

# **Are Foreigners Entitled to a Right to Housing?**

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### **Abstract**

Under the reciprocity clause set forth by Art 16 of the Provisions on the Law in General, foreigners are entitled to the same civil rights as citizens, as long as such rights are afforded to citizens in the foreigners' countries of origin. Still, Art 16 must be constitutionally interpreted so as to accomplish the full protection of human rights. Therefore, reciprocity does not apply to the fundamental rights the Constitution affords to each and every individual as a human being, rather than as the citizen of a State.

Ownership *per se* is not a fundamental right. However, different aims of ownership may characterize the right to ownership as a fundamental right such that the purchase of property may not be restricted by reciprocity. When property is hence purchased for business purposes, reciprocity may still be preserved as a means of political pressure and national promotion. Conversely, when property is purchased to be a home, property becomes 'personal', and ownership is considered to be an inviolable right protected as a right to housing.

### **I. Court of Cassation 21 March 2013 no 7210: The Case**

An Iranian citizen sues an Italian company seeking the nullity or the annulment of a promise to sell part of a three-story building, two stables, barns, coops and courtyards, which he has undertaken to buy for three hundred forty million lire. The plaintiff claims that, as an Iranian citizen, he is not entitled to enter into such a contract, due to the lack of reciprocity as laid down under Art 16 of the Provisions on the Law in General.<sup>1</sup>

The Court of First Instance allows the application and declares

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<sup>1</sup> Art 16 of the Provisions on the Law in General provides that a foreigner is afforded the same civil rights as an Italian citizen based upon reciprocity, that is, subject to the condition that the same rights are afforded to an Italian citizen in the foreigner's country of origin.

the contract to be null and void, because it amounts to a violation of a mandatory rule, such being the principle of reciprocity.

The Court of Appeal overrules the first instance decision, rejects the application for the nullity and declares the contract to be terminated by operation of law. The Court rules that the principle of reciprocity provides a safeguard only to Italian citizens, and thus, an Iranian citizen is not allowed to bring an action based upon the said principle. The case moves on to the Court of Cassation.

In the case at issue, the Court of Cassation holds that reciprocity does not apply to rights that the Constitution and international charters afford to each and every individual. Inviolable rights and fundamental liberties have an indivisible nature and are afforded to individuals, not as parts of a political community, but as human beings. From a universal perspective of the protection of man, no distinction shall be drawn between citizens and foreigners, or between foreigners with or without a residence permit. Art 16, which is still in force and secures civil rights to foreigners subject to reciprocity, must be constitutionally interpreted in compliance with Art 2 of the Constitution<sup>2</sup> in order to accomplish the full protection of human rights.

Contracts to acquire ownership of immovable property do not achieve the fundamental rights of the individual. In this area, reciprocity still plays a key role in pushing other States, outside of the European Union, to adjust their legislation for Italian citizens living abroad.

However, even in the area of economic rights and ownership, where inviolable rights are not at stake, the legislature passed a law on immigration (decreto legislativo 25 July 1998 no 286), which has significantly reduced the area to which the principle of reciprocity might apply, making it generally not necessary for reciprocity to be fulfilled when a foreigner lives in Italy with a lawful residence permit.<sup>3</sup>

<sup>2</sup> Under Art 2 of the Constitution, ‘the Republic recognizes and guarantees the inviolable rights of man, both as an individual and in the social organizations wherein his personality is developed, and it requires the performance of fundamental duties of political, economic, and social solidarity’: translation by M. Cappelletti et al, *The Italian Legal System. An Introduction* (Stanford, CA: Stanford University Press, 1967), 281.

<sup>3</sup> Decreto legislativo 25 July 1998 no 286, Art 2 para 2. Over the years, different issues related to immigration have been addressed by Italian legislation. See: decreto

Even under the legislation in force before decreto legislativo 25 July 1998 no 286, foreigners holding a residence permit, despite not complying with Art 16 of the Provisions on the Law in General, were entitled to acquire ownership of immovable property forming their family home or their place of business. Ownership has different regulations within the Constitution, and Art 42 para 2 of the Constitution aims to make ownership accessible to everybody in order to foster their integration into the national community and to provide them with the economic stability and safety that only 'personal' ownership may grant, banishing any discrimination based upon citizenship.<sup>4</sup> This is why the contract at issue cannot be declared null and void, although it was entered into before the said statute was enacted.

## **II. Reasons and History Behind Reciprocity. From the Early Codifications to a Constitutional Perspective**

The principle of reciprocity set forth in Art 16 of the Provisions on the Law in General states that foreigners enjoy the civil rights afforded to Italians only to the extent that Italians enjoy the same rights in the foreigners' countries of origin.

Although most of the jurisdictions before the Italian unification enforced different kinds of reciprocity,<sup>5</sup> the 1865 Italian Civil Code, highly inspired by liberal theories, did not provide for such a principle and adopted the opposite principle of equality between foreigners and citizens, rejecting those alternative and restrictive

legge 23 May 2008 no 92 and legge 15 July 2009 no 94 (security measures); decreto legislativo 19 November 2007 no 251 and decreto legislativo 28 January 2008 no 25 (right of asylum); legge 5 February 1992 no 91 (citizenship); legge 11 August 2003 no 228 (human trafficking).

<sup>4</sup> Art 42 para 2 of the Constitution reads as follows: 'Private property is recognized and guaranteed by the law, which determines the manner of its acquisition and enjoyment and its limits, in order to assure its social function and render it accessible to all'; translation by M. Cappelletti et al, n 2 above, 290.

<sup>5</sup> Before the Italian unification of 1861, only the Grand Duchy of Tuscany provided for complete equality between citizens and foreigners: E. Calò, *Il principio di reciprocità* (Milano: Giuffrè, 1994), 5.

proposals to extend civil rights only to foreigners who were resident in Italy.<sup>6</sup>

Reciprocity first appeared in the current 1942 Civil Code, at a particular time in Italian history when nationalism and protectionism dominated the State's economy.<sup>7</sup> The legal system did not protect fundamental rights at a Constitutional level, nor did it grant rights to foreigners; the new Code was embedded in the middle of the system and endowed with Constitutional relevance.<sup>8</sup> The 1942 legislature was consistent with affording political rights to Italian citizens only, and by enacting Art 16, it entrenched reciprocity for foreigners' 'civil' rights, ie economic rights and liberties.<sup>9</sup>

In this context, the reasoning behind reciprocity was promotional in nature, that is, it was aimed at prompting foreign countries to

<sup>6</sup> A. Giardina, 'Dell'applicazione della legge in generale: Art. 16', in A. Scialoja and G. Branca eds, *Commentario del Codice civile* (Bologna-Roma: Zanichelli-Foro italiano, 1978), 2-4. When enacting the 1942 Civil Code, the complete equality between citizens and foreigners, as laid down under the 1865 Civil Code, was interpreted as a sign of weakness of the Government in its international relations when it had to obtain favors for Italians living abroad. Italy could not provide anything in exchange, because, with the said provision, Italy had already conceded it all: E. Calò, n 5 above, 15.

<sup>7</sup> The 1942 Civil Code originated from a context mainly focused on immovable property, work and business, and in which economic rights were prominent. The debate over personal rights was just beginning. A historical interpretation may be sufficient to conclude that Art 16 does not regard the fundamental rights of the individual: F. Ranieri, 'Fatto illecito civile. Danneggiati italiani e stranieri a confronto. Tutela risarcitoria differenziata?' *Diritto, immigrazione e cittadinanza*, 72-90, 75 (2011).

<sup>8</sup> A. Galoppini, 'Acquisti immobiliari dello straniero e condizione di reciprocità' *Il Diritto di famiglia e delle persone*, 186-205, 191 (1998).

<sup>9</sup> P. Gazzi, 'Risarcimento del danno dello straniero, condizione di reciprocità prevista dall'art. 16 delle preleggi e Fondo di garanzia vittime della strada' *Responsabilità civile e previdenza*, 1113-1120, 1114 (1998), points out that when the 1942 Civil Code was enacted, fundamental rights had not yet been established in a Constitution, and the protection of human rights was based only on economic rights. Legal scholars would consider just two types of rights: civil rights and political rights, the latter not being afforded to foreigners. As far as civil rights were concerned, even before 1942, the legislature passed a series of laws undermining the liberal approach of the 1865 Civil Code and forbidding foreigners to enter certain professions, such as that of a notary public, or to act as the president or chief executive officer of a fiduciary company. The 1942 legislature merely turned what was largely provided for in a number of laws into a general principle.

introduce legislation in favor of Italians living abroad.<sup>10</sup> Countries willing to invest in Italy, or whose citizens were willing to engage in business in Italy, were thus encouraged to extend equal rights to Italians living in their territories.

Supposedly, the aim of reciprocity was also to act as a political reprisal<sup>11</sup> against those countries that did not secure civil rights to Italian expatriates.<sup>12</sup> A reciprocity clause often implies a judicial evaluation and criticism of governments, thereby entering the field of foreign relations, which is traditionally a matter for the State.<sup>13</sup>

<sup>10</sup> A. Coaccioli, *Manuale di diritto internazionale privato e processuale* (Milano: Giuffrè, 2011), 231, fn 15; M.M. Winkler, 'Il principio di reciprocità nell'era dei diritti fondamentali' *Responsabilità civile e previdenza*, 1178-1188, 1181 (2012); E. Vitta, *Diritto internazionale privato* (Torino: Utet, 1972), I, 452-453. Even the Court of Cassation in the case at issue states that, when it comes to contracts to acquire ownership of immovable property, reciprocity plays a role in encouraging other States, outside of the EU, to change their legislation in the most liberal way, in favor of Italian citizens living abroad. In any case, the application of the principle of reciprocity today, when Italy has shifted from a country with a high level of emigration into a country with a high level of immigration, might trigger a perverse effect, in that a principle thought to help the weakest, ie the Italians leaving their home country in 1940s, may now harm the weakest, ie non-EU immigrants: P. Mengozzi, *Il diritto internazionale privato italiano* (Napoli: Editoriale Scientifica, 2004), 62.

<sup>11</sup> C. Focarelli, 'La reciprocità nel trattamento degli stranieri in Italia come forma di ritorsione o rappresaglia' *Rivista di diritto internazionale*, 825-865 (1989). According to Corte di Appello di Milano 22 June 1999, *Rivista di diritto internazionale privato e processuale*, 1093-1094 (2000), Art 16 provides a promotional retaliation.

<sup>12</sup> In the 1940s, many countries, such as France, Belgium and the US, experienced strong immigration from Italy, due to the economic crisis triggered by the war and the political and racial persecution that took place during the Fascist regime. As a result, these countries enacted restrictive measures against Italian immigrants, affecting entry, residency and business. In this context, reciprocity was enforced in retaliation for these kinds of anti-Italian legislation. However, it is hard to imagine that the United States, for instance, would have been encouraged to ease their restrictive measures against Italians for fear of reprisals from Italian authorities against American citizens in Italy. It was unlikely that such a threat from the Italian government could affect the political and economic relations with other States. Indeed, reciprocity revealed a dangerous misunderstanding of the balance of power between Italy and other countries: A. Galoppini, n 8 above, 190.

<sup>13</sup> Cf J.B. Hackman, 'The Constitutionality of Alien Inheritance Statutes' 10(3) *New York Law School Journal of International and Comparative Law*, 383-420, 391 (1989), who questions the constitutionality of inheritance statutes (the so-called

Notwithstanding the narrow reasoning behind the principle of reciprocity laid down in the 1942 Civil Code, the 1948 Italian Constitution does not rule it out, though in Art 10, it requires the status of the foreigner to be regulated by law in compliance with international norms and treaties.

The reference made in Art 10 to law cannot be fulfilled by national laws only; indeed, international law, and EU law especially, are of vital importance in regulating the foreigner's status.<sup>14</sup> National law, EU law and international law must not be intended as a multitude of separate systems; rather, they make up a single, complex and open legal order, where rules and principles having different origins mix with each other.<sup>15</sup> International customs (Art 10

'iron curtain' statutes) featuring the right of aliens to take property depending on the reciprocal right of US citizens similarly to take property in the alien's country, on three grounds. 'First, the statutes invade the exclusive federal power over foreign affairs. Second, the statutes burden an alien beneficiary's right to equal protection. Third, the statutes burden the alien beneficiary's right to due process.' On this matter, see also M.A. Frank, 'Alien Inheritance Statutes: An Examination of the Constitutionality of State Laws Restricting the Rights of Nonresident Aliens to Inherit from American Decedents' 25(2) *Syracuse Law Review*, 597-622 (1974).

<sup>14</sup> The perspective that the world revolves around Europe and that everyone outside of Europe is a 'non-European' must be dismissed. A modern policy must not be to impede the free movement of persons on the planet, but to establish solidarity between States by means of international conventions and adequate intervention in southern countries. Law alone cannot stop a force of nature, which calls for the preservation of its existence: P. Perlingieri, 'I diritti civili dello straniero', in Id, *La persona e i suoi diritti* (Napoli: Edizioni Scientifiche Italiane, 2005), 85-98, 89. Cf also M. Luciani, 'Cittadini e stranieri come titolari dei diritti fondamentali. L'esperienza italiana' *Rivista critica del diritto privato*, 203-236 (1992); P. Stancati, 'Le libertà civili del non cittadino: attitudine conformativa della legge, assetti irriducibili di garanzia, peculiarità degli apporti del parametro internazionale', in VVAA, *Lo statuto costituzionale del non cittadino. Atti del XXIV Convegno annuale. Cagliari, 16-17 ottobre 2009* (Napoli: Jovene, 2010), 25-132; V. Zambrano, 'Diritti civili dello straniero e rilievo della condizione di reciprocità', in A.A. Carrabba ed, *I diritti civili dello straniero* (Napoli: Edizioni Scientifiche Italiane, 2001), 29-45.

<sup>15</sup> P. Perlingieri, 'Complessità e unitarietà dell'ordinamento giuridico vigente', in Id, *L'ordinamento vigente e i suoi valori* (Napoli: Edizioni Scientifiche Italiane, 2006), 3-32. Professor P. Perlingieri has coined the expression '*sistema italo-comunitario delle fonti*', ie 'Italian-European system of sources'. Even insisting on the distinction between legal systems, the European legal system cannot be granted an autonomous application, so as to be separable from the national legal system. It is no coincidence that European sovereignty originated from a precise and partial

para 1 of the Constitution),<sup>16</sup> international conventions (Art 117 para 1 of the Constitution)<sup>17</sup> and EU law (Arts 11<sup>18</sup> and 117 of the

limitation of sovereignty accepted by the Italian Republic, as set forth in Art 11 of the Constitution. Conversely, the theory of the plurality of legal orders was notably advocated by S. Romano, *L'ordinamento giuridico* (Firenze: Sansoni, 2<sup>nd</sup> ed, 1951), 104-223; Id, *Principii di diritto costituzionale generale* (Milano: Giuffrè, 1947), 58-59. For an overview of the monistic and dualistic theories, see: A. Falzea, *Ricerche di teoria generale del diritto e di dogmatica giuridica* (Milano: Giuffrè, 1999), I, 496-517; N. Lipari, 'Diritto privato e diritto privato europeo' *Rivista trimestrale di diritto e procedura civile*, 7-25 (2000); L. Paladin, *Le fonti del diritto italiano* (Bologna: il Mulino, 1996), 426-431; V. Scalisi, 'Interpretazione e teoria delle fonti nel diritto privato europeo' *Rivista di diritto civile*, 413-437 (2009); Id, 'Complessità e sistema delle fonti di diritto privato' *Rivista di diritto civile*, 147-179 (2009). The evolution of the Constitutional Court's approach to the relation between national law and EU law is highlighted by I. Nicotra, *Diritto pubblico e costituzionale* (Torino: Giappichelli, 2010), 483. The Court has admitted that, after the ratification of the EU treaties, Italy is now part of a legal system that is 'autonomous, integrated and coordinated' with the national one: Corte costituzionale 15 April 2008 no 102, *Giurisprudenza costituzionale*, 2641-2646 (2008).

<sup>16</sup> Under Art 10 para 1 of the Constitution, 'the Italian legal order shall conform to the generally recognized rules of international law'; translation by M. Cappelletti et al, n 2 above, 282. The provision is generally interpreted as referring to international customs: A. Cassese, 'Principi fondamentali: Art. 10', in G. Branca ed, *Commentario della Costituzione* (Bologna-Roma: Zanichelli-Foro italiano, 1975), 485-508; E. Cannizzaro and A. Caliguri, 'Sub Art. 10', in R. Bifulco, A. Celotto and M. Olivetti eds, *Commentario alla Costituzione* (Torino: Utet, 2006), 244-250.

<sup>17</sup> Art 117 of the Constitution was amended by legge 18 October 2001 no 3. The amended para 1 reads as follows: 'The legislative power is exercised by the State and the Regions in compliance with the Constitution and the constraints coming from EU law and international duties.' For a comment, see E. Malfatti, 'Leggi costituzionali e di revisione costituzionale (1994-2005): Legge cost. 18 ottobre 2001, n. 3 (Riforma del titolo V)', in G. Branca and A. Pizzorusso eds, *Commentario della Costituzione* (Bologna-Roma: Zanichelli-Foro Italiano, 2006), 263-396; A. Cossiri, 'Sub Art. 117', in S. Bartole and R. Bin eds, *Commentario breve alla Costituzione* (Padova: Cedam, 2008), 1045-1051. With regard to the 'internationalization' of private law, see VVAA, *L'incidenza del diritto internazionale sul diritto civile. Atti del 5° Convegno Nazionale* (Napoli: Edizioni Scientifiche Italiane, 2011).

<sup>18</sup> Art 11 sets forth the conditions for the limitations of sovereignty, allowing Italy to join the EU and other international organizations. However, the limitation of sovereignty, as provided for by Art 11, cannot be achieved by allowing EU institutions to jeopardize the fundamental values behind the Constitution and the Republic. Cf A. Cassese, 'Principi fondamentali: Art. 11', in G. Branca ed, *Commentario della Costituzione* n 16 above, 577-588; M. Cartabia and L. Chieffi,



Constitution) shape the system and influence judges regarding the extent to which they must combine provisions of different sources (the State, the Regions, the European Union, the international community), balance values and compose interests in accordance with a Constitutional interpretation that is respectful of inalienable rights. Every source of law is part of this unique legal order and must be applied by the Constitutional Court, the European Court of Justice (hereinafter ECJ) and the European Court of Human Rights (hereinafter ECHR) as a single jurisdiction driven by a spirit of sincere mutual cooperation.<sup>19</sup>

In such Italian-European legal system, EU citizens and their family members, albeit not citizens of a Member State,<sup>20</sup> do not fall

'Sub Art. 11', in R. Bifulco, A. Celotto and M. Olivetti eds, *Commentario alla Costituzione* n 16 above, 279-288.

<sup>19</sup> On the mutual cooperation between the courts, see: P. Perlingieri, *Leale collaborazione tra Corte costituzionale e Corti europee. Per un unitario sistema ordinamentale* (Napoli: Edizioni Scientifiche Italiane, 2008); Id, 'Diritto comunitario e identità nazionali' *Rassegna di diritto civile*, 530-545 (2011); A. Tartaglia Polcini, 'Integrazione sistematica e assiologica dirimente nel dialogo tra Corte costituzionale e Corte di giustizia', in P. Femia ed, *Interpretazione a fini applicativi e legittimità costituzionale* (Napoli: Edizioni Scientifiche Italiane, 2006), 421-478; A. Rovagnati, 'Fragilità e forza di un sistema giurisdizionale *sui generis*. I rapporti tra Corte di Giustizia delle Comunità europee e giudici nazionali di ultima istanza alla luce della più recente giurisprudenza comunitaria', in N. Zanon ed, *Le Corti dell'integrazione europea e la Corte costituzionale italiana* (Napoli: Edizioni Scientifiche Italiane, 2006), 353-388; G. Vettori, 'Dialogo fra le corti e tecnica rimediabile', in VVAA, *L'incidenza del diritto internazionale* n 17 above, 455-471.

<sup>20</sup> On this matter, see decreto legislativo 6 February 2007 no 30, implementing directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. With regard to family reunification, see Arts 29 and 29-bis decreto legislativo 25 July 1998 no 286. On the recognition of *kafalah*, see: Corte di Cassazione 2 February 2015 no 1843, with a note by M. Di Masi, 'La Cassazione apre alla *kafalah* negoziale per garantire in concreto il *best interest of the child*' *La nuova giurisprudenza civile commentata*, 707-724 (2015); Corte di Cassazione-Sezioni unite 16 September 2013 no 21108, *Rivista di diritto internazionale*, 271-279 (2014). In the literature, see: R. Senigaglia, 'Il significato del diritto al ricongiungimento familiare nel rapporto tra ordinamenti di diversa «tradizione». I casi della poligamia e della «kafala» di diritto islamico' *Europa e diritto privato*, 533-575 (2014); C.E. Tuo, 'Riconoscimento degli effetti delle adozioni straniere e rispetto delle diversità culturali' *Rivista di diritto internazionale privato e processuale*, 43-80 (2014); G. Magno, 'Ingresso in Italia del



within the definition of ‘foreigner’ and are not subject to reciprocity. Every national of a Member State is a citizen of the Union – such citizenship being additional to and not replacing national citizenship (Art 9 of the Treaty on European Union) – and ‘any discrimination on grounds of nationality’ shall be prohibited (Art 18 of the Treaty on the Functioning of the European Union; Art 21 of the Charter of Fundamental Rights of the European Union).<sup>21</sup> In this context, it is no coincidence that Italian immigration law does not apply to EU citizens (Art 1 para 1 decreto legislativo 25 July 1998 no 286).

Likewise, reciprocity does not apply to citizens of countries that have signed economic agreements with Italy that are designed for the mutual protection and promotion of investments, such agreements – ratified by Italian law – being *lex specialis*, prevailing over Art 16.<sup>22</sup>

Finally, by virtue of international conventions, reciprocity need not be met by stateless persons<sup>23</sup> or refugees,<sup>24</sup> provided that they have resided in Italy for at least three years.

minorenne straniero affidato in «kafalah» a coniugi italiani: una questione da chiarire’ *Il Diritto di famiglia e delle persone*, 99-110 (2014).

<sup>21</sup> The same rights possessed by EU citizens are afforded to citizens of the countries – Liechtenstein, Iceland and Norway – that have signed the Agreement on the European Economic Area (on May 2 1992), as well as to citizens of Switzerland, by virtue of the Swiss-EU Bilateral Agreement on the Free Movement of Persons (on 21 June 1999), and citizens of San Marino, by virtue of the Convention of friendship and good neighborhood (on 31 March 1939): B. Nascimbene, ‘La capacità dello straniero: diritti fondamentali e condizione di reciprocità’ *Rivista di diritto internazionale privato e processuale*, 307-326, 315 (2011).

<sup>22</sup> See A. Busani, ‘Acquisti immobiliari dello straniero non regolarmente soggiornante in Italia sottoposti a condizione di reciprocità’ *Notariato*, 371-383, 378-379 (2013), in particular, fn 44, for a list of the main economic agreements signed by Italy.

<sup>23</sup> Art 7 para 2 of the Convention relating to the status of stateless persons, adopted in New York on 28 September 1954, ratified by Italy in legge 1 February 1962 no 306.

<sup>24</sup> Art 7 para 2 of the Convention relating to the status of refugees, adopted in Geneva on 28 July 1951 and ratified by Italy in legge 24 July 1954 no 722. Within the Constitution, refugee status is regulated by Art 10 para 3, under which ‘foreigners who, in their own countries, are denied the effective exercise of democratic freedoms guaranteed by the Italian Constitution, shall have the right of asylum in the territory of the Republic, in accordance with the conditions established by law’; translation by M. Cappelletti et al, n 2 above, 282. According to Corte costituzionale 23 March 1968 no 11, *Giurisprudenza costituzionale*, 311-363 (1968), it is not reasonable to impose

### III. Reciprocity between *Status Personae* and *Status Civitatis*

Although some might suggest that reciprocity has been tacitly abrogated by the Constitution,<sup>25</sup> a Constitutional interpretation of Art 16 may just overcome any apparent conflict with the Constitution itself,<sup>26</sup> insofar as fundamental rights are afforded to individuals, not as citizens of the State, but as human beings. Reciprocity was not abrogated and is still in force, as long as it is interpreted by means of Art 2 of the Constitution, which sets forth the recognition and guarantee of the inviolable rights of man, as well as the performance of fundamental duties of political, economic and social solidarity.<sup>27</sup>

reciprocity on foreigners who are citizens of countries that deny the effective exercise of democratic freedoms.

<sup>25</sup> The tacit abrogation of Art 16 has been advocated by some renowned scholars: P. Barile, *Il soggetto privato nella Costituzione italiana* (Padova: Cedam, 1953), 57; Id, *Diritti dell'uomo e libertà fondamentali* (Bologna: il Mulino, 1984), 32-34; A. Cassese, 'Principi fondamentali: Art. 10', in G. Branca ed, *Commentario della Costituzione* n 16 above, 512-515; A. La Pergola, *Costituzione e adattamento dell'ordinamento interno al diritto internazionale* (Milano: Giuffrè, 1961), 325, fn 74. Where reciprocity means that a foreigner may be secured rights, subject to the condition that equal rights are secured to an Italian citizen in the foreigner's country of origin, it takes individuals into account, not as human beings, but as manifestations of a State's sovereignty. If this is true, then reciprocity breaches the protection of inviolable rights and the principle of equality set forth by Arts 2 and 3 of the Constitution, because it establishes an unreasonable discrimination based on an element not depending on the foreigner at all, ie the legal treatment of Italians in the foreigner's legal system: P. Rescigno, 'Gli acquisti in Italia dello straniero' *Rivista del diritto commerciale e del diritto generale delle obbligazioni*, 169-188, 174 (1983). More recently, some have argued that reciprocity makes no sense in a globalized world, where national boundaries are dissolving and international cooperation is developing on an unprecedented scale. In this scenario, legal systems tend to attract foreign investments, instead of rejecting them: M.M. Winkler, n 10 above, 1182-1183.

<sup>26</sup> Art 16 actually complies with Art 10 of the Constitution, as no customary or conventional rule of international law imposes equality between citizens and foreigners based on their national legal systems with regard to any right. Moreover, the reference made to international treaties within Art 10 seems to disprove the alleged complete equality between citizens and foreigners. Art 10 means only that any possible discrimination between citizens and foreigners must be subject to law: P. Rescigno, 'Gli acquisti in Italia dello straniero' n 25 above, 174-175.

<sup>27</sup> For the Constitutional interpretation of Art 16 by means of Art 2 of the Constitution, see: Corte di Cassazione 11 January 2011 no 450, *Foro italiano*, 394-402 (2011); Corte di Cassazione 7 May 2009 no 10504, *Diritto e Fiscalità*

Art 16, which secures 'civil rights' to foreigners subject to reciprocity, cannot refer to the fundamental rights of the individual; a different interpretation would be unconstitutional, as it breaches the guarantee set forth by Art 2 of the Constitution. Any legal interpretation must be logical-systematical and teleological-axiological, ie designed to accomplish Constitutional values.<sup>28</sup>

It is by means of a Constitutional interpretation of Art 16 that inalienable rights and duties making up the *status personae* are granted to foreigners, regardless of reciprocity. The Court of Cassation embraces such interpretation and calls for a universal and indivisible protection of the human being, going beyond national boundaries, political communities, residency, citizenship and security reasons.<sup>29</sup>

*dell'assicurazione*, 375-380 (2010). In the literature, see: R. Di Raimo, '«Principio di reciprocità» e «diritti inviolabili dell'uomo»' *Rassegna di diritto civile*, 646-655 (1990); F. Parente, 'L'assetto normativo dei diritti fondamentali della persona tra *status civitatis* e posizione di migrante: le suggestioni della «condizione di reciprocità»' *Rassegna di diritto civile*, 1108-1133 (2008).

<sup>28</sup> On the criticism of the literal rule known as *in claris non fit interpretatio* and the advocacy of a systematic and axiological interpretation, see: P. Perlingieri, 'L'interpretazione della legge come sistematica ed assiologica. Il broccardo *in claris non fit interpretatio*, il ruolo dell'art. 12 disp. prel. c.c. e la nuova scuola dell'esegesi' *Rassegna di diritto civile*, 990-1017 (1985); M. Pennasilico, 'Legalità costituzionale e diritto civile' *Rassegna di diritto civile*, 840-876 (2011); P. Maddalena, 'Interpretazione sistematica e assiologica del diritto' *Giustizia civile*, 65-77 (2009); V. Scalisi, 'Regola e metodo nel diritto civile della postmodernità' *Rivista di diritto civile*, 283-310 (2005).

<sup>29</sup> Too often in the balance between liberty and security, the liberties of a vulnerable minority (the foreigners) have been sacrificed for the purported security of the majority (the citizens). This has happened especially in the US in the wake of the terrorist attacks of September 11. Cf D. Cole, 'Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?' 25(2) *Thomas Jefferson Law Review*, 367-388, 368-369 (2002-03), who criticizes the ambivalent approach of the US Supreme Court, which, on the one hand, has insisted that foreigners are entitled to those rights the Constitution does not expressly reserve to citizens; on the other hand, it has allowed foreigners to be expelled because of their race and to be deported for political associations that were lawful at the time they were engaged in, it has upheld laws barring foreigners from owning land, it has permitted the indefinite detention of foreigners stopped at the border on the basis of secret evidence they could not confront, and it has allowed states to bar foreigners who were otherwise qualified from employment as public school teachers and police officers, based solely on their status as foreigners.

*Status personae* is not identified with legal capacity, ie the eligibility, acquired at birth, to have rights and duties. Indeed, it is the subjective manifestation of an incontestable, unnegotiable, objectively protected value: the value of the human personality. It is the legal position of man in the community, a unique and complex situation consisting of ‘inviolable rights’ and ‘mandatory duties’ (Art 2 of the Constitution), typical and atypical, entailed by man’s living in a community.<sup>30</sup> The rights and duties making up the *status personae* are meant to fulfill the existential needs of humankind; as such, they bear no reciprocity. Their protection is ‘multilevel’, ie involving national, supranational and international dimensions, operating with different levels of integration and interference, different rationales and different effectiveness.<sup>31</sup>

Some of these rights are typical, ie provided for by the law, and most of them are set forth by the Constitution, such as: the right to proceed at law for the protection of rights and legitimate interests and the right of defense at any stage in legal proceedings (Art 24);<sup>32</sup> the right to health (Art 32);<sup>33</sup> and the worker’s right to a

<sup>30</sup> P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 2006), 666-668.

<sup>31</sup> With regard to the multilevel protection of fundamental rights and the challenges it poses, see: I. Pernice, ‘Multilevel Constitutionalism in the European Union’ 27(5) *European Law Review*, 511-529 (2002); G. Martinico, ‘Complexity and Cultural Sources of Law in the EU Context: from the Multilevel Constitutionalism to the Constitutional Synallagma’ 8(3) *German Law Journal*, 205-230 (2007); I. Pernice and R. Kanitz, ‘Fundamental Rights and Multilevel Constitutionalism in Europe’ 7(4) *WHI Paper*, 1-20 (2004); G. Di Federico, ‘Fundamental Rights in the EU: Legal Pluralism and Multi-level Protection after the Lisbon Treaty’, in Id, *The EU Charter of Fundamental Rights* (Amsterdam: Springer Netherlands, 2011), 15-54.

<sup>32</sup> The legal system affords the right to proceed at law to foreigners, on the same terms as citizens: Corte di Cassazione-Sezioni unite 11 April 1981 no 2112, *Rivista di diritto internazionale privato e processuale*, 345-349 (1983).

<sup>33</sup> The right to receive sanitary treatments is ‘conditioned’ by the need for a balance with other constitutionally protected interests. However, there is a hard core within the right to health that must be afforded to foreigners as well, regardless of their position according to the law governing entry and residence, although the legislature might enact different ways to exercise this right: Corte costituzionale 17 July 2001 no 252, *Giurisprudenza costituzionale*, 2168-2174 (2001). See also Art 35 para 3 decreto legislativo 25 July 1998 no 286, under which foreign citizens not complying with the rules on entry and residence can obtain urgent or necessary outpatient and hospital treatments.

remuneration proportionate to the quantity and quality of their work, to a weekly rest and to annual paid holidays (Art 36).<sup>34</sup>

Interestingly, the courts have long debated whether a foreigner is entitled to seek compensation for damages, both economic and non-economic. The solution to the matter has recently been that, regardless of reciprocity, foreigners might claim compensation for damages suffered, although some distinctions are still to be made.<sup>35</sup>

In any case, the above list is just by way of an example. The human *persona* is an open value not implying a specific right or duty provided for by the law, but appearing in an endless, potentially atypical series of situations connected with the existential aspects of humankind.<sup>36</sup> The Italian Constitutional system is founded on the

<sup>34</sup> Foreign workers' right to a remuneration proportionate to the value of the work performed and sufficient to provide a free and dignified existence for themselves and their families, as well as their right to rest and paid holidays, are not subject to reciprocity: Corte di Cassazione 4 March 1988 no 2265, *Giurisprudenza italiana*, 129-131 (1989).

<sup>35</sup> Corte di Cassazione 11 January 2011 no 450, n 27 above. The Court states that the right to health, the right to psycho-physical integrity and the right to family relations are fundamental rights. Compensation for economic and non-economic damages suffered from the breach of such rights might be sought by any foreigner, with no discrimination in terms of citizenship allowed. Such compensation might be claimed, not only against the wrongdoer, but also against the insurer or the Guarantee Fund for road accident victims. However, where reciprocity is not met, damages consisting in loss or damage to property cannot be claimed by the foreigner. In this case, the right to ownership is infringed, and such right is not a fundamental right. For a comment on the decision, see: I. Prisco, 'Protezione dei diritti fondamentali e inapplicabilità della condizione di reciprocità', in G. Perlingieri and G. Carapezza Figlia eds, *L'«interpretazione secondo Costituzione» nella giurisprudenza. Crestomazia di decisioni giuridiche* (Napoli: Edizioni Scientifiche Italiane, 2012), I, 87-96. On this matter, see also: Corte di Cassazione 7 May 2009 no 10504, n 27 above. Foreigners are also entitled to compensation for wrongful conviction, regardless of reciprocity: Corte di Cassazione 7 April 2000 no 2225, *Cassazione penale*, 3510-3511 (2001).

<sup>36</sup> P. Perlingieri, *La personalità umana nell'ordinamento giuridico* (Camerino-Napoli: Università degli Studi di Camerino. Scuola di perfezionamento in diritto civile-Edizioni Scientifiche Italiane, 1982), 174-175; D. Messinetti, 'Personalità (diritti della)' *Enciclopedia del diritto* (Milano: Giuffrè, 1983), XXXIII, 355-406, 371-373; G. Giampiccolo, 'La tutela giuridica della persona umana e il c.d. diritto alla riservatezza' *Rivista trimestrale di diritto e procedura civile*, 458-475, 465-466 (1958). Conversely, for a typical and atomistic approach to the theme of personality, see: A. De Cupis, 'I diritti della personalità', in A. Cicu and F. Messineo eds, *Trattato*

general clause for the protection of the human personality (Art 2 of the Constitution): the *persona* is a general value to be preserved, even in circumstances not provided for by the law. Individuals do not have a personal right in themselves, besides the rights provided for by the law, but all of the positions referring to them must aim to fulfill the value of the *persona*. The *persona* is considered to be a plastic value, staying clear of the traditional division between typical and atypical situations and able to adapt to an infinite variety of circumstances, cultural environments and social changes.

*Status personae* is endowed with absolute independence and can exist without any other status; all of the other statuses revolve around the *status personae* and are committed to its achievement.<sup>37</sup>

Above all, *status personae* is not affected by *status civitatis*, ie the position of man in a State political community. Foreigners do not enjoy: the right to vote (Art 48 Constitution) and to address petitions to the Parliament (Art 50 Constitution), the right of admission to public offices and elective posts (Art 51 Constitution), the duty to contribute toward public expenses (Art 53 Constitution) and the right to petition for referendum (Arts 75 and 138 Constitution).<sup>38</sup>

*di diritto civile e commerciale* (Milano: Giuffrè, 1982), IV, 32-37; P. Rescigno, 'Personalità (diritti della)' *Enciclopedia giuridica* (Roma: Istituto dell'Enciclopedia Italiana, 1990), XXVI, 5; A. Baldassarre, 'Diritti inviolabili' *Enciclopedia giuridica* (Roma: Istituto dell'Enciclopedia Italiana, 1989), XII, 18-21.

<sup>37</sup> R. Di Raimo, n 27 above, 648-649. Legal theory is highly influenced by the traditional distinction between *status civitatis* and a multitude of other particular statuses (entrepreneur, worker, consumer, producer). However, these statuses convey a strong and not always reasonable particularism. Rights and duties that are not dependent on citizenship shall be allocated within the *status personae*, ie a number of rights and duties afforded to man as such, not as a consumer, producer, worker or citizen: P. Perlingieri, 'I diritti civili dello straniero' n 14 above, 88-89.

<sup>38</sup> The Convention on the Participation of Foreigners in Public Life at Local Level, signed in Strasbourg on 5 February 1992, ratified by Italy on 8 March 1994, grants foreign residents the right to freedom of expression, assembly and association, as well as the right to take part in consultative bodies at the local level. However, chapter C of the Convention, which grants the right to vote in local elections, was not ratified by Italy. Cf G. Franchi Scarselli, 'Una legge misconosciuta sulla partecipazione degli stranieri alla vita pubblica' *Quaderni costituzionali*, 649-651 (2000). Another guarantee is provided for by Art 8 para 5 decreto legislativo 18 August 2000 no 267, under which the municipal charter must endorse the participation of EU citizens and lawfully resident foreigners in public life at the local level.



#### IV. The Italian Law on Immigration: Grounds for Analogy in the Court's Reasoning

The unconditional equality between foreigners and citizens, when it comes to fundamental rights, is also solemnly set forth by Italian immigration law. Under Art 2 para 1 decreto legislativo 25 July 1998 no 286, commonly known as *testo unico sull'immigrazione*, 'foreigners present at the border or within the State's territory are afforded the human person's fundamental rights provided for by national law, international conventions in force and generally recognized principles of international law.'

The provision should not be overestimated, because, within the aforementioned statute, the effectiveness of many rights extended to foreigners seems very low.<sup>39</sup> However, it is significant that, on the one hand, reference is made to foreigners 'present' at the border, implying a neutral concept – 'presence' – which is broader than 'stay', the latter being lawful or unlawful; on the other hand, the foreigner's status is regulated not only by national law, but also, and mainly, by international law, both customary and conventional.<sup>40</sup>

Still, the exercise of civil rights, regardless of reciprocity, remains a prerogative of foreigners who are lawfully staying in Italy with a residence permit – unless reciprocity is required by law or international conventions –, whereas foreigners not holding a residence permit are allowed to exercise civil rights, provided that reciprocity is met pursuant to Art 16. As a matter of fact, under Art 2 para 2 decreto legislativo 25 July 1998 no 286, 'the foreigner lawfully staying in the State's territory enjoys the rights in civil matters<sup>41</sup> afforded to the

<sup>39</sup> F. Parente, n 27 above, 1127-1128. The ambiguity and fancifulness behind decreto legislativo 25 July 1998 no 286 is well stressed by P. Perlingieri, 'I diritti civili dello straniero' n 14 above, 90. Many of the provisions set forth by the said legislation are useless and repetitive of what the Constitution already provides, and they create more problems than they are intended to solve.

<sup>40</sup> B. Nascimbene, n 21 above, 316. Foreigners merely 'present' in Italy, regardless of the lawfulness of the 'stay', have the right to diplomatic protection, that is, the right to contact the authorities of their country of citizenship (Art 2 para 7). No reference to 'presence' or 'stay' is made within the provision (Art 2 para 5) that affords the right to proceed at law for the protection of rights and legitimate interests on an equal footing with citizens, as regards the relations with the public administration and access to public services.

<sup>41</sup> For the ambiguity and narrowness behind the notion of 'rights in civil



Italian citizen, unless international conventions in force for Italy and this statute provide otherwise.’ Hence, the legislature sets forth the status of the foreigner who is lawfully staying with a residence permit, ie a foreigner who, on the one hand, has not breached the law on entry and stay, and on the other hand, holds an EU long-term residence permit or a residence permit on the grounds of work, business, study, family or humanitarian reasons (Art 1 decreto del Presidente della Repubblica 31 August 1999 no 394). Such foreigner is supposed to be wholly absorbed into the national community and enjoys the citizen’s ‘civil rights’, regardless of reciprocity.

Conversely, where reciprocity is not met, foreigners not holding a residence permit, lawfully<sup>42</sup> or unlawfully staying in Italy, are denied the exercise of ‘civil rights’. Such foreigners are required to meet reciprocity in order, for example, to run a business<sup>43</sup> or to acquire ownership of property.

It shall be kept in mind that, even before the 1998 immigration law was enacted, the legislation allowed foreigners staying in Italy with a residence permit to enjoy some civil rights and liberties,

matters’, compared to that of the ‘civil rights’ set forth in Art 16, and the alleged intention of the 1998 legislature to afford just a few ‘civil rights’ to foreign residents, see F. Parente, n 27 above, 1129, and especially fn 50, for further references.

<sup>42</sup> Foreigners staying in Italy for visits, business, tourism or study, for periods not exceeding three months, are not required to apply for a residence permit. Instead, they must report their presence in the country according to procedures that vary, depending on whether the country of origin applies the Schengen Agreement (Arts 1 and 2 decreto Ministero dell’Interno 26 July 2007). Foreigners complying with these procedures may lawfully stay in Italy, although they are not exempted from reciprocity, save for fundamental rights: B. Nascimbene, n 21 above, 318.

<sup>43</sup> On the application of reciprocity when a foreigner sets up an Italian company or buys shares in an Italian company, see: Tribunale di Verona 11 April 1995, with a note by F. Mariani, ‘Condizione di reciprocità e omologazione degli atti societari’ *Notariato*, 142-145 (1996); Tribunale di Napoli 12 January 1995, with a note by R. Donnini, ‘Condizione di reciprocità per la costituzione di società da parte di soggetti stranieri’ *Le Società*, 953-954 (1995). Foreign nationals are required to meet reciprocity in order to be appointed as directors of Italian companies: A. Busani and M. Molinari, ‘Condizione di reciprocità e nomina di cittadino straniero nel consiglio di amministrazione di s.p.a.’ *Le Società*, 158-171 (2011); *contra*, L.G. Radicati Di Bronzolo and A. La Mattina, ‘Condizione di reciprocità e partecipazione di stranieri nel consiglio di amministrazione di s.p.a.: osservazioni critiche’ *Le Società*, 642-647 (2011).

regardless of reciprocity. The Court, in the case at issue, refers to such legislation in order to uphold the validity of the contract entered into by the foreign party. In fact, the case revolves around a contract signed by an Iranian citizen holding a residence permit in 1993. At that time, non-EU citizens were allowed to buy shares in cooperatives or to run a business.<sup>44</sup> Above all, Art 1 legge 30 December 1986, no 943, which aimed to grant non-EU workers who were lawfully staying in Italy with a residence permit, as well as their families, equal treatment and non-discrimination with Italian workers, included the right to ‘the availability of housing’.

The Court observes that the choice made by the legislature before 1998 to do without reciprocity, although only in some areas, in order to accomplish the better social inclusion of the foreigner who is lawfully staying within the national community, gives way to the opportunity to extend, by means of analogy, the area of those civil rights, whenever the *eadem ratio* occurs. This way, when it comes to cases involving lawfully staying foreigners before 1998, the Court does not completely rule out reciprocity, but it allows a reasoning by analogy.<sup>45</sup>

## V. The Foreigner’s Right to ‘Personal’ Ownership

Analogy is one, yet not the only, ground upon which the Court develops its reasoning. Above all, the Court, in a crucial passage, emphasizes that ownership has taken on different statuses in the

<sup>44</sup> Arts 9 and 10 decreto legge 30 December 1989 no 416.

<sup>45</sup> For harsh criticism of the Court’s reasoning, see R.S. Bonini, ‘Acquisti immobiliari, reciprocità e interpretazione analogica’ *La nuova giurisprudenza civile commentata*, 821-827 (2013). According to the author, the Court seems to forget that under Art 14 of the Provisions on the Law in General, analogy is not allowed for ‘exceptional’ norms, ie rules deviating from a principle. Indeed, before the 1998 immigration law was enacted, the general rule on the foreigner’s capacity was the one based on reciprocity, whereas provisions affording civil rights regardless of reciprocity were ‘exceptional’, and, as such, not capable of analogy. However, such criticism is not persuasive, as it has been argued that exceptional norms, by connecting principles and rules in a singular relation, can be applied even analogically in their context, in any situation ascribed to that relation: P. Perlingieri and P. Femia, *Nozioni introduttive e principi fondamentali del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2004), 18-19 and fn 22 for bibliography.

Constitution, and when it comes to buying ownership of property to be used as a family home or place of business, the Supreme Charter tends to make ownership accessible to ‘everybody’. ‘Personal’ ownership, providing stability and safety, prevents discrimination based upon citizenship: Its purchase must not be restricted by reciprocity.

The Court’s reasoning appears to be utterly interesting, as it opens up the idea of ‘personal’ ownership as an unassailable right of the individual, and as such, not subject to reciprocity.

It is now quite undisputed that ownership *per se* cannot be labeled as an inviolable and fundamental right, because it is designed to achieve the protection of the human *persona*. Ownership is not ‘sacred’ or ‘inviolable’: Rather, the *persona* is ‘sacred’ and ‘inviolable’. The *persona* must be protected, not for what it ‘has’, but for what it ‘is’. This is the modern Constitutional perspective, in which the categories of ‘having’ are in a subordinate, though functional, relation with the categories of ‘being’.<sup>46</sup> And in this context, it is no coincidence that the Constitution demands that private ownership shall have a social function and be accessible to everybody.

Recently, even the traditional relation between ownership and freedom has been questioned, in order to expose the true nature of private ownership as a ‘depriving’ power, eventually enslaving the owner and third parties.<sup>47</sup> Indeed, on the one hand, ‘power’ was found in the origins of ownership, and power brings subjection, ie a position in which the weak party is subjected to the powerful one. The freer the owner, the less free the non-owner, so that freedom can be linked to ownership, just as much as enslavement can be linked to it. On the other hand, there are legal limits and psychological restraints making immovable property not abandonable, chaining owners to their properties. The recent boost in property taxes has

<sup>46</sup> For an in-depth analysis of the relation between the human personality, private enterprise and ownership, and the supremacy of ‘being’ over ‘having’, see P. Perlingieri, *La personalità umana* n 36 above, 150-155. The author stresses the shift in perspective from the nineteenth century literature, which developed the idea of ownership without boundaries, closely related to an absolute concept of freedom. In this context, property was thought to be an expression of the human personality, so that ‘to be’ was ‘to have’.

<sup>47</sup> U. Mattei, *Senza proprietà non c’è libertà. Falso!* (Bari: Laterza, 2014), e-book, 25-26, 35-36, 45.

pushed many owners to get rid of their properties, but they cannot do so, either because they cannot find a buyer, they do not wish to donate, or they cannot use the legal remedy of dereliction, whose lawfulness, when it comes to immovable property, is disputed. Ultimately, being an owner does not convey being free: Indeed, private ownership obliges.

Ownership *per se* is not an inviolable right, nor does ownership imply freedom. However, different aims of ownership may, under certain circumstances, characterize the right to ownership as a fundamental right and its purchase as not being restrictable by any reciprocity clause.<sup>48</sup> This way, any aprioristic and dogmatic approach asserting the inviolability of ownership *per se* must give way to a functional and dynamic concept of ownership, allowing distinctions based on the purposes behind the ownership itself.

Hence, when property is purchased for business purposes by foreign individuals or companies, political orientations about foreign investments might be involved in a delicate balance between national interests and economic freedom. In this field, reciprocity may still be preserved as a means of political pressure and national promotion.<sup>49</sup>

Conversely, when property is purchased for use as a home, property becomes 'personal',<sup>50</sup> and ownership is deemed to be an inviolable right.<sup>51</sup> The right to a home might be inferred from

<sup>48</sup> *Contra* R.S. Bonini, n 45 above, 825, who points out that the reasons behind the purchase of property by the foreign party cannot be relevant in order to afford a legal capacity that otherwise, the foreign party would not have. Indeed, the foreign party may purchase 'personal' property, and decide to lease it and make profits, instead of using it as a personal home.

<sup>49</sup> A. Galoppini, n 8 above, 196.

<sup>50</sup> The concept of 'personal' property is not new in legal theory. Cf U. Mattei, n 47 above, 33-34, who believes that there is some kind of relation between ownership and needs, which has nothing to do with property accumulation. 'Personal' ownership of certain properties, which are culturally and quantitatively necessary in different contexts to live a free and dignified life, might convey a true connection with freedom and dignity, which are two dimensions of 'being' and not 'having'.

<sup>51</sup> The discrimination in the purchase of ownership based on citizenship breaches a public order principle, ie the principle that properties belong, in private ownership, to individuals or companies, without any discrimination based on nationality as to companies, and without any discrimination based on citizenship as to individuals: P. Rescigno, 'Gli acquisti in Italia dello straniero' n 25 above, 187, who observes that other reasons behind the non-application of reciprocity in the area of

Constitutional provisions on substantial equality (Art 3) and the social function of ownership, as well as its accessibility to everybody (Art 42).<sup>52</sup>

Internationally, the human right to housing has been significantly recognized by a number of charters.<sup>53</sup> Among these, the European

the purchases of immovable property include the chances to know foreign law and the heterogeneity of the notions of ownership within foreign jurisdictions. On the impossibility of applying reciprocity to the right to housing, see also E. Calò, n 5 above, 181-184. *Contra* P. Criscuoli, 'Acquisti immobiliari dei cittadini comunitari e degli extracomunitari' *Immobili & proprietà*, 100-108, 101 (2013), who doubts that housing is an inviolable right.

<sup>52</sup> Actually, the Italian Constitution does not include an explicit right to housing, although some infer it from the principle of 'substantial' equality set forth in Art 3, as housing tends to remove the obstacles that impede the full development of the human personality. The Constitutional Court grounds the recognition of the right to housing on the principle of equality: Corte Costituzionale 7 April 1988 no 404, *Giurisprudenza italiana*, 1627-1635 (1988); Corte Costituzionale 25 February 1988 no 217, *Giurisprudenza costituzionale*, 833-842 (1988). Housing is referred to as a fundamental social right by Corte Costituzionale 21 March 2007 no 94, *Giurisprudenza costituzionale*, 902-919 (2007) and Corte Costituzionale 26 March 2010 no 121, *Giurisprudenza costituzionale*, 1358-1425 (2010). On the right to housing in Italian law, see E. Bargelli, 'Abitazione (diritto alla)' *Enciclopedia del diritto* (Milano: Giuffrè, 2013), Ann VI, 1-19. The author believes the Constitutional relevance of the right to housing cannot be based on Art 47, which protects people's savings and their application towards ownership of the home. The exclusive reference to Art 47 would trigger the wrong idea, ie that the right to housing might be fulfilled only by the purchase of ownership – such idea being enforced, with questionable outcomes, by the Italian legislature after World War II under the slogan '*non tutti proletari ma tutti proprietari*' ('not all proletarians but all owners') – whereas ownership is just one, and not the only, means to fulfill the right to housing. Cf also: U. Breccia, *Il diritto all'abitazione* (Milano: Giuffrè, 1980); M.A. Ciocia, *Il diritto all'abitazione tra interessi privati e valori costituzionali* (Napoli: Edizioni Scientifiche Italiane, 2009); A. De Vita, 'Diritto alla casa in diritto comparato' *Digesto discipline privatistiche. Sezione civile* (Torino: Utet, 1990), VI, 34-69; S. Civitarese Matteucci, 'L'evoluzione della politica della casa in Italia' *Rivista trimestrale di diritto pubblico*, 163-210 (2010).

<sup>53</sup> The Universal Declaration of Human Rights, adopted in 1948, includes a right to housing as part of the broader right to a standard of adequate living and to security (Art 25). Two subsequently adopted treaties further develop the rights outlined in the Declaration: the International Covenant on Economic, Cultural and Social Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), both of which entered into force in 1976. Especially, Art 11 ICESCR significantly states that parties 'recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and

Convention on Human Rights does not include a right to housing *per se*, although the provisions on civil and political rights, especially the right to respect for private and family life (Art 8) and the protection of property (Art 1 Protocol no 1), have been interpreted by the ECHR as leading to the development of a right to housing.<sup>54</sup>

On the European level, immovable property traditionally does not fall within the competence of the Union, and national housing policies are not affected by ‘vertical’ harmonization. However, a ‘diagonal’ harmonization of housing may sometimes be pursued as a consequence of: harmonization in areas falling within the competence of the Union, social policies pursued through ‘soft’ harmonization, and legal principles set forth by national and European courts and bodies.<sup>55</sup>

Significantly, in a recent decision, the ECJ held that national legislation allowing the recovery of a debt based on potentially unfair contractual terms by the extrajudicial enforcement of a charge on immovable property – including a family home – provided as security by the consumer, is not precluded, insofar as that legislation does not make it excessively difficult or impossible to protect the rights conferred on consumers by EU law, which is a matter for national courts to determine. When the consumer and his family are evicted from the accommodation forming their principal family

housing.’ Several other treaties address specific aspects of the right to housing: the Convention on the Rights of the Child (CRC), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Covenant on the Elimination of All Forms of Racial Discrimination (CERD). For our purposes here, Art 5 CERD states that ‘States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: [...] the right to housing.’

<sup>54</sup> See A. Kucs et al, ‘The Right to Housing: International, Regional and National Perspectives’ 64-65 *Cuadernos Constitucionales de la Cátedra Fadrique Furió Ceriol*, 101-123, 105-111 (2008), for an analysis of ECHR case law relating to housing. The ECHR has emphasized that the loss of one’s home is the most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should, in principle, be able to have the proportionality of the measure determined by an independent tribunal in light of the relevant principles under the Convention: Eur. Court H.R. *McCann v The United Kingdom*, Judgment of 13 May 2008, available at [www.hudoc.echr.coe.int](http://www.hudoc.echr.coe.int).

<sup>55</sup> E. Bargelli, n 52 above, 3-4.



home, national courts shall provide for interim measures by which unlawful mortgage enforcement proceedings may be suspended or terminated.<sup>56</sup>

Recognizing a right to housing does not mean the government should provide a free house to everyone. Indeed, the right shall not be interpreted narrowly: It is more than a ‘roof over one’s head’; rather, it encompasses ‘the right to live somewhere in security, peace and dignity.’<sup>57</sup>

<sup>56</sup> Case C-34/13 *Monika Kušionová v SMART Capital a.s.* (European Court of Justice Third Chamber 10 September 2014), available at [www.eur-lex.europa.eu](http://www.eur-lex.europa.eu). The ECJ grounds its decision on the idea that the right to accommodation is a fundamental right under EU law. The loss of a family home is not only such as to undermine consumer rights, but it also places the family of the consumer concerned in a particularly vulnerable position. In this context, the proportionality of the penalty shall be taken into serious account when enforcement of a charge is directed at immovable property used as the family home. With regard to mortgage enforcement proceedings and their compatibility with directive 93/13/EC on Unfair Terms in Consumer Contracts, see also: Case C-415/11 *Mohamed Aziz v Caixa d’Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* (European Court of Justice First Chamber 14 March 2013), available at [www.eur-lex.europa.eu](http://www.eur-lex.europa.eu); Case C-169/14 *Juan Carlos Sánchez Morcillo and María del Carmen Abril García v Banco Bilbao Vizcaya Argentaria SA.* (European Court of Justice First Chamber 17 July 2014), available at [www.eur-lex.europa.eu](http://www.eur-lex.europa.eu). In recent literature, see: A. Las Casas, M.R. Maugeri and S. Pagliantini, ‘Cases: ECJ – Recent Trends of the ECJ on Consumer Protection: *Aziz* and *Constructora Principado*’ 10(3) *European Review of Contract Law*, 444-465 (2014); K. Sein and K. Lilleholt, ‘Enforcement of Security Rights in Residential Immovable Property and Consumer Protection: An Assessment of Estonian and Norwegian Law’ 1(1) *Oslo Law Review*, 20-46 (2014); S.I. Sánchez, ‘Unfair Terms in Mortgage Loans and Protection of Housing in Times of Economic Crisis: *Aziz v. Catalunyaacaixa*’ 51(3) *Common Market Law Review*, 955-974 (2014).

<sup>57</sup> For such evocative remarks, see M. Foscarinis, ‘Advocating for the Human Right to Housing: Notes from the United States’ 30(3) *New York University Review of Law and Social Change*, 447-481, 458-460 (2006), who quotes the Committee on Economic, Social and Cultural Rights (CESCR), the UN body responsible for monitoring and interpreting the ICESCR. The Committee has incorporated the concept of adequacy into the right to housing, and it defined the right to adequate housing to include seven components: legal security of tenure; availability of services, materials, facilities, and infrastructure; affordability; habitability; accessibility; location; and cultural adequacy. Cf also: Id, ‘The Growth for a Movement for a Human Right to Housing in the United States’ 20 *Harvard Human Rights Journal*, 35-40 (2007). The concept of adequacy related to housing is also stressed in the ECHR case law, in which the right to housing is seen through the concept of ‘home’ rather than ‘property’, attaching a human dimension to the right:



## VI. Conclusions: A New Approach to Citizenship Theories

Once 'personal' ownership is recognized as an inviolable right, which, as such, is secured to any foreigner, regardless of reciprocity, property theory may also suggest intriguing solutions to the long-standing dispute between citizenship theories, providing a reasonable third alternative to the traditional, yet anachronistic, principles of citizenship acquisition: *ius soli* (by birth on the territory) and *ius sanguinis* (by birth to a citizen parent).

In fact, if, in the area of private ownership, an individual may gain ownership of property by continuous, peaceable, public possession for a certain period of time (the so-called acquisitive prescription), then a similar rationale might apply to established foreigners seeking citizenship: a State-dispensed, rather than a private, good, which has increasingly become a new kind of property, as it grants securities and opportunities. The acquisition of citizenship should not rely on the moment of the foreigner's entry into the country – which might even be unlawful – but on the life thereafter. Just like someone who has possessed a property without permission might acquire legal title to it under certain circumstances, a foreigner who has entered the country, with or without permission, and has resided in it peacefully and continuously, might acquire a legal title to citizenship. This way, citizenship will not be seen as an act of charity or human compassion, but as a legal title stemming from a continuous, peaceful and actual presence of the foreigner in the State's territory.

It is a new approach, emphasizing the importance of rootedness in the citizenship acquisition process and allowing those who are not eligible for citizenship, because they were not born to citizens or in the State's territory, to become citizens after establishing real and effective ties with the community and not by accidents of fortune.

A. Kucs et al, n 54 above, 111. With regard to the debate on the right to housing in the US, see: F.I. Michelman, 'The Advent of a Right to Housing: A Current Appraisal' 5(2) *Harvard Civil Rights-Civil Liberties Review*, 207-226 (1970); N. Rotunno, 'State Constitutional Social Welfare Provisions and the Right to Housing' 1 *Hofstra Law & Policy Symposium*, 111-148 (1996); K.D. Adams, 'Do We Need a Right to Housing?' 9(2) *Nevada Law Journal*, 275-324 (2008-09); C.P. Derricotte, 'Poverty and Property in the United States: A Primer on the Economic Impact of Housing Discrimination and the Importance of a U.S. Right to Housing' 40(3) *Howard Law Journal*, 689-708 (1996-97).

This new principle of citizenship acquisition, which we shall call *ius nexi*, could operate alongside *ius soli* and *ius sanguinis* to correct their inequalities, especially when a foreigner who is rooted in a country, working regularly and owning a home or a place of business, is denied the exercise of the rights connected to the *status civitatis*, eventually becoming an outcast from the community.<sup>58</sup>

This perspective fully complies with the protection of the *persona*, social solidarity, effective equality and integration within the community, which are pursued by Italy, the EU and international organizations.

<sup>58</sup> The interaction between property and citizenship, and the development of the *ius nexi* principle, have been brilliantly suggested by A. Shachar, 'Earned Citizenship: Property Lessons for Immigration Reform' 23(1) *Yale Journal of Law and the Humanities*, 110-158 (2011). For a criticism of the principle of *ius nexi*, see V.M. Muniz-Fraticelli, 'What Justice Entails' 7(2) *The Ethics Forum (Les Ateliers de l'éthique)*, 18-33 (2012). Cf also: R. Bauböck, 'Boundaries and Birthright: Bosniak's and Shachar's Critiques of Liberal Citizenship' 9(1) *Issues in Legal Scholarship*, 1-19 (2011); S. Benhabib, 'Birthright Citizenship, Immigration, and Global Poverty' 63(3) *University of Toronto Law Journal*, 496-510 (2013); P. Weil, 'From Conditional to Secured and Sovereign: The New Strategic Link Between the Citizen and the Nation-state in a Globalized World' 9(3-4) *International Journal of Constitutional Law*, 615-635 (2011); A.B. Tirres, 'Property Outliers: Non-Citizens, Property Rights and State Power' 27(1) *Georgetown Immigration Law Journal*, 77-134 (2012); J. Lim, 'Immigration, Asylum, and Citizenship: A More Holistic Approach' 101(4) *California Law Review*, 1013-1078 (2013); K. Johnson, 'Theories of Immigration Law' 46(4) *Arizona State Law Journal*, 1211-1252 (2014); E. Zoller, 'Citizenship After the Conservative Movement' 20(1) *Indiana Journal of Global Legal Studies*, 279-312 (2013).