhaustive or even unambiguous definition. The definition of 'private and family life' includes in its notion both the physical and the psychological integrity of a person<sup>34</sup>, the right to establish and develop relations with other human beings<sup>35</sup> and other aspects concerning a person's physical and social identity<sup>36</sup> as well as his or her right to personal fulfilment or his or her right to self-determination<sup>37</sup>. Above all, as far as this paper is concerned, the concept of private life encompasses the emotional ties of a person<sup>38</sup> but also the professional ones<sup>39</sup>.

In *Fernanda Martínez v. Spain*<sup>40</sup>, the Court ruled that '*restrictions on an individual's professional life may fall within Article 8 where they have repercussions on the manner in which he or she constructs his or her social identity by developing relationships with others. In addition, professional life is often intricately linked to private life, especially if factors relating to private life, in the strict sense of the term, are regarded as qualifying criteria for a given profession. Professional life is therefore part of the zone of interaction between a person and others which, even in a public context, may fall within the scope of 'private life'.*'

In consideration of what has emerged so far, it is possible to see how the concept of property has evolved thanks to the ECtHR cases history. Therefore today, a violation of the right to property as for Article 8 of the ECHR and Article 1, Protocol 1, ECHR includes not only an actual damage or violation of the right in

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<sup>30</sup> On the relationship between professional activity and Article 8 see *Chappell v. United Kingdom*, para. 26; *Société Colas Est et al v. France*, para. 41; *Buck v. Germany*, para. 31; *Saint- Paul Luxembourg S.A. v. Luxembourg*; *Popovi v. Bulgaria*, para. 103.

<sup>31</sup> *Buckley v. United Kingdom*, para. 52; *Chapman v. United Kingdom*, para. 71; *Yordanova et al. v. Bulgaria*, para. 103.

<sup>32</sup> The limits to this extensive interpretation of Article 8 are stated in *Loizidou v. Turkey*, para. 66, for which Article 8 does not apply if it is an uninhabited property or an empty or under construction building.

<sup>33</sup> *Demopoulos et al. v. Turkey*, para 137; *Khadija Ismayilova v. Azerbaijan*, para 107.

<sup>34</sup> *X e Y v. The Netherlands*, para. 22.

<sup>35</sup> *Niemietz v. Germany*, para. 29.

<sup>36</sup> *Mikulić v. Croatia*, para. 53.

<sup>37</sup> *Pretty v. United Kingdom*, para. 61.

<sup>38</sup> *Paradiso-Campanelli v. Italy*, para. 159.

<sup>39</sup> *Jankauskas v. Lithuania*, para 56; *Bărbulescu v. Romania*, para 71.

<sup>40</sup> *Fernández Martínez v. Spain*, para 109.

the direct relationship between the individual and the property but also in the emotional, personal and professional relationship between the *res* and the individual.

### Article 8 of the ECHR and Natural Disasters

Returning to analyse the case *Durini v. Italy*, in which precisely had not been recognised the ‘right to remain’ to live in the castle because the interference of the right under Article 8, paragraph 2, ECHR had taken place, avoiding so that the right of others (that of Teobaldo Durini) was undermined, in the case of people affected by an earthquake or any emergency, the situation changes.

Article 8, paragraph 2, ECHR in fact allows the interference of a public authority in the exercise of property if it is in accordance with the law and it is need, in a democratic society, both in the interest of national and public security or for the economic welfare of the country, for the prevention of disorder or crime, for the protection of health or morals, or, finally, for the protection of the rights and freedoms of others.

Following a natural disaster, it is undisputed that the State authority intervenes in order to rebuild the affected territories, with the consequence of compressing the property rights of the victims of the events<sup>41</sup>. However, the tardiness in the process of reconstruction, does not allow the right, once compressed, to return to be fully enjoyed, in fact being able to be a useless intervention and limiting in the meantime the right to disposition and enjoyment of the property<sup>42</sup>.

In addition, unlike the *Durini* case - in which the heirs Paola, Adriana and Diamanda did not have a title to continue living in the family castle - the people involved in a seismic emergency, have both a title in living in the property destroyed by the hazard (as they are the legitimate owners) as well as an affective and lasting bond with it<sup>43</sup>. Also, in light of the evolution of the court cases of the ECtHR, it emerges how, apart from the direct and affective link with the property, the right under Article 8 of the ECHR by virtue of the social function of private property is referred both in the right to remain in someone’s place as well as in the right to exercise of an economic activity<sup>44</sup>. In fact, only through allowing some to produce and work in his homeland, it is possible to guarantee his right to remain there<sup>45</sup>.

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<sup>41</sup> Montecchiarì (2020) at 1140.

<sup>42</sup> Spuntarelli (2019) at 91.

<sup>43</sup> See the stories of *Nonna Peppina* and *Enzo Rendina*.

<sup>44</sup> CJEU: *Hrtmann Schröder HS Kraftfutter GmbH & Co. KG v. Hauptzollamt Gronau*, c-265/87, para. 15; *Georg von Deetzen v. Hauptzollamt Oldenburg*, c-44/89, para. 28.

<sup>45</sup> European Charter for Rural Areas (2016) at 1.

### **The Italian Constitution and the right to remain in your homeland**

The above-mentioned principle can also be found within the Italian Constitution. In order to demonstrate this, it is necessary to relate Articles 41, 42 and 44 of the Italian Constitution. Reading the three aforementioned articles, contained in the so called 'economic Constitution'<sup>46</sup> of the Italian Fundamental Charter, it emerges that the Constitution recognises, for each individual, the following rights:

First of all, Article 41 of the Constitution guarantees for an individual the right to exercise an own economic activity<sup>47</sup>. Article 42, paragraph 2, of the Constitution, recognises the exercise of an individual of his property rights, within the limits established by law<sup>48</sup>. These two are linked by a common thread which is the social function<sup>49</sup> of both private property - intended to promote the person in compliance with her specific peculiarities - and the economic/productive property - as a place in which an individual realises and satisfies his needs in society as well as his personal interests capable of an economic evaluation- in conjunction with Article 2 of the Constitution<sup>50</sup>.

But it is by reading Article 44 of the Constitution that is possible to affirm the existence of 'a right to remain and produce someone's homeland'<sup>51</sup> within the Italian Fundamental Charter. The article now examined in fact states that it is the law to establish 'the reconstruction of production units' (paragraph 1) and that, always the law, 'provides for measures in favour of mountain areas' (paragraph 2). These two paragraphs, in a unified vision of the socio-economic development of the territory, have an enormous scope as regards to the places affected by a seismic emergency<sup>52</sup>.

The first paragraph of the article now examined might be interpreted in the sense that the Constitution needs 'in order to achieve the rational exploitation of the land and to establish fair social relations [...] to impose obligations for the reconstruction of productive activities.' This means that it is the State's duty in light also of Article 3 of the Constitution 'to remove the economic and social obstacles which, by restricting citizens' freedom and equality, impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country'. Therefore, it is of utmost importance, in order to allow the full implementation of the principles of solidarity and equality within the Italian State, that the Government adopts appropriate legislation able to rebuild production units that have become unproductive, thus allowing every person to exercise the rights constitutionally guaranteed pursuant Article 41 of the Fundamental Charter<sup>53</sup>.

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<sup>46</sup> Müller-Graff (2019).

<sup>47</sup> Irti (1965).

<sup>48</sup> Rodotà (1981).

<sup>49</sup> Perlingieri (2011) at 23.

<sup>50</sup> Carapezza Figlia (2011) at 1071.

<sup>51</sup> Angeletti (2006).

<sup>52</sup> Gaspari (2015) at 129.

<sup>53</sup> Guadagnolo (2015) at 366.

Finally, of particular interest for the present article is the second paragraph of Article 44 of the Italian Fundamental Charter. This paragraph states that law ‘provides for measures in favour of mountain areas.’ This means that, in order to guarantee the economic and social rights protected by the Constitution and in order to remove the obstacles referred to in Article 3 of the Constitution, it is the State’s duty to promote a regulatory system able to protect that part of the population living in the mountains<sup>54</sup>. Not only that, in order to avoid inequalities within the State, the Constitution, invites the legislator to ‘forge’ laws able to ensuring that those who live in mountain areas are put in the same position to those living in the city, thus being able not only to continue to live in their own places but also to be able to produce and create wealth in those territories<sup>55</sup>.

### Conclusions

As so far stated, it is possible to deduct that from a reading focused on the person and his values of the Article 8 of the ECHR, there is an inalienable right not only to remain in one’s land but also to produce in it. It is therefore common ground that the European legal framework recognises not only a right to remain in one’s homeland and thus to be able to pursue private and family life in a particular place of one’s election. Therefore, it also exists, thanks to an interpretation focused on the person and social function of the property of Article 8, Article 1, Protocol 1, ECHR and Article 16 and 17 of the CFREU, a right to be able to produce and create wealth in one’s homeland, thus avoiding the depopulation of areas affected by a natural disaster.

At the same time, analysing Article 41, 42 and 44 of the Italian Constitution, it is possible to state that also within the Italian Fundamental Charter it is recognised and guaranteed a right to remain and produce in someone’s homeland. In fact, by interpreting Article 41 and 42 of the Constitution in light of the social function covered by both the private and economic property, it is peaceful to affirm the existence of a right to property that promotes the person in compliance with his specific peculiarities, his needs in the society and his personal interests capable of an economic evaluation. But it is thanks to the analysis of Article 44 of the Italian Fundamental Chart, in which is prescribed a duty for the State of providing the ‘reconstruction of production units’ and to ‘provide for measures in favour of mountain areas’ that the right to remain and produce in someone’s homeland is stated. In fact, the abovementioned obligations, if read together with Article 3 of the Italian Constitution, oblige the State both to rebuild the industrial units that are unproductive but also to eliminate the inequalities between people living in metropolitan areas and people living in mountain areas. By adopting this systematic analysis is possible to state that also within the Italian Fundamental Chart exists a right to remain and produce in one’s own homeland.

The principle thus stated has the purpose to protect - from the point of view of opening our international legal system to the new values and to the new

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<sup>54</sup> Esposito (1954).

<sup>55</sup> Marchetti (2019).

fundamental rights of society- the new needs of the people, which require a positive consideration by our contemporary legal system.

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