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PROPERTY LAW IN EUROPE - A COMPARATIVE STUDY OF NATIONAL LAW AND THE LAW OF THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS/LE DROIT DE PROPRIÉTÉ EN EUROPE - ÉTUDE COMPARATIVE DE DROIT INTERNE ET DU DROIT DE LA CEDH

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Chapter 1: Introduction

1. Objectives and Research Methodology

All national legal orders of the Council of Europe member states have adopted and exercise a certain conception of the constitutional guarantee of property, the normative standard of protection of which is set down, primarily, in addition to other international instruments, by the European Convention on Human Rights and its unique control mechanism reflecting the values of civilisation and democracy. The common standard of protection of property in Europe has proved to be opportune on account of different connotations of the notion of property in different cultures and legal systems, as there is, commonly, the lack of a generally accepted account of what property is, which, inevitably, leads to heterogenous degrees of protection across the continent.

In general terms, the thesis deals with the protection of private property in the law and practice of the European Convention on Human Rights, and in Czech and French constitutional law and practice. It provides a comparative inquiry into the scope of the respective property protection clauses and their judicial interpretation with a view to extracting convergent and divergent elements of the normative and jurisprudential approaches to the protection of private property as a human right. The main focus of the inquiry is to examine and compare the treatment of property in the European Convention on Human Rights and in the constitutional law of France and the Czech Republic. Why France and the Czech Republic? The choice of these countries as reference legal systems was foremost inspired by their different constitutional history, as well as by different political and legal developments in these countries over the past century which have marked, to a certain extent, their current distinct conceptions of the constitutional property guarantee and a different evolution and degree of the willingness of the respective constitutional jurisdictions to implement and be influenced by the case-law of the European Court of Human Rights. Furthermore, the Czech and the French constitutional jurisdictions differ in their approach to the status of the European Convention on Human Rights within the aggregate of norms of reference in the control of the constitutionality of laws. The two countries also have different systems of constitutional justice. The intention was to juxtapose two countries, out of which one has experienced a totalitarian regime and the other has preserved the continuous presence of the rule of law, and which would, accordingly, offer a suitable testing ground for a comparative enquiry. The choice of these two countries was not random but it reflected the author's

theoretical and practical experience with the Czech legal system and her inspiration by the established long-standing French legal tradition as regards the respect for fundamental rights, namely the underpinning of the private property guarantee in the Declaration of 1789.

The general objective of this work is to ascertain to what extent the constitutional protection of property in France and in the Czech Republic is in harmony with the property protection standards laid down by the European Convention on Human Rights and the Convention organs. In concrete terms, the work aims at establishing and comparing how the European Court of Human Rights, on the one hand, and the Czech and the French constitutional jurisdictions in their respective constitutional orders, on the other hand, conceive and interpret the property guarantee, set in a historical, philosophical and theoretical background, and at exposing and comparing the conditions under which they allow interferences with private property. For this purpose the specific provisions on property of the constitutions under scrutiny and their interpretation are analysed and confronted with the property safeguard in the Convention and its interpretation by the European Court of Human Rights. The investigation comprises a general inquiry into the extent to which the national constitutional jurisdictions under scrutiny implement the case-law of the European Court of Human Rights and reflect its jurisprudence in their decision-making. The purpose of this general outline is to look at the extent to which the constitutional bodies strive for harmony with the practice of the European Court of Human Rights and at the means they have at their disposal for this purpose.

As the scope and contents of property rights is dependent on the needs of society, the specific aim consists of a comparison of the extent to which property as a social function is embodied in the law and practice of the Convention and the national constitutions under scrutiny, on the background of the theory of rights, philosophical developments, and the justificatory criteria of interferences with the right of property and their judicial interpretation. In this regard it will be of specific interest to examine and compare the conditions under which private property rights can be limited by the interference of public authorities in pursuance of the public interest, and the judicial approaches to the balancing of the interests of the individual and the interests of society. As regards the method of approach to this comparative analysis, the point of departure is the standard of protection under the Convention system against which the respective constitutional protections will be scrutinised.

2. Scope of the Research

This work revolves around four essential general axes: the meaning and scope of property guarantees in the European Convention on Human Rights and in the Czech and the French Constitutions (I.); their interpretation by the European Court of Human Rights and the respective constitutional jurisdictions (II.); the justificatory criteria of interference with the right of property and their judicial interpretation (III.); and the constitutional approaches to the implementation of the law and practice of the Convention (IV.).

I.

For the purpose of grasping the meaning and scope of the conceptions of the property protection guarantee in question, the latter are placed in a wider philosophical, historical and theoretical context. The specific contribution of the research rests on a claim that the contemporary concepts of the property guarantee in the legal orders under scrutiny have been moulded out of liberal roots and influenced in scope by the evolution of the values of liberty and equality promoted by the changing social and economic experience and by political exigencies, so that the veil of protection of property as a sphere of individual autonomy has gradually been pierced on behalf of general social ends causing its curtailment. Hence, the conventional and the constitutional property guarantees are not static concepts but ever-evolving ones dependent upon the economic, political, and social progress of society. It is to show that this pivotal thesis is reflected across the four essential axes this work deals with - property as a social function influences the scope of the conventional and constitutional property guarantees which is dependent upon the judicial interpretation of permissible interference with property and on the level of interaction of the constitutional jurisdictions with the European Court of Human Rights as a standard-setting international judicial body.

II.

It is the judicial interpretation which serves as a tangible tool for forging the scope of the property guarantee, under which property as a sphere of autonomy of individuals has been receding in favour of the satisfaction of social needs while being safeguarded against arbitrary interferences. What is essential is to find a balance between the preservation of individual autonomy and the promotion of social welfare, which is, foremost, a judge's task. On the background of Hayek's famous line that "such states as "ownership" have no significance except through the rules of conduct which refer to them; leave out those rules of just conduct

which refer to ownership, and nothing remains of it"[1], it can be argued that the quest for this balance on the basis of the rules of conduct is necessary to preserve individual freedom. Freedom is not meant as an absolute freedom, for freedom is always a social relation entailing limitations. That individual freedom and property are interconnected social categories is demonstrated by the Czech experience with socialist property under socialist constitutions marked, in Hayek's terms, by the loss of the significance of private property, and which is, thus, an example of the loss of property freedom where the "common" is given absolute sway. As a consequence, the Czech experience with the absence of "rules of conduct" illustrates that the protection of human rights on a pan-European level is beneficial. It suggests the importantance of maintaining a standard of protection of property and, thus, a certain level of proprietary and personal freedom.

III.

Property, as a human right, has a twofold effect. It maintains human dignity and preserves solidarity, while promoting individualism, for, being associated with classical liberalism, it implies a correlative duty on the part of all individuals, particularly the state, not to interfere with individual autonomy. It is precisely this double function that must be balanced. To this end, it is necessary to interpret property guarantee in such a way that a disbalance between the preservation of individual autonomy and the promotion of social welfare is not produced to avoid little of the guarantee remaining, or, that the "loss of the rules of conduct" is attained. Therefore, one of the questions to which an answer will be sought is to what extent the constitutional jurisdictions under scrutiny interpret the respective constitutional property guarantees in keeping with the standards set down by the Convention and the interpretative practice of the European Court of Human Rights. To what extent are they following the common European "rules of conduct" that preserve our sphere of liberty?

IV.

To set the findings of the analysis in a global context, within which the individual actors operate, the thesis also deals with the principles and means of interaction between the national constitutional jurisdictions and the European Court of Human Rights from a general perspective. As the extent to which the national constitutional courts implement and strive for harmony with the case-law of the European Court of Human Rights varies depending on the

[1]F. A. Hayek, "Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy", Routledge, London, 2012, p. 242.

status of the Convention within the particular legal order and the system of constitutional protection of fundamental rights and freedoms, it further examines the status accorded to the Convention by the respective legal orders, and the relevance of the Convention and the case-law of the European Court of Human Rights in the practice of the respective constitutional jurisdictions.

3. Remarks on Terminology

The issue of property raises challenges which are specific of this field, and which are aggravated by the circumstances that this work is written in English, but deals with French and Czech laws, and with the protection mechanism on a European level. The major problem is the fact that, in respect of property, continental and common law do not use the same terminology. The meaning of the terms *property* and *ownership* is often confusing. In English law the term *property* significantly differs from the continental understanding of *ownership* in that it has more connotations. It signifies the objects of property in terms of things, as well as property as a subjective right in which sense it applies only to real property. The English legal terminology, rather than *ownership*, uses the term *full interest* which, as a term, does not have an equivalent in continental legal language.

For the purposes of the thesis, I have opted for the term *property* or *right of property* for several reasons. I take into account the fact that this terminology corresponds to the French expression *propriété* and that it is used by the European Court of Human Rights. I have also considered that English language scholars have settled on the terms *property* or *right of property* and use them to express *ownership* within the continental law sense of the word. The term *ownership* is used sparingly and mainly in relation to the Czech constitutional law and practice. The reason for this is to express exactly the terminology used in the Czech legal language, which strictly differentiates between ownership (*vlastnictví*) in the sense of subjective rights and property (*majetek*) in the sense of objects of ownership.

To reconcile this double Czech terminology, on the one hand, and the French expression *propriété*, which can mean *ownership* as well as *property* as objects, on the other hand, I have opted for the most widely used terms *property* and *right of property*, which also resemble, from both the linguistic and semantic point of view, the French expression *propriété*.

4. Structure of Thesis

The subject-matter of the thesis is dealt with in four chapters. Chapter Two looks at the philosophical and theoretical foundations and the basic concepts of property. It examines and compares the principal ideas that inspired the property safeguards in the European Convention on Human Rights and in the Czech and the French Constitutions, their evolution towards the social function of property, and property from the perspective of rights. An excursus into the history of property protection is undertaken with the view to providing insight into the background of the constitutional protection of property in France and the Czech Republic and into the foundations of the property guarantee on a European level. Unlike in France, the constitutional protection of property in the Czech Republic has gone through many underlying changes resulting from the change in political regimes that stood behind the rupture of continuity in the constitutional protection of property. Some major aspects of the constitutional developments are outlined which might have had some implicit or explicit impact on the current protection of property in the countries being examined. The historical background allows to understand the differences in the formal underpinning and the material scope of the constitutional protection of property in France and in the Czech Republic.

It is further submitted that property serves two essential functions - the preservation of the sphere of liberty of an individual and the advancement of the public good - both of which are reflected in the concept of property as a subjective public right. This double function of property is also expressed in Hohfeld's theory of rights comprising a series of legal relations both between the owner and a thing, and, between the owner and other persons through a thing involving limitations or duties arising from property. Equality, as one of the key values in the Czech and the French Constitutions and a limiting factor for private property, is closely connected to the positive conception of liberty promoting collective action for the realisation of personal goals, that is, property as a social function. Consequently, the conventional and constitutional protection of property, inevitably, entail a balancing of competing public and private interests at stake. This chapter shows the importance of the philosophical and theoretical underpinnings which influence and form the groundwork for the course of judicial action when interpreting the property guarantee. It also examines whether states can also be responsible for the actions of private individuals.

Chapter Three examines the historical background and political strands which affected the formation of property guarantees in the European Convention on Human Rights and in the Czech and the French Constitutions. It looks at the nature of the property guarantees under scrutiny and examines the extent of the concept of "possessions" and its interpretation under the Convention while comparing it with the scope of the notion of property in the respective national constitutions and its intepretation by the constitutional jurisdictions. It also draws a comparison between the individual constitutional approaches.

Chapter Four concerns the limitations and deprivations of property which are allowed by the Convention and the respective constitutions. The conclusions drawn from the text of this chapter serve to analyze the influence of the case-law of the European Court of Human Rights on the national constitutional systems of property protection. The question is to what extent within the conventional and constitutional limits can private property be interfered with by public authorities. How far, and on what grounds, can property be interfered with by state authorities? What are the criteria when justifying interference with property guarantees? What similarities and differences can be found with respect to the justificatory criteria of interference with the right of property and their judicial interpretation? What is the degree of influence of the interpretative practice of the European Court of Human Rights on Czech and French constitutional decision-making in respect of the justificatory criteria? The conditions of interference with property that are permissible under the Convention and the respective constitutions are examined and compared. In this regard the jurisprudence of the European Court of Human Rights and the respective constitutional jurisdictions is evaluated and compared.

Chapter Five provides an outline of the constitutional approaches to implementation of the law and practice of the Convention. From a general point of view it looks at the principles of interaction between the European Court of Human Rights and national courts, and at the issue of the interpretation of the Convention by the European Court of Human Rights and national courts. It further deals with the status of the Convention in Czech and French constitutional orders, and the relevance of the Convention and the case-law of the European Court of Human Rights in the practice of Czech and French constitutional bodies.

Chapter 2: Foundations: Philosophy and Legal Theory

1. Philosophy

1.1. Principal Ideas that Inspired the French and Czech Property Conception

The origins of the concept of property date back to Roman law when property referred exclusively to private property (*dominium*) characterized as exclusive, sovereign and perpetual power over things, later qualified by the Glossators and Post-Glosators as *ius* or subjective entitlements comprising *ius utendi* (the right or power to use a thing), *ius fruendi* (the right or power to reap fruits or profits), *ius possidendi* (the right or power to possess a thing), *ius disponendi* (the right or power to dispose of a thing) and *ius abutendi* (the right or power to consume a thing). The right to use in Roman law was a separate property right which was distinct from "regular" ownership of *res mancipi*, which represented full sovereignty over a thing, the only form of property which entailed the principle of a free disposition of property, and which represented power over a thing. Later on, in the feudal era, the concept of the right of property as a sovereign power over a thing becomes disintegrated. Ownership and the right to use are interchangeable and the term "property" takes on the meaning of "a legitimate right to derive profits". In other words, one did not have to be the owner to be entitled to draw profits from a thing. Hence, the feudal notion of property expressed a single property regime consisting of the right to draw profits and enabling simultaneous property rights to a thing. At a later point in time such simultaneous rights split into two distinct types of property regimes: "eminent property" (*propriété éminente/domaine éminent*), property, in a narrow sense, comprising the title and the right to abuse (*abusus*), and "useful property" (*propriété utile*) comprising the right to use. So, over time the Roman concept of property was gradually molded under the operation of various philosophical streams, including the influence of the Judeo-Christian religion, shaping the socio-cultural and legal diversity in Europe. Liberalism was one of the most influential philosophical thoughts in post-Roman Europe and was particularly strong during the Enlightenment. It can be claimed that liberalism is still a dominant political philosophy in modern times.

The current constitutional concept of property in France and in the Czech Republic, as well as the property protection clause under the European Convention on Human Rights, were primarily influenced by the liberalist theory of natural law as developed by its chief proponent John Locke. It provides for the justification of private property as a natural right which

existed prior to the state and law. John Locke, the late-seventeenth-century English philosopher, claimed that because everyone possesses the capacity to work, all have a right to the property created when their labour is mixed with that what land can offer. From this thesis it can be perceived that the principle of liberalism respects both individualism and equality. As no one can legitimately take away what naturally belongs to man, nor can man take it away from anyone else, the core values of liberalism are freedom and equality: human beings should have the freedom and responsibility to realize their full potential and should hold a significant degree of control over their personal livelihood and the direction their lives take. But liberalism's core commitment to individual autonomy does not mean that it does not accept the existence of organised society bestowed with authority. On the contrary, a society in which individuals voluntarily and consensually organise on the basis of a social contract to guarantee sufficient economic security should promote the autonomy of individuals by securing their rights. Without such individual rights men would find themselves either in absolute monarchy or in some kind of utopian socialism.

At the time of the drafting of the fundamental law documents currently in force, in 1789 and in the 1990's in France and the Czech Republic respectively, dependency was fostered by legacies of feudal absolutism and communist socialism, respectively, which made individuals subordinate to the power-holders. Therefore, liberty and equality figure as the leading fundamental values in both the French Declaration of the Rights of Man and of the Citizen (hereinafter "the Declaration") and the Czech Charter of Fundamental Rights and Freedoms (hereinafter "the Charter") the drafting of which was largely inspired, in addition to other documents, by the French Declaration. From a historical point of view concerning the incorporation of fundamental rights and freedoms in the constitutional texts, the first Czech (Austrian) constitutions of the nineteenth century experienced certain tardiness in relation to the eighteenth century French Declaration, regardless of the long-lasting doctrinal controversies about the constitutional value of the Declaration.

1.1.1. Principles of Locke's Natural Law Theory as the Underlying Philosophical Rationale of the Fundamental Right of Property

The most influential natural law theory justifying private property was developed by John Locke who elaborated a powerful version of the idea that people can acquire property rights in objects independently of state power and the legal system. Locke’s account continues to be

important because of its influence on the modern philosophical understanding of property. The founding principles of his theoretical account are found in the background of property protection clauses of the fundamental law documents under scrutiny. Locke justifies private property as a subjective claim right which is protected and guaranteed by the state, and which entails duties vis-à-vis society.

1.1.1.1. Everyone's Right to Property

Locke justifies private property on the basis of labour on resources. He maintains that property in the state of nature is not a private dominion but a right common to all mankind. Locke's natural property is therefore a subjective right of use which was granted to men by God. It is a right possessed by all men in common, so it is a common right of use, not a right to the common use. It is not private property but a natural and equal right of men to use whatever resources necessary to satisfy their needs for survival, which generates a duty of others to make those resources available, provided that they are surplus for another. In my understanding, Locke's right of property is a claim right generating the duty of others to let it be exercised by its holder, but not in the sense of others being excluded from its exercise as is the case of private property. Hence, it is not an exclusive right but an inclusive one - others have the duty to include the holder of this right in the use of the common property. James Tully calls this right expressively as "a right to one's *due* rather that to one's *own*"[2]. The end of the right of use is the continued subsistence of men which is expressed by the natural right of "the preservation of Mankind", as well as by the natural right of each man to his preservation, as "men, being once born, have a right to their Preservation". These natural rights serve as the foundation for the natural right of common property and justify the natural right of each man to the means necessary for his preservation. In my mind, this line of thought is reflected in the fundamental property protection clauses by the guarantee that everyone has the right to property, or that property is "inviolable and sacred", whereof the principle of equality of men in respect of the right to acquire property is also apparent.

Locke submits a state of nature where human beings endowed with reason co-exist as free and equal creatures with no relations of authority or subordination. Each of these persons enjoys property in his own person and this right imposes correlative duties on others. Secure ownership of our bodies being insufficient for survival and flourishing, Locke further argues

[2] J. Tully, "A discourse on property – John Locke and his adversaries", Cambridge University Press, 1980, p. 61.

that people can come to have property rights in the earth, even though the initial moral state was the one of common ownership. Individuals can come to acquire rights in what was previously common property by mixing their labour with it. Hence, private property is created on the basis of self-ownership and mixing one's labour with common resources. Through labour the labourer acquires a natural property right to the resource on which he has laboured, for the resource contains something which the labourer owns.

1.1.1.2. Equality as a Limiting Factor for Private Property

Nevertheless, the amount of private property appropriated in such a way is not unrestricted and, thus, comes the second phase of Locke's account which involves individuals' exchanging surplus goods they have appropriated with one another. Locke advances the idea that privatization could be justified so long as the condition of third parties is not worsened by it. This appears to offer a strong justification for private property rights. The appropriation of property from a common ownership of resources is justified as long as the "Lockean proviso" is met, that is, as long as a person appropriating property leaves "enough and as good" for others and does not appropriate so much that goods waste or spoil[3]. The right of subsistence presumably motivated Locke's endorsement of private property, although he acknowledges that the thesis of common ownership is intricate for justification of private property[4]. Some scholars have criticized the common ownership thesis on the ground that the use of property could not have been made without the consent of humankind[5]. Locke's reply and his development of an account of justified private appropriation draw on individuals' natural rights of self-preservation and on the idea that the grant of common ownership should be meaningful[6]. The cornerstone of his argument is the right of self-preservation. He argues that if such a consent as this was necessary, man had been starving, notwithstanding the plenty

[3]J. Locke, "Two Treatises of Government", Cambridge University Press, Cambridge, 1994, at II. 32. Locke identifies two limitations on private property – the 'spoliation proviso' and the 'sufficiency limitation'. The latter requires that an individual who labours must leave behind enough resources for others to appropriate as the function of property is the satisfaction of human needs and subsistence. Under the principle of 'spoliation proviso' if the labourer does not use resources he acquired as private property, they become common again as any surplus in resources which are not used for one's own survival must be given out to those in need.

[4]J. Locke, "Two Treatises of Government", Cambridge University Press, Cambridge, 1994, at II.25: "God, who hath given the world to men in common. The earth and all that is therein is given to men for the support and comfort of their being. And though nobody has originally a private dominion exclusive of the rest of mankind … there must of necessity be a means to appropriate that another can no longer have any right to it".

[5]See R. Filmer, "The Original of Government", in R. Filmer, "Patriarcha and other Writings", (ed.) Johann P. Sommerville, New York: Cambridge University Press, 1991, p. 234; see also A. Ryan, "Property and Political Theory", New York: B. Blackwell, 1984, pp. 16-17.

[6]S. V. Shiffrin, "Lockean Arguments for Private Intellectual Property", in *New Essays in the Legal and Political Theory of Property*, ed. by S. R. Munzer, Cambridge University Press, 2001, p. 145.

God had given him, and that the taking of this or that part does not depend on the express consent of all the commoners[7], as the taking of any part out of the state of nature establishes property without which "the common is of no use"[8]. So, private property is justified for those parts of the common, the use of which requires exclusive possession.

Accordingly, the criteria governing individual appropriation is self-ownership, labour and spoilage[9]. Locke accentuates labour for bringing out the value of a thing and making it useful. The "enough and as good" and waste conditions of the Lockean proviso serve to limit appropriation - any appropriation must respect the equal claims of all people to the means of subsistence and to the common. These criteria ensure that appropriation does not disadvantage the equal rights of others to appropriate some goods and that the common shall be of fruitful use. Consequently, Locke endorses the private appropriation of things beyond what is necessary to subsist, provided that exclusive use of such things is necessary for their fully effective use. This is an argument for privatizing more out of common than is necessary for subsistence. The nature of the property and the conditions of its full and effective use justify its removal from common ownership and render it susceptible to private appropriation. Although Locke speaks about appropriation which is limited by the equal claims of others, in my opinion, this thesis can be equally applied to already established property relations where exercising property rights is limited by the rights of others. This means that duties are intrinsic to property rights.

Consequently, the Lockean theory of property stands on the basis that men have a duty to satisfy others' needs and that this duty correlates with the rights of the needy. In other words, Locke is against the idea that any owner has an absolute right to his property. This is, apparently, a rudimentary philosophical idea behind the modern conception of property as a social function. From this account it is evident that property as a right is intrinsically restricted not only by the rights of others, but also by their pressing existential or social needs. The ideological foundation for the social function of property in modern fundamental law documents is, thus, manifest.

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[7]Locke at II. 27.

[8]Locke at II.27: "It is the taking any part of what is common, and removing it out of the state Nature leaves it in, which begins the property; without which the common is of no use".

[9]Locke at II. 26:"Every man has a "property" in his own "person". The "labour" of his body and the "work" of his hands are properly his. Whatsoever, then, he removes out of the state that Nature hath provided and left it in, he hath mixed his labour with it, and joined to it something that is his own, and thereby makes it his property. For this "labour" being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good left in common for others".

1.1.1.3. Civil Society as the Guarantor of Private Property

The weakest aspect of the Lockean theory is the absence of certainty and security. As opposed to civil society, property in the state of nature, in the absence of positive rules both material and procedural, cannot be clearly determined. Moreover, property in the state of nature is short of its essential prerequisite - a legitimate expectation that what is mine will be respected as mine by others. This is the reason why men were willing to move from a natural to a civil society, that is, to shift from a state of society which is governed by moral principles to a more sophisticated society governed by laws where property is a precisely delimited legal conception. This leads to the third and final stage of Locke's account which is the institution of government protecting property rights.

The primary idea concerning the place of private property in a civil society is that the government has a duty to respect existing property rights and cannot take from a person his property without his consent; this includes taxation which is invalid without consent. Private property rights are natural rights which are not vested in men by society, by virtue of its legal rules, but which are created and exist independently of any society and its legal and political structure, and which are acquired through the actions and transactions of men. According to this line of argument, natural rights lie above the state and legal systems. The rights are natural not in the sense that everybody was born with them, but rather because they were acquired by means of natural and moral conduct of man, and state power shall not be exerted beyond the boundaries of what is necessary to protect those rights. This prohibition of undue interferences finds its projection in the Preambles of both the French and the Czech Constitution. Locke maintains that whenever the state endeavours to take away property rights from man without his consent, he has the ultimate right to enforce the law. From this argumentation implies the imperative that property in a society governed by laws must be protected, and that, although the state cannot deliberately interfere with or take the property, the possibility to take it away is not totally excluded, provided that consent is given, or, in other words, provided that the law is observed. As J. Waldron puts it, the ownership of particular resources, even socially significant resources, is among the rights which define and limit the space available for governments to act[10]. This is the purpose of the fundamental property protection clauses.

[10]J. Waldron, "The Right to Private Property", Clarendon Press, Oxford, 1990, p. 138.

This outline of Locke's theory predicates the essence of fundamental property protection clauses today. If we take a look at such clauses in the French Declaration, the Czech Charter, or the European Convention on Human Rights, their ideological substance is consonant with the major ideas of Locke's account. That is, they provide for: a) the right of property for everyone on an equal basis; b) the obligation of the government to protect property; c) the obligation of the government not to take away property save under exceptional and strictly defined conditions; d) the conditions under which property may be limited or taken away.

1.1.2. Natural Law as the Leading Source of Inspiration for the Declaration of the Rights of Man and of the Citizen

With the emergence of the first modern written constitutions in the late eighteenth century, the right of property figured amongst fundamental constitutional rights. A significant influence on the recognition of property as a fundamental right shaped the philosophical thinking not only of Locke, but also of Grotius, Pufendorf, and Rousseau, outstanding theoreticians of that time and pioneers of the modern natural rights theory. In France the constitutional right of property emerged in the first modern constitutional charter of rights, the Declaration of the Rights of Man and Citizen of 1789. Although the authors of the Declaration inspired themselves primarily by the teachings of Locke and Rousseau, they did not agree on the essential nature of the right of property. Is it a natural and pre-political right or is it a conventional right? Does it entail social responsibilities or is it exclusively an individual right? The revolutionaries were preoccupied with the idea of the foundation of the right of property, whether it is a natural, or positive, right, as well as by the scope of the power of the rulers. Public opinion was diverse. Many people defended the right of property in Lockean terms as a natural right; others insisted that it was purely a social and conventional right. The divergent views reflected the social polarization of French society – widespread economic disparities and often violent political agitation by groups with no property led to the emergence of a range of views on the right of property. Nevertheless, the French revolutionaries, in general, regarded the right of property as fundamental to republican institutions; hence, its rather abstract and aspirational formulation in the Declaration.

In view of the fact that the drafting of the Declaration was accompanied by the ambivalence between natural and positive law, some scholars note that from this primordial tension between these two irreducible poles emerges a sentiment veiled by opacity which sometimes

constrains the recognition that the system is not free from contradictions[11]. One such example may be Article 2 of the Declaration which reads that: "The aim of every political association is the preservation of the natural and imprescriptible rights of Man. These rights are Liberty, Property, Safety and Resistance to Oppression." This provision seems to make, from the preservation of natural rights, an object of politics, which may also be taken as an attestation of the volition of the revolutionaries to transform natural rights into positive ones. In this context P. Wachsmann notes that only those natural rights constitute positive law which the positive law accepts to recognize[12]. It could also be argued that Locke was to some extent a utilitarist[13], for he envisioned the positive role to be played by the government and law in advancing and protecting one's economic and personal well-being while reflecting the interests of the individual. So, although the Declaration can be regarded primarily as a natural law source, the discussion as to its full-blooded naturalist character is open to interpretation.

Be that as it may, the philosophical and legal debate that formed the background for the emergence of the constitutional right of property comprises a modern theory of natural rights and the social contract. One of the objectives of the flourishing natural law theories was to find a theoretical basis of property which would help to curtail the absolutist authority of the king and to impose a new social and legal system, as one of the major objectives of the Revolution was to change the property order of the feudal Ancient Regime. It was necessary to divide and multiply property, dismantle excessive wealth, and facilitate the transfer of property[14]. Property was the major driving force. As G. Romieu puts it, whatever the great names: liberty, equality, fraternity which the Revolution uses as decoration, it is in essence a translation of property; in this consists its intrinsic support, its permanent force, its principal engine and its historical sense[15]. It implies that the framers of the Declaration designed it so as to provide protection to the right of property as a fundamental and natural right of all men, and as a paradigm for all other rights together with liberty, security and resistance to oppression. The major concern was the preservation of property for securing the survival, existence, and liberty of men.

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[11]P. Wachsmann, "Naturalisme et volontarisme dans la déclaration des droits de l'homme de 1789", in *Revue française de théorie juridique – Les droits de l'homme*, Vol. 2, 1985, p. 19.
[12]*Ibid.*, p. 17.
[13]Under utilitarian theory property is regarded as a positive right created by law to achieve social and economic objectives.
[14]G. Romieu, "La propriété, Ses Rapports avec l'État, la Société et l'Individu", Les Presses Universitaires de France, Paris, 1923, p. 121.
[15]*Ibid*., p. 115.

Locke's political philosophy attracted the French revolutionaries, in particular, his opposition to authoritarianism, his insistence on contract and consent as the basis of government, his assertion of the rights of individual citizen, and the formula of rights that he created[16]. So, from the perspective of the inspiration Locke's approach to property could have had on the authors of the Declaration, an important aspect is that the natural right to preserve oneself and others also serves one important purpose - its primary role is to justify resistance to arbitrary and absolute rule. In the words of Locke, men "will always have a right to preserve what they have not a power to part with, and to rid themselves of those who invade this fundamental, sacred, and unalterable law of self-preservation"[17], as in absolute monarchies there is a danger that the rulers "will think themselves to have a distinct interest from the rest of the community, and so will be apt to increase their own riches and power by taking what they think fit from the people"[18].

Besides Locke's account of property, another philosophical stream flourished in parallel that regarded the right of property as conventional and, thus, subject to regulation by society. This competing view was advocated by Rousseau and can be traced back to Plato and the Hellenistic philosophers. A convergent view was propounded by Grotius and Pufendorf who claimed that property was both natural and conventional, whereas, for Locke, property was conventional only in civil society and not in the state of nature. Unlike Grotius, Pufendorf, and Rousseau, Locke believed in the existence of property as a natural right and maintained that private property was prior to the claims of the state (public property). Unlike his contemporaries, Locke claimed that the right of property was inalienable and that the state could not interfere with it without the previous consent of the owner.

Rousseau, on the other hand, inspired the revolution by his ideas behind the *Social Contract.* The revolutionaries drew from the notion of the "general will" of citizens, which is central to Rousseau's theory of political legitimacy, and which is the foundation of laws that can only guarantee individual rights. Rousseau emphasizes that the general will, a result of deliberations of the collective, exists to protect individuals and is directed towards their common preservation and general well-being. He believed that freedom consisted of living under a law which one has oneself enacted and which safeguards everyone's freedom by

[16]P. Garnsey, "Thinking about Property – from Antiquity to the Age of Revolution", Cambridge University Press, Cambridge, 2007, p. 231.
[17] J. Locke, "The Second Treatise of Government", Barnes & Noble, Inc., 2004, p. 83.
[18]*Ibid*., p. 77.

protecting them from personal domination that would otherwise hold sway. Only by this social pact can men become equal. Rousseau's notion of general will was apparently transposed into Article 6 of the Declaration reading that: "The Law is the expression of the general will". His influence can also be seen in Article 3 of the Declaration:" The principle of any Sovereignty lies primarily in the Nation. No corporate body, no individual may exercise any authority that does not expressly emanate from it". As regards property, for Rousseau it is inherently a matter of social concern[19]. He maintains that the right of any individual over his own estate is always subordinate to the right of the community over everything[20]. It may be assumed that this expression found its reflection in the possibility, under Article 17 of the Declaration, to take away property if public necessity requires it.

Locke's and Rousseau's teachings were most influential during the drafting of the Declaration, for they best addressed the aspirations of the revolutionary period. In 1789, the constitutive National Assembly wanted to put an end to an absolutist regime whose abuses had become insupportable. The revolutionaries intended to change the social order by attacking royal absolutism by virtue of natural laws people had been deprived of. To this end, one of the purposes of the Declaration was to indicate "the fundamental principles which shall inspire the ulterior conduct of rulers"[21] and not the means and procedures necessary for their exercise.

The leading figure in the drafting of the Declaration was Abbé Sieyès who was clearly influenced by Locke and derived the right of property from the fundamental right of autonomy. Sieyès developed Lockean principles, among others by affirming that society is based on a social contract aimed at ensuring the good of its members by protecting their rights to their persons and their labour. Sieyès went further than Locke by recognizing a duty on the part of property owners to provide social assistance to the less fortunate by declaring that: "Every citizen who is incapable of providing for his own needs has the right to the assistance of his fellow citizens"[22]. This principle can be also found in the doctrine of necessity as elaborated by Grotius and Pufendorf. Although it was not adopted in the final version of the Declaration, it had great significance for many modern constitutions.

[19]"What man loses by the social contract is his natural liberty and the absolute right to anything that tempts him and that he can take; what he gains by the social contract is civil liberty and the legal right of property in what he possesses". J.-J. Rousseau, "The Social Contract", Penguin Books, 2004, pp. 20-21.
[20]*Ibid*., p. 24.
[21]J. Imbert, "Les droits de l'homme en France", la Documentation Française, N.E.D., no. 4781, 1985, pp. 10-11.
[22]S. Rials, "La Déclaration des droits de l'homme et du citoyen", Paris, Hachette, 1988, art. XXV.

Although the Lockean account of property was by no means universally embraced by the eighteenth-century revolutionaries, the authors of the Declaration adopted the Lockean notion of property as a natural, pre-political, and fundamental right which is the source of all other rights. The idea of private property under the natural law doctrine was conceived as a right which is protected by the social contract concluded by men who left the state of nature, and which is implemented by law. Therefrom ensues a rather abstract provision on property in the Declaration in which property is qualified as a natural right, that is, a right anterior and superior to the state, as a projection of being into the domaine of having[23].

The expressive influence of natural law on the concept of property is apparent upon reading a few passages of the Declaration. For instance, Article 2 of the Declaration describes the right of property as a "natural and imprescriptible" right[24], the Preamble to the Declaration denotes property as an "unalienable" right[25], and Article 17 of the Declaration refers to property as an "inviolable and sacred" right. The defined character of the right of property as a "natural, imprescriptible, inviolable, and sacred" right of man is a reflection of its origin in the abstract state of nature that was then transposed in a concrete order of political society governed by laws.

1.1.3. Leading Sources of Inspiration for the Charter of Fundamental Rights and Freedoms

From a historical perspective, the texts of constitutions on the territory of the Czech Republic have been influenced by natural law, Roman law, and legal positivism linked to the principle of sovereignty of statutes and the rule of law principle. These shaped the constitutional order, traditionally comprising both the Constitution and organic laws, from the times of the Austro-

[23]G. Conac, M. Debene, G. Teboul, "La déclaration des droits de l'homme et du citoyen de 1789", Economica, Paris, 1993, p. 347.

[24]Article 2 of the Declaration by proclaiming that the aim of every political association is the preservation of the natural and imprescriptible rights of man and that these rights are liberty, property, safety, and resistance to oppression expresses that a political organisation of society is conceived in order to permit natural rights of man to be developed and protected. The authors of the Declaration thus classified property in the same category as "liberty, safety and resistance to oppression" - all natural rights attributed only to individuals. Within political society, these rights are subjective rights that every citizen can invoke against the state. As they are inherent to the nature of man, they are "imprescriptible" and superior to positive law of society.

[25]"The representatives of the French People … have resolved to set forth, in a solemn Declaration, the natural, unalienable, and sacred rights of man". Under Article 4 "the exercise of the natural rights of every man has no bounds other than those that ensure to the other members of society the enjoyment of these same rights".

Hungarian monarchy to the end of the Second World War. The modern catalogue of fundamental rights and freedoms was incorporated into the constitutional order[26] only in 1991. Although the rights and duties of citizens were enshrined in the 1920 Constitution in the times of pre-World War II democratic Czechoslovakia, the subsequent Nazi and Communist regimes, ignoring the relevance of the codification of fundamental rights and freedoms, totally eliminated them from legal theory and practice[27]. As a result, Czech lawyers missed out on contemporary developments in the field of democratic human rights thinking[28].

The Charter was inspired by the constitutional tradition of pre-Second World War Czechoslovakia and it also drew on the constitutions of some European states and on international human rights treaties. The ideological foundations were further inspired by Greek philosophy (in respect of political rights and freedoms), Christianity (in respect of the principle of human dignity), natural law theory (in respect of the thesis that the state guarantees fundamental rights and freedoms, but does not create them) and liberal philosophy.

In the process of creating the constitutional order of the Czech Republic the liberalistic and individualistic conceptions that denied the incorporation of duties in the Charter dominated. The guarantee of only fundamental rights[29] in the Charter reflects the predominance of these conceptions which accentuate the freedom of an individual and reject any subordination of him as a duty subject to the supremacy of the state as the standard-setting subject. The relation between rights and duties in general is expressed in Article 4 para.1 of the Charter which stipulates that "duties may be imposed only on the basis, and within the bounds of law, and only while respecting the fundamental rights and freedoms". This provision applies, as well, to property and its limitations.

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[26]Apart from the Constitution of the Czech Republic, promulgated as Constitutional Act No. 1/1993, the constitutional order comprises the Charter of Fundamental Rights and Freedoms, promulgated as Constitutional Act No. 2/1993, and several other constitutional acts.

[27]This experience is recalled in the Preamble of the Charter of Fundamental Rights and Freedoms as follows: "Mindful of the bitter experience of periods when human rights and fundamental freedoms were suppressed in our homeland".

[28]Jiří Zemánek, "The Czech Human Rights Doctrine as Challenged by the EU Charter of Fundamenal Rights", in Jaap W. de Zwaan, Jan H. Jans, Steven Blockmans (eds). *The European Union: An Ongoing Process of Integration* (T. M. C. Asser Press 2004), p. 296.

[29]Rights and freedoms enshrined in the Charter can be divided into several groups in accordance with their historical and philosophical evolution. The first group is composed of traditional liberal freedoms that express the autonomy of man and his protection against interferences of the state. The second group represents political and civil rights which are connected with the citizen and his relationship to the state. The third group includes economic, social, and cultural rights.

The Charter indicates the adherence to the legacy of the French Declaration. The Preamble of the Charter clearly articulates it by "recognizing the inviolability of the natural rights of man, the rights of citizens, and the sovereignty of the law". From this proclamation it follows that the liberal conception of the rights of man was the most important source in the drafting of the Charter. The Preamble ranks the natural rights of man amongst the constitutional values. The emphasis put on the rights of citizens implies that the drafting of the Charter was also influenced by Rousseau's thoughts, while the recognition of the sovereignty of the law indicates positive law influences. The Charter reflects the value-orientation of the Czech constitutional order, as a whole, residing in the democratic legitimacy of the state power. The ideological centrepiece represents liberalism, pluralist democracy, and the respect of human rights. It is reflected in the principles of sovereignty of people, freedom, and equality embodied in the text of the Charter. Article 1, which reads that "all people are free and equal in their dignity and rights" and that "their fundamental rights and freedoms are inherent, inalienable, non-prescriptible, and irrepealable", clearly manifests the foundations on which the Charter is built. It implies that amongst the most important values the Charter ranges freedom[30] and equality in dignity and rights[31]. The equality in rights principle embraces equality before law, as well as equality in duties, which means that constitutionally guaranteed rights and freedoms are not unrestrainable and that people are equal not only as concerns the granting of rights, but also as concerns their limitations. Specific limitation clauses can be found in various provisions of the text of the Charter.

1.2. Principal Ideas Underlying the Property Guarantee under Article 1 of Protocol No. 1 to the European Convention on Human Rights

Throughout the preparatory works of Article 1 of Protocol 1 (hereinafter "P1-1") to the Convention two philosophical and political approaches can be detected. Firstly, the right of property was understood as a fundamental right which is based on the natural rights,

[30]The principle of freedom is elaborated in Article 2 para.3 as follows: "Everyone may do that which is not prohibited by law; and nobody may be compelled to do that which is not imposed upon him by law".

[31]The principle of equality in dignity and rights is particularly expressed by the prohibition of discrimination which is formulated as a general principle in Article 3 para.1 as follows: "Everyone is guaranteed the enjoyment of her fundamental rights and basic freedoms without regard to gender, race, colour of skin, language, faith and religion, political or other conviction, national or social origin, membership in a national or ethnic minority, property, birth, or other status". The principle of equality also appears in Article 4 which provides *inter alia* that "limitations may be placed upon the fundamental rights and freedoms only by law and under the conditions prescribed in the Charter of Fundamental Rights and Freedoms", and further that "any statutory limitation of fundamental rights and freedoms must apply in the same way to all cases which meet the specified conditions".

personality and political liberty theories. These theories can be seen in the arguments put forward, especially by the liberal and conservative members of the Consultative Assembly. Under this line of argument property was defended either as a natural right sanctioned by divine law, as a natural extension of personal freedom, as a guarantee of personal freedom and privacy, or as an extension of personality under the Hegelian personality understanding of property. Secondly, the right of property was understood as a positive right to obtain property (as a right *to* property), or as a social and economic right which should not be protected as a fundamental right. This stance was held by the socialist members of the Consultative Assembly.

When we consider the text of P1-1, it is clearly a projection of these two philosophical stances. The first sentence of the first paragraph expresses the fundamental nature of the right of property which represents the personal function of the right of property – "every natural or legal person is entitled to the peaceful enjoyment of his possessions". The personal function of property secures an area of freedom for the individual; property is closely connected with individual liberty. The idea of property and liberty being mutually intertwined constitutes the essence of the meaning of property in the liberal theory[32].

P1-1 also reflects that individuals are, at the same time, deeply enmeshed in social relations[33]. The social context of an individual's freedom results in the second aspect of the conventional property guarantee, the social function of property. The second sentence of the first paragraph and the second paragraph of P1-1 refer to the function of property to serve public good by acknowledging the power of states to interfere with property in the general, or public, interest.

The personal and the social aspects of property represent the core functions of constitutional property. It is, therefore, not surprising that they also form the ideological backbone of P1-1. Just as it holds for national legal systems protecting property through constitutional norms, the reach of the property guarantee under the Convention is influenced by these two conceptions. The personal function of property represents the freedom of an individual owner from external interferences with his property that is necessary for his self-realization, whereas

[32]The term "liberalism" is used here to refer to a very broad spectrum of political philosophies that prize individual liberty and equality of opportunity above everything else.

[33]For example, F. A. Hayek has expressed the advantages of an individual taking part in social relations in a free society as follows: "What a free society offers to the individualism much more than what he would be able to do if only he were free". F.A. Hayek, "The Constitution of Liberty", University of Chicago Press, 1960, p. 6.

the social function of property implies that the individual owner has obligations vis-à-vis society that has recognized his area of autonomy. This dual approach to property shows that individual rights are possible only in a well-ordered society which can come into being only when individuals have obligations to create it[34].

To conclude, it can be claimed that the philosophical conception of the right of property in the Convention is a projection of liberal political thought of the twentieth century, which is a blend of classical and social liberalism. P1-1 contains justification of private property of individuals (freedom from interference), as well as that of the welfare regulatory power of states (authorization of interference). It comprises seemingly contradictory norms that are, in fact, from the liberal philosophical stance, complementary to one another, as an individual owner's freedom cannot stand without a social and economic context and the "blessing" of society that, in turn, cannot be created and function otherwise but by the endeavour of individuals. The first sentence of P1-1 guarantees that an individual enjoys his personal freedom and autonomy with respect to his private property in that it protects property as a fundamental right. The rest of the provision recognizes the power of states to interfere with private property in the public, or general, interest and refers to the social (public) function of property.

1.3. Comparison, Influences, and Interactions (from Natural Law to the Social Function)

1.3.1. Liberty as the Key Value in the French Declaration and the Czech Charter

The natural law theory brought justification of private property based on the postulate that it is justified as an essential guarantee of liberty and an inherent right of every human being. It emphasized the subjective character of the right of property and placed it as a condition for man's survival and a means of satisfaction of man's needs. Nevertheless, it acknowledged that man must have his property protected for which a social contract was necessary.

The liaison between the preservation of property as the natural right of man and political association based on a social contract indicates that liberty of man is at the forefront of the

[34]A. R. Coban, "Protection of Property Rights within the European Convention on Human Rights", Ashgate, 2004, p. 138.

natural law theory since safeguarding of individual rights, as a means of realization of individual autonomy, is the end of the existence of state and society[35]. In classical liberal theory private property and liberty are intimately related. It is the aim of the government to assure the basic liberty and property rights of its citizens. Since the eighteenth century, classical liberals have maintained that private property is compatible with individual liberty, allowing individuals to live their lives as they see fit; some of them have even asserted that in some way liberty and property are the same thing, that all rights are forms of property, or that property is itself a form of freedom or an embodiment of freedom[36]. In addition, some liberalist thinkers argue that private property, or a free-market economy based on private property, is also the only effective means to protect the freedom of individuals against encroachments by the state[37].

In this respect, the Declaration lays down the fundamental principle of individual liberty, which is the prerequisite for the existence and the exercise of fundamental rights, by stipulating in Article 5 that "nothing that is not forbidden by law may be hindered, and no one may be compelled to do what the law does not ordain". Under the influence of the natural rights theory property is conceived as "private subjective rights"[38]. The Declaration stipulates that men have certain natural rights to property, to liberty and to life which shall be recognized and secured by the government. I presume that the idea of property expressed in the Declaration is that property permits liberty and vice versa[39], and that it protects against interventions of the public authority. By protecting the property of individuals the Declaration also protects liberty so that a citizen is assured of his liberty. The freedom of property guaranteed in the Declaration was constructed so as to protect the proprietors against state power and to constitute the foundations of liberal democracy. To establish that the power of

[35]In Locke's words men "join in society for the mutual preservation of their lives, liberties and estates – their property", for "the chief end of men uniting and putting themselves under government is the preservation of their property". Without a political organisation of society there cannot be any guarantee of the free enjoyment of property in view of the fact that the enjoyment of property in the state of nature was "very unsafe, very uncertain and constantly exposed to the invasion of others". J. Locke, "The Second Treatise of Government", Barnes & Noble, Inc., 2004, p. 67.

[36]For example, G. Gaus, "Property, Rights, and Freedom", in *Social Philosophy and Policy*, Vol. 11, 1994, p. 209; L. Robbins, "*The Theory of Economic Policy in English Classical Political Economy*", Macmillan, London, 1961, p. 104.

[37]F. A. Hayek, "Liberalism", in *New Studies in Philosophy, Politics, Economics and the History of Ideas*, Routledge and Kegan Paul, London, 1978, p. 149.

[38]S. Pavageau, "Le droit de propriété dans les jurisprudences supremes françaises, européennes et internationales", Université de Poitiers, 2006, p. 5.

[39]In 1789 property is perceived as liberty. It is the epoque when it is claimed that Americans are free, because they have property. G. Conac, M. Debene, G. Teboul, "La déclaration des droits de l'homme et du citoyen de 1789", Economica, Paris, 1993, p. 347.

the king ends at the point where property of individuals begins is a manifestation of liberty and independence.

Liberalism, which toppled the French Ancient Regime with a liberal order of legal equality and individual rights and freedoms, inspired by a natural law vision, was adopted also as the ideological centrepiece of the Czech Charter. It applies to the Czech constitutional order as a whole. It is reflected in the principles of the sovereignty of people, freedom, and equality embodied in the text of the Charter that are also proclaimed in the French Declaration. Article 1 of the Charter, which reads that "all people are free and equal in their dignity and rights", and that "their fundamental rights and freedoms are inherent, inalienable, non-prescriptible, and irrepealable" resembles Article 1 of the Declaration, according to which "men are born and remain free and equal in rights". It implies that amongst the most important values of both the Declaration and the Charter are liberty and equality in rights.

If liberty is defined in the Declaration as the ability to do anything that does not harm others which can be limited only by law[40], the Charter reads in a similar way that everybody may do anything that is not prohibited by law and cannot be coerced to do what is not imposed by law[41]. So, it can be observed that while the limits to liberty under both the Charter and the Declaration can be set forth only by law, the Charter does not explicitly stipulate that liberty of man ends at the point where it could harm others. As law, which sets limits to liberty of action of individuals, does not have to prohibit all actions that may be harmful to others, it implies that the guarantee of liberty in the Declaration is more "naturalist" than that in the Charter which founds the limits of liberty on postitive law. Moreover, the Declaration is more precise in that it stipulates that the law can forbid only those actions that are injurious to society. The Charter lacks a provision to this effect and does not explicitly condition the adoption of laws limiting liberty by the qualification that such laws may limit liberty to act in a certain way, provided that such action is not harmful to others.

Nevertheless, if the Charter is not as accurate as regards the general provisions on liberty, it is more specific with respect to the right of property. It explicitly forbids that ownership be

[40]Pursuant to Article 4: "Liberty consists in being able to do anything that does not harm others: thus, the exercise of the natural rights of every man has no bounds other than those that ensure to the other members of society the enjoyment of these same rights. These bounds may be determined only by Law".

[41]Pursuant to Article 2 para. 3: "Everyone may do that which is not prohibited by law, and nobody may be compelled to do that which is not imposed upon her by law".

misused to the detriment of the rights of others or in conflict with legally protected public interests, and that it be exercised so as to harm human health, nature, or the environment beyond the limits laid down by law. So, it differs from the Declaration in that it stipulates that ownership entails obligations. It lays down more specific conditions limiting the exercise of property rights compared to the general restriction on the liberty of action in the Declaration by making clear that every owner also bears some obligations with respect to his property and that his sphere of autonomy is not unrestricted. Thereby, the Charter sets property as a fundamental right in the reality of the twentieth century in which it is confronted with various kinds of limitations and in which it is not regarded as an absolute power over a thing. On the contrary, the property guarantee in the Declaration, in my view, lets the reader believe that the owner enjoys almost unlimited freedom in the realisation of his property rights, which rests, in the absence of constitutionally acknowledged obligations, attached to property; this being considered regardless of the constitutional possibility of deprivation of property which is provided for in both the Declaration and the Charter. The explicit difference in the conception of the scope of property freedom in each of the two bills of fundamental rights and freedoms is justified, as it reflects different periods in which the respective bills were drafted and adopted. Therefore, the meaning and scope of the constitutional property guarantee in terms of a protected sphere of liberty in each country under scrutiny can be unveiled only on examination of the jurisprudence of the constitutional jurisdictions.

In sum, it can be asserted that, in general, the constitutional property guarantee represents freedom in terms of the protected sphere of autonomy of an individual in which the individual realises his ownership rights, and that it simultaneously secures this freedom from unlawful interferences. So, the right of property is both an expression and a prerequisite of the liberty of man.

1.3.2. Equality as the Key Value in the French Declaration and the Czech Charter

As regards the principle of equality in dignity and rights, which embraces equality before law as well as equality in duties, it is expressed in the Charter by the prohibition of discrimination[42]. The principle of equality in the limitation of rights is embodied in Article 4

[42]It is formulated as a general principle in Article 3 para.1 of the Charter as follows: "Everyone is guaranteed the enjoyment of her fundamental rights and basic freedoms without regard to gender, race, colour of skin, language, faith and religion, political or other conviction, national or social origin, membership in a national or ethnic minority, property, birth, or other status".

para. 3 of the Charter which provides that statutory limitations of the fundamental rights and freedoms must apply in the same way to all cases which meet the specified conditions. This provision is particularly important as regards the protection of property, as it requires that property must be limited to the same scope in all cases that meet the conditions set by law. This provision clearly indicates that constitutionally guaranteed rights and freedoms are not unrestrainable and that people are equal not only regarding the granting of rights, but also as regards their limitation. The Declaration clearly lays down the principle of equality in Article 1 by stating that "men are born and remain free and equal in rights", but it does not elaborate further for a general clause on equality in the limitation of rights. It can be only induced that since men are equal in rights, they must be also equal in duties. This indirectly supports Article 6 of the Declaration which reads that the law should be the same for all, which can be also interpreted in a way that rights and duties provided for by law should be the same for all.

The principle of equality is closely connected with the principle of solidarity which is incorporated in the concept of property as a social function. A certain aspect of solidarity, in fact, also implies, from the principle of liberty of individuals, which is limited by the general obligation not to harm others under Article 4 of the Declaration.

1.3.3. Principle of Solidarity

Although the principle of solidarity, as such, is not mentioned in either of the two constitutional texts, it is inherent in the property guarantees therein contained. The principle of solidarity, based on the dignity of a human being, puts stress on an individual both as an end of society and a member of society[43]. It is a principle pertaining to man as a social being, which is legally expressed in legal obligations and without which no community could sustain. The principle of solidarity is projected not only in the concept of social state and social rights guaranteed by it, but also, in my opinion, in the constitutional limitations of property rights entailing some duties on the part of the owners. Limitations of rights are necessarily connected to duties. In this respect it is worth mentioning that neither the Declaration nor the Charter provide for a catalogue of fundamental duties, they only set constitutional standards for limitations of fundamental rights and freedoms that they safeguard. So, for example, Article 4 para.1 of the Charter stipulates that "duties may be

[43]C. Grewe, "Les droits sociaux constitutionnels: propos comparatifs à l'aube de la Charte des droits fondamentaux de l'Union européenne", in *Revue universelle des droits de l'homme*, 2000, No. 3-5, p. 87.

imposed only on the basis, and within the bounds, of law, and only while respecting the fundamental rights and freedoms". This provision also applies to limitations and deprivations of property rights which are, in fact, duties imposed on the owners to renounce some or all of their rights for the common good, and which may have a form of action, non-action, or a waiver of their property rights. So, I consider Article 4 of the Charter to be a general provision to Article 11 of the Charter, which provides for limitations and deprivations of property, for all limitations and deprivations must respect the requirements set out in Article 4. Moreover, Article 11 of the Charter guaranteeing the right of property is self-constraining in that it explicitly stipulates that ownership entails obligations. It bluntly declares that ownership as a fundamental right is self-limited, that it is not only a right as such, but also a social concept. On the other hand, the French Declaration does not explicitly stipulate that property would involve obligations. But, in any event, the aspect of solidarity as regards property is undoubtedly intrinsically contained therein in the possibility of deprivation of property should public necessity require it. As the underlying principle for limitations and deprivations of property, the principle of solidarity is interconnected with the conception of property as a social function.

1.3.4. Property as a Social Function

Property as a constitutional right may be conceived as serving two different fundamental functions. The first one is an individual function whereby the sphere of liberty of action of the individual is secured. Property is thus interconnected with freedom. This idea of property and liberty may be thought to constitute the core substantive meaning of property in the liberal tradition[44]. The second one is a social function whereby property serves to advance the public good in society. This conception, although enjoying less explicit recognition in traditional liberal theory, is not entirely absent from liberalism and can be even attributed to John Locke, depending on how one interprets his proviso[45]. So, although a liberal, Locke may be also considered in a way to be a proponent of the social function of property, for example, as he maintained that any kind of property was not only conditional on the owner‘s performance of a social function, but was held specifically for the sake of the performance of a social function: to preserve mankind[46].

[44]G. S. Alexander, "Constitutionalising Property: Two Experiences, Two Dilemmas", in *Property and the Constitution,* (ed.) Janet McLean, Hart Publishing, Oxford-Portland Oregon, 1999, p. 89.
[45]*Ibid*., p. 90.
[46]J. Tully, "A discourse on property – John Locke and his adversaries", Cambridge University Press, 1980, p. 99.

The social function of private property seems to be reflected also in Hohfeld's analysis of rights in the concept of liability and duty within the sticks of the proprietary bundle. In essence, the idea is that property rights should have their share of social responsibility. This idea is transposed in both the French Declaration and the Czech Charter in the constitutionally permitted restrictions of the right of property, or, in other words, in duties connected with property rights. The scope of constitutionally acknowledged duties connected with property varies, as the social function of property depends in practice on the political and economic interests that prevail in a specific country and society. Today, it is widely acknowledged that property serves individual as well as social function which has udergone an evolution, especially over the past century.

1.3.4.1. Necessary Interdependence

Relying on Locke's justification of private property, it may be argued that the idea of the social function of property is implicitly embraced in the "sufficiency limitation" of private property whereby appropriation is legitimate when there is sufficient property left for others to satisfy their needs or "enough and as good left in common for others". The only drawback is that this "sufficiency limitation" applies to appropriation in the state of nature and does not apply to already established property relations. When outside of the state of nature, in organised society based on a social contract, the limitation of property is envisaged to address social needs. Classical liberalism, although committed to individual autonomy, does not exclude the social aspects. The individual and the social aspects of fundamental rights merge, as liberalism arises historically out of the social contract tradition[47]. Under a social contract individuals in a society accept rules from legitimate authority in exchange for security and economic advantage[48], and the safeguards of basic liberties are, then, fundamental to flourishing lives. Individuals live within an ordered world that necessarily constrains them in their actions. Although liberalism stresses liberty and equality as its core substantive principles, it acknowledges that once have they left the state of nature, individuals require the

[47]The central question of the liberal political theory is whether political authority can be justified, and if so, how. Liberal philosophers, such as Thomas Hobbes, John Locke, Jean-Jacques Rousseau and Immanuel Kant, take, as their starting point, a state of nature in which humans are free and equal, and so argue that any limitation of this freedom and equality stands in need of justification, i.e., by the social contract. It is for this reason that the social contract theory is usually viewed as liberal.

[48]Under this understanding human rights are considered as a product of a natural law, in Hume's terms, as a codification of moral behavior which is a human social product developed by a process of biological and social evolution.

existence of society, that is, interdependence. This interdependence brings about obligations vis-à-vis community and, consequently, limitations of rights.

So, if the liberalist natural rights theory serves as a basis for the justification of property protection in the French and the Czech Constitutions, it appears that this very justification is necessarily self-constraining, as protection is guaranteed to the extent in which, in the words of Locke, the good of others is observed and the use of property does not undermine the aim of humanity's survival and flourishing. Although it may seem that the French Revolution made the right of property an absolute right by eliminating the scattering of its diverse attributes, it also provided for its exercise without risking to interfere with the rights of other owners or with those of the state[49]. Therefore, the Declaration allows for deprivation of property under specific circumstances. G. Romieu notes that, by this provision, the authors of the Declaration wisely mitigated the effects of too grand a liberty by imposing certain restrictions in order to safeguard the interest of society[50].

1.3.4.2. Positive Conception of Liberty

On all accounts, the understanding of property as a social function today, in the twenty-first century, differs from that in the eighteenth century. If Locke's classical liberalism sees the social aspect of property in that it preserves mankind, the function of property today is, in my opinion, rather about promoting equality. If classical liberalism puts freedom first and equality as the second substantive goal, by claiming that everyone should have the possibility of realizing the objective of a free and independent life and to pursue what one determines to be in his own self-interest without the government interfering in his decisions, the current global endeavour is, in my opinion, directed more towards solidarity and equality, or non-discrimination. Individuals must be able to realize their goals even if this requires an intervention from the state. A twentieth-century British philosopher, Isaiah Berlin, calls this a "positive" conception of liberty through which equality is to be realized[51]. This conception holds that individuals should be able to realize their goals through their collective efforts.

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[49]G. Romieu, "La propriété, Ses Rapports avec l'État, la Société et l'Individu", Les Presses Universitaires de France, Paris, 1923, p. 115.
[50]*Ibid*., p. 127.
[51]I. Berlin, "Two concepts of Liberty", in *The Proper Study of Mankind: An Anthology of Essays*, New York, Farrar, Straus&Giroux, 1998, p. 197.

I consider that the classical liberal understanding of equality, according to which autonomous individuals pursuing the realization of their full human capacities are equal in rights, has been passed over in favour of the understanding of equality as a means of seeking the state's assistance in dealing with alleged or factual inequalities in the enjoyment of fundamental rights. To my mind, the reliance on the state and the state's intervention has become central to the current idea of equality. In this context, drawing on the terminology of Isaiah Berlin, I suggest that the classical liberalist "negative" liberty consisting of individualism and independence has made way to a modern "positive" liberty based on solidarity and a reliance on state interventions for the realisation of individual freedom, and, thus, to a certain degree of dependence. This evolutionary tendency is not a recent one, but has been in place for more than a century. As Constance Grewe mentions, solidarity already takes on the character of a legal obligation in the second half of nineteenth-century France when social rights, such as the right to property, to family life, to religion or work, were recognised as fundamental in the Preamble to the Constitution of 1848[52]. It was the solidarist thinkers in nineteenth-century France who developed a social liberal theory seeking to balance individual liberty and social justice, and who believed that the legitimate role of the government was to address economic and social issues.

The conception of property as a social function today stands quite apart from the classical understanding of the limitation of rights in exchange for their recognition and enforcement. It relates to the advent of social (or also modern or welfare) liberalism and its impingement throughout the twentieth century. With the development of Western societies, from the eighteenth-century revolutions directed against absolutist monarchies to established liberal democracies and stabilised legal relations under constitutional imperatives, classical liberalism started losing ground in Europe in favour of an advancing stream of social liberalism that appeared on stage in the late nineteenth century to be present, side by side, with classical liberalism. Advocating state interventions for the enhancement of personal liberty, social liberalism accentuates the protection of civil and political rights and proposes to replace the individualistic conception of property by a social one. Free society does not need extensive private property rights any more. Instead, in modern societies the interests of the community often take precedence over individual rights, as opposed to the insistence of

[52]C. Grewe, "Les droits sociaux constitutionnels: propos comparatifs à l'aube de la Charte des droits fondamentaux de l'Union européenne", in *Revue universelle des droits de l'homme*, 2000, No. 3-5, p. 86.

classical liberals of the importance of strong and extensive private property to protect freedom and promote efficient economic transactions.

The social conception implies that property is conceived to serve social ends or the public good. Private property is recognized to advance the common good of society; it is allowed to be in private hands as long as it serves the public welfare, which is clear-cut especially in the area of taxation. One of the strongest proponents of the social function of property in the beginning of the twentieth century was Léon Duguit. He saw in it both a limitation on private property and a defining aspect of private property[53]. Duguit's conception of private property limits it by requiring that property should have some degree of social utility. In other words, private property rights are limited by social obligations that are subject to political, economic and social conditions in which the public administration operates. According to Duguit, the authority of a state to issue orders is justified by the function it performs which is to provide for certain social needs[54]. Private property is justifiable as long as it serves those social needs which limit it. Hence, property comprises some social responsibilities and public authorities enjoy a power to interfere with it. From this understanding, property is a social construct whereby society creates and maintains property rights, and the state is vested with a wide power to limit the extent of property rights for social purposes[55].

Another French scholar, Paul Coste-Floret, submitted a positive theory of property as a social function which departs from the premise that society follows different aims than an individual in respect of property. Even though the principle of property lies in its personal function, which reflects the primacy of man over society, and whereby property is to assure the subsistence of man and equally the subsistence of a family as the primary and fundamental

[53]His two expressions describe the notion of property as the subjective right and as a social function: right-property (*propriété-droit*) and function-property (*propriété-fonction*). Duguit drew inspiration from the work of Auguste Comte who advocated the idea that property carries with it an indispensable social function. Duguit emphasized the importance of social solidarity and social interdependence and maintained that the social function had modified or limited the established notions of liberty and freedom of contract.

[54]L. Duguit, "The Law and the State" (1917) 31 *Harvard Law Review* 1.

[55]It is interesting that, for Duguit, the Declaration of Rights of Man of 1789 and the Code Civil of 1804 were documents enshrining a metaphysical, individual, and resultant formalist approach to law based on the power of the individual will and subjective rights. They enshrined this approach to law by making property a right and by making the enjoyment of that right the most absolute possible. The new transformation, the social function of law, was a reaction to the concept of law found in these documents. Under the former framework, the state became the protector of individual rights. In Duguit's view, this obscured the more important function of the state to promote the place of humans in society. Instead, Duguit suggests that subjective rights should have been, and were, replaced by the social function. L. Duguit, "Les transformations générales du droit privé depuis le Code napoléon", 2nd ed., 1920.

cell of society, this personal function can be altered by the social function of property. Under this approach, property is realised personally in its principle and socially in its usage[56]. Hence, the principle of the right of property is to serve the interests of an individual while this usage for private purposes can be altered by the requirements of the public interest. An individual is free to use, enjoy, and dispose of his property as long as he is not limited in its exercise by legal obligations in respect of society imposed on him by law.

Although the social conception may not enjoy an explicit recognition in the liberal theory, it is not totally distant from liberalism, as it continues to remain present in modern social liberal discourses on property. Not all liberals share the conception of an intimate association between private property and individual liberty. Many of the social liberalist thinkers challenge this intimate connection between personal liberty and private property by accepting the so called "social justice", or "welfare state", and do not see private property as an effective safeguard against state encroachments[57]. They doubt that private property is an adequate foundation for a stable free society[58] and focus on developing a theory of social justice[59]. In short, social liberalism puts stress on redistribution to achieve social justice.

What are the consequences of the empowered social dimension of property for the constitutional protection of the latter? The implications are, apparently, reflected in enhancing the limitations of the scope of property as a constitutionally guaranteed and protected fundamental right which can be perceived from both the French and the Czech constitutional jurisprudence. Even though the French Declaration draws on the reality of the eighteenth century and the then dominant classical liberalism, and the Czech Charter was inspired in large part by the French Declaration, the constitutional practice in both countries manifests openness to restrictions of property as a fundamental right, either in the name of the public interest or when it enters in conflict with other constitutionally protected rights.

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[56]P. Coste-Floret, "La nature juridique du droit de propriété d'après le Code civil et depuis le Code civil", Sirey, 1935, pp. 235-236.

[57]This turnover is mainly due to the state gradually converting into the protector of personal liberty.

[58]The roots of new liberalism can be found in John Stuart Mill's work. He emphasized that it was an open question whether personal liberty can flourish without private property (this view was later reasserted by Rawls).

[59]See John Rawls, "Theory of Justice", Harvard Univeristy Press, 1971. On the basis of his famous "difference principle", a just, basic structure of society arranges social and economic inequalities so that they are to the greatest advantage of the least well-off representative group, for only those inequalities that best enhance the long-term prospects of the least advantaged are just. On the other hand, classical liberals (such as Hayek) assert that the contemporary liberal fixation on "social justice" causes new liberals to ignore that freedom depends on a decentralized market based on private property.

In this context it can be remarked that the social function of property is reinforced in the Charter which, unlike the Declaration, stipulates that ownership obliges and that its exercise must not jeopardise human health, nature, or environment above the degree set forth by law. This is clearly a social obligation. The owner is prohibited from using his property against the collective interests of the community. It follows that while the Declaration lays down the property guarantee by employing the classical liberal point of view, the Charter embodies both the classical liberal influence and the idea of the social function of property. The Charter, thus, seems to be a projection of liberal political thought of the twentieth century, that is, a blend of classical and social liberalism. This is the major difference between the two constitutional texts from the aspect of the social function of property, which undoubtedly bears upon the period in which each of these fundamental documents was drafted. The social function of property inevitably entails a balancing of competing public and private interests that are at stake.

1.3.4.3. Balancing of Interests

Private property rights need to be recognized and protected by the government in order that their existence be secured. From this perspective their existence depends on the state and their enforcement requires state action. But it is inevitable that the enforcement of property rights brings about inequalities, as the interests of some will always be protected at the expense of the identical interests of others. In my view, these inequalities are inflicted by the inherent allocative nature of property meaning that legal protection of someone's property rights in resources is to someone else's exclusion or detriment. As Joseph Singer asserts, the grant of a property right to one person leaves others vulnerable to the will of the owner; conversely, the refusal to grant a property right leaves the claimant the vulnerable one[60].

By recognising and protecting property on the constitutional level the state assumes legal control over it. So, the French and Czech Constitutions not only protect property rights but they also place explicit conditional limits on them in the name of the interests of society. I shall call the constitutional guarantee, as a whole, as the formal aspect of property. Since the existence of property rights depends on the willingness of the government to recognise and protect them, by doing so the government also has *a fortiori* the inherent power to restrict or

[60]J. W. Singer, "Sovereignty and Property", in *Northwestern University Law Review* 1 (1991), p. 41.

otherwise interfere with property, provided that the limits of the constitutional protection are not transgressed so that the formal aspect of property is preserved.

I suggest that the essence of constitutional property is based on the fusion of the material aspect of property represented by its allocative nature, on the one hand, and the formal aspect of property, on the other. Both aspects are mutually interrelated, for without the existence of the formal aspect the right of property would lose any fundamental safeguards whatsoever, and thus become precarious and ephemeral. Should the right of property lose its material aspect, its allocative nature, it would become nothing but an illusion and the need for its legal protection by the authority of the state would lose any reason.

So, intrinstic to property as a legal institution are competing claims and interests over external resources. It is the inherent allocative nature of property that brings about inequalities and legitimises restrictions of property. I endorse the argument advocated by some legal scholars that this nature of ownership warrants and legitimises less protection, and that ownership as a constitutional matter must be recognized as the compromise of conflicting claims[61]. I argue that the allocative nature of property is the driving force behind the recognition of property as a social institution which entails an obligation to balance out inequalities brought about by this nature of property.

The fact that owners have obligations as well as rights is related to the social context in which they operate. They do not act alone but in the context of a society governed by laws, as members of that society, as citizens of state. Being a member of society means being an owner amongst owners. Joseph Singer conceives this aptly as a "citizenship" model of property which, he argues, is based on the notion of obligations associated with the concept of citizenship. Those obligations may be to refrain from exercising power over one's property, such as limitations of land use by zoning and environmental laws, but they may also require affirmative action, such as the payment of taxes, sharing of property with others, or adjusting one's property for the benefit of others. It is a social contract that limits liberty to enlarge liberty, and that limits property to secure property[62]. Being endowed with obligations, owners are in the role of guardians of social order, this position of guardianship entailing duties to

[61]L. S. Underkuffler, "The Idea of Property", Oxford University Press, Oxford, 2005, pp. 142-143.
[62]J. W. Singer, "The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations", in *Harvard Environmental Law Review*30 (2006), pp. 328-329.

refrain from actions that endanger the underpinnings of a free and democratic society that treats all individuals with equal concern and respect[63].

As the constitutional protection of property embraces, apart from the protection of the proprietary freedom of an individual vis-à-vis the state, the protection of legitimate proprietary claims in cases of conflicting interests to the same resource between individuals or between an individual and the state, it entails the weighing of competing interests within a given social context and the interpretation of particular constitutional rights in the light of social goals and aspirations, such as social justice, equality, or human dignity. Consequently, the weighing of competing interests embraces the weighing of individual interests against public interests, such as in cases of expropriation or limitation of property, in the framework of which competing interests to the same resource between an individual and the state are assessed.

2. Legal Theory

One of the objectives of this work is to expound the way the respective constitutional jurisdictions and the European Court of Human Rights conceive the property guarantee and approach its interpretation. Before embarking on this exercise in the following chapters, one issue should be addressed first. It is a fundamental question which cannot be and has never been satisfactorily answered. What actually is property? What is the essence of private property that is guaranteed by national constitutions and the European Convention of Human Rights? What is the substance of the right this work actually deals with?

2.1. Conceptual Aspects of Property

The institution of property is a rather complex concept which has different meanings across time and space. Property has had different forms in different cultures and different legal systems[64]. Its meaning varies from one society to the other, depending on the political, legal, and economic conditions of a given society. There are differences among the concepts of property used across Europe, both in terms of rights and objects, even in the private law sphere. Within private law terminology, for example, the French *propriété* and the German

[63]J. W. Singer, "The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations", in *Harvard Environmental Law Review*30 (2006), p. 330.
[64]A. R. Coban, "Protection of Property Rights within the European Convention on Human Rights", Ashgate, 2004, p. 9.

Eigentum denote movable and immovable tangible things, whereas the Czech *majetek* is conceived as a larger concept embracing both tangible and intangible things. Accordingly, there seems to be a larger discrepancy between private law and constitutional concepts of property in terms of objects in France, or in Germany, compared to the Czech Republic, as the term "property" in the constitutional context usually designates a broader concept than in private law and includes also other patrimonial and incorporeal rights[65].

Even though there are different approaches to the notion of property in terms of objects in various national legal systems, the essence of private property, in general, can be described as a series of relationships between private individuals over the control and use of resources. Every society, democratic or totalitarian, develops its own system of property as a basic instrument for survival. It is beyond dispute that property is not only a legal institution but also a social and economic one. But in any of these scientific disciplines one can derive a common perception of property as a system of rules governing the allocation and control of the use of material resources for the purpose of satisfying human needs.

If property is an institution governing the control and allocation of resources, it places ultimate control over scarce resources in the hands of the individual. In a private property system individuals are granted powers over the control and use of a resource[66]. J.W. Harris, for example, defines property both in terms of use and wealth when he claims that the institution of property serves the dual function of controlling the use of things and allocation of wealth[67]. Hence, the idea of private property seems to be a solution to the problem of allocation of resources, which was already demonstrated in Locke's labour theory justifying appropriation. The fundamental presupposition for the existence of private property is that the rest of society accepts that its members are allocated elements of material resources and that the rest of society is prepared to abide by property rules. Such understanding coincides with the notion of private property as an aggregate of entitlements against many single persons. It can be summed up that from the structural point of view in terms of rights, there are two general approaches to the notion of private property as rights, which imply: 1) a relationship of a person to a thing, some distinguish it as the only real right that the person can have with

[65]H. Mostert, "The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany", Springer, 2002, pp. 17-18.
[66]A. R. Coban, "Protection of Property Rights within the European Convention on Human Rights", Ashgate, 2004, p. 11.
[67]J. W. Harris, "Property and Justice", Clarendon Press, Oxford, 1996, p. 140.

regard to his or her own object[68]; and 2) a relationship between persons with respect to a thing, comprising relationships both to and through resources[69] and an area of freedom against others, including the state.

Constitutional norms are primarily about vertical operation in respect of relations between individuals and the state. A comprehensive account of the vertical operation of fundamental rights norms comprises the doctrine of subjective public rights. It provides for a theoretical account of the standing of addressees of constitutional norms vis-à-vis public power and their entitlements that ensue from those norms. The following overview of this theoretical account shall serve as the groundwork for the analysis of the conceptual understanding and interpretation of property guarantees by the respective national constitutional jurisdictions and the ECHR from a practical viewpoint dealt with in the next chapters. As the doctrine of subjective public rights operates within a wider context of the subjective-objective rights divide, a general account of the objective and subjective character of rights will be put forward first.

2.2. Objective and Subjective Character of Rights

A general distinction between objective and subjective rights was adopted in the nineteenth century by the German Pandektists. Objective rights are generally understood as an aggregate of legal norms created by the state. Accordingly, the term "objective rights" coincides with the notion of law in its general meaning of legal regulations or legal order. The term "subjective rights" generally signifies entitlements of subjects of rights to act in a certain way. For example, R. Jhering describes subjective rights as "a concrete transformation of an abstract rule into a concrete entitlement of a person"[70]. It is worth mentioning that the distinction between objective and subjective rights does not exist in the Anglo-American legal tradition which clearly distinguishes between the "right" (entitlement (fr. *droit*, ger. *Recht,* cz. *právo*)) and the "law" (legal regulations (fr. *droit*, ger. *Recht,* cz. *právo*))[71].

[68]H. Mostert, "The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany", Springer, 2002, p. 14.
[69]D. Lametti, "The Deon-Telos of Private Property: Ethical Aspects of the Theory of and Practice of Private Property", unpublished D. Phil. Thesis, Oxford, 1998, p. 34.
[70]Rudolf Ihering, "Recht und Sitte", A. Langen publ., München, 1924, p. 9.
[71]In this context, Viktor Knapp argues that the terminology of the continental legal system poses a theoretical problem, as the distinction between objective and subjective rights is based on a trivial logical mistake (quaternio terminorum) stemming from the fact that the term "right" has in both cases a different meaning – an objective right within the meaning of a legal norm and a subjective right within the meaning of a certain possibility to act according to or within the limits of that norm. Viktor Knapp, "Teorie práva", C. H. Beck, Praha, 1995, p. 51.

2.2.1. Objective Rights

I suggest that there are two aspects to the issue of the objective character of rights. Firstly, it is a formal aspect which can be described as a form in which permission to act is enshrined, that is, a legal regulation, notwithstanding its legal force, such as the constitution. Secondly, it is a material aspect, meaning the contents of the norm or the individual right provided for in the norm, such as a constitutional provision that everyone has the right to the protection of property. So, the objective right in the material sense can be defined as permission which is granted to the addressee of the norm by the legislator and which gives rise to the enforceable subjective rights of the addressee, the "right to do". As Viktor Knapp maintains, each legal norm, as "a molecular element of the legal order", has its own structure constituted by structural facets, so called "normative modalities", which are partly objective and partly subjective. According to him, the basic objective normative modalities are two: permitted/not permitted, which can be enlarged to the following three modalities: permitted/ordered/prohibited[72]. So, under this terminology the material objective right is a "normative modality" of being permitted. The formal and material aspects may also be denoted as an external and an internal dimension of the objective character of rights, respectively, or, metaphorically, as a nutshell and a nut which, when taken out of the nutshell, offers various possibilities for its holder of disposing of the nut that are only limited by the properties of the nut.

2.2.2. Objective Character of Fundamental Rights

In view of the aforementioned, it may be asserted that the objective character of fundamental rights has a material dimension, which is the textual content of a fundamental legal norm, and a formal dimension, which is the norm itself. The fundamental character of rights in a material sense emerges from the nature of the legal norm in which they are enshrined – the Constitution or any other legal document having the same legal force, such as the Declaration of the Rights of Man. For example, the German Constitutional Court has defined the objective character of fundamental rights as the "objective legal contents" (*objektiv rechtlicher Gehalt*) which the legislator creates while limiting the legislator[73].

[72] *Ibid*., pp. 153-154.
[73] BVerfGE 7, 198 [205].

In France, for example, the basis of such legislative competence to guarantee fundamental rights is explicitly given in Article 34 of the Constitution of 1958. Concerning property rights, this provision stipulates that a "law shall lay down the fundamental principles of the regime of property". The legislator is simultaneously limited by the scope of the existing fundamental rights and liberties in that its legislative acts must always be in conformity with the Constitution. For that purpose Article 61 of the Constitution confers on the Constitutional Council a power to control the conformity of bills with the Constitution before they come into force. The same applies to legislation and legislative provisions which, in pending court proceedings, are claimed to infringe upon the rights and freedoms guaranteed by the Constitution. A provision declared unconstitutional shall be "neither implemented nor promulgated" or "repealed"[74]. So, in the area of the protection of fundamental rights and liberties in France it is both the legislature and the Constitutional Council that exercise the role of a direct and indirect fundamental law-maker, respectively.

The same applies for the Czech Republic where the Constitutional Court has the competence to annul statutes and decrees or individual provisions thereof if they are in conflict with the constitutional order. Thus, in both countries the legislature and the constitutional jurisdiction participate in the shaping of the formal and material dimension of the objective character of fundamental rights, or, within the meaning of the terminology of the German Constitutional Court, in the forming of the "objective legal contents" of fundamental rights.

Fundamental rights are a source of protection for individuals against state power. They have a protectionist effect for individuals and a corresponding limiting effect for public authorities by imposing an obligation on them to perform or to abstain from acting. Thereby, fundamental rights in the objective sense bestow on individuals a sphere of liberty in which they can act autonomously; a sphere of liberty which enjoys protection by the "highest" law against interferences of the state power and which entails the empowerment of individuals to legally enforce their liberty vis-à-vis public authorities. This protected sphere of action of an individual constitutes the essence of subjective rights.

[74]Article 62 of the Constitution reads as follows: "A provision declared unconstitutional on the basis of article 61 shall be neither promulgated nor implemented. A provision declared unconstitutional on the basis of article 61-1 shall be repealed as of the publication of the said decision of the Constitutional Council or as of a subsequent date determined by said decision. The Constitutional Council shall determine the conditions and the limits according to which the effects produced by the provision shall be liable to challenge. No appeal shall lie from the decisions of the Constitutional Council. They shall be binding on public authorities and on all administrative authorities and all courts".

2.2.3. Towards Subjective Rights - Subjectivisation of the Right of Property

The advancement of subjective rights comes to a head in the florescence of individualism. From the Renaissance period a powerful stream of individualism turns over the objective character of rights as an individual becomes the centre of the system of rights, including property rights. The phenomenon of the subjectivisation of the right of property is associated with the philosophy of the school of natural law which developed in the seventeenth century, particularly with Grotius, Pufendorf, Locke, and Rousseau. The right to appropriate is considered to be the most important natural right of man, as it provides for the survival of an individual. A right becomes "a moral power to act"[75] which indicates that an act is morally necessary and prescribed by God. The right of property is conceived as one of the subjective rights in the sense of "a moral quality attached to a person"[76]. By the end of the eighteenth century the right of property experiences a double turnover: a legal turnover of the notion of simultaneous property towards exclusive property, and a philosophical turnover of the objective right of the appropriation of things for the utility of men towards the subjective and natural right of property of man[77].

The influential notion of subjective rights was created in the late nineteenth century by the German Pandectist scholars [78]. They identified a "subjective right" with a "claim" under civil law. In addition to the objective meaning of the word *Recht* as the legal order, *Recht*, in the subjective sense, was the legally protected right of an individual to demand something from others[79]. German Pandectists influenced legal thought in all continental jurisdictions, including France and the Czech Republic. "Individualist philosophy" and "will theory" put the power of the individual in the very centre of nineteenth-century private law ideology. The sphere of individual freedom is synonymous with the notion of subjective right: it is, in Savigny's words, "the power of the individual person, a realm where his will reigns supreme"[80]. The German Pandectist school was influenced by natural law doctrine which, as

[75]A.-M. Patault, "Introduction historique au droit des biens", Presses Universitaires de France, Paris, 1989, p. 142.
[76]J.-L. Halpérin, "Histoire du droit des biens", Economica, Paris, 2008, p. 158.
[77]A.-M. Patault, "Introduction historique au droit des biens", Presses Universitaires de France, Paris, 1989, p. 143.
[78]The nineteenth-century Pandectist Roman law movement, led by Savigny, who, being inspired by Kant, erected an abstract set of principles based on human autonomy, human will and moral freedom as a basis to reconceive the German private law.
[79]M. Stolleis, "Public Law in Germany, 1800-1914", Berghahn Books, 2001, p. 211.
[80]H. Dedek, "From Norms to Facts: the Realization of Rights in Common and Civil Private Law", McGill Law Journal / Revue de droit de McGill,Volume 56, No. 1, December 2010, pp. 77-114.

already mentioned, conceived natural rights as rights inherent to every person that, although protected and respected by the state, are not created by the state. The state sets out the limits and the subjects of subjective rights have, within the limits of law, an option to choose their mode of action. In this respect, the notion of subjective rights coincides with the notion of liberty in the sense that one can act in any way he chooses unless his chosen way of action is not prohibited by law (within the meaning of the principle that all is permitted which is not prohibited by law). For example, René Capitant relates the subjective character of property rights to individualism by claiming that "when lawyers proclaim a property right as inviolable and sacred, they speak only as individualists, liberals who consider individualism and liberalism as a natural legal order. To say that a subjective property right is sacred, it is, in fact, to say that individualism is sacred and that a certain legal rule is sacred"[81]. He thereby underlines that subjective rights ensue from objective law.

The notion of subjective rights is rather a private law concept - subjective rights define the relations of private individuals and, therefore, amount to substantive private law. Although the notion of the subjective rights of private individuals is "the very centre of the liberal, private law–based legal philosophy of the nineteenth century"[82], it did not stay only within the realm of private law and was further developed by scholars to apply to the public law environment. The notion of subjective public rights was created on the basis of the concept of private law claims. Subjective public law was, then, a dogmatic outgrowth of the civil law category of "claim" and its main thrust was an attempt to prevent illegal administrative acts by the state[83]. A comprehensive account of subjective public rights was elaborated by Georg Jellinek in his status theory.

2.2.4. Subjective Public Rights and the Status Theory

A systematic scholarly work on subjective public rights was accomplished by Georg Jellinek. His definition of subjective public rights is a combination of a view of the individual "power to will" with the doctrine of material interests. He maintains that subjective public rights are recognized and protected by the legal order and by the human will to power directed toward goods or interests, and that they imply the "capacity to mobilize legal norms in the individual

[81]R. Capitant, "L'illicite. L'impératif juridique", Paris, 1928, p. 228.
[82]H. Dedek, "From Norms to Facts: the Realization of Rights in Common and Civil Private Law", McGill Law Journal / Revue de droit de McGill,Volume 56, No. 1, December 2010, pp. 77-114.
[83]M. Stolleis, "Public Law in Germany, 1800-1914", Berghahn Books, 2001, p. 350.

interest"[84]. His concept of subjective public rights allows for the participation of individuals in state power. Depending on the status in which the individual stands in relation to the state, he or she can acquire subjective public rights, or claims, in various areas.

Under Jellinek's theory the sphere of an individual's freedom within the state and independence of the individual from the state represents "status negativus", or the protective status. Its essence is the duty of the state to refrain from interfering with the rights of individuals[85]. As regards the property guarantee, this status is expressed in both the constitutional and conventional right of everyone to own or enjoy property as a sphere of autonomy from the state action, as well as in the delimitation of state interference with property based on the requirements of the public interest, legality, proportionality, and the payment of compensation.

He describes the active status of being able to make demands from the state (to invoke fundamental rights) as "positive rights" or "status positivus", which is the entitlement of the individual to claim certain performance from the state whereby the state is bound to ensure undisturbed enjoyment of the constitutionally guaranteed right of the individual. So, it is not sufficient that the state only refrains from interfering with the rights of the individual, but it must also act to safeguard their protection. The positive status is clearly expressed in the Czech Charter by the guarantee that the state secures for every owner the same content of property rights and the same protection[86]. By comparison, the French Declaration is more succinct when it states that ownership is inviolable and sacred. But both the negative and positive obligation of the state to protect the natural rights of every man implies from the general wording of the Preamble of the Declaration pursuant to which the Declaration may remind the legislative and the executive power, denoted as "all members of the body politic", of their "duties".

Jellinek's status theory affirms that subjective public rights entail both a vertical and horizontal dimension. An individual can claim protection of his subjective rights from the state against all kinds of interferences, be it by other individuals or public authorities. In this context, for example, the Czech Constitutional Court has declared that although the guarantee

[84]G. Jellinek, "System der subjektiven öffentlichen Rechte", Tübingen, 1905, p. 51.
[85]*Ibid*., p. 94.
[86]Article 11 §1 reads that: "Each owner's property right shall have the same content and enjoy the same protection".

of property under Article 11 of the Charter imminently concerns only the relation between an individual and the public power, it also obliges the latter to grant the owner protection in cases where his property is interfered with or violated by third parties, in addition to obliging the public power not to interfere with his property[87]. Accordingly, subjective public rights have an effect *erga omnes* and can be generally characterised as comprising: a) a protected entitlement to act or behave in a certain way within the limits given by law; b) a protected entitlement to require from the state that other private persons do not interfere; c) a protected entitlement to require the state not interfere.

In sum, property as a fundamental right is a subjective public right which provides for a protected sphere of autonomy consisting in an entitlement against the state not to interfere with it, as well as for tools for its protection against the state consisting of an entitlement against the state to positive action. In other words, it comprises both passive and active components reflecting the scope of action the owner disposes of vis-à-vis the state with a view to having his property protected.

For the purpose of this work, the scope of "status negativus" and "status positivus", in Jellinek's terms, when applied to the given national constitutional and European property protection clauses, will allow, in the following chapters, the scope of the property protection guarantee and positive action, in terms of the posibility to invoke the protection of property, these clauses afford to owners to be described.

2.2.5. Other Doctrinal Approaches to the Notion of Subjective Public Rights

Subjective public rights have been subject of doctrinal discussions mainly in Germany where also originated one of the most influential definitions of subjective public rights which still marks its imprints in contemporary case-law of the German Constitutional Court. It comes from the pen of Ottmar Bühler: "A subjective right is a legal situation of a subject vis-à-vis the State in which he can, by virtue of a legal act or a restrictive norm enacted to protect his individual interests which he must be entitled to invoke before the administration, request something from the State or on the basis of which he is entitled to do something"[88].

[87]Judgment no. III. ÚS 456/05 of 23 September 2005; judgment no. IV. ÚS 1735/07 of 21 October 2008.
[88]O. Bühler, "Die subjektiven öffentlichen Rechte und ihr Schutz in der deutschen Verwaltungsrechtsprechung", Kolhammer, Berlin/Stuttgart/Leipzig, 1914, pp. 224-225: "Un droit subjectif est la situation juridique d'un sujet par rapport à l'Etat dans laquelle, sur le fondement d'un acte juridique ou d'une norme contraignante édictée

An interesting account of subjective public rights is also given by Thomas Meindl who built his thesis on the dual character of subjective public rights: a material and a formal one. He conceives the material character of subjective fundamental rights as the protection of interests of an individual against the arbitrary actions of public authorities, and a formal one as their enforceability by an individual - the ability of an individual to invoke his fundamental subjective rights[89]. In other words, there has to be a protective legal norm providing for a subjective right (substantive basis) and a procedural right of an individual to invoke his subjective fundamental right in legal proceedings in order to protect his individual interests (procedural basis). The formal character of subjective public rights under this conception basically coincides with Jellinek's *status positivus*.

It is apparent that this approach does not explicitly mention the right to require others to act or abstain from action, that is, the *erga omnes* character. T. Meindl views subjective rights as individual interests which he puts in contrast to general (public) interest. They are constituted by both material and formal elements and if one of the elements is lacking, the rights lose their subjective connotation. As regards the formal element, T. Meindl claims that in France it is lacking, as individuals cannot directly invoke their fundamental rights before the Constitutional Council, and, further, that contrary to rights and liberties enshrined in the European Convention on Human Rights, rights and liberties of the "bloc of constitutionality" are not directly applicable. He therefore induces that fundamental rights and liberties of the "bloc of constitutionality" cannot be considered as subjective public rights, and that, due to the absence of individual character of the control of constitutionality, the protection of individual interests takes place in the framework of the assessment of the public interest[90].

This assertion requires a comment. While it held true at the time of publication of the author's work, it does not hold at present. The tendency towards subjectivisation of fundamental rights in terms of constitutional review can be observed after the adoption of Act no. 2009-1523 of 10th December 2009 pertaining to the application of Article 61-1 of the Constitution[91], which

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pour protéger ses intérêts individuels, qu'il doit pouvoir invoquer à l'encontre de l'administration, il peut exiger quelque chose de l'Etat ou envers lequel il peut faire quelque chose".

[89]T. Meindl, "La notion de droit fondamental dans les jurisprudences et doctrines constitutionnelles françaises et allemandes", Librarie Générale de Droit et de Jurisprudence, Paris, 2003, p. 282.

[90]*Ibid*., pp. 291, 296-297, 303.

[91]Loi organique no 2009-1523 du 10 décembre 2009 relative à l'application de l'article 61-1 de la Constitution.

introduced the institute of "priority preliminary rulings on the issue of constitutionality". Since then individuals can indirectly refer to the Constitutional Council if it appears that a law or its provision infringes rights and freedoms guaranteed by the Constitution[92]. However, such constitutional protection of the fundamental rights of individuals is only indirect, for the absence of the right to a direct constitutional petition, and limited, as individuals can claim a violation of their objective fundamental rights enshrined in the Constitution by the legislator and not by other public bodies such as courts. So, since the introduction of the priority question of constitutionality, the "formal character", or the "*status positivus*", of subjective public rights, consisting of the possibility to address the constitutional jurisdiction, is not entirely lacking, but is only indirect and limited. This leads to the question as to what is the position of the notion of subjective public rights in the French public law doctrine.

It seems that the French public law doctrine has predominantly denied the existence of subjective public rights and uses the term "subjective right" very little, and that the notion of subjective rights is primarily a private law concept concerning legal relations between individuals. In public law, and, in particular, in constitutional law, the notion of subjective rights seems to have been employed marginally. It is worth to note that the Constitutional Council itself does not use the term "subjective right". One of the few French scholars defending the existence of subjective rights was Roger Bonnard who claimed that a subjective right was a power to require from someone, by virtue of the rule of law, something in which one has an interest, under the sanction of a lawsuit; the content of the claimable thing being immediately fixed either by law or by an individual legal act[93]. Besides subjective private rights, R. Bonnard also formulated the notion of subjective public rights which he defined as the power to demand something from the state and from the administration. The main

[92]Article 61-1 of the Constitution reads as follows: "If, during proceedings in progress before a court of law, it is claimed that a legislative provision infringes the rights and freedoms guaranteed by the Constitution, the matter may be referred by the Conseil d'État or by the Cour de Cassation to the Constitutional Council which shall rule within a determined period". By the term "the Constitution" it does not mean only the text of the Constitution of 1958, but the term comprises more consitutional texts so as to include all rights of freedoms of the "bloc of constitutionality". Therefore, the "rights and freedoms guaranteed by the Constitution" are the rights and freedoms to be found in: the Constitution of 1958 as amended; the texts referred to by the Preamble to the Constitution of 1958, namely: the Declaration of the Rights of Man and the Citizen of 1789, the Preamble to the Constitution of 1946, the fundamental principles recognized by the laws of the Republic (to which the Preamble to the Constitution of 1946 refers); the Charter for the Environment of 2004.

[93]R. Bonnard, "Les droits publics subjectifs des administrés", RDP, 1932, p. 695: "Le droit subjectif est le pouvoir d'exiger de quelqu'un, en vertu d'une règle de droit objectif, quelque chose à laquelle on a l'interêt, sous la sanction d'une action en justice; le contenu de la chose exigible étant fixé immédiatement soit par le droit objectif, soit par un acte juridique individuel".

contribution of his was that he overpassed the scholarly gap between the exclusivity of objective rights and the rejection of the notion of subjective right[94].

Another distinctive French scholar who was a proponent of subjective rights was Léon Michoud. Unlike Georg Jellinek, he maintained that the essence of subjective rights lay in the protected interest, the power of will being only the means of its protection[95]; whereas, for Jellinek, the main essence of subjective rights consisted of a volitive act and the protected interest was only complementary. Like R. Bonnard, L. Michoud claimed that a will is not the essence of the subjective right. But there were also opponents to the idea of subjective rights. The eminent opponent was Léon Duguit. Like his German counterpart, Hans Kelsen, he recognized only the existence of objective rights, claiming that the expression "subjective right" is only an application of objective law on a particular situation[96].

2.2.6. Summary

I suggest that the objective character of rights has two aspects – a formal one, meaning the norm itself, and a material one, meaning a normative permission conferred by the legislator on the subjects of rights who have the possibility to avail of it. In this context, a normative prohibition means a duty (no-right) creating correlative rights of other subjects. In constitutions these material objective rights and duties have an imperative character and *erga omnes* effect. The material objective right is a precondition for the origination of subjective rights. In this sense, they are “dormant” rights insofar as they may give rise to subjective rights (entitlements) once they are exercised.

The subjective character of rights confers on an individual the quality of a subject of rights. It can be claimed that a subjective right is the entitlement of a natural or moral person to act in a certain way, which is delimited and guaranteed by law, to satisfy certain needs and interests. It is a protected space, an area of liberty, in which the right holder is sovereign within the limits of law.

[94]R. Bousta, "Essai sur la notion de bonne administration en droit public", L’Harmattan, Paris, 2010, p. 277.
[95]L. Michoud, "Théorie de la personnalité morale", 2. vol., Paris, 1906, I, p. 99.
[96]L. Duguit, "Études de droit public, p. I: L’État, le droit objectif et la loi positive", Paris, A. Fontemoins, 1901, p. 127.

The concept of subjective public rights comprises enforceable entitlements of the individual to claim certain performance from the state whereby the state is bound to ensure the undisturbed enjoyment of subjective rights of the individual (*status negativus*) and protect them against interferences (*status positivus*). So, it is not sufficient that the state only refrains from interfering with the subjective rights of the individual, but it must also act to safeguard their protection. Legal doctrine has developed the concept of subjective public rights as a "power of will"[97], a "legally protected interest"[98], or a "human power of will accepted and protected by the legal order"[99]. It follows that a subjective public right can be conceived in terms of theory as a will, an interest, and a power; in other words, as an entitlement to act which is recognized and protected by objective law, and which serves as an impetus to a subjective volitive conduct within the limits of law. Fundamental rights as subjective public rights are, compared to other public law rights, specific, as in public law an individual is usually subjected to the state authority in his capacity as recipient of the state power and not as a holder of claims and protection vis-à-vis the state.

The relationship between subjective and objective rights in the formal sense (law, legal norms) can be at least twofold, depending on the chosen philosophical approach. First, from the natural law approach, under which natural rights of people are inherent to them and do not depend on formal objective rights, there are subjective rights which exist independently from formal objective law (customs). Second, from the viewpoint of positive law, every subjective right derives from objective law and limitations of subjective rights are always given by law. A person is entitled to act only within the limits of law – to the extent to which he is explicitly or implicitly permitted to act, or, otherwise, if not prohibited by law.

So far, the discussion has revolved around rights, but it is a matter of course that every right generates a duty. The discussion on rights would not be complete without a proper analysis of their correlatives. Subjective public rights provoke duties not only on the part of the state, but they may, by their essence, generate duties for their holder. As concerns property as a fundamental subjective right, in the fundamental law documents under scrutiny its protection is "balanced" by the possibility and conditions for its deprivation and limitation which

[97]B. Windscheid,"Lehrbuch des Pandektenrechts", 9th ed., 1906, Bd I.
[98]R. Ihering, "Geist des römischen Rechts", Vol. 3, 10th ed., 1993, p. 327.
[99]G. Jellinek, "System der subjektiven der öffentlichen Rechte", 2nd ed. , Verlag Von J. C. B. Mohr, 1919, p. 44: "Das subjektive Recht ist (daher) die von der Rechtsordnung anerkannte und geschützte auf ein Gut oder Interesse gerichtete menschliche Willensmacht".

generate duties for the property holder. What is, then, the nature of such subjective public duties and which precise correlation between subjective rights and duties is at stake?

For a closer analysis I propose to avail of Hohfeld's theory of rights which remains one of the most influential analyses of rights in modern property law. The essence of the Hohfeldian conception of property rights is that property consists of a variety of relations, each of them comprising bundles of entitlements and obligations between subjects in respect of certain objects. Hohfeld's concept of property as "sticks in a bundle" of rights is relevant for the description of rights and duties comprised in the structure of constitutional property protection clauses involving a deprivation norm and a limitation norm. I embark on this analysis not only to balance the discourse on rights, but also to lay down a theoretical basis for a later enquiry into whether, and to what extent, the jurisdictions under scrutiny adhere to the conception of property as a single right or a multitude of rights. This enquiry should contribute to demonstrating that property is not an exclusive dominion over a thing, but that it is a multifaceted social relationship which, naturally, promotes its limitations for the benefit of the whole.

2.3. Property - a Single Right or a Bundle of Rights?

The departing premise which is sought to be demonstrated is that the right of property is a series of relationships between persons through their things. That it is a social relationship. Under this proposal, property can be described as a totality of legal relationships which impose certain obligations on an individual and which give him certain possibilities to act[100]. This premise supports the "bundle of rights" theory elaborated by Wesley Hohfeld[101].

Hohfeld developed an analytical framework for understanding interests in property. He analysed legal relations, or rights and duties in a generic sense, into rights (claims or claim-rights), powers, privileges and immunities, and their jural opposites and jural correlatives. In line with his theory, owning property means to have various rights with respect to a thing constituting one’s property as well as with respect to other people through a thing - the "bundle" of sticks or rights. Hohfeld’s eight terms are arranged in two tables of 'correlatives' and 'opposites' that structure the relationships among the different fundamental legal rights:

[100]M. Magheru, "La conception philosophique de la notion de la propriété en France", Jouve & Cie, Paris, 1935, p. 110.
[101]Wesley Newcomb Hohfeld, an American law professor in the early part of the 20th century.

JURAL OPPOSITES

Right	Privilege	Power	Immunity
No-right	Duty	Disability	Liability

JURAL CORRELATIVES

Right	Privilege	Power	Immunity
Duty	No-right	Liability	Disability

The eight concepts are the means describing generically legal relations between persons[102]. Jural opposites describe two different situations from the point of view of the same person. They display not only an array of "rights" the owner has vis-à-vis his property, but also duties he has vis-à-vis his property. In this respect, this theory is to refute the claim held by some[103]that the owner has a single right to a thing which is composed of the constitutive attributes of ownership. Such a stance neglects the fact that the constitutive elements are also rights *per se*, while being, at the same time, manifestations of property. Understanding property only as a simple right vested in a thing would be single-sided and would fall short of the full meaning of property.

Jural correlatives describe one and the same situation viewed, first, from the point of view of one person and, then, from that of the other to display an array of "rights" the owner has vis-à-vis other persons with respect to his property. This indicates that the essence of a right in a generic sense is a legal relation between a person who has a right and another person who is under a correlative duty. In general terms, jural opposites and jural correlatives signify a series of legal relations and provide for a thorough analysis of the premise that property is a series of relations between a person and a thing, and, simultaneously, a series of relations between persons with respect to things.

[102]For example, a person who owns a piece of land has rights in relation to the land. He also has the power to transfer his rights to anyone else or to create an easement which gives the grantee certain rights vis-à-vis others and certain rights and privileges vis-à-vis the owner (the capacity to create or change a legal relationship). He has the right to exclude and everyone else has a correlative duty not to use his property.

[103]A.-F. Zattara, "La dimension constitutionnelle et européenne du droit de propriété", L.G.D.J., 2001, p. 138.

Such understanding of property is not insular and it is shared across modern property scholarship. Accordingly, it is not uncommon that Hohfeldian fundamental legal conceptions are taken, together with fundamental attributes of property, or "standard incidents of ownership", and a catalogue of tangible and intangible "things" as objects of property, as forming part of the idea of property[104]. Property is also characterised by open-ended use-privileges and control-powers[105]. Hence, it is evident that the modern conception of property extends beyond the simple notion of object relations and that property necessarily involves various combinations of legal relations both between persons and assets and between persons with respect to assets. This "things and rights" approach captures the essence of what the modern understanding of property involves. So, property can be defined as "rights" in the generic sense embracing rights, privileges, powers, and immunities over tangible and intangible things, and legal relations between persons with respect to these things.

Relevant in constitutional law are jural correlatives, as they concern an analysis of rights and duties the owner has vis-à-vis other persons, including the state, with respect to his property, and *vice versa*. So, for example, if the constitution stipulates that everyone has the right to enjoy property, it protects a negative right of property of the owner that his property will not be interfered with, which is, in fact, a privilege in the sense of a liberty right, or freedom from the right of another, and not a claim right against the state. Accordingly, a privilege in terms of a sphere of autonomy of an individual in which he can freely enjoy his property rights corresponds to a constitutional status of an individual embracing his subjective public right vis-à-vis the state to forbear from interfering. Hence, the state has a no-right to interfere with this privilege to enjoy property. Whereas, if a positive right involves the owner's claim that the state protect his property, the state would have a correlative duty to protect the property from interferences. A privilege and a claim-right, thus, correlate to the negative and positive obligation, respectively, on the part of the state.

Hence, the theory of rights clearly expresses that the fundamental right of property as a subjective public right is not only a claim-right against the state in the usual sense of the word, but that it also comprises a privilege, meaning a liberty right. In other words, the fundamental right of property also encompasses a dimension of liberty, liberty of action. It

[104]S. Munzer, "A Theory of Property", Cambridge University Press, Cambridge, 1990, p. 23.
[105]J. W. Harris, "Property and Justice", Clarendon Press, Oxford, 1996, pp. 75-76.

can be also suggested that property is, in a way, a synonym to liberty[106]. This liberty right bestow both constitutional property protection clauses under scrutiny, as well as the European Convention on Human Rights. Similarly, the correlative subjective public duties of the state are not only duties in the usual sense of the word, but also no-rights, meaning that the state has no right to interfere with property. This terminology seems to be more accurate as it hints at a "passive" abstention than an "active" duty of state.

As Hohfeld's theory of rights shows, property also involves duties and liabilities. From the constitutional perspective, this aspect is important, as the theory of rights makes it clear that constitutional property clauses do not entail only the protection of property rights, but that they also allow for interferences with property rights which generate liability on the part of the owner to submit to the state power under certain constitutionally delimited conditions. To my mind, "liability" seems to express, better than "duty", that the social function of property involves a vertical relationship between the owner and the state entailing a power, or discretion, on the part of the state whether or not to limit a right. It expresses that the fundamental right of property within the meaning of liberty, or a protected sphere of autonomy, is usually balanced out in fundamental laws by the power of the state to limit or take away this sphere of autonomy under certain circumstances, usually when social, economic, or another necessity requires it. The ECHR implicitly recognised the states' privilege in *Handyside v. the United Kingdom* when it held that the Convention "never puts the various organs of the Contracting States under an obligation to limit the rights and freedoms it guarantees" by imposing restrictions or penalties[107]. This means that, under the Convention, states have the discretion not to restrict a right, along with the discretion to restrict it, even if the restriction is not necessary[108].

As concerns deprivation of property, provided that no one can be deprived of his property irrespective of the conditions provided for by law, a fundamental subjective public right of a

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[106]Immanuel Kant, for example, compares property to liberty as follows: "If I am a holder of a thing (that is, physically connected to it), then anyone who touches it without my consent (for example, wrests an apple from my hand) affects and diminshes that which is internally mine (my freedom)...". Immanuel Kant, "The Metaphysical Elements of Justice", Bobbs-Merrill, Indianapolis, 1965, p. 57. A similar view holds L.W. Sumner who argues that a liberty is the core of a liberty-right, and that claims, powers, and immunities consist its periphery "whose function is to enhance and protect the exercise of the core liberty". L.W. Sumner, "The Moral Foundation of Rights", Clarendon Press, Oxford, 1987, p. 77.

[107]*Handyside v. the United Kingdom*, 7 December 1976, Series A no. 24, § 54.

[108]J. Christoffersen, "Straight Human Rights Talk – Why Proportionality does (not) Matter", in *Human Rights: Their Limitations and Proliferation*, P. Wahlgren (ed.), Scandinavian Studies in Law, Stockholm Institute for Scandinavian Law, Vol. 55, 2010, pp. 42-43.

person not to be deprived of his property contrary to law would correspond to his immunity, or exemption, from the legal power of the competent state authority which is, then, disabled (lacking the legal power) from interfering with the person's property. These generic terms describe any legal situation in which a given legal relation vested in one person cannot be changed by the act of another person[109]. In such cases, the right not to be deprived of property is not a claim-right in the sense of claiming something from the state, but a defence variety of right consisting of immunity. Similarly, the state does not have a right in the sense of an entitlement to deprive property, but a power-right corresponding to its exercising sovereignty which denotes the legal ability to alter legal relations by certain acts. If the state limits the right of property of an individual, the latter cannot be said to have a right, but a liability to sustain the limitation, or alteration, of his legal relations by the state exercising its power-right to limit the property.

In my view, the notion of immunity can be compared to that of inviolability. Property is inviolable insofar as the owner has immunity. This fundamental condition indicates the importance of immunity in the modern constitutional protection of property. Immunity can be used to justify the existence of the constitutional protection of the right of property from arbitrary intrusions. Regarding the possibility of deprivation of property enacted in the constitutional texts in France and in the Czech Republic, inviolability does not indicate an absolute character in terms of "sacrosanctness" of property. Applied to the constitutional guarantees of property in both the French Declaration and the Czech Charter, the notion of inviolability to which subscribe both constitutional documents[110] would then be limited to the extent in which property is constitutionally protected against interference by public authorities. In other words, inviolability of property would be limited by the notion of public interest which is a constitutionally enshrined justification for possible interference. In the comparative inquiry, it is, thus, to see and compare the extent to which the French and the Czech constitutional jurisdictions, on the one hand, and the ECHR, on the other hand, see to keeping the balance between the public interest and the sphere of inviolability of individuals.

[109]W. N. Hohfeld, "Fundamental Legal Conceptions", Yale University Press, Fourth printing, New Haven and London, 1966, p. 9.
[110]The Charter recognises in the Preamble "the inviolability of the natural rights of man", amongst which also includes the right of property, and the Declaration proclaims that the right of property is "inviolable and sacred".

Hohfeld's analysis of rights indicates that the fundamental right of property as a subjective public right is a multilayered right in the generic sense of comprising right and duty elements which facilitate the description of the structure of the fundamental law clauses that protect it. This analysis also enables us to identify the essential features of property as a fundamental right. The "sticks in a bundle" approach indicates that property comprises a sphere of liberty, or freedom from the right or claim of another, as well as claim-rights to its protection. Under the deprivation and limitation norms property implies both immunity from legal power, which is already a given right that does not have to be claimed if unlawful deprivation is not at stake, as well as liability to sustain the alteration of property, which is, in fact, a kind of duty which corresponds to the power of the state to limit or take property from an individual.

It follows that the fundamental property protection clauses do not protect only rights, but that they also "protect" duties of individuals. Would it not, then, be more pertinent to reformulate the current fundamental rights documents as the French Declaration of the Rights and Duties of Man and of the Citizen, the Czech Charter of Fundamental Rights, Duties and Freedoms, and the Convention for the Protection of Human Rights, Duties and Fundamental Freedoms? What is the extent of those property rights and duties in national constitutions compared to the Convention? What are the constitutional principles that allow for restrictions of property rights for the purpose of fulfilment of duties attached to property? To what extent are they convergent with the Convention? I treat these questions in greater detail in the chapters devoted to limitations of property.

3. Summary

The origins of the property guarantees in the Convention and in the French and the Czech constitutions emanate primarily from the classical liberal understanding of property. Drawing largely on Locke's theory of property as natural rights, they focus on the individual as the prime value in socio-political matters and place stress on the connection between free society and the right to private property.

The liberal concept of property is built on the key values of liberty and equality. The former indicates that property, as a fundamental right, serves an individual function: it provides for an area of autonomy of individuals in which the state must not interfere and which the state must protect. The individual function of property aims at protecting material wealth and

prosperity which are necessary preconditions for social stability and the maintenance of democratic governance. From this point of view, property may be conceived as a subjective public right comprising an enforceable entitlement of the individual to claim certain actions from the state, whereby the state is obliged to ensure undisturbed enjoyment of property rights of the individual and to protect them against interference; or as a "negative" right that protects individuals from the state action[111]. The equality value indicates that property as a fundamental right also serves the social function of promoting solidarity and equality. Although constitutionally protected property rights are, in nature, "individual" human rights, they are embedded in the social context. Consequently, the social function is inevitable and intrinsic to constitutionally and conventionally protected property rights, and it is their inherent and indivisible part. Put in the words of Laura Underkuffler, property rights are, by nature, social rights[112]. The protection of property clauses in the European Convention on Human Rights, the French Declaration, and the Czech Charter project the social function of property in that they provide for the possibility of deprivation and limitation of property.

It has been suggested that property is not a single right but a multitude of legal relationships between persons with respect to a thing comprising right and duty elements. This "sticks in a bundle" approach indicates that property comprises a sphere of liberty, or freedom from the right or claim of another, claim-rights to its protection, and duties to sustain interferences in the public interest. Under this approach it is clear that the constitutional concept of property also entails obligations which are correlative to the power of state to limit or take away property under certain circumstances.

[111]The idea that the Constitution is a charter of negative rather than positive rights (liberties) is an entrenched feature of American legal discourse.
[112]L. S. Underkuffler, "The Idea of Property", Oxford University Press, Oxford, 2005, p. 145.

Chapter 3: Extent of Property Protection

1. European Convention on Human Rights

1.1. Origins of Property Guarantee

The origins of the protection of property at the European level date back to the drafting of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "the Convention") with the aim "to lay the foundations for the new Europe" which was hoped to be built "on the ruins of a continent ravaged by a fratricidal war of unparalleled atrocity"[113]. During the drafting process of the Convention the question of whether the right of property should be included in text of the Convention was subject to a vivid and hotly contested debate. The divergence of opinions had its own social and political reasons reflecting the post-World War II period in which the Convention was being drafted, and political developments in Europe. The drafting of the Convention was influenced by socialist ideas supported by the political parties in power in most European countries at that time, as well as by the constitutions of member states[114] and the Universal Declaration of Human Rights which, in Article 17, recognizes the right to own property as a human right.

The birth of the Convention began in May, 1948, with the convention of the Congress of Europe by the International Committee of Movements for European Unity[115]. The members of the Congress articulated the desire to adopt a Charter of Human Rights and establish a Court of Justice which would sanction the implementation of the Charter. In July, 1949, the International Juridical Section of the European Movement[116] submitted a draft Convention to the Committee of Ministers of the Council of Europe, containing a list of political and civil rights including the right of property, with a recommendation that it be considered at the first session of the Consultative Assembly of the Council of Europe.

[113]Rolv Ryssdal, President of the European Court of Human Rights, speaking in Rome on the occasion of the 40th anniversary of the European Convention, on 5 November 1990, published in *Cour*, 289 (1990), 3.
[114]*Travaux préparatoires*, Vol. I, p 102.
[115]The International Committee of Movements for European Unity was an unofficial organisation whose members were well-known politicians and academics from different European countries.
[116]The Section was established under the chairmanship of Pierre-Henri Teitgen, a former French Minister of Justice. Sir David Maxwell Fyfe and Professor Fernand Dehausse were joint reporters.

The Council of Europe commenced preparatory works on the Convention in 1949[117]. The Committee of Ministers approved the request[118], suggesting that the Consultative Assembly should come up with a Convention which would require member states to protect those rights and freedoms already guaranteed in their national constitutions. The Assembly held a general debate on the subject in August 1949 during which it was proposed to create "an organization within the Council of Europe to ensure the collective guarantee of human rights"[119]. After the general debate, in which there was great disagreement as to whether to include the right of property in the Convention[120], the issue was referred to the Committee on Legal and Administrative Questions which elaborated, on the basis of the Universal Declaration of Human Rights, the Teitgen report[121] listing twelve human rights to be protected including the right of property[122].

However, the right of property was not included in the original proposal of the reporter, Teitgen. Its inclusion was preceded by a lively discussion whether to include the guarantee of the right to own property. It was criticized by several members of the Committee. They claimed that the right of property was a social and economic right, and therefore there was no reason to include it in the proposal since social and economic rights were not intended to be covered. Some of the members also submitted that it would not be possible to confer on any international organization the protection of the right of property, because it would not be possible that an international organization be conferred the responsibility to evaluate the legitimacy of various charges and restrictions which might be imposed on private property by the member states on account of its social function and with regard to the economic or social conditions in respective member states. In the end, the majority of the Committee considered that the right of property should be included in the list of guaranteed rights, regard being paid

[117]When taking up the preparation of the Convention in 1949, the Council of Europe was able to refer to the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations in December 1948.
[118]First Session, Fifth Sitting of the Committee of Ministers (13 August 1949) *Travaux*, Vol. I, p. 102.
[119]Motion of Mr. Teitgen, Sir David Maxwell Fyfe and others, *Documents of the Assembly* (1949), Document 3.
[120]The debates of the Consultative Assembly on the right of property in the Convention are included in the preparatory works (*travaux préparatoires*).
[121]The so-called "Teitgen report" is reproduced in Council of Europe, *Collected Editions of the "Travaux Préparatoires" of the European Convention on Human Rights*, 8 vols. (The Hague: Martinus Nijhoff, 1975), vol. I, pp. 192-212.
[122]Article 2 para. 12 of the report reads that: "The right to own property, in accordance with Article 17 of the United Nations Declaration". *Travaux*, Vol. I, p. 218 (Doc. A 290).

to the importance which the right plays in the independence of the individual and the family[123].

During the following session of the Consultative Assembly debates relating to the inclusion of the right of property into the Convention featured different visions that can globally be divided into three groups. The first group, counting mainly the liberal, conservative, and Christian democratic members of the Assembly, was pleading for the incorporation of the protection of property guarantee. They argued that the right of property was one of the fundamental and natural rights of men which emanated from natural law, and which, therefore, had to be proclaimed as inviolable by positive law of civilized and democratic states[124]. The advocates of the property guarantee also stressed that property guarantees the independence of the individual and the family, and that many totalitarian regimes confiscated property of individuals to suppress their freedom[125]. It is worth noting that none of the members who defended the inclusion of the right of property into the proposed text of the Convention wished to formulate its guarantee in such a way to make it an absolute and inviolable right. On the contrary, they were rather of the opinion that the right of property should be subjected to limitations in the public or social interest. A Belgian Member of Parliament, Mr De la Vallé-Poussin, expressed the prevailing attitudes in this respect by the following words: *No longer does any party defend the absolute right to own property, as it was understood by Roman law, and I do not think there is anyone either who is in favour of the completeness of the Communist theory.*[126]

The second group of ideas was represented by proponents of a limited guarantee of property rights in the Convention. Some of them referred to Hegel and his understanding of property as an extension or projection of the personality of the owner[127]. Under this philosophical argument, they wanted to restrict the property guarantee to "the right to own property for the owner's personal use", and, thus, to exclude commercial property as a right that is not fundamental. Pragmatic members of the Assembly defended a limited guarantee against

[123] *Travaux Préparatoires*, Vol. I, p. 200 (Doc. A 290).
[124] *Travaux Préparatoires*, Vol. II, p. 100 (M. Boggiano Pico, I).
[125] A French member of the Consultative Assembly, Mr Pernot, stated that "The totalitarian regimes had a tendency to interfere with the right to own property as a means of exercising illegitimate pressure on its nationals". European Court of Human Rights, Preparatory Work on Article 1 of the First Protocol to the European Convention on Human Rights – Information Document prepared by the Registry (1976), p. 88.
[126] European Court of Human Rights, Preparatory Work on Article 1 of the First Protocol to the European Convention on Human Rights – Information Document prepared by the Registry (1976), p. 12.
[127] *Travaux Préparatoires,* Vol. II, p. 72 (Philip), p. 98 (Dominedo).

arbitrary confiscation of property[128]. They argued that this minimum guarantee should render the protection against arbitrary acts of totalitarian governments. However, opponents of this idea claimed that the meaning of the notion "arbitrary" was not clear and could, therefore, bring laws adopted by democratically elected legislators before the international authority.

The third group was against the inclusion of any guarantee of the right of property into the Convention. The major advocates of this idea were the members from the United Kingdom and Sweden. One of their objections was that the aim was not that the proposed Convention cover an exhaustive list of human rights. Another argument was that since the right of property was subjected to many kinds of limitations by domestic laws, and since political opinions varied with regard to restrictions of the right of property, it was difficult if not impossible to arrive at a generally acceptable definition of property[129]. Furthermore, the socialist members of the Assembly argued that the right of property was a social and economic right, in their understanding, a positive right to obtain property, which made it impossible to include it in the proposed text of the Convention while social rights would stay out[130]. They were quite concerned about the possible limitations which the protection of property may impose on nationalizations.

All in all, a majority of the members of the Assembly was in favour of the inclusion of the guarantee of property into the Convention. However, the Assembly referred the proposed formulation of the property guarantee back to the Legal Committee because of a vague reference to Article 17 of the Universal Declaration. Consequently, the Committee embarked on formulating a definition of property rights. The approved text of the Committee declared the right of all natural and legal persons to respect for their property which shall not be liable to arbitrary confiscation. It further provided for the right of the states to "enact such laws as may be necessary to ensure the use of property for the public good"[131], and accordingly approved the social function of property[132].

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[128] *Travaux Préparatoires*, Vol. II, p. 74 (Pernot), p. 70 (Sundt).
[129] *Travaux Préparatoires*, Vol. II, p. 50 (Lord Layton (UK)); pp. 60-86 (M. Ungoed-Thomas (UK)); M. Edberg (Sweden)).
[130] *Travaux Préparatoires*, Vol. II, p. 78 (M. Nally (UK)); p. 56 (Lord Layton (UK)); p. 62 (M. Ungoed-Thomas (UK)); p. 80 (M. Elmgreen (Sweden)); p. 98 (M. Callias (UK)).
[131] *Travaux Préparatoires*, Vol. III, p. 208.
[132] One of the Italian members of the Committee, Mr. Azara, noted, as to the theoretical basis of the proposed guarantee, the following: "No one today contests the social function of property. This function provides that the utilisation of property, in accordance with the general interest, can be sanctioned by law, only in order to avoid that *cives ad arma veniant*, and each state may decide, through its legislative power, in what form and to what extent the right of the individual should be conformable to the general interest". *Travaux Préparatoires*, Vol. III,

The adopted wording of Article 1 of Protocol No. 1 to the Convention[133] reflects an effort to reconcile the social conception of property with the prohibition of arbitrary confiscation[134] and reads as follows:

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

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

The social function of property is clearly expressed in the second sentence of the first paragraph and in the second paragraph. Under such wording, the right of property can be limited by law and each member state may decide in what form, and to what extent, the right of property of individuals will comply with the general interest[135]. The structure of the text apparently resembles the property guarantee as contained in German Basic Law or in the Czech Charter of Fundamental Rights and Freedoms; and, only partially, the property guarantee in the French Declaration, as the latter lacks an explicit provision on permissible limitations of property. The resemblance consists of two functions the property clause renders – individual (private) and social (public). So, it can be observed that the property guarantee in the Convention has a dual function. It protects, simultaneously, the "private property sphere" of individuals and the "public interests sphere" of society.

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p. 244-46. During the discussions in the Assembly, Mr. Bastid, a French member of the Assembly, in defence of the proposed Article on property submitted very interesting remarks when he said that property had more than an economic significance in that it is bound up with the development of the human being, and further that it was an extension of the individuality of man and the guarantee of his independence. *Travaux Préparatoires*, Vol. IV, pp. 118 and 122.

[133]The text of Article 1 of Protocol No. 1 was signed in Paris on 20 March 1952 and entered into force on 18 May 1954 following the ratification by ten member states.

[134]*Travaux Préparatoires*, Vol. VI, p. 76 (Sir David Maxwell-Fyfe (UK)). The Consultative Assembly agreed that a clause guaranteeing ownership should figure in the Convention and to that end adopted a recommendation to the Committee of Ministers. The latter, however, signed the Convention without the property guarantee and referred the matter to the Committee of Experts on Human Rights for further consideration and preparation of a protocol. The Committee of Experts, in view of the importance of the right of property and the tendency of totalitarian regimes to interfere with the right to own property as a means of legitimate pressure (*Travaux Préparatoires*, Vol. III, p. 262), elaborated a text of the future Article 1 of Protocol 1 to the Convention.

[135]*Travaux Préparatoires*, Vol. V, pp. 244-246.

It can be also observed that the adopted text of Article 1 of Protocol No. 1 (hereinafter "P1-1") does not contain any remark on compensation. Overall, there was much discussion as to whether or not it should be stipulated that deprivation of property should be subject to compensation. The proposal of compensation was rejected in the Committee of Ministers, as some national delegations (namely the French and the United Kingdom delegations) could not accept a guarantee of the right of property comprising the principle of compensation in the event of private property being acquired by the state. They did not think it possible to express this principle in terms which would be appropriate to the types of cases which might arise, and they could not admit that decisions taken on this matter by competent national authorities should be subject to review by an international body. The major worry was the possibility of condemning nationalization programs. Nevertheless, the door for compensation was left open by virtue of the condition "subject to the conditions provided for by law". It provided a leeway to the practice of the European Court of Human Rights (hereinafter "the ECHR") to establish a compensation guarantee, which has become a standard requirement in the ECHR's decision making[136], and which is normally provided for in member states' legislation on nationalization or expropriation[137].

1.2. Autonomous Concept of Property

The terminology of P1-1differs from constitutional guarantees of property at national level in that it does not render protection to "property" or "ownership" but to "possessions". In this regard, during the preparatory works, a British member of the Consultative Assembly came with an interesting remark to the effect that: "The word "possessions", used in the English text, is not a really satisfactory word. It is a word that would not be found in a British Act of Parliament or any other legal document"[138]. So the question of what is the extent of the concept of "possessions" arises.

By reading that "Every natural or legal person is entitled to the peaceful enjoyment of his possessions" it is apparent that the objective of P1-1 is to provide for a guarantee of property. The ECHR affirmed it by holding that: "By recognising that everyone has the right to the

[136]It was established in *Lithgow and others v. United Kingdom*, judgment of 8 July 1986, Series A no. 102.
[137]The Commentary of the Secretariat-General on the Draft Protocol, in *Travaux Préparatoires*, Vol. VIII, p. 8 (Doc. AS/JA (3) 13; A.S 904 dated 18 September 1951).
[138]Mr. Roberts, a UK member of the Consultative Assembly of the Council of Europe on proposed drafts of P1-1, August 1950 (Council of Europe, *Collected Editions of the "Travaux Préparatoires" of the European Convention on Human Rights*, 8 vols. (The Hague: Martinus Nijhoff, 1975), vol. 6, p. 88).

peaceful enjoyment of his possessions, Article 1 is, in substance, guaranteeing the right of property. This is the clear impression left by the words "possessions" and "use of property" (in French: *biens, propriété, usage des biens*); the *travaux préparatoires,* for their part, confirm this unequivocally: the drafters continually spoke of "right of property" or "right to property" to describe the subject matter of the successive drafts which were the forerunners of the present Article"[139]. The property guarantee protects "the peaceful enjoyment of possessions" which embraces the right to own, possess, use, lend or dispose of the property as one so desires without interference by the state, however, subject to a number of significant limitations and exceptions[140]. So, P1-1 provides for the positive guarantee of the peaceful enjoyment of possessions as well as for the negative one.

But save for the term "possessions" in the first paragraph, P1-1 employs also the term "property" in the second paragraph; the French version uses *propriété* and *biens*. Do these two expressions have a different meaning or do they have an identical connotation? According to the case-law of the ECHR, the different terms entail, in substance, the guarantee of the right of property[141]; they have the same meaning for the purposes of the protection guaranteed by the Convention. Despite both terms being interchangeable, the text of P1-1 does not offer any guidance as to their precise meaning. The definition of "property" under the Convention is, thus, left to the interpretation by the judges of the ECHR.

They were not left with an easy task, as they could not automatically rely on national legal systems in this respect. Regarding the fact that the term "property" is defined variously in different national jurisdictions, the ECHR could not but define its own concept of property. By explicitly acknowledging that it was not its role to determine whether or not the right of property existed in domestic law, the ECHR was left with the necessity to coin an autonomous definition of property and to determine the scope of protection under the Convention. Accordingly, the notion of property under the Convention is an autonomous one, independent of any national concept of constitutional property, whenever it may be overlapping. Consequently, within the scope of P1-1 also fall property rights which are not treated as proprietary interests by national courts[142]. The reason why the ECHR developed the

[139]*Marckx v. Belgium*, 13 June 1979, § 63, Series A no. 31.
[140]D. Rook, "Property Law & Human Rights", Blackstone Press Limited, London, 2001, p. 61.
[141]*Handyside v. UK*, judgment of 7 December 1976, Series A no. 24, § 62; *Marckx v. Belgium*, judgment of 13 June 1979, Series A no. 31, §63.
[142]*Gasus Dosier- und Fördertechnik GmbH v. the Netherlands*, 23 February 1995, Series A no. 306-B.

autonomous notion of property was to prevent states from avoiding their obligations under the Convention by relabeling rights or legal processes that would otherwise come within the scope of a Convention right[143]. The autonomous concept is important, as on its basis the ECHR can exercise a uniform and effective interpretation and application of the Convention. This concept has permitted the ECHR to proceed to a large interpretation and to revaluate the concept of property in view of the fact that the Convention is conceived as a "living instrument" which is to be interpreted in the light of "present-day conditions"[144], which some scholars refer to as a "socialisation of the notion of property"[145].

The consequence of creating an autonomous concept of property with an autonomous meaning, not limited to ownership of physical goods[146], is that in considering whether a right enjoys protection under the Convention guarantee, it is irrelevant whether the right exists in national law[147]. Even if a right is not considered as a property right in a national jurisdiction, it can be regarded as "possessions" under the Convention. The concept of "possessions" in P1-1 is not limited to ownership of physical goods and is independent of formal classification in domestic law: certain other rights and interests constituting assets can also be regarded as "possessions" for the purposes of P1-1[148]. It is a broad concept embracing all rights which are well-founded under national law, which is not limited to the concept of property in national legal systems and also includes some public law rights such as pensions and social benefits. It comprises ownership rights and other *rights in rem*, as well as claim rights of economic (pecuniary) value arising both from private[149] and public[150] law relationships which exist and are not mere expectations to acquire property in future[151]. In brief, the settled case-law recognises as "possessions" all vested rights of pecuniary value: rights *in rem* in tangible and intangible things, intellectual property (copyrights, patents, publishers' rights, trademarks and

[143]T. Allen, "Closing the door on restitution", in Transitional Jurisprudence and the ECHR, A. Buyse and M. Hamilton (eds.), Cambridge University Press, 2011, pp. 225.
[144]D. Spielmann, V. Bruck, "La Cour européenne des droits de l'homme et le droit au respect des biens: une synthèse", in *Journal des tribunaux Luxembourg*, No. 24, 5 December 2012, p. 150.
[145]J.-P. Marguenaud, "Les grands arrets de la Cour européenne des droits de l'homme", P.U.F., Paris, 2011, p. 739.
[146]*Gasus Dosier-und Födertechnik GmbH v. the Netherlands*, judgement of 23 February1995, § 53, Series A no. 306-B.
[147]*Matos e Silva, Lda., and Others v. Portugal*, 16 September 1996, § 75, *Reports of Judgments and Decisions* 1996-IV.
[148]*Beyeler v. Italy* [GC], no. 33202/96, ECHR 2000-I.
[149]*Van Marle and Others v. the Netherlands*, 26 June 1986, Series A no. 101.
[150]*Tre Traktörer Aktiebolag v. Sweden*, judgment of 7 July 1989, Series A no. 159; *Pressos Campania Naviera and Others v. Belgium*, judgment of 20 November 1995, Series A no. 332; *Gaygusuz v. Austria*, judgment of 16 September 1996, reports 1996-IV.
[151]For example, in the case of *Marckx v. Belgium* the ECHR held that P1-1 was not applicable to the illegitimate child's potential right to inherit in the case of the death of her mother.

other protective rights), and rights *in personam* comprising claim rights arising from relationships between private individuals (such as pecuniary claims based on contract, tort or unjust enrichment or on arbitration award, goodwill or company shares), in addition to public law relationships (such as monetary compensation claims against public authorities, pension and benefit claims, licence claims). This broad interpretation is mandated by the use of the term *biens* in the French version of the text of P1-1, which relates to all pecuniary rights that, under French law, represent "patrimony" composed of the totality of legal relations susceptible to pecuniary evaluation which can have either a positive economic value or a negative one such as debts[152]. So, the essential criterion in determining whether a right constitutes a "possession" under the Convention is the economic value of the interest, notwithstanding that national law of the contracting state does not recognise the right as property, for the ECHR interprets the concept of possessions independently from the national legal systems.

It is important to note that the case-law acknowledges both pecuniary rights arising from a public law relationship, as well as those arising from a relationship between private individuals. Whereas pecuniary claims in private law generally amount to a possession within the meaning of P1-1[153], the extent of the protection of public law claims, such as welfare benefits, had not, for a long time, been straightforward. Before the *Stec and others v. United Kingdom*[154] judgment was handed down, the case-law had distinguished between public law claims based on individual contributions and those based on state concessions. The ECHR had maintained that only the payment of compulsory contributions to a pension fund might create a property right in a portion of the fund and a claim of the assured to a share of the fund[155]. At all times, the existence of a possession was conditional on the existence of the legal right to a benefit. The second type of public law claims represented licences or authorisations required to run a business. Nevertheless, they generally do not, in themselves, constitute possessions unless there is a link between the licence and economic interests of the business and the licence is a vital component in the continuation of the business[156], provided

[152]Y. Strickler, "Les biens", Presses Universitaires de France, Paris, 2006, pp. 198-199.
[153]For example, *Stran Greek Refineries and Stratis Andreadis v. Greece*, 9 December 1994, Series A no. 301-B; *Pressos Compania Naviera S.A. and Others v. Belgium*, 20 November 1995, Series A no. 332.
[154]*Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, ECHR 2005-X.
[155]For example, *X and Y v. the Netherlands*, 26 March 1985, Series A no. 91; *Müller v. Austria*, no. 12555/03, 5 October 2006.
[156]*Tre Traktörer AB v. Sweden*, 7 July 1989, Series A no. 159.

that all conditions attached to the licence are fulfilled and the licence has not been withdrawn in accordance with law[157].

But the notion of "possessions" is not limited to only "existing possessions", as "possessions" also include other assets, including claims in respect of which applicant can argue that he has at least a "legitimate expectation"[158], and the nature of which is more concrete than the mere hope that they will be realised. But such a claim is regarded as an asset only when it is sufficiently established to be enforceable. In this respect the ECHR has emphasised that the object and purpose of the Convention is not to guarantee rights that are theoretical or illusory, but rights that are practical and effective. Accordingly, a person who seeks protection under the Convention must have, if not an existing right, at least a legitimate expectation that his right will be materialised. *A contrario* there will be no "legitimate expectation" if the claim is conditional and has lapsed as a result of the failure to fulfil the condition, or if it amounts to a mere expectation to acquire property at a future date[159] or to the hope that a long-extinguished property right may be revived. In other words, the hope that the state will restore a property right fully extinguished is not itself a "possession" under P1-1[160]. In the *Marckx* judgment, the ECHR observed that P1-1 does no more than enshrine the right of everyone to the peaceful enjoyment of "his" possessions, and that, consequently, it only applies to a person's existing possessions and does not guarantee the right to acquire possessions, whether on intestacy, or, through voluntary dispositions[161]. On the basis of this statement, the ECHR did not find a breach of P1-1 when Belgian law accorded illegitimate children lesser patrimonial rights in comparison to legitimate children, for an expectation of inheritance does not, according to the

[157]*Gudmunsson v. Iceland*, decision of 17 January 1996, application no. 23285/94.
[158]The notion of "legitimate expectation" within the context of P1-1 was first developed in the case of *Pine Valley Developments Ltd and Others v. Ireland*, judgment of 29 November 1991, Series A no. 222, p. 23, § 51. In that case, the ECHR found that a "legitimate expectation" arose when outline planning permission had been granted, in reliance on which the applicant companies had purchased land with a view to its development. The planning permission, which could not be revoked by the planning authority, was "a component part of the applicant companies' property". In a more recent case of *Stretch v. the United Kingdom*, no. 44277/98, § 35, 24 June 2003, the applicant had leased land from a local authority for a period of twenty-two years on payment of an annual ground rent with an option to renew the lease for a further period at the expiry of the term and, in accordance with the terms of the lease, had erected at his own expense a number of buildings for light industrial use which he had sub-let. The ECHR found that the applicant had to be regarded as having at least a "legitimate expectation" of exercising the option to renew and this had to be regarded, for the purposes of P1-1, as "attached to the property rights granted to him under the lease".
[159]*Marckx v. Belgium*, 13 June 1979, Series A no. 31.
[160]This issue was addressed in the case of *Malhous v. the Czech Republic* (dec.) [GC], no. 33071/96, ECHR 2000-XII. The ECHR held that an old expropriation left the former owner with no subsisting rights to provide the basis for a claim under P1-1. It stated that "the hope of recognition of the survival of an old property right which it has long been impossible to exercise effectively cannot be considered as a "possession"".
[161]*Marckx v. Belgium*, judgment of 13 June 1979, § 50, Series A no. 31.

ECHR, constitute a possession. The ECHR, however, found that making a distinction between legitimate and illegitimate children in respect of the right to inheritance was discriminatory and constituted a violation of Article 14 of the Convention. It established that P1-1 protects only existing property and that it does not guarantee a right to acquire property. Besides this, it also ruled that "the right to dispose of one's property constitutes a traditional and fundamental aspect of the right of property"[162]. Having outlined the nature of "possessions", it remains now to examine the scope of protection guaranteed by P1-1.

1.3. Contents of the Right of Property

As the Convention lacks any definition whatsoever of the notion of "possessions", it is, therefore, indispensable to look at the case-law of the ECHR that determines the scope of protection under P1-1. The meaning and scope of P1-1 was analysed in detail in *Sporrong and Lönnroth v. Sweden* and it has become the established method of applying P-1. The ECHR identified the existence of "three distinct rules" that comprise P1-1 by explaining that:

The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognizes that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph[163].

The facts of the case concerned a complaint on expropriation. The applicants owned land in the City of Stockholm that was subject to expropriation permits, issued by the Government on an application by the local authority, and to prohibition of any construction, imposed by the local administration board. The property was never expropriated and the prohibition on construction lapsed. The ECHR ruled that the expropriation permits did not constitute a deprivation of property within the meaning of the second rule, for the land had never been expropriated, nor that they amounted to a control of the use of property under the third rule. Nonetheless, the ECHR observed that, although the owners' right to use and dispose of their

[162] *Marckx v. Belgium*, judgment of 13 June 1979, § 63, Series A no. 31.
[163] *Sporrong and Lönnroth v. Sweden*, 23 September 1982, § 61, Series A no. 52.

possessions was left intact in law, in practice the owners were significantly reduced the possibility of its exercise. Consequently, their right of property was precarious given that the City of Stockholm could lawfully expropriate the land whenever it wished. The ECHR thus found that the first rule applied and that the expropriation permits interfered with the applicants' ownership of their land.

Under the ECHR's analysis, the first rule is a general one which provides protection to the right to the peaceful enjoyment of possessions against state interferences. The second rule restricts the general guarantee of the first rule by providing for deprivation of property by the state under certain circumstances. The third rule defines conditions under which the state may interfere with a person's peaceful enjoyment of possessions by means of a control of the use of property, and so provides another qualification to the general guarantee of the first rule. This analysis has become the established method of application of P1-1, though on rare occasions the ECHR has looked at P1-1 as a whole without identifying applicability of any of the three rules. Accordingly, when considering whether there has been a violation of P1-1, the ECHR examines which of the three rules applies: it examines, first, whether there exists any property right within the meaning of P1-1, secondly, it considers whether there has been any interference with the property, and ultimately, it examines the nature of that interference.

It is worthy to note that the three rules, although distinct, are not unconnected. The second and the third rule are concerned with particular instances of interference with the right to the peaceful enjoyment of property and are, therefore, construed in the light of the general principles enunciated in the first rule. The ECHR clarified the relationship between the three rules in the case of *James and others v. UK*. This case concerned a complaint about a violation of the right to the peaceful enjoyment of possessions as a result of a piece of legislation enabling certain tenants of long leases to compulsorily purchase the landlord's property. The ECHR had to examine whether the deprivation of the landlord's property was justified. In the framework of this enquiry it clarified the relationship between the three rules as follows:

Before inquiring whether the first general rule has been complied with, the Court must determine whether the last two are applicable. The three rules are not, however, "distinct" in the sense of being unconnected. The second and third rules are concerned with particular

instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule[164].

It came to the conclusion that the deprivation was justifiable under the second rule. Nevertheless, under the three rules principle, the ECHR had to examine further whether the deprivation could constitute a violation within the wider scope of the first rule. It ruled that the general rule was complied with and that the second sentence supplemented and qualified the general principle enunciated in the first sentence[165].

It follows that the inextricable link between the three rules consists of the deprivation rule and the control of the use rule supplementing and qualifying the general rule. Under this scheme, the ECHR first examines whether either the second or third rule is applicable, that is, whether a given case concerns either a deprivation or a control of the use of property. If it is not the case, it approaches the application of the first rule to find out whether it has been complied with. If the interference with the right of property is either a deprivation or a control of use, then the conditions specified in those rules must be complied with to prevent a violation of P1-1. If an act of the state power constitutes neither a deprivation nor a control of use, but it nevertheless constitutes an interference with the owner's peaceful enjoyment of possessions, it falls within the scope of application of the first rule. Accordingly, an interference that is considered to be neither a deprivation of property nor a control of use of property can violate P1-1 if it fails to respect the first rule of P1-1. The first rule is therefore separate from the second and third rules and represents "a kind of catch-all category for any kind of interference which is hard to pin down"[166].

The first rule is, compared to the second and the third rules, rather concise as regards the determination of conditions for interfering with property. It does not contain any express condition that the interference with the peaceful enjoyment of property be lawful, although it is the first and most important requirement of P1-1[167]. Even so, the requirement of lawfulness of an interference follows from the well-established case-law of the ECHR referring to the rule of law principle which is inherent in all Articles of the Convention. It is, therefore,

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[164] *James and Others v. the United Kingdom*, 21 February 1986, § 37, Series A no. 98.
[165] *James and Others v. the United Kingdom*, 21 February 1986, § 71, Series A no. 98.
[166] L. Sermet, "The European Convention on Human Rights and property rights", Council of Europe Press, Human Rights files No. 11, 1992.
[167] *Iatridis v. Greece* [GC], no. 31107/96, § 58, ECHR 1999-II.

incumbent on states to comply with this principle regardless of the nature of interference, that is, regardless of which rule of P1-1 applies. The same holds for the principle of proportionality which follows as well from the established case-law. Therefore, as with the second and third rules, the compensation factor and the due process factor are relevant in the assessment of whether the fair balance was struck under the first rule[168].

It can be observed that the general rule is problematic, in that the ECHR's criteria for its application are not clear or consistent, which corresponds to the designation of this rule as "a kind of catch-all category". The ECHR avails of this rule when it has difficulty classifying interferences into a precise category. What is certain is that the ECHR will follow the same approach in the examination of interferences with property, notwithstanding which rule of P1-1 applies: it will examine lawfulness, legitimacy, and proportionality of interferences. The ECHR has qualified as an interference with the substance of property, for example, a provisional transfer of agricultural land in connection with a long-term consolidation programme[169], prohibitions on construction leaving the status of property uncertain for a long period of time without paying compensation[170], the retroactive annulment of arbitration awards by legislation[171], or an unreasonable delay in payment of compensation for expropriation[172]. The second and the third rules are dealt with separately in Chapter 4 under limitations and deprivations of property.

1.4. Jurisprudential Tools for Expanding the Scope of Convention Rights and Freedoms

The provision of P1-1 incorporates both negative and positive[173] obligations: the objective of this provision is to protect persons against arbitrary interferences of state authorities with

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[168]*Matos e Silva, Lda., and Others v. Portugal*, 16 September 1996, *Reports of Judgments and Decisions* 1996-IV.
[169]*Erkner and Hofauer v. Austria*, Judgment of 23 April 1987, Series A, No. 117; *Poiss v. Austria*, Judgment of 23 April 1987, Series A, No. 117.
[170]*Phocas v. France*, Judgment of 23 April 1996, Reports 1996-II; *Katte Klitsche de la Grance v. Italy*, Judgment of 27 October 1994, Series A, No. 293-B; *Iatridis v. Greece*, Judgment of 25 March 1999, Reports 1999-II; *Pialopoulos and Others v. Greece*, Judgment of 15 February 2001.
[171]*Stran Greek Refineries and Stratis Andreadis v. Greece*, Judgment of 9 December 1994, Series A, No.. 301-A.
[172]*Matos e Silva, Lda., and Others v. Portugal*, Judgment of 27 August 1996, Reports 1996-IV; *Almeida Garrett, Mascarenhas Falcao and Others v. Portugal*, Judgment of 11 January 2000.
[173]The ECHR already held in the *Marckx* judgment that Article 8 "does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective "respect" for family life". *Marckx v. Belgium*, judgment of 13 June 1979, § 31, Series A no. 31.

property, as well as to require from them to take positive measures[174]. Effective exercise of the rights and freedoms under the Convention does not depend merely on the state's duty not to interfere, but may require positive measures of protection even in the sphere of relations between individuals[175]. Positive obligations may entail certain measures necessary to protect the right of property, even in cases involving litigation between individuals or companies. This means, in particular, that states are under an obligation to offer necessary procedural guarantees and enable domestic courts and tribunals to adjudicate effectively and fairly on any disputes between private persons[176]. In this respect a court decision in a conflict between private parties is also considered a measure adopted by a state[177]. The existence of positive obligations is generally based either on the need to guarantee the "effective" protection of a Convention right, or on Article 1 of the Convention which requires states to "secure" the enjoyment of the Convention rights to everyone within their jurisdiction[178].

It is by way of positive obligations that the ECHR has extended the scope and impact of Convention rights[179]. In the field of protection of property the first positive obligation to have been imposed by the ECHR in the context of Article 1 of Protocol No. 1 was the obligation to compensate victims who have been deprived of their possessions in the public interest (by expropriation or otherwise). The ECHR stressed in *James v. the United Kingdom*[180] that the

[174]For example, in *Öneryıldız v. Turkey* [GC], no. 48939/99, § 134, ECHR 2004-XII, the ECHR ruled that: "Genuine, effective exercise of the right protected by that provision does not depend merely on the State's duty not to interfere, but may require positive measures of protection, particularly where there is a direct link between the measures an applicant may legitimately expect from the authorities and his effective enjoyment of his possessions". The state was found to be under the obligation to undertake steps to avoid destruction of property as a result of unsafe conditions.

[175]The ECHR has found that such obligations may arise under Article 2 (see, for example, *McCann and Others v. the United Kingdom*, § 161, and *Osman v. the United Kingdom*, §§ 115-117) and Article 3 (see *Assenov and Others v. Bulgaria*, §102), under Article 8 (see, amongst others, *Gaskin v. the United Kingdom*, §§ 42-49) and Article 11 (see *Plattform "Ärzte für das Leben" v. Austria*, § 32), as well as under Article 1 of Protocol No. 1 (see *Sovtransavto Holding v. Ukraine*, no. 48553/99, § 98, ECHR 2002-VII; *Sud Est Réalisations v. France*, no. 6722/05, § 50, 2 December 2010).

[176]*López Ostra v. Spain*, judgment of 9 December 1994, Series A no. 303-C, p. 55, § 55; *Sovtransavto Holding v. Ukraine*, no. 48553/99, § 96, ECHR 2002-VII.

[177]*Palomo Sánchez and Others v. Spain* [GC], nos. 28955/06, 28957/06, 28959/06 and 28964/06, § 60, ECHR 2011.

[178]L. Lavrysen, "The scope of rights and the scope of obligations", in *Shaping Rights in the ECHR*, (eds.) E. Brems and J. Gerards, Cambridge University Press, 2013, p. 162.

[179]See, for example, *Von Hannover v. Germany*, no. 59320/00, ECHR 2004-VI; or *Fuentes Bobo v. Spain*, no. 39293/98, 29 February 2000. In the latter case the applicant was laid off by the Spanish television company (TVE) because of his criticism of its management, which was made during a radio programme. In response to a government argument that TVE was a legal person, the ECHR found that by virtue of its positive obligation, it was incumbent on the Spanish government to safeguard freedom of expression from threats stemming from private persons, and that the applicant's lawful dismissal constituted an interference with his freedom of expression.

[180]*James and Others v. the United Kingdom*, 21 February 1986, § 54, Series A no. 98.

protection of the right of property would be largely illusory and ineffective in the absence of any equivalent principle. So, to satisfy Convention requirements, compensation must meet two conditions: it must be proportionate to the value of the property taken, and it must be paid within a reasonable time. The case-law has added other obligations to that of compensation. It relates to the substantive and procedural protection of property considered as a matter of general interest. The ECHR employs a general formula whereby the public authorities are required to react in good time, correctly and with utmost consistency[181]. The states are under obligation to take judicial and practical protection measures suitable for preventing violations of the right of property[182]. The assertion of procedural obligations involves, for example, the obligation to investigate thoroughly, promptly, impartially and in detail[183] the allegations of violation of property by public authorities, or the obligation to provide necessary procedural guarantees[184]. This obligation applies to both disputes between individuals and those between individuals and the state. Moreover, the ECHR also induced from Article 1 of Protocol No. 1 a right to execution of final court decisions establishing ownership[185], that is, procedural rights safeguarded by Article 6 of the Convention.

In respect of France, the ECHR has applied the positive obligations doctrine consisting of the requirement to respect for the right to execution of final court decisions in property matters, for example, in the case of *Matheus v. France*[186]. This case concerned a refusal of the authorities to assist in the execution of a final judgment ordering restitution of property. The ECHR, finding a violation of the right of property, observed that for sixteen years state authorities and officials had refused to cooperate when enforcing the judgment in question,

[181]*Novoseletskiy v. Ukraine*, no. 47148/99, §102, ECHR 2005-II (extracts).
[182]From recent decisions illustrating that the ECHR decided to examine the complaints from the standpoint of positive obligations can be mentioned *Păduraru v. Romania*, no. 63252/00, ECHR 2005-XII (extracts), concerning non-restitution of property arising from the state of legal uncertainty caused by legislative imprecision and contradictions in the relevant case-law. The ECHR ruled that once a solution had been adopted by a state, it must be implemented with a reasonable degree of clarity and consistency in order to avoid, as far as possible, legal insecurity and uncertainty for the individuals concerned by the measures taken to implement the solution. In *Broniowski v. Poland* [GC], no. 31443/96, ECHR 2004-V, the ECHR held that "the rule of law underlying the Convention and the principle of lawfulness in Article 1 of Protocol No. 1 require States not only to respect and apply, in a foreseeable and consistent manner, the laws they have enacted, but also, as a corollary of this duty, to ensure the legal and practical conditions for their implementation".
[183]*Novoseletskiy v. Ukraine*, no. 47148/99, §§ 35, 103, ECHR 2005-II (extracts).
[184]*Sovtransavto Holding v. Ukraine*, no. 48553/99, § 96, ECHR 2002-VII. The ECHR observed that "an obligation to afford judicial procedures that offer the necessary procedural guarantees and, therefore, enable the domestic courts and tribunals to adjudicate effectively and fairly any disputes between private persons".
[185]In this connection, see in particular *Burdov v. Russia*, no. 59498/00, ECHR 2002-III; *Jasiūnienė v. Lithuania*, no. 41510/98, 6 March 2003; *Sabin Popescu v. Romania*, no. 48102/99, 2 March 2004.
[186]*Matheus v. France*, no. 62740/00, 31 March 2005.

although there were no public-order or social considerations to justify such an unreasonable delay. Accordingly, they had not done everything in their power to protect the applicant's pecuniary interests. The ECHR considered that the award of compensation to the applicant was incapable of redressing the authorities' inaction. It concluded that in the absence of an effective system of enforcement, such a situation created a risk that a form of "private justice", contrary to the rule of law, might emerge.

In respect of the Czech Republic one of the recent judgments imposing a positive obligation concerns a positive obligation to protect those in custody from harm and fully and independently investigate deaths in custody[187]. The ECHR clarified that states had a positive duty to take active measures to protect those in custody from harm, including self-harm, and reiterated the importance of providing an adequate, impartial, and independent investigation into deaths in custody.

The ECHR has maintained that it does not have to develop a general theory of the positive obligations which may flow from the Convention[188]. Therefore, it approaches this doctrine on a case-by-case basis which leaves no clear line of the nature and application of positive obligations. Some criticism of positive obligations concerns their "open-ended" nature and the fact that the Strasbourg Court "does not set general conceptual limitations for its interventions" in developing them, which implies that positive obligations may be applied in an undefined variety of cases[189]. This statement seems to be correct beyond doubt. Although the ECHR has maintained that positive obligations must not be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities[190], this does not change the fact that the scope of the obligations will vary considering the diversity of situations in the Contracting States, the difficulties involved in policing modern societies and the choices

[187] *Eremiášová and Pechová v. the Czech Republic*, 16 February 2012, application no. 23944/04.
[188] *Plattform "Ärzte für das Leben" v. Austria*, 21 June 1988, § 31, Series A no. 139.
[189] See D. Xenos, "The Positive Obligations of the State under the European Convention of Human Rights", Routledge, London, 2011, p. 3. Some scholars also argue that, through the extensive "creation" of positive obligations, the ECHR reads "new" human rights into the Convention and, thus, "inflates" human rights. See, in this respect, G. Letsas, "A Theory of Interpretation of the European Convention on Human Rights", Oxford University Press, 2007, pp. 126-30. Other scholars object that this criticism stems from the symmetrical nature of rights and obligations when a right of an individual corresponds to an obligation on the state and *vice versa*, and that a positive obligation does not necessarily create a new abstract right. See in this respect R. Alexy, "A Theory of Constitutional Rights", Oxford University Press, 2002, p. 296. Some authors argue that as the ECHR does not create "new" human rights this way, the criticism of "human rights inflation" is simply incorrect. See L. Lavrysen, "The scope of rights and the scope of obligations", in *Shaping Rights in the ECHR*, (eds.) E. Brems and J. Gerards, Cambridge University Press, 2013, p. 174.
[190] *Rees v. the United Kingdom*, 17 October 1986, § 37, Series A no. 106; *Osman v. the United Kingdom*, 28 October 1998, § 116, *Reports of Judgments and Decisions* 1998-VIII.

which must be made in terms of priorities and resources[191]. So, the doctrine of positive obligations seems to be a rather unpredictable interpretative tool in the hands of the ECHR.

The uncertainty as to the scope of rights "touched" by positive obligations apparently increases when more than one protected right or freedom is at stake. This is illustrated, for example, by the case of *Khurshid Mustafa and Tarzibachi v. Sweden*[192]. The facts show the applicants, as tenants, were evicted from their flat, by a court order, for safety and aesthetic reasons for refusing to dismantle a satellite dish with which they received programmes in their native language. The ECHR considered that this interfered with their freedom to receive information and that the respondent state failed in its positive obligation to protect that freedom as the domestic courts ordered the eviction. The ECHR has held particularly that the freedom to receive information does not extend only to reports of events of public concern, but also covers, in principle, cultural expressions as well as pure entertainment demonstrating that the importance of the latter types of information should not be underestimated, especially for an immigrant family with three children who may wish to maintain contact with the culture and language of their country of origin, and that the right at issue was, therefore, of particular importance to the applicants. It seems that, in the ECHR's interpretation, the importance of freedom of information and the interests of the applicants, in this particular case, clearly outweighed the interests of the owner of the property in the preservation of the aesthetic or safety aspects of his property.

The scope of Convention rights and freedoms, and, thus, the application of the Convention, has also been expanded by the ECHR by way of other jurisprudential tools, such as "the living instrument" doctrine which was first articulated in the 1970's in the context of the legality to use corporal punishment in a criminal justice system[193] requiring that the Convention rights and freedoms be interpreted in light of contemporary conditions[194]. Furthermore, the European consensus doctrine has been applied by the ECHR to expand the interpretation of

[191]For example, in deciding whether a positive obligation under Article 10 exists, regard must be had to the kind of expression rights at stake; their capability to contribute to public debates; the nature and scope of restrictions on expression rights; the ability of alternative venues for expression; and the weight of countervailing rights of others or the public. See, for example, *Appleby and Others v. the United Kingdom*, no. 44306/98, §§ 42-43, ECHR 2003-VI.
[192]Decision no. 23883/06, 16 December 2008.
[193]*Tyrer v. the United Kingdom*, 25 April 1978, Series A no. 26.
[194]*Demir and Baykara v. Turkey* [GC], no. 34503/97, ECHR 2008; *Bayatyan v. Armenia* [GC], no. 23459/03, ECHR 2011. In these cases the ECHR used the "living instrument" doctrine to justify the overruling of the interpretation of the Convention that was not in accordance with the up-to-date standards in the area of trade union rights and conscientious objection to compulsory military service.

Convention rights and freedoms in cases where a clear majority of the Contracting Parties have adopted a consistent practice in interpreting a Convention right or freedom[195]. If, on the other hand, a European consensus is lacking, then the ECHR will tend to adopt a more literal interpretation of the Convention[196]. In the progressive interpretation of the ECHR all the interpretative instruments can be applied simultaneously. But, regardless of whether the ECHR applies the progressive interpretation or not, it seems that it interprets the scope of the Convention right of property as comprising a multitude of distinct rights.

1.5. Property as a Bundle of Rights

The approach to property as a bundle of rights, or a bundle of sticks, where each stick represents a distinct and separate right is not unfamiliar to the ECHR in its decision-making. It may be suggested that the ECHR has availed of this doctrine in two different fashions. The first aspect deals with the question of the scope of protection of P1-1, that is, whether P1-1 renders protection to each individual stick from the bundle. It concerns situations in which a person holds only one, or a few rights, from the bundle through which he enters into relationships with other persons. In *Iatridis v. Greece*, for example, the ECHR held that a clientele of a cinema, which the applicant built up in his capacity of a tenant of the cinema, was a "possession" within the meaning of P1-1. In this case it was the right of use standing alone which generated the assets through a series of relationships and interactions with other persons. The fact that the applicant was evicted from the cinema by public authorities, whereby his right to use was circumscribed and rendered inoperative, established a violation of P1-1. The ECHR held that before the applicant was evicted he had operated the cinema for eleven years under a formally valid lease without any interference by the authorities as a result of which he had built up a clientele that constituted an asset[197]. The ECHR found that

[195]Such as, for example, a consensus across the Council of Europe member states regarding the abolition or non-use of the death penalty has lead the ECHR to hold that the death penalty violates Article 3 of the Convention. See in this respect, for example, *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, ECHR 2010.
[196]A. Mowbray, "Between the will of the Contracting Parties and the needs of today", in *Shaping Rights in the ECHR*, (eds.) E. Brems and J. Gerards, Cambridge University Press, 2013, p. 34.
[197]*Iatridis v. Greece* [GC], no. 31107/96, § 54, ECHR 1999-II. Similarly, in a more recent case of *Depalle v. France* [GC], no. 34044/02, § 68, ECHR 2010, the ECHR considered that the applicant who lived in a house built on maritime public property could not have reasonably expected to continue to peacefully enjoy the property solely on the basis of the decisions authorising the occupancy, but it reiterated that the fact that the domestic laws of the state do not recognise a particular interest as a "right", or even a "property right", does not necessarily prevent the interest in question, in some circumstances, from being regarded as a "possession" within the meaning of Article 1 of Protocol No. 1. It concluded that in the present case the time that had elapsed had the effect of vesting in the applicant a proprietary interest in the peaceful enjoyment of the house that was sufficiently established and was weighty enough to amount to a "possession" within the meaning of the rule expressed in the first sentence of Article 1 of Protocol No. 1.

since the applicant held only a lease of the business premises, the interference neither amounted to an expropriation, nor was it an instance of controlling the use of property, and that it was an interference with the substance of possessions. Similarly, in *Van Marle v. the Netherlands* the ECHR held that the refusal to register the applicants as certified accountants radically affected the conditions of their professional activities the scope of which was reduced. Their income and the value of their clientele (goodwill) fell, and so did their business. The ECHR established that the clientele "had in many respects the nature of a private right and constituted an asset and, hence, a possession within the meaning of the first sentence of Article 1 (P1-1)"[198]. In *Gasus Dosier-und Fördertechnik GmbH v. the Netherlands*[199] the ECHR, acknowledging that property within the meaning of P1-1 can also be a security right *in rem,* recalled that the notion "possessions" had an autonomous meaning not limited to ownership of physical goods, and that certain other rights and interests constituting assets could be also regarded as property rights, and thus as "possessions" for the purposes of P1-1. It can be claimed that by underlying that property within the meaning of P1-1 comprises "rights", the ECHR has indirectly affirmed that property under the Convention is constituted by a variety of distinct rights generating a multitude of legal relations.

The above cited case-law of the ECHR seems to indicate that individual rights from the bundle are treated as a "possession" within the meaning of P1-1, and that they, accordingly, enjoy the protection of P1-1. Interference with one or some of those rights then constitutes interference with property. So, it can be asserted that P1-1 protects ownership as a bundle of rights, as well as the rights that constitute it, such as claim rights or use rights. It may be suggested that this approach relies on the autonomous meaning of possessions which comprises ownership, as well as "other rights and interests constituting assets", and that it corroborates the thesis that the bundle of rights theory is rooted in the theory and practice of the Convention organs.

The second aspect deals with the use of the concept of the bundle of rights for the purpose of ascertaining the nature of interference depending on its latitude with individual rights of the bundle. In concrete terms, the approach to property as a bundle of rights is helpful in deciding

[198] *Van Marle and Others v. the Netherlands*, 26 June 1986, Series A no. 101.

[199] *Gasus Dosier- und Fördertechnik GmbH v. the Netherlands*, 23 February 1995, Series A no. 306-B. The ECHR held that "... in the present context it is therefore immaterial whether Gasus's right to the concrete-mixer is to be considered as a right of ownership or as a security right in rem. In any event, the seizure and sale of the concrete-mixer constituted an "interference" with the applicant company's right "to the peaceful enjoyment" of a "possession" within the meaning of Article 1 of Protocol No. 1 (P1-1)".

whether an interference with property constitutes a deprivation, or a control of the use of property. It appears that the ECHR is not concerned what constitutes property as much as it is concerned with deciding the nature of interference, that is, which of the three rules of P1-1 will apply. It has been mentioned that P1-1 protects property as well as the rights constituting it. Depending on the scope of interference, the ECHR assesses its nature according to the three-rule classification. When one right from the bundle of rights is lost or restricted, but the owner still retains the remainder of the rights from the bundle, the interference does not amount to a deprivation of property. Accordingly, if the owner loses one, or some rights, from the bundle, or if his bundle of rights is restricted, he does not lose "possessions" for the purposes of P1-1. When looking at property as a bundle of rights, the fact that an owner has been deprived of one right from the bundle would not normally suffice to be considered to have been deprived of property. Only a total loss of all attributes of ownership would amount to a deprivation of property.

It follows that even if some attribute of property is interfered with or taken away, it cannot normally be assimilated to expropriation[200]. Even though the right of property loses some of its substance, it does not disappear[201]. This means that any of its restrictions, when only certain rights are taken away, must leave the owner at least a certain degree of freedom. If only some rights are taken away or restricted, such a case concerns either a control of use of property, or an infringement of the peaceful enjoyment of possessions within the meaning of the first sentence of the first paragraph of P1-1[202].

The ECHR does not see single rights forming the bundle in isolation. For instance, in *Tre Traktörer Aktiebolag v. Sweden* the judges accepted the economic interest of running a restaurant as a "possession" within the meaning of P1-1 when they held that the maintenance of the licence was one of the principal conditions for continuing the applicant company's business, and that its withdrawal had adverse effects on the goodwill and value of the restaurant[203]. The ECHR found that the withdrawal of the licence to serve alcoholic beverages in the restaurant, and the consequent loss of business, constituted a measure of control of the use of property. It did not regard the interference as constituting a deprivation of property, for all the rights of the bundle were not taken away – the applicant company, although it could no

[200] *Banér v. Sweden*, decision no. 11763/85, 9 March 1989, §5.
[201] *Sporrong and Lönnroth v. Sweden*, 23 September 1982, § 63, Series A no. 52.
[202] *Iatridis v. Greece* [GC], no. 31107/96, ECHR 1999-II.
[203] *Tre Traktörer AB v. Sweden*, 7 July 1989, § 53, Series A no. 159.

longer operate the restaurant business, kept some economic interests represented by the leasing of the premises and the property assets contained therein.

Another example of the ECHR according protection to single rights out of the bundle, but not in isolation, is the case of *Fredin*[204]. This case concerned a revocation of the applicant's permit to extract gravel. The applicants complained that the revocation, taken together with other existing regulatory measures, left no meaningful alternative use for their parcel. They also maintained that the revocation deprived their property of all its value. The ECHR held that the applicants' possibilities of using their possessions could not be assessed by looking at the parcel in question in isolation. The judges of the ECHR observed that this parcel had been created by the applicants from parts of their existing properties for the sole purpose of serving as a base for the gravel pit business and that its separation from the other parcels seemed to have been simply a formality. They mentioned that in order to take into account the realities of the situation, the effects of the revocation, thus, also had to be ascertained in light of the situation pertaining to the applicants' surrounding properties. When assessing whether the measure amounted to a *de facto* expropriation, the judges took into account the effects of the revocation on the surrounding properties to find that the revocation had not directly affected them and, consequently, that it had not taken away all meaningful use of the properties in question. Therefore, the revocation could not be regarded as amounting to a deprivation of possessions, but rather as a control of the use of property.

Similarly, in *Pine Valley Developments Ltd and Others v. Ireland*[205] the applicants contended that the annulment of the outline planning permission constituted a deprivation of possessions. The ECHR observed that the impugned measure was basically designed to ensure that the land was used in conformity with the relevant planning laws and that the title remained vested with one of the applicants whose powers to reach decisions concerning the property were unaffected. The land was not left without any meaningful alternative use for it could have been farmed or leased. Although the value of the site was substantially reduced, it was not rendered worthless. The ECHR concluded that, with reference to the *Fredin* case, the interference had to be considered as a control of the use of property.

[204] *Fredin v. Sweden (no. 1)*, 18 February 1991, Series A no. 192.
[205] *Pine Valley Developments Ltd and Others v. Ireland*, 29 November 1991, Series A no. 222.

Some scholars suggest that the established case-law of the ECHR shows that the right of property is a single right. For instance, A. R. Coban presumes that it is "a single right which gives different use rights" and infers that, since each use right does not constitute a distinct property right and interference with such use does not constitute deprivation of property, the ECHR does not accept the idea of property as a bundle of rights[206]. However, this thesis does not sit comfortably with the argument that even interference with the use right may constitute interference with the substance of property, and that the state, when interfering with the right of use, may also interfere with "possessions"[207]. If we take the idea of property as a single right, it would not be possible for the ECHR to distinguish the three rules under P1-1, for if property was a single right to dispose, any interference with it would amount to either to a formal or a *de facto* deprivation, or to an interference with the substance of property. Therefore, it is important to define the nature of the "single right". Is it one use right comprising of an amalgam of various use rights only, or is it a right to dispose of a thing entailing various use rights? If we accept Coban's idea that property is a single right which gives different use rights, presumably in the sense that it comprises different use rights, would it not be easier from a terminological point of view to suggest that this "single right" comprising different use rights is rather a bundle of different rights forming property which enjoys protection under P1-1? Irrespective of whether the right of property is conceived in theory as a single right comprising different forms of use, or as a bundle of rights, it does not change anything about the fact that, according to the established case-law of the ECHR, all these single manifestations of property constitute prima facie "possessions" in terms of P1-1 and enjoy protection of the Convention.

Ultimately, it can be observed that the embodiment of the bundle of rights doctrine in the practice of the ECHR is also well reflected in the concept of possessions as developed by the ECHR's established case-law. The autonomous concept of possessions[208] under the Convention comprises both rights in property and claims as distinct and separate rights - ownership rights, other *rights in rem*, and claim rights of pecuniary value arising both from

[206]A. R. Coban, "Protection of Property Rights within the European Convention on Human Rights", Ashgate, 2004, p. 162.
[207]The *Iatridis* case is an example that the right to use may give rise to ownership, or "possessions", within the meaning of P1-1 – by entering into relationships with the clients of the cinema the applicant created "possessions".
[208]"Possessions in the first part of Article 1 has an autonomous meaning which is not limited to ownership of physical goods and is independent from the formal classification in domestic law". *Beyeler v. Italy* [GC], no. 33202/96, §100, ECHR 2000-I.

private and public law relationships - which exist and are not mere expectations to acquire property in future. Accordingly, "possessions" within the meaning of P1-1 also comprise claim rights in respect of which there is at least a "legitimate expectation" that they will be realised, that is, on condition that there is a sufficient basis for them in national law, such as, for example, when there is a settled case-law of domestic courts confirming their existence. This conception of "possessions" is consonant with the proposition of A. M. Honoré, one of the major proponents of the bundle of rights theory, to the effect that the right to possess as one of the "incidents of ownership" has two aspects: it entails both a claim that others should not interfere with the owner's possession and a claim that the owner should be put into possession[209]. This proposition is reflected in the autonomous concept of possessions encompassing a right to the peaceful enjoyment of possession, clear of interferences incompatible with the requirements of P1-1, and a "legitimate expectation" that the right of property will be materialised. Both claims create obligations on the part of the state. The character of property as a complex bundle comprising rights and duties is also reflected in the social function of property entailing duties on the part of the owners.

1.6. Social Function of Property and the Property Guarantee under the Convention

The social function of property was a relevant approach in the drafting of the Convention. It is manifested in the limitation of property rights for the purpose of public good, as the social function of property has been used to justify expropriation and redistribution of property[210]. The drafters of P1-1 embodied this function of property under the requirement that limitations of property must follow the wide concept of the public (general) interest, such as the protection of health, morals, or safety of the public. This indicates that the property guarantee in the Convention is a projection of a blend of classical and social liberalism. Under the latter, property carries within itself an indispensable social function and should entail a share of social responsibility. Its effect on the drafting of P1-1 can be seen in the second sentence of the first paragraph laying down the conditions for deprivations of property, and in the second paragraph laying down the conditions for the control of the use of property. The latter is

[209]A. M. Honoré, "Making Law Blind", Clarendon Press, 1987, pp. 166-168.

[210]The notion of social obligations attached to property stands in sharp contrast to the classical liberal notions of property found in the Anglo-American tradition. For example, F. H. Lawson and B. Rudden submit that: "In principle, owners can do anything they like with what they own: use it, use it up, neglect it, destroy it, give it away entirely or for a time, lend it, sell or lease it, pledge it, leave it by will, and so on. Furthermore the owner is perfectly free to do nothing at all with the thing: in principle, the law of property imposes no positive duties on an owner". F. H. Lawson and B. Rudden, "The Law of Property", 3rd ed., 2002.

characterised by a wide scope of appreciation given to states to regulate the use of property rights.

It is suggested that from the point of view of the protection of property under the Convention, there are two aspects inherent in the social function of property: the "giving" aspect relating to limitations of property in the public interest, and the "receiving" aspect relating to the protection of social security or welfare benefits by the Convention. As the permissible restrictions of property conditioned by the requirements enshrined in P1-1 are dealt with in a separate chapter, I now make a brief enquiry into the issue of welfare benefits.

1.6.1. Welfare Benefits

The "receiving" aspect is reflected in a rich case-law pertaining to pecuniary claims against public authorities arising from public law relationships. This aspect of the social function of property corresponds to a modern, broad, conception of "social property" in the sense of "security", or "social net", based on welfare benefits guaranteed and allocated by the state[211]. This aspect of the social function of property does not pertain to private property limited by its social function, but rather to social claim rights of to-be-owners of social benefits.

The ECHR and the Commission have developed an ample case-law on pensions and welfare benefits. For the purpose of a social right protected under P1-1 to arise, they distinguished claims based on the provision of consideration by the claimant and those based on state grants and concessions in relation to social and economic policy. If an individual contribution was not necessary for an entitlement to welfare benefits, no right arose under P1-1. On the other hand, if a social security system was based on contributions representing shares in the social fund, those contributions gave rise to a right to the fund protected by P1-1. This original approach results from a leading case of *Gaygusuz v. Austria* in which the ECHR ruled that the right to emergency unemployment assistance, stemming from payments of contributions the applicant made to unemployment insurance, was a pecuniary right for the purposes of P1-1 which was then applicable without it being necessary to rely solely on the link between entitlement to emergency assistance and the obligation to pay "taxes or other

[211]This kind of property was denoted as "new property" by Charles Reich in his influential article published in Yale Law Journal in 1964. Charles A. Reich, "The New Property", Yale Law Journal 733 (1964), p. 771.

contributions"[212]. However, following this judgment, the criterion of contributions appears to be misleading. For example, in the case of *Willis* the ECHR did not make it explicit that the link between contributions and benefits is essential to establish a claim under P1-1 when it held that it was not necessary to pronounce on "whether a social-security benefit must be contributory in nature in order for it to constitute a "possession" for the purpose of P1-1"[213]. The ECHR ruled similarly in *Koua Poirrez* where it found that a non-contributory benefit gave rise "to a pecuniary right" for the purposes of P1-1[214]. But, in subsequent decisions, the judges reverted again to the contributory criterion[215] and maintained the distinction between benefits which were paid out on the basis of contributions and those which were paid out without reference to contributions.

Several years later, in *Stec and Others v. UK*[216], the ECHR definitively set up a new direction by disregarding contributory and non-contributory schemes and cleared up any confusion as to whether non-contributory benefits fall within the scope of P1-1. Under the new approach, if the legislation in force provides for the payment of a welfare benefit, whether conditional or not on the prior payment of contributions, that legislation must be regarded as generating a proprietary interest falling within the scope of P1-1 for persons satisfying its requirements. Accordingly, for the creation of a right under P1-1 it is seminal whether the state grants an entitlement to welfare benefits, notwithstanding whether it is conditional upon the payment of contributions. The ECHR held that there was no ground to justify the continued drawing of a distinction between contributory and non-contributory welfare benefits as "in the modern, democratic state, many individuals are, for all or part of their lives, completely dependent for survival on social security and welfare benefits". Many domestic legal systems recognise that such individuals require a degree of certainty and security, and provide for benefits to be paid - subject to the fulfilment of the conditions of eligibility - as a right. The ECHR stated in this regard that P1-1 places no restriction on the Contracting States' freedom to decide whether or not to have in place any form of social security scheme, or to choose the type or amount of benefits to provide under any such scheme. So, where an individual has an assertable right under domestic law to a welfare benefit, that interest should also be reflected by holding P1-1

[212] *Gaygusuz v. Austria*, 16 September 1996, § 41, *Reports of Judgments and Decisions* 1996-IV.
[213] *Willis v. United Kingdom*, no. 36042/97, § 35, ECHR 2002-IV.
[214] *Koua Poirrez v. France*, no. 40892/98, § 37, ECHR 2003-X.
[215] *Kjartan Ásmundsson v. Iceland*, no. 60669/00, § 39, ECHR 2004-IX.
[216] *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, ECHR 2006-VI.

applicable[217]. However, this does not mean that the States Parties to the Convention are, henceforth, required to guarantee social security benefits that do not exist within their legal system[218], but they cannot refuse such benefits on discriminatory grounds[219]. Accordingly, if a state does decide to create a benefits or pension scheme, it must do so in a manner which is compatible with Article 14 of the Convention[220].

As a consequence of the *Stec* judgment, non-contributory benefits were brought under the scope of protection of both P1-1 and Article 14. Following this extension of the scope of property under P1-1 by this judgment, P1-1 will bring most social security disputes within the scope of the non-discrimination clause of Article 14[221] and within that of Article 1 of Protocol No. 12 as the general equality clause. From the 2005 decision in *Stec* onwards, virtually all social security interests are automatically granted the prima facie protection offered by P1-1. In one of the most recent cases, *Grudic v. Serbia*, the ECHR repeated, in respect of pensions, the findings in *Stec*, holding that where a contracting state has in force legislation providing for the payment as of right of a pension - whether or not it is conditional to the prior payment of contributions - that legislation has to be regarded as generating a proprietary interest falling within the ambit of Article 1 of Protocol No. 1 for persons satisfying its requirements[222]. Accordingly, where the amount of a benefit is reduced or discontinued, this may constitute interference with possessions which requires it to be justified in the general interest. Where, however, the person concerned does not satisfy, or ceases to satisfy, the legal conditions laid down in domestic law for the grant of such benefits, there is no interference with the rights under P1-1[223].

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[217]*Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, § 51, ECHR 2005-X; *Moskal v. Poland*, no. 10373/05, § 39, 15 September 2009.
[218]*Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, § 54, ECHR 2005-X.
[219]*Willis v. the United Kingdom*, no. 36042/97, ECHR 2002-IV; *Wessels-Bergervoet v. the Netherlands*, no. 34462/97, ECHR 2002-IV; *Koua Poirrez v. France*, no. 40892/98, ECHR 2003-X.
[220]*Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, § 53, ECHR 2006-VI.
[221]G. Nagel, F. Kessler, "Social Security Law, Council of Europe", Kluwer Law International BV, 2010, p. 47.
[222]*Grudić v. Serbia*, no. 31925/08, § 72, 17 April 2012. See also *Carson and Others v. the United Kingdom* [GC], no. 42184/05, § 64, ECHR 2010.
[223]*Bellet, Huertas and Vialatte v. France*, (dec.) no. 40832/98 27 April 1999; *Rasmussen v. Poland*, no. 38886/05, § 71, 28 April 2009. It is necessary to note that the ECHR affords the states a margin of appreciation when it comes to general social and economic measures.

If the contributory benefits schemes criterion was reversed in *Stec*, the ECHR has not diverted from the principle that P1-1 does not create a right to acquire property[224] and that there is no right *per se* to receive a social security payment of a particular amount. The ECHR has relied on a wide margin of appreciation of states in this respect. For example, the case of *Müller v. Austria*[225] established that there was no general right to an old-age state pension under the Convention and that, even if rights are attached to a pension scheme, they could not be interpreted as a guarantee of a particular amount[226]. Adhering to the established case-law, the ECHR referred to the margin of appreciation of states, for example, in the case of *R.Sz. v. Hungary*[227] by stating that it transpires from its case-law that in the area of social and economic legislation states enjoy a wide margin of appreciation which, in the interests of social justice and economic well-being, may legitimately lead them to adjust, cap or even reduce the amount of severance normally payable to the qualifying population. But any such measures must be implemented in a non-discriminatory manner and comply with the requirements of proportionality, as reduction or discontinuance of a welfare benefit may constitute interference with the peaceful enjoyment of possessions if it is not justified[228]. In the *Janković v. Croatia*[229] case the ECHR found that, since the reduction of the pensions of officers of the Socialist Federal Republic of Yugoslavia was a means of integrating those pensions into the Croatian general pension system, the measures taken by the authorities were within the state's margin of appreciation. The precept that P1-1 does not guarantee, as such, any right to a pension of a particular amount has appeared in many other decisions[230].

To sum up, the Convention is a dynamic "living" instrument which responds to the evolution of society and which must be interpreted in the light of present-day conditions[231]. In this

[224]See, among others, *Van der Mussele v. Belgium*, 23 November 1983, § 48, Series A no. 70; *Slivenko v. Latvia* (dec.) [GC], no. 48321/99, § 121, ECHR 2002-II; *Kopecký v. Slovakia* [GC], no. 44912/98, § 35 (b), ECHR 2004-IX.

[225]*Müller v. Austria*, no. 5849/72, Commission's report of 1 October 1975, Decisions and Reports 3, p. 25.

[226]The Commission held that the national authorities disposed of a margin of appreciation in fixing the amount of pensions or benefits, and that they had the power to reduce the amount payable as part of their economic policy.

[227]*R.Sz. v. Hungary*, no. 41838/11, 2 July 2013.

[228]*Rasmussen v. Poland*, no. 38886/05, 28 April 2009.

[229]*Janković v. Croatia* (dec.), no. 43440/98, ECHR 2000-X.

[230]*Kuna v. Germany* (dec.), no. 52449/99, ECHR 2001-V (extracts); *Kjartan Ásmundsson v. Iceland*, no. 60669/00, ECHR 2004-IX; *Poulain de Saint Père v. France*, no. 38718/02, 28 November 2006; *Wieczorek v. Poland*, no. 18176/05, 8 December 2009; *Apostolakis v. Greece*, no. 39574/07, 22 October 2009; *Maggio and Others v. Italy*, nos. 46286/09, 52851/08, 53727/08, 54486/08 and 56001/08, 31 May 2011; *Grudić v. Serbia*, no. 31925/08, 17 April 2012.

[231]The ECHR held in the *Airey v. Ireland* judgment of 9 October 1979, Series A no. 32, that, although social and economic rights were largely dependent on the situation – notably financial – in the State in question, the

regard, the case-law of the ECHR evolves according to the social evolution in the member states of the Convention, in particular as regards the ECHR's recognition of the pecuniary nature of certain social rights and their falling within the scope of P1-1. The case-law has developed in extending the scope of protection of P1-1, and in accepting that the notion of "possessions" extends to all social security benefits, whether contributory or non-contributory. This enlargement of the scope of protection of P1-1 may lead to the question as to how far this widening of the applicability of P1-1 may go, with regard to the fact that states have a wide margin of appreciation in social and economic matters, as P1-1 places no restriction on their freedom to decide whether or not to have in place any form of social security system, or to choose the type or amount of benefits to provide under any such scheme.

Over the past twenty years the ECHR has also dealt with a specific type of cases which can be claimed to carry within itself a social dimension. It is the restitution of property cases stemming from restitution laws adopted by some of the states of Central and Eastern Europe after the fall of communism. The ECHR's case-law against the Czech Republic on this issue is numerous and, although I am conscious of that, for the purposes of this work there is hardly any comparative aspects in view of there not being a comparable experience in France, it seems to be pertinent to outline this specific type of cases for they represent an indivisible and specific part of European jurisprudence on property.

1.6.2. Background of Property Restitution Cases

After the Second World War the communist regimes in Central and Eastern Europe began massive expropriations and the nationalisation of property with a view to socializing and controlling the means of production in the spirit of the central-planning communist- oriented ideology. The industry, banks, enterprises, and privately owned land were transformed into various forms of public property which were to be run by the state on the principles of central planning. The sweeping confiscations without compensation in the name of a totalitarian ideology affected hundreds of thousands of people and deprived them of their property. Their property was taken, in most cases, without any rules of procedure and without the possibility of seeking a review before a then-non-existent independent judiciary; the specificity of

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Convention should be interpreted in the light of present-day conditions, and that many of the civil and political rights it enshrined had social or economic implications.

nationalisations and expropriations in Central and Eastern Europe consisted of their massive character and incompatibility with the guarantees safeguarded by the Convention (no compensation).

Many decades had to pass before the victims of the past injustice were able to see a light of hope that their grievances could be redressed. At the beginning of the 1990's, in an effort to overcome the past, many of the affected states began to adopt legislation on restitution of property, the privatisation and reparation of certain damages incurred during the communist regime. The fundamental idea was to restore, as much as possible, old property relationships, although it was clear that not all of the violations could be remedied for various reasons. Either the property did not exist anymore or it was difficult, if not impossible, to restore it back to the former owners, as it had been passed on to other private owners by the state and restoring it would create another injustice. The main interest was to keep the legal certainty of property relationships, as otherwise it would bring the affected countries, still seriously buffeted by economic and social chaos, to a total collapse.

At the beginning of the 1990's the countries of Central and Eastern Europe had to go through an inevitable "baptism by fire". The transformation from centrally-planned economies to market economies was necessary to dismantle the structures and mechanisms in place for decades and create new economic structures[232]. Property relations had to be radically reformed and it was impossible to simply invalidate nationalisations and confiscations that took place in the past, including those that took place some forty or fifty years ago. The process of transformation deeply modified the then-existing property relations. Property restitution brought about its own complications and controversies. There was no single system of property restitution laws and procedures that could be sweepingly applied to all affected countries distinguished by different historical, economic, and political pasts and realities. Moreover, the extent and depth of nationalisations, which was determining for the practical difficulties of restitution, varied from state to state. A question may be posed whether restitution of property was the right thing to do at that time, whether it helped those states in

[232]"The heritage of former communist totalitarian systems is not an easy one to handle. On an institutional level this heritage includes (over)centralisation, the militarisation of civilian institutions, bureaucratisation, monopolisation, and over-regulation; on the level of society, it reaches from collectivism and conformism to blind obedience and other totalitarian thought patterns. To re-establish a civilised, liberal state under the rule of law on this basis is difficult - this is why the old structures and thought patterns have to be dismantled and overcome". Resolution of the Parliamentary Assembly of the Council of Europe no. 1096 (1996) on measures to dismantle the heritage of former communist totalitarian systems.

any way in their efforts towards the restructuring of their economic and legal systems and establishing an economic growth. It is difficult to judge now, after some course of time, whether the desired benefits and expectations of achieving greater justice through restitution prevailed over the difficulties the states had to encounter. What was primarily at stake was a danger of jeopardising legal certainty and the stability of property relations and, consequently, affecting the rule of law which had to be strengthened rather than imperilled. There was considerable opposition to restitution in the Czech Republic including concerns of economic and social character, for instance, that restitution would slow down privatization efforts instead of accelerating the economic transformation into a market economy, or the fear that restitution of property seized forty years ago would result in protracted and expensive litigations. Although this proved to be true to some extent, it can be asserted that, overall, the restitution legislation was conducive to restoring, at least, some property wrongs committed during the communist regime.

With regard to the wider context of restitutions, comprising not only complex legal but also economic and social aspects, it is difficult to agree with Tom Allen that the ECHR should have investigated and reviewed the circumstances or reasons of property takings carried out during the communist regime[233] or to investigate the proportionality of the refusal of the present regime to recognize property interests under restitution laws[234]. The reason for my disagreement is that the fact that the post-communist states adopted restitution laws which were acts of their exclusive benevolence and discretion. They did not have to embark on the process of restitution of property at all and could have left, in fact were free to leave, the status quo of legal titles in property. Moreover, no obligation to enact restitution laws arises from the text of P1-1 or from any other provision of international law. The states were, thus, free to determine the scope of restitution of property and the conditions under which property rights would be restored to former owners[235]. It is beyond doubt that the Convention cannot

[233]The author maintains that "the Court has gone out of its way" in developing jurisdictional rules denying victims a hearing on the merits, and that the Court has put emphasis on stability of current entitlements "to the exclusion of complaints concerning injustice in the pre-transitional era". Or further that "we would not expect a blanket rule to the effect that rights of property that were not capable of exercise immediately before the ratification of P1-1 must be treated as having been extinguished". T. Allen, "Closing the door on restitution", in *Transitional Jurisprudence and the ECHR*, (eds.) A. Buyse and M. Hamilton, Cambridge University Press, 2011, pp. 212, 227.

[234]*Ibid*., p. 233.

[235]The ECHR held that P1-1 cannot be interpreted as imposing any general obligation on the Contracting States to return property which was transferred to them before they ratified the Convention, nor does P1-1 impose any restrictions on the Contracting States' freedom to determine the scope of property restitution and to choose the conditions under which they agree to restore property rights of former owners. See, for example, *Jantner v.*

be used to rewrite history[236]. The fact that it is impossible to rewrite history through restitution of property laws, and in some cases even by abusing those laws[237], was corroborated by the ECHR in its case-law pertaining to restitution of property in post-communist states, especially the case-law dealing with the temporal limitations of the competence of the ECHR.

The objectives of property restitutions are connected with the specific context of changes of the social, political, and economic regime that were taking place in the 1990's. The objective of the restitution laws was to redress some of the wrongs of the past and, thereby, establish a certain level of social justice. The obliged persons to restitute property were primarily legal persons of public law (the state), but also, in some instances, natural persons who acquired the property contrary to law then in force. It can be thus asserted that property restitutions performed a quasi-social function in that the state and the obliged natural persons had a certain legal and moral responsibility, within the limits of the restitution laws, towards the persons entitled to restitution. The state may be considered as having had a quasi-social obligation to restore social justice by restituting unjustly taken assets, stemming from the political, economic, and social conditions existing at the relevant time. The state was obliged to provide the claimants either with the tangible property, or, with pecuniary or material compensation. Consequently, the restitution claimants were in a position of holders of claim rights, or a "legitimate expectation", against the state which, by analogy, may be comparable to claim rights of to-be-owners of social benefits.

1.6.3. Restitution of Property and the Jurisprudence of the ECHR

After the accession of states from Central and Eastern Europe to the Council of Europe, the ECHR was confronted with a completely new type of applications pertaining to restitution of property expropriated or confiscated, not only in the aftermath of the Second World War, but

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Slovakia, no. 39050/97, § 34, 4 March 2003. The states were free to set down categories of persons entitled to restitution, as well as to exclude certain categories of former owners from such entitlement. In this respect the Convention left the states a wide margin of manoeuvring as regards the distribution of burden that comes with the process of transformation, and the assessment of the existence of a problem of public concern warranting specific measures and the implementation of social and economic policies. Accordingly, the Contracting States enjoyed a wide margin of appreciation with regard to the exclusion of certain categories of former owners from entitlement to restitution.

[236]D. Popović, "Protecting Property", Eleven International Publishing, 2009, p. 70.

[237]In the Czech Republic, for example, there were many cases where restitution of property was claimed by persons who for that purpose provided themselves, through illegal avenues, documents certifying that they newly obtained the Czech citizenship, which they would have not normally obtained, in order to qualify as entitled persons under relevant restitution statutes.

throughout the duration of communist rule. The assessment of those cases has not been an easy task. Many judges of the ECHR, especially those from non-communist countries, stood before new factual and legal issues which they had never had to deal with in their home countries. Complex cases, such as those of the restitution of property, required a fair amount of caution. For example, in cases pertaining to claims of previous owners or their heirs for restitution of property, it was necessary to secure a fair balance was struck between the interests of persons currently in possession of the property, who had acquired the property in compliance with law, and those of the original owners or their heirs. By the same token, it was necessary to assure that the requirements of the right to a fair trial and the prohibition of discrimination were respected.

The process of property transformation had deep implications on the evolution of property relations in the affected countries, which have been reflected in applications brought before the ECHR. It is worthy to note that, as the text of P1-1 provides for a minimal standard of protection of property in all Contracting States, irrespective of their geographical position or history, the same principles that apply to "non-transitional" cases apply to restitution of property cases brought against countries of Central and Eastern Europe. The ECHR applies the same receivability criteria, the existence of its competences *ratione temporis*, *ratione personae* and *ratione materiae*, the same approach to P1-1 in assessing the existence of "possessions", and the same analytical method in respect of claimed interferences comprising three phases - legal basis, legitimate aim, and proportionality. However, the "transitional" cases representing an unprecedented sort of applications before the ECHR have called for a certain level of deference from the part of the ECHR. More specifically, it is suggested that the ECHR has shown deference to decisions of the national legislator in choosing a specific means for privatization of public property[238] and that it has also accepted that specific circumstances of the countries in transition should be taken into account in determining the scope of the margin of appreciation allowed to them[239]. A former judge of the ECHR in

[238]In the case of *Broniowski v. Poland* [GC], no. 31443/96, § 162, ECHR 2004-V, the ECHR recognised that "given the particular historical and political background of the case, as well as the importance of the various social, legal and economic considerations that the authorities had to take into account in resolving the problem of the Bug River claims, the Polish State had to deal with an exceptionally difficult situation, involving complex, large-scale policy decisions".

[239]*Broniowski v. Poland*, GC], no. 31443/96, § 182, ECHR 2004-V: "The Court accepts that in situations such as the one in the present case, involving a wide-reaching but controversial legislative scheme with significant economic impact for the country as a whole, the national authorities must have considerable discretion in selecting not only the measures to secure respect for property rights or to regulate ownership relations within the country, but also the appropriate time for their implementation. Balancing the rights at stake, as well as the gains

respect of Poland, Lech Garlicki, suggests that the characteristics of the ECHR's case-law on protection of property is that the principle of proportionality is interpreted extensively in order to find out whether "the judgment of the legislator is not manifestly unreasonable", and that this approach is stronger in "transformation" cases concerning restitution of property where the ECHR appears to be even more deferent to the liberty of the decision of the national legislator[240]. Even so, however large the margin of appreciation may be, it is not unlimited and the state's discretion, even in the context of the most complex reforms of the state, cannot entail consequences at variance with the Convention standards.

The ECHR delimited its temporal jurisdiction in these cases on the basis of the general rules of international law, especially Article 28 of the Vienna Convention on the Law of Treaties, according to which the provisions of the Convention do not bind a Contracting Party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the Convention with respect to that Party. The ECHR expressively held that any attempt to remedy, on the basis of the Convention, an interference that had ended before the Convention came into force would necessarily lead to its retroactive application[241]. Applicants had, thus, to identify a post-ratification act, or conduct attributable to their state, to make their case. However, the question of whether an alleged violation is based on a fact occurring prior or subsequent to a particular date gives rise to difficulties when the facts relied on fall partly within and partly outside the period of the ECHR's competence. The ECHR held, in this regard, that divorcing the domestic courts' judgments, delivered after ratification of the events which had given rise to the court proceedings, would amount to giving retroactive effect to the Convention, which would be contrary to the general principles of international law. In other words, there had to be a continuing situation of a violation of the Convention so that the ECHR did not pronounce itself incompetent *ratione temporis*. Thereby, the ECHR refused to examine those applications on restitution of property where the alleged interference took place or where the restitution proceedings ended before the entry into force of the Convention in respect of the defendant state.

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and losses of the different persons affected by the process of transforming the State's economy and legal system, is an exceptionally difficult exercise. In such circumstances, in the nature of things, a wide margin of appreciation should be accorded to the respondent State".

[240]L. Garlicki, "L'application de l'article 1er du Protocole no. 1 de la Convention Européenne des droits de l'homme dans l'Europe centrale et orientale: problèmes de transition", in *Propriété et droits de l'homme-Property and human rights*, (ed.) H. Vandenberghe, Bruylant&die Keure/ La Charte, 2006, p. 160.

[241]*Blečić v. Croatia* [GC], no. 59532/00, § 80, ECHR 2006-III.

Since the provision of P1-1 requires existing possessions, or at least a "legitimate expectation" of obtaining effective enjoyment of a property right[242], and a continuing situation of a state's intervention into the right of private property in cases of unlawful confiscation of property[243], if the applicant did not meet clear conditions under the restitution laws, such as nationality, residence in the country or the requirement that the claimed property was in the possession of the state, he could not claim that the requirement of a "legitimate expectation" was given or that he had an "asset" that has a sufficient basis in national law[244], for P1-1 does not guarantee the right to acquire property, either in the form of restitution or compensation, or a belief that a law previously in force would be changed to his advantage could be regarded as a form of legitimate expectation for the purposes of P1-1. In many cases in which the applicants did not qualify as entitled persons under national law on account of the lack of nationality or residency requirements, the ECHR has ruled that they did not have either a "possession" or a "legitimate expectation" to acquire the claimed property. The argument that such conditions were in breach of the right to non-discrimination guaranteed by Article 14 of the Convention were not accepted by the ECHR in view of the non-separability of application of this provision.

In respect of compensation the ECHR has accepted that the radical reform of a country's political and economic system might justify stringent limitations on compensation[245]. On no account, however, could the relationship between the value of the property taken and the compensation paid be manifestly disproportionate. But the total lack of compensation would mean that the applicants had to bear a disproportionate and excessive burden incompatible with the right to respect for the peaceful enjoyment of possessions[246] and only exceptional circumstances could justify non-payment of compensation for the taking of property, such as the unique context of German reunification[247].

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[242] *Gratzinger and Gratzingerova v. the Czech Republic* (dec.), no. 39794/98, ECHR 2002-VII. The ECHR held that there was a difference between the mere hope of restitution, however understandable that hope may be, and a "legitimate expectation", which must be of a nature more concrete than a mere hope and be based on a legal provision or a legal act such as a judicial decision.

[243] *Vasilescu v. Romania*, 22 May 1998, *Reports of Judgments and Decisions* 1998-III; *Zwierzyński v. Poland*, no. 34049/96, ECHR 2001-VI.

[244] *Kopecký v. Slovakia* [GC], no. 44912/98, § 38, ECHR 2004-IX.

[245] *Broniowski v. Poland* [GC], no. 31443/96, § 162, ECHR 2004-V.

[246] *Străin and Others v. Romania*, no. 57001/00, ECHR 2005-VII.

[247] *Jahn and Others v. Germany* [GC], nos. 46720/99, 72203/01 and 72552/01, ECHR 2005-VI.

Some scholars suggest that the ECHR's decision-making has been different in "transitional" and "non-transitional" cases[248] in that, unlike in "non-transitional" cases, the ECHR usually settles for a national legislative provision or a national court judgment, and ask why the Strasbourg Court is so set against restitution that it refuses even to consider these cases on the merits[249]. It is due to be noted in this regard that restitution of property cases brought against the post-communist states have been rather peculiar in that they were connected with a large-scale transformation of societal and economic structures, and thus the transitional legislation and related acts of state authorities necessitated a certain level of forbearance and deference compared to interferences with the right of property inflicted by well-established and stable democracies of Western Europe. The specific economic and social conditions of the Central and East European countries in transition apparently had to be taken into account. There was a concern about stability and reconstruction in the post-transition world, especially with regard to evidence that restitution interfered with reconstruction in some states and slowed privatisation[250] or aggravated housing shortages[251]. Moreover, regard should be also paid to the fact that P1-1 allows states a large margin of discretion in introducing measures pursuing social justice and economic restructuring.

Worthy of note is a remark by Lech Garlicki that a wider margin of appreciation recognised by the ECHR in property restitution cases, as opposed to "normal" property cases, was partly due to the large volume of decisions on restitution of property and their impact on the economy and finances of the affected states, and partly due to the fact that there were no established precedents on restitution of property which would set down the standards of reference for the assessment of decisions delivered in Central and East European countries[252].

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[248]"The formal reasoning of *Polacek* would suggest that the failure to satisfy the nationality requirement meant that the applicant did not hold possessions under P1-1. However, in *Gaygusuz*, the Court not only found that there were possessions, but also that Austria violated the Convention rules against discrimination, when applied to the right to property". T. Allen, "Closing the door on restitution", in *Transitional Jurisprudence and the ECHR*, (eds.) A. Buyse and M. Hamilton, Cambridge University Press, 2011, p. 229.

[249]*Ibid*., p. 232.

[250]R. Crowder, "Restitution in the Czech Republic: Problems and Prague-nosis", Indiana International and Comparative Law Review 5(1994) 237, p. 262.

[251]F. H. Foster, "Restitution of Expropriated Property: Post-Soviet Lessons for Cuba", Columbia Journal of Transnational Law 34 (1996) 621, pp. 644-646.

[252]L. Garlicki, "L'application de l'article 1er du Protocole no. 1 de la Convention Européenne des droits de l'homme dans l'Europe centrale et orientale: problèmes de transition", in *Propriété et droits de l'homme-Property and human rights*, ed. by H. Vandenberghe, Bruylant&die Keure/ La Charte, 2006, p. 148.

2. France

2.1. Origins of the Property Guarantee

Since 1789, the protection of property in France has been rendered by the Declaration of the Rights of Man and the Citizen of 1789 (hereinafter "the Declaration"). The Declaration, which reflects liberal philosophy of the 1789 Revolution, guarantees an aggregate of fundamental rights and freedoms amongst which includes the right of property in Articles 2 and 17 of the Declaration[253]. Article 2 of the Declaration lists property amongst the rights of man and describes it as a "natural and impresciptible" right. More specifically, it reads that: "The aim of all political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression"[254]. Article 17 of the Declaration describes property as an "inviolable and sacred right" and it does not set up limits to the scope of its application. The material guarantee of the right of property under Article 17 reads as follows: "Since property is an inviolable and sacred right, no one shall be deprived thereof except where public necessity, legally determined, shall clearly demand it, and then only on condition that the owner shall have been previously and equitably indemnified"[255]. So, according to the Declaration, property is both "natural and imprescriptible", and "inviolable and sacred". The Declaration is the only French constitutional text that provides for the explicit protection of private property of individuals[256].

As far as constitutional laws are concerned, property was acknowledged for the first time in the Constitution of 1791 which adopted the principles of Article 17 of the Declaration by incorporating the Declaration. The text of the Constitution of 1791 enshrined the guarantee of protection of property as a natural right and confirmed the abolition of feudal privileges. It

[253]Decisions no. 2008-567 DC, 24 July 2008, Official Journal of 29 July 2008, p. 12151, Rec., p. 341; no. 2009-594 DC, 3 December 2009, Official Journal of 9 December 2009, p. 21243, Rec., p. 200; no. 2010-618 DC, 9 December 2010, Official Journal of 17 December 2010, p. 22181; no. 2011-118 QPC, 8 April 2011, Official Journal of 9 April 2011, p. 6363.

[254]In the original language version it reads as follows: "Le but de toute association politique est la conservation des droits naturels et imprescriptibles de l'homme. Ces droits sont la liberté, la propriété, la sûreté et la résistance à l'oppression".

[255]In the original language version it reads as follows: "La propriété étant un droit inviolable et sacré, nul ne peut en être privé, si ce n'est lorsque la nécessité publique, légalement constatée, l'exige évidemment, et sous la condition d'une juste et préalable indemnité".

[256]Due to the decision-making of the Constitutional Council, the protection has been enlarged also to "property of the state and other public persons". Para. 58 of the "Privatisations" decision (decision no. 86-207 DC of 25, 26 June 1986) states that: "The Declaration of the Rights of Man of 1789 concerning the right of property and the protection due to it; this protection concerns not only the private property of individuals, but also, on an equal footing, the property of the state and of other public persons".

attempted to establish a constitutional monarchy, but lasted less than a year. The following Constitutions continued to acknowledge and render protection to the right of property. The Montagnard Constitution of 24 June 1793, which never entered into force, retained and even strengthened the property guarantee of 1789. It also aimed at protecting new forms of property emerging in the eighteenth century, such as industrial and literary property, and recognized the right of property as one of the rights of constitutional value. It provided, for the first time, for a definition of property that echoed the absolutist definitions propounded by civil law scholars, and recognised that the right of property entails social responsibilities, more specifically, it proclaimed a social duty to provide for the welfare of the indigent. It defined property in Article 16 as "the right which belongs to every citizen to enjoy and to dispose at will of his goods, his revenue, and the fruits of his labour and skills"[257]. In terms of its historical influence, the recognition of the social aspect of property rights in the Constitution of 1793 was more significant than its absolutist rhetoric. The Constitution of 1795 dropped the notion of natural rights and declared property, liberty, equality and security to be "human rights in society" (*droits de l'homme en société*). The absolutist definition of the right of property was retained from the previous Constitution. For the first time the declaration of rights was supplemented with a declaration of duties, including the duty to respect for property rights. The following Constitution of 1799 and the Constitutions of 1802 and 1804, which consolidated it, dispensed with declarations of rights and detailed provisions on property. Subsequent French constitutions, including the Charters of 1814 and 1830 and the Constitutions of 1848 and 1852, reincorporated the same formulation of the right of property figuring in the revolutionary constitutions[258]. The Constitution of 1848 defined property as one of the foundations of the Republic, but, at the same time, it allowed for its confiscation by stipulating that, although property is inviolable, the state can claim private property for reasons of "public utility", pursuant to law, and after the payment of just satisfaction[259]. The following Constitution of the Third Republic (1875) contains no general bill of rights, so the only property guarantee is contained in the Declaration.

[257]Article 16 of the 1798 Constitution reads as follows: "Le droit de propriété est celui qui appartient à tout citoyen de jouir et de disposer à son gré de ses biens, de ses revenus, du fruit de son travail et de son industrie".
[258]Jean Morange, "La Déclaration et le droit de propriété", in *Droits: Revue française de théorie juridique*, 1988, pp. 101, 106-107.
[259]According to Article 12: "Toutes les propriétés sont inviolables. Néanmoins, l'Etat peut exiger la sacrifice d'une propriété pour cause d'utilité publique légalement constatée et moyennant une juste et préalable indemnité".

2.2. Constitution of 1946

After the Constitutional Law of 1940 establishing the Vichy regime, and the Constitutional Law of 1945 establishing the Provisional Government of the French Republic, the Constitution of the Fourth Republic was adopted on 27 October 1946. It attempted to restore the liberal democratic tradition of government, but it soon went into demise due to several major problems, such as government instability or the existence of political divisions comprising supporters of the Vichy regime, the reawakened extreme right, or the still growing Communist party. As regards the Constitution, it did not have broad political support. It was lukewarmly received in a referendum only on a second attempt after the first draft of the Constitution, forwarded by the First Constituent Assembly for a referendum in May 1946, had been defeated. The Preamble of the Constitution of the Fourth Republic introduced the revival of fundamental human rights and freedoms by unequivocally endorsing the existence of "sacred and inalienable" rights for each human being, and reaffirmed the rights and freedoms enshrined in the Declaration[260].

This reference to the Declaration is worthy of a broader observation. I suggest that a remark may be made to the effect that throughout French constitutional history the Declaration of 1789 has been either a source of inspiration for the constitutional property clauses, or, ultimately, the text of reference, shown not only in the French Constitution of 1946, but also the Constitution of 1958 currently in force. In this respect, the Declaration seems to be an enduring invaluable legal source concerning fundamental human rights and freedoms, including the right of property. It has endured remarkably for centuries despite losing and regaining its constitutional value.

Whatever difficulties the 1946 Constitution encountered, it was still a liberal democratic constitution which remained effective for more than a decade until the establishment of the Fifth Republic in 1958.

[260]The Preamble of the Constitution of 1946 refers to the Declaration by stipulating that "the French people solemnly reaffirm the rights and liberties of man and of the citizen recognised by the Declaration of Rights of 1789, and the fundamental principles recognized by the laws of the Republic".

2.3. Constitution of 1958

The current Constitution of France, often referred to as the Constitution of the Fifth Republic, was adopted on 4 October, 1958 after having been approved in a referendum. It is the fifteenth Constitution in the long constitutional history of France since the first Constitution of 3 September 1791. For the first time in the French constitutional history the Constitutional Council was established to become one of the most important institutions of the Fifth Republic.

Like the Constitution of 1946, the Constitution of the Fifth Republic also incorporates, by reference, the guarantee of property as proclaimed in the Declaration of 1789. It acknowledges the constitutional character of property not only by referring to the Declaration and the Preamble of the 1946 Constitution, but also by bestowing on the legislator the power to "lay down the fundamental principles of the property regime"[261]. The guarantee of the right of property and other fundamental rights and freedoms enshrined in the Declaration has been in place since 1971, with the Constitutional Council responsible for ensuring that all laws passed by parliament and submitted to it are in conformity with the Constitution[262].

2.4. Concept of the "Bloc of Constitutionality"

The concept of the French "bloc of constitutionality" (*bloc de constitutionnalité*) includes not only the Constitution of 1958 and its Preamble, but also, since 1971[263], the Declaration, the Preamble of the Constitution of 1946[264], and the 2004 Charter of the Environment, to which the Preamble of the 1958 Constitution refers. Furthermore, the norms of constitutional value, or the norms of reference in the control of constitutionality exercised by the Constitutional Council, are not limited to constitutional texts only. They also include norms referred to by constitutional texts, such as the "fundamental principles recognized by the laws of the

[261]According to Article 34: "La loi détermine les principes fondamentaux du régime de la propriété, des droits réels".

[262]Prior to 1971 administrative and judicial decisions had to comply with the general principles of law; there were no such restrictions on legislation.

[263]In a landmark decision no. 71-44 DC of 16 July 1971 the Constitutional Council expressly acknowledged that the Preamble of the 1958 Constitution had a constitutional value and by reference to the principles laid down in the Declaration it rejected a law that violated one of those principles. For the 1958 Preamble refers to the Declaration, the Preamble of the 1946 Constitution, and recently to the Charter of the Environment. The Constitutional Council also acknowledged that these documents formed part of the Constitution.

[264]The Preamble of the 1946 Constitution enumerates social rights, or more precisely "the political, economic, and social principles" that are "especialy necessary to our times".

Republic" and "political, economic, and social principles"[265] to which refers the Preamble of the 1946 Constitution[266]. In addition, they comprise the principles and objectives of constitutional value that, although not being explicitly referred to or enshrined in the constitutional texts, are deduced by constitutional judges from these texts by interpretation. This notion of the Constitution in the "broad" sense was denoted by the doctrine as the "bloc of constitutionality"[267] following a decision of the Constitutional Council of 1971[268]. It refers to the totality of constitutional norms and principles that are taken into consideration in the framework of the control of the constitutionality of laws by the Constitutional Council and which must be observed by the executive and by parliament in the exercise of its legislative power.

The notion of the bloc of constitutionality has enabled the Constitutional Council to exercise strict control over the legislation on the basis of a large number of constitutional principles. Worthy of remark is that there is no hierarchy of constitutional norms forming part of the bloc of constitutionality. Thus, for example, the 1958 Constitution is not superior to the

[265]These principles were recognised by the Constitutional Council in a decision no. 74-54 DC of 15 January 1975, "Voluntary Interruption of Pregnancy Act", Official Journal of 16 January 1975, p. 671, Rec., p. 19, concerning a termination of pregnancy. The Constitutional Council held that: "None of the exceptions allowed by the statute is, as matters stand, inconsistent with any of the fundamental principles recognised by the laws of the Republic, nor with the principle set out in the preamble to the Constitution of 27 October 1946 whereby the nation guarantees health care to all children, nor with any of the other principles of constitutional value established by that text; none of the derogations anticipated by the law is not contrary to one of the fundamental principles recognized by the laws of the Republic, nor disregards the principle pronounced in the Preamble of the 1946 Constitution according to which the Nation guarantees a child the protection of health. The Voluntary Interruption of Pregnancy Act is not therefore at variance with the texts to which the Constitution of 4 October 1958 refers in the preamble thereto, nor with any Article of the Constitution". Besides the right to health, the Constitutional Council has also recognised as belonging to this category of principles, for example, the right to asylum (decision no. 93-325 of 13 August 1993, Rec., p. 224), the right of workers to participate in the gestion of enterprises (decision no. 93-328 of 16 December 1993, Rec., p. 547), or the right to lead a normal family life (decision no. 93-325 of 13 August 1993). As principles, these were denoted as positive rights or claim rights vis-à-vis the state.

[266]The Preamble of the 1946 Constitution proclaims in paragraph 1 that: "The French people proclaims anew that any human being possesses inalienable and sacred rights, without distinction as to race, religion, or beliefs. It solemnly reaffirms the rights and liberties of man and of the citizen recognised by the Declaration of Rights of 1789, and the fundamental principles recognized by the laws of the Republic".

[267]The creation of this notion is accredited to Louis Favoreu. He defined the "bloc of constitutionality" as "l'ensemble des principes et règles à valeur constitutionnelle dont le respect s'impose au pouvoir législatif comme au pouvoir exécutif". L. Favoreu, "Bloc de constitutionnalité", Dictionnaire constitutionnel, sous la dir. O. Duhamel et Y. Mény, Paris, PUF, 1992, p. 87. Georges Vedel developed a double definition of the "bloc of constitutionality" according to which the "bloc of constitutionality" in the narrow sense comprises provisions of constitutional value, and in the large sense all norms superior to law the respect of which is guaranteed by the Constitutional Council. G. Vedel, "La place de la Déclaration de 1789 dans le "bloc de constitutionnalité"", La Déclaration des droits de l'homme et du citoyen et la jurisprudence, Paris, PUF, coll. "Recherches politiques", 1989, p. 35.

[268]Decision no. 71-45 DC, 16 July 1971, Official Journal of 18 July 1971, p. 7114, Rec., p. 25.

Declaration and vice versa. Nor the rule that lex posterior derogat legi priori applies. It can be concluded that, in French constitutional law, there is plurality and the heterogeneity of sources of fundamental rights.

2.4.1. Constitutional Value of the Declaration

The Constitution of 1958 does not contain a list of fundamental rights and freedoms. The Preamble of the Constitution merely acknowledges the attachment of the French people "to the rights of man and to the principles of national sovereignty such as are defined by the Declaration of 1789, confirmed and completed by the Preamble to the 1946 Constitution". It implies that the guarantees of fundamental rights and freedoms are to be found in the Declaration and in the Preamble of the 1946 Constitution. The Declaration and the values listed in the 1946 Preamble were first indirectly referred to by the Constitutional Council in a decision of 19 June 1970, on the issue of compatibility of an international treaty modifying budgetary provisions of the EC Treaties in which the Constitutional Council, carrying out a control of compatibility of an international instrument with the Constitution, referred to "each provision" of the Constitution. The seminal step in acknowledging the constitutional value of the Declaration and the 1946 Preamble was taken a year later in a decision of 16 July 1971, concerning associations law. The Constitutional Council, for the first time, struck down a statutory provision for a breach of fundamental rights by appealing to the Preamble of the 1958 Constitution and to a fundamental principle recognised by the laws of the Republic. Namely, it recognized freedom of association as one of the fundamental principles recognized by the laws of the Republic, the principle enshrined in a statute of 1 July 1901, on associations. This decision is important for by recognising that the Preamble of the 1958 Constitution has a constitutional value, the Constitutional Council, thereby, implicitly, also recognised the constitutional value of the Preamble of the 1946 Constitution, the Declaration, and the fundamental principles recognized by the laws of the Republic.

Accordingly, the Declaration, and the fundamental rights and freedoms therein guaranteed, entered in the bloc of constitutionality by the decision of 16 July 1971. This was explicitly corroborated by a decision of 27 December 1973[269] in which the Constitutional Council directly referred to the Declaration, more precisely to the principle of equality before law guaranteed therein, by declaring that a provision of the Taxation Code discriminated against

[269]Decision no. 73-51 of 27 December 1973, Official Journal of 28 December 1973, p. 14004, Rec., p. 25.

citizens in that they were not entitled to submit evidence against an arbitrary tax assessment[270]. It is the first decision in which the Constitutional Council expressly referred to the Declaration.

2.4.2. Place of the Declaration within the Bloc of Constitutionality

In respect of the place of the Declaration within the bloc of constitutionality, several questions can be raised. Where does the Declaration stand within the bloc of constitutionality? What is its hierarchical position vis-à-vis the Preamble of 1946? Is it superior, inferior, or do these two constitutional texts have an equal standing?

Before the Declaration was referred to in the Preambles of the Constitutions of 1946 and 1958, and especially before the decision of the Constitutional Council of 27 December 1973[271] was rendered, the opinions of legal scholars differed in this respect. For French legal positivists, such as R. Carré de Malberg, A. Esmein, or C. Eisenmann, the answer was clear. They viewed the Declaration as a text of philosophical nature only[272]. They did not recognize its superiority to the Constitution and even claimed that the Declaration and the fundamental rights and freedoms guaranteed therein "do not have the character of legal rules"[273], for they are not integrated in positive law, and that they lie beyond the constitutional order[274]. One of

[270]The Constitutional Council found as discriminating a provision of Law on Finances that differentiated between citizens as regards the possibility of challenging a decision given by a tax authority. The Council held the following: "Considérant, toutefois, que la dernière disposition de l'alinéa ajouté à l'article 180 du code général des impôts par l'article 62 de la loi de finances pour 1974, tend à instituer une discrimination entre les citoyens au regard de la possibilité d'apporter une preuve contraire à une décision de taxation d'office de l'administration les concernant; qu'ainsi ladite disposition porte atteinte au principe de l'égalité devant la loi contenu dans la Déclaration des Droits de l'Homme de 1789 et solennellement réaffirmé par le préambule de la Constitution".

[271] Decision no. 73-51 of 27 December 1973, Official Journal of 28 December 1973, p. 14004, Rec., p. 25.

[272]For Adhémar Esmein the Declaration does not have any positive legal value: "Les Déclarations des droits émanent de corps possédant une autorité légale et même souveraine, d'assemblées constituantes; mais ce ne sont pas des articles de lois précis et exécutoires. Ce sont purement et simplement des *déclarations de principes*". A. Esmein, "Eléments de droit constitutionnel francais et comparé", 8th edition, Paris, Sirey, 1927, Vol. I, p. 592.

[273]Charles Eisenmann, "La justice constitutionnelle et la haute cour constitutionnelle d'Autriche", Paris, PUAM-Economica, 1928, re-ed. 1986, p. 97.

[274]Raymond Carré de Malberg claimed that even if the Declaration was incorporated in the Constitution, it could not have a constitutional value, for "la Déclaration de 1789 n'est pas, a proprement parler, une déclaration de droits, mais seulement une déclaration de principes: elle ne formule pas des régles juridiques, qui soient susceptibles d'être appliquées pratiquement par un juge; elle ne met pas les citoyens en état de faire valoir devant les tribunaux telle ou telle faculté individuelle nettement délimitée; les vagues et générales affirmations auxquelles elle se borne, laissant entière la question de la réglementation législative des droits individuels qu'elle a pu implicitement consacrer; et par suite, elles laissent entière aussi la puissance du législateur a l'égard de cette réglementation." Raymond Carré de Malberg, "*Contribution à la théorie générale de l'État*", Vol. II, Paris, CNRS Éditions, 1985, p. 581.

the representatives of a differing view was Léon Duguit, for whom the Declaration conserved a positive legal force and had not only a constitutional value, but even a supraconstitutional one[275]. Equally, for M. Hauriou, the Declaration and the Constitution had the same constitutional value, also with regard to the fact that the Declaration recognises existing rights which must, as a consequence, impose upon the legislator in its lawmaking activity[276].

Since 1971, when the Constitutional Council indirectly referred to the Declaration by declaring the constitutional value of the Preamble of the 1958 Constitution[277], the scholarly discussion on the question of the legal value of the Declaration changed to that of its place in the bloc of constitutionality. In other words, if the debate under the Third Republic was centred around the question of the legal value of the Declaration, in the Fourth and the Fifth Republics the debate is preoccupied by the place of the Declaration in the bloc of constitutionality.

What is, then, the position of the Declaration within the bloc of constitutionality? Some scholars have advocated that the Declaration is superior to the Preamble of the 1946 Constitution. Two arguments were invoked in this respect. The first one was based on the absolute and imprescriptible character of fundamental rights guaranteed by the Declaration. This argument was to support, for example, the thesis that the Declaration is superior to the "political, economic, and social principles particularly necessary in our times" as invokes the Preamble of the 1946 Constitution[278], or a thesis that the principles enounced in the

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[275]"Les déclarations des droits n'étaient point de simples formules dogmatiques ou de simples énoncés théoriques formulés par un législateur philosophe; elles étaient de véritables lois positives obligeant non seulement le législateur ordinaire, mais aussi le législateur constituant. Particulièrement, la déclaration des droits de 1789 a conservé encore de nos jours toute sa force législative positive. Je crois que si ajoud'hui le législateur faisait une loi violant un des principes formulés dans la Déclaration des droits de 1789, cette loi serait inconstitutionnelle. Je crois même que la Déclaration des droits de 1789 s'impose encore non seulement au législateur ordinaire, mais aussi au législateur constituant, et qu'une assemblée nationale formée dans les conditions de l'article 8 de la loi constitutionnelle du 25 février 1875 ne pourrait point juridiquement faire une loi contraire aux termes de la Déclaration". Léon Duguit, "Traité de droit constitutionnel", 3rd edition, Paris, Ancienne librairie fontemoing, 1930, Vol. III, pp. 606-607.

[276]D. Rousseau, "Droit du contentieux constitutionnel", 2nd ed. Montchrestien, 1992, p. 92.

[277]Decision no. 71-44 DC of 16 July 1971.

[278]One of the advocates of this thesis is, for example, François Goguel who claims that: "Il résulte des termes mêmes de la Déclaration de 1789 que celle-ci ne prétend pas correspondre à un état donné du développement de l'histoire de l'humanité et de l'évolution des sociétés. Les droits qu'elle proclame appartiennent à l'homme en tant qu'il est homme. Ils sont absolus et imprescriptibles. Au contraire les principes énoncés par le Préambule de 1946 sont expréssement déclarés 'particulièrement nécessaires à notre temps'. Ils ont donc pu ne pas être nécessaires dans le passé, ils pourront ne plus l'être dans l'avenir. Les principes particulièrement nécessaires à notre temps, à la différence des Droits proclamés en 1789, sont donc affectés d'un certain coefficient de contingence et de relativité". François Goguel, "Objet et portée de la protection des droits fondamentaux",

Declaration are of liberal character, as opposed to the interventionist character of those proclaimed in the 1946 Preamble[279]. The second argument stresses the complementary character of the Preamble of the 1946 Constitution in view of the wording of the Preamble of the 1958 Constitution that the Constitution of 1946 "confirms" and "complements" the Declaration[280]. Some scholars used this argument to support a thesis that social rights, as enshrined in the 1946 Preamble, are rights of inferior rank and subordinated to rights and freedoms guaranteed by the Declaration[281].

Some have supported the opposite view that the Preamble of the 1946 Constitution is superior to the Declaration. Their arguments are also twofold. The first argument is based on the axiom *lex posterior derogat legi priori*. According to this maxim, in case of conflicting texts, the more recent one prevails over the older one[282]. The second argument holds that "the principles particularly necessary in our times" must prevail over the principles from other times[283].

Colloque international d'Aix-en-Provence des 19, 20, 21 février 1981, in *Revue internationale de droit comparé*, 1981, p. 444.

[279]For example, André de Laubadère and Pierre Delvolvé claim the following: "Les principes interventionnistes ne viennent qu'en second lieu (ils sont proclamés 'en outre'). Dans la mesure où ils contredisent les précédents, ils l'emportent sur eux. Mais en dehors de ceux qu'ils impliquent nécessairement, les principes libéraux retrouvent application. Si l'on voulait schématiser, on dirait que ces derniers constituent le droit commun, alors que les autres constituent l'exception. La formule est sans doute trop brutale. Il n'en faut pas moins considérer que l'interventionnisme qu'appelle le préambule s'inscrit dans un système dont il maintient le libéralisme". André de Laubadère, Pierre Delvolvé, "Droit public économique", Paris, Dalloz, 5th edition, 1986, p. 101

[280]The first paragraph of the 1958 Preamble reads that: "La Déclaration de 1789, confirmée et complétée par le préambule de la Constitution de 1946".

[281]For example, Jean-François Flauss argues that: "... les principes constitutionnels résultant de la Déclaration de 1789 sont, par rapport à ceux issus du Préambule de 1946, dotés d'une autorité supérieure. Par voie de conséquence, en cas de conflit les premiers primeront les seconds". Jean-François Flauss, "Les droits sociaux dans la jurisprudence du Conseil constitutionnel", in *Droit social*, 1982, pp. 652-653.

[282]In this regard Loïc Philip affirms that: "Les dispositions contenues dans la Constitution de 1958 l'emporteraient sur celles du Préambule de 1946, lesquelles prévaudraient sur les principes fondamentaux reconnus par les lois de la République, qui eux-mêmes l'emporteraient sur la Déclaration de 1789. Les dispositions contenues dans ce texte ne pourraient donc recevoir valeur constitutionnelle que dans la mesure où elles ne seraient pas contredites par d'autres dispositions constitutionnelles postérieures et leur portée devraient être définie compte tenu des limitations qui ont pu intervenir par la suite dans des textes de valeur constitutionnelle". Loïc Philip, "La valeur juridique de la Déclaration des droits de l'homme et du citoyen du 26 août 1789 selon la jurisprudence du Conseil constitutionnel", in *Études offertes à Pierre Kayser*, Presses universitaires d'Aix-Marseille, 1979, Vol. II, pp. 335-336.

[283]This argument was put forward by François Luchaire: "La Déclaration des droits de l'homme et du citoyen de 1789 répondait aux exigences de son époque; mais notre époque a d'autres exigences: la propriété 'droit inviolable et sacré' est devenue une fonction sociale; l'égalité en droit est dépassée par le souci d'une égalité matérielle; la Déclaration de 1789 ne doit pas être interprétée comme elle l'aurait été au début de la grande révolution, mais en fonction de notre temps et naturellement des autres dispositions très générales de la Constitution de 1958 de son préambule comme celui de 1946. A cet égard une disposition de l'actuelle Constitution apparaît fondamentale 'la France est une République sociale'; cette affirmation apporte la clé d'interprétation de la Déclaration de 1789 qui la fait correspondre aux exigences de notre temps". François Luchaire, "Le Conseil constitutionnel et la protection des droits et des libertésdu citoyen", in *Mélanges M. Waline*, Paris L.G.D.J., 1974, pp. 572-573.

It can be argued that there is no hierarchy between the Declaration and the Preamble of the 1946 Constitution for the fact that both of these texts have the same legal force by virtue of the 1958 Constitution. If the Declaration was dominant over the 1946 Preamble, it would mean that, in the French legal system, natural law principles would figure on the top of hierarchy within the bloc of constitutionality. I consider the maxim *lex posteriori derogat legi priori* has no place in the relation between the Declaration and the Preamble of the 1946 Constitution[284]. Moreover, the text of the Declaration has been recognised for its integrity and it is not possible to invalidate one or more of its parts[285]. As regards constitutional jurisprudence, it does not appear that there is a decision of the Constitutional Council declaring that there is any hierarchy whatsoever between these two texts forming part of the bloc of constitutionality. It cannot be claimed that any hierarchical relationship implies from the fact that the Constitutional Council has declared that the Preamble of the 1946 Constitution "confirms and completes" fundamental rights defined by the Declaration by the formulation of political, economic, and social principles particularly necessary in our times[286]. Presuming that no hierarchy lies between the Declaration and the Preamble of the 1946 Constitution[287], it may be asserted that all texts within the bloc of constitutionality have equal

[284]From the legal point of view they simultaneously form "an intrinsic part of the 1958 Constitution". See, for example, Henry Roussillon, "Le Conseil constitutionnel", Paris, Dalloz, 2nd edition, 1994, p. 65: "L'argument de l'âge des textes (1789-1946, essentiellement) n'a aucune valeur malgré l'évidence qu'on voudrait lui donner. En effet, ces deux textes ont exactement le même âge au plan juridique puisque leur date de naissance, dans notre système juridique actuel, est la même, le 4 octobre 1958, date de promulgation de notre Constitution". See also Dominique Rousseau, "Droit du contentieux constitutionnel", Paris, Montchrestien, 3rd edition, 1993, p. 112: "Si les deux textes ont été élaborés à des dates évidemment différentes, ils ont été repris ensemble dans le Préambule de la Constitution de 1958, approuvés ensemble par un vote du Peuple français lors du référendum du 28 septembre 1958 et ils on reçu, à la même date, le 16 juillet 1971 valeur constitutionnelle; ils doivent en conséquence être considérés comme deux textes contemporains, dans tous les sens du terme".

[285]As Georges Vedel aptly mentions: "Le fait que le Préambule de 1946 'confirme' et 'complète' la Déclaration de 1789 n'empêche pas que le constituant a énoncé de façon positive en quoi consistent ces compléments. Aucune autorité ne peut retrancher tel ou tel de ces compléments ou l'invalider. Ils sont ce qu'ils sont. Il peut se poser à leur sujet un problème d'interprétation, mais non pas de validité. Ce sont deux points de vue différents. Le constituant a bien pu estimer que les principes posés par le Préambule étaient 'particulièrement nécessaires à notre temps'. Mais il a laissé subsister le texte de 1789 dans son intégrité et aucune autorité ne peut opérer, au nom d'une hiérarchie sans fondement positif, de retranchement traduisant une invalidation partielle de la Déclaration". Georges Vedel, "Place de la Déclaration de 1789 dans le 'bloc de constitutionnalité'", La Déclaration des droits de l'homme et du citoyen et la jurisprudence (Colloque des 25 mai et 26 mai 1989 au Conseil constitutionnel), Paris, P.U.F., 1989, pp. 52-53.

[286]For example, decision no. 81-132 DC of 16 January 1982, Official Journal of 17 January 1982, p. 299, Rec., p. 18: "Le préambule de la Constitution de 1946 réaffirme solennellement les droits et les libertés de l'homme et du citoyen consacrés par la Déclaration des droits de 1789 et tend seulement à compléter ceux-ci par la formulation des principes politiques, économiques et sociaux particulièrement nécessaires à notre temps; aux termes du préambule de la Constitution de 1958, le peuple français proclame solennellement son attachement aux droits de l'homme et aux principes de la souveraineté nationale tels qu'ils ont été définis par la déclaration de 1789, confirmée et complétée par le Préambule de la Constitution de 1946".

[287]G. Vedel affirms that: "La Déclaration garde toute sa force juridique. Mais rien dans la décision ne marque que cette force serait supérieure à celle des dispositions du Préambule de 1946. Les deux textes sont à égalité".

value and the provisions of the Declaration and the 1946 Preamble are on equal footing with the provisions of the Constitution.

2.4.3. Fundamental Principles Recognised by the Laws of the Republic

The notion of fundamental principles recognised by the laws of the Republic is a specificity of the French Constitution that does not have a counterpart in the Czech Constitution. Fundamental principles are referred to in paragraph 1 of the Preamble of the 1946 Constitution in the following way: "the French people solemnly reaffirm the rights and liberties of man and of the citizen recognized by the Declaration of Rights of 1789, and the fundamental principles recognized by the laws of the Republic". It follows from the wording of this paragraph that fundamental principles recognized by the laws of the Republic are contained neither in the text of the Declaration, nor in the 1958 Constitution, and that even principles or values that are not protected by the Constitution can be recognized as fundamental. The wording of the Preamble is rather vague and does not give any specific indication as to what principles could be considered as fundamental. The category is, therefore, open-ended and depends on the decision-making of the Constitutional Council.

The Constitutional Council referred, for the first time, to fundamental principles in 1971, striking down a statute that, in its view, violated the principle of liberty of association underlined by provisions of the 1901 Law on the contract of association. Although the Constitutional Council did not identify a list of fundamental principles recognised by the laws of the Republic, it held that freedom of association was one such principle. It, thereby, clearly expressed its intention to play an important role in protecting fundamental rights and freedoms of French citizens and to become the "protector" of fundamental rights and freedoms and the "guarantor" of the rule of law state. Following the explicit acknowledgment of the constitutional value of the Preamble of the Constitution, the Constitutional Council progressively recognised every right and freedom guaranteed by the Declaration. Amongst the fundamental principles recognised by the laws of the Republic it has acknowledged, for example, individual liberty, freedom of conscience, independence of administrative courts, the exclusive competence of administrative courts to void acts of public authorities,

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Georges Vedel, "Place de la Déclaration de 1789 dans le 'bloc de constitutionnalité'", La Déclaration des droits de l'homme et du citoyen et la jurisprudence (Colloque des 25 mai et 26 mai 1989 au Conseil constitutionnel), Paris, P.U.F., 1989, p. 57. See also Louis Favoreu, "Les libertés protégées par le Conseil constitutionnel", *in* Dominique Rousseau et Frédéric Sudre (eds.), *Conseil constitutionnel et Cour européenne des droits de l'homme*, Actes du Colloque de Montpellier des 20-21 janvier 1989, Paris, Éditions STH, 1990, p. 37.

independence of university professors, the competence of courts to protect private immovable property, rights of defence, the freedom of education, or the principle of secularity. By recognizing certain principles as fundamental, the Constitutional Council has, since 1971, enlarged the concept of the Constitution. It is necessary to add that it was also the Council of State that enlarged the pool of fundamental principles. In 1996, for the first time in the era of the Fifth Republic, it established a fundamental principle recognized by the laws of the Republic when it held that a principle that extradition demanded for political purposes must be refused, this being one of the fundamental principles recognised by the laws of the Republic. What is interesting about this case is that by giving rise to a constitutional principle the Council of State clearly shared a competence which usually belongs to the Constitutional Council. B. Genevois notes, in this respect, that, after the *Koné* decision, a part of the doctrine contested, for reasons of preservation of legal certainty, the possibility of an administrative judge to establish a fundamental principle which was not put forward beforehand by the Constitutional Council. At the same time, he draws attention to the fact that in view of the fact that all jurisdictions are competent to apply and interpret the Constitution, ordinary jurisdictions have the right and even the obligation to take a stance as to the existence of a fundamental principle, provided they abide by the methods of identification laid down by the Constitutional Council.

In view of the fact that fundamental principles recognized by the laws of the Republic are mentioned in the Preamble without any further enumeration, the Constitutional Council disposes of a large margin of appreciation in establishing various principles as fundamental. But it is not completely free in setting out these principles. It has elaborated three criteria[288] for recognizing fundamental principles that it is obliged to observe: a) the principle must figure in a piece of republican legislation[289], b) the republican legislation concerned must be dated from the period before the Preamble of 1946 Constitution came into force, and c) the principle must not be derogated by any republican legislation before the entry into force of the

[288]In a decision no. 88-244 DC of 20 July 1988, "Loi d'amnistie", the Constitutional Court rejected a claim of the applicants that a republican tradition is susceptible of constituting one of the fundamental principles recognised by the laws of the Republic. It established that in order to constitute one of the fundamental principles, a principle must be enshrined in a republican legislative text adopted before the entry into force of the Preamble of the 1946 Constitution. It came to similar conclusions, for example, in decision no. 86-224 DC of 23 January 1997.

[289]This condition excludes legislation adopted in the period of the monarchy or the Vichy regime. Yet, there is one exception which represents a decision no. 86-224 of 23 January 1987 in which the Constitutional Council made reference to Law of 16 and 24 August 1790 adopted by the constituent National Assembly and ratified by Louis XVI.

Preamble of the 1946 Constitution (the necessity of continuous application). Therefore, a principle which does not result from any legal provision anterior to the 1946 Constitution, and which is in conflict with diverse anterior laws, shall not be regarded as a fundamental principle recognized by the laws of the Republic[290]. Along the time, to these three cumulative conditions another two have been added, namely, that in order to be considered as fundamental, a principle must contain a norm which is sufficiently important, general, and non-contingent[291], and, further, that it must have a fundamental character[292].

In addition to the fundamental principles recognised by the laws of the Republic there are other constitutional principles derived by the Constitutional Council: the principles of constitutional value (*principes a valeur constitutionnelle*), which are general principles of law elevated to the constitutional level, and the objectives of constitutional value (*objectifs de valeur constitutionnelle*).

2.4.4. Principles and Objectives of Constitutional Value

There is no clearly defined relation between the principles and objectives of constitutional value. Most of them ensue from constitutional decision-making[293]. It may, nevertheless, be

[290]For example, decision no. 2008-563 DC, 21 February 2008, Official Journal of 27 February 2008, p. 3370, Rec., p. 100; decision no. 2008-573 DC, 8 January 2009, Official Journal of 14 January 2009, p. 724, Rec., p. 36.
[291]For example, decision no. 93-321 DC of 20 July 1993, "Reform of the Code of nationality", Official Journal of 23 July 1993, p. 10391, Rec., p. 196; decision no. 97-393 DC of 18 December 1997, Official Journal of 23 December 1997, p. 18649, Rec., p. 320.
[292]For example, decision no. 98-407 DC of 14 January 1999, "Mode of election of regional councillors", Official Journal of 20 January 1999, p. 1028, Rec., p. 21. The Constitutional Council rejected a claim of the applicants to the effect that the invoked provisions of Act determining the mode of election of regional councillors and of councillors in the Corsican Assembly violated a fundamental principle, whereby, in case of electoral parity, the last seat should be assigned to such an electoral roll featuring the highest average age or the oldest candidate susceptible of being elected. It did not find that this rule would have such importance as to be considered one of fundamental principles recognised by the laws of the Republic. The Council stated that: "Considérant que, en tout état de cause, la règle invoquée ne revêt pas une importance telle qu'elle puisse être regardée comme figurant au nombre des "principes fondamentaux reconnus par les lois de la République" mentionnés par le premier alinéa du Préambule de la Constitution de 1946".
[293]The Constitutional Council has induced, for example, the following principles of constitutional value: 1) continuity of the public service: e.g. decision no. 79-105 DC of 25 July 1979, Official Journal of 27 July 1979, Rec., p. 33; 2) protection of dignity of a human being: decision no. 93-343/344 of 27 July 1994, Official Journal of 29 July 1994, p. 11024, Rec., p. 100. In this respect the Constitutional Council held that: "The referred legislation sets out a number of principles including the primacy of the human being, respect for the human being from the inception of life, the inviolability, integrity and non-marketability of the human body and the integrity of the human race; these principles help to secure the constitutional principle of the protection of human dignity". The Constitutional Council recalled and enlarged this principle against "all forms of enslavement and degradation" notably in decision no. 2013-674 DC of 1 August 2013, Official Journal of 7 August 2013, p. 13450, as follows: "la sauvegarde de la dignité de la personne humaine contre toute forme d'asservissement et de dégradation est un principe à valeur constitutionnelle".; 3) contractual liberty: contractual liberty is indirectly protected by virtue of protection of liberty under Article 4 of the Declaration (see decision no. 98-401 DC of 10

argued that the objectives of constitutional value are a means for achieving constitutional principles. By reason of this conditionality, I will primarily deal with the objectives of constitutional value[294]. It is worthy of remark that no constitutional text mentions the category of "objectives of constitutional value" or "constitutional objectives". It is, thus, a category created by the Constitutional Council by way of teleological interpretation of constitutional provisions. Their ground lies in constitutional provisions guaranteeing fundamental rights and freedoms and it is by way of interpretation that the Constitutional Council deduces them from those constitutional rights and freedoms. Although the role of the Constitutional Council is not to create new fundamental rights, it can, by virtue of its power of normative interpretation, lay down the framework for the delimitation of fundamental rights and freedoms in terms of their meaning and scope, and, thereby, fix a line of conduct for parliament and the government in respect of fundamental rights and freedoms. Accordingly, the objectives of constitutional value do not produce the same effects as fundamental rights and freedoms, for they are not claim-rights that can be invoked before public authorities. The objective that every person has the possibility to dispose of decent housing, for example, does not produce subjective rights vis-à-vis the state to claim decent housing.

I consider that each objective of constitutional value is attached to a constitutional text which recognises the former, either implicitly or explicitly, and further that, although the objectives do not have a specific common content, they are directly or indirectly attached to the general interest. They represent an aim which is to be attained by the public authorities and which has

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June 1998, Official Journal of 14 July 1998, p. 9033, Rec., p. 258; 4) liberty of entrepreneurship: e.g. decision no. 81-132 of 16 January 1982, Official Journal of 17 January 1982, p. 299, Rec., p. 18. Liberty of entrepreneurship is indirectly protected by virtue of Article 4 of the Declaration. The Constitutional Council held that liberty, which within the meaning of Article 4 of the Declaration consists of the power to do all what does not intrude the others, would not be preserved had the liberty of entrepreneurship been burdened by arbitrary or abusive restrictions.; 5) respect for private life: decision no. 94-352 of 18 January 1995, Official Journal of 21 January 1995, p. 1154, Rec., p. 170.

[294]From amongst the objectives of constitutional value can be adduced, for example: 1) the safeguard of public order: see decision no. 82-141 of 27 July 1982, Official Journal of 27 July 1982, p. 2422, Rec., p. 48; decision no. 2001-457 DC, 27 December 2001, Official Journalof 29 December 2001, p. 21172, Rec. p. 192; decision no. 2010-73 QPC, 3 December 2010, Official Journalof 4 December 2010, p. 21358; decision no. 2011-631 DC, 9 June 2011, Official Journalof 17 June 2011, p. 10306; 2) financial transparency of press entreprises: see decision no. 84-181 DC of 10 and 11 October 1984. This objective was derived from the provisions of Article 11 of the Declaration proclaiming the right to free communication of ideas and opinions; 3) respect for the liberty of others: decision no. 82-141 of 27 July 1982, Official Journal of 27 July 1982, p. 2422, Rec., p. 48; 4) the possibility of every person to dispose of decent housing: see decision no. 94-359 DC of 19 January 1995 ("Diversité de l'habitat"), Rec., p. 176; 5) pluralism: see decision no. 86-210 DC of 29 July 1986 ("Régime de la presse"), Rec., p. 110; decision no. 86-217 DC of 18 September 1986 ("Liberté de communication") Rec., p. 141. In both of these decisions the Constitutional Council declared as incompatible with the Constitution a law under scrutiny for insufficient implementation of the objective of pluralism; 6) accessibility and clarity of law: see decision no. 79-105 DC of 25 July 1979, Official Journal of 27 July 1979, Rec., p. 33.

a textual constitutional basis. For this reason I presume that the objectives may serve as an instrument for limitation of property rights to attempt to satisfy the pressing needs of the community. The objectives of constitutional value, thus, seem to represent a sort of constitutional instruction allowing the legislator to limit the scope of a fundamental right or freedom without denaturing its meaning. In respect of the right of property, I do not see the importance of the objectives of constitutional value only in that they may serve as constitutional instructions for limitations of property, but also in that they may serve as a means for enlarging the scope of the application of constitutional provisions for new domains that were not envisaged by the constitution makers. In my view their function in respect of property is twofold.

Firstly, representing a sort of instructions that the legislature must follow in realizing fundamental rights and liberties, they may restrict the freedom of action of the legislature. They determine the conduct of the legislator where the obligation to act may take on a character of a positive[295] or negative obligation. Therefore, I argue that the objectives are rather commands than recommendations. They are ends assigned by the Constitutional Council to the legislator that is obliged to implement them, non-observance of this obligation being sanctioned by the former[296].

Secondly, they may, simultaneously, justify restrictions of fundamental rights laid down in written texts[297], and, thus, set down conditions and limits to those rights. The limiting function of the objectives is reflected in their permitting normative function whereby they allow the legislator to limit the exercise of fundamental rights and liberties for the purpose of their realization[298]. I suggest that the justification of limitation lies in the pursuance of either the general interest or the reconciliation of the objectives with conflicting fundamental rights. Thus, for example, in order to implement the objective of decent housing, and, so, to safeguard the effectiveness of rights stemming from it, the legislator is allowed to limit the right of property to an extent it deems necessary[299]. The limitation serves to protect other

[295]For example, as regards the objective of decent housing see decision no. 94-359 DC of 19 January 1995, "Diversité de l'habitat", Rec., p. 176.
[296]For example, in decision no. 2003-475 DC of 24 July 2003, "Loi portant réforme de l'élection des sénateurs", Rec., p. 397, the objective of accessibility and intelligibility of law served as a reason for the finding of incompatibility of a law with the Constitution.
[297]J. Bell, "French Constitutional Law", Oxford University Press, 2001, pp. 71-72.
[298]This kind of normative function clearly stems out from the first Constitutional Council's decision explicitly recognizing the institute of objectives of constitutional value (decision no. 82-141 DC of 27 July 1982).
[299]Decision no. 98-403 DC of 29 July 1998, "Taxe d'habitation", Rec., p. 276.

fundamental rights, and so the objectives of constitutional value exert a protective function. In other words, the objectives have a dual function which appears to be rather paradoxical and which requires a balancing of interests. On the one hand, their function is to limit fundamental rights[300], and, on the other hand, their essential role is to protect these rights. In their protective function the objectives of constitutional value constitute objective conditions for the effectiveness of constitutional rights and freedoms from which they imply. It can be summed up that the objectives of constitutional value: a) justify restrictions of fundamental rights and liberties by public authorities, especially by the legislature; and b) determine the end that is to be achieved in order to allow for the effective exercise of fundamental rights and liberties.

It can be observed that there is a slight difference in viewing the constitutional principles in France and the Czech Republic. If, in France, they are derived by interpretation by the Constitutional Council and constitute a sort of ends assigned by the Constitutional Council to the legislator that is obliged to implement them, in the Czech Republic it is the legislator that sets them forth in organic laws, in the constitutional order, which does not mean that the legislator would not be bound by them. On the one hand, the legislator must follow them in realizing fundamental rights and liberties and, on the other hand, they allow the legislator to limit the exercise of fundamental rights and liberties for the purpose of their realization. So, the limiting and normative functions of the constitutional principles are preserved, only their origin is rather legislative than judicial. In the Czech constitutional texts the fundamental principles are predominantly set out in the Preamble of the Constitution in the general provisions of the Constitution and the Charter. Those principles are, for example, the inalienable values of human dignity, freedom and humanity, equality in dignity and rights, the judicial review of judgments, or the general principles of inviolability of the natural rights of man, the rights of citizens and the sovereignty of the law. These last three principles were declared by the Constitutional Court as expressing the principles of the rule-of-law state and

[300]The majority of the doctrine advocates the opinion that the objectives are primarily instruments of the limitation of fundamental rights. See, for example, J.-B. Auby, "Le recours aux objectifs des textes dans leur application en droit public", *RD publ.*, 1991, p. 331-332; V. Constantinesco, S. Pierré-Caps, "*Droit constitutionnel"*, Paris, PUF, coll. "Thémis", 2004, p. 515; C. Grewe, H. Ruiz Fabri, "*Droits constitutionnels européens"*, Paris, PUF, coll. "Droit fondamental", 1995, p. 155, para. 121; L. Favoreu, L. Philip, "*Les grandes décisions du Conseil constitutionnel"*, Paris, Dalloz, 13th ed., 2005, no. 34, para. 4, p. 577; F. Luchaire, "Brèves remarques sur une création du Conseil constitutionnel: l'objectif de valeur constitutionnelle", *RFD const.*, no. 64, 2005, p. 678.

the principles of legal certainty, which demand that the commands and bans be regulated in law in such a way so no doubt about the basic contents of the legal norm may arise[301].

2.5. Right of Property as a Fundamental Right

The fundamental character of the right of property was brought about by the constitutional case-law in two stages. Firstly, the Constitutional Council integrated the Preamble of the Constitution of 1958 into the bloc of constitutionality when it established, in decision no. 71-44 DC of 16 July, 1971, that the constitutionality of a norm could be assessed on the basis of the Preamble to the Constitution of 1958, and, consequently, on the basis of the provisions of the Declaration of 1789, in addition to the fundamental principles recognized by the laws of the Republic and principles and objectives of a constitutional value.

The significance of decision no. 71-44 DC lies in the fact that since the Preamble of 1958 was accorded a constitutional value, the Declaration of 1789 and the Preamble of the Constitution of 1946 were integrated in the range of constitutional norms[302]. The Constitutional Council thereby constitutionalised the fundamental principles enshrined in the Preamble of 1958 and, thus, indirectly recognised that the provisions of the Declaration formed part of the Constitution. However, the doctrine was not, at the time, unanimous as regards the meaning of the decision. The contested issue was whether all provisions of the Declaration, or only some of them, were accorded a constitutional character. For example, M. Luchaire held the view that the constitutional value was meant to be for the text of the Declaration as a whole[303]. The same opinion was advocated by M. Robert who claimed that it was admitted that the rights and liberties proclaimed by the Declaration of 1789 had a constitutional value[304]. On the other hand, L. Philip supported the idea that only certain provisions of the Declaration have a constitutional value, and he even suggested a "presumption of non-constitutionality of the provisions of the Declaration of 1789" and required that the

[301]Decision no. Pl. ÚS 5/92 of 4 September 1992.
[302]The decision itself dealt with the freedom of association and the Council explicitly stated the following: "Considering that there are grounds to include the principle of freedom of association amongst the fundamental principles recognised under the laws of the Republic and solemnly reaffirmed in the Preamble to the Constitution".
[303]M. Luchaire, "La lecture actualisée de la Déclaration de 1789", in *La Déclaration des droits et la jurisprudence*, 1989, PUF, p. 215.
[304]M. Robert, "Propos sur le sauvetage d'une liberté", R.D.P. 1971, p. 1189.

Constitutional Council expressly recognise a constitutional character of each and every provision of the Declaration[305].

Be that as it may, the decision of 16 July 1971 definitively accorded the Preamble of the Constitution of 1958 a constitutional character[306]. Since the Preamble of 1958 explicitly declares the "attachment of the French people to human rights as defined by the Declaration of 1789"[307], it ensues that the acknowledgment of the fundamental character of principles reaffirmed in the Preamble of 1958 applies to the text of the Declaration of 1789 as a whole as it does not seem that the text of the Preamble of 1958 would treat "human rights defined by the Declaration of 1789" hierarchically whatsoever. Accordingly, as for the significance of this decision for the right of property, by according a constitutional value to the totality of the text of the Declaration of 1789, it acknowledged the fundamental character of the rights enshrined therein.

The explicit acknowledgment of constitutionality of the provisions of the Declaration of 1789 - the principles enshrined in the Declaration - was given by the Constitutional Council in decision no. 81-132 of 16 January 1982 (the "Nationalisations" decision). The Council affirmed that "the principles enshrined in the Declaration have a full constitutional value". The connotation of the statement on the constitutionality of the principles enshrined in the Declaration aptly describes P. Brunet who, in answering his question whether the principles enshrined in the Declaration should be understood as one or more norms, claims that this affirmation contains a norm according to which the legislator and other state bodies must respect the principles of 1789[308].

As regards the right of property, decision no. 81-132 was the first step towards the creation of an autonomous concept of property, as the Constitutional Council recognized, for the first time, that the right of property was a fundamental right, or a right of "constitutional value". The foundations of the constitutional dimension of property were, thus, first laid down only in

[305]L. Philip, "La valeur juridique de la Déclaration des droits de l'homme de 1789 selon la jurisprudence du Conseil constitutionnel", Vol. 2, Mélanges Kayser, PUAM, 1979, p. 317.
[306]H. Pauliat, "Le droit de propriété dans la jurisprudence du Conseil Constitutionnel et du Conseil d'État", Vol. I, Université de Limoges, 1994, p. 49.
[307]"The French people solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789, confirmed and complemented by the Preamble to the Constitution of 1946 …".
[308]P. Brunet, "Les garanties de la propriété par le juge constitutionnel", in *La propriété*, Vol. LIII, 2003, Travaux de l'Association Henri Capitant, Société de législation comparée, 2006, p. 533.

1982, which was not long before the Czech Charter of Fundamental Rights and Freedoms came into effect. The concept used until that date was purely civilian, as enshrined in Article 544 of the Civil Code[309]. Until the Nationalisations decision of 1982, the constitutional status of property had not been certain and had been systematically questioned.[310] The main reason was that the right of property had been so circumscribed by legislation that it was hardly conceivable to consider it within the meaning of the right enshrined in the Declaration. The Constitutional Council has recently upheld that the right of property as guaranteed by Article 17 of the Declaration ranks amongst the rights and liberties that are guaranteed by the Constitution and that can be invoked in support of an application for a priority preliminary ruling on the issue of constitutionality (*question prioritaire de constitutionnalité*)[311].

It is worthy of mention that in the "Privatizations" decision[312] the Constitutional Council expanded the scope of the constitutional protection of property to public property. In this and in later decisions[313] it confirmed that the constitutional protection of property applies to both private and public property. The provisions of Articles 2 and 17 of the Declaration, thus, do not only concern private property of individuals, but also, on an equal basis, property of the state and other public persons. They prevent the public sphere from being terminally encumbered by real property rights without receiving an adequate remedy which would take into account the real value of the property, as well as the mission of the public service it is assigned to. In line with the practice of the Constitutional Council, the protection of property of the state and public persons under the Constitution is founded not only on Articles 2 and 17 of the Declaration, but also on Articles 6 and 13 of the Declaration providing for equality before law and equality before public burdens, respectively[314].

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[309]"Ownership is the right to enjoy and dispose of things in the most absolute manner, provided they are not used in a way prohibited by statutes or regulations".

[310]For example, Löic Philip claimed, in 1979, that property should not be regarded as a constitutional principle, but only as an appeal similar to many rights proclaimed by the 1946 Preamble (in *La Valeur juridique de la Déclaration des droits de l'homme et du citoyen du 26 août 1789 selon la jurisprudence du Conseil constitutionnel*, Études offertes à P. Kayser (Aix, 1979), p. 317).

[311]See, for example, decision no. 2010-26 QPC, 17 September 2010, Official Journal of 18 September 2010, p. 16951, para. 6; decision no. 2010-43 QPC, 6 October 2010, Official Journal of 7 October 2010, p. 18155, para. 3; decision no. 2010-60 QPC, 12 November 2010, Official Journal of 13 November 2010, p. 20237, para 3.

[312]Decision no. 86-207 DC of 25, 26 June 1986.

[313]For example, decision no. 591/2557 of 21 July 1994, Journal Official of 23 July 1994, p. 10635, p. 96.

[314]Decision no. 86-207 DC of 25 June 1986, (*Privatisations*); decision no. 2008-567 DC of 24 July 2008, *Loi relative aux contrats de partenariat*; decision no. 2010-67/86 QPC of 17 December 2010, *Région Centre et région Poitou-Charentes (AFPA - Transfert de biens publics)*. According to these decisions public property cannot be ceded to private persons for a price that is inferior to its value.

2.6. "Nationalisations" Decision

In 1982 the Constitutional Council had to deliver a decision on the constitutionality of a law on nationalizations. It had to decide whether a law on nationalisations, which nationalised major banks, the steel industry, and certain industrial and armaments manufacturers, was in compliance with the Constitution. The Constitutional Council did not consider these nationalisations unconstitutional and clearly stated that it had the right to review the assessment of public necessity. The provisions of the law were found to be unconstitutional only in several specific aspects which were mainly related to the amount of compensation for the assets to be nationalized.

On 16 January 1982 the Constitutional Council rendered a decision which marked a turning point in the jurisprudence on property – it explicitly ascribed to the right of property "a fundamental character", recognized a constitutional value of the Declaration as a whole, and consequently of the right of property as enshrined in Articles 2 and 17 of the Declaration. Hence, these provisions of constitutional character account for the fundamental legal provisions on property. The Constitutional Council explicitly declared that the 1789 principles were supreme, and that those of 1946 could complement but never contradict them. Besides the right of property, the Constitutional Council ruled that freedom of private enterprise (*liberté d'entreprendre*) was also of fundamental constitutional value, whereby it seemed, clearly, to signal that, in its view, socialism was incompatible with the French Constitution[315].

The Constitutional Council imposed strict limits on the power to nationalize by prioritizing the Declaration of 1789 over the Preamble of the 1946 Constitution providing for nationalisations[316]. It invalidated numerous aspects of socialist legislation seeking to nationalize large industrial corporations and banks. The most significant provision of the nationalisation project invalidated by this decision was the formula for compensation of affected shareholders. The Socialists had proposed to assess compensation under a multifactor formula based on the expropriated companies' assets as well as the three-year average of share prices and profits in order to reduce any unfairness resulting from short-term fluctuations in value. According to the Constitutional Council, the correct procedure was to assess these amounts as of "the day of the property transfer, taking into account the influence

[315]L. Favoreu, "Une Grande Decision", in *Nationalisations et Constitution*, Économica, 1982, p.19.
[316]Para. 9 of the Preamble reads as follows:"All property and all enterprises that have or that may acquire the character of a public service or de facto monopoly shall become the property of society".

which the prospect of nationalisation might have had on the value of their shares". The result of this decision was that the affected shareholders received a fifty percent premium on the market value of their shares.

When deciding on the principles of nationalisations the Constitutional Council invoked Articles 2[317], 4[318] and 17[319] of the Declaration and stated the following:

Considering that, if since 1789 until today, the objectives and the conditions for the exercise of the right of property have undergone an evolution characterized both by a significant extension of its sphere of application to particular new areas and by limitations required in the name of the public interest, the same principles proclaimed by the Declaration of the Rights of Man retain full constitutional value both in so far as they concern the fundamental character of the right of property, whose preservation constitutes one of the purposes of political society, and which is placed on the same level as liberty, security, and resistance to oppression, and in so far as they concern the safeguards given to the holders of this right and the prerogatives of public authorities; that the freedom which, in the terms of Article 4 of the Declaration, consists in the power to do anything that does not cause harm to another itself cannot be preserved if arbitrary or abusive restrictions are imposed on the freedom of enterprise.

Furthermore, the Constitutional Council made it clear that paragraph 9 of the Preamble of the Constitution of 1946 had "neither the purpose nor the effect of rendering inapplicable the principles of the Declaration of 1789" to the operations of nationalisations. In other words, the Constitutional Council acknowledged that, by nationalisation, one may be deprived of property provided that there is a requirement of a legally ascertained public necessity and on the payment of a just and prior indemnity.

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[317]Article 2 of the Declaration reads as follows: "The aim of every political association is the preservation of the natural and imprescriptible rights of Man. These rights are Liberty, Property, Safety and Resistance to Oppression".

[318]Article 4 of the Declaration reads as follows: "Liberty consists in being able to do anything that does not harm others: thus, the exercise of the natural rights of every man has no bounds other than those that ensure to the other members of society the enjoyment of these same rights. These bounds may be determined only by law".

[319]Article 17 of the Declaration reads as follows: "Since the right to Property is inviolable and sacred, no one may be deprived thereof, unless public necessity, legally ascertained, obviously requires it, and just and prior indemnity has been paid".

2.7. Implications of the "Nationalisations" Decision for Property Rights

As the Nationalisations decision acknowledged the constitutional character of the Preamble of the 1958 Constitution, and thereby the constitutional value of Declaration and the Preamble to the Constitution of 1946, the Declaration became the core constitutional source of property protection and part of the bloc of constitutionality. Philippe Remy denotes this protection as "supra-legislative" (*supra-législatif*) which implies private property as a natural right "turning into a positive right"[320].

The 1982 decision rejected an absolutist conception of property rights. Firstly, by emphasizing that such rights "have undergone an evolution characterized both by a significant extension of its sphere of application to particular new areas and by limitations required in the name of the public interest", and, secondly, by leveraging para. 9 of the Preamble of the 1946 Constitution into the constitutional order and, thereby, putting constitutional limits on private property.

It follows from this decision that property is neither exclusive nor absolute, and that it is conditioned by the exigencies of the general interest. The Constitutional Council reiterated that property was a right-liberty of a fundamental character and laid down a series of rules for its interpretation which the legislator is obliged to follow. First of all, the right of property as guaranteed in the Declaration should be interpreted as a fundamental right of a "constitutional value". Secondly, the right of property should be interpreted in the light of the evolution it has undergone since 1789. The evolution of the protection of the right of property was endorsed in later decisions of the Constitutional Council, for example, the Council used a formulation that "the reaffirmation of the constitutional value of the right of property by the Preamble of the Constitution of 1958 must be perceived by way of this evolution"[321]. Amongst new areas to which the sphere of application of the right of property has extended, the Constitutional Council has classified intellectual property, such as copyright or trademark[322]. Thirdly, the Constitutional Council stated that the right of property should not be interpreted as an

[320]P. Remy, "La propriété privée considérée comme un droit de l'homme", in *La protection des droits fondamentaux*, Presses Universitaires de France, 1993, pp. 123-124.

[321]"C'est en fonction de cette évolution que doit s'entendre la réaffirmation par le Préambule de la Constitution de 1958 de la valeur constitutionnelle du droit de propriété". Decision no. 89-256 DC, 25 July 1989, Official Journal of 28 July 1989, p. 9501, § 18, Rec. p. 53.

[322]See decisions no. 90-283 DC, 8 January 1991, Official Journal of 10 January 1991, p. 524, para. 7, Rec. p. 11; no. 91-303 DC, 15 January 1992, Official Journal of 18 January 1992, p. 882, para. 9, Rec. p. 15; no. 2006-540 DC, 27 July 2006, Official Journal of 3 August 2006, p. 11541, para. 15, Rec. p. 88.

absolute right but as a right which could be limited and which could be interfered with only in the general interest. The constitutional character of the right of property thus requires that for any deprivation of property to be constitutional it must be justified by public necessity and must be followed by a just indemnisation - a non-compensated and unnecessary deprivation of property would be contrary to the Constitution[323]. Although it follows that the right of property is conceived as a fundamental right which since the adoption of the Declaration has changed its character in terms of its content and scope, the decision itself does not, in any way, alter the concept or the scope of protection of the right of property as formulated in the Declaration.

Another aspect of the decision is that it demonstrates the deference the Constitutional Council awards to the legislator on stating that the assessment made by the legislature on the need for nationalizations cannot, in the absence of a manifest error, be rejected by the Constitutional Council. In other words, restrictions of private property cannot reach the point of disregarding the provisions of the Declaration of 1789[324]. The Constitutional Council clearly left the legislator a wide margin of appreciation as to the determination of the scope of nationalisations and limited itself to exercising a restricted control of the modalities of introduction of such measures. This jurisprudence has been relied on by the courts until present, which, for some, represents a "striking continuity of jurisprudence"[325].

It can be suggested that the importance of the Nationalisations decision resides in two respects. Firstly, the 1958 Constitution is considered as retaining the fundamental liberal values of the Revolution of 1789. Secondly, the social provisions of the 1946 Preamble were considered as developing the rights laid down in the Declaration and not as restraining them and Article 17 of the Declaration was pinpointed as the main source of the property protection guarantee.

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[323]See, for example, decisions no. 94-346 DC of 21 July 1994; no. 96-373 DC of 9 April 1996; no. 98-403 DC of 29 July 1998; or no. 2000-436 DC of 7 December 2000.

[324]The control of a manifest error of appreciation was transposed from administrative law. See, for example, decision CE, Ass, 13 November 2013, no. 347704, *M. D.*

[325]B. Genevois, "Les nationalisations et privatisations", Colloque du CREDA "L'enterprise et le droit constitutionnel", 26 May 2010, available at: http://www.creda.cci-paris-idf.fr/colloques/pdf/2010-droit-constitutionnel/14-nationalisations%20et%20privatisations.pdf. Further see, for example, decision no. 96-375 DC of 9 April 1996, Rec., p. 60; or decision no. 2004-501 DC of 5 August 2004, Rec., p. 134, in which the Constitutional Council upheld its anterior rulings on restricted control: "qu'il est loisible au législateur de déterminer des critères en fonction desquels ces transferts pourront être approuvés par les autorités ou organes désignés par lui comme il lui appartient de définir les règles applicables à de tels transferts; que toutefois, dans l'exercice de la compétence qu'il tient de l'article 34, le législateur ne saurait méconnaître aucun principe ou règle de valeur constitutionnelle".

2.8. Constitutional Basis of the Protection of Property

The function of the constitutional guarantee of property as enshrined in Article 17 of the Declaration is to render protection to private property. It reads as follows:

Since the right to Property is inviolable and sacred, no one may be deprived thereof, unless public necessity, legally ascertained, obviously requires it, and just and prior indemnity has been paid.

This constitutional norm sets out standards of protection which simultaneously delimit the constitutional conception of property the scope of which is also shaped by the legal interpretation of the supreme courts. In other words, it renders protection to legal relations of proprietorial character and, at the same time, it sets limits to those relations by acknowledging the possibility of deprivation of the object of those relations.

Inasmuch as the constitutional guarantee of property allows for the deprivation of property, thereby negating its absolute character, the constitutional protection of relations amongst persons with respect to things, as well as of rights of the owner to a thing, manifested by *usus, fructus* and *abusus*, is correspondingly weakened and subordinated to an unstable institute of the public interest. It can be asserted that by not acceding to the thesis that the right of property is absolute, the Constitutional Council inherently admits that the owner does not necessarily have to enjoy the totality of the attributes of property in order to have his property constitutionally protected. It follows that constitutionally protected is not only a full ownership, but also what I would denote as a "bare ownership", that is ownership when the owner does not enjoy one or more of the attributes of property. This leads to the following questions. What is the scope of the notion of constitutional property? What is the constitutional basis for the protection against arbitrary limitations of property which are, in practice, more frequent than deprivations of property?

The constitutional conception of private property seems to be more restricted than that under the Convention, which, however, does not mean that the constitutional property guarantee is thereby diminished. The Constitutional Council has interpreted the scope of the right of

property more strictly in comparison with the ECHR[326]. It does not recognise, for example, the property status of authorisations granted by the state[327], whereas the ECHR accords authorisations and concessions full protection under the Convention[328], along with the allocation of alimony[329], or social security benefits[330]. The ECHR, on the other hand, conceives property or "possessions" as largely embracing every "patrimonial value" even in the absence of the ownership title to it[331]. But the scope of the constitutional concept of property is wider in that it also comprises property of public persons, which is under the Convention excluded by definition, as the purpose of Article 1 of Protocol No. 1 is to protect natural or legal persons from arbitrary interferences with their possessions by the state. In any event, the constitutional conception of property is not authoritative for the ordinary supreme courts endowed with the power to exercise the control of conformity of laws with the Convention.

Since the control of constitutionality and conventionality is bifurcated, the Constitutional Council exercising only the control of constitutionality of laws, the ordinary judges of the Council of State or the Court of Cassation exercising the control of conventionality do not have to adhere to the interpretation of the concept of property by the Constitutional Council. Indeed, the ordinary judge is not bound by the appreciation of the Constitutional Council, which, for example, the Council of State demonstrated in a decision[332] rendered immediately after the Constitutional Council delivered a decision refusing the application of Article 17 to the right of use[333]. Contrary to the decision of the Constitutional Council, the Council of State acknowledged that a holder of the right of use of property, although a non-owner, fell within

[326]C. Nivard, "Le régime du droit de propriété", Revue française de droit admnistratif, 28 année-bimestrielle, No. 4, juillet-août 2012, p. 632.
[327]Decision no. 82-125 L of 23 June 1982; decision no. 82-150 DC of 30 December 1982; decision no. 2011-141-QPC of 24 June 2011. In the latter decision the Council stated that: "Considérant que les autorisations délivrées par l'État, au titre de la police des eaux, sur le fondement de l'article L. 214-3 du code de l'environnement ne sauraient être assimilées à des biens objets pour leurs titulaires d'un droit de propriété et, comme tels, garantis par les articles 2 et 17 de la Déclaration de 1789".
[328]See, for example, *Tre Traktörer AB v. Sweden*, 7 July 1989, Series A no. 159; *Posti and Rahko v. Finland*, no. 27824/95, ECHR 2002-VII.
[329]For example, decision no. 2011-151-QPC of 13 July 2011. It held that: "the involuntary allocation of an asset such as alimony results in the obligor being deprived of the ownership of that asset, this does not fall within the scope of Article 17 of the 1789 Declaration".
[330]See, for example, decision no. 85-200 of 16 January 1986 on retirement pensions.
[331]*Gasus Dosier- und Fördertechnik GmbH v. the Netherlands*, 23 February 1995, Series A no. 306-B.
[332]CE 22 July 2011, *Commune de Saint-Martin d'Arrossa*, no. 330481. The Council of State concluded that in this case the absence of procedure of indemnisation breached a fair balance between the requirements of the general interest and the right to respect for property, and that, consequently, the challenged statutory provision was incompatible with Article 1 of Protocol No. 1.
[333]Decision no. 2011-118-QPC of 8 April 2011.

the ambit of Article 1 of Protocol No. 1 and was entitled to damages when subjected to a special and exorbitant burden out of proportion with the general interest. It follows that the division of the control of constitutionality and conventionality has found reflection in divergent views of the highest courts on the notion of property and the scope of its protection with the apparent inclination of the Council of State to the broad conception of property as interpreted by the ECHR.

Although Article 17 has a limited application to property takings, the scope of protection of property seems to be equivalent to that under the Convention, as the Constitutional Council has compensated this limitation by availing of other provisions of the Declaration. It is not only Article 17 of the Declaration that renders constitutional protection to property, but it is also Article 2 of the Declaration that has been ranged by the Constitutional Council, after some hesitation, as a norm of reference in the constitutional protection of property along with Article 17. In the control of constitutionality of laws it is incumbent on the Constitutional Council not to render decisions that would be in conflict with the European Convention on Human Rights and the practice of the ECHR[334]. Providing only for takings as the extreme form of an interference with property, Article 17 appeared to fall short with regard to the exigencies of the European Convention standards. So, although the constitutional protection of property has, for a long time, relied entirely on Article 17 of the Declaration, it proved to be insufficient, as it does not apply to cases of limitations of property as a less serious form of interference. In view of the fact that the European property guarantee under P1-1 comprises three rules of protection, including the protection against arbitrary limitations of property, it was necessary for the Constitutional Council to find a solution to keep up with the European standards. Article 2 of the Declaration, thus, came into play, whatever model role the structure of Article 1 of Protocol No. 1 may have played.

While constantly delimiting and shaping the scope of the constitutional guarantee of property, the Constitutional Council has held the view that the right of property is a limited right the exercise of which can be circumscribed by the exigencies of the public interest set forth in the legislation and it has, traditionally, relied on Article 17 when dealing with limitations of property. The latter, lacking an independent textual foundation in the Constitution, saw the

[334]Such as illustrated by the case of *Zielinski and Pradal and Gonzalez and Others v. France* [GC], nos. 24846/94 and 34165/96 to 34173/96, ECHR 1999-VII, and a recent case of *De Souza Ribeiro v. France* [GC], no. 22689/07, ECHR 2012.

Constitutional Council fill out this lacuna by reference to Article 2 of the Declaration which reads as follows:

The aim of every political association is the preservation of the natural and imprescriptible rights of Man. These rights are Liberty, Property, Safety and Resistance to Oppression.

The application of this provision was rather general in the beginning. It was first in the decision on nationalisations of 16 January 1982 when the Council referred to Article 2. After acknowledging a full constitutional value of the principles pronounced in the Declaration and the fundamental character of the right of property, it declared that property was equal to liberty, safety, and resistance to oppression. Although this lead the Council to include in the scope of the constitutional protection limitations of the right of property imposed by public authorities[335], the Nationalisations decision had, shortly thereupon, a follow-up which was, yet, limited only to constatation that Article 17 could not be applied for reasons of the nature of the interference. For example, in a decision of 20 July 1983[336] the Council found that Article 17 did not apply as the provisions of the law in question concerning the representation of employees in the administrative or control boards did not amount to deprivation of property. Thereby, the Council made it clear that Article 17 did not apply beyond property takings. However, in turn, in decisions rendered in 1984, the Council apparently analysed the cases brought before it solely in light of Article 17. When dealing with limitations of the right of property, it stated that the limitations did not have a grave character so as to produce denaturation of the meaning and scope of this right, and, thus, its violation contrary to the Constitution[337], and that they did not amount to deprivation or otherwise prevent any mode of exercise of property rights contrary to Article 17[338].

Yet, in 1985, the Council outlines a tendency towards distinguishing the protection under Article 17 and Article 2 of the Declaration. For example, in a decision of 17 July 1985[339] it dealt with a claim under Article 2 against a law conferring on public authorities a power to submit every division of a lot to the regime of preliminary authorisations, and, simultaneously, with a claim under Article 17 concerning the impossibility to seek

[335]B. Genevois, "La jurisprudence du Conseil constitutionnel. Principes directeurs", Editions STH, 1988, p. 255.
[336]Decision no. 83-162 DC of 20 July 1983, Official Journal of 22 July 1983, p. 2267, Rec., p. 49.
[337]Decision no. 84-172 DC of 26 July 1984, Official Journal of 28 July 1984, p. 2496, Rec., p. 58.
[338]Decision no. 84-181 DC of 11 October 1984, Official Journal of 13 October 1984, p. 3200, Rec., p. 78.
[339]Decision no. 85-189 DC of 17 July 1985, Official Journal of 19 July 1985, p. 8200, Rec., p. 49.

compensation for an injury suffered. Regarding the Article 2 claim, the Council stated, applying the usual criterion of denaturation, that the law defined a limitation of certain modes of exercise of property, which did not have a grave character so as to denature the meaning and scope of the right of property contrary to the Constitution. It concluded by stating that the object or the effect of the law in question was not a deprivation of property within the meaning of Article 17. This decision demonstrates that when a deprivation was not at stake, the Council did not hesitate to apply Article 2 and, thus, to distribute the protection between two constitutional provisions according to the nature of the interference. Nevertheless, however it may have seemed that this double approach was anchored with definitive effect, some hesitations were yet to come.

Namely, in a case concerning the right of public broadcasting corporations to install and exploit broadcasting devices on roofs of public and private buildings, the Council strictly applied Article 17 with no mention of Article 2[340]. It found that the case did not concern a deprivation of property but servitude in the public interest in view of the fact that the right of property had not been void of its contents. A promising point seemed to be the decision of 22 January 1990 in which the Council explicitly referred to Article 2 when it stated that the principle that the price of property relinquished for the benefit of an authorised syndicate association should not be inferior to its value followed from "the respect to the right of property guaranteed in Article 2 of the Declaration"[341]. It proceeded to this provision after having held that Article 17 was inapplicable to the instant case. As Patrick Wachsmann notes, the distinction between a deprivation and a control of the use of property under Article 1 Protocol No. 1 to the Convention, hence, found its equivalent in French constitutional jurisprudence, and that it was attained by "autonomisation of the property guarantee under Article 2 of the Declaration"[342]. According to the author, Article 2 relates to both the first (general guarantee) and the third (control of the use) rule of P1-1.

[340]Decision no. 85-198 DC of 13 December 1985, Official Journal of 14 December 1985, p. 14574, Rec., p. 78.
[341]Decision no. 89-267 DC of 22 January 1990, Official Journal of 24 January 1990, p. 971, Rec., p. 27.
[342]P. Wachsmann, "La transposition en droit constitutionnel français de l'économie de l'article 1er du Protocole additionnel", in *Cohérence et impact de la jurisprudence de la Cour européenne des droits de l'homme. Liber amicorum Vincent Berger*, (eds.) L. Berg, M. Enrich Mas, P. Kempees, D. Spielmann, Wolf Legal Publishers, 2013, p. 447.

However, ambiguity persisted, with many instances of exclusive references to Article 17 in cases of serious restrictions of the use of property analysed as denaturation of property, confirming so the tie between the idea of denaturation and a violation of Article 17[343], until a decision of 12 November 2010 which laid down, with definitive effect, the duality of protection under Articles 2 and 17 of the Convention. According to the Constitutional Council, in the absence of deprivation of the right of property, it results from Article 2 of the Declaration of 1789 that the limits imposed on its exercise must be justified by the general interest and be proportionate to the objective sought[344]. So, the Council laid down a system of examination of limitations of property under Article 2 of the Declaration whereby the constitutionality of restrictions is conditioned by the requirements of the general interest and proportionality. Accordingly, it is no more necessary to assess whether the right of property was denatured, and, thus, dispossessed. This approach has been confirmed in later decisions[345]. Consequently, the property guarantee under the Declaration, as interpreted by the Constitutional Council, corresponds to the structure of Article 1 of Protocol No. 1 to the Convention comprising three distinct rules. The reference to Article 2 pertaining to limitations of property and embracing the test of proportionality allows the conformation of the exigencies of the Strasbourg Court in a more complete manner than that permitted by the control of the absence of denaturation of the right of property which seems to be endowed to extinction in the control under Article 2 of the Declaration[346].

2.9. Interpretation of the Property Guarantee by the Constitutional Council

The interpretation of the constitutional guarantee of property by the Constitutional Council apparently builds on the notion of property in civil law. Although the Civil Code, promulgated in 1804, does not expressly endorse a specific theory of property rights, it was drafted embracing the Lockean theory of natural rights[347], and it restated the absolutist civilian definition of property that had been incorporated into the Constitutions of 1793 and

[343]For example, decision no. 96-373 of 9 April 1996, Official Journal of 13 April 1996, p. 5724, Rec., p. 43; or decision no. 98-403 of 29 July 1998, Official Journal of 31 July 1998, p. 11710, Rec., p. 276.
[344]Decision no. 2010-60 QPC of 12 November 2010, Official Journal of 13 November 2010, p. 20237, Rec., p. 321.
[345]For example, decision no. 2011-141 QPC of 24 June 2011, Official Journal of 25 June 2011, p. 10842, Rec., p. 304; or decision no. 2011-209 QPC of 17 January 2012, Official Journal of 18 January 2012, p. 1014, Rec., p. 81.
[346]P. Wachsmann, "La transposition en droit constitutionnel français de l'économie de l'article 1er du Protocole additionnel", in *Cohérence et impact de la jurisprudence de la Cour européenne des droits de l'homme. Liber amicorum Vincent Berger*, (eds.) L. Berg, M. Enrich Mas, P. Kempees, D. Spielmann, Wolf Legal Publishers, 2013, p. 452.
[347]R. Schlatter, "Private Property: The History of an Idea", Allen & Unwin, London, 1951, pp. 231-234.

1795. The Civil Code, thus, strengthened the perception of property as a right grounded in natural law.

The general concept of constitutional property as interpreted by the Constitutional Council is a synergy of private and public law approaches to property which breaks with the private law tradition of the Civil Code, although not absolutely. The Council has also inspired itself by the case-law of the Council of State dealing with property of public bodies and with rights of individuals to public property. The Constitutional Council has come up with a complex definition of constitutional property which covers the identification of subjects, objects, and attributes of property.

The concept of constitutional property as elaborated by the Constitutional Council is distant from the notion of property in the sense of an absolute power over a thing advocated by philosophers of the eighteenth century and by the authors of the Civil Code. Moreover, civil lawyers today would no longer encounter property like that. The Constitutional Council denied recognizing the absolute character of the right of property as "the right to enjoy and dispose of things in the most absolute manner"[348].

2.9.1. Denial of the Absolute Character of Property

The Civil Code in Article 544 provides that ownership is an absolute right (*droit absolu*); the civil law doctrine also speaks about a perpetual right (*droit perpétuel*). The Constitutional Council has never recognised the absolute character of property in its case-law and it has not had an occasion to pronounce itself regarding the perpetual character of ownership. Its primary interest has been to guarantee the protection of property which, it considered, would be best done by setting up limitations to it. In my view, the fundamental idea that the Constitutional Council has adopted is that no right or liberty are illimitable and that a right without limits cannot be objectively guaranteed.

The Constitutional Council, as the sole body empowered to review legislation for unconstitutionality, and originally created to protect the executive branch from encroachments by the legislature, began, by 1971, to exercise general powers of constitutional review in the

[348]Article 544 of the Civil Code reads as follows: "Ownership is the right to enjoy and dispose of things in the most absolute manner" ("La propriété est le droit de jouir et disposer des choses de la manière la plus absolue".).

framework of which it recognized that only limited property could exist. Moreover, although the Declaration stipulates that ownership is inviolable and sacred, it simultaneously acknowledges the necessity of its limitation. The Constitutional Council, bound by both the Declaration and the Preamble of the 1946 Constitution, explicitly admitted the existence of limitations of property in a landmark decision of 16 January 1982 where it stated that the exercise of the right of property could be subject to limitations required by "the general interest" which has been its established line of argument ever since[349].

The limiting criterion of the public interest implies that property guaranteed by the Constitution has a social dimension. The Constitutional Council has recognised the social character of property on many occasions, especially by stressing that property rights "have undergone an evolution characterized by limitations required by the general interest". It has, thus, adopted a pragmatic approach which has been accentuated in Europe over the centuries, and which can also be encountered in the case-law of the Czech Constitutional Court and the ECHR. But restrictions of the right of property had already been frequently imposed in feudal times. In the Ancient French Regime feudal property was fragmented, and thus, in order to evade such fragmentation, measures that imposed restrictions on ownership were introduced. Those restrictive measures prohibited the owner from fragmenting his property, with the exception of usufruit, mortgage and servitudes, and the owner was banned from using his property in a manner that would be harmful either to society or other owners[350]. So, limitations of property on behalf of the general interest are not a novelty of post-industrialized Europe, but are deeply rooted in the legal history.

Had the Constitutional Council adopted the approach that the right of property could be exercised in an absolute manner, under unlimited liberty, the very existence of property rights would be imperilled by the simple fact that presumably they could be hardly respected by society. Namely, if everyone exercised his property rights in an absolute manner, there would be no respect to property of others amongst the owners themselves or by the impecunious who would not have a reason to respect the property of the propertied. An absolute character of a right may be confused with unlimited liberty of the holder of the right, that is, with liberty to do whatever one pleases regardless of others. It is quite straightforward that for the normal

[349]For example, decision no. 85-193 DC; decision no. 94-459 DC; or decision no. 90-287 DC.
[350]M. Hayem, "Essai sur le droit de propriété et ses limites", in *Librairie nouvelle de droit et de jurisprudence*, 1910, p. 214.

functioning of society it is impossible to recognize that each and every proprietor bears unlimited rights over his property. A guarantee of property is indispensable in society, but property cannot be guaranteed without imposing limitations on it. It is to avoid a state of anarchy in society in which every owner would handle his property according to his unlimited will. Every member of society owns something, because other members: a) allow him to own; and 2) recognize him as the owner. Each proprietor is dependent upon others. As there are many actors in society, it would be impossible for its survival if property entailed an absolute power over a thing as every owner is limited by property rights of others**.** The denial of an absolute character of property, thus, seems to be a realistic approach. It reflects the exigencies of the post-feudal world in which there is no need to erect barriers against interventions in the use of property. Warranting the social dimension of property reflects an egalitarian approach whereby the legitimacy of the right of property derives from the consensus of members of society as a whole in the sense "I allow you to have if I am allowed to have". Under this logic of limited exercise of property rights, no individual interest can take precedence over the interests of society. An individual proprietor can act freely in so far as he does not intrude upon the rights of others. Article 4 of the Declaration, which provides for a definition of liberty and its limits, is clear on this when it states that liberty ends there where liberty of others begins. The Constitutional Council manifestly implemented this provision in the constitutional concept of property.

Nonetheless, such an approach must be well balanced so that society does not find itself in the extreme which brought about, for instance, the communist ideology in the twentieth century. The society must not derogate individuals from the exercise of their rights and freedoms. The seminal is to find a balance between individual interests and interests of community as a whole. In this regard, the Constitutional Council has held that freedom would not be preserved if arbitrary and abusive restrictions were in place[351]. The constitutional protection of property consists in protecting this fragile equilibrium. In its interpretation the Constitutional Council reaches even further by overstepping the private property dimension to include public property in the framework of this protected equilibrium within an autonomous concept of constitutional property.

[351]Decision no. 81-132 DC of 16 January 1982, Official Journal of 17 January, p. 299, Rec., p. 18.

2.9.2. Constitutional Protection of Public Property

The only constitutional reference to public property is in paragraph 9 of the Preamble of the Constitution of 1946[352], which indirectly recognises that the state can be the owner of property and privatise private property.

On reading Article 17 it is straightforward that it is meant to protect private property of individuals. As it allows for deprivations in cases when the public necessity demands it, it can be asserted that the constitutional guarantee of public property lies there where the constitutional guarantee of private property ends. This can be one facet of interpretation of Article 17, based on the presupposition that Article 17 guarantees, first and foremost, private property. Along this line of grammatical interpretation it can be suggested that the constitutional guarantee of public property can be perceived in permissible restrictions of private property. The scheme of the scope of the constitutional guarantee of public property, which is based on the approach that Article 17 solely protects private property and that public property is guaranteed only after private property has been derogated, can be set out by virtue of the following formula: public property = private property + qualified public necessity + qualified indemnity.

Under this approach a deprivation of private property gives rise to public property on the basis of the criteria of "legally determined public necessity" and "just and advance indemnity". Accordingly, Article 17 can be viewed as providing for the guarantee of public property based on the negation of private property: a deprivation of property in the private sector necessitated by the public interest and its transfer to the public sector establishes public property. Such interpretation justifies the constitutional guarantee of only such property of public entities which is assigned to serve the public interest.

There is another line of interpretation of Article 17 that is to be suggested. It follows from the case-law of the Council of State and the Constitutional Council enlarging the constitutional guarantee to public property. First should be mentioned the decision of 16 July 1909 in which the Council of State acknowledged the right of property of public bodies[353]. In fact, this

[352]"Any property or business whose exploitation has or acquires the character of a national public service or of a *de facto* monopoly should become the property of the community".

[353]*The City of Paris and the Railway Company of Orleans*, Sirey 1909, 3, p. 97.

decision acknowledges two types of property: eminent property of the state and property of territorial authorities. From a historical perspective this perception is susceptible of being supported by the existence of a property structure – the so called eminent property (*domaine éminent*) - which, in the Ancient Regime, the monarchic regime before the French Revolution, represented a superior prerogative of the sovereign over property of individuals, and which is still present in a modified form, reinforced by procedural and indemnity guarantees, in French law and often denoted by the doctrine as real administrative rights (*droits réels administratifs*). Within the modern meaning of the term, this type of property, typical examples of which are servitudes and authorisations, is subject to two separate rights – that of private individuals, which is inferior, and that of public bodies, which is superior[354]. Another decision, in which the Council of State recognised the right of property of the state, was a decision of 17 January 1923[355]. It was the first one in which the Council of State explicitly recognised the right of public property without making reference to eminent property. Some authors argue that the reason behind this acknowledgment of public property is that public authorities are endowed with legal personality which enables them to manifest their will and they can therefore become proprietors[356]. This argument is not devoid of its logic, for legal personality implies the ability to have and to perform its own will and seems to be the prerequisite of a public authority to become and stand as proprietor. So, legal personality is apt to justify the right of property of public bodies.

The Constitutional Council handed down a decision relating to the right of property of public entities in 1986, in the so called *Privatisations* case[357]. It concerned a piece of legislation which enabled the transfer of sixty-five companies to the private sector within five years. Its purpose was to reverse nationalisations effected by the governments after the liberation of 1944 and to return more than one thousand companies to the private sector. In the decision, the Constitutional Council imposed limitations on privatisations of businesses of the public

[354]The holder of real administrative rights possesses an authorisation (licence) to use public property which in reality belongs to a public authority. The Constitutional Council has refused to accord constitutional protection to this kind of property for the reason that the rights holder (the beneficiary of the authorisation) is not a proprietor, as he exercises his rights on public property, and that, as he has no property, the authorisation cannot be an object of property rights (see decision no. 82-125L, *Recueil des décisions du Conseil constitutionnel*, p. 101). The constitutional guarantees accorded to the right of property therefore do not apply to real administrative rights. Although the Council of State does not grant a minimal general protection to this type of property either, due to its revocability and thus instability, it accords at least a limited protection to holders of certain authorisations who exercise their rights on public property (e.g. holders of concessions).
[355]Decision CE, 17 January 1923, *Piccioli*, Rec., p. 44.
[356]H. Pauliat, "Le droit de propriété dans la jurisprudence du Conseil Constitutionnel et du Conseil d'État", Vol. I, Université de Limoges, 1994, p. 188.
[357]Decision no. 86-207 DC of 25 and 26 June 1986, Rec. 61, p. 7982.

sector. This decision expanded the scope of the constitutional protection of property to public property - the Constitutional Council admitted the existence of property of "the state and other public authorities" and accorded to public bodies the right of property equivalent to that of private individuals. It ruled that the Declaration of 1789 protected "not only the private property of individuals, but also, on an equal footing, the property of the state and other legal persons of public law"[358]. This statement was endorsed in later decisions of the Constitutional Council[359]. The originality of this decision lies in the fact that the Constitutional Council used Article 17 of the Declaration as a foundation, although this provision was originally drawn up to protect the rights of individuals against the state and not vice versa. The Privatisations decision treats property of public entities in general as property falling within the scope of application of Article 17 of the Declaration.

In the *Privatisations* decision the Constitutional Council basically confirmed earlier decisions of the Council of State, rendered at the beginning of the twentieth century, and refused a construct of the Court of Cassation based on the principles of the Civil Code whereby there is no right of public bodies over their property since the latter does not bear characteristics of private property which is the only known form of property. The majority of the civilist doctrine in the twentieth century, that operated in the period of the delivery of the decision of the Constitutional Council, advocated this line of argument based on a claim that the right of property of public bodies lacks exclusive character, as nobody is totally excluded from the enjoyment of public property, or that it lacks traditional attributes (*usus, fructus, abusus*). By encompassing both private and public property, the concept of constitutional property differs from the notion of property under the Civil Code which deals strictly with private property. It follows that the decisions of the Council of State and the Constitutional Council have reinforced the autonomous character of constitutional property.

[358]See also, for example, decision no. 86-217 DC of 18 September 1986, Rec., p. 141; or decision no. 94-346 DC of 21 July 1994, Rec., p. 96.

[359]From more recent decisions reiterating that Article 17 of the Declaration provides public property with the same protection as private property see, for example, decisions no. 2003-473 DC of 26 June 2003; no. 2008-567 DC, 24 July 2008, Official Journal of 29 July 2008, p. 12151, para. 25, Rec. p. 341; no. 2009-594 DC, 3 December 2009, Official Journal of 9 December 2009, p. 21243, para. 15, Rec. p. 200; no. 2010-618 DC, 9 December 2010, Official Journal of 17 December 2010, p. 22181, para. 44; no. 2011-118 QPC, 8 April 2011, Official Journal of 9 April 2011, p. 6363, paras. 5 and 6.

2.9.3. Concept of Constitutional Property – Civil Law Concept of Property Enlarged

Civil law defines the right of property by three attributes - the right to use (*usus*), the right to enjoy the fruits (*fructus*) and the right to freely dispose of property (*abusus*). The constitutional conception of property, as elaborated by the Constitutional Council, is autonomous with regard to the notion of property in civil law. The Constitutional Council has adopted a practical approach to the issue of property – always with regard to the nature of cases submitted to it and in view of the progressive evolution. The constitutional judges have not perceived property as a static institute, but rather as ever a developing one which has taken on many new forms, and thus, for which the definition of the Civil Code is no more sufficient.

Although inspired by the Civil Code and departing from the traditional concept of private property as enshrined in the Civil Code and advocated by the civil law doctrine, the Constitutional Council attributed its concept of property a larger scope of application. The constitutional judges have acknowledged that, although the right of property is a natural right of man, it has been constantly evolving together with the evolution of society. In order to promote dynamism, permitting for an adaptation of property to new domains, they have conceived[360] constitutional property as enlarged in scope and overlapping the individual dimension - above and beyond the classical types of property, it also recognises "new forms of property", such as shares[361], voting rights attached to a share[362], copyright[363], debts[364], or trademarks[365].

Furthermore, the Constitutional Council has not, in general, conceived the right of property by its attributes, but rather in a global manner. The constitutional case-law indicates that the attributes of property have always been marginalized by the Constitutional Council. That

[360]The other supreme jurisdicion - the Council of State - has not had an opportunity to elaborate its case-law to the extent as the Constitutional Council due to its restricted competences of the highest administrative jurisdiction dealing with cases relating to executive power, local authorities, independent public authorities, public administration agencies, or any other agency invested with public authority.
[361]Decision no. 89-254 DC of 4 July 1989, Official Journal of 5 July 1989, p. 8382, paras. 9 and 10, Rec. p. 41; Decision no. 94-347 DC of 3 August 1994, Official Journal of 6 August 1994, p. 11481, paras. 10 and 11, Rec., p. 113.
[362]Decison no. 83-162 DC of 20 July 1983, Official Journal of 22 July 1983, p. 2267, Rec., p. 49.
[363]Decision no. 2006-540 DC of 27 July 2006, Official Journal of 3 August 2006, p. 11541, text no. 2, para. 41, Rec. p. 88; decision no. 2009-580 DC of 10 June 2009, Official Journal of 13 June 2009, p. 9675, text no. 3, para. 13, Rec., p. 107.
[364]Decision no. 2010-607 DC of 10 June 2010, Official Journal of 16 June 2010, p. 10988, text no. 2, para. 9; decision no. 2011-151 QPC of 13 July 2011, Official Journal of 14 July 2011, p. 12250, text no. 83, para. 4.
[365]Decision no. 90-283 DC of 8 January 1991, Official Journal of 10 January 1991, p. 524, para. 9, Rec. p. 11.

being the case despite the fact that it considers that an interference with one of the essential attributes of property may constitute denaturation of the meaning and scope of the latter, for example restrictions of property which are so grave that they induce a factual deprivation of property without any property being transferred.

The openness to new forms of property is one aspect which distinguishes the constitutional concept of property from the civilian one. In this context some authors assert that the Constitutional Council has acknowledged only new property in the sense of new objects (*biens nouveaux*) and not in the sense of new rights (*droits nouveaux*)[366], and submit that the Constitutional Council's casuistic approach implicates that its case-law is more hesitant and less solid when it comes to knowing whether its understanding of property encompasses an object or a right[367]. It can be said that such claims do not reckon with the argument that objects of property can, and necessarily do, induce rights of individuals with respect to the objects. Consequently, any new object legally recognised must, inevitably, establish new rights of individuals to those objects, as well as rights amongst the individuals themselves. However, the truth is that the Constitutional Council has not clearly established any distinction between an object and a property right. In general, it awards protection to any type of property (tangible, intangible, movable, immovable), although there are certain types of property which it does not consider as property within the meaning of Articles 2 and 17 of the Declaration, such as social security benefits[368] or the human body[369]. It is worth noting that the Constitutional Council does not assess welfare benefits under property clauses, but under Article 6 of the Declaration, entailing the principle of equality before law[370], and Article 13 of the Declaration on equal distribution of taxes, which applies also in the area of certain pension allowances[371]. Welfare benefits thus fall outside the scope of the notion of constitutional property, which contrasts with the approach adopted by the ECHR in the interpretation of Article 1 of protocol No. 1 of the Convention.

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[366]H. Pauliat, "Le droit de propriété dans la jurisprudence du Conseil Constitutionnel et du Conseil d'État", Université de Limoges, 1994, p. 136.
[367]*Ibid*., p. 144.
[368]Decision no. 85-200 of 16 January 1986 on retirement pensions.
[369] Decision no. 74-54 of 15 January 1975 on abortions.
[370]See, for example, decision no. 2010-83 QPC of 13 January 2011 concerning lifetime invalidity allowances; decision no. 2011-127 QPC of 6 May 2011; decision no. 2011-170 QPC of 23 September 2011, in which the Constitutional Council assessed conformity of provisions of the Code of Social Security pertaining to working disability of liberal professions with the principle of equality; or decisions pertaining to discrimination in the enjoyment of military pensions: no. 2010-1-QPC of 28 May 2010; no. 2010-18-QPC of 23 July 2010; or no. 2010-93-QPC of 4 February 2011.
[371]See, for example, decision no. 2011-180 QPC of 13 October 2011; decision no. 2011-175 QPC of 7 October 2011.

2.9.4. The Right to Dispose of Property

The original approach of the Constitutional Council to property can be characterised by its concentration on the right to dispose of property to the detriment of the right to use (*usus*) and the right to reap the fruits of property (*fructus*) which it conceived as being embodied in the very right to dispose. The principle of free disposition (*le principe de libre disposition*) has played a key role in the constitutional understanding of property. From a historical perspective, the faculty to dispose of a thing, or the liberty to alienate it and to change its form, became an important right over a thing in the sixteenth century as a consequence of the development of commerce[372] and it belonged only to those who physically possessed a thing. The freedom to dispose of property served as a tool against the traditional system of real estate property unifying peasants and bourgeoisie in their fight for the liberation of land which was also a fight for liberation of an individual, and it was the ferment that underlied the revolutionary legislation inspiring the authors of the Civil Code[373].

The principle of free disposition of property was covered by the Constitutional Council in the category of fundamental principles of the constitutional property regime. The decision of 27 November 1959[374] in which the Constitutional Council referred for the first time to this principle can serve as an example. It accepted that the state could intervene in the private property domain, provided that the principle of free disposition was not jeopardized and that law provided for the infringement of this principle. Although conceiving the principle of free disposition of property as one of the fundamental principles of property, the Constitutional Council did not provide any definition of it. In the instant case, the Constitutional Council failed to examine the question of a violation of *fructus*, but, by incorporating it in the right to dispose of property, it enlarged the traditional (civilian) notion of the latter[375]. Furthermore, the principle of free disposition of property was also specifically qualified as a "fundamental

[372]A.-M. Patault, "Introduction historique au droit des biens", Presses Universitaires de France, Paris, 1989, p. 143.
[373]*Ibid*., p. 145.
[374]Decision no. 59-1 FNR of 27 November 1959, *Recueil des décisions du Conseil constitutionnel*, p. 71.
[375]The Civil Code enumerates the following prerogatives of ownership: "the right to enjoy and the right to dispose of things" (*le droit de jouir et disposer des choses).* Art. 544 of the Civil Code reads as follows: "Ownership is the right to enjoy and dispose of things in the most absolute manner, provided they are not used in a way prohibited by statutes or regulations". ("La propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les règlements".).

principle" in posterior decisions[376]. Moreover, the Council of State has held that it was a fundamental principle that could be limited only by law[377]. Ultimately, the Constitutional Council implicitly ascribed to this principle a constitutional value in the decision of 4 July 1989[378] whereby it weakened the power of the legislator to limit the right to dispose of property significantly.

2.9.5. Usus and Fructus as Full-bodied Attributes of Constitutional Property

In its early decision making, the tendency of the Constitutional Council was to embrace the right to use property (*usus*) within the right to dispose of property[379]. It justified this approach by its concern to avoid fragmentation of property guaranteed in Article 17 of the Declaration had *usus* been recognized. The fact that the Constitutional Council disregarded *usus* seems to be historically supported. From a historical point of view, in the Ancient Regime (*Ancien Régime*), there were two distinct types of property regimes: "eminent property" (*propriété éminente/domaine éminent*), property in a narrow sense comprising the title and the right to abuse (*abusus*), and "useful property" (*propriété utile*) comprising the right to use. Another assumption is that the Constitutional Council may have identified a guarantee of Article 17 of the Declaration with the guarantee of the right to dispose of property as such. In any event, when applying Article 17 of the Declaration to all cases concerning property, including those pertaining to the use and to the enjoyment of the fruits of property (*fructus*), it subordinated *usus* and *fructus* to the right to dispose and, hence, ranked them as secondary.

Such an approach to property, thus, distinguishes between the right to dispose, or the principle of free disposition of property, on the one hand, and usus and fructus on the other. Usus and fructus are, therefore, regrouped into one concept of rights comprising rights pertaining to utilization of property (*droits interessant l'utilisation*). The Constitutional Council thereby denied that each and every constitutive attribute of property is of equal value and conceived constitutional property as being embodied in the right to dispose of property.

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[376]Decision no. 60-7 L, 8 July 1960, *Recueil des décisions du Conseil constitutionnel*, p. 35; decision no. 61-3 FNR, 8 September 1961, *Recueil des décisions du Conseil constitutionnel*, p. 48; decision no. 73-80 L, 28 November 1973, *Recueil des décisions du Conseil constitutionnel*, p. 45.
[377]C.E., 16 April 1986, *Téqui*, Rec. Lebon, p. 110.
[378]Decision of 4 July 1989, Official Journal, p. 8382.
[379] For example, decision no. 60-7 L, 8 July 1960, Rec., p. 35; decision no. 73-80 L, 28 November 1973, R.J.C., II.

It goes without saying that *usus* constitutes a significant aspect of property. The evolution of the jurisprudence of the Constitutional Council, in this regard, can be illustrated by way of several examples of its decision-making. An attempt to recognize *usus* as a "fundamental principle" of the concept of property is perceivable, for example, in the decision of 4 December 1962[380] from which emanates the right of tenants to remain on rented premises constituting one of the "fundamental principles of the property regime". In the subsequent decision of 30 December 1981[381] the Constitutional Council went even further when it recognized that the right to use is a property right *per se* for the purpose of imposing a tax on "great fortunes" (*l'impôt sur les grandes fortunes*) by holding that the legislator could impose this tax on property generated by virtue of the use of property ("usufructus, use, and habitation"). The Council reaffirmed that *usus*, specifically the right of owners to use their chasing rights, was "one of the fundamental principles of the property regime" in the decision of 20 February 1987[382] pertaining to chasing rights.

A significant turnover in respect of conceiving *usus* as an attribute of property guaranteed in Articles 2 and 17 of the Declaration is marked by the decision of 15 January 1992[383]**.** Although the Council admits the importance of *usus*, the decision lacks its explicit recognition. Nevertheless, the significance of the decision lies in that it is shifted towards recognition of *usus*, albeit implicitly, as an independent attribute of property right that stands beside the right of free disposition. In this case the Constitutional Council took the right to use and to protect a trademark as constituents of constitutionally protected property,

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[380]Decision no. 62-21 L of 4 December 1962, R.J.C., 1959-1993, p. 12: "la loi détermine les principes fondamentaux du régime de la propriété, des droits réels et des obligations civiles et commerciales; que le droit au maintien dans les lieux, consacré au profit des locataires et de certains occupants par les articles 11 à 13 de la loi du 1er septembre 1948, modifiée par l'ordonnance du 27 décembre 1958, est au nombre de ces principes".

[381]Decision no. 81-133, DC, 30 December 1981, Rec., p. 41: "capacité contributive se trouve entre les mains non du nu-propriétaire mais de ceux qui bénéficient des revenus ou avantages afférents aux biens dont la propriété est démembrée; que, dans ces conditions, et compte tenu des exceptions énumérées par le législateur, celui-ci a pu mettre, en règle générale, à la charge de l'usufruitier ou du titulaire des droits d'usage ou d'habitation, l'impôt sur les grandes fortunes sans contrevenir au principe de répartition de l'impôt selon la faculté contributive des citoyens comme le veut l'article 13 de la Déclaration des droits de l'homme et du citoyen".

[382]Decision no. 87-149 L, 20 February 1987, Official Journal of 26 February 1987, p. 2208, Rec., p. 22: "touchent aux "principes fondamentaux du régime de la propriété" et ressortissent par suite à la compétence du législateur les dispositions qui font obligation à l'administration d'informer personnellement tout propriétaire ou détenteur de droits de chasse, remplissant les conditions prévues pour faire opposition, de l'annonce de la constitution d'une association communale ou intercommunale de chasse agréée, qui aura pour effet de diminuer l'usage qu'il peut faire de sa propriété ou de son droit de chasse".

[383]Decision no. 91-303 DC, 15 January 1992,Official Journal, p. 882, Recueil, p. 15, §9: "Considérant que les finalités et les conditions d'exercice du droit de propriété ont subi depuis 1789 une évolution caractérisée par une extension de son champ d'application à des domaines nouveaux; que parmi ces derniers figure le droit pour le propriétaire d'une marque de fabrique, de commerce ou de service d'utiliser celle-ci et de la protéger dans le cadre défini par la loi et les engagements internationaux de la France".

simultaneously acknowledging the constitutional value of intellectual property; hence, the tendency to seclude *usus* from the right to dispose and not to limit the concept of property only to the right to dispose of a thing.

With the changing perception of *usus* and *fructus* in the progressive constitutional case-law, the right to use and the right to enjoy the fruits of property become recognized, together with the right to dispose of property, as constituent elements of the concept of constitutional property. A landmark decision was rendered on 19 January 1995[384] in which the Constitutional Council endorsed its developing stance vis-à-vis property. By holding that the right to decent housing is an objective of a constitutional value, it recognized the right to use and the right to reap the fruits of property as constituents *per se* of the constitutional concept of property, the decision marking a significant milestone in constitutional jurisprudence. It was explicitly affirmed that the right to dispose does not entail the right to use, thereby reducing the former to its strict sense, i.e. to the right to alienate. The recognition of the right to decent housing purported to limit the owners' right to dispose of their property – it was acknowledged that public authorities could impose on them an obligation to let their housing facilities to disadvantaged persons, that is, to let those persons use and enjoy their property in order to comply with a constitutional objective. In such cases, the owner was left only with the right to alienate his property. By reducing the scope of the right to dispose strictly to the right to alienate, the Constitutional Council reduced, at the same time, the substance and the scope of constitutional property and admitted that the right to use, and the right to enjoy the fruits of property, could be "competing" rights with the right to dispose.

To summarize, the only right which the Constitutional Council has not explicitly recognised as forming part of property, as opposed to the civilian doctrine, is *abusus* (the right to completely use a thing, to destroy it or abandon it). In a decision of 24 January 1990[385] it stated that the conditions of the exercise of the right to abandon do not fall within the scope of Article 17 of the Declaration of 1789. All in all, it can be claimed that by acknowledging that property is formed by a multitude of distinct rights, the approach of the Constitutional Council adheres to the concept of property as a bundle of rights.

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[384]Decision no. 94-359 DC, 19 January 1995, J.O.R.F., 21 January 1995, pp. 1166 ff.

[385]Decision no. 89-267 DC, Official Journal of 24 January 1990, p. 971, §17: "Considérant que l'exercice du droit de délaissement constitue une réquisition d'achat à l'initiative d'un propriétaire de parcelles qui n'entend pas adhérer à une association syndicale autorisée; que par suite les conditions d'exercice de ce droit n'entrent pas dans le champ d'application de l'article 17 de la Déclaration de 1789".

2.10. Property as a Bundle of Rights

It cannot be contested that the concept of property, in general, either civilian or constitutional, embraces a series of legal relationships amongst persons with respect to things. If property is to be taken only as a relationship between the owner and a thing, one would have to return to the state of nature, a pre-legal state in which no rules created by society apply. This means that every attribute of property plays a significant role, and that the fact that the Constitutional Council has not expressly expounded the differences between the rights and objects of property cannot be taken as an incentive to spur a debate over the question of whether property in the constitutional sense is an object or right, as it must, inevitably, embrace both. The only question which may arise is whether the Constitutional Council recognises property as a single right or a multitude of rights.

It can be asserted that there are two aspects of the right of property. It embraces relationships between an owner and a thing, and, simultaneously, relationships between the owner and other persons with respect to a thing. From this perspective it appears from the early decisions of the Constitutional Council that it conceived property rather as a right to dispose embracing other rights of the owner through a thing. But eventually it adopted a conception of property as a multitude of independent rights of the owner to a thing where interference with one of the attributes of property leaves the other ones intact. This perception of property as a bundle of independent rights embraces the right to use, the right to reap fruits, and the right to freely dispose of property as rights which enjoy constitutional protection.

2.11. Property as a Social Function under the Declaration

In the twentieth century new social and economic necessities emerge and the exercise of the right of property becomes more and more subjected to certain social objectives. With regard to such an evolution it is discernible that the right of property has gradually been subjected to limitations, digressing so, especially, from the principles enshrined in Article 17 of the Declaration.

The answer to the question as to whether property under the French Constitution has a social function does not appear to be straightforward upon reading Article 17 of the Declaration from which it seems that property is almost an absolute right. Taking into account the Declaration describes property as a "natural, imprescriptible, unalienable and sacred" right

which is safeguarded for the purpose of securing an area of liberty for owners against the power of the state, it does not directly imply that private property as a subjective right should also perform a social function. But, on further reading Article 17 which allows for deprivation of property when "public necessity obviously requires it", it is evident that this provision, apart from the private property guarantee, ascertains the social utility of property. The case-law of the Constitutional Council further expands this provision through interpretation and establishes Article 2 of the Declaration as a norm of reference for limitation of property cases.

It occurred at the beginning of its decision-making when the Constitutional Council, in its decision of 27 November 1959[386] stated that "a free disposition of property" is one of the fundamental principles of the property regime which can be restricted by "limitations of general character" introduced by the legislation so as to permit "certain interventions judged as necessary by the public authorities"[387]. Recognition must be also given to the fact that the social function of property had already been accentuated in the project of the 1946 Constitution which was rejected in a referendum of 5 May 1946[388].

The social aspect of property also emanates from Article 13 of the Declaration which provides for general taxation for the "maintenance of the public force", and which guarantees its proportionality and equal distribution amongst citizens. Moreover, the Preamble of the 1946 Constitution sets out a number of social principles that implicate a number of social rights of French citizens. It is these social rights that were considered by the Constituent Assembly as "particularly necessary to our times"[389]. In this context, the Preamble underlines the

[386]Decision no. 59-1 FNR of 27 November 1959, Official Journal of 14 January 1960, p. 441, Rec., p. 71; this statement was upheld, for example, in decision no. 61-3 FNR of 8 September 1961, Official Journal of 9 September 1961, p. 8427, Rec., p. 48.

[387]The Constitutional Council held that: "Principes fondamentaux du régime de la propriété qui sont ici en cause, à savoir la libre disposition de son bien par tout propriétaire, l'autonomie de la volonté des contractants et l'immutabilité des conventions, doivent être appréciés dans le cadre des limitations de portée générale qui y ont été introduites par la législation antérieure pour permettre certaines interventions jugées nécessaires de la puissance publique dans les relations contractuelles entre particuliers".

[388]Although it characterised property as "an inviolable right to use, enjoy and dispose of property guaranteed to everyone by law" (Art. 35), it went on in the following Article 36 to declare that "the right of property cannot be exercised contrary to its social utility or in the manner detrimental to security, liberty, existence or property of other persons".

[389]The Preamble of the 1946 Constitution in paragraph 2 reads that: "In addition, it proclaims the following political, economic, and social principles as particularly necessary in our times". The Preamble provides for the following social principles:

- equal rights to men and women in all spheres guaranteed by the law,
- everyone's duty to work and everyone's right to obtain a job,
- to defend his rights and his interests by union action and belong to the union of his choice,

importance of public property, for it appears from para. 2 of the Preamble, read in conjunction with its para. 9, that one of the "political, economic, and social principles as particularly necessary to our times" is the property of the community which is to be private property, provided that it has, or acquires, the character of a national public service, or a *de facto* monopoly[390]. The practical example of application of these provisions is the nationalisations that took place at the beginning of the 1980's.

The social function of property is an aspect which distinguishes constitutional property from civil law property. The social dimension of property is essentially manifested by restrictions on the use of property imposed by the state, and it can be translated as limitations of property required by the public interest. It is best reflected in the usage of objects of property, for it is the usage which is interfered with by the state power that can either restrict it, such as in the cases of pre-emption or servitudes and easements, interdict it, or even annul it by expropriation. In short, it is reflected, in particular, in the limitations and deprivations of property for the purpose of satisfying social needs.

As regards the social concept of property as enshrined in the French Constitution, a question may be posed at the outset as to whether the Declaration, which puts stress on the individual approach to rights and freedoms, stands in contradiction to the 1946 Preamble which emphasises the social approach to rights. A potential conflict is only a seeming one. In my

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- the right to strike exercised within the framework of laws that regulate it,
- participation of every worker, through his representative, in the collective determination of conditions of work, and in the running of businesses,
- any property or business whose exploitation has or acquires the character of a national public service or a *de facto* monopoly should become the property of the community,
- the nation shall ensure to the individual and to the family the conditions necessary for their development,
- guarantee to all, especially to the child, the mother, and aged workers, the protection of health, material security, rest, and leisure,
- the right of any human being who, by reason of his age, physical or mental health, or economic situation, is unable to work, to obtain appropriate means of subsistence from the community,
- the solidarity and equality of all French men and women in the face of the burdens that result from national calamities,
- the guarantee of the equal access of children and adults to instruction, to professional training, and to culture.

[390]Some legal scholars comment that it is a "radical denial of the legitimity of private property as regards certain categories of assets". P. Remy, "La propriété privée considérée comme un droit de l'homme", in *La protection des droits fondamentaux*, Presses Universitaires de France, 1993, p. 125.

view it may be well illustrated by the Nationalisations decision[391] which concerned a clash of paragraph 9 of the 1946 Preamble and Article 17 of the Declaration. Paragraph 9 of the 1946 Preamble allows for nationalisation of private property when it stipulates that "any property or business whose exploitation has or acquires the character of a national public service or a *de facto* monopoly should become the property of the community", whereas Article 17 of the Declaration protects the right of property when it reads that "property, being an inviolable and sacred right, none can be deprived of it, except when public necessity, legally ascertained, evidently requires it, and on condition of a just and prior indemnity". The Constitutional Council gave priority to the Declaration by stating that the Preamble to the 1946 Constitution solemnly reaffirms the rights and liberties of man and of the citizen as recognised by the Declaration of Rights of 1789 and aims at completing them by the formulation of "political, economic, and social principles as particularly necessary for our times".

More importantly, in this decision the Constitutional Council conceded that the exercise of the right of property could be traditionally limited not only by the existence of competing rights[392], but also by its social function. It observed that the right of property had evolved and that the evolution was characterised by two elements – an extension of its sphere of application to new areas and limitations required by the public interest. It stressed that not only Article 17, but also Article 2, should be interpreted in view of these changes. That is, the Constitutional Council recognised that property protected under Article 17 and Article 2 of the Declaration has a social function. It stated that: "Since 1789 until today the objectives and the conditions for the exercise of the right of property have undergone an evolution characterized both by a significant extension of its sphere of application to particular new areas and by limitations required in the name of the public interest"[393].

[391]Decision no. 81-132 DC of 16 January 1982, "Nationalisations", Official Journal of 17 January 1982, p. 299, Rec., p. 18.
[392]The traditional limitation of the right of property resulting from the existence of competing rights is affirmed in Article 4 of the Declaration.
[393]The Council, in addition to Article 17, referred to Article 2 of the Declaration: "Considérant que, si postérieurement à 1789 et jusqu'à nos jours, les finalités et les conditions d'exercice du droit de propriété ont subi une évolution caractérisée à la fois par une notable extension de son champ d'application à des domaines individuels nouveaux et par des limitations exigées par l'intérêt général, les principes mêmes énoncés par la Déclaration des droits de l'homme ont pleine valeur constitutionnelle tant en ce qui concerne le caractère fondamental du droit de propriété dont la conservation constitue l'un des buts de la société politique et qui est mis au même rang que la liberté, la sûreté et la résistance à l'oppression, qu'en ce qui concerne les garanties données aux titulaires de ce droit et les prérogatives de la puissance publique...".

Accordingly, the Constitutional Council reconciled the individualistic fundamental character of property with its character as a social function by virtue of the interpretation of Articles 2 and 17 of the Declaration in light of these new elements and by affirming the existence of requirements of the public interest. This decision demonstrates that the evolution of the right of property is simultaneously negative and positive. It is favourable to the owner in that the scope of his right of property has extended to "new areas" and unfavourable in that property is progressively limited by the requirements of social necessity which impose restrictions on its enjoyment. The Constitutional Council, thus, confirmed the double function of property which is reflected in the declared extension and limitations of the right of property.

In view of the fact that this statement has been reiterated by the Constitutional Council on many occasions in its posterior decisions[394], it can be observed that the individualistic conception of the right of property as enshrined in the Declaration has been progressively substituted by the idea of property as a social function. I would refer to this phenomenon as a gradual relativisation of the right of property by virtue of positive obligations of the state set forth by law. The Constitutional Council has admitted the existence of a social dimension of property, side by side with its essentially individualistic character, although, originally, it was reluctant to explicitly accord to property a social function and favoured the idea of property as an individual subjective right[395]. However, with the evolution of society, and passing of time, it had to admit that property evolves and that it also fulfils certain social functions. It is, thus, necessary to interpret both Article 17 and Article 2 of the Declaration in light of the fact that the individual and social aspects of property must be conciliated, as they permit limits to be set on the rights of the state concerning property of individuals, as well as limits on the rights of individuals by allowing public authorities to impose restrictions on private property.

It is noteworthy that the social dimension of property has also appeared in the jurisprudence of the Council of State, especially in its application of the theory of abuse of rights (*l'abus des*

[394]For example, in decision no. 89-254 DC of 25 July 1989, no. 90-283 DC of 8 January 1991, in which it stated that it is in relation to this evolution that the reaffirmation by the Preamble to the Constitution of 1958 must be understood; or decision no. 91-303 DC of 15 January 1992, in which the Constitutional Council further qualified property in view of its continuous development and importance in modern society.
[395]H. Pauliat, "Le droit de propriété dans la jurisprudence du Conseil Constitutionnel et du Conseil d'État", Université de Limoges, 1994, p. 150.

droits)[396] which emerged at the beginning of the twentieth century. Under this theory exercising the right of property takes place within the framework of social relations where everyone has to respect the rights of others and abstain from any intentional nuisance or interference with them[397]. According to L. Josserand it is "a living and moving theory of great plasticity, an instrument of progress, a method for adapting the law to social needs"[398]. This theory is also reflected in Article 17[399] of the European Convention on Human Rights which explicitly prohibits any abuse of rights.

3. Czech Republic

3.1. Origins of the Property Guarantee

At the time of the proclamation of the French Declaration the Czech Crown lands (Bohemia, Moravia, and Silesia) formed part of the Habsburg monarchy which later became the Austrian monarchy, and, ultimately, in 1867, the Austro-Hungarian monarchy. The origins of the Czech constitutional tradition, thus, were not independent, but were brought forth within the tradition of the Austrian monarchy. The first attempts to establish a constitution, including a catalogue of fundamental civic rights, were connected with the revolutionary period of 1848, more than fifty years after the French Declaration came into being. However, all constitutions subsequently enacted during the Austrian period[400] were far from being democratic as they did not allow for judicial review of acts of parliament or those of Habsburg emperors.

From a historical perspective regarding the territory of the Czech Republic, property first received protection under the Austrian Civil Code (ABGB) of 1811, which, unlike in the

[396]See, for example, decision *Coquerel/Clément–Bayard*, 3rd August 1915, DP 1917 .1.79. The case concerned an installation of an appliance on a terrain which represented no use for the owner but was installed with the aim to harass his neighbors.

[397]The abuse of rights involves a disproportionate action or an action contrary to the Constitution consisting in a breach of a permission to act or a duty to abstain from acting, which causes an injury.

[398]L. Josserand, "De l'esprit des droits et de leur relativité, théorie dite de l'abus des droits", 2nd ed., 1939, p. 336. In Dworkin's view it is not a "moving theory" but rather a principle: "A standard that must be applied, not because it will ensure the occurrence or protection of an economic, political, or social situation deemed desirable, but because it is a requirement dictated by justice, fairness or some other dimension of morals". R. Dworkin, "Prendre les droits au sérieux", P.U.F., 1995, p. 80.

[399]Article 17 of the Convention on "prohibtion of abuse of rights" reads as follows:" Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention".

[400]The Constitutions of April 1848, March 1849, and February 1861, all enacted by the king, and the Constitution of December 1867 enacted by Parliament.

Czech Republic, has not ceased to regulate property relations in Austria. The concept of property emanated from Roman law conceiving ownership as an exclusive legal domain over a thing. Property was defined as the right to dispose of the substance and fruits of property arbitrarily and to exclude everyone else from it, subject to limitations imposed by a statute or rights of third parties. It is not without interest that the current Czech Constitutional Court has adhered to this conception of property when it stated that it was necessary, even at present, to adhere to the principles which had been respected until the abrogation of ABGB, which comported with the democratic values of the state, and which "must be followed in the application of contemporary law, especially when the current law suffers from lacunas that are necessary to be bridged over by interpretation"[401].

While property as a fundamental right was already recognised in France for quite some time, in the Czech lands the first constitutional enactment of private property appeared in the Constitution of 1849. Under the chapter devoted to the "imperial civic right" private property was proclaimed as inviolable. Article 29 of the 1849 Constitution provided that "property is under the protection of the empire; it can be restricted or deprived only for the public good, on the payment of compensation, and on the basis of law". It implies that the contents of this property guarantee reflected the wording of the property clause in the Declaration as regards the conditions of deprivation of property. Furthermore, according to the Constitution every citizen of the Austrian empire was entitled to acquire immovable property in all parts of the empire and freely transfer his movable property within the frontiers of the empire. The Constitution was, however, abolished in 1851 with the restoration of absolutism. The private property guarantee reappeared in the Constitution of 1867, which was in force in the Czech lands until the adoption of the Reception Law in 1918. The Constitution of 1867[402] provided for inviolability and deprivation of property "against the will" only "in cases and by means stipulated by law", as well as for citizens' freedom of acquisition and disposal of immovable property. Compared with the 1849 Constitution, it no longer provided for the conditions of deprivation of property, such as the public good or payment of compensation.

[401]Decision no. III. ÚS 77/97 of 8 July 1997.

[402]More precisely, it was one of the seven Basic Laws forming part of the Constitution, the Basic State Law No. 142/1867 of 21 December 1867 on General Rights of Citizens of the Kingdoms and Laender represented in the Council of the Realm, which was a decree issued by Emperor Franz Josef. The property guarantee read as follows:"Property is inviolable. Forced expropriation shall take place only in cases and according to the forms detemined by law".

During the French Third Republic, whose Constitution remained in effect until 1940, the Czech constitutional tradition marked a crucial turning point. The Austro-Hungarian Empire came apart and Czechoslovakia began its existence as an independent and sovereign state in 1918[403]. The creation of Czechoslovakia, or the First Czechoslovak Republic, represented the full restoration of historical Czech sovereignty and statehood comprising of Bohemia, Moravia, and Silesia, the lands of the Czech Crown. It also had significant economic aspects, especially as regards land reform measures, which were necessary, as the conditions of land tenure could not last[404]. It can be asserted that a truly democratic Czech constitutional tradition began with the adoption of the first republican Constitution in 1920. I lay focus on this constitution, in particular, because it anchors the republican system of government that is based on liberal democratic ideas entailing the protection of fundamental human rights and freedoms. The government was instituted to help secure people's rights to life, liberty and property, which was protected from being taken for public use, without just compensation. This shift from the monarchic to a republican system also entailed a shift in the approach to fundamental rights, such as property, in terms of its conception as a natural right inherent to every man. Accordingly, it was the First Republic which brought convergence with the French Declaration as concerns the classical liberal view on property[405].

3.2. Czechoslovak Constitution of 1920

Before the Constitution of 1920 came into existence, two interim constitutions were adopted. The First Interim Constitution was Law No. 11/1918 on the Establishment of an Independent Czechoslovak State, the Reception Law, which was adopted to facilitate the functioning of the newly established democratic state and legal relations therein. Besides promulgating the creation of the independent Czechoslovak state, it provided for the reception of the Austrian and Hungarian legal orders, and, thus, for the reception of legal dualism, whereby only those norms that were compatible with the new republican government were applicable. By virtue

[403]The Czechoslovak Declaration of Independence of 28 October 1918 enounced by the Czechoslovak National Committee officially proclaiming independence from the Austro-Hungarian Empire.
[404]There was disproportionate accumulation of land in the hands of a small group of aristocratic owners as a result of a long historical development including the Habsburg confiscations against the revolutionary Protestant nobles.
[405]As regards the consecutive modern Czech constitutionalism, it was influenced by repeated infringements of sovereignty, usually committed by an external agent, and consequently by ideological discontinuity. Property relations and the extent of constitutional protection of property in the Czech Republic went through turbulent changes in the 20th century with reverbating consequences of distorted property relations transcending the boundaries of the 21st century.

of this law, all laws and regulations of the Austro-Hungarian monarchy that had been in force in the Czechoslovak territory were taken over and remained in force to be part of the new Czechoslovak legal system. The legal continuity was, thus, preserved with the aim of preventing potential chaos and disturbance of the transition to the republican democratic system of government. As regards the monarchic constitution and the fundamental civic rights, they were not incorporated in the new legal order. It means that upon the entry into force of the Reception Law, the 1867 Constitution ceased to be effective, and, until the promulgation of the 1920 Constitution, the right of property did not enjoy constitutional protection.

The Second Interim Constitution was adopted on 13 November 1918 as Law No. 37/1918. It laid down the form of the new Czechoslovak state as a parliamentary republic with definitive effect and the competences of a National Assembly, president and government. The Second Interim Constitution transformed the hitherto functioning National Committee into the National Assembly that was bestowed with one of the most important tasks for adopting a definitive constitution.

The definitive Czechoslovak Constitution, entitled "the Constitutional Charter of the Czechoslovak Republic", was adopted on 29 February 1920 as Law No. 121/1920 replacing the Second Interim Constitution. Pursuant to this Constitution, the Czechoslovak Republic was declared to be a "democratic republic" with the structure of the supreme bodies based on the principle of division of powers. The 1920 Constitution was one of the most democratic constitutions of the period between the two world wars, especially with regard to the reality of the fascization of a large number of European constitutions in the second half of the 1920s and 1930s. With the establishment of a democratic parliamentary structure, the rule of law, and respect for fundamental rights and freedoms of citizens[406], it was one of the most significant constitutions of that time. It had an influence on subsequent Czechoslovak constitutional history and constitutional texts, including the current Constitution of 1992.

[406]Article 1 para. 2 of the Constitutional Charter stipulates that: "This Constitutional Charter determines the bodies through which sovereign people shall express their will in laws, provides for the execution of these laws, and guarantees people their rights and liberties. Such limitations are imposed upon these bodies of Government as shall preserve to the people all rights guaranteed by this Charter".

Demonstrating remarkable stability in the midst of neighboring turmoil, the Constitution of 1920 endured unchanged until 1938[407] and it stayed formally in force until 1948[408].

It is not without interest that the French Constitution of the Third Republic served as one of the models for the 1920 Constitution, notably as regards the structure of the supreme state bodies and the republican form of government with weak competencies of the president, along with the 1867 Basic Law of the Austro-Hungarian monarchy regarding fundamental citizen rights and freedoms, and the Constitution of the United States of America. In line with the constitutional tradition of the Austro-Hungarian monarchy, the Czechoslovak Constitution was polylegal, which means that besides the Constitution itself, it comprised several gradually adopted organic laws, or "constitutional statutes"[409]. This feature has remained the characteristic of Czechoslovak and Czech constitutional history.

As regards the protection of property, the Constitution guaranteed "freedom of property". Every citizen was free to acquire immovable property in the territory of the Czechoslovak Republic save restrictions in the public interest which had to be based on law. The Constitution provided for conditions of limitation of property when it explicitly stipulated that ownership may be restricted only by law, and, further, that expropriation is possible only on the basis of law and shall be compensated in all cases unless the law stipulates that no compensation be awarded. The Constitution, likewise, stipulated that taxation and public levies may generally be imposed only by law. It is not without significance that the 1920 Constitution provided not only for "civic rights and liberties"[410], but also for "civic duties". This resembles the French Constitution of 1795 that contained a declaration of duties and provided for the duty of respect for property rights, though no such duty is to be found in the Constitution of 1920.

[407]The period between October 1938 and March 1939 is denoted as the Second Republic. From 1939 to 1945 Czechoslovakia was the German protectorate of Bohemia and Moravia. As the Third Republic is denoted the period from the liberation from the Nazi occupation in May 1945 to the taking up of power by the Communists in February 1948.

[408]It remained effective until the downfall of the Czechoslovak Republic in 1938 as a consequence of Nazi aggression following the Treaty of Munich.

[409]Organic laws and laws referred to by the Constitution form part of the Constitution.

[410]The rights and freedoms of citizens were binding on both the legislative (the protection against unconstitutional legislation was to be provided by the Constitutional Court) and the executive (the citizen was entitled to redress before the Supreme Administrative Court for breaches of fundamental rights and freedoms by the executive).

From the viewpoint of comparative elements, the guarantee of the right of every citizen to acquire immovable property in the Czechoslovak territory bears resemblance to provisions of the Austrian Constitutions of 1849 and 1867. What is interesting about the conditions for deprivation of property is that there is no mention of the public or general interest. This is a point of difference not only in comparison to the French and Austrian Constitutions of 1848 and 1849, respectively, but also to the French Declaration of 1789. Furthermore, another feature lacking from the comparative perspective is that the 1920 Constitution does not treat property as inviolable. Despite that these facts may lead to the conclusion that, from a theoretical point of view, the protection of property was perhaps weaker compared to the French Declaration or the French Constitution of 1848, I consider that the existence of manifest safeguards against interferences with property is more important than a pure and simple declaration of inviolability. Accordingly, in my view, the absence of a declaration of inviolability could not render the constitutional guarantee of property less weighty. In this respect, it is notable to add that, in practice, the expropriation clause was only used in exceptional cases and it was usually the Civil Code that was applied, pursuant to which a citizen was obliged to cede full ownership for adequate compensation should the public interest require[411].

A distinct feature of the 1920 Constitution was that it established the Constitutional Court competent to exercise a review of constitutionality of legislation and to abolish laws. It was to serve as the protector of constitutionality of laws. The Constitution was, thus, placed under the special protection of the Constitutional Court whose judgments declaring a law invalid induced that the law, or its defective part, lost its binding force for the future. The Constitutional Court was vested with two competences: 1) to decide as to whether laws promulgated either by the National Assembly or by the Diet of Carpathian Ruthenia[412] were in conflict with the Constitution or with laws amending or supplementing it, and therefore invalid, and 2) to decide as to whether measures adopted by the Standing Commission of the National Assembly were in conflict with constitutional laws[413].

[411]V. Pavlíček, "Constitutional Law and the Science of the State, 2nd Part. Constitutional Law of the Czech Republic", Leges, Prague, 2011, p. 85.
[412]Carpathian Ruthenia was an autonomous territory of Czechoslovakia enjoying the widest measure of self-government compatible with the unity of the Czechoslovak Republic. It was an integral part of this unity by the terms of its voluntary declaration set forth in the Treaty between the Allied Powers and the Czechoslovak Republic of 10th September 1919.
[413]The Standing Commission was entitled to adopt emergency measures with the power of law during the period elapsing between the dissolution of the National Assembly and its re-assemblage, or between the expiration of its term of office and its convocation, or during the period of adjournment.

From the comparative perspective, the establishment of an institution of this kind does not figure in any of the French Constitutions promulgated to that time. The institution of the Constitutional Court was a specificity of Czech constitutional law and a rarity of its kind worldwide - the Constitution of 1920 was the first constitution worldwide ever to lay down the foundations of a constitutional court as a specialized judicial body endowed with the power to scrutinise acts of parliament with regard to their conformity with the Constitution as the highest norm in the country. However, reality was not as positive as one might imagine by virtue of the formal enactment in the Constitution. The Constitutional Court never properly functioned during the period of the First Republic and was, in fact, substituted by the Supreme Administrative Court. It left only an insignificant mark both in the world and in the Czechoslovak history of constitutional justice. After the Second World War the Constitutional Court was not revived and there was no place for it in the communist Constitution of 9 May 1948.

The constitutional system comprising the security of property relations was significantly disturbed by events following the Treaty of Munich, especially after the Nazi occupation of Czechoslovakia in 1939, in respect of certain categories of persons being identified by their race and nationality, such as the "arization" of Jewish property or deprivation of agricultural property of Czech nationals by German settlers. After the Second World War, some of the decrees of president Beneš reacted to that situation. Little stability and the security of property relations even worsened in the forthcoming decades of "real socialism".

3.3. Czech Constitution of 1948

After the restoration of independent statehood, in 1945, there was a short-lived revival of democratic rule. From 1945 to 1948 communist political forces formed a strong power base by gaining control of the government and winning thirty-eight percent of the popular vote in the 1946 election. February of 1948 marked a radical turning point not only in the constitutional history of Czechoslovakia as the Communist takeover brought a Communist dictatorship to power. The period of pluralist parliamentary democracy came to an end and a dictatorship of the proletariat was installed. The Communist party assumed absolute power in

the country[414]. Since February 1948, state power was monopolised in the hands of one political party possessing unrestricted power. A new regime of the so-called "people's democracy" was created as a form of the Marxist-Leninist conception of the dictatorship of the proletariat. With the Communists having a monopoly of decision making as to the future constitutional pattern of the country, it was obvious, then, which conceptions the new constitution would bear.

The Constitution of 1948 was published as Act No. 150/1948 and designated as the "Constitution of 9th May" according to the date of its adoption. It was an ambivalent document. An attempt was made to adapt the new constitutional structure of Czechoslovakia to the traditional system of the First Republic, as well as to the specific conditions of post-war Czechoslovakia. There was no attempt yet to introduce the Soviet system without change and respect for national traditions. Despite the new political situation, the 1948 Constitution preserved some democratic features as a matter of form[415]. In consequence, Czechoslovakia offered an interesting case study on the nature of the impact of the Soviet constitutional model on a country with a background profoundly different from that of the Soviet Union and other communist states. The explanatory report to the 1948 Constitution mentioned that the new Constitution established "a system completely different from that which we know from the pre-Munich period or in Western states"[416]. Czechoslovakia was not denoted as a "parliamentary democracy" anymore but as a "people's democratic republic".

[414]It was not only an internal matter; the installed dictatorship closed up a process of power takeover by communist political parties in the states of Central and Eastern Europe, the process that took place regardless of how much support the parties had obtained in post-war elections. The political upheaval broke down the existing political structure and contributed to the destruction of the state apparatus.

[415]It maintained foremost the basic structure of the supreme state bodies and parliamentary democracy, although the doctrine of the separation of powers was replaced by the doctrine of "unitary popular power", the constitutional guarantee of fundamental rights and duties of citizens, and the conception of an independent judiciary. The 1948 Constitution was thus an amalgam of new and old comprising two component parts, the old taken over from the Constitution of 1920, in so far as the provisions were convenient to the then political situation, and the new based on the achievements of the political upheaval (in the words of the Constitution "the results of the national and democratic revolution" referring in particular to the new economic system, the social and economic rights of citizens, or the new system of public administration) which formed the core of the new Constitution. In this the 1948 Constitution markedly differed from the Soviet "Stalin Constitution" of 1936 as well as from constitutions of other so-called "people's democratic" states that basically imitated the Soviet Constitution.

[416]The opening Declaration expressly proclaimed the wish "to attain to a social order in which exploitation of man by man shall be completely abolished – to socialism". However, the Constitution, unlike other people's democratic constitutions, did not describe the state as a proletarian dictatorship and it did not assign any special position to the working class or proletariat. On the contrary, the people are described as "the sole source of all power in the State".

The basic feature of constitutional development in Czechoslovakia of the 1950s, comprising the Constitution of 1948, was that the *de facto* constitutional situation, political, social and societal in general, flagrantly contradicted, on a daily basis, the text of the Constitution, or the *de iure* constitutional situation. It was primarily due to the fact that the 1948 Constitution reflected, in character, the constitutional situation of the parliamentary democracy of the First Republic and that it was, at the same time, repeatedly amended and changed to follow the Soviet constitutional pattern which was being gradually implanted into Czechoslovak constitutional law which was being systematically breached, circumvented and arbitrarily broadly interpreted[417]. As a consequence, fundamental rights and freedoms were restricted and grossly violated. Extra-judicial repressions were taking place, and democratic rules of civic life, as well as independent judiciary, were being eliminated. On the one hand, the contradiction between the *de facto* and the *de iure* 1948 Constitution was gradually overcome by eliminating some of the democratic elements and by adapting the constitutional order to the new totalitarian reality, while, on the other hand, the contradiction was deepened in the area of rights and freedoms of citizens, especially by by-laws and unconstitutional interferences of the public administration and political bodies.

The 1948 Constitution guaranteed rights and duties to citizens whereby it followed the 1920 Constitution. The rights set forth were guaranteed to "all citizens" and were an amalgam of traditional political rights drawn from the 1920 Constitution combined with economic and social rights which were new. Pursuant to the Soviet doctrine, it was believed that economic and social rights gave real meaning to civil rights derived from the 1920 Constitution.

The Constitution still guaranteed "freedom of property". In this respect it is interesting that, despite the totalitarian reality, it used the expression "freedom". Every citizen had a right to acquire movable and immovable property in the territory of Czechoslovakia within the limits of law. It also guaranteed private property by providing that it can be restricted only by law, and that expropriation is possible only on the basis of law and shall be compensated in all cases unless the law provides that no compensation be given. Up to this point, these provisions were identical to those of the 1920 Constitution, but it also contained a novelty which was tributary to the regime in power as it stipulated that "no one shall abuse ownership to the detriment of the collectivity". It also set forth a duty to preserve public property as one

[417]V. Pavlíček et al., "Constitutional Law and the Science of the State, 2nd Part. Constitutional Law of the Czech Republic", Prague: Leges, Prague, 2011, p. 221.

of the basic duties of citizens toward the state and community, and, unlike the 1920 Constitution, it contained two special restrictive provisions allowing for serious limitations of the exercise of the guaranteed rights.

The chapter on the "Economic system" described property, or more precisely the "means of production", either as "national property" - state-owned and run by state-owned enterprises, or as property of people's cooperatives, or as private property of individual producers. Hence, it introduced three types of property. In respect of private property, the Constitution further guaranteed and distinguished "private ownership of small and medium enterprises" having up to 50 employees, the so-called "personal property", and ownership of agricultural land. Personal property was held inviolable and was to include mainly "objects of personal and household consumption, family houses, and savings gained by work, as well as the right to inherit them". The largest area of land that was permitted to be privately owned was up to 50 hectares. Private ownership of agricultural land was guaranteed only up to a maximum of 50 hectares and only for those smallholders who "personally till it".

All the same, the guarantees of private property remained only on paper. In reality, it was not exceptional that even personal property was confiscated in the name of the struggle against a "class enemy" as part of extra-judicial or judicial persecution, and that smallholders and small traders were forced to enter "people's cooperatives" by various repressive means. Consequently, private ownership was, essentially, already almost entirely eliminated in the course of the first half of the 1950s. Václav Pavlíček mentions that this was, in large extent, also a result of interpretation of the 1948 Constitution that proclaimed that "we wish to achieve such a societal order in which any exploitation of man by man will be utterly eliminated – socialism" which, in itself, meant exclusion of private ownership as such from the state economy. According to Pavlíček, to own an enterprise with 50 employees or land of 50 hectars without "exploitation of man by man" was virtually impossible[418].

The notion of ownership and its content were deformed after 1948. Ownership was stripped of some until-then-valid attributes, including the effects of time on the contents of rights or their modification. The standpoint of the pre-war legal doctrine and the concordant legislation of

[418]V. Pavlíček et al., "Constitutional Law and the Science of the State, 2nd Part. Constitutional Law of the Czech Republic", Prague: Leges, 2011, pp. 231-232.

the time that ownership is a "legal, social, and economic category"[419] was impugned, including the necessity to acknowledge ownership as a social category in a situation in which a person behaved as the owner, was recognised as the owner, and was convinced of his ownership notwithstanding that the legal reality could have been different (such situations were dealt with by the notions of usucapio or eligible tenure that were, together with the temporary limitation of action of detinue against the owner registered in the Land Registry and the protection of the acquirer in good faith, entirely natural to the Czech legal order)[420]. All these notions were disclaimed with the entry into force of the Civil Code of 1950 that contributed to the deformation of ownership and its protection for many decades to follow[421].

Many provisions of the 1948 Constitution remained only empty declarations inasmuch as law in general was conceived, in conformity with the Marxist theory of class struggle[422], as the will of the ruling class that was elevated above legal norms, denying any difference between public and private law. In consequence, the constitutionally guaranteed civil rights and freedoms, especially personal freedoms and political rights of citizens, were virtually liquidated and there was no chance that they would be respected in a gradually installed system of legalised repressions, unlawfulness, and politically motivated and arranged judicial proceedings. The majority of social relations were not regulated by law at all or were regulated by a large number of adminstrative by-laws[423], regardless of whether they pertained to rights and freedoms of citizens, that often were not even published and, hence, undisclosed to citizens. Although the Constitution declared freedom of property, protection of small entrepreneurship, and inviolability of personal property, unconstitutional deprivations of property of natural and legal persons were taking place on a regular basis.

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[419]J. Sedláček, F. Rouček: "Komentář k československému obecnému zákoníku občanskému a občanské právo platné na Slovensku a v Podkarpatské Rusi" [The Commentary to the Czechoslovak General Civil Code and the Valid Civil Law in Slovakia and Carpathian Ruthenia], Vol. II, Prague, 1935, p. 198 ff.

[420]V. Pavlíček et al., "Constitutional Law and the Science of the State, 2nd Part. Constitutional Law of the Czech Republic", Prague: Leges, 2011, p. 219 ff.

[421]See judgment no. Pl. ÚS-st 21/05 of 1 November 2005, published under no. 477/2005 Sb.

[422]Marx's class theory rests on the premise that the history of all hitherto existing society is the history of class struggles. According to this view, ever since human society emerged from its primitive and relatively undifferentiated state it has remained fundamentally divided between classes who clash in the pursuit of class interests. Class interests and the confrontations of power are to Marx the central determinant of social and historical process. In Marx's view, class struggle expresses the nature of history. According to the Marxist conception, a class is defined by the ownership of property. In relation to property there are three great classes of society: the bourgeoisie (who own the means of production such as machinery and factory buildings, and whose source of income is profit), landowners (whose income is rent), and the proletariat (who own their labor and sell it for a wage).

[423]This fact was connected with the executive being the major transmission instrument of the Czechoslovak Communist Party.

In sum, property that enjoyed protection by the Constitution was scaled up according to the degree of the granted protection. There were three forms of property with private property enjoying the weakest degree of protection. This contrasts with the fact that the text of the 1948 Constitution guaranteed a "freedom of property" which, in reality, did not exist, as private property was being slowly eliminated.

In France no such comparable classification of property under the Constitution has ever existed. Private property has remained a natural, inviolable, and sacred right. Although the Preamble of the 1946 Constitution stipulates that "all property and all enterprises that have or that may acquire the character of a public service or *de facto* monopoly shall become the property of society", this provision does not equal to the general and rather vague duty to preserve public property as one of the basic duties of citizens. In spite of some similarities in the constitutional clauses on property of the two countries in the period of the First Czechoslovak Republic, after World War II the two countries started to diverge sharply on the political and legal plane, including that of the constitutional protection of property.

3.4. Czech Constitution of 1960

The 1960 Constitution, which was adopted as Act No. 100/1960, was already denoted as a "socialist" constitution, or as a "constitution of a developed socialist democracy". It was not a constitution of the Czechoslovak Republic as a "people‘s democratic republic" anymore, but it was adopted as a constitution of the Czechoslovak Socialist Republic, the new official name of the state. Unlike the 1948 Constitution, it was fully based on Soviet constitutional theory and terminology. It was, first and foremost, a political document of little juristic value, for it was full of political proclamations and ideological rhetoric allowing considerably for its arbitrary interpretation and application[424]. Czechoslovakia was defined as a "socialist state founded upon a firm alliance of workers, peasants, and intelligentsia, with the working class at its head". It was confirmed that the concentration of power in the state belonged to the Communist Party which was described as the "vanguard of the working class" and "the leading force in society and the state". Sovereignty, thus, rested on the Communist Party, the

[424]For example, it is proclaimed in the Preamble that: "the people’s democracy as a way towards socialism has fully acquitted itself" and has brought Czechoslovakia "to the triumph of socialism". The system of division of power that had been well-established in the Czechoslovak democratic constitutional tradition was left out of the text of the Constitution. Hence, there ceased to be even a formal textual reminiscence of it in the Constitution.

existing form of government being the dictatorship of one party or, officially, "the proletariat". There was no room for non-Marxist-Leninist ideas, ideologies, or world views in the country. The drafters of the Constitution assured the elimination of non-Marxist-Leninist ideas and beliefs, denoted as "non-scientific", by enacting that "the state and social organisations strive systematically for the eradication of any remnants of the society of exploiters in the conscience of the people". This proclamation aimed at the destruction of any non-Marxist-Leninist philosophy and, at the same time, at the building of an ideological unity of the masses.

Taking the Soviet constitutional model as an example, the 1960 Constitution proclaimed "the socialist system of economy which excludes any form of exploitation of man by man" to be "the economic foundation of the Czechoslovak Republic" and laid down a system of planned national economy. The socialist system of economy was conceived as unitary, comprising two basic forms of socialist property: state property, which was the property of all people and, therefore, a higher form of socialist property, and "co-operative property", ownership of people's co-operatives, which was a lower form of socialist property due to the limited range of subjects. Personal ownership, which was proclaimed to be "inviolable", was restricted to "articles of personal and household consumption, family dwellings as well as savings acquired by work" and its inheritance was "guaranteed".

The Constitution did not mention private property. Nevertheless, it can be argued that, by interpretation of Article 9 stipulating that "within the limits of the socialist economic system a petty private economy based on personal labour precluding exploitation of labour of others is permitted", private property was allowed to a certain extent. The question of the existence, or the constitutional admission of the existence, of private property is rather interesting as regards agricultural land pooled in agricultural co-operatives, representing most of the land, let alone the agricultural land farmed by private farmers. The land pooled in agricultural co-operatives was, yet, formally owned by farmers who acceded, although they had to give it up for the purpose of collective "use", as, according to the Constitution, "land pooled for common co-operative farming shall be in collective use of the co-operatives". In actual fact, the farmers' ownership of agricultural land lacked all elements of ownership. The omission of a constitutional guarantee of private property portended nationalisations of land and expropriations of the last private farms and small trades in the future and the socialist

constitution gave a legal underpinning to this development[425]. The fundamental right of man to property had no constitutional standing. The Constitution superordinated state property over other types of property, personal property and co-operative property, and it only tolerated private property in a rather limited extent.

As regards rights and duties of citizens, the 1960 Constitution largely lagged behind the Constitution of 1948. The point of departure of the constitutional conception of rights and duties of citizens was a proclamation that in a society of workers in which exploitation of man by man has been cleared away, the development and interests of each of its members shall be consistent with the development and interests of the whole society. Hence, the Constitution provided for the standing of an individual and a citizen in society and in the state, contrary to the fundamental idea of Marx and Engels as expressed in the Communist Manifesto of 1848, to the effect that the free development of each is the condition for the free development of all. Such a "collectivist" understanding of fundamental rights and freedoms, based on the idea of conformity of interests of citizens with those of society, laid the ground for the constitutional principle of unity of rights and duties, that is, for conditioning of rights on the fulfillment of duties. Although the Constitution did not expressly embrace this principle, it was, in theory, inferred from the constitutional clear-cut delimitation and limitation of rights and freedoms of citizens as rights and freedoms which could be exercised only "in conformity with the interests of the working class".

In comparison to the 1948 Constitution, the range of constitutionally guaranteed rights and freedoms was considerably narrower. The 1960 Constitution was characterised by a broad catalogue of citizen duties, amongst which figured also a duty "to protect and strenghten socialist property" which resembled the duty to protect public property contained in the 1948 Constitution. The foremost duty of all was to work for the "benefit of the whole".

Generally speaking, the elemental feature underlying the legal status of individuals and citizens were declaratory and ideologically-based constitutional guarantees that allowed for open-ended encroachments on fundamental rights, as well as for imposing duties by virtue of secondary legislation, including by-laws, often not published. It was virtually a situation where, on the one hand, an individual citizen was allowed to do only what was permitted by

[425]J. Kalvoda, "Czechoslovakia's Socialist Constitution", in *American Slavic and East European Review*, Vol. 20, No. 2 (Apr., 1961), p. 224.

law, while, on the other hand, the state authorities were allowed to do anything what law did not prohibit. On the top of that, there was no independent justice which would provide protection of fundamental human and citizen rights. The Constitution explicitly stated that the courts and the state prosecution protect the socialist state, its social system, and rights and legitimate interests of citizens and working class organisations. The constitutional reality was that the interpretation of rights and legitimate interests was subject to authoritative political recognition by the Communist Party leadership. The judges were bound to interpret the Constitution and socialist laws in conformity with the "socialist legal consciousness", in other words, in conformity with the Communist Party's will which was, in fact, the supreme law in the country.

3.5. Towards the Constitution of 1993

As opposed to the uniterrupted existence of the French Constitution since 1958, the current Czech Constitution came into existence only after the epochal political changes that were marked by the date of 17 November 1989[426]. They did not occur isolated from the processes taking place in the Soviet Union and in the former "Eastern" political bloc. The underlying geopolitical changes afflicted constitutional systems in those countries. The existing constitutional conceptions were no more able to organise social relations raising the question as to what constitutional ideas and principles were to be followed in the future and how to rearrange anew social relations in a Communist-directed society. It was not only the Marxist-Leninist state ideology embedded in constitutions that collapsed, it was also the conception of "socialist nations". With the fall of the embracive power of the Communist Party and its ideology, the hitherto suppressed or hidden values, traditions, religions, and differences of individual oppressed nations rose up to the surface. In Czechoslovakia, the Czech and Slovak Federative Republic at the time, the political regime which came to power after the Second World War finally collapsed. It was necessary to rearrange the constitutional order. The Soviet model was to be cleared out by constitutional means. The first step was taken on 29 November 1989 when the Federal Assembly adopted a constitutional amendment abrogating Article 4 of the 1960 Constitution which provided for the leading role of the Communist Party of Czechoslovakia. The initial preparations for the drafting of a Czech Constitution began in August 1990. The drafters used the Czechoslovak Constitution of 1920 as a model. The reasons for adopting a new constitution were twofold: to replace the old "basic" document by

[426]The changes have sometimes been called the "Velvet Revolution".

a democratic one and to guard against the return of an arbitrary abuse of power. The purpose was to abandon the basic philosophy that had governed the country, that is the leading role of one political party as the organ of concentration of state power. The new Constitution was adopted on 16 December 1992. It entered into force on 1 January 1993 after the formal dissolution of the Czech and Slovak Federative Republic, on 31 December 1992, on its division into two separate and independent states – the Czech Republic and the Slovak Republic.

3.6. Concept of the Czech "Constitutional Order"

A similarity of the Czech Constitution to the French one lies in that it is not formed by a single document. However, it is structured quite differently. It is not comprised of a few constitutional texts referred to in the very text of the Constitution like the French Constitution, but it comprises several organic laws, or "constitutional acts"[427] of the same legal nature. In this respect, the Constitution introduced a comprehensive term "constitutional order". In substance, this expresses the fact that besides the Constitution in the narrow sense, which is Organic Law No. 1/1993, there are further organic laws which together with the Constitution form the "constitutional order" of the Czech Republic, or the Constitution in the broad sense. The "constitutional order" can be matched with the French "bloc of constitutionality", but only to the extent in which they comprise constitutional legislation.

The constitutional order is defined in Article 112 para. 1 of the Constitution as consisting of the Constitution, the Charter of Fundamental Rights and Freedoms, organic laws adopted pursuant to the Constitution and organic laws of the National Assembly of the Czechoslovak Republic, the Federal Assembly of the Czechoslovak Socialist Republic, and the Czech National Council defining the state borders of the Czech Republic, as well as constitutional acts of the Czech National Council adopted after 6 June 1992. In brief, apart from the Constitution, the constitutional order comprises the Charter of Fundamental Rights and Freedoms, promulgated as Organic Law No. 2/1993[428], and several other organic laws[429]. In

[427]Laws that are promulgated as "constitutional" and that are approved by both chambers of Parliament by a qualified majority of three-fifths of all deputies, and by a qualified majority of three-fifths of all senators present.

[428]Originally promulgated as Constitutional Act no. 23/1991 and later republished as Constitutional Act No. 2/1993. The fact that the Charter exists as a separate constitutional act and that the Constitution only refers to it and proclaims it part of the constitutional order is due to political reasons. The cause was unwillingness of the then ruling Civic Democratic Party to include the provisions on social rights in the Constitution and the corresponding disagreement of other political parties.

Czech constitutional terminology a distinction is, thus, made between the Constitution as such and the "constitutional order". The Czech Constitution is thus a polylegal[430] Constitution in which it follows the Czechoslovak and Austrian tradition, for all preceding Czechoslovak Constitutions were also polylegal comprising an aggregate of organic laws.

The introduction of the term "constitutional order" in the Czech legal order was motivated by an effort to incorporate the Charter of Fundamental Rights and Freedoms in the Constitution. Fundamental rights are not provided for in the respective text of the Constitution but in the Charter of Fundamental Rights and Freedoms which exists as a separate organic law. Moreover, fundamental rights and freedoms are guaranteed and protected by the decision-making of the Constitutional Court established by virtue of the Constitution.

The Constitution establishes the existence of the Constitutional Court as a "guardian of constitutionality". The latter is not part of the general court system, nor is it hierarchically above the ordinary courts, but it is a single-instance court that reviews the constitutionality of judicial decisions and legislation. Pursuant to Article 83 of the Constitution, it is a judicial body responsible for the protection of constitutionality. It rules on constitutional complaints of natural or legal persons against final decisions or other acts of public authorities that interfere with constitutionally guaranteed rights and freedoms. The Constitutional Court also has jurisdiction, among other competences, to annul statutes or individual provisions thereof if they are in conflict with the constitutional order, and to annul other legal enactments, or individual provisions thereof if they are in conflict with the constitutional order or a statute. The power of the Constitutional Court to deal with direct constitutional complaints of natural or legal persons is an essential point of difference from the French Constitutional Council which is endowed with the power of an *ex ante* and *ex post* review of constitutionality of laws. In the framework of the *ex ante* review it exercises a prior review of the correct

[429]Namely, Organic Law No. 347/1997, on the Creation of Higher Territorial Self-Governing Units; Organic Law No. 110/1998, on the Security of the Czech Republic; Organic Law No. 515/2002, on the Referendum on the Czech Republic's Accession to the European Union; the Constitutional Acts relating to the break up of Czechoslovakia and the founding of the Czech Republic as a new successor state (Organic Law No. 4/1993, on Measures connected with the Dissolution of the Czech and Slovak Federal Republic, Organic Law No. 29/1993, on certain Additional Measures connected with the Dissolution of the Czech and Slovak Federal Republic); and Organic Laws defining the Czech Republic's borders with neighboring states.

[430]The term "polylegal Constitution" expresses that the Constitution is comprised of many organic laws. It is a synonym to the term "constitutional order".

application of constitutional law, and, since 1 March 2010[431], it has also been exercising an *ex post* review concerning statutes already enacted by virtue of an application for a priority preliminary ruling on the issue of constitutionality (*question prioritaire de constitutionnalité*, or "QPC")[432]. Under the QPC procedure the Constitutional Council may consider whether a legislative provision, which is already in force, violates rights and freedoms guaranteed by the Constitution, acting so on referral by the Council of State or the Court of Cassation. The QPC does not provide for the possibility to lodge a constitutional complaint directly before the Constitutional Council, it only accords individuals the right to ask the Council of State or the Court of Cassation to have the case examined by the Constitutional Council.

Despite the differences in the right to individual complaint, decisions of both the Czech Constitutional Court and the French Constitutional Council have the authority of res judicata with the *erga omnes* effect, as they are binding on all administrative and judicial bodies. Under the Czech Constitution, enforceable decisions of the Constitutional Court are directly binding for the parties to the proceedings and for other bodies and persons within the extent of the *ratio decidendi*. Both the Czech and the French constitutional jurisdictions have the competence to repeal unconstitutional statutes. But, unlike the French Constitutional Council, the Czech Constitutional Court is competent to annul, and return for a new ruling, decisions of ordinary courts that violate fundamental rights and freedoms.

3.7. Czech Constitutional Property Protection Guarantee

I proceed now to an analysis of the constitutional property clause in view of its complexity, as it embraces not only protected rights of owners, but also their duties. From the comparative perspective, although the content of the property protection clause corresponds in scope to that of Article 1 of Protocol No. 1 to the Convention and to Articles 2 and 17 of the French Declaration, as it provides for a general guarantee of property as well as for conditions of its limitations and deprivations, it has a larger reach in that it stipulates that property also entails obligations.

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[431]The Constitutional Act no. 2008-724 of 23 July 2008 inserted Article 61-1 into the Constitution and amended Article 62 to introduce a special procedure for a *a posteriori* review of constitutionality of statutes.

[432]The procedure of the QPC was introduced under the constitutional reform of 23 July 2008 and came into force on 1 March 2010. Its purpose was threefold: 1) to vest a new right in a person coming under the jurisdiction of the courts enabling him to avail himself of the rights which are conferred on him by the Constitution; 2) to remove unconstitutional provisions from the national legal order; 3) to ensure the paramouncy of the Constitutional Council in the national legal order.

The content of the Czech property guarantee is more comprehensive than that in the French Declaration which relates to different periods in which each of these documents was drafted. In the Czech Republic the right of property became one of the fundamental human rights only after the constitutional changes following 1989 when the constitutional system returned to the classical constitutional concept of property as a natural right conditioning freedom of an individual. And it is only since 1992 that the current Constitution enshrines anew two cornerstones of the market economy - private ownership and free enterprise, and subjects taking of property to enumerative conditions. The drafting of the constitutional property guarantee was inspired by public international law documents, especially by the Universal Declaration of Human Rights and Protocol No. 1 to the European Convention on Human Rights, constitutions of other states, and, partly, by the Czechoslovak historical experience. The constitutional property protection clause is contained in Article 11 of the Charter of Fundamental Rights and Freedoms and reads as follows:

(1) Everyone has the right to own property. Ownership of everyone shall have the same content and enjoy the same protection. Inheritance is guaranteed.

(2) The law shall designate the property necessary for securing the needs of the entire society, the development of the national economy, and public welfare, which may be owned exclusively by the state, a municipality, or by designated legal persons; the law may also provide that certain items of property may be owned exclusively by citizens or legal persons with their headquarters in the Czech and Slovak Federal Republic.

(3) Ownership entails obligations. It may not be misused to the detriment of the rights of others or in conflict with legally protected general interests. It may not be exercised so as to harm human health, nature, or the environment beyond the limits laid down by law.

(4) Expropriation or forced limitation of ownership is permitted in the public interest, on the basis of law, and for compensation.

(5) Taxes and fees shall be levied only on the basis of law.

All paragraphs of Article 11 are directly applicable and can be directly invoked without having resort to laws of lower legal force. Except for clearly delimited obligations, the

structure of Article 11 fundamentally corresponds to that of Article 1 of Protocol No. 1 to the Convention. It comprises a general guarantee of property, a limitation and a deprivation clause, including a provision on taxes and fees as a specific form of property limitation. Before outlining the meaning and scope of these provisions, I deal first with the concept of ownership as a protected right under Article 11 of the Charter and as interpreted by the Constitutional Court.

3.7.1. Concept of Ownership

The Charter does not contain a definition of ownership, it merely stipulates, in the Preamble and in Article 1, that fundamental rights and freedoms are natural rights that are "inherent, inalienable, non-prescriptible, and irrepealable". Due to its nature, ownership belongs to the category of core-rights of individuals, as it forms the core of personal autonomy of an individual in relation to public power. Under the interpretation of the Constitutional Court, ownership, within the meaning of Article 11 of the Charter, is an all-embracing category of an autonomous standing of an individual vis-à-vis public power[433].

As the Charter does not provide for any further specification or guidance as to the meaning of ownership, it is the Constitutional Court which has shaped the concept in its decision-making. The constitutional jurisprudence demonstrates that the constitutional judges rely primarily on the Civil Code for a definition of ownership. They have maintained that, with reference to the Civil Code, it is possible to reach a concrete content of ownership as a category protected by the constitutional order whose essential characteristic is that restrictions of its exercise are possible within the bounds of the law[434]. Similar to the French Constitutional Council, the Czech Constitutional Court conceives property as a sphere of autonomy of the owner in disposition of his property which is not absolute, but restricted by the limits of law and by subjective rights of other persons. According to the Court, private property rights have their limits in that they may clash with the rights of others and society as a whole, and, consequently, it is necessary to interpret them according to a legal-political maxim that the right of an individual ends there where the rights of others begin[435].

[433] Judgment no. II. ÚS 268/06 of 9 January 2008, published under no. N 2/48 SbNU.
[434] Judgment no. Pl. ÚS 34/03 of 13 December 2006, § 75, published under no. 49/2007 Sb.
[435] *Ibid.,* § 79.

The general property guarantee draws on the conception set out in the Civil Code. The Constitutional Court has submitted the view that Article 11 para. 1 refers to an ordinary law for a concrete content of ownership, and that it is the law which shall set out the content of ownership. The role of the Charter is, then, to guarantee the unity of this content, for the purpose of Article 11 para. 1 is to prevent stating that only one type of property exists, as it was in the past when the legal order knew only socialist, private, and personal ownership, or when owners were limited to such an extent due to the type of property they possessed so that they were left only with a "bare" ownership whose exercise was entrusted to a socialist organisation[436]. The Court went on to state that the statutory provision delimiting the statutory content of ownership was Article 123 of the Civil Code pursuant to which the owner has the right to possess, use, reap the fruits, and dispose of it within the limits of law, and, further, that with reference to the Civil Code one could attain the concrete content of ownership as a category protected by the constitutional order[437]. Nonetheless, in the hitherto jurisprudence on property the Constitutional Court referred to the "old" Civil Code, Act No. 40/1964 as amended, which ceased to be operative on 1 January 2014 with the entry into force of the "new" Civil Code. The former Civil Code defined the rights of the owner as the right to possess (*ius possidendi*), use (*ius utendi*), reap the fruits (*ius fruendi*), and dispose of his property (*ius disponendi*). Accordingly, the Constitutional Court adhered to the concept of property as defined by its traditional constitutive attributes. It can be perceived that the French Constitutional Council has come to the same solution over its long-standing practice, although it originally seemed to lean to the one-right-embracing all approach conceiving the right to dispose of property as the definitional attribute.

The new Civil Code, in force as of 1 January 2014, defines ownership as everything which belongs to a person, all his tangible and intangible things, from which it results that the civil law offers a rather narrow definition of ownership restricting it to "things", to objects of ownership. In this aspect the Civil Code, in Article 1011, draws on the Austrian Civil Code (ABGB) which, in Article 353, conceives ownership similarly. The influence of the Roman civilist concept is obvious here. As regards the rights of the owner, the Civil Code sets forth that the owner has the right to dispose of his ownership at will within the limits of law, and

[436]Judgment of the Constitutional Court no. Pl. ÚS 34/03 of 13 December 2006, § 73, published under no. 49/2007 Sb.
[437]*Ibid*., §§ 74-75.

that he is prohibited from disproportionately and seriously disturbing the rights of others[438]. Ownership, in its unity, thus, comprises both positive and negative aspects. The positive delimitation is represented by the right of the owner to freely dispose of his property and to exclude any other person from using his property or affecting it in some way (*ius exclusionis*) within the limits of law. The negative aspect lies in the limitation of the exercise of ownership rights by the rights of other individuals. Compared with the definition of property put forward by the French Civil Code[439], it results in both civil codes conceiving property in similar terms as the right to enjoy and dispose of things, which is delimited by the rights of others or by the law. But as regards limitations, under the Czech Civil Code, the exercise of the right of property does not have to be specifically prohibited by law, as for being prohibited, it is sufficient that it seriously harms or disturbs the rights of others, which seems to be a more flexible and casuistic criterion than that of the prohibition by law as stipulated in the French Civil Code. By drawing on the civilian conception of property as defined in the Civil Code, the approach of the Czech and French constitutional jurisdictions seems to be identical. Both jurisdictions implicitly rely on a definition of property to which some limitations are inherent.

The way the constitutional guarantee of property has been interpreted by the constitutional jurisdictions is also influenced by the status of the Convention within the respective national legal orders and within the system of constitutional review. In this regard the difference between the Czech and French constitutional practice lies in the fact that for the French Constitutional Council the Convention is only a source of inspiration and does not form part of the bloc of constitutionality, whereas the Czech Constitutional Court awarded international human rights treaties a constitutional force and classified them as part of the constitutional order[440]. Hence, the Constitutional Court has adopted a stance that international human rights treaties have derogative effects and not only application priority allowing a conflicting law to remain valid and only be disapplied, which means that it can set aside a law which is in conflict with the Convention[441]. The Convention, thus, forms part of the constitutional order and is one of the norms of reference in the control of constitutionality of laws. Accordingly,

[438]Article 1012 of the Civil Code reads that: "The owner has the right to dispose of his ownership at will within the limits of the legal order and to exclude other persons from it. The owner is prohibited from seriously disturbing the rights of other persons beyond the extent proportionate to the conditions, and from exercising such acts whose main purpose is to intrude or harm other persons".
[439]Article 544 of the Civil Code reads that: "La propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les règlements".
[440]Judgment no. Pl. ÚS 36/01 of 25 June 2002, published under no. 403/2002.
[441]In line with this judgment the Constitutional Court abrogates laws and legal provisions for their conflict with the Convention. See, for example, judgment no. Pl. ÚS 44/02 of 24 June 2003, published under no. 210/2003 Sb.

the Constitutional Court interprets fundamental rights and freedoms in the light of the Convention and the interpretative practice of the ECHR. It relies on the concept of property as interpreted by the ECHR and quotes the latter's jurisprudence on a regular basis, which can be illustrated with some examples.

In a recent decision the Constitutional Court, dealing with the issue of a *bona fide* acquisition of property from a non-owner, considered that the acquirer benefited from the protection of Article 1 of Protocol No. 1 to the Convention also involving the protection of a legitimate expectation to acquire property. The Court, referring to the case-law of the ECHR[442], reiterated that the notion of "property" within the meaning of this provision was interpreted autonomously - independently from the definition in domestic law, and widely - as it comprises both tangible and intangible things and any existing claim or interest of patrimonial value. In the Court's view, given the autonomous concept of property in the Convention, property rights of the *bona fide* owner who aquired his property from a non-owner should rather be considered as falling within the ambit of protection by Article 1 of Protocol No. 1[443]. It assessed the case in the light of the conventional notion of property.

In another recent decision the Constitutional Court explicitly stated that the case-law of the Constitutional Court "adopts and draws on the notion of property protected under the Convention which also comprises patrimonial interests of economic value"[444]. It stressed that in the instant case it would proceed similarly as it did in its previous decisions[445] and "will primarily reflect the Convention and the rich case-law of the ECHR on protection of property interests". Dealing with the issue of possession and the use of property, the Court specified that, according to the well-established case-law of the ECHR, possession and the use of property was an asset falling within the ambit of protection of Article 1 of Protocol No. 1. It stated that it had to depart from the opinion of the ECHR that the concept of property under the Convention is autonomous, not restricted to ownership of tangible assets and independent of any classification in domestic law. In view of these general considerations the Court decided to reject the applicant's claim on the basis that there was nothing to indicate that Article 1 of Protocol No. 1 was violated. These recent decisions clearly indicate that the

[442]*Gratzinger and Gratzingerova v. the Czech Republic* (dec.), no. 39794/98, ECHR 2002-VII; *Glaser v. the Czech Republic*, no. 55179/00, 14 February 2008.
[443]Decision no. I. ÚS 2219/12 of 29 April 2014.
[444]Decision no. II. ÚS 3035/12 of 18 March 2014.
[445]See judgment no. Pl. ÚS 2/02 of 9 March 2004; decision no. I. ÚS 360/3 of 22 October 2003.

Constitutional Court adheres to the notion of property under the Convention, directly applies it in its practice, and assesses cases brought before it according to this concept. In the context of the scope of the notion of property it should be mentioned that the Czech Constitutional Court, like the French Constitutional Council, does not apply the property guarantee to welfare benefits. The Court avails of the provision of Article 30 of the Charter which figures amongst economic, social, and cultural rights[446], which are not directly applicable on the basis of the Charter, as opposed to fundamental rights and freedoms, and for being invokable they must be provided for in a law. Besides Article 30 of the Charter, the Constitutional Court also examines compliance with the principle of equality enshrined in Article 1 of the Charter[447]. In this aspect both national constitutional jurisdictions mutually converge and vary from the concept of property within the meaning of the interpretative practice of the ECHR.

3.7.2. Adherence to the Interpretative Practice of the ECHR

With regard to the aforementioned, if we compare the level of adherence of the Czech and French constitutional jurisdictions to the interpretative practice of the ECHR in the field of property protection, it must be stated that the Czech practice seems to be more convergent, as the Constitutional Court relies directly on the Convention and its Protocols and on the practice ofthe ECHR, and, in view of that, it considers the Convention as part of the constitutional order, whereas for the French Constitutional Council the Convention does not represent a norm of reference in the control of constitutionality. The situation is, however, different as regards the Council of State[448] and the Court of Cassation[449] which in the framework of the control of conventionality apply the Convention, and whose practice is comparable to that of

[446]Article 30 reads as follows: "(1) Citizens have the right to adequate material security in old age and during periods of work incapacity, as well as in the case of the loss of the provider. (2) Everyone who suffers from material need has the right to such assistance as is necessary to ensure her a basic living standard. (3) Detailed provisions shall be set by law". See, for example, judgment no. Pl. ÚS 8/07 of 16 April 2010, § 81, published under no. 135/2010Sb.

[447]See, for example, judgments no. Pl. ÚS 36/93 of 17 May 1994; Pl. ÚS 16/93 of 24 May 1994; Pl. ÚS 6/05 of 13 December 2005.

[448]The Council of State has assessed the compatibility of a domestic law with the Convention, for example, in Ass. 21 décembre 1999, *Confédération nationale des associations familiales catholiques et autres*, Rec., p.369, and held the following: "qu'eu égard aux conditions posées par le législateur, les dispositions issues des lois des 17 janvier 1975 et 31 décembre 1979 relatives à l'interruption volontaire de grossesse, prises dans leur ensemble, ne sont pas incompatibles avec les stipulations de l'article 2 de la convention européenne de sauvegarde des droits de l'homme".

[449]See, for example, Cass. Crim. 14 May 1996, Bull. Crim. no. 204, p. 577, in which the Court of Cassation considered that: "instaurent une restriction à la liberté de recevoir et de communiquer des informations qui n'est pas nécessaire à la protection des intérêts légitimes énumérés par l'article 10.2 de la Convention européenne des droits de l'homme; qu'étant incompatibles avec ces dispositions conventionnelles, ils ne sauraient servir de fondement à une condamnation pénale".

the Czech Constitutional Court in this regard. But the ordinary French courts do not have the power to set aside a law or its provisions found to be contrary to the Convention, they can only render it inapplicable, that being even in cases where the Constitutional Council has previously declared the law to be compatible with the Constitution[450]. Whereas, if the Czech Constitutional Court finds a law incompatible with the Convention, it means that it is also in conflict with the constitutional order and the Court can annul it. The Czech constitutional practice also seems to recognise that property as a constitutional concept comprises a multitude of distinct rights where each one of them enjoys the protection of the Constitution.

3.7.3. Property as a Bundle of Rights

As regards the judicial practice of the Czech Constitutional Court in respect of the fundamental attributes of property (*ius possidendi, ius utendi, ius abutendi, ius fruendi)*[451] viewed through the theory of rights as comprising a bundle of rights, powers, privileges, and immunities of the owner vis-à-vis his property and vis-à-vis other persons with respect to his property, it can be observed that the Court has maintained that ownership "is to be understood as a legally established potentiality of the owner within the limits of law to possess, use, and dispose of things at his discretion and in his interest by virtue of power that is not dependent on the existence of power of any other person to the same thing and at the same time, thus as an aggregate of rights denoted as *ius disponendi*, *ius utendiet fruendi*, and *ius possidendi*"[452].

In another illustrative case the Constitutional Court was more illuminating when it held that the owner was "endowed with the exercise of all rights ensuing from the nature of ownership – *ius utendi, fruendi, possidendi, abutendi, disponendi*"[453], or that "*ius possidendi, ius utendi, ius fruendi*, and *ius disponendi* are the aspects of the content of ownership"[454]. Accordingly, it

[450]According to the Constitutional Council "une loi contraire à un traité ne serait pas pour autant contraire à la Constitution". Decision no. 74-54 DC of 15 January 1975.
[451]In view of Hohfeld's legal conceptions, *ius possidendi* is to be conceived as the right, power, or privilege of the owner to possess the property corresponding to liberty in the sense of a right against all others to act or to forbear from interfering. *Ius utendias* the right, power, or privilege to make use of property corresponding to liberty in the sense of an immunity from interference by others with using the property. *Ius disponendi* as the right, power, or privilege to dispose of property corresponding to liberty in the sense of an immunity from interference by others with disposing of property. *Ius abutendi as* the right, power, or privilege to consume property, if it is capable of consumption, corresponding to liberty in the sense of an immunity from interference by others with consuming of property. *Ius fruendi* as the right, power, or privilege to reap fruits or profits from property, as by harvesting crops or taking rents from the property, corresponding to liberty in the sense of an immunity from interference by others with reaping fruits or profits from property.
[452]Judgment no. Pl. ÚS 83/06 of 12 March 2008, published under no. 116/2008 Sb.
[453]Judgment no. Pl. ÚS 78/06 of 16 October 2007, published under no. 307/2007 Sb.
[454]Resolution no. IV. ÚS 703/06 of 2 January 2007.

may be induced that the Constitutional Court endorses the understanding of property as an aggregate of rights, privileges, powers, and immunities forming the fundamental attributes of property, and that it conceives the latter as various combinations of legal relations between persons over things. It can be claimed that constitutional property is interpreted as being comprised of constituent attributes, or *iura*, that are formed by a series of generic rights in consonance with the conception of property as a "bundle of rights". Such an approach is thus in concurrence with the practice of the French Constitutional Council with respect to the fundamental attributes of property that are acknowledged as constituents *per se* of the constitutional concept of property.

3.7.4. General Property Guarantee

From the wording of the first paragraph of Article 11 that "ownership enjoys protection" and that "inheritance is guaranteed", it ensues that the Charter guarantees not only the existence of private property as a legal institution in terms of its content, but also the right to own property. In my opinion, the first sentence of the first paragraph, which reads that "everyone has the right to own property", entails two interpretations. Firstly, it can be interpreted as a guarantee that no one is to be excluded from the possibility to own and that everyone's existing property is constitutionally protected. In this sense "the right to own" is to be interpreted as "the right to have" one's property. Secondly, it can also be interpreted as "the right to acquire" property. In this sense the first sentence also protects claims to ownership. In sum, the constitutional guarantee of ownership affirms that everyone can be the owner and that no owner may be discriminated against vis-à-vis other owners. It embodies the principle of equality of ownership. Article 11 para. 1 is, thus, a special provision to the general principle of equality enshrined in Article 1[455] and Article 3 para. 1[456] of the Charter[457]. The conception of property is based on the premise that, although the Charter does not contain a definition of ownership, it guarantees everyone the right to own property and accords to the ownership of every owner the same legal content and protection[458]. The Constitutional Court has shed a clear light on the way this provision is to be considered.

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[455]Article 1 of the Charter reads as follows: "All people are free and equal in their dignity and rights. Their fundamental rights and freedoms are inherent, inalienable, non-prescriptible, and irrepealable".

[456]Article 3 para.1 reads as follows: "Everyone is guaranteed the enjoyment of her fundamental rights and basic freedoms without regard to gender, race, colour of skin, language, faith and religion, political or other conviction, national or social origin, membership in a national or ethnic minority, property, birth, or other status".

[457]Judgment no. I. ÚS 2229/08 of 29 December 2009.

[458]Judgment no. IV. ÚS 2005/09 of 26 April 2012; or judgment no. IV.ÚS 652/06 of 21 November 2007.

The Court stated that the first sentence of the first paragraph that "everyone has the right to own property" must be understood, firstly and foremostly, as a reference of the constitution drafters to the legislator that it in its norm-creating practice nobody can be excluded from the right to own property. According to the Court, the guarantee of the right to own property relates only to property which already exists, and does not pertain to an alleged claim to property[459]. More specifically, the constitutional protection is not to be rendered to any claim for ownership, but only to such a claim where there is a legitimate expectation that it will be realised. Like the ECHR, the Czech Constitutional Court also renders protection to ownership which already exists, and not to the mere hope that it will be recognised in the future[460]. In its respective interpretation, the Constitutional Court refers to the ECHR's interpretation of Article 1 of Protocol No. 1 to the Convention. Consequently, the "right" of everyone to own property cannot be interpreted in a way that any claim to property is constitutionally protected. A mere litigation over a claim to property, in which the existence of ownership is to be only established or even constituted, is not and cannot be protected under the Constitution[461].

It results from the aforementioned that when interpreting the general guarantee of property, the Constitutional Court strictly draws on the case-law of the ECHR by reiterating the latter's legal sentences in its argumentation. The Constitutional Court assesses alleged breaches of fundamental rights and freedoms in individual constitutional petitions and reviews the legislation from the point of view of compatibility with the constitutional order which also comprises, according to the Court's jurisprudence, the Convention.

The first sentence of Article 11 para. 1 of the Charter embodies universality of subjects of ownership by declaring that "everyone has the right to own property", natural as well as legal persons, whereby each owner's property shall have the same content and enjoy the same statutory protection. No one may be discriminated against in his enjoyment of property rights in relation to other owners. It does not elaborate on particular aspects of the right of property except for the right of inheritance.

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[459]See decision no. I. ÚS 299/96 of 11 November 1997, published under no. N 138/9 Sb.; judgment no. Pl. ÚS 2/02 of 9 March 2004, published under no. 278/2004 Sb.; judgment no. I. ÚS 642/03 of 17 June 2004; judgment no. I. ÚS 353/04 of 16 June 2005.
[460]Judgment no. I. ÚS 197/96 of 6 November 1996.
[461]Decision no. Pl. ÚS 41/97 of 11 March 1998.

From the comparative perspective, although the French property guarantee in the Declaration is silent on universality of subjects of property, it cannot be interpreted that the French Declaration would provide a weaker guarantee than the Czech Charter. What I consider crucial is that both documents proclaim the right of property as a natural right which is inherent to every man. The stipulation that "everyone has the right to own property" is, in my view, only a consecration of the character of the right of property as a natural right. Furthermore, it is evident that Article 11 para. 1 bears a clear resemblance to the wording of the first sentence of Article 1 of Protocol No. 1 to the Convention which, although not formulated identically, has the same meaning when it reads that "every natural or legal person is entitled to the peaceful enjoyment of his possessions". This similarity may indicate that the drafters of the Charter, most probably, drew inspiration from the Convention and the Universal Declaration of Human Rights whose Article 17 reads similarly that "everyone has the right to own property alone as well as in association with others".

The Constitutional Court affirmed that public property enjoyed the protection of Article 11 of the Charter, for example, in the decision of 13 November 2013[462]. In this decision it, moreover, pronounced itself on the position of the state in private law relations. It held the view that, in cases where the state figures as party of private law relationships, its standing cannot be identical with that of a natural person, for the state is not endowed with a real autonomous will. The position of the state in such relationships, thus, cannot be entirely abstracted from the second dimension of the state, which is that of public authority in which it exercises its main function. According to the Constitutional Court, this aspect must be born in mind in situations where the state enters in legal relations on the basis of legal acts, in which it has an equal standing with other subjects of private law, as the state may create and change the rules of these relations and may execute its public authority.

The second sentence of the first paragraph forbids any owner from enjoying no advantage whatsoever over other owners by virtue of ordinary statutes. The ban concerns both the content of ownership and its protection and includes, for example, a property litigation before the court. Hence, the Charter does not differentiate between private law and public law subjects of ownership, natural or legal persons. Nor does it give preference to any type of

[462]Judgment no. II. ÚS 2876/12 of 13 November 2013; judgment no. III. ÚS 495/02.

ownership according to its objects. This indicates that the property guarantee applies also to public property. It is corroborated by the constitutional jurisprudence. The Constitutional Court explicitly ruled in one of the cases concerning privatisation of property that "the constitutional regulation of the standing of an individual in society comprises the protection of individual rights and freedoms as well as the protection of public property"[463].

In this respect the Czech Charter guarantee comprising both private and public property corresponds in scope to the protection provided for by the French Declaration, as interpreted by the Constitutional Council, which also includes public property by virtue of the *Privatisations* decision of 1986[464]. In this respect both national constitutional laws differ from the ambit of operation of the Convention which protects the rights of persons against violations by the High Contracting Parties, that is, private property against encroachments of the state.

The insertion of the second and the third sentence of Article 11 para. 1 in the Charter was, foremostly, a reaction to the constitutional and statutory reality of the previous totalitarian regime in which ownership was divided into hierarchical categories (state, co-operative, personal, and private property) with the state property having a privileged standing with respect to all areas of life, and in which the owners did not enjoy an equal degree of property protection. It is no more in conformity with the Constitution that different owners enjoy a different degree of constitutional protection, or that there exist special constitutionally protected types of ownership. The guarantee of inheritance is not a standard in European constitutions. Its appearance in the Czech Constitution is a reaction to socialist concepts that disallowed or restricted inheritance of property and that regarded inheritance as an immoral means of acquisition of property lacking any personal endeavour. The general guarantee of the first paragraph is further "balanced out" by the recognition of constitutionally permitted statutory limitations of property set forth in the following paragraphs of Article 11.

[463]Judgment no. Pl. ÚS 15/96 of 9 October 1996, published under no. 280/96 Sb. For privatisation cases, see also decision III. ÚS 380/97 of 9 April 1998; or judgment Pl. ÚS 38/01 of 12 March 2003, published under no. 87/2003 Sb.
[464]Decision no. 86-207 D.C. of 25, 26 June 1986, Rec. 61, p. 7982.

3.7.5. Expropriation and Forced Limitation Clause

Article 11 para. 4 relativizes the inviolability of ownership when it allows for expropriation and for forced limitation of ownership. The drafters of the Charter did not restrain the scope of possible limitations of ownership only to expropriations, but were mindful also of those situations in which restrictions impinge only on the exercise of ownership and no transfer of ownership takes place. The French Declaration differs in this respect as it provides for protection against deprivations and limitations of property in two distinct provisions of Article 2 and Article 17. Although forced limitations of ownership are a more moderate form of interference with property rights, the Charter submits them to the same conditions which apply to expropriation.

The Charter also provides for a specific limitation in the ownership of certain property when it states that the law may designate property which is to be owned by the state, municipality or specified legal persons for the purpose of securing the needs of society, the development of the national economy, and public welfare. It is left to the discretion of the legislator whether or not this provision is to be implemented, and if so, what property is to be concerned. A certain guideline for the legislator, in this respect, is contained in Article 7 of the Constitution, according to which the state shall have a duty to prudently use its natural resources and to protect its natural wealth, as well as in the Preamble to the Constitution declaring a resolution to build, safeguard, and develop the country in the spirit of the sanctity of human dignity and liberty[465].

In any event, with regard to the constitutional obligation to preserve the essence and significance of fundamental rights and freedoms (Article 4 para. 4 of the Charter), ownership cannot be restricted more than to a reasonable extent and only when it is necessary[466]. So, when a law provides for a limitation of ownership in the public interest, the former must simultaneously respect the requirements strictly stipulated in Article 4 of the Charter. The same applies to the application and interpretation of such statutory provisions for the

[465]To date, no implementing legislation has been adopted. Yet, there are some statutes that allot certain properties to the state (e.g. the Mining Act in respect of mineral wealth on the territory of the state, or the Act on Terrestrial Communications in respect of certain types of roads).
[466]Concerning the permitted degree of limitation of property, see judgment no. II. ÚS 482/02 of 8 April 2004.

limitations shall not be misused for purposes other than those for which they were enacted[467]. Expropriations and limitations of property are dealt with in more detail in Chapter 4.

3.7.6. Duties Attached to Ownership

Pursuant to Article 11 para. 3 of the Charter, "ownership entails obligations". This formulation was, literally, borrowed from German Basic Law[468]. According to this provision, ownership must not be misused to the detriment of subjective rights of other people, in conflict with legally protected public interests, or to harm human health, nature, or the environment, meaning not only nature, but also, for example, the working environment, beyond statutory limits. The legal term "misuse of a right" employed in the Charter may be interpreted as such as an exercise of a right which deliberately causes harm to other individuals or to society. The misusive exercise of a right must, thus, entail a direct will (*dolus directus*) to cause harm; the owner's cognizance of possible harmful effects of his actions would be insufficient for this qualification. This provision also prohibits any exercise of ownership which, despite it not being able to be qualified as misuse of ownership, harms human health, nature, or the environment beyond the limits laid down by law. Accordingly, both misuse of ownership and prohibited exercise of ownership are deprived of any judicial protection whatsoever. Such an exercise of ownership would be denied judicial enforcement or would be prohibited by the court. The Constitutional Court considered that this provision was in compliance with Article 1 of Protocol No. 1 to the Convention, pursuant to which states may adopt laws they deem necessary to regulate the enjoyment of property in compliance with the general interest and to secure the payment of taxes and fees. The Court underlined that this provision involved, in line with the practice of the ECHR, the assessment of whether the limitation of the enjoyment of property pursues a legitimate aim, whether it is in compliance with domestic law, and whether it is proportionate to the legitimate aim sought[469].

Article 11 para. 3 sets forth the limits on the constitutional guarantee of freedom of property enshrined in paragraph one. It appears that it is a liberal provision, as the prohibition, although setting down certain clear limits on the exercise of ownership leaves the owners unlimited

[467]Judgment no. IV. ÚS 652/06 of 21 November 2007.
[468]Article 14 §2 of the Basic Law for the Federal Republic of Germany reads as follows: "Property entails obligations. Its use shall also serve the public good".
[469]See judgment no. II. ÚS 482/02 of 8 April 2004.

freedom in the enjoyment of their property beyond the set limits. Yet, this hypothesis would prove to be valid only if the enumeration of the set of limits is exhaustive. This, however, does not appear to be the case, especially with regard to the interpretative opinion of the Constitutional Court. The latter puts forward a test of an existing conflict with other constitutionally guaranteed values to the effect that paragraph three leaves way to other limitations of ownership beyond those explicitly enumerated therein if the exercise of ownership rights would be contrary to other values guaranteed in Article 11 of the Charter[470]. It follows that, pursuant to this provision, owners are bound in the exercise of their ownership rights by the rights of other persons, by the general interest the determination of which rests on the legislator, and by the limits of Article 11 of the Charter read as a whole.

The specificity of Article 11 of the Charter lies in that it provides not only for the guarantee of freedom of property and the constitutional protection of property, but it also provides for certain constitutional duties of man and citizen with respect to his or her property. In this respect Article 11 clearly reflects the influence of legal positivism. In any event, the imposition of any duty must respect the general rule contained in Article 4 para. 1, pursuant to which "duties may be imposed only on the basis, and within the bounds, of law, and only while respecting the fundamental rights and freedoms". The principle that ownership obliges alludes to the limitability of ownership as well as to the social function of property based on the principle of solidarity.

3.8. Social Function of Property

On a general plane, the Constitutional Court holds that respecting the social function of ownership is the usual approach of democratic states, and refers to Article 11 para. 3 which empowers the legislator to subordinate the use of private property to the requirements of the general interest. The text of Article 11 para. 3 does not provide a great deal of guidance as to its intent. It may be asserted that it expresses a civic dimension of ownership in that private property serves as a means for the satisfaction of objective social values and, thereby, for the maintenance and enhancement of the public welfare. The civic dimension of ownership implicates obligations of the owner vis-à-vis society which recognized his ownership and was willing to render it constitutional protection. From this aspect the social function of property may be materialised into private assets, given by individual owners-citizens for the purpose of

[470]Decision no. I. ÚS 31/97 of 4 June 1997.

providing the material foundation for the fulfillment of social goals enhancing the collective good, which are, in return, traded-off for the immaterial zone of freedom of individual owners-citizens in the exercise of their property rights guaranteed and protected by the Constitution. When put this way, the Constitution, in my view, resolves conflicts between the citizen and the community by way of a method of "scourge and honey", it binds the citizen to the community by ascribing his property a social role to provide the citizen with a preserved space of ownership liberty in which he can realize his individuality.

According to the Constitutional Court, this provision expresses that the enjoyment of ownership should equally serve the general interest and should meet the requirements of social justice[471]. It thereby acknowledges that property entails a certain degree of limitation which is to be understood in a sense that, although the provision that ownership obliges restricts the owner in the enjoyment of his property, it does not mean that the owner, as the exclusive master of his property, would be restricted under the Constitution in his power to dispose of his property *ex lege*[472]. He is protected insofar as the exercise of his ownership rights does not violate other values the protection of which is guaranteed in Article 11 of the Charter[473].

It appears that the Constitutional Court is rather cautious in lending Article 11 para. 3 of the Charter an extensive interpretation, and that it inclines to put emphasis on the individual aspect of property in the sense that the obligation imposed on the owner must see to the constitutionally preserved sphere of autonomy of the owner, which must be preserved unless the exercise of property right is excessive so that other values recognised by Article 11 may be jeopardised. This cautious stressing and attention to the individual dimension of property is, in my view, also justified by the fact that the Constitutional Court is bound *ex lege* to follow a constitutional imperative, according to which when employing the provisions concerning limitations on the fundamental rights and freedoms the essence and significance of these rights and freedoms must be preserved and, therefore, the possible restrictions must be interpreted narrowly. It may also be presumed that the Court's accentuating of property freedom in the balancing of private and public interests may be connected with looking at

[471]Judgment of the Constitutional Court no. IV. ÚS 2005/09 of 26 April 2012.
[472]Judgment of the Constitutional Court no. III. ÚS 77/97 of 8 July 1997.
[473]Judgment of the Constitutional Court no. I. ÚS 31/97 of 4 June 1997.

property freedom as a highly praised and cherished value in society after the Czech experience with a series of authoritative regimes in the twentieth century.

This may also explain the fact that the social function of property, as enshrined in the Charter, is closely connected to human dignity. As Constance Grewe mentions, human dignity and liberty, as inviolable values, are the highlighted values in the Czech Constitution[474]. The Charter in Article 10 para. 1 explicitly states that everyone has the right that his human dignity, personal honour, and good reputation be respected. Hence, the state committed itself to guarantee the respect for human dignity as a constitutional value. The conception of human dignity in the Czech Constitution is not that of classical individualism from the perspective of which the state interventions in the name of the common welfare might be regarded as contradicting the state's commitment to guarantee the respect to everyone's human dignity. It is evident that, under the Czech Constitution, human dignity exists in a social context, for it is the social conditions that determine the extent to which an individual is able to preserve his dignity. Human dignity, as one of the ultimate constitutional values, is thus interrelated with the social function of property which serves the purpose of maintaining the former and promotes human flourishing. From this perspective, the social role of property has a moral dimension in implicating the value of human dignity.

From the comparative perspective, it must be noted that French constitutional practice also ranks the protection of human dignity against all forms of degradation as a principle of constitutional value[475]. In this both the French and Czech Constitutions acknowledge the legal and moral dimension of the social function of property. The only difference is the normative standing of this principle. While the right to human dignity is a directly invokable fundamental right in the Czech Charter, it is ranked as a principle of constitutional value under the French Constitution, and, so, it lacks the nature of a directly applicable right that can be invoked by an individual.

Apart from Article 11 para. 3, Article 35 para. 3 of the Charter also restricts the enjoyment of private property rights when it lays down limits on owners by obliging them not to endanger

[474]C. Grewe, "Methods of Identification of National Constitutional Identity", A. S. Arnaiz and C. A. Llivina (eds.), *National Constitutional Identity and European Integration*, Intersentia, Cambridge-Antwerp-Portland 2013, p. 46.

[475]Decision no. 94-359 DC of 19 January 1995, Loi relative a la diversité de l'habitat, J.O.R.F., 21 January, p. 1166: "Il ressort également du Préambule de la Constitution de 1946 que la sauvegarde de la dignité de la personne humaine contre toute forme de dégradation est un principe à valeur constitutionnelle".

or cause damage to the environment, natural resources, the wealth of natural species, or cultural monuments beyond the extent set by law. The social role of property can also be traced in paragraphs two and five of Article 11. The second paragraph lays down the limits of ownership in the interest of society when it allows for statutory designation of specific property that shall be owned exclusively by the state, municipality, or certain legal persons to secure social and economic goals. There are many statutes limiting ownership for various purposes in various fields, such as agriculture, forestry, water management, protection of the environment, or urban and territorial planning.

The social dimension of the fifth paragraph of Article 11, which reads that taxes and fees shall be levied only on the basis of law, lies in the distributive effect of taxes and fees, whereby the state controls the use of private property in pursuance of *inter alia* social justice. In this respect, any interference resulting from a measure to secure the payment of taxes must strike a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. A similar provision is also enshrined in Article 1 of Protocol No. 1 to the Convention and in the French Declaration[476]. The Declaration, however, further requires that the principle of proportionality be observed in imposing taxes when it obliges the legislator to take into account the ability of citizens to pay taxes. Although the Charter does not contain any such requirement, limitations of the legislator, in this regard, imply from other provisions of the Charter[477] that prohibit it to impose excessive burdens on citizens. Property also serves a social function in cases of expropriation and limitation which embody a certain degree of legislative interference with property that has to be tolerated if justifiable in terms of Article 11 para. 4 of the Charter.

Even though the purpose of property is, nowadays, more social than individual[478], I find the claim that "individual property ceases to be the right of an individual to become a social function"[479] rather problematic, for property *is not* a social function, it *has* a social function. I

[476]Article 13 of the Declaration reads that: "For the maintenance of the public force, and for administrative expenses, a general tax is indispensable; it must be equally distributed among all citizens, in proportion to their ability to pay".

[477]In imposing taxes and fees the legislator is bound by a duty to respect funadmental rights and freedoms. Article 4 para.1 of the Charter specifically reads that: "Duties may be imposed only on the basis, and within the bounds, of law, and only while respecting the fundamental rights and freedoms".

[478]A.-F. Zattara, "La dimension constitutionnelle et européenne du droit de propriété", LGDJ, Paris, 2001, p. 123.

[479]A.-F. Zattara, "La dimension constitutionnelle et européenne du droit de propriété", LGDJ, Paris, 2001, p. 124: "la propriété individuelle cesse d'etre un droit de l'individu pour devenir une fonction sociale". Other legal scholars who follow this postulate are, for example, J. Imbert, G. Morin, G. Reynard or L. Trotabas.

think it is necessary to distinguish the right as such and the utility or function of the right. The right of property has a double function – an individual one and a social one. On the basis of my observance, I suggest that the theory of property as being uniquely a social function has not been endorsed either by the French Constitutional Council[480], or by the Czech Constitutional Court.

4. Summary

For reasons of clarity of the structure, I approach the comparison of substantive and jurisprudential aspects of property protection guarantees in the European Convention on Human Rights and in the French and the Czech Constitutions in a two-stage order. Firstly, I compare the European guarantee with the French and the Czech one in a consecutive order, and, secondly, I approach the French-Czech comparison. The summary of the European property protection clause serves as the point of reference (I.) and is followed by France (II.) and the Czech Republic (III.), and, subsequently, by the comparison between France and the Czech Republic (IV.) At the outset of each section, I will submit a brief summary of the findings.

I.

The origins of the property guarantee in the European Convention on Human Rights were accompanied by long-term discussions and disagreements both as regards its inclusion in an international treaty and its scope. The property safeguard, which was, in the end, inserted in the First Additional Protocol to the Convention, was agreed to perform the function of a guarantee of independence of the individual against potential threats of confiscations by totalitarian regimes. It was, thus, conceived as a natural right of all natural and legal persons to respect for their property not being liable to arbitrary confiscation and which should be subjected to limitations in the public, or social, interest. In this spirit the adopted wording of Article 1 of Protocol No. 1 to the Convention reflects an effort to reconcile the social conception of property with the prohibition of arbitrary confiscations, and performs, thus, a dual function. The social function of property is clearly expressed in the second sentence of the first paragraph and in the second paragraph. Under these provisions the right of property can be limited by law and each member state may decide in what form and to what extent the

[480]The same opinion is shared, for example, by H. Pauliat: "Le droit de propriété dans la jurisprudence du Conseil constitutionnelet du Conseil de l'État", Université de Limoges, 1994, p. 152.

right of property of individuals will comply with the general interest. Although it does not provide for the right to compensation, by virtue of the formulation "subject to the conditions provided for by law", the property clause has permitted the ECHR to establish a compensation guarantee which has become a standard requirement.

The concept of property under the Convention is an autonomous one, independent of any national concepts of constitutional property, whatever it may be overlapping them. It embraces any asset of patrimonial value, which exists or which is legitimately expected to be acquired, comprising rights *in rem*, and claim rights, including public law claims such as welfare benefits, licences, authorisations, or goodwill. So, the jurisprudence of the ECHR treats property not only as objects, but also as distinct rights that generate a multitude of legal relationships which, if possessing a patrimonial value, enjoy protection under the Convention. Such a concept has permitted the ECHR to proceed to a wide interpretation and to revaluate the concept of property in view of which the Convention is conceived as a "living instrument" which is to be interpreted in the light of "present-day conditions".

The scope of the property protection as interpreted by the ECHR comprises three distinct rules that are interrelated: the general guarantee of the right to the peaceful enjoyment of possessions against the state interference, the protection against arbitrary deprivations and control of use of property. The second and the third rule define conditions under which the state may interfere with a person's peaceful enjoyment of possessions by means of deprivation or control of the use of property and so provide another qualification to the general guarantee of the first rule. The purpose of the property guarantee is to protect persons against arbitrary interferences of the state with private property, as well as to require from the state to take positive measures of protection.

II.

As regards the French origins of the constitutional property protection guarantee, it was already in place in 1789 when it was first enacted with the adoption of the Declaration of the Rights of Man. On the constitutional level, it first appeared in the Constitution of 1791 which adopted the principles of Article 17 of the Declaration. Throughout French constitutional history the Declaration of 1789 has been either a source of inspiration for the constitutional property clauses or a text of reference. The property guarantee is based on the same liberal philosophical grounds as the Convention and is conceived as a natural inviolable,

imprescriptible, unalienable, and sacred right which shall be preserved together with liberty and the safety of man. However, until 1971 the Declaration did not form part of the bloc of constitutionality, as it was not acknowledged that it entailed a constitutional value. The fundamental character of the right of property was brought about by constitutional case-law in two stages. Firstly, in 1971 the Constitutional Council integrated the Declaration, and, thereby, the property protection guarantee, in the norms of reference in the control of the constitutionality of laws and in the bloc of constitutionality, in addition to the Constitution of 1958, the Preamble of the Constitution of 1946, and the 2004 Charter of the Environment, the constitutional principles and objectives, and fundamental principles recognized by the laws of the Republic. Secondly, the explicit acknowledgment of the constitutionality of the provisions of the Declaration of 1789 was rendered by the Constitutional Council in a decision of 1982 on nationalisations. By acknowledging that private property may be burdened by deprivations and limitations in the public interest, the Constitutional Council simultaneously acknowledged that property serves a social function. Until the decision of 1982 the constitutional status of property had not been certain and had been systematically questioned. The main reason was that the right of property had been so circumscribed by legislation that it was hardly conceivable to consider property within the meaning of the right described by the Declaration. As regards the scope of the notion of property as guaranteed in Articles 2 and 17 of the Declaration, it is not identical to the definition of "possessions" under the Convention which comprises any asset of patrimonial value. On the contrary, it is more restricted, as the constitutional jurisdiction does not recognise, for example, authorisations, concessions, or welfare benefits as falling within the scope of those provisions, but, it is larger in scope, as it also comprises property of the state and public law persons the protection of which falls beyond the ambit of the Convention, for the purpose of Article 1 of Protocol No. 1 is to protect individuals and legal persons of private law from arbitrary interferences by the state with their possessions. However, the notion of property as interpreted by the Constitutional Council is not the only concept that is relevant, as it is also the ordinary supreme courts that develop their own understanding of property within the framework of review of conventionality of national law and are not bound by the appreciation of the Constitutional Council in this regard.

As regards the scope of the property protection, as interpreted by the Constitutional Council, in the decision on nationalisations the Constitutional Council enlarged the scope of the normative fundamental property protection by invoking, besides Article 17, Article 2 of the

Declaration as a protective norm applicable on limitations. The Council thereby stepped towards enlarging the ambit of the property protection clause under the Declaration. However, until the decision of 2010, the practice of the Council varied in that it alternately relied exclusively on Article 17 in limitations cases. In view of that the property guarantee under Article 1 of Protocol No. 1 to the Convention comprises three distinct rules of protection such practice did not attain the Convention standards. Decision no. 2010-60 QPC, which laid down with definitive effect the duality of protection under Articles 2 and 17 of the Convention, put the property guarantee under the Declaration as interpreted by the Constitutional Council in line with the structure of Article 1 of Protocol No. 1 to the Convention comprising three distinct norms, whereby Article 2 relates to both the first (general guarantee) and the third (control of the use) rule of P1-1. So, although the notion of constitutional property does not correspond in scope to that under the Convention, it does not mean that the level of constitutional protection of property is thereby diminished. Although the wording of the applicable constitutional provisions is distinct from that of Article 1 of Protocol No. 1 to the Convention, for example, in that Article 17 provides for compensation for takings, the level of property protection seems to be largely convergent due to the interpretative practice of the Constitutional Council and, primarily, to that of ordinary judges exercising the control of conventionality of laws. For example, the Constitutional Council applies the same system of examination of cases brought before it as the ECHR when it assesses them under the deprivation and, subsequently, the limitation rule of the Declaration. It also applies the same test of proportionality in limitation cases. The Constitutional Council has likewise acknowledged that property comprises of the right to use, the right to enjoy, and the right to freely dispose of property as distinct property rights which enjoy equal constitutional protection.

III.

In the Czech Republic the origins of the constitutional protection of private property reach to the Austro-Hungarian Constitutions of 1849 and 1867. Although the protection guarantee appeared much later than the French Declaration, there were no doubts about its constitutional character. The property guarantee was also inserted into the 1920 Constitution of the First Republic which recognised, apart from the "freedom of property", that property may be restricted by law. In subsequent constitutional history the constitutional property protection was gradually weakened with the instalment of the socialist regime that strictly differentiated property according to categories to which it attached varying degrees of constitutional

protection. Socialist property, comprising property of the state and various cooperatives, became the most privileged type of property, while private property was oppressed and did not enjoy the same level of constitutional protection. Moreover, the basic feature of constitutional development under the communist regime was that the *de facto* constitutional situation, political, social and societal in general, flagrantly contradicted the *de iure* constitutional situation. The Constitution of 1960 did not even contain any provision for protection of private property. The current property protection clause is provided for in the Charter of Fundamental Rights and Freedoms which forms part of the constitutional order comprising the Constitution of 1993 and other organic laws. The drafting of the constitutional property guarantee was inspired, among other sources, by the European Convention on Human Rights, which is reflected in the text of the property clause which bears many similarities to Article 1 of Protocol No. 1 to the Convention. The structure of the constitutional property clause corresponds to that of Article 1 of Protocol No. 1 to the Convention, as it comprises a general guarantee of property, and limitation and deprivation rules. The Czech property clause is larger in that it attaches generally delimited obligations to ownership and that it provides for compensation for deprivations and limitations of property.

The way the constitutional guarantee of property has been interpreted by the Constitutional Court has been influenced by the standing of the Convention within the Czech legal order. As the Convention forms part of the constitutional order and is one of the norms of reference in the control of the constitutionality of laws, the Constitutional Court has interpreted fundamental rights and freedoms in light of the Convention. It has directly relied on the concept of property within the meaning of interpretation by the ECHR and has exercised the competence to set aside laws or their parts that are contrary to property safeguard under Article 1 of Protocol No. 1. It follows that the meaning and scope of the concept of property under the Czech Constitution is consonant with the notion and the scope of protection of property under the Convention. This also applies as concerns the conception of property as a multitude of rights and a social function of property. In the latter respect, the Czech constitutional law and practice differs in scope from the practice under the Convention, as the constitutional property clause does not apply to welfare benefits, similar to the French constitutional property guarantee.

IV.

The similarity between the French and the Czech constitutional law rests in that they operate with the notion of the Constitution, in the larger sense, representing the bloc of constitutionality and the constitutional order, respectively, and in that the list of fundamental rights and freedoms is comprised in a separate document of a constitutional value – the Declaration and the Charter, respectively. Both notions of the constitution in the larger sense are strictly delimited in the text of the Constitution. But while the concept of the bloc of constitutionality can be enlarged by way of interpretation of the Constitutional Council as regards the principles and objectives of constitutional value and the principles recognised by the laws of the Republic, the scope of the Czech constitutional order, comprising a series of organic laws, is strictly delimited by the Constitution and can be enlarged only by organic laws, that is, only exceptionally. The Czech Constitutional Court, however, extended this concept by ruling that international human rights treaties form part of the constitutional order, despite the fact that its finding lacked any support in the text of the Constitution. In consequence, the Constitutional Court takes the Convention as one of the norms of reference in the control of constitutionality, refers directly to it in its decision-making on constitutional complaints, and sets aside laws and legal provisions it finds unconventional. The practice of the French Constitutional Council is distinct in this respect. It does not deal with direct constitutional complaints on human rights violations, but provides control of constitutionality of laws both *ex ante* and *ex post*. Like the Czech Constitutional Court, it can set aside laws it finds contrary to the Constitution, but it does not examine their compatibility with the Convention. In this respect, the French review is bifurcated and more dispersed compared to the Czech practice, as it is exercised by three supreme jurisdictions, for the control of conventionality of legislation falls within the competence of the Council of State and the Court of Cassation. The latters' competences in the review of conventionality are analogous to those of the Czech Constitutional Court with the exception that they cannot, unlike the Czech Constitutional Court, annul a law or its part for incompatibility with the Convention.

As to the scope of the normative protection of property, the French Declaration was originally more concise than the Czech Charter in that it did not clearly delimit which provision applied to property limitations, as the constitutional practice was not settled on this issue. The constitutional protection was distributed between Articles 2 and 17 of the Declaration with definitive effect in 2010 whereby the constitutional property reached as to the scope of normative protection to the standards of the Convention, and, thus, also to those of the Czech

Charter. But unlike the Czech constitutional property protection clause, neither Article 2 nor Article 17 of the Declaration attach duties to ownership.

On the substantive law level the major difference between the constitutional protection of property in France and the Czech Republic is in the scope of the constitutional guarantee of property. Whereas the Declaration provides for a negative guarantee by setting forth an inviolable, imprescriptible, and sacred autonomous sphere of liberty of the owner that should be preserved save exceptional circumstances given by the public interest, the Charter is more tangible. Its Article 11 does not explicitly conceive the right of property as a natural right, although this implies from the Preamble, but rather as a right of individuals to own property which is restricted by limitations and generally framed duties imposed on the owner. The attachment of obligations to property indicates that the Charter is a more modern charter of fundamental rights and freedoms than the Declaration. As a consequence, it provides for a more limited guarantee of property than the Declaration which corresponds to the evolution of the conception of property, since 1789, towards a social concept implicating increasing limitations on behalf of the public interest as the interest of society as a whole. The Charter, by stipulating that everyone has the right to own property, not only expresses that every owner is entitled, under the Constitution, to a sphere of liberty, that is, to a negative subjective right to non-interference, but also to a positive subjective right vis-à-vis the state to ensure the possibility to become the owner. The fact that, unlike the Declaration, the Charter stresses equality of every ownership as regards its contents and protection, and the right to inheritance, is tributary to different historical circumstances in which each of these guarantees was enacted. The constitutional concepts of property in both Constitutions are autonomous and comprise public property.

As to the scope of the constitutional protection, two evolutional benchmarks can be observed: the limitation of property and the extension of the right of property to new objects. As regards the extension of the sphere of application of the right of property to new areas, the notion of property as conceived by the constitutional jurisdictions oversteps the original meaning of property as movable or immovable objects to encompass various forms of intellectual property. The extension of the sphere of application to new areas and limitations in the name of public interest can be interpreted in a way that they interlock two facts: the individual fact which allows an individual to affirm his power over new objects, and the social fact which

makes a man living in society defend collective interests[481]. Neither of these two facts excludes the existence of the other and neither of them prevails over the other.

With a view to the fact that the meaning and scope of the constitutional property safeguards in France and the Czech Republic have been shaped on the basis of their interpretation by constitutional jurisdictions, they have reached the contours reflecting constantly growing interferences of the state in property relations and the strengthening of the understanding of property as a social function.

In France and the Czech Republic the scope of the constitutional protection of property has been shaped more towards the understanding of property as a social function. As a consequence, I consider that the ability to enjoy the right of property becomes increasingly dependent on the interests of the community, and that the common good is a precondition for the enjoyment of individual rights. Accordingly, the importance of the right of property in terms of the reality and the scope of its protection becomes justified by its service to the common good, and, so, it is also determined by the interests of others who may benefit from this right.

Compared to Articles 2 and 17 of the French Declaration, Article 11 of the Czech Charter provides for the social function of property in four subparagraphs out of five, so the scope of the constitutionally recognised social dimension of property that restricts property significantly overpasses those provisions of the Declaration. Although the Preamble to the French 1946 Constitution enumerates several social principles that implicate a number of social rights of French citizens, the French Constitution does not impose explicit obligations on owners that would be attached to the enjoyment of their property rights comparable to those contained in Article 11 of the Charter. Nevertheless, I am of the opinion that the principle under the Preamble of the 1946 Constitution, that private property that has or acquires the character of a national public service or a *de facto* monopoly shall become public property, may be put on the same footing as the obligation under Article 11 para. 2 of the Charter which allows that specific private property be owned exclusively by the state. Although a fundamental principle, it empowers, like Article 11 para. 2 of the Charter, the legislator to adopt laws to this effect. So, both provisions delegate the competence on the

[481]A.-F. Zattara, "La dimension constitutionnelle et européenne du droit de propriété", LGDJ, Paris, 2001, p. 126.

legislative body to project these specific aspects of the social function of property in the legislation and provide the legislator with guidelines concerning the extent to which it may restrict the individual owner's power of disposal for reasons of the public good.

Chapter 4: Limitations and Deprivations of Property under the European Convention on Human Rights and the Constitutions of France and the Czech Republic

In this Chapter I analyse and put to comparison the Czech and the French constitutional property guarantees with the protection of property under Article 1 of Protocol No. 1 to the European Convention on Human Rights (hereinafter "P1-1"). The overall exercise focuses on the issue of limitations and deprivations of property in the law and practice of the European Convention on Human Rights (hereinafter the "Convention") and the respective constitutional law and practice with a view to providing insight into the scope of the conventional and constitutional property guarantees in the light of their judicial interpretation. The objective of this chapter is to find out the extent to which the interpretations of the property safeguards, by the respective highest judicial bodies, overlap. For this purpose the individual criteria of conventionality and constitutionality of interferences with the right of property is put to scrutiny. It will be examined to what degree the European standards of property protection against arbitrary limitations and deprivations within the meaning of the interpretation of the European Court of Human Rights (hereinafter the "ECHR") are embedded in the Czech and the French constitutional practice on private property protection. Accordingly, the following questions are to be dealt with in this chapter. What is the scope of the property guarantee under the Convention within the meaning of interpretation by the ECHR? What are the counterparts of the conventional guarantee of the right of property in the Czech and the French Constitutions and their interpretation by the respective constitutional jurisdictions? What are the criteria of justification of interferences with those property guarantees? What similarities and differences can be found in respect of the justificatory criteria of interferences with the right of property and their judicial interpretation? What is the degree of influence of the interpretative practice of the ECHR on Czech and French constitutional decision-making in respect of the justificatory criteria?

As regards the method of approach to this analysis and comparison, I take, as a point of departure, the standard of protection under the Convention system against which I scrutinise the respective constitutional protections. Firstly, I inquire into the mechanisms of property protection under the Convention and the respective constitutional law and practice. Subsequently, I examine and compare the criteria of conventionality and constitutionality of

interferences with property rights. In the conclusion I explore the extent to which the examined jurisprudential approaches to the protection of private property converge and promote synergy in the area of protection of private property as a fundamental right on European level.

1. Mechanisms of Property Protection in the Light of Judicial Interpretation

1.1. General Remarks

In view of the expanding social function of property it can be asserted that the fundamental idea which dominates the conventional, as well as the constitutional notion of property not only in France and the Czech Republic, but in general, is that the societal evolution in time and space brings about various new limitations. Those limitations do not, in any way, change the nature of property as a subjective right. What has been under constant motion, though, is the manner of perception of property along with the evolution of society. The notion of property has been changing depending on new perspectives of things which go hand in hand with technological development. Although the enlargement of the perception of the notion of property as objects has been underway, technological and industrial progress and related welfare enhancement have been accompanied with an augmentation of demands in the social sphere entailing diminution in the sphere of property as rights. Simply put, although property as objects has been constantly enlarging[482], property as rights has been experiencing ongoing restrictions in the name of public interest. I would term this kind of phenomenon as the narrowing of property freedom.

It is, therefore, indispensable to look at the notion of property as comprising the factor of evolution of society. It is not possible to conceive of property only from the point of view of an individual, as a full legal power over a thing, for there may be many different rights to its utilization. It is the utility on behalf of society that influences the modern understanding of property. As a consequence, property is constantly being formed by law according to social necessities determined by the state power with the aim of organizing and directing activities of individuals so that property is utilised in the interest indicated by law[483]. Limitations of property are clearly not a product of recent times. Deprivation of property as a legal institute was already accounted for in the French Declaration in the 18th century. Although both the

[482]M. Magheru, "La conception philosophique de la notion de la propriété en France", Jouve & Cie, Paris, 1935, p. 9.
[483]*Ibid*., p. 17.

French Declaration and the Czech Charter characterize property as a natural right that is imprescriptible, inviolable, and sacred, they acknowledge in one breath that property, as a constitutionally protected right, may be circumscribed by various forms of limitations or even deprived of. It clearly implies from the Czech Charter and the French Declaration, but also from Protocol 1 to the Convention[484], that the fundamental right to the protection of property therein guaranteed is not conceived as an absolute right, and that the state can interfere with it on terms stipulated in those legal documents. It is evident that the limitation of the sphere of autonomy of the owner is inherent to both the conventional and the constitutional notions of property in the countries under scrutiny.

In this respect I borrow an apposite account of the relation between ownership and property-limitation rules given by J.W. Harris. Departing from the premise that ownership is not absolute, for owners are not free to do anything they like to or with their things, he claims that property-limitation rules and expropriation rules are typically part of the minimal structure of ownership and that ownership must comprise them[485]. He, thus, advances the claim that limitations of property are an inherent part of the notion of property, including the constitutional one. The difference between a limitation and a deprivation of property has been appositely outlined by a former member of the Constitutional Council, François Luchaire, who has employed an interesting and pertinent metaphor whereby he considers the right of property to be an "artichoke" right: "even if one removes a set of attributes from it, it remains the same; only when one touches its heart does it disappear"[486]. The heart can be touched by expropriation or nationalisation entailing dispossession pure and simple, or by serious

[484]The ECHR has explicitly declared that the right of property is not absolute. Protocol no. 1 to the Convention provides for two kinds of restriction of ownership: a) the deprivation of property, b) the control of the use of property. See also judgments of the Czech Constitutional Court no. II. ÚS 482/02 of 8 April 2004, and no. IV. ÚS 652/06 of 21 November 2007.

[485]J. W. Harris, "Property and Justice", Oxford, Clarendon Press, 1996, pp. 29, 33-34. The author presumes that ownership is determined by, first, the "trespassory rules", by which he means any social rules which purport to impose obligations on all members of society, other than the owner who is taken to have some form of open-ended relationship to a thing, not to make use of property without the consent of the owner, and, second, by "ownership spectrum" meaning open-ended relationships presupposed and protected by trespassory rules. In other words, according to Harris, ownership is defined by the negative obligation of other persons not to interfere with property of the owner, and by particular ownership relations. He alleges that these twin constituents of ownership may be superimposed by "property limitation rules" and "expropriation rules" whereby ownership rights (privileges and powers) are curtailed or taken away.

[486]"Même si on lui retire une série d'attributs, il reste lui-même; sauf si l'on touche au coeur, auquel cas il disparaît", in *Quelques éléments sur le droit de propriété et le Conseil constitutionnel*, note d'information interne aux services du Conseil constitutionnel, available at: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/pdf/Conseil/propriet.pdf.

limitations by which the meaning and scope of the right is denatured. They, too, are inherent in the conventional and constitutional conception of property.

And so, the following questions remain: where are the limits of encroachments on property rights and what constitutes the "checks and balances" to secure that the encroachments are not boundless and that property does not become a mere bundleless eggshell devoid of its content? It is the subject of the following inquiry into the conventional and constitutional "checks and balances" that provide safeguards for the control of interferences with property. It will be demonstrated that it is not only the principles of the rule of law and legality, seeking to subject the exercise of public power to effective legal constraints to avoid arbitrariness, which govern the conventional and constitutional protection of property, but that it is also, however paradoxical it may seem, the public interest which is, at the same time, the driving force behind restrictions of property as a bundle of rights. An inquiry will also be made into the mechanism whereby the systems under scrutiny manage to balance the social demands reflected in the public interest with the necessity to protect private property of individuals.

But before embarking on the inquiry into the conventional and constitutional safeguards against arbitrary interferences with property, I provide some insight into the concepts of limitation and deprivation of property in the light of the judicial interpretation by the ECHR and by the Czech and the French constitutional jurisdictions.

1.2. Limitations of Property under the European Convention on Human Rights

The Convention provides for distinct safeguards against arbitrary deprivations and limitations of property. Limitations of property fall under the notion of "control of the use of property" under the second paragraph of P1-1 which reads as follows: *The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.*

The "control of the use of property" comes under the third rule comprising P1-1 as laid down by the ECHR in the case of *Sporrong and Lönnroth v. Sweden*[487]. The third rule applies to

[487] *Sporrong and Lönnroth v. Sweden*, 23 September 1982, § 61, Series A no. 52: "The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the

those cases in which the enjoyment of property is restricted or placed under supervision. From the wording of P1-1 it follows that it recognises not only limitations in the general interest, but also limitations for the purpose of securing the payment of taxes, other contributions, and penalties, which appear to represent an aspect of the right of the state to control the use of property. Similar provisions on the right of the state to levy taxes or other contributions can be also found in the French Declaration[488] and the Czech Charter[489].

P1-1 stipulates that the control relates to the use of property which may be defined as the ability to enjoy the object of property in accordance with its purpose[490]. But the control of the use rule may also apply to the right to dispose of property which represents a fundamental attribute of the right of property and entitles the owner to enter into legal relationships[491]. Generally speaking, the control of the use of property covers both orders and prohibitions of the specific use of property, as public authorities may exercise their power of control of the use of property by requiring positive action from individuals or by imposing restrictions on them. The French expression *réglementer l'usage des biens* describes more accurately the purpose of the third rule of P1-1 which is to permit the enforcement of laws that are deemed necessary to regulate the use of property.

But within the meaning of interpretation given by the ECHR, P1-1 is a complex provision, as it embraces in scope straightforward cases of a control of the use of property and those cases which have been qualified by the ECHR under the general rule of the first sentence of the first

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first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognizes that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph".

[488]Article 13 of the Declaration reads that: "For the maintenance of the public force, and for administrative expenses, a general tax is indispensable; it must be equally distributed among all citizens, in proportion to their ability to pay".

[489]Article 11 para. 5 of the Charter reads as follows: "Taxes and fees shall be levied only pursuant to law".

[490]L. Sermet, "The European Convention on Human Rights and Property Rights", Council of Europe, Strasbourg, 1990, p. 8.

[491]See, for example, a case pertaining to restrictions of contractual freedom - *L v. Sweden*, decision of 13 April 1989, application no. 12585/86. The application concerned a complaint about prevention from selling a property at a certain price by way of refusing to grant a permit by the Agricultural Committee and establishing an artificial market price for the property. See also the case of *Mellacher and Others v. Austria*, 19 December 1989, Series A no. 169, in which the applicants complained that the Austrian authorities had interfered with their freedom of contract and deprived them of a substantial proportion of their future rental income by enacting a law on reduction of rents. See further *Amato Gauci v. Malta*, no. 47045/06, 15 September 2009, which concerned a statutory imposition of a unilateral lease relationship for an indeterminate time on the applicant without reflecting a fair and adequate rent.

paragraph of P1-1 which reads that: *every natural or legal person is entitled to the peaceful enjoyment of his possessions.*

1.2.1. Interference with the Peaceful Enjoyment of Possessions as an Autonomous Norm

The ECHR came up with this norm of reference within the scope of P1-1 in its extensive interpretation of P1-1. Unlike the national constitutional jurisdictions that usually refer to the classical typology limitations-deprivations of property, the ECHR has elaborated a third category of interferences with property. The Strasbourg Court conceives the first sentence of P1-1 both as "a criterion of interpretation and an autonomous norm"[492] containing the principle of peaceful enjoyment of property which was first recognised in the case of *Sporrong and Lönnroth*[493]. I would refer to the first sentence of P1-1 as a "last instance" norm interpreted and applied by the ECHR to interferences that cannot be qualified either as a formal deprivation or control of the use of property. Some authors denote it a "broom norm" permitting the ECHR to enlarge the scope of its control of interferences with property, as well as to define the content of the property guarantee[494]. It may, arguably, be so. By autonomisation of the first sentence of P1-1 the ECHR apparently seeks to render the right of property a protection which goes beyond the classical distinction between deprivations and limitations based on the nature of interference. The ECHR conceives the first norm as a general rule of which the control of the use and deprivation of property are specific manifestations. This is explicitly shown, for example, in the case of *Beyeler v. Italy*[495] in which the ECHR reiterated that the various rules incorporated in P1-1 are not distinct in the sense of being unconnected, and that the second and third rules are concerned only with particular instances of the first rule. As apparently a "catch-all" category, the first rule may play, in my opinion, a significant role in counterbalancing the margin of appreciation bestowed on states.

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[492]L. Condorelli, "Premier protocole additionnel, article 1", in *La convention européenne des droits de l'homme, commentaire article par article*, L.-E. Pettiti, E. Decaux, P.-H. Imbert (dir.), 2nd ed., Economica, 1999, p. 979.
[493]*Sporrong and Lönnroth v. Sweden*, 23 September 1982, Series A no. 52.
[494]F. Sudre, "La protection du droit de propriété par la Cour européenne des droits de l'homme", Dalloz, 1988, p. 71.
[495]*Beyeler v. Italy* [GC], no. 33202/96, § 111, ECHR 2000-I.

The autonomous character of the first norm apparently permits the ECHR to reinforce the protection of the right of property. The "universal" first norm seems to be a means allowing the ECHR to exercise an all-embracing control of interferences with property in a way that no such measure may escape its scrutiny. The concept of the first sentence of P1-1 thus seems to lack a conceptual unity and permits the ECHR to not only exercise control over all interferences with property of individuals but to also leave the ECHR wide discretion in the assessment of their compatibility with the Convention[496]. Consequently, it may be observed that the ECHR refers to the first norm even when the exercise of the rights derived from a lease is at stake. Such as, for example, in *Iatridis*[497] where the ECHR qualified the interference as a violation of the first sentence of P1-1 on the simple fact that the applicant was not the owner but only a lessee of business premises from which he was expelled by the local municipality that ultimately occupied them without a title, refusing that the applicant re-establish his activities there. Similarly, the ECHR has applied the first sentence of P1-1 in cases where the national authorities found, in retrospect, that the owner was someone other than the person who had been regarded as the lawful owner from the moment of the purchase of a thing[498].

The types of interferences falling within the scope of application of the first sentence of P1-1 pose a problem as regards their meaning. They are of limiting nature and are grave in the sense of entailing a certain loss of substance of the right of property. But it is not an easy task to find a common denominator for different situations in which the ECHR has recognised the applicability of this norm. In light of the ECHR's practice it can be inferred that those acts impinge upon the substance of property which leave the right to dispose and the right to use intact, but which significantly reduce the practical possibility of their exercise[499]. But it is a matter of fact that the criterion of reduction of the possibility to exercise one's property also appears under the control of the use rule. So, in the absence of precise criteria, the reference point of the ECHR seems to be a degree of intensity or gravity of interference, or the

[496]For example, J.-F. Struillou tends to denote it as a legal category whose unity is "functional". J.-F. Struillou, "Protection de la propriété privée immobiliere et prérogatives de puissance publique, contribution a l'étude de l'évolution du droit français au regard des principes dégagés par le Conseil constitutionnel et par la Cour européenne des droits de l'homme", L'Harmattan, 1996, p. 55.
[497]*Iatridis v. Greece* [GC], no. 31107/96, ECHR 1999-II.
[498]See, for example *Beyeler v. Italy* [GC], no. 33202/96, § 106, ECHR 2000-I; *Gladysheva v. Russia*, no. 7097/10, § 71, 6 December 2011; *Žáková v. the Czech Republic*, no. 2000/09, § 58, 3 October 2013.
[499]S. Marcus-Helmons, "Le droit de propriété est-il un droit fondamental au sens de la Convention européenne des droits de l'homme?", in *Les nouveaux droits de l'homme en Europe*, 11th Congress of the Union of European Advocates, 29-30 May 1997, Bruxelles, Bruylant, 1999, p. 193.

significance of interference with the substance of property, which enables the duration and the character of interference to be taken into consideration possibly leading to its classification under P1-1[500]. The determination of the gravity of interference implies an assessment of real possibilities of an owner to use his property[501]. It can be argued that, by applying the concept of the degree of gravity of interference, it seems that the ECHR resorts to the first norm as regards those limitations of property where a measure is grave, in the sense of producing effects similar to a formal deprivation but not a total loss of the right to dispose where the owner has a possibility to use his property, and where the purpose of the measure is not to control the use of property. In this context it can be suggested that, although the French Constitutional Council and the Czech Constitutional Court also take into account the intensity of measures limiting property, they do not make it a reference criterion of an autonomous general rule, but a criterion that applies to differentiate limitations and deprivations of property and an indicator in the balancing of conflicting interests in the framework of the test of proportionality.

A similar general provision to the autonomous first rule of P1-1 can also be found in the Czech Charter, in Article 11 para. 1 which stipulates that: *everyone has the right to own property*. Nonetheless, it appears that in the Czech constitutional practice the general provision does not constitute a distinct legal basis for restrictions of property per se as it does in the practice of the ECHR[502]. It is referred to very rarely by the Czech Constitutional Court. The application of Article 11 para. 1 of the Charter can be found, for example, in some jurisprudence pertaining to unequal enjoyment of possessions by reason of rent regulation causing the owners of flats with regulated rents to be discriminated against for they had to bear the burden of subsidizing the rents compared with those who owned non-regulated flats, whereby the enjoyment of their property rights was "groundlessly denied"[503]. The Czech

[500]L. Sermet, "Le droit de propriété dans la convention européenne des droits de l'homme", dossier droits de l'homme no. 11, Conseil de l'Europe, 1998, p. 31.
[501]F. Biglione, "La notion de privation de propriété, Étude relative a la propriété immobiliere", PUAM, 1999, p. 298.
[502]See in this respect, for example, judgment no. Pl. ÚS 34/97 of 27 May 1998, published under no. 152/1998 Sb., according to which Article 11 para. 1 does not contain a general clause on limitation of ownership by law, which is the reason why it is followed by further paragraphs enumerating the instances of limitation.
[503]See, for example, judgment of the Constitutional Court no. Pl. ÚS 3/2000 of 21 June 2000, published under no. 231/2000 Sb. See further judgment no. IV. ÚS 524/03 of 23 September 2004, in which the Constitutional Court explicitly held that it was not permissible to create inequalities. Concretely, the inequality between tenants of rent-controlled flats and those renting flats not subject to rent control, or between landlords who owned flats with controlled rents and those who owned flats not subject to control. The Constitutional Court found that Czech rent law was based on a high level of protection of tenants, prompted in particular by social considerations, as housing served a basic human need. However, it was unacceptable simply to transfer a social

Constitutional Court has referred to the provision of Article 11 para. 1 of the Charter in connection with the obligation of the state to render equal protection to all owners, since "all owners of the same kind are guaranteed by Article 11 para. 1 of the Charter that their ownership be regulated, firstly and foremostly, by a statute and not by a decision on regulation of prices, and that their ownership enjoy the same content and protection"[504]. As has already been mentioned in the previous chapter, Article 11 para. 1 of the Charter embodies the principle of equality of ownership, affirming that everyone can be an owner and that no owner may be discriminated against vis-à-vis other owners. As the Czech Constitutional Court put it, it is a special provision to the general principle of equality enshrined in the Charter[505]. So, although it appears that the rules of reference in Article 11 of the Czech Charter correspond to the triple typology of P1-1, there is nothing to indicate in the case-law of the Czech Constitutional Court that the provision of Article 11 para. 1 of the Charter would be accorded an interpretation similar to that of the first sentence of P1-1, that is, an interpretation of an autonomous norm reaching beyond the classical normative deprivations-limitations divide. Similarly, in the absence of a general provision of this kind in the French Declaration, nothing indicates that the French constitutional jurisprudence would interpret any provision of the Constitution as a general norm applicable to restrictions of property which do not fall within the scope of either Article 2 or Article 17 of the Declaration. In this respect the scope of applicability of P1-1 on limitation of property cases, thus, seems to be more complex, as there are, in fact, two rules that come into consideration in the assessment of limitations.

Consequently, it can be perceived that while national judges must qualify interferences either as a deprivation or a limitation of property, the ECHR may have further resort to the general rule by nuancing the criteria to be applicable to borderline cases of property limitations that appear to be close to a deprivation. For example, in *Sporrong and Lönnroth*[506] it was the diminution of the right to dispose caused by the particularly excessive duration of proceedings. It was also the duration of retention of valuables by the state which could not be qualified as a deprivation or a control of the use and which led the ECHR to find a violation

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burden from one group of persons (tenants) to another one (landlords). In the housing market landlords did not have any legal means of obtaining a rent-controlled flat as substitute housing for a tenant whose tenancy was being terminated. Moreover, the fact that there was no rent-control law leading to rent deregulation could not work to the detriment of landlords.

[504] Judgment no. Pl. ÚS 8/02 of 20 November 2002, published under no. 528/2002 Sb.

[505] Judgment no. I. ÚS 2229/08 of 29 December 2009.

[506] *Sporrong and Lönnroth v. Sweden*, 23 September 1982, Series A no. 52.

of the first sentence of P1-1 in the case of *Vasilescu*[507]. Or, in *Ekner*[508] and *Poiss*[509] it was the character of a consolidation measure that was held to produce effects similar to a deprivation. In these two cases the ECHR could not conclude on a deprivation, for the transfer of the land in question was only temporal, or on a control of the use of the land, for the principal aim of the measure was not to limit or control the use of the land but to restructure the zone of consolidation rapidly with a view to ameliorating and rationalising its exploitation by provisional owners. In *Loizidou*[510] the gravity of interference was held to lie in the factual obstacle of the division of Cyprus as a consequence of which the owners lost control over their property by losing the possibility to use and enjoy it. It is interesting that the ECHR assessed the interference to fall under the first sentence of P1-1 and not to amount to a *de facto* expropriation. But there are also cases in which the ECHR has applied the first sentence of P1-1 despite not finding the interference grave enough, such as in the case of *Beyeler*[511] concerning the exercise of the right of pre-emption of the Italian authorities in respect of a painting by Vincent Van Gogh which belonged to the applicant. This leads to the argument that, although the gravity of interference may be taken as an incontestable criterion, there is still persisting ambiguity as to the qualification of restrictions of property under P1-1.

1.2.2. Control of the Use of Property or Interference with the Peaceful Enjoyment of Possessions?

With regard to the case-law it appears that the first sentence of P1-1, although being fundamental, since it contains a general declaration of the protection of property and is a source of the principle of proportionality which applies to P1-1 as a whole, is subsidiary in the sense that it applies when the interference is covered neither by the deprivation rule nor by the control of the use rule. For example, in the *Greek Refineries*[512] the judges in Strasbourg only stated that the applicants were unable to be granted execution of the final arbitration decision imposing an obligation on the state to reimburse them the costs incurred on the basis of a contract concluded with the Greek authorities due to a retroactive annulment of arbitration awards by legislation. Regarding the facts of the case, the ECHR could not hold that there was either a deprivation or a control of the use, and so it referred to the first sentence of P1-1. But

[507] *Vasilescu v. Romania*, 22 May 1998, *Reports of Judgments and Decisions* 1998-III.
[508] *Erkner and Hofauer v. Austria*, 23 April 1987, Series A no. 117.
[509] *Poiss v. Austria*, 23 April 1987, Series A no. 117.
[510] *Loizidou v. Turkey* (merits), 18 December 1996, *Reports of Judgments and Decisions* 1996-VI.
[511] *Beyeler v. Italy* [GC], no. 33202/96, ECHR 2000-I.
[512] *Stran Greek Refineries and Stratis Andreadis v. Greece*, 9 December 1994, Series A no. 301-B.

the application of the first sentence of P1-1 and the criteria of the ECHR's classification of interferences with property do not seem to be entirely clear. It is interesting that in a similar case of *Pressos Compania Naviera*[513] the ECHR ruled that a retrospective annulment of compensation claims arising from tort constituted a deprivation of property, or in the case of *Building Societies*[514] the judges decided that a retrospective annulment of restitution claims arising from the exercise of unlawful tax law amounted to a control of the use.

That there is a thin line between interference with property falling within the scope of either the first sentence or the control of the use of property may be illustrated in the case of *Matos e Silva*[515]. The ECHR underlined that the disputed measures, restricting the applicants' right to their land in view of creating a nature reserve for animals, had left intact the applicants' right to deal with and to use their possessions, but had greatly reduced the ability to do so in practice, and thus affected the very substance of ownership - the right over possessions had become precarious. The ECHR held that, although the right may have lost some of its substance, it did not disappear, and the owners had not lost all reasonable means of exploiting their property. Referring to the reversible nature of the measures, it further stated that the effect of the measures in issue did not amount to a formal or *de facto* expropriation and that the restrictions stemmed from a reduced ability to dispose of the property and from the damage sustained, because expropriation was contemplated. In the opinion of the ECHR, although the individually disputed measures did not have the same legal effect and had different aims, they were to be looked at together in light of the first sentence of the first paragraph of P1-1. In my view, this case could also have been clearly qualified as a control of the use of property to which the second paragraph of P1-1 could have been directly applicable, for the disputed measures seem to have imposed restrictions directed at controlling

[513]*Pressos Compania Naviera S.A. and Others v. Belgium*, 20 November 1995, Series A no. 332.
[514]*National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom*, 23 October 1997, *Reports of Judgments and Decisions* 1997-VII.
[515]*Matos e Silva, Lda. and Others v. Portugal*, 16 September 1996, *Reports of Judgments and Decisions* 1996-IV. The Portugese government declared that a half of Matos e Silva's land was needed for public purposes. This public-interest declaration was preliminary to expropriating the land with a view to building an aquacultural research station on it. Later the Government made another public-interest declaration with a view to expropriating the other half of Matos e Silva's land in order to set up a single nature reserve for the protection of migrant birds and other important species. The order authorised "the immediate taking of possession" of the land by the state. Furthermore, by decree the Government withdrew the applicant's concession to work all the parcels of land. The withdrawal was to be effected in the manner in which expropriation was permitted by the decree and the state was to take immediate possession of the land without any formalities or compensation except for compensation payable for necessary and useful improvements made on the property. By another decree the government created the Ria Formosa Nature Reserve on the Algarve and adopted rules for the protection of the area's ecosystem. Among other things, these rules prohibited, in addition to all building, any change in the use of the land and the starting up of any new agricultural and fish-farming activities without permission.

the use of property. A similar view held the Commission, which dealt with the case before the ECHR, and which in its report of 21 February 1995 expressed the opinion that P1-1 had been violated, stated that the different measures had to be looked at in light of the combined provisions of the first sentence of the first paragraph and the second paragraph of P1-1. The Commission argued that with the exception of the decree imposing a withdrawal of the concession to work all the parcels of land, the aim of the measures was to impose restrictions with a view to controlling the use of property. I consider that the withdrawal of the concession could be assimilated to the withdrawal of a licence on which the ECHR has already adjudicated as constituting a measure of control of the use of property which falls under the second paragraph of P1-1[516].

The decision in this case shows that the qualification of interferences with property under P1-1 by the ECHR may embody some imprints of ambiguity and that the interpretation of P1-1, in some cases, may be open to and exposed to some criticism. It goes without saying that drawing a line between a control of use under the second paragraph of P1-1 and an interference with the substance of property under the first sentence of P1-1 leaves room for certain subjectivity in the ECHR's assessment[517]. The ECHR disposes in this regard a large discretion which may be illustrated, in addition to the abovementioned case of *Matos e Silva*, by the cases of *Katte Klitsche de la Grange*[518] or *Mellacher*[519]. In the latter the apartment owners were obliged by law to reduce the amount of rent substantially. They claimed to be

[516]For example, in *Rosenzweig and Bonded Warehouses Ltd v. Poland*, no. 51728/99, § 49, 28 July 2005, the ECHR stated that "the withdrawal of valid permits to run a business is an interference with the right to the peaceful enjoyment of possessions guaranteed by Article 1 of Protocol No. 1. It constitutes a measure of control of the use of property, which falls to be examined under the second paragraph of Article 1 of Protocol No. 1". In respect of the qualification of the withdrawal of a licence as a control of the use of property see also, for example, *Tre Traktörer AB v. Sweden*, 7 July 1989, § 55, Series A no. 159; *Fredin v. Sweden (no. 1)*, 18 February 1991, § 47, Series A no. 192; *Luordo v. Italy*, no. 32190/96, § 67, ECHR 2003-IX; or *Capital Bank AD v. Bulgaria*, no. 49429/99, §§ 130-131, ECHR 2005-XII (extracts).

[517]J.-F. Struillou, "Protection de la propriété privée immobiliere et prérogatives de puissance publique, contribution a l'étude de l'évolution du droit francais au regard des principes dégagés par le Conseil constitutionnel et par la Cour européenne des droits de l'homme", L'Harmattan, 1996, p. 54.

[518]*Katte Klitsche de la Grange v. Italy*, 27 October 1994, Series A no. 293-B. The applicant owned a large portion of a park. A land-use plan developed by the District Council excluded part of the applicant's land from the area intended for residential construction. The applicant complained that the land-use plan had unfairly deprived him of the right to build on a part of the park and of the lack of compensation for the damage he had sustained. In the opinion of the ECHR the mere approval of the land-use plan was sufficient to restrict the applicant's excercise of his right to the peaceful enjoyment of his possessions. The ECHR applied the first rule since the case did not, in its view, involve a deprivation of property or control of the use of property, and as there was not an absolute prohibition of construction on the whole of the applicant's land his property was not subject of a *de facto* deprivation. A question stands as to why this case was not qualified as falling within the remit of the control of use rule. There seems to be no reason why this use rule could not be applicable in view of the fact that the purpose of the approval of the land-use plan was to control the use of the land in the framework of the local policy of urbanism and protection of the environment.

[519]*Mellacher and Others v. Austria*, 19 December 1989, Series A no. 169.

victims of an interference amounting to a deprivation of property, as they were receiving reduced rents, and to a *de facto* deprivation due to the introduction of the system of rents by virtue of square metres. According to the ECHR, there was no transfer of property of the applicants who were not deprived of the right to use, let, or sell their property. This argument, however, does not sit comfortably with the fact that what was at the stake was not the use of the flats but the reduction in rents. The ECHR decided, without further explication, not to qualify the loss of a part of the revenue as being contrary to the general rule of the peaceful enjoyment of property but as a control of the use. In my opinion, this case might have been qualified as an interference with the peaceful enjoyment of possessions guaranteed under the first sentence of P1-1 - not only in view of the criterion of the absence of a transfer of property and the degree of intensity of the rent reduction producing effects similar to deprivation, but also in view of the purpose of the rent reduction which was, apparently, not to "control the use of rent" but, as the ECHR observed, to "reduce excessive and unjustified disparities between rents for equivalent apartments and to combat property speculation" and to make "accommodation more easily available at reasonable prices to less affluent members of the population". It follows that the purpose of the rent reduction was, foremost, to redress a social injustice rather than the control of the use of property, which had the consequence that some landlords were not able to enjoy their possessions in the form of revenue. Does this not mean that their right to the peaceful enjoyment of possessions in respect of which the landlords had a legitimate expectation may have been infringed? Be that as it may, it appears that the ECHR has held on to the same line of qualification under the control of the use rule in later rent control cases[520].

[520]For example, in *Anthony Aquilina v. Malta*, no. 3851/12, § 54, 11 December 2014; *R & L, s.r.o. and Others v. the Czech Republic*, nos. 37926/05, 25784/09, 36002/09, 44410/09 and 65546/09, § 108, 3 July 2014; *Bittó and Others v. Slovakia*, no. 30255/09, § 101, 28 January 2014; *Hutten-Czapska v. Poland* [GC], no. 35014/97, § 160, ECHR 2006-VIII; *Radovici and Stănescu v. Romania*, nos. 68479/01, 71351/01 and 71352/01, § 74, ECHR 2006-XIII (extracts). It is worth noting that in one of the most recent cases, *R & L, s.r.o. and Others v. the Czech Republic*, nos. 37926/05, 25784/09, 36002/09, 44410/09 and 65546/09, 3 July 2014, the ECHR associated the right to increase rents with the right and ability to use property as guaranteed by P1-1. The applicants complained about rent regulations imposed by the state and the fact that they were unable to increase the rents paid by their tenants, which they considered too low and which they had never agreed to. The respective rent agreements were created ex lege by the transformation of the previously existing right of personal use of a flat and were valid for an indefinite period of time. The applicants could not have increased the rents above the maximum amounts set by the state, nor freely terminated the rent agreements and concluded new ones with different – higher – levels of rent. The ECHR clearly indicated that the legislation, which deprived the landlords concerned the possibility of increasing rents, put all of them in a situation of risk that they could not use their property in the conditions guaranteed by P1-1 which corresponds to the term "use" contained in P1-1: they could let flats in their apartment houses but as the controlled rents could generally not cover the maintenance of these houses, they faced the risk that the houses would become uninhabitable. This can, in other words, be interpreted as that it was in fact the use of the flats was controlled through the ban on the rent increase, and, accordingly, that what was at stake under the control of the use rule was the control of the use of flats. It would seem contradictory if the ECHR claimed that the use of rent could be controlled but was lost by virtue of a statutory

In this connection I draw attention to a quite distinct reasoning of the Czech Constitutional Court in a case concerning regulated rents, in which the Court, quoting the case of *Mellacher,* qualified the situation of owners of flats with regulated rents who were found to be burdened with the obligation to "subsidize" the rents, as unequal, discriminatory, and a "groundless denial" of the enjoyment of some of their property rights contrary to the general right of everyone to own property[521]. The ECHR focused on the partial loss of revenue as such which it found proportionate to the achievement of the legitimate aim consisting in the reduction of rents to a more socially acceptable level and in the encouragement of improvements in the quality of accommodation, and held that the right to the peaceful enjoyment of possessions of the landlords had not been violated. Whereas the Czech Constitutional Court was not concerned as much with the loss of the landlords' revenue due to the rent regulation as with the fact that the landlords were obliged to expend some of their property, or in the judges' proper words to "subsidize" the rents, to be able to cover the costs connected with the maintenance of the leased flats, and so not being able to enjoy the right to own some of their possessions in violation of the general rule of Article 11 para. 1 of the Charter. But it is noteworthy that, although in the case of *Mellacher* the domestic legislation restricted the chargeable rent, the levels of rent were never set below the costs of the maintenance of the property and landlords were able to increase the rent to cover the necessary maintenance expenses. That provision had at least made it possible for Austrian landlords to keep their property in proper condition, whereas the Czech scheme did not provide for any procedure for maintenance contributions or state subsidies. Moreover, in the *Mellacher* case the ECHR could not deal with the claim on discrimination, as no such claim was submitted to it by the

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ban, that is, the use of property that never existed, a lost profit, which would make the qualification under the control of the use rule rather dubious. It is interesting that the ECHR did not qualify such lost profits as deprivation of property.

[521]Judgment of the Constitutional Court no. Pl. ÚS 3/2000 of 21 June 2000, published under no. 231/2000 Sb. The Court repealed a decree which froze the rents at a level that made it impossible for the landlords to cover their maintenance costs and to derive profits from their property. The Court held that: "The major challenges faced and the substantive restrictions on property rights adopted from 1950 to 1980 made it necessary to put an end to discrimination against certain classes of owners so as to restore their right to the peaceful enjoyment of their possession within the meaning of Article 1 of Protocol No. 1 and Article 11 § 1 of the Charter. The essence of the discrimination lies in the fact that, in contrast with other owners, some of the substantive aspects of their property rights are denied to the aforementioned owners and, further, in the fact that in many cases, where their only income is derived from rent, those owners are being obliged to subsidise what in the Constitutional Court's view is a major social problem, ... that is, a burden which cannot be shouldered by a certain section of society but requires a reasonable and balanced solution by the State and society as a whole. ... In other words, as a result of existing legislation, certain groups in our society are bearing costs which should be covered by the State. The rent-ceiling scheme, if it is to be compatible with the Constitution, must not keep rents at a level which eliminates any possibility of an economic return on all the established and necessary costs. Otherwise it would imply the denial of all principles of ownership".

applicants. It should also be noted that as regards the majority of Czech constitutional jurisprudence on regulated rents, it relies rather on Article 11 para. 4 and qualifies such cases as a forced limitation of property, in line with the jurisprudence of the ECHR, due to the intensity of interference[522].

In view of any ambiguity in the classification of limitations under P1-1, the following questions may be posed: What potential consequences can be drawn from the application of the first sentence of P1-1 by the ECHR on national restrictions of private property? What are the implications of the existence of the three rules in P1-1 for victims of violations of property rights by national authorities? The answer to these questions is, in my opinion, connected with the issue of compensation. The clear-cut implications lie in the possibility of the granting of compensation. As will be shown hereinafter, the ECHR has adopted a rule whereby a deprivation of property in principle requires the payment of compensation. There is a clear difference in the entitlement to compensation depending on whether interference is qualified as a deprivation or as an interference with the peaceful enjoyment of possessions under the first rule of P1-1. Accordingly, if interference results in a deprivation of property or if it results in an economic loss comparable to that arising from deprivation, but the ECHR qualifies it under the first sentence of P1-1, such a qualification will not automatically entail the right of the owner to be compensated. Such was the above cited case of *Stran Greek Refineries*[523] in which the ECHR ruled that a retroactive annulment of arbitration awards by legislation fell under the first sentence, although it may have been qualified as an expropriation, such as in the case of *Pressos Compania Naviera*[524]. Based on the facts of those cases there was no difference, but the entitlement to compensation under the Convention significantly differed due to the distinct qualification. Hypothetically speaking, if an interference with property is qualified as a deprivation under national law, whereas the ECHR considers it as violating the first rule of P1-1, can we not speak then about reduced protection under the Convention? Such a schismatic hypothesis seems to be especially

[522]The intensity of regulated rents amounting to a forced limitation is projected in undue extent and duration of the limitation. See, for example, the opinion of the Constitutional Court no. Pl.ÚS-st. 27/09 of 28 April 2009, published under no. 136/2009, §§ 14-22. The Constitutional Court declared unconstitutional an unequal standing of two groups of owners where one group was obliged to bear the costs of the social policy of the state in the area of housing, and where no reasonable grounds were given that some owners of flats had to bear the costs of housing of their tenants. The Court stated that the limitation of ownership of a group of landlords renting rent-controlled flats went far beyond the limitations of ownership laid down for all owners, and that regard had to be paid to the scope of costs that the individual landlords had to bear without any related advantages whatsover, as well as to the long-term existence of such a situation.

[523]*Stran Greek Refineries and Stratis Andreadis v. Greece*, 9 December 1994, Series A no. 301-B.

[524]*Pressos Compania Naviera S.A. and Others v. Belgium*, 20 November 1995, Series A no. 332.

pertinent for the national constitutional courts which either directly implement and rely on the ECHR's case-law, such as the Czech Constitutional Court, or which draw inspiration from the ECHR's jurisprudence, such as the French Constitutional Council, entrusted solely with the control of constitutionality, and which may come to a different legal qualification of the same facts than the ECHR.

Consequently, if the first sentence of P1-1 can be considered as a tool for the enlargement of the control powers of the ECHR, its application does not seem to be advantageous in those cases in which the award of compensation is, due to the circumstances of the case, pertinent. This context instigates an inquiry as to what are the Czech and the French constitutional provisions that provide for safeguards against arbitrary restrictions of property and what is their scope compared to the control of the use rule under P1-1.

1.2.3. Counterpart Provision of the Czech Charter to the Control of the Use Rule under Article 1 para. 2 of Protocol No. 1

Compared to Article P1-1 of the Convention, the Czech constitutional framework of limitations of property is wider, embracing more than one paragraph of Article 11 of the Charter, namely paragraphs 3-5[525]. Limitations of the exercise of property rights, thus, cover the majority of the text of the constitutional guarantee of property and are considered by the constitutional jurisdiction as the essential attribute of ownership[526]. Quantitatively speaking, the spectrum of constitutionally delineated limitations is broader than those covered by P1-1 of the Convention, embracing limitations of property for the fulfilment of the public or general interest[527]or the levy of taxes and fees, and limitations for the purpose of protection of the rights and interests of others. It is now to be ascertained from the qualitative point view which paragraph of Article 11 corresponds to the control of the use rule under P1-1.

[525]Judgment of the Constitutional Court Pl. ÚS 15/96 of 9 October 1996, published under no. 280/1996 Sb.: "The constitutional framework of possible limitations of ownership is provided for in the provision of Article 11 paras. 3 to 5 of the Charter of Fundamental Rights and Freedoms".
[526]Judgment no. Pl. ÚS 34/03 of 13 December 2006, published under no. 49/2007 Sb.
[527]Article 11 para. 4 reads that: "Expropriation or some other mandatory limitation upon property rights is permitted in the public interest, on the basis of law, and for compensation".

If we take, for example, paragraph 3 of Article 11[528], it is an atypical provision in that it does not provide for subjective constitutionally guaranteed rights but for duties. It foremost entails a principle that ownership obliges, which reflects the fact that property rights have their limits and may collide with the interests of others and those of society as a whole. This provision is basically an expression of the legal maxim that the right of an individual ends there where the rights of others begin. Its wording guarantees that the rights of others and legally protected public interests are protected from the abuse of ownership. When compared with Article 11 para. 4[529], it can be perceived that there is one fundamental difference as regards the character of each of these norms and their "addressees". Whereas, on the one hand, Article 11 para. 3 specifies that the content of ownership involves also duties which, by definition, impose limits on its exercise, and that property may not be misused or exercised in a certain way so as to harm the rights or interests of others, Article 11 para. 4, on the other hand, allows for interferences of others with one's ownership in compliance with the criteria of constitutionality set forth as the constitutional parameters of expropriations and forced limitations.

What does this matching test reveal? It shows that Article 11 para. 3 is clearly a "banning" norm prohibiting certain actions from the part of the owner, its "addressees" being the owners of property, and further that Article 11 para. 4 is a "permitting" norm allowing certain actions, its "addressees" being the public, in general, including the state. So, while the control of the use rule of P1-1 is addressed to states and empowers them to limit property rights of owners, Article 11 para. 3 prohibits the owners to act in a certain harmful way or misuse their property vis-à-vis the property of others. It follows that Article 11 para. 3 of the Charter as a "self-restricting" norm, from the viewpoint of the protection it renders to ownership, does not have an equivalent in the Convention.

Nonetheless, if we take the principle on which Article 11 para. 3 is built, this provision, similar to the control of the use rule of P1-1, contains a principle which was interpreted by the Czech Constitutional Court to the effect that ownership, which is not an unlimited legal power

[528]"Ownership entails obligations. It may not be misused to the detriment of the rights of others or in conflict with legally protected public interests. Property rights may not be exercised so as to harm human health, nature, or the environment beyond the limits laid down by law".
[529]"Expropriation or forced limitation upon property rights is permitted in the public interest, on the basis of law, and for compensation".

over a thing, "should fulfil and also fulfils other functions"[530]. By these other functions the established Czech constitutional case-law means the "socially binding effect" of ownership within the meaning of Article 1 para. 2 of Protocol No. 1 to the Convention[531]. The constitutional judges have thereby acknowledged that both the constitutional and conventional provisions on limitation of property reflect the social function of property. So, although the text of paragraph 3 as a "banning" norm is addressed to owners at large to abstain from interfering with the protected interests of others rather than a "permitting" norm to restrict property in the public interest, it nevertheless resonates with the control of the use rule under P1-1 in that it implies the principle of the social function of property.

This principle is also enshrined in paragraph 4 of Article 11 and the Constitutional Court has acknowledged it by holding that even though the Czech Republic is in no constitutional document proclaimed as a "social rule of law state", the whole of its constitutional and legal system, in fact, departs from the principle that ownership obliges and is limited by the rights of others or by legally protected general interests, as well as from the principle that the state may interfere with property in pursuance of the public or general interest[532]. The Constitutional Court has thereby recognised that the objective of limitations of property permitted under Article 11 of the Charter is twofold, namely, the protection of the rights and interests of individuals and the pursuance of the public or general interest. From the comparative perspective it is evident that whatever this Constitutional Court's interpretation may, at first glance, conduce to argue that both paragraphs 3 and 4 of Article 11 bear, all at once, an analogy with the content of Article 1 para. 2 of Protocol No. 1 to the Convention, the equivalent of the latter clearly represents paragraph 4 of Article 11, in conjunction with Article 11 para. 5[533]. Namely, it, too, allows for restrictions of property rights in the public interest and it sets down the conditions under which limitations of property are to be regarded as constitutionally conforming. Unlike Article 11 para. 3, which pursues rather the objective of protection against potential conflicts of rights and interests and which can be said to impose restrictions on the owner's enjoyment of property rights from the "inside" by setting down the owner's duties to avoid those conflicts, Article 11 para. 4 allows for possible interferences with the owner's enjoyment of property rights from the "outside" under strictly specified

[530]Judgment no. Pl. ÚS 21/02 of 22 March 2005, published under no. 211/2005 Sb.
[531]See, for example, judgment no. Pl. ÚS 11/01 of 6 March 2002, published under no. 144/2002 Sb.; or judgment no. Pl. ÚS 21/02 of 22 March 2005, published under no. 211/2005 Sb.
[532]See, for example, judgment of the Constitutional Court Pl. ÚS 15/99 of 15 March 2000, published under no. 80/2000 Sb.
[533]Article 11 para. 5 reads as follows: "Taxes and fees shall be levied only pursuant to law".

conditions. Hence, it can be argued that the common aspect that links Article 11 para. 4 of the Charter and Article 1 para. 2 of Protocol No. 1 to the Convention is the permission of private property limitations by the public authority in pursuance of the public interest as a guarantee against arbitrary action. Now a question arises as to whether the notion of forced limitation of property in Article 11 para. 4 of the Czech Charter corresponds, in terms of scope, to the notion of control of the use of property in Article 1 para. 2 of Protocol No. 1 to the Convention.

1.2.4. Can the Concepts of Control of the Use and Forced Limitation of Property be put on Equal Footing?

The Constitutional Court has explicitly held that Article 11 para. 4 of the Charter corresponded in scope to the guarantees under Article 1 of Protocol no. 1 of the Convention and pertained to limitations which exclude the exercise of ownership in such a scope that the exercise of some of the attributes of ownership is significantly prevented[534]. Referring to the analogy with P1-1, the constitutional judges have suggested that the notion of forced limitation of ownership permitted by Article 11 para. 4 is an equivalent of the term "control of the use of property" as enshrined in the Convention[535]. This means that both notions of forced limitation and control of the use of property imply that the owner is considerably precluded in the exercise of some of the attributes of ownership by an interference that "narrows down some of the attributes of ownership"[536], such as, by restricting the use of land for the reason of protecting the environment or for urban planning reasons. Both notions, thus, refer to situations in which the owner's mode of using his property is negated by the imposition of a corresponding duty enforceable by sanctions, or in which the owner is curtailed in the exercise of some of his rights[537], and in which the owner is left with a certain degree of

[534]Judgment no. Pl. ÚS 34/03 of 13 December 2006, published under no. 49/2007 Sb, §§ 76-77; judgment no. IV. ÚS 2005/09 of 26 April 2012, § 35; decision no. III. ÚS 294/14 of 30 July 2014.
[535]In this respect see, for example, judgment of the Constitutional Court no. Pl. ÚS 3/2000 of 21 June 2000, published under no. 231/2000 Sb., in which the Court referred to the case of *Mellacher v. Austria* concerning regulated rents, in which the ECHR considered the measures introducing rent regulation and a consequential decrease in rents under the "control of the use of property" rule and not as a formal or *de facto* expropriation. The Constitutional Court, applying the ECHR's case-law, came to a conclusion that the decree of the Ministry of Finance on regulation of rents violated Article 1 of Protocol No. 1 to the Convention as well as Article 11 para. 1 of the Charter. This case is one of the examples of a direct application of the Convention and its case-law by the Constitutional Court which lead, besides the incompatibility with the Charter, to the setting aside of domestic legislation. See further, for example, decision no. II. ÚS 3035/12 of 5 March 2014, § 61, in which the Constitutional Court rejected the application solely on finding a non-violation of P1-1 of the Convention.
[536]Judgment of the Constitutional Court no. III.ÚS 455/03 of 25 January 2005.
[537]L. S. Underkuffler, "The Idea of Property", Oxford University Press, Oxford, 2005, p. 56.

freedom to use his property, for restrictive measures are premised on the assumption that the owner would be free to act in a certain way[538].

In view of the fact that not all interferences restricting ownership amount to a forced limitation, which is a sort of qualified limitation, the Constitutional Court has expressed the opinion that a limitation must reach a certain degree of intensity so as to qualify as forced within the meaning of Article 11 para. 4[539]. The proviso of a certain degree of intensity or gravity of interference, which is embodied in many factors such as the extent or the duration of the limitation, thus excludes that every limitation be comparable to forced limitation of property[540]. In the Constitutional Court's view, a significant feature of such a qualified limitation is that it goes beyond the scope of duties a statute lays down, in general, for all subjects of ownership with the principle of equality being preserved[541]. In other words, although reaching beyond limitations that apply to subjects of ownership in general, and thus creating unequal standing, forced limitations of ownership within the meaning of Article 11 para. 4 are, nevertheless, in compliance with the principle of equality due to the existence of facts which justify such inequality. For example, it may concern statutory easements entailing a duty to withstand public construction on one's land, which apply only to some owners who are thus "disadvantaged" vis-à-vis other owners and whose ownership is restricted beyond the scope of general limitations of ownership by law. Hence, any forced limitation of ownership must observe the principle of non-discrimination, as enshrined in Article 4 para. 3 of the Charter, according to which any statutory limitation upon the fundamental rights and freedoms must apply in the same way to all cases which meet the specified conditions, and also preserve the essence and significance of those rights and freedoms without being misused for purposes other than those for which they were enacted[542]. It implies that a forced limitation may be placed upon the fundamental rights and freedoms only by law, under the conditions prescribed in the Charter, in a non-discriminatory way, and only to such an extent in which it does not impinge on the substance of ownership which cannot become a

[538]Judgment of the Constitutional Court no. IV. ÚS 2005/09 of 26 April 2012.
[539]Opinion of the plenum of the Constitutional Court no. Pl. ÚS-st. 27/09 of 28 April 2009, published under no. 136/2009 Sb.
[540]Judgment of the Constitutional Court no. IV.ÚS 3377/12 of 16 May 2013.
[541]Opinion of the plenum of the Constitutional Court no. Pl. ÚS-st. 27/09 of 28 April 2009, published under no. 136/2009 Sb.
[542]In other words, forced limitations of property must also fulfill the conditions of Article 4 para. 4 of the Charter. See, for example, the judgment of the Constitutional Court no. Pl. ÚS 34/03 of 13 December 2006, published under no. 49/2007 Sb.

mere shell deprived of its content[543].

From the aspect of the scope of applicability of Article 11 para. 4 of the Charter, which is limited to forced limitations of ownership, that is, to certain qualified cases of limitation, Article 11 para. 4 of the Charter differs from the control of the use rule under P1-1 which does not impose a similar qualification. By all means, the criterion of gravity is equally important in the assessment of the applicability of individual norms within P1-1.

1.2.5. Counterpart Provision of the French Declaration to the Control of the Use Rule under Article 1 para. 2 of Protocol No. 1

Contrary to the Convention or the Czech Charter, the French Declaration does not explicitly set out conditions for limitations of property. It is, thus, left to the constitutional jurisdiction to recognise that property may be subject to limitations and to lay down and interpret the requisite constitutional criteria. The Constitutional Council has generally recognized that the evolution of the right of property is characterised by limitations of its exercise necessitated by the public interest[544], which may be also put as that since 1789 the evolution of the right of property resigned itself to a long litany of limitations[545]. In particular, it has underlined that the right of property has, since 1789, undergone an evolution both in respect of its scope and its purpose[546], which is constantly being delimited by volatile exigencies of the public interest, and that, consequently, the concept of constitutional property must be seen from the perspective of this evolution. It means that property inherently comprises limitations.

It was shortly after its establishment in 1958 by the Constitution of the 5th Republic when the Constitutional Council admitted that the legislator could impose on the right of property "limitations of general character". Referring to the criterion of anterior legislation, it laid down a rule whereby the principle of a free disposition of property by every owner, the

[543]See judgment of the Constitutional Court no. Pl. ÚS 8/02 of 20 November 2002, published under no. 528/2002 Sb.; or judgment no. I.ÚS 2229/08 of 29 December 2009.
[544]Decision no. 90-283 DC of 8 January 1991, Official Journal of 10 January 1991, p. 524, § 8, Rec. p. 11:"L'évolution qu'a connue le droit de propriété s'est également caractérisée par des limitations à son exercice exigées au nom de l'intérêt général".
[545]G. Conac, M. Debene, G. Teboul, "La déclaration des droits de l'homme et du citoyen de 1789", Economica, Paris, 1993, pp. 348-349.
[546]Decision no. 2013-370 QPC of 28 February 2014, § 13, Official Journal of 2 March 2014, p. 4120; decision no. 89-256 DC, 25 July 1989, Official Journal of 28 July 1989, p. 9501, Rec., p. 53; decision no. 81-132 DC of 16 January 1982, "Nationalisations", Official Journal of 17 January 1982, p. 299, Rec. , p. 18, §16.

autonomy of will of contracting parties, and the immutability of conventions must be regarded within the framework of limitations of general character which have been introduced by the anterior legislation, prior to the Constitution of 1958, to provide for certain necessary interventions of public authorities in contractual relations between individuals[547]. The constitutional judges, thus, acknowledged that, once established by law, public authorities may impose limitations on property rights of individuals. Such statements illustrate a tendency, prevalent in the past several decades, to weaken and to limit the right of property as a fundamental right. It can be observed that even after the decision of 16 July 1971 the Constitutional Council seems to continue to hold the line that certain limitations are compatible with the fundamental character of the right of property, and, therefore, with the Constitution, thus leaving discretion to the legislator to introduce restrictions to the exercise of the right of property under the condition that they do not interfere with the substance of the right[548].

As has been already stated in Chapter 3, although the constitutional protection of property has, for a long time, relied entirely on Article 17 of the Declaration, it proved to be insufficient, as this provision did not apply to cases of limitations of property as a less serious form of interference. So, it was Article 2 of the Declaration that was designated by the Constitutional Council, with definitive effect in the decision of 12 November 2010[549], laying down the duality of protection under Articles 2 and 17 of the Declaration, as a norm of reference for limitations of property, arguably with the view to keeping up with the scope of the property guarantee under the Convention. Thereby, the constitutionality of limitations is conditioned by the requirements of the general interest and proportionality between the gravity of interference and the general interest justifying the interference[550], and the Constitutional Council performs, like the ECHR, the same fair balance test enabling it to exercise a control equivalent to that of the ECHR. The test of proportionality seems to have

[547]Decision no. 59-1, FNR of 27 November 1959, pp. 71 ff; decision no. 61-4, FNR of 18 October 1961, Rec. 50.
[548]It is a constant jurisprudence since the decision of the Constitutional Council no. 83-162 DC, 19 and 20 July 1983, Rec., p. 49 ff.
[549]Decision no. 2010-60 QPC of 12 November 2010, Official Journal of 13 November 2010, p. 20237, Rec., p. 321.
[550]Decision no. 2014-411 QPC of 9 September 2014, §§ 12-14, Official Journal of 12 September 2014, p. 15020; decision no. 2014-409 QPC of 11 July 2014, § 3, Official Journal of 13 July 2014, p. 11816; decision no. 2014-406 QPC of 9 July 2014, § 4, Official Journal of 11 July 2014, p. 11613; decision no. 2014-394 QPC of 7 May 2014, § 10, Official Journal of 10 May 2014, p. 7873; decision no. 2014-691 DC of 20 March 2014, § 7, Official Journal of 26 March 2014, p. 5925; decision no.2013-369 QPC of 28 February 2014, §§ 8-11, Official Journal of 2 March 2014, p. 4119; decision no. 2011‑212 QPC of 20 January 2012, §§ 3 and 4;decision no. 2011-208-QPC of 13 January 2012, § 4; decision no. 2011-207-QPC of 16 December 2011;decision no. 2010-60 QPC of 12 November 2010, §§ 6 and 7.

replaced the control of the absence of denaturation of property requiring that limitations do not have such a grave character as to denature the meaning and scope of property[551]. The approximation of the constitutional standard of property protection to the European one is also apparent as regards the conditions of compensation for injury. The Council has integrated the criteria applied by the ECHR into its practice and has applied a principle whereby indemnity is not excluded in cases where the application of law caused a special and exorbitant burden which is disproportionate to the pursued public interest[552]. So, overall, it can be claimed that Article 2 of the Declaration represents an equivalent to the control of the use rule of P1-1.

Article 2 of the Declaration requires that proportionality between the gravity of interference and the general interest be given, meaning that the interference must not encroach upon the right of property more than is necessary for the achievement of the aim in the general interest. Gravity, or intensity of interference, is, thus, an important factor for it plays a double role. It is not only an important criterion in the assessment of proportionality, but it is also crucial for the ascertainment of the nature of interference, that is, for distinguishing between deprivations and limitations of property. It will be demonstrated that the criterion of gravity of interference plays the same crucial role in the practice of the ECHR as in the practice of both national constitutional jurisdictions under scrutiny.

1.3. Gravity of Interference in the Practice of the ECHR

The gravity of interference plays an important role in the assessment of whether a measure which produces serious consequences such as establishing a violation of P1-1 amounting to deprivation or to controlling the use of property. Although the ECHR has, on many occasions, qualified a measure that it found grave enough to violate P1-1 as falling within the scope of the control of the use rule, when no transfer of property takes place the gravity of interference is an important aspect in determining whether a *de facto* expropriation[553] or control of the use

[551]See, for example, decision no. 2000-434 of 20 July 2000.
[552]The Council relied on this criterion, for example, in decisions no. 2010-43-QPC of 6 October 2010; no. 2011-118-QPC of 8 April 2011; no. 2011-141-QPC of 25 June 2011; or no. 2011-201-QPC of 2 December 2011.
[553]The ECHR has been dealing with claims of *de facto* deprivations of property since the case of *Sporrong and Lönnroth v. Sweden*, 23 September 1982, § 63, Series A no. 52. In this case the ECHR had to decide whether expropriation permits and prohibitions on construction in respect of the applicants' land amounted to deprivation of property. It observed that the Swedish authorities did not proceed to expropriation of the applicants' property and that the applicants were entitled to use, sell, donate, or mortgage their property, though it was more difficult due to the imposed limitations. The ECHR found in this case that the owners had a reduced possibility of disposing of their property, and that although their right lost some of its substance, it did not disappear. In view of the fact that the owners could continue to utilise their property, the ECHR was of the opinion that the effects

is at stake, as the deprivation of property rule under the first paragraph of P1-1 is not limited only to cases of formal expropriation involving a transfer of the title to property, but also includes *de facto* deprivations presuming the absence of a transfer of the ownership title.

1.3.1. Gravity of Interference as an Indicator of Formal Deprivation of Possessions in the Practice of the ECHR

The essence of deprivation of property is a transfer of the ownership title and the extinction of the legal rights of an owner to the property. A deprivation of property, in the usual sense, denotes a *de iure* expropriation which strips the owner of all his proprietary rights to a thing. Although there is no reference to "expropriation" in the second sentence of the first paragraph of P1-1, which reads that: *no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law*, its wording shows clearly that it is intended to refer to formal expropriation in the public interest. This interpretation is confirmed by the *travaux préparatoires* for P1-1 as well as by the case-law[554]. The ECHR, like the Commission, have, specifically, considered that the object and purpose of P1-1 is, primarily, to guard against the arbitrary confiscation of property[555]. There may, however, be cases where the owner retains his legal title to property, but is, nevertheless, limited in disposition with it. The ECHR, therefore, distinguishes between a *de iure* and a *de facto* expropriation in its case-law which both come within the ambit of P1-1[556]. From the viewpoint of gravity of interference, a formal deprivation represents a more serious interference, as it involves a transfer of property. The lesser degree of gravity coincides with the qualification of *de facto* deprivations under the notion of limitation in Czech and French constitutional practice.

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of the measure in question were not such that they could be assimilated to deprivation of property. Therefore, the prohibitions on construction were found to amount to control of the use of property, and the expropriation permits which were only an initial step in a procedure leading to deprivation of possessions were to be examined under the first sentence of the first paragraph of P1-1. This case shows clearly the importance of the intensity of interference for the choice of the applicable rule under P1-1. Prohibitions on construction did not amount as to their gravity to expropriation permits.

[554]See, for example, *Bramelid and Malmström v. Sweden*, decision of 12 October 1982, DR 29, p. 64: "The second sentence of this [first] paragraph only aims at expropriation in the true sense".

[555]*The Sunday Times v. the United Kingdom (no. 1)*, 26 April 1979, § 48, Series A no. 30; *James and Others v. the United Kingdom*, 21 February 1986, § 42, Series A no. 98; *Brumărescu v. Romania* [GC], no. 28342/95, ECHR 1999-VII; *Jahn and Others v. Germany*, nos. 46720/99, 72203/01 and 72552/01, 22 January 2004; *Zagrebačka banka d.d. v. Croatia*, no. 39544/05, § 251, 12 December 2013.

[556]A definition of the concept of deprivation of possessions within the meaning of P1-1 given by Judge Pellonpää in the partly dissenting opinion in the Commission's report of 30 November 1993 in the case of *Air Canada v. the United Kingdom*: "Deprivation, whether it takes place through formal expropriation or other proceedings, or *de facto* by way of fundamental interferences with the owner's position, can be defined as the taking of property which is irreversible in the sense that there is no reasonable prospect of its return".

"Deprivation of possessions", within the meaning of P1-1, refers to expropriation[557] in the sense of a compulsory transfer of property rights to a public body for the purpose of public use, which, inevitably, also embodies nationalisations[558]. A transfer of property, which represents the most serious interference with property on the scale of gravity, entails a loss of all attributes of property[559], bringing about a loss of the title. *A contrario*, there is no transfer, and, consequently, no formal deprivation, if it is possible for the owner to hold some modes of exercise of property. Such was, for example, the case of *Tre Traktörer Aktiebolag*[560]. The ECHR found that as the applicant company, although it could no longer operate its restaurant business due to the withdrawal of a licence to serve alcoholic beverages, kept some economic interests represented by leasing the premises and the property assets contained therein, there was accordingly no deprivation of property in terms of P1-1. The withdrawal of the licence to serve alcoholic beverages was qualified as a measure of control of the use of property, for it had an important impact on the running of the restaurant business.

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[557]See, for example, *Pincock v. the United Kingdom*, decision of 19 January 1989, DR 59, p. 281, involving compulsory purchase of real estate for road construction; *Zubani v. Italy*, judgment of 7 August 1996, *Reports of Judgments and Decisions* 1996-IV, p. 1067, involving the taking of land with a view to the construction of low-cost and social housing; or *Tsomtsos and others v. Greece*, judgment of 15 November 1996, *Reports of Judgments and Decisions*1996-V, p. 1699, involving expropriation for a road project.

[558]*Lithgow and Others v. the United Kingdom*, 8 July 1986, Series A no. 102; *Străin and Others v. Romania*, no. 57001/00, ECHR 2005-VII; *Anea and Nitescu v. Romania*, no. 45924/06, 13 October 2009.

[559]Yet, not every loss of all the attributes automatically gives rise to a deprivation**.** It is, for example, in cases concerning the fiscal power of the states to levy taxes where the ECHR has held strictly that the states have the power to adopt laws that are necessary to secure the payment of taxes. J.-F. Flauss mentions that it seems that originally this clause was considered to be sufficient to leave the questions of the imposition of taxes outside the scope of application of the Convention, and, consequently, beyond the competence of the Convention bodies. J.-F. Flauss, "Fiscalité et droits substantiels garantis par la concention européenne des droits de l'homme", Petites affiches, 6 July 1994, no. 80, p. 15. But even though the states enjoy a wide margin of appreciation in the area of the excercise of fiscal administration, it does not mean that they are not obliged to fulfill the requirements of P1-1. Thus, for example, the ECHR held in the case of *Hentrich v. France*, 22 September 1994, Series A no. 296-A, that the states have a certain margin of appreciation to frame and organise their fiscal policies and make arrangements, such as the right to pre-emption, to ensure that taxes are paid, but that the excercise of the right of the state must not create an individual and excessive burden. In respecting the fiscal sovereignty of the states, the ECHR refers to the second paragraph of P1-1 on the control of the use of property, thus excluding any reference to deprivation of property, save when a case discloses an arbitrary confiscation. See also, for example, *Gasus Dosier- und Fördertechnik GmbH v. the Netherlands*, 23 February 1995, § 5, Series A no. 306-B; or *East West Alliance Limited v. Ukraine,* no. 19336/04, § 192, 23 January 2014. According to the ECHR, at the stage of drafting of P1-1when its second paragraph did not contain explicit reference to taxes, "it was already understood to reserve the States' power to pass whatever fiscal laws they considered desirable, provided always that measures in this field did not amount to arbitrary confiscation".

[560]*Tre Traktörer AB v. Sweden*, 7 July 1989, §§ 53-55, Series A no. 159. The ECHR found that the maintenance of the licence was one of the principal conditions for the continuance of the applicant company's business, and that its withdrawal had adverse effects on the goodwill and value of the restaurant. This case shows that "possessions" also include incorporeal economic interests such as goodwill or the clientele.

It implies that since a deprivation of property takes place when all the attributes of property are lost, no deprivation is at stake if the victim is not the owner, but only a holder of some patrimonial rights, which is illustrated by the case of *Iatridis v. Greece*[561]. Unlike the *Tre Traktörer* case, this case was not qualified as falling within the control of the use rule but within the first sentence of P1-1. The ECHR inferred that, in view of the fact that the applicant, who had a specific licence to operate a cinema he had rented and was evicted from without the possibility to regain possession of the cinema, held only the lease of his business premises, the interference neither amounted to expropriation, nor was it an instance of controlling the use of property, but came under the first sentence of the first paragraph of P1-1.

Although in most cases a deprivation of property under P1-1 involves a transfer of property from the private owner to the public body, the deprivation rule also covers a transfer between private parties. This concerns cases in which public bodies authorise a compulsory transfer of property between private parties in the public interest[562]. Furthermore, specific cases of deprivation of property through legislative measures are also considered under the deprivation rule[563], although whether the law gives rise to a deprivation of property may sometimes be a matter of interpretation of the law[564], provided that there is a sufficient causal nexus between

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[561] *Iatridis v. Greece* [GC], no. 31107/96, § 55, ECHR 1999-II.

[562] Such as, for example, in *James and others v. the United Kingdom,* 21 February 1986, Series A no. 98. The case concerned the long leasehold system of tenure in Engalnd and Wales. The applicants were trustees and substantial owners of residential property in London. They were deprived of their ownership of a number of properties through the excercise by the occupants of rights of purchase conferred by the Leasehold Reform Act 1967. This Act conferred on tenants residing in houses held on long leases the right to purchase the freehold of the house (the landlord's interest) subject to certain conditions. The applicants maintained that they had been deprived of their property. The Commission accepted that the transfer of property rights from an individual to another individual amounted to a deprivation of property. The ECHR came to the same conclusion as the Commission that a taking of property effected in pursuance of legitimate social, economic or other policies may be in the public interest, even if the community at large has no direct use or enjoyment of the property taken.

[563] Such as the above cited case of *Hentrich v. France*, 22 September 1994, Series A no. 296-A. The applicant bought a plot of land. The Commissioner of Revenue informed the applicant that because of the insufficient price paid he intended to excercise the right of pre-emption over the property. The Commissioner intended to take over the ownership of the property against payment of the purchase price increased by 10 per cent by way of indemnity. The applicant submitted that the pre-emption of her property amounted to a *de facto* expropriation. The ECHR held, without any further reasoning, that because the right of pre-emption was exercised the applicant had been deprived of her property within the meaning of the deprivation rule. It seems to have been decisive that the transfer of property was carried out on an arbitrary legal basis. In *The Holy Monasteries v. Greece*, 9 December 1994, § 61, Series A no. 301-A, a part of the monasteries' property was to be managed by a Church institution by virtue of law. The majority of members of the Church institution was to be appointed by the state. The law also provided that the state would become the owner of all monastery property unless the monasteries could prove their ownership by producing either a duly registered title deed or a final court decision against the state. The ECHR held that there had been an interference amounting to a deprivation of property. This case shows that arbitrary abuse of legislative power comes within the scope of the deprivation rule.

[564] This may be shown on the case of *The Holy Monasteries v. Greece*, 9 December 1994, § 61, Series A no. 301-A, in which the ECHR held that the relevant legislative provision regulating matters of Church property was "not

the legislation and the deprivation in order to constitute the state's responsibility for the property loss. Namely, if the legislation provides a framework for private law activities of individuals, it does not mean that a property loss due to such activities will be attributable to the state, as there must be a connection between the action of the state and the loss of property[565]. As deprivation of property, within the meaning of P1-1, is generically related to "expropriation" in international law, it falls under the rules of state responsibility according to which liability for deprivation presupposes an act attributable to the state and a sufficient causal connection between the act and the loss of property[566]. Notwithstanding that a state may also be held responsible for a property loss resulting from private law legislation if the legislation creates "such inequality that one person could be arbitrarily and unjustly deprived of property in favour of another"[567]. Accordingly, P1-1 does not cover interferences with property in the framework of private law relationships in which the state does not play any role, either an active or a passive role as the legislator. Likewise, where parties to a contract have agreed on a contractual provision allowing for deprivation of property under specific circumstances, the state does not have any obligation under the Convention to step into the private law relationship to prevent the deprivation.

In view of the aforementioned it follows that deprivation of possessions within the meaning of P1-1, in principle, entails a forcible transfer of all attributes of property notwithstanding whether the transfer takes place in the framework of a private or public law relationship, on condition that the state's liability is given. Accordingly, it involves a transfer of ownership from an individual to the state or a transfer from one private individual to another private individual provided that the transfer is regulated by a state authority.

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merely a procedural rule relating to the burden of proof but a substantive provision whose effect is to transfer full ownership of the land in question to the State".

[565]The Commission already emphasised this in the *Bramelid and Malmström v. Sweden*, decision of 12 October 1982, DR 29, p. 64.

[566]M. Pellonpää, "Reflections on the notion of "deprivation of possessions" in Article 1 of the First Protocol to the European Convention on Human Rights", in *Protecting human rights: studies in memory of Rolv Ryssdal*, Köln, 2000, p. 1094.

[567]See, for example, *Bramelid and Malmström v. Sweden,* decision of 12 October 1982, DR 29, p. 82; *Zagrebačka banka d.d. v. Croatia*, no. 39544/05, § 251, 12 December 2013.

1.3.2. Notion of *de facto* Deprivation of Possessions in the Practice of the ECHR

The approach of the ECHR in the absence of a transfer of property is that it is necessary to look beyond appearances and investigate the realities of the situation complained of[568]. In other words, it is necessary to ascertain whether, in the absence of a loss of all attributes of property, the situation amounts to a *de facto* dispossession, that is, whether the owner has lost all ability to use and dispose of his possessions without losing his property title in consequence of a measure affecting the substance of property or in spite of recovering his property title, or whether the owner, although absolutely prevented from using his property for intended purposes, nevertheless retains the possibility of a meaningful use of the property[569], by way of selling it or otherwise disposing of it, although under difficult conditions. In consequence, a partial depreciation in value of property would not give rise to a *de facto* expropriation, as shown, for example, in the case of *Mellacher and others v. Austria*[570]. The ECHR held the view that, in the absence of transfer of the right to use, let, mortgage, donate, or sell the property, legislation reducing rents did not amount to a formal or a *de facto* expropriation. Similar cases concern, for example, the inability to evict tenants in consequence of statutory extension of existing leases[571], in consequence of impossibility to enforce the order for possession[572], or in consequence of the impossibility of obtaining a

[568]See, for example, *Brumărescu v. Romania* [GC], no. 28342/95, ECHR 1999-VII; *Jahn and Others v. Germany*, nos. 46720/99, 72203/01 and 72552/01, 22 January 2004.

[569]Property was found not to have been left without any meaningful use, for example, in *Pine Valley Developments Ltd and Others v. Ireland*, 29 November 1991, § 56, Series A no. 222; *Fredin v. Sweden (no. 1)*, 18 February 1991, Series A no. 192; or *Terazzi S.r.l. v. Italy*, no. 27265/95, 17 October 2002.

[570]*Mellacher and Others v. Austria*, 19 December 1989, Series A no. 169. See also *Fleri Soler and Camilleri v. Malta*, no. 35349/05, § 59, ECHR 2006-X, in which the ECHR stated that "the measures taken by the authorities were aimed at subjecting the applicants' property to a continued tenancy rather than at taking it away from them permanently. Therefore, the interference complained of cannot be considered as a formal or even *de facto* expropriation, but constitutes a means of State control of the use of property". Or *Lindheim and Others v. Norway*, nos. 13221/08 and 2139/10, §§75-77, 12 June 2012, which concerned limitations imposed by law on the level of rent that the applicant property owners could demand from the lease holder and the indefinite extension of the lease contract on the same terms, in which the ECHR considered that the low level of annual rents and the indefinite duration of the impugned rent limitation interfered to a very significant degree with the applicants' enjoyment of their possessions. It was not persuaded that there was expropriation or de facto expropriation, or that "all meaningful use" had been taken away.

[571]*Spadea and Scalabrino v. Italy*, 28 September 1995, Series A no. 315-B; *Scollo v. Italy*, 28 September 1995, Series A no. 315-C.

[572]*Immobiliare Saffi v. Italy* [GC], no. 22774/93, ECHR 1999-V. In order to deal with the chronic housing shortage, the Italian government adopted a series of emergency measures designed to control rent increases and to extend the validity of existing leases. When the last statutory extension expired, the Italian state considered it necessary to resort to emergency provisions to suspend the enforcement of non-urgent orders for possession. The applicant company submitted that its apartment had been expropriated *de facto*, since, even if it would theoretically have been possible for it to sell the apartment, it could not have done so at market value as in practice apartments with sitting tenants sold at approximately 30%-40% less than vacant apartments. It added that its rent receipts had been low, as the tenancy had been regulated by law. The ECHR noted that in this case

judgment upon termination of lease[573]. In those cases the ECHR found that there was neither a *de facto* expropriation, nor a transfer of property, for the applicants retained the possibility of alienating their property and were paid rent regularly.

Accordingly, the fact that the gravity of interference does not reach such intensity as to strip the owner of all the possibilities to dispose of his property, together with the absence of a transfer of property rights, is a key element of distinguishing between a control of the use and a deprivation of property. In other words, the interference must not entail a total loss of the substance of property[574]. It can be induced *a contrario* that only when the restrictive measure is of such severity that the owner cannot make any sensible use of his property, or when it, in effect, destroys the substance of the right of property, it amounts to a *de facto* or, eventually, to a formal expropriation[575].

The ECHR has been dealing with claims of *de facto* deprivations of property since the decision in the case of *Sporrong and Lönnroth*[576] in 1982. In this case the ECHR had to decide whether expropriation permits and prohibitions on construction in respect of the applicants' land amounted to deprivation of property. It observed that the Swedish authorities did not proceed to expropriation of the applicants' property and that the applicants were entitled to use, sell, donate, or mortgage their property, though it was more difficult due to the imposed limitations. The ECHR found, in this case, that the owners had a reduced possibility of disposing of their property, and that although their right lost some of its substance, it did not disappear. In view of the fact that the owners could continue to utilise their property, the ECHR was of the opinion that the effects of the measure in question were not such that they could be assimilated to deprivation of property. Therefore, the prohibitions on construction were found to amount to control of the use of property, and the expropriation permits which were only an initial step in a procedure leading to deprivation of possessions were to be examined under the first sentence of the first paragraph of P1-1.

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there was neither a *de facto* expropriation nor a transfer of property, as the applicant company was at no stage deprived of the right to let or to sell the property.

[573] *Velosa Barreto v. Portugal*, 21 November 1995, Series A no. 334.

[574] For example, in the case of *Sporrong and Lönnroth v. Sweden*, 23 September 1982, § 63, Series A no. 52, the ECHR held that although the right in question lost some of its substance, it did not disappear, and consequently the effects of the measures were found not to be of such gravity that they could be assimilated to a deprivation.

[575] See *Gillow v. the United Kingdom*, application no. 9063/80, report of the Commission of 3 October 1984, § 89.

[576] *Sporrong and Lönnroth v. Sweden*, 23 September 1982, § 63, Series A no. 52.

If the *Sporrong and Lönnroth* case involved the first claim of a *de facto* deprivation of property, the case of *Papamichalopoulos*[577]was the first one in which *de facto* expropriation was established. The applicants were owners of a plot of land that was occupied by the Greek Navy at the time of a dictatorship in Greece. After democracy was restored in Greece, the Greek authorities recognized the applicants' title to the land, but ordered that other land of equal value be given to them. Although the land had never been formally expropriated, the applicants were unable either to make use of their property, or to sell, bequeath, mortgage or make gift of it and they did not receive any compensation. The ECHR, thus, found that the loss of all ability to dispose of their land, taken together with the failure of the attempts made to remedy the situation, entailed sufficiently serious consequences for the applicants to have been *de facto* expropriated in a manner incompatible with their rights to the peaceful enjoyment of their possessions. The ECHR came to the same conclusion, for example, in the case of *Vasilescu v. Romania*[578] which concerned the seizure of gold coins and other jewellery, without a warrant, by the police during a police search of the applicant's house. The police kept the seized items and the applicant was unable to recover them through legal proceedings, despite the police action being recognized as unlawful by the state authorities. The applicant, although deprived of the use and enjoyment of the items, did not cease to remain their legal owner. The loss of all ability to dispose of the property in issue, taken together with the failure of attempts made so far to have the situation remedied, had entailed sufficiently serious consequences for it to be held that there had been a *de facto* deprivation of property. As an example of *de facto* expropriation after the recovery of the ownership title can also serve restitution of property cases brought before the ECHR against some of the post-communist states. In those cases the national courts found that expropriation taking place during the communist regime was unlawful and, accordingly, that the applicant's proprietary title was still valid, but they refused to order restitution of property[579].

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[577]*Papamichalopoulos and Others v. Greece*, 24 June 1993, Series A no. 260-B.

[578]*Vasilescu v. Romania*, 22 May 1998, § 53, *Reports of Judgments and Decisions* 1998-III.

[579]See, for example, the case of *Zwierzyński v. Poland*, no. 34049/96, ECHR 2001-VI; or *Străin and Others v. Romania*, no. 57001/00, ECHR 2005-VII. A specific case in this group of cases represents *Brumărescu v. Romania* [GC], no. 28342/95, ECHR 1999-VII, in which the recognised ownership title was later taken away from the applicant. On the facts, the applicant's parents' house was nationalised without the payment of compensation. The nationalisation decision was later held by the court to have been unlawful. The applicant regained possession of the house. The Supreme Court of Justice of Romania quashed the judgment declaring the nationalisation unlawful on the ground that the house had passed into state ownership on the basis of law. Thereupon, the tax authorities informed the applicant that the house would be reclassified as state property. The ECHR found that the judgment of the Supreme Court had amounted to interference with the applicant's right of property and that it fell under the deprivation rule, for the effect of the judgment had been to deprive the applicant of ownership of the house. This case has demonstrated that a violation of legal certainty is an important factor in deciding on the applicability of the deprivation rule. See, for example, similar cases of *Vasiliu v.*

So, the lesser gravity of *de facto* deprivations compared with formal deprivations lies in the absence of a transfer of the title. But what makes them more serious than a control of the use of property is the factor of irreversibility.

1.3.2.1. Irreversibility

Apart from the loss of all possibilities of disposing of property the ECHR has further defined another qualification, or a threshold criterion, of *de facto* deprivation embodying the irreversibility, or definitiveness, of the situation in *Matos e Silva, Lda. and others v. Portugal*[580]. It appears that the standard for the evaluation as to when an interference amounts to *de facto* expropriation, based on the criterion of irreversibility, is similar to that applied in general international law[581]. The *Matos e Silva* case indicates that in the absence of irreversibility of the situation, the first sentence of the first paragraph of P1-1, embodying the principle of peaceful enjoyment of property, comes into play[582]. The application of this rule seems to be pertinent, as it prevents states from seeking to raise a defence under the deprivation rule, so avoiding the application of P1-1, that by virtue of the disputed state action the owners were not *de iure* or *de facto* durably deprived of their ownership title.

It seems that for the ECHR the factor of irreversibility, or definitiveness, of a transfer of property plays an essential role in the process of assessment of the existence of formal or *de facto* expropriation. A temporary transfer of property rights was not considered by the ECHR to amount to a deprivation of property, for example, in several Austrian land consolidation

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Romania, judgment of 21 May 2002, or *Gheorghiu v. Romania*, judgment of 17 December 2002, in which the applicant lost the possibility to dispose of his property implying the loss of all ability to use his property.

[580]*Matos e Silva, Lda., and Others v. Portugal*, 16 September 1996, § 85, *Reports of Judgments and Decisions* 1996-IV. The ECHR did not find the applicant's position irreversible, as the restrictions on the right to property stemmed from the reduced ability to dispose of the property and from the damage sustained by reason of the fact that expropriation was contemplated. Thus, although the right in question had lost some of its substance, it had not disappeared. The ECHR found that "all reasonable manner of exploiting the property had not disappeared seeing that the applicants continued to work the land".

[581]M. Pellonpää, "Reflections on the notion of "deprivation of possessions" in Article 1 of the First Protocol to the European Convention on Human Rights", in *Protecting human rights: studies in memory of Rolv Ryssdal*, Köln, 2000, p. 1100. The author submits an example of the Iran-United States Claims Tribunal which stated that the conclusion of expropriation was "warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral". *Tippetts, Abbett, Mscarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, award no. 141-7-2 of 22 June 1984, 6 Iran-U.S. Claims Tribunal Reports (1984-II), p. 219, p. 225.

[582]From more recent case-law see, for example, *Tsirikakis v. Greece*, no. 46355/99, § 55, 17 January 2002; or *Assymomitis v. Greece*, no. 67629/01, § 51, 14 October 2004.

cases[583]. Whereas the loss of all ability to dispose of the land in issue, taken together with the failure of the attempts made so far to remedy the situation complained of, entailed sufficiently serious consequences for the applicants *de facto* to have been expropriated in *Papamichalopoulos and others v. Greece*[584]or in *Vasilescu v. Romania*[585]. It can, therefore, be suggested that both formal and *de facto* deprivation of possessions under P1-1 have common criteria: the forcible loss of all attributes of property, either *de iure* or *de facto*, and the definitiveness and irreversibility of such a loss. This double method of evaluation does not quite match up with the practice of Czech and French constitutional jurisdictions which, as will be shown hereinafter, do not appear to consider the factor of irreversibility in the assessment of interferences with property, and which do not tend to treat interferences amounting to a *de facto* deprivation of property under the deprivation of property guarantee. Hence, from the comparative aspect the use of the material criterion of irreversibility, or definitiveness, of the loss of all attributes of property by the ECHR appears to represent a more restrictive approach to the notion of deprivation.

1.4. Gravity of Interference in Czech Constitutional Practice

In Czech constitutional practice it is apparent that the gravity of interference also plays a significant role in determining whether a restrictive measure amounts to a *de facto* deprivation of possessions. From the classification viewpoint, however, it seems that *de facto* deprivation is considered rather as a form of forced limitation of property than as a form of deprivation. Namely, according to the Constitutional Court, forced limitations of property, which may embody many factors, such as, and in particular, the extent and the duration of the limitation[586], are of two kinds:

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[583]*Erkner and Hofauer v. Austria*, 23 April 1987, Series A no. 117; *Poiss v. Austria*, 23 April 1987, Series A no. 117. See also *Gasus Dosier- und Fördertechnik GmbH v. the Netherlands*, 23 February 1995, § 59, Series A no. 306-B; *Air Canada v. the United Kingdom*, 5 May 1995, § 33, Series A no. 316-A; *Beyeler v. Italy* [GC], no. 33202/96, § 106, ECHR 2000-I; *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, § 142, ECHR 2005-VI; or *J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. the United Kingdom* [GC], no. 44302/02, §§ 64-66, ECHR 2007-III.

[584]*Papamichalopoulos and Others v. Greece*, 24 June 1993, § 45, Series A no. 260-B.

[585]*Vasilescu v. Romania*, 22 May 1998, § 53, *Reports of Judgments and Decisions* 1998-III.

[586]The Constitutional Court expressed an opinion that "if an interference with property lasted disproportionately long, it would be a disproportionate interference with property", and that "the lapse of time diminishes the legitimity of limitation of fundamental rights for the public interest", decision no. IV. ÚS 2564/09 of 5 January 2010. See also judgment no. Pl. ÚS 3/2000 of 21 June 2000, published under no. 231/2000 Sb.; judgment no. Pl. ÚS 8/02 of 20 November 2002, published under no. 528/2002 Sb.; judgment no. ÚS 689/05 of 12 December 2004; or opinion of the plenum of the Constitutional Court no. Pl. ÚS-st. 27/09 of 28 April 2009, no. 136/2009 Sb.

1) Limitations which necessitate the owner to sustain the use of property in a state of emergency or in the pressing public interest for a requisite period of time and to a requisite extent if there are no other means of attaining the purpose of limitation of ownership;

2) Limitations where the purpose of which is identical with the purpose of expropriation. It concerns those cases in which the purpose of expropriation can be attained only by restriction of ownership, which implies that ownership cannot be taken away completely. This kind of forced limitation apparently involves a significant restriction of the right to dispose of one's property amounting to a *de facto* expropriation that practically disables the owner to use and dispose of his property, such as forced easements[587].

1.4.1. Gravity and the Nature of Interference

According to this classification, both prohibitions on construction and expropriation permits that were issued in the *Sporrong and Lönnroth* case, for example, would qualify as forced limitations and not as *de facto* deprivation of property. From the point of view of the text of the Charter this makes little difference, as the Charter sets out the same conditions of constitutionality for deprivations and forced limitations of property, while P1-1 differentiates between a deprivation and a control of the use of property in that it lays down stricter requirements for deprivations. By all means, forced limitations must preserve the substance and significance of fundamental rights and freedoms and must not be misused for purposes other than those for which they were enacted[588]. Meticulously observing the Constitution, the Constitutional Court has on many occasions reiterated that ownership can be limited only by law and under conditions set forth in the Charter[589] and only to such extent in which the substance of ownership is not violated, as "ownership cannot become a mere peel deprived of content" and the prohibition of discrimination under Article 4 para. 3 of the Charter must be respected[590].

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[587]Judgment no. Pl. ÚS 15/96 of 9 October 1996, published under no. 280/1996 Sb.
[588]Forced limitations of property must fulfill the conditions of Article 4 para. 4 of the Charter according to which: "When employing the provisions concerning limitations upon the fundamental rights and freedoms, the substance and significance of these rights and freedoms must be preserved. Such limitations shall not be misused for purposes other than those for which they were enacted". See, in this regard, judgment no. Pl. ÚS 34/03 of 13 December 2006, published under no. 49/2007 Sb.
[589]According to Article 4 para. 2 "Limitations may be placed upon the fundamental rights and basic freedoms only by law and under the conditions prescribed in this Charter of Fundamental Rights and Basic Freedoms".
[590]Judgment no. 20/05 of 28 February 2006, published under no. 252/2006 Sb.

In this context a question may be posed whether there are any consequences of the qualification of *de facto* deprivations as forced limitations of property? From a formal point of view it does not seem that there are any, because if we compare the requirements of constitutionality for forced limitations and the requirements of conventionality for deprivations of property, they are the same for both interferences, that is, they must be provided for by law, be in the public interest, and be compensated. Article 11 para. 4 of the Charter reads as follows*: Expropriation or forced limitation of ownership is permitted in the public interest, on the basis of law, and for compensation.*

But if we regard the material aspect, the uniformity is only a seeming one. The point of difference lies in the scope of the entitlement to compensation, not to say the amount of compensation, which, pursuant to Czech constitutional practice, is not the same for forced limitations and deprivations of property. This practice, which bears upon the gravity of interference, has been consecrated by the ECHR. The latter has recognised the role of superior national courts in determining the substantive or procedural characterisation given to property restrictions, and specified that the starting-point must be the provisions of the relevant domestic law and their interpretation by domestic courts[591]. Moreover, if the superior national courts analyse, in a comprehensive and convincing manner, the precise nature of the restriction, on the basis of the relevant Convention case-law and principles drawn therefrom, the ECHR has stated that it would need strong reasons to differ from the conclusion reached by those courts by substituting its own views for those of the national courts on the question of interpretation of domestic law[592]. This means that the ECHR acknowledges the national courts' qualification of a measure interfering with property under national law. Such an approach of the ECHR is an example of the evolutive interpretation of the Convention in the framework of a dialogue between national legal systems and the Convention system which is conducive to ensuring a high standard of protection of human rights in Europe.

Another aspect of this classification is that if a restriction of property does not fall within any of the two kinds of limitations comprising the notion of forced limitation, the restriction would lay outside the protection of Article 11 para. 4 of the Charter and, consequently,

[591] *Masson and Van Zon v. the Netherlands*, judgment of 28 September 1995, Series A no. 327-A, p. 19, § 49; *Roche v. the United Kingdom*, application no. 32555/96, 19 October 2005, § 120.
[592] *Roche v. the United Kingdom*, application no. 32555/96, 19 October 2005, § 120.

outside the constitutional duty to award compensation, as in the Charter there is no such "catch-all" general rule as the first norm of P1-1.

Furthermore, it can be claimed that since a *de facto* deprivation of property falls within the notion of forced limitation, and there is no general norm the application of which significantly depends on the criterion of gravity of interference, the role of the gravity criterion in the Czech constitutional practice is limited to a distinction between a forced limitation and a deprivation of property, whereas in the practice of the ECHR it is a factor that may tilt the scales in favour of either a formal deprivation, *de facto* deprivation, control of the use, or interference with the peaceful enjoyment of possessions. It thus seems that, in the practice of the ECHR, the factor of gravity of interference has a wider application. Consequently, it can be argued that, for the ECHR, the gravity of interference is not only a significant factor to distinguish limitations and deprivations of property, but also to decide between formal and *de facto* deprivations.

All in all, it appears that the Czech notion of forced limitations embraces limitations of property of a different degree of intensity. Seen from the perspective of P1-1, the notion of forced limitations thus comprises a control of the use of property, *de facto* deprivation of possessions, as well as situations which the ECHR qualifies as interferences with the peaceful enjoyment of possessions.

From the viewpoint of irreversibility it can be suggested that, since the notion of *de facto* deprivation of property, within the meaning of the terminology used by the ECHR, falls within the notion of limitation under Czech, and as will be seen also French, constitutional practice, there are two kinds of constitutionally guaranteed limitations: those that are reversible and those amounting to *de facto* deprivation that are irreversible. It implies, at the same time, that the criterion of irreversibility of the loss of all attributes of property is not an indicative criterion for the determination of whether the deprivation or limitation rule in the Czech Charter, or the French Declaration, be applied, which contrasts with the practice of the ECHR that takes the issue of irreversibility as one of the characteristic indicators of the notion of deprivation of possessions. Moreover, the criterion of irreversibility of the situation may lead to broader application possibilities in the practice of the ECHR, as the latter can, unlike the national constitutional jurisdictions, avail not only of the control of the use rule, but also

of the general rule of P1-1. This fact may account for irreversibility finding its justification in the ECHR's practice, while in constitutional practice it seems to be a marginalized factor.

But there are, nevertheless, specific cases in which the issues of gravity and irreversibility lose ground, no matter how the cases may embody all signs of a deprivation, and as regards which a convergence in the approach of the ECHR and the Czech constitutional body can be observed. These specific cases of confiscation of illicit property, or property that is dangerous for the public, represent an exception of the rule that the definitive character of the loss of all attributes of property leads to the subsumption of such interference under the deprivation rule, and show that, although a transfer of property is a hallmark of deprivation, the ECHR may consider it also as a part of control of the use of property[593].

1.5. Gravity of Interference in the French Constitutional Practice

The Constitutional Council has often availed of the criterion of gravity of interference in connection with denaturation of the substance of property. In its constant practice it has held that interference with the right of property does not have a grave character insofar as it does not denature the meaning and the scope of the latter, and, therefore, is not contrary to the Constitution[594]. Hence, it has measured the level of gravity of interference by the potentiality of denaturation of the substance of the right.

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[593]It concerns, for example, cases involving confiscation as a penal or preventive measure or cases involving taxes, penalties and contributions, provided that the confiscation is not arbitrary. The seizure of property in connection with the commission of a criminal offence was the subject-matter, for example, in *Air Canada v. the United Kingdom*, 5 May 1995, Series A no. 316-A, which involved a seizure of an aircraft as liable to forfeiture for reason of carrying prohibited drugs in one of its containers. The applicant was obliged to pay a fine in return of the aircraft. The ECHR considered that the seizure did not involve a deprivation of property but a temporary restriction on the use not involving a transfer of ownership. The release of the aircraft subject to payment was a measure taken in view of preventing aircrafts from bringing prohibited drugs in the United Kingdom. The seizure amounted to a control of use of property. In the case of *Phillips v. the United Kingdom*, no. 41087/98, § 51, ECHR 2001-VII, the applicant was convicted of being involved in the importation of cannabis resin. On the basis of a confiscation order he had to pay a sum assessed by the national judge to amount to the proceeds of drug trafficking. The ECHR held that the confiscation order constituted a "penalty" and therefore fell within the scope of the second paragraph of Article 1 of Protocol No. 1, which, inter alia, allows the Contracting States to control the use of property to secure the payment of penalties. See also *Paulet v. the United Kingdom*, no. 6219/08, § 64, 13 May 2014.

[594]Decision no. 84-172 DC of 26 July 1984, Rec., p. 58, § 3. In decision no. 85-189 DC of 17 July 1985, Official Journal of 19 July 1985, Rec., p. 49, § 9, the Constitutional Council assimilated denaturation of property to the loss of the right to dispose: "par la perte de la libre disposition du bien, la propriété est démembrée et, par voie de conséquence, dénaturée". See further, for example, decision no. 98-403 DC of 29 July 1998, Official Journal of 31 July 1998, p. 11710, § 7, Rec., p. 276. This decision concerned the possibility of every person to dispose of a decent accommodation as one of the objectives of constitutional value. According to the Constitutional Council, the legislator may for this purpose limit the right of property as he sees fit, but provided that the limitation does not have a grave character so that the meaning and the scope of this right are not denatured: "s'il appartient au législateur de mettre en oeuvre l'objectif de valeur constitutionnelle que constitue la possibilité pour toute

Thereby, the criterion of gravity permits the Council to distinguish encroachments on property which denature, or interfere with the substance of the right, from those which prove to be "simply limiting", though defining denaturation is rather difficult a task. Denaturation of the right of property may be considered as the withdrawal of two essential prerogatives – use and disposition[595], in which case it would amount to deprivation. In any event, the question as to the point from which limitations can be considered serious so as to be able to fulfil the criterion of denaturation of the meaning and scope of the right of property is dealt with by the Constitutional Council on a case-by-case basis since the first reference to limitations denaturing the meaning and the scope of the right of property in the decision of 26 July1984[596].

When it comes to the question of whether denaturation of the right of property could be considered comparable to deprivation of property, the theory is not unanimous. Some scholars deem that denaturation is equivalent to deprivation. For instance, S. Pavageau claims that limitations which denature the meaning and the scope of the right of property vary on a scale of seriousness from deprivations to simple restrictions[597], whereas, for example, according to H. Pauliat, a serious restriction is deprivation to which Article 17 of the Declaration is applicable[598]. This approach, though, then brings about the question as to what degree of seriousness denaturation can be considered as deprivation. Other scholars, such as F.

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personne de disposer d'un logement décent, et s'il lui est loisible, à cette fin, d'apporter au droit de propriété les limitations qu'il estime nécessaires, c'est à la condition que celles-ci n'aient pas un caractère de gravité tel que le sens et la portée de ce droit en soient dénaturés". See also a decision no. 2000-434 DC of 20 July 2000, Rec., p. 107, §24, which concerned the right to chase as an attribute of the right of property - the right to use ("le droit de chasse sur un bien foncier se rattache au droit d'usage de ce bien, attribut du droit de propriété"). According to the Constitutional Council, the exercise of this right can be limited provided that two conditions are met: the limitations must be required by the general interest and they cannot have a grave character as to denaturate the meaning and the scope of the right of property. In decision no. 2011-169 QPC of 30 September 2011, Official Journal of 1 October 2011, p. 16527, text. no. 109, § 8, the Constitutional Council dealt with limitations of the right of property introduced by the legislator with a view to protecting an objective of constitutional value – the right of everyone to decent accommodation; it stated that the legislator was free to introduce limitations of the right of property which he deemed necessary on condition that they were not grave enough so as to denature the meaning and the scope of this right. In decision no. 2011-193 QPC, Official Journal of 11 November 2011, p. 19010, § 7, the Council held that:"the restriction of the exercise of the right of property by the contested provision does not have a character of gravity which would denature the meaning and the scope of the right".

[595]S. Pavageau, "Le droit de propriété dans les jurisprudences suprêmes françaises, européennes et internationales", LGDJ, 2006, p. 280.

[596] Decision no. 84-172 DC, Official Journal of 28 July 1984, p. 2496, Rec., p. 58.

[597]S. Pavageau, "Le droit de propriété dans les jurisprudences suprêmes françaises, européennes et internationales", LGDJ, 2006, p. 283.

[598]H. Pauliat, "Le droit de propriété dans la jurisprudence du Conseil constitutionnel et du Conseil d'État", PULIM 1994, pp. 48-49.

Biglione, are of the opinion that deprivation and denaturation seem to be of a different nature[599]. Which opinion adheres to the Constitutional Council?

The Constitutional Council seems to have approved the first view in a decision concerning the autonomous status of French Polynesia[600], in which it sanctioned denaturation of the right of property by virtue of Article 17 of the Declaration when it assimilated the denaturation of property to its deprivation. When dealing with a discretionary authorisation scheme prior to all property transfer transactions, where no grounds of the general interest on which the Council of Ministers was to base its decisions were given, the Constitutional Council held that the authorisations imposed restrictions on the freedom to dispose of property which was an intrinsic component of property rights, and that the restrictions were so serious that the resultant violation of property rights altered the nature of the right safeguarded by Article 17 of the Declaration. This decision does not embody any element that would be susceptible of providing guidance concerning the constitutional conception of denaturation of the right of property, and so it follows that the qualification of the interfering measure by the Constitutional Council is essential. It can be perceived that the Constitutional Council examined two criteria: whether the measure constituted a deprivation of property, and the related degree of interference from the point of view of its gravity. This decision indicates that the Constitutional Council used the criterion of gravity of interference with the right to dispose to rule on the measure amounting to a deprivation of property.

From subsequent jurisprudence it also appears that the Council uses the criterion of gravity to identify the nature of the measure in question. The essential question is whether the measure dispossesses the owner of his property. So, for example, in a decision on the Law against Social Exclusions the Council assimilated a diminution of property to a *de facto* deprivation of property. The decision concerned the question of constitutionality of a new procedure of acquisition of real estate under this law which imposed on a creditor an obligation to be declared the successful bidder at a fixed price. Even if there was no bid, the creditor became automatically and definitively the owner of the real estate at the price determined by the court. According to the Constitutional Council, this procedure constituted a measure of depriving property in that the creditor could be awarded the real estate for a price superior to that which

[599]F. Biglione, "La notion de privation de propriété, Étude relative à la propriété immobilière", PUAM 1999, p. 392.
[600]Decision no. 96-373 DC, 9 April 1996, Official Journal of 13 April 1996, p. 5724, Rec., p. 43.

he would have paid voluntarily. This intervention in the principle of free consent which governed the acquisition of property induced, according to the Council, that the creditor was susceptible to bear a diminution of his property similar to a deprivation, without the public necessity requiring it and without the possibility for the incumbent to claim compensation[601]. It can be perceived that the Council's assessment as to the nature of the interference in question differs from the assessment of the ECHR in similar cases, as the ECHR does not consider a diminution of property caused by the state's intervention in the voluntary price setting to amount to a *de facto* deprivation, since the incumbent retains the possibility of alienating his property, which, in this case, would be the property the creditor acquired in the judicial sale.

1.5.1. Gravity and the Nature of Interference

A decision of 12 November 2010, in which the Constitutional Council established, with definitive effect, that Article 2 of the Declaration be the reference provision for limitations of property, seems to mark a turning point for the criterion of gravity which appears to be switching from the benchmark in the assessment of denaturation[602] to a component in a test of proportionality, together with the general interest. Namely, the Constitutional Council held that, in view of the fact that the motif of the general interest was given, the general interest was proportionate to the objective set by the legislator, and that the right to claim damages was guaranteed, the restriction of the right of property did not have so grave a character to denature the meaning and the scope of the right[603]. The gravity of the interference also played a role in the assessment of the nature of the interference - the fact that the owner could exercise all the attributes of the right of property did not call into question a deprivation of property under Article 17 of the Declaration[604]. So, it seems that the control of the absence of denaturation of the right of property has given way to the test of proportionality in the control

[601]Decision no. 98-403 DC, 29 July 1998, Official Journal of 31 July 1998, p. 11710, Rec., p. 276, § 41: "au cas où le créancier devrait revendre ce bien à la suite de l'acquisition à laquelle il a été contraint et où, en raison de la situation du marché immobilier, la valeur de revente serait inférieure à la valeur fixée par le juge, il subirait une diminution de son patrimoine assimilable à une privation de propriété, sans qu'aucune nécessité publique ne l'exige évidemment et sans possibilité d'indemnisation".

[602]The absence of denaturation was replaced by a control of proportionality in many antecedent decisions such as, decision no. 2000-436 DC of 7 December 2000, Official Journal of 14 December 2000, p. 19840, Rec., p.176.

[603]Decision no. 2010-60 QPC of 12 November 2010, Official Journal of 13 November 2010, p. 20237, Rec., p. 321, § 6.

[604]Decision no. 2010-60 QPC of 12 November 2010, Official Journal of 13 November 2010, p. 20237, Rec., p. 321, § 5: "Si ... le propriétaire ... continue à exercer sur son bien tous les attributs du droit de propriété, dès lors, en l'absence de privation de ce droit, l'accès à la mitoyenneté autorisé par le texte en cause n'entre pas dans le champ d'application de l'article 17 de la Déclaration de 1789".

under Article 2 of the Declaration[605], and that it is no more necessary to assess whether the right of property was denatured, and, thus, dispossessed[606].The Constitutional Council has ruled on many occasions that, in the absence of a deprivation of the right of property within the meaning of Article 17 of the Declaration, it implies from Article 2 of the Declaration that interferences with property must be justified by the general interest and be proportionate to the objective sought[607].

It follows from the constitutional case-law that, similar to Czech constitutional practice, but unlike the practice of the ECHR, *de facto* deprivations fall within the scope of the constitutional norm that is applicable to limitations and not to deprivations of property. It is, thus, Article 2 of the Declaration which applies to both limitations and *de facto* deprivations of property. The Constitutional Council has specifically stated that Article 17 of the Declaration does not apply to servitudes in the public interest. In particular, in its decision of 13 December 1985[608], which concerned the installation of transmitters and related equipment by a public broadcaster on buildings in private and public ownership, the Constitutional Council ruled that these servitudes in the public interest did not amount to deprivation of property within the meaning of Article 17 of the Declaration since they did not deprive the property in question of its content or represent an impediment in the exercise of rights and freedoms guaranteed by the Constitution.

The Constitutional Council has upheld this approach in its recent jurisprudence. For example, a right of way which can be established, pursuant to the Forestry Code, by the state in its favour, or in favour of another public body, a group of local public bodies or a trade union association to ensure continuity in fire prevention routes, the continuing existence of established routes, as well as the establishment of forest protection and monitoring facilities, did not lead, according to the Constitutional Council, to a deprivation of property within the

[605]P. Wachsmann, "La transposition en droit constitutionnel français de l'économie de l'article 1er du Protocole additionnel", in *Cohérence et impact de la jurisprudence de la Cour européenne des droits de l'homme. Liber amicorum Vincent Berger*, (eds.) L. Berg, M. Enrich Mas, P. Kempees, D. Spielmann, Wolf Legal Publishers, 2013, p. 452.
[606]This approach was confirmed in later decisions. For example, in decision no. 2011-141 QPC of 24 June 2011, Official Journal of 25 June 2011, p. 10842, Rec., p. 304; or decision no. 2011-209 QPC of 17 January 2012, Official Journal of 18 January 2012, p. 1014, Rec., p. 81.
[607]See, for example, decision no. 2011-208 QPC of 13 January 2012, Official Journal of 14 January 2012, Rec., p. 75, § 4; decision no. 2011-209 QPC of 17 January 2012, Official Journal of 18 January 2012, Rec., p. 81, § 4; decision no. 2011-212 QPC of 20 January 2012, Official Journal of 21 January 2012, Rec., p. 84, § 3.
[608]Decision no. 85-198 DC of 13 December 1985, Official Journal of 14 December 1985, p. 14574, Rec., p. 78, §9.

meaning of Article 17 of the Declaration[609]. Likewise, a plan for the prevention of foreseeable natural risks provided for in the Code of the Environment, which was earmarked by the Constitutional Council as servitude of a public utility, was assessed in the framework of Article 2 of the Declaration, and, thus, against the requirements of the objective of public security, proportionality between the objective pursued and the interference with the enjoyment of the right property, as well as against the procedural safeguards and the guarantee of compensation[610]. As regards the latter, the Constitutional Council reiterated that the award of compensation for servitudes in the public interest was connected with the existence of a disproportionate burden when it declared that the legislator did not exclude indemnisation in exceptional cases in which the owner was to bear a "special and exorbitant burden, out of proportion with the objective in the general interest sought"[611].

What are the implications of the fact that *de facto* deprivations of property do not fall within the scope of application of Article 17 of the Declaration but fall under the limitation norm? As has already been stated, as in the Czech case, the consequences lie in the entitlement to compensation. The right to indemnisation for such restrictions of property does not rest on Article 17 of the Declaration, that is, on the unconditional entitlement to a just and advance compensation, but implies from the principle of the equality of citizens before the public burdens (*le principle d'égalité devant les charges publiques*)[612]. It means that the right to compensation, including its advance payment, is not automatically guaranteed[613]. The principle of equality before the public burdens comes into play when public authorities impose on an individual an excessive burden in the general interest which would not be normally incumbent upon him[614]. Hence, the right to compensation is not guaranteed in all circumstances.

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[609]Decision no. 2011-182 QPC of 14 October 2011, Official Journal of 15 October 2011, p. 17465, § 5.
[610]Decision no. 2014-411 QPC of 9 September 2014, Official Journal of 12 September 2014, p. 15020, §§ 13-14.
[611]Decision no. 2014-411 QPC of 9 September 2014, Official Journal of 12 September 2014, p. 15020, §14. The Constitutional Council basically reiterated a ruling of the Council of State in the case of *Bitouzet* of 3 July 1998, Rec. 288.
[612]Decision no. 85-198 DC of 13 December 1985, Official Journal of 14 December 1985, p. 14574, Rec., p. 78, § 16.
[613]As opposed to the procedure of expropriations in which the amount of compensation is fixed by force of law, either by way of consent or judgment. See in this regard, for example, decision no. 89-256 DC of 25 July 1989, Official Journal of 28 July 1989, p. 9501, Rec., p. 53, § 21.
[614]CE *Couitéas,* 30 November 1923, Rec. Lebon p. 789; CE *commune de Gavarnie*, 22 February 1963. In a decision CE of 3 July 1998, *Bitouzet* , Rec. 288, the Council of State recognised that as regards the servitudes of urbanism the owner of the incumbent property was entitled to compensation in those exceptional cases in which he was to bear a "special and exorbitant burden, out of proportion with the general interest pursued". It thereby assured the conformity with P1-1 of the Convention.

At last, it seems pertinent to mention the importance of judicial proceedings and the related influence of the ECHR. According to the theory of indirect expropriation in administrative law, which is a particular means of a forced acquisition of immovable property by public administration, the public authorities may, in the general interest, take possession of private real estate. The aggrieved person continues to be the owner, so it is not possible for him to bring an action of revendication or an action to determine the possession. He can only claim damages. The owner becomes dispossessed on the determination of compensation by the court. The Court of Cassation abandoned this theory of indirect expropriation in the judgement of 6 January 1994 when it stated that "the transfer of property that was not required by the owner cannot take place without preceding expropriation proceedings"[615]. Since this decision property can be transferred only in the framework of expropriation proceedings or on the basis of a mutual consent. Moreover, the decision of the ECHR in the case of *Papamichalopoulos v. Greece*[616] led the Tribunal of Conflicts to render, in 2002, a decision in the case of *Binet v. EDF*[617] which disturbed the theory of inviolability of a public work when the Tribunal stated that the court could order a measure that would interfere with the integrity of the functioning of a public work in the absence of appropriate proceedings that would legalise it. This decision was followed by a decision of the Council of State adhering to the reasoning of the Court of Cassation, in a decision the of 29 January 2003[618] in which it specified that the principle of inviolability of a public work could not exclude the demolition of the work.

1.6. Irrelevance of the Gravity of Interference

1.6.1. Practice of the European Court of Human Rights

The irrelevance of the gravity of interference for the purpose of applying one of the rules of P1-1 concerns cases involving confiscation of property in connection with the commitment of

[615]Cas. Ass. plén. 6 January 1994, *Cts Baudon de Mony C/ EDF*: JCP 1994 , II , no. 22207; Bull. civ. ass. plén. no. 1, p. 1. In the instant case the applicants were indivisible owners of land, a part of which was sold to an electricity company that started to construct dams thereupon in the public interest. The applicants were not aware of the sale and requested its annulation. The Rouen Court of Appeal ruled that it was impossible to intervene in a public work and that there was an indirect expropriation. The Court of Cassation, however, ruled that the transfer of property had to be a result of regular expropriation proceedings. The Court of Cassation thus manifested its will to prohibit such a transfer of property which was not grounded either on a contract or on a decision rendered in the framework of exprorpiation proceedings.
[616]*Papamichalopoulos and Others v. Greece*, 24 June 1993, Series A no. 260-B.
[617]Tribunal des Conflits, 6 May 2002, application no. 02-03287.
[618]CE 29 January 2003, *Synd. départemental de l'électricité et du gaz des Alpes-Marimes et Cne de Clans* , Rec. p. 21.

a criminal offence. So, in *Handyside v. the United Kingdom*[619], which concerned a seizure of the applicant's publications for children by the United Kingdom authorities under the Obscene Publications Acts and a forfeiture and destruction of those publications ordered by the national courts, the ECHR held that both the seizure and forfeiture fell within the ambit of the control of the use rule. That irreversibility or "permanency" of a transfer, a usual indicator of deprivation, does not play a role in this sort of cases clearly stems from the statement of the ECHR to the effect that, although the forfeiture and destruction of the publications permanently deprived the applicant of the ownership of certain possessions, these measures were authorised by the second paragraph P1-1. The ECHR thus qualified forfeiture, a typical deprivation case, as a limitation under the control of the use rule.

The fact that, in certain cases, a transfer of property may constitute an integral part of control of the use of property can also be induced from the case of *AGOSI v. the United Kingdom*[620]. The case concerned the seizure of gold coins that were sold by the applicant company, but were unpaid for by the buyers who attempted to smuggle them into the United Kingdom whose authorities seized them. Although the applicant company claimed that the coins were not liable to forfeiture under the customs laws as they owned the coins, and that it was, accordingly, entitled to the return of the coins, the English courts declared the coins forfeited. In the ECHR's view the prohibition to import gold coins in the United Kingdom constituted a control of the use of property and their seizure and forfeiture were measures taken to enforce that prohibition. The forfeiture of the coins formed a constituent element of the procedure for the control of the use. It can be perceived that, as in *Handyside,* in this case the deprivation of property was a secondary act that went hand in hand with the procedure leading to a control of the use of property in the general interest with a view to enforcing the control of the use measure. It can, therefore, be induced that it is the secondary and concomitant nature of the

[619]*Handyside v. the United Kingdom*, 7 December 1976, §§ 62-63, Series A no. 24. In § 62 the ECHR stated that: "The seizure complained of was provisional. It did no more than prevent the applicant, for a period, from enjoying and using, as he pleased, possessions of which he remained the owner and which he would have recovered had the proceedings against him resulted in an acquittal".

[620]*AGOSI v. the United Kingdom*, 24 October 1986, Series A no. 108. See also, *Raimondo v. Italy*, 22 February 1994, § 29, Series A no. 281-A, in which the ECHR explicitly stated that confiscation of property does not always fall within the deprivation rule: "Although it involves a deprivation of possessions, confiscation of property does not necessarily come within the scope of the second sentence of the first paragraph of Article 1 of Protocol No. 1 (P1-1)". In *Butler v. the United Kingdom* (dec.), no. 41661/98, ECHR 2002-VI, which concerned the seizure and forfeiture of the applicant's money, the ECHR stated that, although the applicant had been permanently deprived of his money in application of the forfeiture order, "it considers nonetheless that the impugned interference falls to be considered from the standpoint of the State's right "to enforce such laws as it deems necessary to control the use of property in accordance with the general interest", the so-called "third rule"".

confiscation in the framework of the control of the use measures, in those specific cases, that makes the confiscation considered by the ECHR to fall under the control of the use rule. Although the ECHR admitted that the forfeiture of the coins did involve a deprivation of property, with regard to the circumstances, the deprivation formed a constituent element of the procedure for the control of the use of gold coins. Thus, it can be argued *a contrario* that a seizure will amount to a deprivation when it is a primary and targeted measure by public authorities, not connected to the commitment of a criminal offence. Such was, for example, the case of *Vasilescu v. Romania*[621] which concerned the unlawful seizure of gold objects that were not returned to the applicant, and in which the ECHR established unlawfulness of the seizure inflicting the loss of all ability to dispose of the property in issue as a decisive factor for determining a *de facto* deprivation of property.

1.6.2. Practice of the Czech Constitutional Court

The Czech constitutional practice follows the same pattern and qualifies such cases as a control of the use of property as long as the confiscation of property, in connection with the commitment of a criminal offence, has a temporary and not a definitive nature. The Constitutional Court has stated on many occasions that the seizure of financial means in connection with the commitment of a criminal offence is a temporary measure interfering with the fundamental right to the peaceful enjoyment of possessions, which is of interim and securing nature, and which does not represent a final decision in the matter. Therefore, according to the Court, it does not involve any "deprivation of property" pursuant to Article 1 para. 1 of Protocol no. 1 to the Convention, but a limitation of the use of property within the meaning of Article 1 para. 2 of Protocol no. 1 to the Convention, as interpreted in the case of *Handyside v. the United Kingdom*[622]. In the Court's view, the essence of this measure is not to deprive the owner of his financial means, but to limit his disposition right to them. It is apparent that the Czech Constitutional Court has been inspired by the practice of the ECHR on which it explicitly relies in its decisions. It follows that in these specific cases neither the Constitutional Court takes the gravity of interference as a criterion signifying deprivation of property.

[621] *Vasilescu v. Romania*, 22 May 1998, *Reports of Judgments and Decisions* 1998-III.
[622] Judgment of the Constitutional Court no. I.ÚS 2485/13 of 6 January 2014, § 48. See further decision no. I.ÚS 3783/13 of 11 June 2014, § 17; decision no. III. ÚS 294/14 of 30 July 2014; decision no. III.ÚS 2017/14 of 7 August 2014; or decision no. II ÚS 3360/14 of 12 November 2014.

1.6.3. Practice of the French Constitutional Court

A quite different approach has been adopted by the French constitutional jurisdiction. It has made clear that Article 17 of the Declaration does not apply to confiscations in connection with the commitment of a criminal offence and that the conformity of such a type of confiscations is examined by virtue of Article 8 of the Declaration[623] providing for the principle of the necessity of punishment[624]. It is incumbent on the Constitutional Council to examine whether a fair balance has been struck between the infraction and the punishment[625]. The solution adopted by the French constitutional jurisdiction coincides with the practice adopted by the ECHR and the Czech Constitutional Court in that it does not apply the deprivation norm as a norm of control, but it clearly deviates from the latter in that it does not qualify the punitive confiscation of property as a measure controlling the use of property.

In this context it is worth noting that the ECHR has already had the opportunity to deal with an application concerning punitive confiscation of property in which a breach of the right of property under the Convention by the French authorities was at issue. In the case of *Bowler v. France*[626] the ECHR has dealt with the application of a company claiming that the seizure of its property constituted a violation of P1-1. The applicant company, a forwarding agent, commissioned a company to transport a shipment of boxes of dolls from Spain to the United Kingdom. The French customs authorities searched the lorry carrying the consignment, the driver of which was a British national. Amongst the boxes of toys, they found several boxes

[623]Article 8 of the Declaration reads as follows: "The law must prescribe only the punishments that are strictly and evidently necessary; and no one may be punished except by virtue of a law drawn up and promulgated before the offense is committed, and legally applied".

[624] See, for example, decision no. 2010-66 QPC of 26 November 2010, Official Journal of 27 November 2010, p. 21117, Rec. p. 334, § 7: "Considérant que l'article 131-21 du code pénal, qui préserve le droit de propriété des tiers de bonne foi, n'est contraire à aucun autre droit ou liberté que la Constitution garantit". The statement of the Constitutional Council concerning the right of property - that the provision of the Penal Code in question protects the right of property of third persons in good faith and that it does not contradict any right or freedom guaranteed by the Constitution – is rather laconic. By this declaration it implicitly rejected that the right of property was encroached upon whatsoever. This means that the punitive confiscation of property is not protected by Article 17 of the Declaration and that the "just and advance payment of compensation" therein guaranteed is not applicable in cases in which the deprivation of property has a repressive function. In such cases the reference norm of control is Article 8 of the Declaration. See also decision no. 2014-692 DC, 27 March 2014, § 24, Offical Journal of 23 March 2014, p. 6232: "... the Labour Code by requiring it to pay a penalty of up to twenty times the monthly value of the statutory minimum wage for the jobs lost as part of the collective redundancy ... this penalty amounts to a sanction with the status of a punishment for the purposes of Article 8 of the 1789 Declaration".

[625]Decision no. 2010-66 QPC of 26 November 2010, Official Journal of 27 November 2010, p. 21117, Rec. p. 334, § 4: "... si la nécessité des peines attachées aux infractions relève du pouvoir d'appréciation du législateur, il incombe au Conseil constitutionnel de s'assurer de l'absence de disproportion manifeste entre l'infraction et la peine encourue."

[626]*Bowler International Unit v. France*, no. 1946/06, 23 July 2009.

of cannabis resin. The boxes of dolls were seized under the Customs Code on the grounds that they had served to conceal the fraud. The criminal court found the lorry driver guilty of transporting, importing and trafficking in drugs and sentenced him to, inter alia, three years' imprisonment and a customs fine equal to the value of the drugs seized. It also ordered the confiscation of the drugs, as well as the boxes of dolls, which had "evidently served to conceal the fraud because the boxes of drugs had been hidden amongst them". The company's request to have its merchandise returned to it was rejected. The court of appeal modified the sentence imposed by the lower court and ordered the customs authorities to return the boxes and to pay the applicant company compensation. The Court of Cassation quashed the appeal court's judgment and dismissed the applicant company's appeal. The ECHR ruled that although there had been a transfer of ownership, the confiscation of property did not necessarily fall within the scope of the deprivation rule of P1-1. The applicable legislation showed that the confiscation of the merchandise that had served to commit the fraud had pursued the legitimate aims of combating international drug-trafficking and making owners more responsible in their choice of transporters, which the parties did not dispute. As such, the interference concerned the control of the use of property.

Having established matching counterparts to the norms of P1-1 in the texts of the Czech Charter and the French Declaration, I will now focus on the criteria of conventionality and constitutionality of limitations and deprivations of property from the comparative perspective, as interpreted and developed by the court practice. It is a common ground that limitations or deprivations of property imposed on owners by a state authority cannot be justified merely because they are demanded by society, crucial also is whether they meet the requirements the given society has laid down, whether they can be normatively justified. The normative justification is determined by several criteria that must be observed. In this regard Protocol no. 1 to the Convention, the Czech Charter, and the French Declaration show, in general, within the meaning of the interpretative practice by the respective highest courts, convergences in providing for comparatively similar conditions or criteria of permissibility of interferences with property rights.

1.7. Criteria of Conventionality and Constitutionality of Interferences with Property

I suggest that the criteria of conventionality and the criteria of constitutionality of interferences with property can be divided into two categories: the first category which is set

forth directly in the text of the Convention and the respective Constitutions, and the second category which has been developed by the ECHR and the constitutional jurisprudence. The first category of criteria is largely identical. In respect of the requirements of the Convention, a deprivation or a control of the use of property in order to be compatible with P1-1 must be lawful and pursue the public, or general, interest. Although Article 17 of the French Declaration and Article 11 para. 4 of the Charter also require that every deprivation of property must be lawful and justified by the public interest, they require, in addition, that compensation be paid[627]. The Convention, on the contrary, as well as Article 2 of the French Declaration, are silent as regards the requirement of compensation which, thus, comprises the second category of judge-made criteria, together with the requirement of proportionality.

A common characteristic of the requirement of proportionality is that it becomes relevant only once it has been established that the interference satisfied the requirement of lawfulness and was not arbitrary. But although proportionality is examined in all cases of interference with property, it differs depending on which rule is applicable. The ECHR has adopted a stricter approach under the deprivation clause allowing states a narrower margin of appreciation, whereas under the control of the use rule the approach is less stringent. The difference in approach is linked to the seriousness of the interference which is of decisive importance in the test of proportionality. The proportionality principle, thus, does not apply to all interferences with property in the same way[628]. The same tendency can be perceived in the practice of the constitutional jurisdictions under scrutiny. Also, the conditions of compensation apply more strictly in deprivation cases and the finding of deprivation may sometimes be crucial for the determination of the amount of compensation[629].

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[627]Article 17 of the Declaration reads that: "Since the right to Property is inviolable and sacred, no one may be deprived thereof, unless public necessity, legally ascertained, obviously requires it, and just and prior indemnity has been paid". Article 11 para. 4 of the Charter stipulates that: "Expropriation or forced limitation of property rights is permitted in the public interest, on the basis of law, and for compensation". Lawfulness is furthermore required by the general provision of Article 4 para. 2 of the Charter which reads as follows: "Limitations may be placed upon the fundamental rights and basic freedoms only by law and under the conditions prescribed in this Charter of Fundamental Rights and Basic Freedoms".

[628]In its report in *Gillow v. the United Kingdom*, 24 November 1986, Series A no. 109, the Commission stated that the measure of proportionality clearly differs in the application of the deprivation rule and the control of the use rule since deprivation of property is inherently more serious than the control of its use where full ownership is retained. Report adopted on 3 October 1984, § 148.

[629]For example, the ECHR has made it clear that in certain cases of deprivation, in which the violation does not lie merely in a failure to pay fair compensation, *restitutio in integrum* would be an appropriate remedy. Such as, in the case of *Hentrich v. France* where the ECHR held that "given the violation found of Article 1 of Protocol No. 1, the best form of redress would, in principle, be for the State to return the land". *Hentrich v. France*, judgment of 22 September 1994, Series A no. 296-A, § 71.

Lastly, there is one observation to be made. Both Article 11 para. 4 of the Czech Charter and Articles 2 and 17 of the Declaration must be read in conjunction with other relevant constitutional provisions to achieve a complete picture of the conditions that are necessitated by the respective Constitutions in cases of limitations and deprivations of property. Namely, the Czech Charter lays down, besides the principle of preservation of the substance and meaning of fundamental rights and freedoms[630] which covers the requirement of minimalisation of interference, also the general principle of equality[631]. Equality in the enjoyment of rights is enshrined as a fundamental principle in Article 1 of the Charter[632]. Also, the French Declaration treats equality as a constitutional principle, against which the Constitutional Council assesses legislation, in Article 1 of the Declaration[633] which provides for equality in rights similar to Article 1 of the Czech Charter. It can be observed that, in the respective constitutional orders, equality plays a double function – it simultaneously constitutes a specific fundamental right as such and a principle or a condition for the exercise of fundamental rights[634]. In this context it can be suggested that it is foremost the general equality clauses which do not, in my opinion, constitute autonomous legal norms, as, on

[630]Pursuant to Article 4 para. 4 of the Charter: "In employing the provisions concerning limitations upon fundamental rights and basic freedoms, the substance and meaning of these rights and freedoms must be preserved. Such limitations are not to be misused for purposes other than those for which they were laid down".
[631]Pursuant to Article 4 para. 3 of the Charter: "Any statutory limitation upon the fundamental rights and basic freedoms must apply in the same way to all cases which meet the specified conditions".
[632]"All people are free, have equal dignity, and enjoy equality of rights". Article 3 para. 1 of the Charter provides for the right to non-discrimination in the enjoment of fundamental rights and freedoms: "Everyone is guaranteed the enjoyment of his fundamental rights and basic freedoms without regard to gender, race, color of skin, language, faith and religion, political or other conviction, national or social origin, membership in a national or ethnic minority, property, birth, or other status".
[633]Article 1 of the Declaration reads that: "Men are born and remain free and equal in rights. Social distinctions may be based only on considerations of the common good". Furthermore, there are also constitutional provisions that provide for the fundamental right to equality. Article 1 of the Constitution provides for the right of French citizens to equality before the law. The first paragraph of Article 1 of the Constitution reads that: "France shall be an indivisible, secular, democratic, and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race, or religion. It shall respect all beliefs. It shall be organised on a decentralised basis". Article 6 of the Declaration, which basically stipulates the principle that laws must be the same for every citizen, reads as follows: "The Law is the expression of the general will. All citizens have the right to take part, personally or through their representatives, in its making. It must be the same for all, whether it protects or punishes. All citizens, being equal in its eyes, shall be equally eligible to all high offices, public positions and employments, according to their ability, and without other distinction than that of their virtues and talents". The projection of the specific instances of the fundamental right to equality can be found further in Article 13 of the Declaration (equality before public burdens: general tax "must be equally distributed among all citizens, in proportion to their ability to pay"), as well as in the Preamble to the Constitution of 1946 and the Preamble to the Constitution of 1958 (equality of the overseas territories) and its Articles 2 (equality as the maxim of the Republic), and 3 (universal, equal, and secret suffrage).
[634]F. Melin-Soucramanien, "Le principe d'égalité dans la jurisprudence du Conseil constitutionnel. Quelles perspectives pour la question prioritaire de constitutionnalité?", Cahiers du Conseil constitutionnel no. 29 (Dossier: La Question Prioritaire de Constitutionnalité), October 2010, available at: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/nouveaux-cahiers-du-conseil/cahier-n-29/le-principe-d-egalite-dans-la-jurisprudence-du-conseil-constitutionnel-quelles-perspectives-pour-la-question-prioritaire-de-constitutionnalite.52731.html#_ftn4.

standing alone, they seem to be lacking material content, and which embody equality as a principle. This claim corroborates the Czech Constitutional Court which, in its established case-law, conceives equality within the meaning of Article 1 of the Charter as a relative concept, always in relation to fundamental rights and freedoms[635].

This double function of equality is reflected in the practice of the respective constitutional jurisdictions in that that they may put to scrutiny interferences not only against constitutional provisions enshrining the fundamental right to specific equality, but also against equality as the constitutional principle and a benchmark in the control of constitutionality of interferences with other fundamental rights[636]. In the latter case the principle of equality plays the role of an indicator in the framework of proportionality[637] whereby the judges basically examine proportionality between the means employed and the objective sought, and, thus, carry out a control of rationality of the choice of the legislator. It is not the discriminatory character of a legislative measure that is put to scrutiny, but the absence of a reasonable relationship between the difference in treatment the measure provides for and the objective sought by it[638].

It can be, thus, induced that, although proportionality is generally considered to be a judge-made concept, it implies that the search for equality or balance is prescribed in the respective constitutional texts. In relation to property rights this suggestion means that it is not only the specific constitutional property clauses, as interpreted by constitutional jurisdictions, that provide safeguards against arbitrary interferences with property, but that it is also the

[635]See, for example, judgment no. Pl. ÚS 3/02 of 13 August 2002, published under no. 405/2002 Sb.; or judgment no. Pl. ÚS 38/02 of 9 March 2004, published under no. 299/2004 Sb.

[636]The constitutional judges carry out, on the one hand, a control of equality by examination of discriminations that are expressively prohibited by the Constitution and those that jeopardise the exercise of fundamental rights, and, on the other hand, a control of differences in treatment in comparable legal or factual situations.

[637]For example, in a judgment no. Pl. ÚS 2/03 of 19 March 2003, published under no. 84/2003 Sb., the Czech Constitutional Court specifically underlined that: "It is possible to limit ownership by rent regulation only on the basis of law, under conditions stipulated in the Charter and only to such extent in which the substance of ownership is not violated and the prohibition of discrimination is respected". See also, for example, the decision of the Constitutional Council no. 2009-599 DC of 29 December 2009, Official Journal of 31 December 2009, p. 22995, Rec., p. 218, § 80: "... le principe d'égalité ne fait pas obstacle à ce que soient établies des impositions spécifiques ayant pour objet d'inciter les redevables à adopter des comportements conformes à des objectifs d'intérêt général, pourvu que les règles qu'il fixe à cet effet soient justifiées au regard desdits objectifs".

[638]The judges use a standard formula which expresses the global conception of the principle of equality to the effect that it is not contrary to this principle that the legislator treats different situations in a different manner, or that it derogates equality for the reasons of the general interest, provided that the difference in treatment is in a direct relation to the objective sought by the law adopted. See in this respect, decision no 96-375 DC of 9 April 1996, Official Journal of 13 April 1996, p. 5730, Rec., p. 60, § 8: "... le principe d'égalité ne s'oppose pas à ce que le législateur déroge à l'égalité pour des raisons d'intérêt général pourvu que la différence de traitement qui en résulte soit en rapport direct avec l'objet de la loi qui l'établit". A similar wording can be found in a judgment of the Czech Constitutional Court no. Pl. ÚS 38/02 of 9 March 2004, published under no. 299/2004 Sb.

constitutional principles derived from the constitutional texts which provide a barrier against unlimited encroachments on private property rights.

As regards the Convention, in the absence of a general provision similar to Article 1 of the Czech Charter or Article 1 of the Declaration providing for a principle of equality in rights, the natural law principle that every man is endowed with from birth, we cannot speak, in my opinion, about a general clause entailing the principle of equality that would "shine" through the text of the Convention as a whole. We can only speak about the right to non-discrimination as a fundamental right which is enshrined in Article 14 of the Convention[639] and in Article 1 of Protocol no. 12 to the Convention[640]. While the latter provides for the general prohibition of discrimination which can be invoked alone, Article 14 of the Convention does not have an independent standing and may be applicable only in conjunction with P1-1 or any other substantive provision of the Convention. Neither of these provisions of the Convention is applicable automatically in property matters and neither one can be dealt with *ex officio* without being directly invoked.

In view of the aforementioned, it can be suggested that the respective constitutional texts provide for stronger property safeguards than the Convention. This argument seems to speak for the subsidiary nature of the Convention system and supports the claim and the latest tendency[641] that violations of fundamental rights should be dealt with primarily on the national level.

In the following part I deal with the overall analysis and comparison of the individual textual and judge-made criteria that apply to both limitations and deprivations of property within the

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

[640]"1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1".

[641]See the Brighton Declaration adopted at the High Level Conference meeting at Brighton on 19 and 20 April 2012. It reads in para. 11 as follows: "The jurisprudence of the Court makes clear that the States Parties enjoy a margin of appreciation in how they apply and implement the Convention, depending on the circumstances of the case and the rights and freedoms engaged. This reflects that the Convention system is subsidiary to the safeguarding of human rights at a national level and that national authorities are, in principle, better placed than an international court to evaluate local needs and conditions. The margin of appreciation goes hand in hand with supervision under the Convention system. In this respect, the role of the Court is to review whether decisions taken by national authorities are compatible with the Convention, having due regard to the State's margin of appreciation".

meaning of their interpretation and application by the jurisdictions under scrutiny. In the framework of this exercise I first set the criteria of P1-1, as interpreted and applied by the ECHR, to be followed by those applied by the individual constitutional jurisdictions under scrutiny.

1.7.1. Lawfulness

1.7.1.1. Approach of the ECHR

The condition of lawfulness expresses the exigence that limitations and deprivations of property can take place only to follow the purpose expressly set forth by law. According to the ECHR, it is the first and most important requirement of P1-1 that any interference by a public authority with the peaceful enjoyment of possessions should be in compliance with law[642]. Although the second sentence of the first paragraph of P1-1 authorises a deprivation of possessions only "subject to the conditions provided for by law" and the second paragraph of P1-1 recognises that states have the right to control the use of property by enforcing "laws", both expressions contain the same reference to lawfulness. Legality or lawfulness of interference is a general condition prohibiting that any mesure of public authorities restricting the right of property lacks a legal basis.

The concept of the legal basis or "law" is interpreted by the ECHR as a notion that has an autonomous meaning and that is independent from the meaning used in national legal systems. It includes not only statutes, but also subordinate legislation, constitutions, or judge-made law, for the ECHR, which conceives the term "law" in the substantive sense and not in the formal one, considers "law" as including unwritten law, judge-made law, and statutory written law encompassing "enactments of lower ranking statutes and regulatory measures taken by professional regulatory bodies under independent rule-making powers delegated to them by Parliament"[643]. In brief, the term "law" comprises written and unwritten law as well as case-law[644].

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[642] *Iatridis v. Greece* [GC], no. 31107/96, § 58, ECHR 1999-II; *Beyeler v. Italy* [GC], no. 33202/96, § 108, ECHR 2000-I.
[643] *R & L, s.r.o. and Others v. the Czech Republic*, nos. 37926/05, 25784/09, 36002/09, 44410/09 and 65546/09, § 114, 3 July 2014.
[644] *Špaček, s.r.o., v. the Czech Republic*, no. 26449/95, § 54, 9 November 1999; or *Sanoma Uitgevers B.V. v. the Netherlands* [GC], no. 38224/03, § 83, 14 September 2010.

It would seem that the ECHR's control powers end with the establishment of the existence of the legal basis, especially in view of the fact that with regard to the principle of subsidiarity the ECHR has adjudicated that it does not examine whether national law was applied correctly[645], and that it is, firstly, for domestic authorities to interpret and apply domestic law and to decide on the issue of constitutionality[646]. But the purpose of the principle of lawfulness is to protect individuals against the arbitrary action of public authorities. Hence, even though a measure is proved to have a legal basis, if the latter is found to be arbitrary, or the national authority applied it in such an arbitrary way that the right of property was violated, such an action would not escape the ECHR's control of conventionality. Thus, what matters under this principle is not only the existence of the legal basis as such, but also whether it has been applied in light of the Convention, for the ECHR's role is to verify whether the way in which the domestic law is interpreted and applied produces consequences that are consistent with the principles of the Convention.

Such was, for example, the case of *Hentrich v. France* in which the ECHR found a violation of P1-1 on the grounds that the expropriation of property by the Commissioner for Revenue, exercising a right of pre-emption for reason that the purchase price was too low, failed to satisfy the condition of being "provided for by law". The ECHR classified the pre-emption in the given case as arbitrary, selective, scarcely foreseeable, and short of the basic procedural safeguards[647]. This case indicates that the existence of a legal basis in domestic law does not suffice in itself to satisfy the principle of lawfulness. The latter relates not only to the form, but also to the content of "law". The legal basis must be endowed with a certain quality, namely, it must be compatible with the rule of law and must provide guarantees against arbitrariness[648]. In other words, "law" must also have some qualitative characteristics. It must

[645]*Sporrong and Lönnroth v. Sweden*, judgment of 23 September 1982 Series A no. 52, § 68.
[646]*Former King of Greece and Others v. Greece* [GC], no. 25701/94, § 82, ECHR 2000-XII; *Jahn and Others v. Germany* [GC], nos. 46720/99, 72203/01 and 72552/01, § 86, ECHR 2005-VI.
[647]*Hentrich v. France*, 22 September 1994, § 42, Series A no. 296-A. The application of law inconsistent with the requirement of lawfulness was also found, for example, in *Carbonara and Ventura v. Italy* or *Belvedere Alberghiera v. Italy*, with both cases involving a constructive-expropriation rule under Italian law. In the first case, the ECHR noted that, pursuant to the constructive-expropriation rule, the Court of Cassation held that the applicants had been deprived of their land from 28 October 1972.The ECHR found that the applicants' situation could not be regarded as “foreseeable” as they did not become certain that they had been deprived of their land until 26 November 1993, when the Court of Cassation's judgment was lodged with the registry. In the second case the ECHR observed that the case-law on constructive expropriations had evolved in a way that has led to the rule being applied inconsistently, "a factor which could result in unforeseeable or arbitrary outcomes and deprive litigants of effective protection of their rights and is, as a consequence, inconsistent with the requirement of lawfulness".
[648]*R & L, s.r.o. and Others v. the Czech Republic*, nos. 37926/05, 25784/09, 36002/09, 44410/09 and 65546/09, § 113, 3 July 2014.

be accessible, its provisions must be formulated with sufficient precision to enable a certain level of foreseability so that the public at large can anticipate the consequences their actions may entail, and it must afford appropriate procedural safeguards so as to ensure protection against an arbitrary action[649]. The intelligibility of law requires that a fundamental right or freedom be exercised in a manner that is precise and comprehensible[650]. It is, thus, a condition for the respect and effectiveness of fundamental rights and an instrument of their concretisation.

It can be suggested that there are, in fact, two discernible aspects that are inherent in the requirement of lawfulness to be applicable on national level. Firstly, the reasons of deprivations or limitations for the purpose of the public interest, such as, for example, the erection of public works, the creation of protective zones and preserves or the establishment of indispensable access to privately owned land or construction, must be laid down by law. Secondly, limitations and deprivations of property must be carried out by virtue of law and observe the Convention standards. That is, on the basis of a decision against which lay an appeal[651], or a special law allowing for a direct restriction of property. In my view, therefore, the principle of lawfulness also embodies the right to access to a court which is guaranteed by Article 6 of the Convention providing for a right to a fair trial.

The availability of access to a court and the opportunity to challenge the lawfulness of an interference with property is a significant aspect of the right of property. An example may serve well here. In the abovementioned case of *Hentrich v. France*, in which the national tribunals refused the applicant the opportunity to challenge the pre-emption and, consequently, the ECHR held that, due to the absence of adversarial proceedings that comply with the principle of equality of arms, there had been a violation of the right to a fair trial. This case also indicates that the right to a fair trial guaranteed by Article 6 of the Convention is closely related to the principle of proportionality, as the degree of protection from

[649]*Hentrich v. France*, 22 September 1994, § 42, Series A no. 296-A; *Špaček, s.r.o., v. the Czech Republic*, no. 26449/95, § 54, 9 November 1999; *Beyeler v. Italy* [GC], no. 33202/96, § 109, ECHR 2000-I;*Vistiņš and Perepjolkins v. Latvia* [GC], no. 71243/01, §§ 96-97, 25 October 2012.

[650]A. Jennequin, "L'intelligibilité de la norme dans les jurisprudences du Conseil constitutionnel et du Conseil d'État", RFDA, septembre-octobre 2009, p. 917.

[651]For example, pursuant to Article 36 para. 2 of the Czech Charter, unless the law provides otherwise, a person who claims that his or her rights were curtailed by a decision of the public authority may turn to a court for a review of legality of that decision. Judicial review of decisions affecting the fundamental rights and freedoms listed in the Charter may not be removed from the jurisdiction of the courts. The same guarantee is contained in Article 16 of the French Declaration: "A society lacking a provision guaranteeing rights or the separation of powers has no Constitution".

arbitrariness is one of the important factors[652] in the assessment of proportionality of an interference. The significance of procedural remedies was decisive also in the case of *AGOSI v. the United Kingdom*[653] in which the ECHR came to the conclusion that P1-1 had not been violated, as the national authorities afforded the applicant *inter alia* a reasonable opportunity to put its case before the courts. In the case of *Chadzitaskos and Franta v. the Czech Republic*[654] the ECHR has held that P1-1 imposes an obligation on the state to afford judicial procedures which offer the necessary procedural guarantees and, therefore, enable the domestic courts and tribunals to adjudicate effectively and fairly on any disputes between private persons relating to property rights[655]. In other words, the state must ensure in its domestic legal system that property rights are sufficiently protected by law and that adequate remedies are provided whereby the victim of an interference can seek to vindicate his rights, including, where appropriate, by claiming damages in respect of any loss sustained[656].

All in all, the observance of the principle of lawfulness is a precondition for the existence of effective procedural remedies which is implicit in the principle of proportionality and which secures the respect for the right of property. This means that there is a close link between the examination of interferences with property rights under P1-1 and Article 6 of the Convention. But procedural guarantees do not always guarantee a substantive fair result, and compliance of an interference with property with Article 6 of the Convention does not mean that it meets the requirements of P1-1[657]. Further, sometimes the examination of complaints under P1-1 is found to be unnecessary after the examination of complaints under Article 6 and *vice versa*[658].

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[652]Besides, for example, the excessive length of proceedings. See in this respect, for example, *Matos e Silva, Lda., and Others v. Portugal*, 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, in which the ECHR concluded that the applicants had borne an individual and excessive burden due to the long period of uncertainty as to what would become of their property.

[653]*AGOSI v. the United Kingdom*, 24 October 1986, Series A no. 108.

[654]*Chadzitaskos and Franta v. the Czech Republic*, nos. 7398/07, 31244/07, 11993/08 and 3957/09, § 48, 27 September 2012.

[655]*Sovtransavto Holding v. Ukraine*, no. 48553/99, § 96, ECHR 2002-VII; *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, § 83, ECHR 2007-I.

[656]*Blumberga v. Latvia*, no. 70930/01, § 67, 14 October 2008. The ECHR has acknowledged that procedures satisfying the procedural requirement of P1-1 do not have to be judicial in nature. See in this respect, *Jokela v. Finland*, no. 28856/95, § 45, ECHR 2002-IV; or *Družstevní záložna Pria and Others v. the Czech Republic*, no. 72034/01, § 89, 31 July 2008.

[657]A. R. Coban, "Protection of Property Rights within the European Convention on Human Rights", Ashgate, 2004, p. 248.

[658]See, for example, *British-American Tobacco Company Ltd v. the Netherlands*, 20 November 1995, § 91, Series A no. 331. The applicant company argued under P1-1 that the denial of access to an independent and impartial tribunal for the determination of its entitlement to a patent meant that it had been deprived of a "possession" without any judicial examination. The ECHR held that: "The complaint under this head, namely the denial of a judicial remedy, is, in substance, identical to that already examined and rejected in the context of Article 6 para. 1 (art. 6-1) of the Convention. The Court considers that no separate issue arises under Article 1 of

It can be claimed that, in general, when complaints concern the issue of fairness of proceedings in connection with the interference with property rights, Article 6 would "absorb" complaints under P1-1, and it would normally be the other way round when procedural issues are not of major relevance in the assessment of proportionality of interference[659].

1.7.1.2. Approach of the Czech Constitutional Jurisdiction

The Czech constitutional jurisdiction has underlined the necessity of a legal basis for limitations and deprivations of property in general by holding that restrictions may be placed upon fundamental rights and freedoms only by law, under the conditions prescribed in the Charter, and only to such an extent in which they do not impinge on the substance of ownership which cannot become a mere shell deprived of its content[660].

Although the Constitutional Court quite often uses the term "statute" as a synonym to the legal basis in its decision-making, it has accepted the ECHR's wide interpretation of the notion of "law". It is not without interest that constitutional judges do not hesitate to directly refer to the case-law of the ECHR when identifying and defining the requirement of lawfulness in restriction of property cases to hold that limitations or deprivations of ownership or any other fundamental right or freedom may take place only by virtue of law or "statute" whereby it is understood, in line with the case-law of the ECHR, the jurisprudence of courts as well[661]. In this way the Constitutional Court has taken over the ECHR's definition of "law" as comprising not only legal regulations, but also the case-law which, in the view of the ECHR, represents "law" in the material sense. Accordingly, the Constitutional Court also

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Protocol No. 1 (P1-1) in relation to the matters complained of". For the opposite result, see, *Almeida Garrett, Mascarenhas Falcão and Others v. Portugal*, nos. 29813/96 and 30229/96, § 54, ECHR 2000-I, in which the ECHR found a violation of P1-1 based on the ground that twenty-four years had elapsed without the applicants having been paid the final compensation without justification, the delay being indisputably attributable to the state. Under Article 6 of the Convention the applicants complained of the lack of any machinery in Portuguese law capable of remedying the situation in issue. The ECHR stated that having regard to the conclusion on violation of P1-1, it found that it was unnecessary to examine the issue separately under this provision. See also *Pressos Compania Naviera S.A. and Others v. Belgium*, 20 November 1995, Series A no. 332.

[659]G. Gauksdóttir, "The Right to Property and the European Convention on Human Rights, A Nordic Approach,", Lund University, 2004, p. 329.

[660]Judgment of the Constitutional Court no. Pl.ÚS 8/02 of 20 November 2002, published under no. 528/2002 Sb.; or judgment no. I.ÚS 229/08 of 29 December 2009.

[661]See, for example, judgment of the Constitutional Court no. I. ÚS 717/05 of 21 March 2006 in which the Constitutional Court referred to cases of the ECHR such as *Kruslin v. France*, *Müller and others v. Switzerland* or *Markt Intern Verlag GmbH and Klaus Beermann v. Germany*. See further also judgment no. II ÚS 3035/12 of 5 March 2014, § 47, in which the constitutional judges referred to the conditions of conventionality of interferences with property, as interpreted by the ECHR, and rejected the complaint about unlawful interference with property solely on the ground that they did not find any violation of P1-1.

considers that the law should meet certain qualitative characteristics. Constitutional judges have specifically reiterated that legal norms should be foreseeable and intelligible, for the principles of foreseeability, intelligibility and the internal consistency of norms belong to the fundamental principles of the rule of law state[662]. In their opinion, in the absence of clarity and precision of norms the requirements of the rule of law state would not be met. Therefore, legislation must follow the basic principles such as confidence in law, legal certainty, and the foreseeability of legal acts which make up the structure of the democratic legal order, as it is necessary that legal norms meet the requirements as to their content, the corrective of which, including its interpretation and application, represent in the rule of law state fundamental rights[663].

Like the ECHR, the Constitutional Court considers the availability of procedural guarantees to challenge the lawfulness of an interference with property as a significant aspect of the right of property which finds its constitutional basis in Article 11 of the Charter. Constitutional judges have stated that it implies from Article 11 of the Charter and P1-1 of the Convention that the state has a procedural obligation to render the right of property effective protection in court proceedings, and, further, that the courts must proceed in such a way as to avoid property rights from becoming factually non-enforceable in consequence of the length of proceedings or modification of legal opinions[664]. The judges' clear-cut reference to Article 11 of the Charter expresses aptly, and it can be claimed even more appositely than the ECHR's reference to Article 6 of the Convention, that the availibity of procedural guarantees is integrated in the property safeguard under the Constitution and that it, in fact, conditions the effective enforcement of property rights. The constitutional judges have further established, with reference to the case-law of the ECHR, that the obligation of the state to provide the right of property with procedural guarantees represents a "positive component", or status positivus, of the right to the protection of property as guaranteed in Article 11 of the Charter and in P1-1 of the Convention. In the opinion of the judges, such positive obligation entails a duty of the state to adopt measures to protect property not only against interventions of third persons, but also against property disputes between individuals, and those measures which would "establish a procedural framework enabling the courts to effectively adjudicate on

[662]For example, judgment no. Pl. ÚS 77/06 of 15 February 2007, § 36.
[663]For example, judgment no. I ÚS 2166/10 of 24 March 2011.
[664]For example, judgment no. I. ÚS 2472/13 of 25 November 2014, §§34-35. The Court did not consider it effective to examine compatibility of the claims with the right to a fair trial on account of the found breach of the right to the peaceful enjoyment of possessions.

property disputes" which necessitates both consistency in decision-making and keeping proceedings to a reasonable length[665]. It can be observed that, as regards the issue of lawfulness of interferences with property, the Czech constitutional judges unconditionally rely on the interpretative practice of the ECHR. The conceptual harmony of both jurisdictions concerns formal as well as qualitative aspects of the principle of lawfulness of measures providing for encroachments on property.

1.7.1.3. Approach of the French Constitutional Jurisdiction

Although the requirement of lawfulness implies from Article 17 of the Declaration applicable to deprivations of property, as it stipulates that public necessity for takings must be "legally ascertained"[666], there is no mention whatsoever to the similar effect in Article 2 of the Declaration applicable to property limitations[667]. Does this mean that the Constitution lays down a double standard for interferences with property? First of all, the answer may be found directly in the text of the Declaration. Similarly as the Czech Charter, which, in Article 4 para. 2, generally stipulates that limitations may be placed upon fundamental rights and freedoms only by law and under the conditions prescribed in the Charter, the French Declaration also reads in its Article 4 that restrictions of fundamental rights shall be determined only by law[668]. Furthermore, the recent practice shows that the Constitutional Council considers the principle of lawfulness to be equally necessary in cases of limitation of property. The constitutional judges have stressed the importance of a substantive legal basis of limitations of property, which must be in the general interest and proportionate to the purpose sought to be achieved, together with procedural guarantees which must be provided for, so that a measure interfering

[665]Judgment no. I. ÚS 2472/13 of 25 November 2014, §§22-25. On the positive obligation of the state to provide adequate procedural safeguards to property rights under Article 11 of the Charter see further, for example, judgment no. I ÚS 1826/11 of 7 March 2012, § 21; judgment no. I. ÚS 2166/10 of 22 February 2011, § 18; judgment no. Pl. ÚS 34/09 of 7 September 2010, § 23; or judgment no. IV. ÚS 1735/07 of 21 October 2008, § 31.

[666]Decision no. 2010-26 QPC, 17 September 2010, p. 229, § 6: "In order to comply with these constitutional requirements, a statute can authorize expropriation of the real estate or real property rights solely in order to carry out an operation in respect of which the public interest has been legally ascertained".

[667]Decision no. 2010-60 QPC of 12 November 2010, Official Journal of 13 November 2010, p. 20237, Rec., p. 321.This decision laid down with definitive effect the duality of protection under Articles 2 and 17 of the Convention.

[668]Article 4 of the Declaration reads as follows: "Liberty consists in being able to do anything that does not harm others: thus, the exercise of the natural rights of every man has no bounds other than those that ensure to the other members of society the enjoyment of these same rights. These bounds may be determined only by Law".

with property is not of such a serious nature that it distorts the meaning and the scope of the right and, thus, does not fail to comply with Article 2 of the Declaration[669].

The legislative competences are set forth in Article 34 of the French Constitution pursuant to which it falls within the competence of the legislator to determine the fundamental principles of property law, real rights and civil and commercial obligations, to set out the rules governing the acquisition or maintenance of ownership[670]. This general provision clearly also grants the legislator the competence to lay down restrictions of property that may impinge upon all attributes of property and on all forms of property. The power of the legislator to lay down the basic principles of ownership and rights *in rem* implies that the legislator is also vested with the power to determine procedural guarantees, or the right to effective recourse, enabling the owners to enforce or reconcile their interests[671], which rank amongst the general principles applicable to rights and freedoms guaranteed by the Constitution.

[669]Decision no. 2010-60 QPC, 12 November 2010, §§ 6 and 7, p. 321: "The system of co-ownership of walls separating adjoining properties determines an economic method of enclosing and building pieces of real estate and a rational use of space, while apportioning the rights of neighbours on the basis of the limits of their property. The compulsory access to a dividing wall provided for by Article 661 of the Civil Code is a necessary element of this system and meets a need in the general interest. It is proportionate to the purpose which Parliament has sought to achieve. It is reserved for the owner of the property adjoining the wall and dependent upon the refunding to the initial owner thereof of one half the cost of said wall or the portion thereof which is to become an adjoining wall and one half of the value of the ground on which said wall has been built. Failing agreement between the parties, these basic conditions shall be ascertained by the Court which shall fix the amount to be refunded. In view of these guarantees covering the substantive basis of such refunding and the procedure pertaining thereto, the restriction placed on the right to property by the challenged provisions is not of such a serious nature that it distorts the meaning and the scope of said right. As is shown by the foregoing the adverse effect on the exercising of the right to property by Article 661 of the Civil Code does not fail to comply with Article 2 of the Declaration of 1789". See also, for example, decision no. 2013-687 DC, 23 January 2014, Official Journal of 28 January 2014, p. 1622, §§ 52, 53: "Le droit au respect des biens garanti par ces dispositions ne s'oppose pas à ce que le législateur, poursuivant un objectif d'intérêt général, autorise le transfert gratuit de biens entre personnes publiques"; or decision no. 2014-691 DC, 20 March 2014, Official Journal of 26 March 2014, p. 5925, § 7: "Il est loisible au législateur d'apporter aux conditions d'exercice du droit de propriété des personnes privées, protégé par l'article 2 de la Déclaration des droits de l'homme et du citoyen de 1789 ... des limitations liées à des exigences constitutionnelles ou justifiées par l'intérêt général, à la condition qu'il n'en résulte pas d'atteintes disproportionnées au regard de l'objectif poursuivi".

[670]See, for example, the decision of the Constitutional Council no. 2011-212 QPC, 20 January 2012, Official Journal of 21 January 2012, p. 1214, §§ 3, 4; decision no. 2014-691 DC, 20 March 2014, § 46, Official Journal of 26 March 2014, p. 5925; decision no. 2014-394 QPC, 7 May 2014, Official Journal of 10 May 2014, p. 7873; or decision no. 2014-409 QPC, 11 July 2014, Official Journal of 13 July 2014, p. 11816, § 4: "It is for the legislator, which has jurisdiction pursuant to Article 34 of the Constitution to determine the fundamental principles of property law, real rights and civil and commercial obligations, to set out the rules governing the acquisition or maintenance of ownership".

[671]Decision no. 2010-60 QPC, 12 November 2010, p. 321, §§ 3 and 4.

The procedural guarantees, or the right to effective recourse, attached to the principle of lawfulness follow from Article 16 of the Declaration[672] as interpreted by the Constitutional Council[673]. It clearly concerns a distinct provision from Articles 2 and 17 of the Declaration, while in Czech constitutional practice the procedural safeguards form part of the property guarantee of Article 11 of the Czech Charter. It results from the provision of Article 16 of the Declaration that it prohibits substantial interferences with the right to effective recourse before the court[674]. So, if the owners whose property has been expropriated dispose of the right to avail of effective procedural remedies, the exigencies of Article 16 and Article 17 will be fulfilled. In this context the constitutional judges stated that there was no violation of Article 16 or Article 17 of the Declaration in respect of the provisions of the Code of Expropriation in the Public Interest since the parties wishing to submit challenges on the merits of the determination of the level of compensation or to raise objections are required to appeal "before the competent authorities", and since the order by which the judge in the expropriation proceedings sets compensation is issued upon conclusion of proceedings which may be subject to appeal[675].

The right to effective judicial remedy before a court of law, which derives from Article 16 of the Declaration of 1789, is a constitutionally guaranteed right and freedom and may be raised in support of an application for a priority preliminary ruling on the issue of

[672]Article 16 of the Declaration reads as follows: "Any society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution".

[673]Decision no. 2010-19/27 QPC, 30 July 2010, p. 190, §§ 17 and 19; decision no. 2010-614 DC, 4 November 2010, p. 305, §§ 4 and 5: "Article 16 of the Declaration of the Rights of Man and the Citizen of 1789 guarantees the right of persons to an effective judicial remedy". See further decision no. 2010-90 QPC 21 January 2011, p. 81, §§ 7, 8; or decision no. 2011-129 QPC, 13 May 2011, p. 239, § 4: "Article 16 of the Declaration of 1789 guarantees the right to effective redress which must be reconciled with the principle of the separation of powers which serves as the basis of the normative autonomy of each House of Parliament". Decision no. 2011-138 QPC, 17 June 2011, § 4 p. 291: "This provision guarantees the rights of persons concerned to petition for effective redress before a court of law". Decision no. 2012‑247 DC, 16 May 2012, § 3, p. 267: "Article 16 of the Declaration guarantees the right to effective judicial relief, the right to a fair trial and the principle of adversarial proceedings". Decision no. 2012‑256 QPC, 18 June 2012, §§ 1 and 6, p. 295; decision no. 2012‑283 QPC, 23 November 2012, §§ 11 and 12, p. 605: "According to Article 16 of the Declaration, no substantive encroachment may be made on the right of an interested party to seek effective relief before a court".

[674]Decision no. 99-416 of 23 July 1999, Rec., p. 100, § 38: "... il résulte de cette disposition qu'il ne doit pas être porté d'atteintes substantielles au droit des personnes intéressées d'exercer un recours effectif devant une juridiction; que le respect des droits de la défense constitue un des principes fondamentaux reconnus par les lois de la République réaffirmés par le Préambule de la Constitution de 1946, auquel se réfère le Préambule de la Constitution de 1958."

[675]Concerning the right of appeal of the expropriated party in the event of disagreement on the amount of compensation, see decision no. 2012‑226 QPC, 6 April 2012, p. 183, § 3; decision no. 2012‑236 QPC, 20 April 2012, p. 211, § 3; or decision no. 2012‑275 QPC, 28 September 2012, p. 498, §§ 5-7.

constitutionality[676]. The right to appeal is closely connected with the quality of law, especially with the requirement of intelligibility of legal provisions providing for access to court, as their imprecision or ambiguity may be susceptible of bringing about an interference with the right to remedy. This fact was stressed by the Constitutional Council which held that especially the right to appeal might be affected by ineffectiveness caused by the redundant complexity of norms[677]. The lack of clarity of norms has already been sanctioned by the ECHR which found that, as a consequence, the right to access to a court was violated in the particular case by the French state[678].

This indicates that the French constitutional practice is consonant with the ECHR also as regards the quality of legal provisions. Besides the existence of the legal basis, the constitutional jurisprudence further requires that laws meet certain qualitative characteristics such as precision and unambiguity as well as intelligibility and accessibility. In this respect the Constitutional Council has stated that it is incumbent upon Parliament to exercise fully the powers vested in it by the Constitution, in particular Article 34 thereof. According to the constitutional judges, the exercise of these powers to the full, together with the objective of the constitutional value of intelligibility and accessibility of the law[679]which derives from Articles 4, 5, 6 and 16 of the Declaration of 1789, requires the judges to enact provisions which are sufficiently precise and unambiguous[680]. The accessibility and intelligibility of law as the objective of constitutional value is considered as a tool preventing any interpretation

[676]Decision no. 2010-19/27 QPC, 30 July 2010, § 6, p. 190; decision no. 2010-38 QPC, 29 September 2010, p. 252, § 3; decision no. 2010-69 QPC, 26 November 2010, p. 388, § 4; decision no. 2010-71 QPC, 26 November 2010, p. 343, § 33; decision no. 2010-90 QPC, 21 January 2011, p. 81, § 7. The Constitutional Council ruled on unconstitutionality for the lack of intelligibility of statutory provisions, for example, in a decision no. 2003-475 DC, 24 July 2003, Official Journal of 31 July 2003, p. 13038, § 20; or decision no. 2008-567 DC, 24 July 2008, Official Journal of 29 July 2008, p. 12151.

[677]Decision no. 2005-530 DC, 29 December 2005, Official Journal of 31 December 2005, p. 20705.

[678]See *F.E. v. France*, 30 October 1998, *Reports of Judgments and Decisions* 1998-VIII.

[679]Decision no. 99-421 DC, 16 December 1999, Official Journal of 22 December 1999, p. 19041. The Constitutional Council reaffirmed that inteligibillity and accessibility of law were the objectives of constitutional value, for example, in decisions no. 2012‑230 QPC, 6 April 2012, § 6, p. 190; no. 2012‑277 QPC, 5 October 2012, § 7, p. 508; no. 2012‑283 QPC, 23 November 2012, § 28, p. 605; or no. 2012‑285 QPC, 30 November 2012, § 12, p. 636.

[680]See, for example, decision no. 2008-564 DC, 19 June 2008, Official Journal of 26 June 2008, p. 10228; decision no. 2009-578 DC, 18 March 2009, Official Journal of 27 March 2009, p. 5445; decision no. 2011-644 DC, 28 December 2011, § 16 p. 605; or decision no. 2011-645 DC, 28 December 2011, § 7 p. 605. The intelligibility was often examined simultaneously with the principle of clarity of law implying from Article 34 of the Constitution until their examination was merged, in decision no. 2001-447 DC, 18 July 2001, Official Journal of 21 July 2001, p. 11743, under the "objective of clarity and intelligibility of law". The principle of clarity was abandoned in decision no. 2006-540 DC, 27 July 2006, Official Journal of 3 August 2006, p. 11541.

contrary to the Constitution or against arbitrary interpretation[681]. In the absence of intelligibility, legal norms "would not be effective if the citizens did not dispose of sufficient knowledge of rules applicable to them and if these rules were of inutile complexity"[682]. This also implies that the motives justifying the general interest in property takings and limitations must be sufficiently and precisely defined by law[683].

The Constitutional Council has conceived the requirement of lawfulness concerning property limitations and takings rather aptly when it held that Article 34 of the Constitution makes "ownership, rights in rem and civil and commercial obligations" the "preserve of statute law"[684]. It is worth noting that the accessibility and intelligibility of law has also served as a means of scrutiny of administrative acts since the decision of the Council of State of 8 July 2005[685], subsequently reiterated in the decision of 24 March 2006[686]. The constitutional and administrative judges also refer to the "objective of accessibility and intelligibility"[687] without mentioning its constitutional value, or to the "requirement"[688] or the "principle"[689]. The intelligibility seems not to be only a technical instrument implied in the Declaration permitting to evaluate the effectiveness of fundamental rights and freedoms, but also an instrument of jurisprudential politics which enables the constitutional and administrative

[681]See, for example, decision no. 2014-694 DC, 28 May 2014, Official Journal of 3 June 2014, p. 9208, § 7: "L'objectif de valeur constitutionnelle d'accessibilité et d'intelligibilité de la loi... impose au législateur d'adopter des dispositions suffisamment précises et des formules non équivoques. Il doit en effet prémunir les sujets de droit contre une interprétation contraire à la Constitution ou contre le risque d'arbitraire, sans reporter sur des autorités administratives ou juridictionnelles le soin de fixer des règles dont la détermination n'a été confiée par la Constitution qu'à la loi".

[682]Decision no. 2003-473 DC, 26 June 2003, Official Journal of 3 July 2003, p. 11205.

[683]Decision no. 85-189 DC, 17 July 1985, Official Journal of 19 July 1985, p. 8200, Rec., p. 49: "The administration must found its decisions on the motives referring to the general interest which are sufficiently precisely defined by law". Decision no. 2012‑247 DC, 16 May 2012, p. 267, § 6: "The judge in the expropriation proceedings may only issue an order transferring ownership after a lawful declaration of public utility has been made".

[684]Decision no. 2011-227L, 10 November 2011, p. 526, § 1.

[685]CE 8 July 2005, *Fédération des syndicats généraux de l'Éducation nationale et de la recherche publique SGEN-CFDT*, Lebon T. 708.

[686]CE 24 March 2006, *KPMG*, Lebon 154. See further, for example, CE 9 August 2006, *Association des avocats conseils d'entreprises*, Lebon T. 940; CE 17 October 2007, *Département de Seine-et-Marne*, appl. no. 294271; CE 18 June 2008, *Commune de Tremblay-en-France*, appl. no. 285344; or CE 25 July 2008, *Fédération nationale de l'aviation marchande*, appl. no. 290726.

[687]For example, the decision of the Constitutional Council no. 2003-475 DC, 24 July 2003, Official Journal of 21 July 2003, p. 13038; or decision no. 2007-557 DC, 15 November 2007, Official Journal of 21 November 2007, p. 19001.

[688]Decision of the Constitutional Council no. 2004-494, 29 April 2004, Official Journal of 7 May 2004, p. 7998; decision no. 2006-535, 30 March 2006, Official Journal of 2 April 2006, p. 4964; or decision CE 16 June 2008, *Fédération des syndicats dentaires libéraux*, appl. no. 296578.

[689]Decision of the Constitutional Council no. 2005-530 DC, 29 December 2005, Official Journal of 31 December 2005, p. 20705; CE 18 June 2008, *Commune de Tremblay-en-France*, appl. no. 285344; or CE 29 Octobre 2008, *LEEM-Les entreprises du médicament*, appl. no. 306449.

judges to interpret those statutory provisions that are so incomprehensible as to render them intelligible[690]. Indeed, the Council of State has held that if the administrative judge can specify the meaning of a statute, he cannot annul it on the pretext that it is not precise enough[691]. The Constitutional Council has, as well, expressly admitted that it appertains to it to interpret the provisions of law brought before it to the extent in which interpretation is necessary for the assessment of constitutionality[692].

In spite of that the Constitutional Council is not a judicial body of the control of conventionality and that it does not, as opposed to the Czech Constitutional Court, directly refer to the standards of the Convention, within the meaning of their interpretation by the ECHR, in its practice of the control of constitutionality, it can be observed that it recognises the necessity to abide by the principle of lawfulness of interferences with property as regards both its substantive and procedural limbs, which represents one of the principles of the rule of law state, to the same extent as the ECHR.

1.7.2. Legitimacy - Public Interest

Property as a social institution is subordinate to evolving public needs. The latter are expressed in the Convention as the "public interest" or the "general interest", while the Czech Charter employs the term "general interest" and the French Declaration the term "public necessity". It can be argued that all these terms are more-or-less interchangeable as to their meaning. It is, by reason of the public interest, the social function of property which forms an integral part of the conventional and constitutional concepts of property whereby it contributes to the shaping of the modern understanding of property, the conception of property which dominates the proprietary relations in contemporary society and which is also incorporated in fundamental laws and in instruments of international law. The determination of the public interest is, therefore, important for the modern understanding of the notion of private property. It can be asserted that the larger the domain of the public interest, the stronger the social function of private property.

[690]A. Jennequin, "L'intelligibilité de la norme dans les jurisprudences du Conseil constitutionnel et du Conseil d'État", RFDA, September-October 2009, p. 916.
[691]CE, ass., 5 March 1999, *Rouquette*, Lebon 37.
[692]Decision no. 2001-455, 12 January 2002, Official Journal of 18 January 2002, p. 1053.

1.7.2.1. Approach of the ECHR

Although the case-law of the ECHR does not offer any specific clarification as to the difference between the "public interest" in the control of the use rule and the "general interest" in the deprivation rule, it can be asserted that both terms are, in general, interchangeable and apply to P1-1 as a whole. In this respect the ECHR has held, for example, in *Beyeler v. Italy*[693] that the "public interest" required under the second sentence and the "general interest" referred to in the second paragraph of P1-1 are, in fact, corollaries of the principle set forth in the first sentence of P1-1. Despite the fact that P1-1 does not specify the meaning of "public interest" or "general interest", it is apparent that this condition requires the state to put forward reasons which would justify restrictions of private property. For this purpose the case-law uses the term "legitimate aim". Thus, any deprivation or limitation of possessions must pursue a legitimate aim in the public interest, such as the elimination of social injustice in the housing sector[694], nationalisations[695], or prevention of tax evasions[696].

A question arises as to the extent of discretion states have at their disposal in respect of specifying what is in the "public interest", or what legitimate aims they may seek. In view of the wording of P1-1, which does not determine what is the permissible aim of restrictions, it can be suggested that the discretionary power is a wide one, and that the notion of "public interest" is accordingly extensive. The fact that the public interest is an open-ended concept is reflected on the European level in a wide margin of appreciation of states to determine what is in the public interest, and, further, that the ECHR will respect the legislature's judgment as to what is in the general interest unless that judgment is manifestly without reasonable foundation[697]. The ECHR's limited supervision stems from the fact that the definition of public or general interest varies from state to state and over time. So, the states enjoy a wide power of discretion in determining the existence of a problem of public concern warranting limitation or deprivation of property, that is, in determining the necessity of interference. The

[693] *Beyeler v. Italy* [GC], no. 33202/96, § 111, ECHR 2000-I.
[694] For example, *Hutten-Czapska v. Poland* [GC], no. 35014/97, ECHR 2006-VIII; *Lindheim and Others v. Norway*, nos. 13221/08 and 2139/10, 12 June 2012; *Bittó and Others v. Slovakia*, no. 30255/09, 28 January 2014; or *Berger-Krall and Others v. Slovenia*, no. 14717/04), 12 June 2014.
[695] For example, *Calheiros Lopes and Others v. Portugal*, no. 69338/01, 7 June 2005.
[696] See, for example, *Gasus Dosier- und Fördertechnik GmbH v. the Netherlands*, 23 February 1995, Series A no. 306-B; *Benet Czech, spol. s r.o. v. the Czech Republic*, no. 31555/05, 21 October 2010; or *Metalco Bt. v. Hungary*, no. 34976/05, 1 February 2011.
[697] See *Mellacher and Others v. Austria*, 19 December 1989, §45, Series A no. 169; *Scollo v. Italy*, 28 September 1995, § 27, Series A no. 315-C; *Immobiliare Saffi v. Italy* [GC], no. 22774/93, § 49, ECHR 1999-V; *Hutten-Czapska v. Poland* [GC], no. 35014/97, § 166, ECHR 2006-VIII; *Lindheim and Others v. Norway*, nos. 13221/08 and 2139/10, § 96, 12 June 2012.

wide discretionary power of the states applies to the determination of the aim as well as to the choice of measures securing the aim set. The ECHR's approach is based on the presumption that because of their direct knowledge of their society and its needs, the national authorities are, in principle, better placed than an international judge to appreciate what is in the public interest. The margin of appreciation of states, which goes hand in hand with the subsidiary role[698] of the ECHR in the protection of Convention rights, demarcates the ECHR's power of review vis-à-vis the authorities of Contracting States and varies depending on the circumstances of the individual case and on the right or freedom which is at stake. It refers to the discretion allowed to national authorities when restricting the guarantees of the Convention[699]. It follows that the identification of "public interest" is largely left to the state's discretion, which commonly involves consideration of political, economic and social issues on which opinions within a democratic society may reasonably differ widely[700], meaning that every limitation and deprivation of property must pursue legitimate political ends – economic, social, or special public interests[701].

A wide margin of appreciation accorded to states and the related principle of subsidiarity of the Convention suggest a measure of discretion of national authorities in assessing the necessity of restrictions imposed on the right of property. Hence, it may make one believe that arguments put foward by national authorities may hardly be questioned by the ECHR. Can. then, the ECHR exercise real control? May not such a wide margin of appreciation lead to the weakening or softening of property safeguards on the European level since the ECHR has, essentially, granted the Contracting States leeway in delimiting the boundaries of state interferences with private property veiled under the notion of public necessity? It seems that the ECHR has, nevertheless, retained some power to scrutinise justificatory arguments advanced by the national authorities enabling it to exercise control over the finality of interferences and, at the same time, preserve a large margin of appreciation of states.

[698]"The Court points out that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights … The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines. The institutions created by it make their own contributions to this task but they become involved only through contentious proceedings and once all domestic remedies have been exhausted". See *Handyside v. UK*, Series A 24 (1976), §48.

[699]It ensues from the *travaux préparatoires* that the drafters of the Convention were reluctant to make economic and social policies of states questionable before the Commission and the ECHR. This would have made the ratification of the Convention more difficult. Another concern was a deference to the social function of property, which imposes limits on private property and which brought the drafters to formulate the provision of P1-1 in a way to prevent only arbitrary confiscations of property.

[700]*James and Others v. UK*, judgment of 21 February 1986, Series A No. 98, § 46.

[701]J. Frowein, W. Peukert: "Europäische Menschenrechts-konvention, EMRK-Kommentar", 2nd edition, E. P. Engel Verlag, Kehl, 1996, pp. 791-792.

Although the ECHR cannot substitute its own assessment for that of the national authorities, it is bound to review the contested measures under P1-1 and, in so doing, to make an inquiry into the facts with reference to which the national authorities acted. In view of the ECHR's usual statement that national authorities are, in principle, better placed than an international judge to appreciate what is in the public interest, it implies that the decision of national authorities on the choice of measures interfering with property is likely to be subject to stricter control by the ECHR, in the framework of the test of proportionality, than the determination of the aim itself. Accordingly, it can be claimed that the liberty of discretion granted to states when identifying the aim in the public interest is counterbalanced by the proportionality test within which the ECHR balances the legitimate aim and the measures adopted to realize that aim.

It follows that the liberty of national discretion is not absolutely unlimited, and that it is constrained by the principle of proportionality. And not only by that for measures restricting property must also be set in a legislative context, be subject to domestic judicial review, and be compensated. The wide discretion of states is further constrained by the principle of commonality which can be found in the Preamble of the Convention under the aim of the Council of Europe to achieve greater unity between its members through "the maintenance and further realisation of human rights and fundamental freedoms" under the principle of "common understanding and observance of the human rights" as one of the ways through which fundamental freedoms may be best secured, or, under the common heritage principle, affirming that the Convention derives from the "common heritage of political traditions, ideals, freedom and the rule of law" of European countries[702]. So, if the definition of the public interest is largely in the hands of states, the ECHR disposes of these core interpretative principles constituting a limitation upon state discretion which allow it to maintain some unity and harmony in interpretation and application of Convention rights and freedoms. Domestic courts will have to settle the scope of discretion of national authorities with respect to Convention rights and freedoms according to these principles.

Furthermore, although the ECHR does not, in fact, examine the legitimacy of the aim in the public interest as much as it puts to scrutiny the means to fulfil the aim, it, nonetheless, examines the "reasonableness" of the latter. European judges should look into whether the

[702]S. Greer, "The margin of appreciation: interpretation and discretion under the European Convention on Human Rights", Council of Europe Publishing, Strasbourg, 2000, p. 19.

national authorities have advanced reasonable and sufficient arguments for an interference with property and should, usually, respect the justification of the state unless it proves to be manifestly without reasonable foundation[703]. But what are the indicators of the basis on which the "reasonableness" of arguments is measured? It is apparent that this exercise necessarily bears some degree of subjectivity and that "reasonableness" represents a rather vague and casuistic criterion. It results in, generally speaking, the conception of public interest coinciding on European and national levels as long as a restrictive measure taken in the public interest is considered by the ECHR to have a "reasonable" foundation. This means that beyond the line of "reasonableness", which is upon the ECHR to assess, it is the European Court that takes the lead in pinpointing and regulating the boundaries of the public interest on national level. It further results in it being generally accepted that the public interest, which manifests the social utility of the right of property and comprises a variety of social needs that change and evolve with time, is a variable notion that changes according to the changing pressing needs of society. In this respect it is worthwile to cite the Czech Supreme Court which has held that the public interest, being the basic principle of expropriation or limitation of ownership, is a so-called open-ended legal term the definition of which cannot be found in any legal norm[704].

At last, it should be mentioned that as regards property takings, the notion of public interest does not always have to denote the interest of the whole of society. For a deprivation to be in the "public interest" it is not necessary that property be put to direct use of the community as a whole[705]. The fundamental condition is that the expropriated property must serve a legitimate social, economic, or other public goal. This means that even a private party may benefit from expropriation, provided that it is justified by the public interest. So, the concept of "public interest" under P1-1 does not necessarily require that the transferred property be put to the use of the general public or that the community is to benefit directly from the taking, on condition

[703]Such was the case, for example, in *Brumarescu v. Romania* where the condition of public interest was not considered to have been fulfilled as regards the interference falling under the deprivation rule, for no plausible argument was found to have been advanced to prove that the deprivation of property was justified as being in the public interest. See also *Zvolský and Zvolská v. the Czech Republic*, no. 46129/99, § 67, ECHR 2002-I; *Jahn and Others v. Germany* [GC], nos. 46720/99, 72203/01 and 72552/01, § 91, ECHR 2005-VI; or *J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. the United Kingdom* [GC], no. 44302/02, § 71, ECHR 2007-III.
[704]Judgment of the Czech Supreme Court no. 2 As 11/2003-164 of 23 October 2003.
[705]In *James and Others v. UK* the ECHR stated that a "taking of property effected in pursuance of legitimate social, economic or other policies may be in the 'public interest', even if the community at large has no direct use or enjoyment of the property taken".The facts of this case concerned a transfer of property between private individuals, the landlord and the tenant. Although the general public did not draw any direct benefit from the expropriated property, the deprivation pursued the enhancement of social justice within the community.

that the deprivation of property is not effected only for the reason of conferring a benefit solely on a private party[706].

1.7.2.2. Approach of the Czech Constitutional Jurisdiction

Similarly, in Czech constitutional practice, a public interest is an indeterminate notion. As to the doctrine, some Czech academics distinguish between simple public interests and qualified public interests (important and pressing interests)[707]. Other scholars define the public interest as being opposite to private interests[708], that is, interests the bearer of which is the public at large and which are incorporated in a legal norm either explicitly or in general terms[709]. All in all, it will be shown that the pivotal, and only, guidance in the constitutional interpretation and assessment of the "public" character of an interest rests in the benefits the interest is to produce which must be addressed to, and enjoyed by, the community at large. The interpretations of the notion of "public interest" have a common denominator which is the generality owing to a wide spectrum of situations in which it is necessary to assess this constitutional condition. A definition of the term must therefore be determined on a case-by-case basis within the framework of evaluation of each individual case and by virtue of weighing various existing interests and taking account of the particular circumstances of each case.

As regards the Czech constitutional jurisdiction, the notion of the public interest has been interpreted as an interest which could be qualified as "general" or "generally beneficial"[710]. This leads to the argument that, like the ECHR, the Czech Constitutional Court conceives the terms of "public" and "general" interest as interchangeable. Furthermore, in its practice, the Constitutional Court has borrowed legal sentences from the case-law of the late Supreme Administrative Court of Czechoslovakia to hold that the public interest is given there where the purpose of a measure is to "meet vital needs of some broader collectivity, either the state,

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[706]The ECHR has observed that no common principle could be identified in the constitutions, legislation or the case-law of the Contracting States, which would warrant understanding the notion of public interest as outlawing a compulsory transfer between private parties. See, for example, *Erkner and Hofauer v. Austria*, 23 April 1987, § 131, Series A no. 117.

[707]J. Hoetzel, "Zájmy veřejné. Slovník veřejného práva československého"[*Public Interests. The Dictionary of the Czechoslovak Public Law*], Vol. V., Eurolex Bohemia, Prague, 2000 (a reprint of the original version from 1948), pp. 577-578.

[708]P. Průcha, "Základní pojmy a instituty správního práva" [*Fundamental Notions and Concepts of Administrative Law*], Masaryk University, Brno, 1998, p. 355.

[709]S. Skulová, "Správní uvážení, základní charakteristika a souvislosti pojmu" [*Discretion in Administrative Law, Basic Characteristic of the Notion in Context*], Masaryk University, Brno, 2004. pp. 97-100.

[710]Judgment of the Constitutional Court no. I. ÚS 198/95 of 28 March 1996.

territorial, or social one, etc."[711]. This interpretation seems to exclude expropriation or limitation of property in the interest of an individual or a group of individuals, although such interests can also be beneficial for the public at large. But the Constitutional Court has further specified, in line with the practice under the Convention, according to which private interests of individuals may be considered as public ones[712], that the public interest can also be seen in the interest of an individual, and that the legislator may restrict ownership for the benefit of private persons[713]. The Court has thereby acknowledged that the characteristic of being "generally beneficial" does not have to be born only by the "collective" interest, but also by the interests of private individuals, and that even a private interest can sometimes prove to be also a public interest. It follows that the public interest does not have to be limitited to the interests of a larger collectivity as long as it produces generally beneficial properties. Likewise, not every collective interest can be labelled as the public interest of society and satisfying collective interests of some groups can, in many cases, be in absolute contradiction to the general interests of society. In this context the constitutional judges have expressed a noteworthy opinion that the whole history of the evolution of democratic institutions is the history of a struggle to prevent individual groups from exploiting the government to the benefit of collective interests of those groups[714]. Such a statement indicates that the definitional hallmark of the public interest is the public benefit. This conception is in harmony with the opinion of the ECHR that the public interest does not mean that transferred property should be put into use for the general public or that the community, in general, or, even a substantial proportion of it, should directly benefit from the taking[715].

In cases in which property rights of private individuals are in conflict, typically when ownership of one private party is violated by an interference provoked by other private party, it is necessary, in the opinion of the Constitutional Court, that conflicting individual interests be determined and assessed to evaluate the requirement of the public interest. So, for example, when a private person illegally builds a structure restricting the enjoyment of property of another person, pulling down the illegal construction does not have to be the only constitutionally commensurate solution, as the approach in the assessment of the public

[711]Judgment no. Pl.ÚS 34/97 of 27 May 1998, published under no. 152/1998 Sb.
[712]See, for example, *James and Others v. the United Kingdom*, 21 February 1986, § 40, Series A no. 98: "**...** even where the texts in force employ expressions like "for the public use", no common principle can be identified in the constitutions, legislation and case-law of the Contracting States that would warrant understanding the notion of public interest as outlawing compulsory transfer between private parties".
[713]Judgment no. IV. ÚS 652/06 of 21 November 2007.
[714]Judgment no. I. ÚS 198/95 of 28 March 1996.
[715]*James and Others v. the United Kingdom*, 21 February 1986, § 41, Series A no. 98.

interest must take into consideration the necessity of settling the conflict of ownership rights of the private parties and to protect the owner of the land[716]. The Constitutional Court, specifying that there must, therefore, be room for other solutions of the settlement of the dispute, holds that, in such cases, finding a solution to the contentious rights of two private parties represents a public interest and that it is necessary to justly determine the rights of the owners in contention which would both justify a legitimate interference with property rights[717]. The public interest, then, also coincides with the interest of individuals in resolving their conflict and it is also the protection of interests of aggrieved individuals which is at stake. Accordingly, the public interest can also be seen in society's need or interest in having private disputes most justly settled and the rights of individuals in conflict justly delimited, which means that it may also serve to preserve legal certainty and stability of legal relations. This type of cases shows that the public interest does not necessarily have to be represented by restricting the property of individuals for the public good as such, but that it can also be embodied in the interest in the settlement of a dispute for the purpose of which the property of one private party in conflict is to be restricted. In such cases the limitation of private property represents a means of achieving the public interest in the settlement of a dispute which, in fact, may amount to a positive obligation of the state under the Convention to protect rights, which, inevitably, reduces the scope of the state's discretion. By holding that the public interest may be embodied in the interest of the state to settle a dispute of private parties, the constitutional jurisdiction seems to have implicitly acknowledged that the power of national authorities to identify the aim in the public interest also entails obligations which have restrictive effects on their margin of appreciation. Such an interpretation is consonant with the interpretative practice of the ECHR that P1-1 of the Convention means that states must also act positively to protect the rights of individuals.

These considerations indicate the necessity of the evaluation of the circumstances of each individual case. In this respect the Constitutional Court came with a premise to the effect that, in cases of expropriation in the public interest, it is necessary to weigh the varying interests and particular circumstances of every single case[718]. As the constitutional judges put it, interferences with property are usually justified by a relative necessity[719]. This implies that the

[716]Judgment no. III. ÚS 455/03 of 25 January 2005; decision no. II. ÚS 568/01 of 22 October 2002; decision no. I. ÚS 353/98 of 22 November 1999.
[717]Judgment of the Constitutional Court no. III. ÚS 455/03 of 25 January 2005.
[718]Judgment of the Constitutional Court no. III. ÚS 455/03 of 25 January 2005.
[719]Judgment of the Constitutional Court no. Pl. ÚS 34/97 of 27 May 1998, published under no. 152/1998 Sb.

existence of the public interest cannot be determined *a priori*, but is to be ascertained in the course of proceedings by weighing various particular interests based on the circumstances of each particular case, whereby the public benefit must clearly prevail over particular private interests which, in fact, must be well reasoned[720]. In other words, it is necessary that procedural aspects of an interference restricting private property be safeguarded and respected.

1.7.2.3. Approach of the French Constitutional Jurisdiction

The requirement of public interest is expressed in Article 17 of the Declaration by the notion of "public necessity" justifying property transfers[721], which must not only be legally determined, but must also be imposed by force of evidence[722]. The Constitutional Council has acknowledged public necessity for property takings by holding that in order to comply with Article 17 of the Declaration a statute can authorize expropriation of real property rights solely for the carrying out of an operation for which the public interest has been legally ascertained[723].

Since the protection of private property is guaranteed not only in Article 17, but also in Article 2 of the Declaration[724], the question arises as to whether the existence of the public interest is also required in respect of those interferences with property that do not amount to deprivation. In view of the fact that Article 2 of the Declaration is silent on this issue, resort must be given to the practice of the Constitutional Council. Indeed, the constitutional case-law discloses that the existence of the public interest is also required as regards limitations of

[720]Judgment of the Constitutional Court no. Pl. ÚS 24/08 of 17 March 2009, published under no. 124/2009 Sb.
[721]Article 17 of the Declaration reads as follows: "Since the right to Property is inviolable and sacred, no one may be deprived thereof, unless public necessity, legally ascertained, obviously requires it, and just and prior indemnity has been paid". It involves transfers of private property to the public sphere as well as privatisations, in line with the interpretation of the constitutional jurisdiction stretching the constitutional concept of property beyond the limits of private property.
[722]G. Conac, M. Debene, G. Teboul, "La déclaration des droits de l'homme et du citoyen de 1789", Economica, 1993, p. 352. It should be added that on the level of ordinary laws the Code of Expropriation (Code de l'expropriation pour cause d'utilité publique) stipulates that expropriation of immovable property can be carried out only if it is preceded by a declaration of public utility (Article L11-1 para. 1: "L'expropriation d'immeubles, en tout ou partie, ou de droits réels immobiliers ne peut être prononcée qu'autant qu'elle aura été précédée d'une déclaration d'utilité publique"), and that "public utility is declared by a ministerial or prefectoral decree" (Article L11-2: "L'utilité publique est déclarée par arrêté ministériel ou par arrêté préfectoral"). Compared with the Czech Act on Expropriation, the latter also requires the existence of the public interest and reads in Article 3 that the public interest must outweigh the rights of the owner.
[723]Decision no. 2010-26 QPC, 17 September 2010, p. 229, § 6.
[724]Decision no. 2010-60 QPC, 12 November 2010, p. 321, § 3: "The right to property is one of the rights of man enshrined by Articles 2 and 17 of the Declaration of 1789".

property. In the opinion of the constitutional judges, if an interference with property does not have a character of deprivation, it nonetheless follows from Article 2 of the Declaration that any restriction imposed on the enjoyment of this right must be justified by the general interest and must be proportionate to the purpose sought to be achieved[725]. Thus, for example, with regard to the fact that hunting rights are attached to the right of use of immovable property, an attribute of the right of property, the exercise of this right can be limited only on a double condition: that the limitations follow the aim in the "general interest" and that they are not of such gravity to be susceptible to denaturing the meaning and scope of the right of property[726]. As it is up to the legislator to define the purpose of restrictions of the right of property it is about to introduce, the general interest may also take the form of a principle or an objective of constitutional value[727]. For example, in dealing with the Law on the Action Against Tobacco and Alcohol the Council faced the task of balancing the constitutional principles of the protection of public health and the freedom of entrepreneurship[728]. It came to the conclusion that the limitation of the freedom of entrepreneurship, and connected property rights, embodied in the ban on tobacco advertising was justified by the protection of public health which represented the public interest. It is not without interest that the Constitutional Council employs the term of "general interest" when speaking about limitations of property, whereas when mentioning deprivation of the right of use, it employs the expression "public necessity"[729]. All in all, the existing constitutional practice shows that the necessity of justifying the limitations of property for purposes of the general interest is embedded in Article 2 of the Declaration[730].

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[725]See, for example, decision no. 2010-60 QPC, 12 November 2010, § 3, p. 321; decision no. 2011-141 QPC, 24 June 2011, § 3, p. 304; decision no. 2011‑208 QPC, 13 January 2012, § 4, p. 75; decision no. 2011‑212 QPC, 20 January 2012, §§ 3 and 4, p. 84; decision no. 2011‑215 QPC, 27 January 2012, § 3, p. 98; or decision no. 2012‑283 QPC, 23 November 2012, §§ 14 and 16 to 19, p. 605.

[726]For example, decision no. 2000-434 DC, 20 July 2000, Official Journal of 27 July 2000, p. 11550, Rec., p. 107, § 24.

[727]S. Pavageau, "Le droit de propriété dans les jurisprudences suprêmes françaises, européennes et internationales", LGDJ, 2006, p. 356. For example, in a decision no. 91-303 DC of 15 January 1992, Official Journal of 18 January 1992, p. 882, §10, Rec., p. 15, the public interest was embodied in the principle of "the assurance of loyalty of commercial transactions and promotion of the defense of consumer interests".

[728]Decision no. 90-283 DC of 8 January 1991, Official Journal of 10 January 1991, p. 524, § 8, Rec., p. 11. The constitutional judges simultaneously conditioned the limitation in the public interest by the absence of denaturation of the meaning of the restricted freedom of entrepreneurship, that is, by the absence of an excessive disproportionality.

[729]See § 23 of the abovementioned decision no. 2000-434 DC: " l'instauration d'un "jour de non chasse" par l'article 24 de la loi "revient à priver le propriétaire de son droit de faire un libre usage de ses biens, sans aucune nécessité publique évidente".

[730]From the most recent practice see, for example, decision no. 2014-691 DC, 20 March 2014, § 7, Official Journal of 26 March 2014, p. 5925; decision no. 2014-394 QPC, 7 May 2014, Official Journal of 10 May 2014, p. 7873, § 10; decision no. 2014-406 QPC, 9 July 2014, Official Journal of 11 July 2014, p. 11613, § 4; or decision no. 2014-409 QPC, 11 July 2014, Official Journal of 13 July 2014, p. 11816, § 3.

The competence of the French legislator to determine a legitimate aim in the public interest results from Article 34 of the Constitution. Pursuant to this provision, the legislator has the power to determine the fundamental principles of property law, real rights, and civil and commercial obligations, to set out the rules governing the acquisition or maintenance of ownership[731], as well as the power to impose limitations on the exercise of the rights of property which are justified by the general interest[732]. It can be perceived that, like the ECHR and the Czech Constitutional Court, the Constitutional Council also applies the terms "public necessity" and "general interest" interchangeably, and, further, that the pursuit of the general interest is the condition sine qua non of any interference of the legislator with private property, that is, also regarding restrictions of private property not amounting to deprivation[733].

Namely, the Constitutional Council has clearly connected the existence of the general interest with the preservation of legal certainty when it held that, although Parliament may, at any time, amend or repeal previous statutes by replacing them, if need be, by other provisions, it would fail to have due regard to the guarantee of rights proclaimed in Article 16 of the Declaration, prohibiting legally acquired situations from being adversely affected other than for reasons of sufficient general interest, if it were to pass measures adversely affecting situations recognized by law without justifying them on the ground of the general interest[734]. The Constitutional Council apparently does not substitute the appreciation of the existence of the general interest by the legislator, but it censures those provisions interfering with the exercise of the right of property when "neither the wording of the provision in question nor

[731]Decision no. 2011‑212 QPC, 20 January 2012, §§ 3 and 4, p. 84; decision no. 2014-691 DC, 20 March 2014, § 46, Official Journal of 26 March 2014, p. 5925; decision no. 2014-409 QPC, 11 July 2014, § 4, Official Journal of 13 July 2014, p. 11816.
[732]Decision no. 2014-691 DC, 20 March 2014, Official Journal of 26 March 2014, p. 5925, § 7.
[733]The pursuit of the public interest may even justify the legislator to authorise a transfer of property free of charge between persons of public law. See, for example, decision no. 2013-687 DC, 23 January 2014, §§ 52-53, Official Journal of 28 January 2014, p. 1622.
[734]Decision no. 2010-4/17 QPC, 22 July 2010, §§ 14,15 and 17, p. 156. In a decision no. 2010-19/27 QPC, 30 July 2010, §§ 17 and 19, p. 190, the Council stated that, as Act no 2008-776 of August 4th 2008 conferred upon certain taxpayers subjected to searches or seizures prior to the entry into force of the Act the right to appeal against the order authorizing the search or make an objection against the manner in which the operations were carried out, it therefore granted such persons a retrospective right to avail themselves of new channels of appeal and did not adversely affect any lawfully acquired situation in such a way as to infringe the guarantee of rights as proclaimed by Article 16 of the Declaration of 1789.

the parliamentary debates specifies the aim of the general interest justifying the interference"[735].

It can be asserted that the legislator disposes of freedom of discretion to such an extent it corresponds to the role of property in the social context and to the social function it performs. There does not appear to be a similar sign of an inherent reference to the state's positive obligation to protect property rights of individuals in the constitutional practice which is perceptible from the Czech constitutional case-law and which represents a certain counterbalance to a wide margin of appreciation of the legislator. In this context the Constitutional Council has specified that the exercise of the right of property has undergone an evolution characterised by limitations required by the general interest[736]. So, it seems that the legislator's liberty of appreciation in the performance of its competence pursuant to Article 34 of the Constitution is limited only by the principles and norms of constitutional value imposed on all state bodies, and that it is bound to respect[737].

This corresponds to the restricted power of appreciation of the Constitutional Council vis-à-vis the legislator, whereby the former is bestowed only with the competence to rule on the conformity of laws brought before it with the Constitution[738]. The reluctance or caution of the constitutional jurisdiction not to encroach upon the powers of the legislator stemming from the Constitution is obvious. Although the existence of the public interest is required when fundamental rights and freedoms are to be curtailed, it seems that the constitutional jurisdiction provides the legislator considerable discretion in terms of identifying the goals to be pursued. This may bear relation to the fact that the founders of the Constitution of 1958 designed the Constitutional Council as a means of securing the executive dominance of Parliament and not to protect fundamental rights[739]. The constitutional jurisprudence does not seem to deal with the "reasonableness" of the legislator's choice, since it contents itself only with the existence of the public interest. In consequence, it can be claimed that the legislator

[735]See, for example, decision no. 2000-434 DC of 20 July 2000, Official Journal of 27 July 2000, p. 11550, Rec. p. 107, §§ 31 and 34; decision no. 2011-224 QPC, 24 February 2012, p. 136, § 45; or decision no. 2012-263 QPC, 20 July 2012, p. 386, § 3.
[736]Decision no. 81-132 DC, 16 January 1982, Official Journal of 17 January 1982, p. 299, § 16; or decision no. 2013-370 QPC, 28 February 2014, Official Journal of 2 March 2014, p. 4120, §13.
[737]Decision no. 81-132 DC, 16 January 1982, Official Journal of 17 January 1982, p. 299, § 18.
[738]Decision no. 74-54 DC, 15 January 1975, Official Journal of 16 January 1975, p. 671.
[739]E. Lambert Abdelgawad, A. Weber, "The Reception Process in France and Germany", in *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, H. Keller and A. Stone Sweet (eds.), Oxford University Press, 2008, p. 144.

enjoys a wide margin of appreciation, similar to that enjoyed by national parliaments under the Convention, and that the constitutional jurisdiction, similar to the ECHR, exercises limited control powers in terms of patent incompatibility with the Constitution. It can be further observed that the Czech constitutional jurisdiction seems to enjoy a more challenging position vis-à-vis the legislator than its French counterpart, as it does not hesitate to interpret discretionary legislative power as comprising and being delimited by an implicit responsibility for the protection of property rights of individuals.

Generally speaking, the legitimate aim is a means on the basis of which judges further weigh the advantages against the disadvantages of a measure and balance conflicting interests. The existence of the legitimate aim is, thus, a precondition for a proportionality test[740] which has been developed as a judge-made concept by the ECHR and the national constitutional jurisdictions under scrutiny as another criterion in the assessment of conventionality and the constitutionality of measures restricting property rights.

1.7.3. Proportionality

1.7.3.1. Approach of the ECHR

The control of proportionality was introduced by the ECHR, as P1-1 does not contain any reference to proportionality of measures restricting property rights, although it may be argued that the requirement of proportionality is latent[741]. The principle of proportionality, which is a central interpretative principle in international human rights law[742], has acquired the status of a general principle which applies to the whole of the Convention, including P1-1. Although the general principle of proportionality was established by the ECHR as the principle of interpretation of the first sentence of the first paragraph, or the first norm, of P1-1[743], according to the ECHR the search for a fair balance is inherent in the whole of the

[740]The existence of the public interest is one of the conditions for striking a fair balance within the test of proportionality. See, for example, *Beyeler v. Italy* [GC], no. 33202/96, § 111, ECHR 2000-I.
[741]M.-A. Eissen, "Le principe de proportionnalité dans la jurisprudence de la Cour européenne des droits de l'homme", in *La Convention européenne des droits de l'homme, commentaire article par article*, L.-E. Pettiti, E. Decaux, P.-H. Imbert (eds.), 2th ed., Economica, 1999, p. 66.
[742]J. Christoffersen, "Straight Human Rights Talk – Why Proporionality does (not) Matter", in *Human Rights, Their Limitations and Proliferation*, P. Wahlgren (ed.), Scandinavian Studies in Law, Vol. 55, Stockholm Institute for Scandinavian Law, Stockholm, 2010, p. 17.
[743]*Sporrong and Lönnroth v. Sweden*, 23 September 1982, Series A no. 52.

Convention[744] and is also reflected in the structure of P1-1, which means that the necessity of the fair balance applies to both limitations and deprivations of property.

So, although not explicitly required by the Convention, the principle of proportionality was elaborated upon by the interpretative practice of the ECHR and is one of the core requirements of conventionality. It has been developed by the ECHR as a corrective and restriction to the margin of appreciation doctrine[745] and it can be viewed as a "passe partout" criterion which serves to fill out lacunas of P1-1[746]. This extensive conception was the object of some criticism from a part of the doctrine. For example, according to B. Stern the essential aim of the first norm was to "introduce the idea of proportionality in the interpretation of the two norms regulating deprivation of property and control of the use of property" whereby "the whole text was innervated by the idea of proportionality"[747]. It may be argued that this criticism is apparently given by the fact that, as opposed to other criteria of conventionality that are prescribed by the Convention such as legality and pursuance of the public interest, proportionality as a principle developed by the jurisprudence is liable to a broad and discretionary interpretation by the ECHR. From the point of view of potential variability of the application of the doctrine of the margin of appreciation such criticism may seem to be reasonable[748]. Even so, the global application of the principle of proportionality provides another "safeguard" in the assessment of the permissibility of interferences with property under the Convention and, as will be shown below, it is one of the examples of a close relationship between the Convention standards and the law of the member states of the Convention. It will be shown that this principle is also embedded in the practice of the French and Czech constitutional jurisdictions[749]. In any event, as a general rule, it holds that the

[744]See, for example, *Herrmann v. Germany* [GC], no. 9300/07, § 74, 26 June 2012.
[745]F. Matscher, "Methods of Interpretation of the Convention" in Macdonald, R., Matscher, F., and Petzold, H., (eds.) *The European System for the Protection of Human Rights,* London, 1993, p. 79.
[746]A.-F. Zattara, "La dimension constitutionnelle et européenne du droit de propriété", LGDJ 2001, p. 529.
[747]B. Stern, "Le droit de propriété, l'expropriation et la nationalisation dans la convention européenne des droits de l'homme", Droit et pratique du commerce international (DPCI), 1991, p. 405.
[748]See, for example, D. J. Harris, M. O'Boyle, C. Warbrick, "Law of the European Convention on Human Rights", Butterworths, London, Dublin, Edinburgh, 1995, p. 14. The authors draw attention to the controversiality of the doctrine of the margin of appreciation consisting in its unstable application: "When it is applied widely, so as to appear to give a state a blank cheque or to tolerate questionable national practices or decisions, it may be argued that the Convention authorities have abdicated their responsibilities". Accordingly, this means that the intensity of the test of proportionality may vary and is reflected in the scope of the margin of appreciation that is accorded by the ECHR to states. It may be argued that the wider the application of the doctrine of the margin of appreciation, the looser the application of the test of proportionality.
[749]The test of proportionality is one of the standard legal tools of European constitutional courts as well as international courts. Judgment of the Czech Constitutional Court no. Pl. ÚS 38/04 of 20 June 2006, §27, published under no. 409/2006 Sb.

search for balance between individual and public interests is rather challenging, as it can be claimed that proportionality is an ideal the search of which is permanent[750].

The principle of proportionality requires that a reasonable relationship of proportionality between the means employed and the aim sought to be realised be struck[751]. In other words, a measure restricting property rights must be necessary in a democratic society and must be directed at achieving a legitimate aim. As the ECHR has specified, not only must the measure be appropriate for achieving its aim, but it also must not be disproportionate thereof[752]. The case-law uses, for this purpose, a fair-balance test which is expressed by the ECHR as a requirement that a fair balance must be struck between the collective interest and the interests of an individual[753]. The doctrine denotes it as "proportionality in the narrower sense"[754] regarding rights as protected interests and the public interest as the common interest, which means that a suitable and necessary measure may not upset the fair balance and/or destroy the essence of the protected right[755]. Accordingly, the purpose of a fair-balance test is to assess whether a measure strikes a fair balance between the demands of the general interest of the community and the requirements of protection of fundamental rights of an individual[756]. As the ECHR reiterated and concluded in the *Hutten-Czapska* case, not only must an interference with the right of property pursue, on the facts as well as in principle, a legitimate aim in the general interest, but there must also be a reasonable relation of proportionality between the means employed and the aim sought to be realised by any measures applied by the state, including measures designed to control the use of the individual's property. That requirement is expressed by the notion of a fair balance that must be struck between the demands of the

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[750]X. Philippe, "Le contrôle de proportionnalité dans les jurisprudences constitutionnelles et administratives françaises", PUAM, 1990, p. 20.

[751]See, for example, *The Holy Monasteries v. Greece*, 9 December 1994, § 70, Series A no. 301-A; *Brosset-Triboulet and Others v. France* [GC], no. 34078/02, § 86, 29 March 2010; *Herrmann v. Germany* [GC], no. 9300/07, § 74, 26 June 2012; or *Paulet v. the United Kingdom*, no. 6219/08, § 64, 13 May 2014.

[752]*James and Others v. the United Kingdom*, 21 February 1986, § 50, Series A no. 98.

[753]*Sporrong and Lönnroth v. Sweden*, 23 September 1982, § 69, Series A no. 52.

[754]A. R. Coban, "Protection of property rights within the European Convention on Human Rights", Ashgate, 2004, p. 205.

[755]J. Christoffersen, "Straight Human Rights Talk – Why Proporionality does (not) Matter", in *Human Rights, TheirLimitations and Proliferation*, P. Wahlgren (ed.), Scandinavian Studies in Law, Vol. 55, Stockholm Institute for Scandinavian Law, Stockholm, 2010, p. 17.

[756]In *Depalle v. France* [GC], no. 34044/02, § 83, ECHR 2010, the ECHR specified that "the second paragraph of Article 1 of Protocol No. 1 is to be read in the light of the principle enunciated in the first sentence. Consequently, the interference must achieve a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The search for this balance is reflected in the structure of Article 1 of Protocol No. 1 as a whole, and therefore also in the second paragraph thereof: there must be a reasonable relationship of proportionality between the means employed and the aim pursued". For recent authority, see, for example, *Bittó and Others v. Slovakia*, no. 30255/09, § 97, 28 January 2014.

general interest of the community and the requirements of the protection of the individual's fundamental rights[757].

It seems that, quite differently from the Czech constitutional law and practice, which accords deprivations and formal limitations of property the same standing as concerns the requirements of constitutionality that must be satisfied, the ECHR's test of proportionality does not appear to be the same under the deprivation and the control of use rule. It can be claimed that the requirement of proportionality differs, depending on the applicable rule, from a more strict approach under the deprivation rule allowing states a narrower margin of appreciation to a less stringent approach under the control of the use rule[758]. It is the seriousness of interference that is of decisive importance. Although the case of *James and Others v. UK* seems to indicate that the principle of proportionality applies in the same way to all interferences with property under P1-1, this is not supported by the case-law and the ECHR seems to stress different factors depending on which rule of P1-1 applies[759]. It can be observed that there is the opposite tendency in the practice of the French Constitutional Council which examines only manifestly disproportionate errors of the legislator as regards deprivations of property, whereas, as regards limitations of property, it performs a balancing test of proportionality.

In deprivation of property cases the ECHR has laid down the principles in *James and Others v. UK* and *Lithgow v. UK*. It is primarily the payment of compensation the lack of which is justifiable only in exceptional circumstances. Accordingly, it is usually the amount, terms and the effectiveneness of the payment of compensation that is crucial in the assessment of proportionality of a deprivation of property[760]. Another decisive factor is, apparently, the availibility of procedural safeguards, and, since expropriation is the most serious interference with the right under P1-1, it requires a careful examination of all relevant factors by a court. So, it can be asserted that in deprivation of property cases two major factors are relevant for

[757]*Hutten-Czapska v. Poland* [GC], no. 35014/97, § 167, ECHR 2006-VIII.
[758]G. Gauksdóttir, "The Right to Property and the European Convention on Human Rights, A Nordic Approach", Lund University, Lund, 2004, p. 253.
[759]In search for a balance the ECHR weighs different competing factors and subsequently assesses whether the owner does not bear a burden which is excessive compared to the benefit which the interference brings to the public. To this end, the ECHR conducts an overall examination of the various interests at issue, having regard to the fact that the Convention is intended to guarantee rights that are "practical and effective", not theoretical or illusory, so it goes beneath appearances and looks into the reality of the situation at issue, taking account of all the relevant circumstances.
[760]*Kozacıoğlu v. Turkey* [GC], no. 2334/03, §§ 65-73, 19 February 2009; *Arsovski v. the former Yugoslav Republic of Macedonia*, no. 30206/06, §§ 57-61, 15 January 2013.

the assessment of whether a fair balance has been struck: a) the availability of compensation, b) the availability of procedures to challenge the interference with property. Besides these fundamental factors the ECHR may also examine other ones which may prove to be of decisive importance, such as the beneficiary of expropriation - if it is the state or a private company which, through commercial means, may profit from expropriation[761].

As regards the test of proportionality under the control of the use rule, there are many factors which interact and overlap to a greater or lesser extent and depend on the circumstances of the case. There is a variety of factors that may come into play, according to the circumstances of the limitation of property, as the control of use rule covers a wide variety of restrictions on the use of property. They may include, for example, the conduct of the parties[762], whether the public authorities acted arbitrarily[763], the personal situation of the applicants and their good faith[764], the existence of procedural and other safeguards[765], legitimate expectation[766], the

[761]*Arsovski v. the former Yugoslav Republic of Macedonia*, no. 30206/06, 15 January 2013.
[762]For example, in *Katte Klitsche de la Grange v. Italy*, 27 October 1994, Series A no. 293-B, the ECHR observed that the applicant would have had ample time to take appropriate steps but he did not do so. In *Beyeler v. Italy* [GC], no. 33202/96, § 114, ECHR 2000-I, the ECHR held that "ascertaining whether such a balance existed requires an overall examination of the various interests in issue, which may call for an analysis not only of the compensation terms – if the situation is akin to the taking of property – but also, as in the instant case, of the conduct of the parties to the dispute, including the means employed by the State and their implementation".
[763]Namely, the ECHR dealt with unreasonably lengthy interferences, such as unreasonably lengthy expropriation permits (*Sporrong and Lönnroth v. Sweden*, *Erkner and Hofauer v. Austria*, or *Poiss v. Austria*), unreasonable delays in the determination of compensation (*Mateos e Silva, Lda., and Others v. Portugal or Almeida Garrett, Mascarenhas Falcao and Others v. Portugal*), or contruction prohibitions leaving the status of property uncertain for a long period of time without paying compensation (*Iatridis v. Greece, Pialopoulos v. Greece,*or *Phocas v. France*).
[764]See *Pincová and Pinc v. the Czech Republic*, no. 36548/97, ECHR 2002-VIII; *Forminster Enterprises Limited v. the Czech Republic*, no. 38238/04, § 75, 9 October 2008; *Vistiņš and Perepjolkins v. Latvia* [GC], no. 71243/01, 25 October 2012; or *Lavrechov v. the Czech Republic*, no. 57404/08, § 44, ECHR 2013.
[765]For example, in *AGOSI v. the United Kingdom*, 24 October 1986, Series A no. 108, which concerned a seizure of and forfeiture of gold coins, the ECHR considered that the British system had not failed to afford the applicant a reasonable opportunity to put its case before the courts. In *Hentrich v. France*, judgment of 22 September 1994, Series A, No. 296-A, the ECHR held that as a selected victim of the exercise of the right of pre-emption, the applicant bore an individual and excessive burden that could have been rendered legitimate only if she had had the possibility of effectively challenging the measures taken against her. In *Air Canada v. the United Kingdom*, 5 May 1995, Series A no. 316-A, the ECHR considered that that the applicant had had the opportunity to institute judicial review proceedings to challenge the failure of the authorities to provide reasons for the seizure of the aircraft. Similarly, in *Phocas v. France*, 23 April 1996, *Reports of Judgments and Decisions* 1996-II, the ECHR found that the law applicable at the material time had afforded the applicant a remedy. For recent authority, see, in particular, *Hutten-Czapska v. Poland* [GC], no. 35014/97, § 168, ECHR 2006-VIII; or *Bittó and Others v. Slovakia*, no. 30255/09, § 98, 28 January 2014.
[766]For example, in *Fredin v. Sweden (no. 2)*, 23 February 1994, Series A no. 283-A, concerning a revocation of a permit to exploit gravel, the ECHR held that the obligation of the authorities to take due account of the applicants' interests could not reasonably have founded any legitimate expectation on the part of the applicants of being able to continue exploitation. In *Gasus Dosier- und Fördertechnik GmbH v. the Netherlands*, 23 February 1995, Series A no. 306-B, which concerned the seizure of a mixer, the ECHR held that the requirement of proportionality had been satisfied, as the applicant company was engaged in a commercial venture which involved an element of risk.

breach of legal certainty[767], or the compensation terms if the situation is akin to the taking of property[768]. The ECHR may also examine the purpose for which the owner intends to use the property and the economic impact of a measure, as for an interference to amount to control of the use of property it is important that there is the possibility of a meaningful alternative use of property and that the owner has retained some economic interests in the property[769]. The purpose for which the owner intends to use his property was acknowledged already by the Commission as a principal criterion for establishing whether a fair balance has been struck[770]. This factor may prove to be useful in an examination of the existence of a *de facto* deprivation of possessions where, despite no formal alienation having been carried out, the property, nevertheless, becomes wholly unusable[771]. The case-law indicates that it is also the economic impact of a measure on property that may influence which rule of P1-1 is chosen as applicable. The fact that the applicant has maintained some economic interest in property induces the ECHR to hold that the disputed measure does not fall within the scope of the deprivation rule[772], for example, if the value of property has not been rendered worthless in spite of the fact that it has been substantially reduced[773], or if there is no significant financial loss connected with a change of the applicant's accommodation[774].

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[767]For example, in *Sporrong and Lönnroth* the ECHR held that the applicant's property rights had become precarious in the sense that the owner was uncertain of keeping his ownership title due to the inflexibility of the prevailing legislation. The lack of legal certainty played a role also, for example, in the case of *Matos e Silva, Lda., and Others v. Portugal*, 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, which was found to fall within the first norm of P1-1, or in the cases of *Brumărescu v. Romania* [GC], no. 28342/95, ECHR 1999-VII, and *Hentrich v. France*, 22 September 1994, Series A no. 296-A, which were classified as coming within the ambit of the deprivation rule

[768]See, for example, *Beyeler v. Italy* [GC], no. 33202/96, § 114, ECHR 2000-I; or *Broniowski v. Poland* [GC], no. 31443/96, § 151, ECHR 2004-V. In *Depalle v. France* [GC], no. 34044/02, § 84, ECHR 2010 the ECHR reiterated that although the lack of compensation is a factor to be taken into consideration in determining whether a fair balance has been achieved, it is not of itself sufficient to constitute a violation of Article 1 of Protocol No. 1. See also *Anonymos Touristiki Etairia Xenodocheia Kritis v. Greece*, no. 35332/05, § 45, 21 February 2008.

[769]*Tre Traktörer AB v. Sweden*, 7 July 1989, Series A no. 159; *Fredin v. Sweden (no. 1)*, 18 February 1991, § 45, Series A no. 192; *Pine Valley Developments Ltd and Others v. Ireland*, 29 November 1991, Series A no. 222; *Pinnacle Meat Processors Company and Others v. the United Kingdom,* application no. 33298/96, decision of 21 October 1998; *Lindheim and Others v. Norway*, nos. 13221/08 and 2139/10, § 77, 12 June 2012.

[770]*Gillow v. the United Kingdom*, application no. 9063/80, report of the Commission of 3 October 1984, § 90.

[771]See, for example, *Papamichalopoulos and Others v. Greece*, 24 June 1993, §§ 43-45, Series A no. 260-B; *Pinnacle Meat Processors Company and Others v. the United Kingdom,* application no. 33298/96, decision of 21 October 1998.

[772]See, for example, *Tre Traktörer AB v. Sweden*, 7 July 1989, Series A no. 159.

[773]*Pine Valley Developments Ltd and Others v. Ireland*, 29 November 1991, Series A no. 222.

[774]*Hatton and Others v. the United Kingdom* [GC], no. 36022/97, ECHR 2003-VIII. The fact that the applicants were able to move elsewhere without incurring any financial loss played a significant role in the assessment of a complaint about night flights at Heathrow airport.

1.7.3.2. Approach of the Czech Constitutional Jurisdiction

Similarly, in Czech constitutional practice the constitutionally prescribed criteria are not the only ones the constitutional judges rely on and the Czech Constitutional Court, too, has been applying a test of proportionality of forced limitations and deprivations of property[775].With reference to the constitutional judges, constitutional conformity requires that any forced restriction or deprivation of property be prescribed by law, pursue a legitimate aim, and, at the same time, preserve the relationship of proportionality. The requirement of proportionality contributes to ascertaining whether restrictions of one of the typical attributes of ownership, which, as a complex, enjoy the protection of Article 11 of the Charter, comprising the right of the owner to dispose of a thing (*ius disponendi*), to use a thing (*ius utendi*), and to reap the fruits of a thing (*ius fruendi*), are constitutionally conform or whether they involve an inadmissible violation of the right of property[776]. In the view of the Constitutional Court, this entails weighing concrete measures interfering with property in the sense that these concrete means employed to attain the goals in the public interest must be in a reasonable relationship with the concrete goals so that they do not unduly interfere with the individual's protected sphere of ownership[777].

[775]See, for example, judgment no. IV. ÚS 113/05 of 7 September 2005; judgment no. I. ÚS 2229/08 of 29 December 2009; or judgment no. IV. ÚS 3377/12 of 16 May 2013. The requirement of proportionality is directly enshrined in Act no. 184/2006, on Deprivation or Limitation of Ownership of Land or Construction (the Expropriation Act). The Act explicitly stipulates that expropriation shall not be permitted if the rights to a land or construction necessary for the fulfillment of the aim of expropriation can be obtained by virtue of an agreement or other means. It further stipulates that expropriation shall be realised only to such an extent that is necessary for the fulfillment of the aim of expropriation established by a special law, and that the extent of expropriation shall be proportionate to the aim sought by expropriation.

[776]See, for example, judgment no. IV. ÚS 113/05 of 7 September 2005; judgment no. 611/05 of 8 February 2006; judgment of the Constitutional Court no. Pl. ÚS 8/08 of 8 July 2010, published under no. 256/2010 Sb.; or judgment of the Constitutional Court no. IV. ÚS 2005/09 of 26 April 2012.

[777]For example, in judgment no. Pl. ÚS 3/2000 of 21 June 2000, published under no. 231/2000 Sb., the Constitutional Court referred to the case *James and others v. the United Kingdom* to underline that any interference of the state must respect the principle of a fair balance between the requirement of the general interests of society and the requirement of protection of fundamental rights of individuals. Likewise, in judgment no. Pl. ÚS 2/03 of 19 March 2003, published under no. 84/2003 Sb., which concerned a rent regulation, the Constitutonal Court reiterated that "for the rent regulation it is necessary to duly consider both the existence of the public interest justifying the measure and the choice of rules for its implementation so that a fair balance is struck between the requirement of the general interest of society and the requirement to protect fundamental rights of individual. This means that there must be a reasonable relation of proportionality between the means used and the aims sought". For a reference to the principle of proportionality see further the decision of no. IV. ÚS 324/97 of 30 January1998; judgment no. IV. ÚS 113/05 of 7 September 2005; judgment no. IV. 611/05 of 8 February 2006; judgment no. I. ÚS 717/05 of 21 March 2006; judgment no. Pl. ÚS 34/03 of 13 December 2006, published under no. 49/2007 Sb.; judgment no. II. ÚS 268/06 of 9 January 2008; judgment no. I.ÚS 229/08 of 29 December 2009; or judgment no. IV. ÚS 2005/09 of 26 April 2012.

Compared with the practice of the ECHR, the Czech Constitutional Court basically applies a similar test of proportionality, but in terms of terminology it explicitly distinguishes between proportionality in a broad and narrow sense. The test is the same for all fundamental rights and freedoms[778]. An interference must be proportionate to the aim sought and, simultaneously, it must not be in a disproportionate balance with interests of individuals which it must take into account. This weighing of social interests, together with the interest in the protection of the fundamental rights of individuals, is referred to as proportionality in a narrow sense[779].The Court maintains that, in a case of conflict between the public interest and constitutionally protected fundamental rights and freedoms, or between fundamental rights and freedoms, it is always necessary to assess the aim of interference against the means employed, which comprises the principle of proportionality in a broad sense, and which, according to the constitutional judges, inherently embraces a prohibition of excessive interferences with fundamental rights and freedoms[780]. More precisely, the requirement of proportionality in a broad sense entails an assessment of fundamental social goals and measures adopted for their realisation which interfere with the fundamental right to the protection of property as a sphere of freedom for the owner, whereby the social aim driven by the general interest and the measures taken must respect the private property of individuals so that the latter does not bear an excessive burden. Hence, it may be argued that the concept of proportionality in a broad sense entails a fair-balance test, as well as the prohibition of excessive burden, as defined by the ECHR, in the sense of a burden that is not normally and generally required of an individual to bear[781], which within the meaning of interpretation by the constitutional judges corresponds to proportionality in a narrow sense.

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[778]As regards the payment of taxes, penalties and other pecuniary sanctions it appears that the constitutional judges have settled rather for a method of exclusion of extreme disproportionality, which seems to show similarity to the usual reference of the French constitutional jursdiction to the principle of equality before public burdens under Article 13 of the Declaration in this sort of cases. The intensity of constitutional review is thus limited only to the exclusion of extreme disproportionality - the judges examine the suitability and necessity of a measure only to a limited extent to exclude extreme disproportionality and discrimination.

[779]Judgment no. Pl. ÚS 19/13 of 30 October 2013.

[780]See, for exampe, judgment no. Pl. ÚS 25/97 of 13 May 1997; judgment no. Pl. ÚS 38/04 of 20 June 2006, §27, published under no. 409/2006 Sb.; judgment no. I. ÚS 2485/13 of 6 January 2014.

[781]See, for example, *Depalle v. France* [GC], no. 34044/02, § 83, ECHR 2010: "The requisite fair balance prohibits that the person affected by a restrictive measure bears an individual and excessive burden". A "disproportionate burden" that does not represent a fair balance was found, for example, in *Chassagnou and others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, ECHR 1999-III, in which it was found to be constituted by a statutory obligation to transfer hunting rights from landowners who were opposed to hunting to *Associations communales de chasse agréées*. There can also be a multiple disproportionate burden which was found, for example, in *Immobiliare Saffi v. Italy* [GC], no. 22774/93, ECHR 1999-V, and consisted in the length of time involved in the wait for the enforcement of the possession order, in the applicant's inability to challenge the delay in the enforcement before the domestic courts, and in the absence of compensation for the delay. For further references see also, for example, *The Former King of Greece and Others v. Greece* [GC], no. 25701/94, §§ 89-90, ECHR 2000-XII; *Broniowski v. Poland* [GC], no. 31443/96, § 150, ECHR 2004-V; *Jahn and Others v.*

The Czech constitutional judges have conceived the principle of proportionality in a broad sense as embracing three criteria of the evaluation of constitutionality of measures interfering with property[782], which is applied rather consistently[783]. The first criterion is the principle of suitability, expressing the ability of the measure to reach the intended goal in the public interest. The second criterion is the principle of necessity according to which it is permissible to use only the most lenient means available[784]. Hence, expropriation is permitted, provided that there is no other means of reaching the purpose of expropriation which is a subsidiary solution. If there is the possibility to reach the aim by limitation of ownership, expropriation is excluded, and, likewise, if there are other means that are possible without limiting the ownership, the other means must take precedence over limitation[785]. Therefore, for the use of private property for public purposes, it is necesssary that there is a genuine need which is pressing and which cannot be substituted by another solution. The Constitutional Court draws attention to the requirement to observe that ownership can be restricted only when it is necessary along with a regard to the obligation to preserve the substance and meaning of ownership stipulated in Article 4 para. 4 of the Charter which serves as a legal basis when examining whether all avenues of minimalisation of interference with the right have been exhausted[786]. Furthermore, by a general stipulation that limitations of fundamental rights and freedoms must not be misused for other purposes than for those they were limited, the Czech Charter obliges the use of restricted or expropriated property for the purpose for which it was restricted or expropriated.

The third criterion represents proportionality in a narrow sense which requires that the negative effects of a measure must not overreach the positive effect represented by the public interest in these measures[787], that the public interest and the interests of the individual affected should be in balance. Accordingly, the principle of proportionality in a narrow sense entails a

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Germany [GC], nos. 46720/99, 72203/01 and 72552/01, § 93, ECHR 2005-VI; or *Potomska and Potomski v. Poland*, no. 33949/05, § 65, 29 March 2011.

[782]See, for exampe, judgment no. Pl. ÚS 25/97 of 13 May 1997; judgment no. Pl. ÚS 38/04 of 20 June 2006, §27, published under no. 409/2006 Sb.; judgment no. Pl. ÚS 3/02 of 13 August 2002, published under no. 405/2002; judgment no. I. ÚS 2485/13 of 6 January 2014.

[783]Z. Červínek, "Princip proporcionality v judikatuře Ústavního soudu ČR", diploma thesis, Palacký University, Olomouc, 2012, pp. 47, 52.

[784]Judgment no. Pl. ÚS 3/02 of 13 August 2002.

[785]Judgment no. II. ÚS 268/06 of 9 January 2008.

[786]Judgment no. Pl. ÚS 4/94 of 12 October 1994.

[787]See, for example, judgment no. Pl. ÚS 8/06 of 1 March 2007; judgment no. Pl. ÚS 7/09 of 4 May 2010; judgment no. Pl. ÚS 24/11 of 20 December 2011.

prohibition of an individual and excessive burden. This criterion also indicates that the adverse effects of a measure are important in the assessment of proportionality, and that the scrutiny of severity or intensity of a measure is inherent in the proportionality test irrespective of whether a deprivation or forced limitation of property is at stake. This involves a balancing which, as some scholars indicate, comprises a rule whereby the greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other[788]. It seems that in distinguishing between proportionality, in a broad and narrow sense, the Constitutional Court was inspired by the practice of the German Constitutional Court according to which an expropriation of private property to satisfy the principle of proportionality must be suitable, necessary and proportionate to the aim pursued[789].

In the end, Czech constitutional judges apply the same proportionality test in cases of limitation of rights due to their collision or their collision with "public goods"[790]. For this purpose the Constitutional Court views "public goods" as constitutionally protected values which do not have the character of a fundamental right or freedom, such as the state defence, national security, public order, or a healthy environment[791]. It can be assumed that "public goods" correspond to the notion of principles and objectives of constitutional value under the French Constitution. Their protection, as well as the protection of individual rights and freedoms, is encompassed in the constitutional regulation of the standing of an individual within society. When these situations collide, it is necessary, according to the Constitutional Court, to observe a principle whereby a fundamental right or freedom can be limited only in the interest of another fundamental right or freedom or a "public good"[792], as fundamental rights and public goods are *prima facie* equal. The assessment of their importance, provided that the conditions of suitability and necessity are met, comprises an evaluation of empirical,

[788]R. Alexy, "Rights and Liberties as Concepts", in *The Oxford Handbook of Comparative Constitutional Law*, M. Rosenfeld and A. Sajó (eds.), Oxford University Press, Oxford, 2012, p. 294.
[789]S. Scholz, B. Tremml, "Staathaftungs und Entschädigungsrecht", Vahlen, Munich, 1994, 5th ed., p. 141.
[790]See judgment no. Pl. ÚS 15/96 of 9 October 1996, published under no. 280/1996 Sb.; or judgment no. IV. ÚS 652/06 of 21 November 2007. The constitutional judges submit that what makes the difference between "public goods", on the one hand, and fundamental rights and freedoms, on the other hand, is their distributiveness. It is typical for "public goods" that the benefit drawn from them is indivisible and that individuals can be excluded from the enjoyment of the benefit. A certain aspect of human existence may become a public good, provided that the former cannot be divided, by definition, materially or legally, into parts that could be distributed to individuals as shares. In contrast, it is typical for fundamental rights and freedoms to be distributed. The aspects of human existence, such as personal freedom, freedom of speech, participation in political life, the right to vote, or the right of assembly can be, either by definition, materially, or legally, divided into parts and distributed to individuals.
[791]Judgment no. IV. ÚS 652/06 of 21 November 2007.
[792]Judgment no. Pl. ÚS 15/96 of 9 October 1996, published under no. 280/1996 Sb.

systemic, contextual, and value arguments[793]. At the same time, with a view to preserving the substance of the fundamental right which was not evaluated to be prioritized, it is necessary to avail of all means to minimise encroachments on it.

1.7.3.3. Three-Stage Test of Proportionality in Light of the Practice of the ECHR

It can be observed that the principle of proportionality in a narrow sense, as adopted and interpreted by the Czech Constitutional Court, reflects in substance a fair-balance test as exercised by the ECHR, and, further, that the ECHR examines the criterion of suitability or "reasonableness", although it is, first and foremost, for the national authorities to decide which type of measures should be imposed[794]. It is apparent that the assessment of whether a measure is appropriate for "achieving its aim and not disproportionate thereto"[795] forms the first step in the ECHR's test of proportionality. As the second step, the ECHR usually scrutinises whether a requisite balance has been struck between the demands of the public interest and the protection of the fundamental rights of an individual. It can be observed that, so far, the procedure of the Czech Constitutional Court is consonant in that the question of suitability of a measure represents a separate criterion that is examined before the actual test of proportionality in a narrow sense. Hence, it can be suggested that, in both systems, the defence of interests of individuals passes through the defence of the general interest[796].

However, as regards the requirement of necessity, the ECHR grants states considerable leeway. It has maintained that the national authorities enjoy a wide margin of appreciation in determining the necessity of a measure of control, and that the legislature's judgment in this connection will, in principle, be respected unless it is manifestly arbitrary or unreasonable[797]. The ECHR, thus, scrutinises only a manifest disproportionality and the states enjoy a wide

[793]According to the judges, an empirical argument represents the factual importance of a phenomenon which is linked with the protection of a fundamental right, a systemic argument entails an evaluation of the meaning and ranking of a fundamental right or freedom in the system of fundamental rights and freedoms, a contextual argument can be interpreted as an evaluation of further negative impacts of the limitation of one fundamental right as a result of prioritizing another, and a value argument represents the assessment of the positives of a collision of fundamental rights with regard to the accepted hierarchy of values.
[794]*Depalle v. France* [GC], no. 34044/02, §87, ECHR 2010.
[795]*James and Others v. the United Kingdom*, 21 February 1986, §50, Series A no. 98. Further, in *Berger-Krall and Others v. Slovenia*, no. 14717/04, § 198, 12 June 2014, for example, the ECHR held that "the principle of 'good governance' requires that when an issue in the general interest is at stake, it is incumbent on the public authorities to act in an appropriate manner".
[796]M.-P. Deswarte,"L'intérêt général dans la jurisprudence du Conseil constitutionnel", RFD const. 1993, p.23.
[797]See, for example, *Lithgow v. the United Kingdom*, judgment of 8 July 1986, Series A no. 102, p. 51, § 122; *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, ECHR 1999-III, § 75; or *Alatulkkila and Others v. Finland*, no. 33538/96, § 67, 28 July 2005.

margin of appreciation in ascertaining whether the consequences of a restrictive measure are justified in the general interest for the purpose of achieving the object of the law in question[798], that is, both as regards the setting up of the aim, which must be legitimate and pursue a general interest, and choosing the means to achieve it. They are, thus, the sole judges of the "necessity" of laws limiting the use of property. Amongst rare cases in which the ECHR has explicitly examined the necessity of a measure figures, for example, *Herrmann v. Germany* in which European judges accepted the respondent government's explanation concerning the necessity of allowing area-wide hunting[799].

The ECHR's power of review depends on the scope to which it is willing to restrict the wide power of the discretion of states as to the choice of measures. If the states enjoy a wide margin of appreciation regarding which aims are justified in the public interest, when it comes to measures to realise the aims, they must comply with the requirement of proportionality. Accordingly, the ECHR exercises a limited review as regards the legitimity of the aim of the legislation as identified by the state, but a greater review as regards proportionality of a measure. Despite the margin of appreciation given to states, the ECHR must, in the exercise of its power of review, determine whether the requisite balance was maintained in a manner consonant with the applicant's right to property[800]. The principle of proportionality, thus, limits the effects of the doctrine of margin of appreciation vested in states.

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[798]For example, in *Jahn and Others v. Germany,* [GC], nos. 46720/99, 72203/01 and 72552/01, § 91, ECHR 2005-VI, the ECHR stated that "finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one [the Court] will respect the legislature's judgment as to what is 'in the public interest' unless that judgment is manifestly without reasonable foundation". See also *James and Others v. the United Kingdom* judgment of 21 February 1986, Series A no. 98, p. 32, § 46; *J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. the United Kingdom* [GC], no. 44302/02, §§ 55 and 75, ECHR 2007-III; *Depalle v. France* [GC], no. 34044/02, § 83, ECHR 2010; or *Herrmann v. Germany* [GC], no. 9300/07, §§ 43 and 74, 26 June 2012. In *J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. the United Kingdom* the ECHR, referring to *James and Others v. the UK,* acknowledged an important additional reason for allowing a wide margin of appreciation with regard to the public interest criterion: when the issue to be subject to regulation involves "longstanding and complex" issues which also entail regulation of contractual matters between individuals, the margin necessarily ought to be extensive. In *Herrmann v. Germany* the ECHR accepted the reasons put forward by the government when it considered a difference in treatment as sufficiently justified by the necessity to pool smaller plots in order to allow for area-wide hunting and, thus, to assure an effective management of the game stock.

[799]*Herrmann v. Germany*, no. 9300/07, § 50, 20 January 2011. The ECHR considered that "as regards the necessity of the measure at issue, the Court takes note of the Government's submissions that the specific situation in Germany as one of the most densely populated areas in Central Europe made it necessary to allow area-wide hunting on all suitable premises".

[800]*Rosiński v. Poland*, no. 17373/02, § 78, 17 July 2007; *Arsovski v. the former Yugoslav Republic of Macedonia*, no. 30206/06, § 55, 15 January 2013. Furthermore, the ECHR has specified that its duty is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention, and not to deal with errors of fact or law allegedly committed by a national court unless Convention rights and freedoms may have been infringed. See in this respect, for example, *Anheuser-Busch Inc.v. Portugal* [GC], no. 73049/01, § 83,

In this context the question emerges as to whether the ECHR applies, like the Czech constitutional jurisdiction, a test of strict necessity, or, in other words, whether it examines the existence of less onerous means. With a view to its judicial practice it is evident that the ECHR does not require the states to apply less onerous measures. The ECHR has rejected this test, for example, in *James v the United Kingdom*[801] which concerned the compulsory transfer of property as part of a leasehold reform. The European judges stated that, provided a fair balance was struck, it was not for the ECHR to consider whether there were better or less onerous solutions to that adopted by the legislator. It appears that the ECHR rather puts stress on the means being "reasonable and suited" to achieving the legitimate aim than on better solutions. A statement to the effect that if a measure is found to strike a fair balance the fact that there were alternative solutions available does not in itself render the measure chosen unjustified, and that it is not for the ECHR to examine whether the measure chosen represented the best solution, can be found in the case-law of the ECHR[802]. But it cannot be

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ECHR 2007-I; *J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. the United Kingdom* [GC], no. 44302/02, § 75, ECHR 2007-III.

[801]*James and Others v. the United Kingdom* judgment of 21 February 1986, Series A no. 98, p. 32, § 51.The ECHR did not agree that the legislation could be considered proportionate only if there was "no other less drastic remedy": "This amounts to reading a test of strict necessity into the Article, an interpretation which the Court does not find warranted. The availability of alternative solutions does not in itself render the leasehold reform legislation unjustified; it constitutes one factor, along with others, relevant for determining whether the means chosen could be regarded as reasonable and suited to achieving the legitimate aim being pursued, having regard to the need to strike a "fair balance". Provided the legislature remained within these bounds, it is not for the Court to say whether the legislation represented the best solution for dealing with the problem or whether the legislative discretion should have been exercised in another way". See also *Mellacher and Others v. Austria*, 19 December 1989, § 53, Series A no. 169; *Bäck v. Finland*, no. 37598/97, § 54, ECHR 2004-VIII; or *Blečić v. Croatia*, no. 59532/00, §67, 29 July 2004.

[802]For example, in *Tre Traktörer AB v. Sweden*, 7 July 1989, § 62, Series A no. 159, the ECHR ruled that, although the public authorities could have taken less restrictive measures, with regard to the legitimate aim of the Swedish social policy concerning the consumption of alcohol, the measure complained of did not fail to strike a fair balance. In *Mellacher and Others v. Austria*, 19 December 1989, § 53, Series A no. 169, the ECHR held that the possible existence of alternative solutions did not in itself render the contested legislation unjustified, and that it was not to say whether the legislation represented the best solution, provided that the legislature remained within the bounds of its margin of appreciation. In *Brannigan and McBride v. the United Kingdom*, 26 May 1993, § 54, Series A no. 258-B, the ECHR held that the state did not need to adopt means more expedient to secure conformity with the Convention: "The validity of the derogation cannot be called into question for the sole reason that the Government had decided to examine whether in the future a way could be found of ensuring greater conformity with Convention obligations". In *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 123, ECHR 2003-VIII, the ECHR stated that it is not to substitute the assessment of the national authorities for any other assessment of what might be the best policy, and that the state must, in principle, be left a choice between different ways and means of meeting this obligation, while the ECHR has a supervisory function of a subsidiary nature and is limited to reviewing whether or not the particular solution adopted can be regarded as striking a fair balance. In this case the Grand Chamber overrode the Chamber's opinion that it was necessary to seek "the least onerous solution". In *J.A. Pye (Oxford) Ltd v. the United Kingdom*, no. 44302/02, § 45, 15 November 2005, the ECHR reiterated its findings in the case of *James and Others* by holding that: "The possible existence of alternative solutions does not in itself render the contested legislation unjustified. Provided that the legislature remains within the bounds of its margin of appreciation, it is not for the Court to say whether

claimed that the ECHR has, in general, entirely abandoned the examination of the existence of less restrictive measures in the assessment of proportionality of an interference to the aim sought to be realised. So, for example, in the case of *Arsovski v. the former Yugoslav Republic of Macedonia* the ECHR considered that the domestic authorities did not explain whether, and if so, how, the seizure of the applicants' land, as the most drastic measure, had been proportionate to the aim sought to be achieved, and that neither did they give any reason why a lease, as less restrictive for the applicants' property rights, was inappropriate in their case, although domestic legislation provided for such a possibility and which, through subsequent jurisprudence, became a requirement[803]. Even so, no general obligation to use less restrictive measures ensues from the case-law and it can be claimed that the longstanding practice of the ECHR is to reject the examination of less restrictive measures.

Apart from manifestly isolated cases, what may have conduced the ECHR to waive the strict necessity test? On the face of it, it seems that the ECHR rests its arguments on the principles of subsidiarity and the margin of appreciation left to states involving a limited review. But it can also be suggested that it is because the ECHR guarantees a minimum standard of protection of human rights and freedoms, which means that states dispose of a considerable discretion in the implementation of the Convention. This implementation freedom excludes ipso facto the application of the principle of necessity. If the state chooses less onerous means or not, while respecting the minimum standard of protection, this fact has no bearing on complying with the state's obligations under the Convention. How, then, can the ECHR require in some cases, such as in the abovementioned *Arsovski* case, the use of less restrictive measures? Is it a requirement or a recommendation addressed to states? It seems that this approach is justified if the absence of availability or non-application of less restrictive means is decisive and violates the minimum standard of protection under the Convention, and that it concerns violations where far-reaching measures have been adopted[804]. So, it can be concluded that the ECHR, in principle, does not deal with the existence of less restrictive measures and that the purpose of the proportionality test is not to determine a better or the

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the legislation represented the best solution for dealing with the problem or whether the legislature's discretion should have been exercised in another way".

[803] *Arsovski v. the former Yugoslav Republic of Macedonia*, no. 30206/06, § 59, 15 January 2013. See also, for example, *Vistiņš and Perepjolkins v. Latvia* [GC], no. 71243/01, § 129, 25 October 2012.

[804] In this respect see also *Riener v. Bulgaria*, no. 46343/99, § 125, 23 May 2006. The ECHR found that "it does not appear that the fiscal authorities actively sought to collect the debt" and that "the authorities' failure to employ obvious means for the collection of at least a portion of the debt undermines the respondent Government's position that the travel ban remained necessary for its collection or proportionate to the far-reaching restriction imposed on the applicant's freedom of movement".

best solution that might be adopted, provided that the minimum human rights standards protected by the Convention are not violated.

From the point of view of the Hohfeld's theory of rights, states, in disposing of a wide margin of discretion under the Convention as to the choice of the aim and measures restricting property rights, enjoy a privilege to restrict property rights and an opportunity to stretch restrictions beyond what is "necessary" derived from the minimum standard of protection guaranteed by the Convention. Compared with the Czech constitutional interpretation of the principle of proportionality comprising the three-stage control, it can be claimed that the latter ensures a stricter protection against restrictions of property which is far from granting the public authorities the privilege entailing wide discretionary powers in the area of property rights. The proportionality test as exercised by the ECHR does not, in principle, seem to entail the criterion of necessity which is regularly and automatically examined by the Czech Constitutional Court.

It can be concluded that the core of the examination of proportionality by the ECHR lies in the assessment of a fair balance, that is, in the proportionality test in a narrow sense, for it is clearly the striking of a fair balance with protected fundamental rights which renders a measure compatible with the Convention. It is thus, in my view, the issue of intensity or gravity of interference that is pivotal in the control of proportionality, not to say of the conventionality of interferences with property, whereas it is apparent that in Czech constitutional practice all consecutive stages of the proportionality test are interrelated and enjoy the same degree of importance. What conclusions may be drawn thereof for property rights? If the principle of proportionality serves to "neutralize" the legislator's discretion as to the identification of the legitimate aim in the public interest and the choice of measures to fulfil it, the three-tier control of proportionality, then, evidently represents a stronger defense barrier against arbitrary interventions enabling scrutiny to be put not only on the gravity of interference, that is, objective impacts of the restrictive measure, but also as a matter of priority legitimacy of the measure, that is, the subjective choice of the legislator also. It follows that the ECHR does not apply the proportionality test in a rigorous fashion in property rights cases[805] and that its approach to proportionality seems to be less stringent and clearly more lenient with the legislator than that of the Czech Constitutional Court.

[805]J. McBride, "Proportionality and the European Convention on Human Rights", in *The Principle of Proportionality in the Laws of Europe*, E. Ellis (ed.), Hart Publishing, Oxford, 1999.

1.7.3.4. Approach of the French Constitutional Jurisdiction

The control of proportionality is also of significant importance as one of the principles inherent in the control of constitutionality[806]. It appears that the constitutional judges, in exercising their control, have been putting stress foremost on the assessment of the existence of a manifest error of appreciation (*erreur manifeste d'appreciation des faites*)[807]. Unlike the Czech Constitutional Court which has, in substance, adopted the three-stage proportionality analysis introduced by the German Constitutional Court[808], the Constitutional Council reduces its proportionality analysis in property cases to a control of a "manifest disproportion" or a "manifest error of appreciation"[809]. The constitutional judges have not obviously followed the same path and have not submitted to the same influence in respect of proportionality in property cases as the Czech constitutional judges. Likewise, it does not seem that the Constitutional Council would have developed a clear definition of the principle, that being despite the recent development consisting of the introduction of *a posteriori* control of constitutionality.

The manifest error of appreciation test, as an established means of assessment of proportionality, which developed in the administrative jurisprudence since the Council of State's decision of *Lagrange*[810], has been exercised by the Constitutional Council since 1981[811]and since recently also in the *a posteriori* review with a view to abrogating those provisions that embody manifest disproportions with constitutional principles[812]. In the general practice of the Constitutional Council the manifest error of appreciation also appears under other notions, such as the notions of manifest disproportion[813], manifestly disproportionate interference[814], absence of a disproportionate character of interference with

[806]X. Philippe, "Le contrôle de proportionnalité dans les jurisprudences constitutionnelle et administrative françaises", dissertation, Aix-Marseille III, Economica-PUAM, 1990, p. 90. D. Rousseau, "Droit du contentieux constitutionnel", Montchrestien, 5th ed., 1999, p. 141.
[807]According to D. Rousseau, "the Constitutional Council evidently interconnects the control of the manifest error and the respect of the principle of proportionality". D. Rousseau, "Droit du contentieux constitutionnel", Paris, LGDJ, 10th edition, 2013, p. 145. The notion of a manifest error of appreciation is conceived by O. Duhamel and Y. Mény as a "flagrant error of appreciation committed by the legislator as regards the facts or motives which are based on law and which entail the annulation of the latter". O. Duhamel, Y. Mény, "Dictionnaire constitutionnel", Paris, PUF, 1992, p. 403.
[808]In a decision "Apothekenurteil", BverfGE 7, 377, 11 June 1958.
[809]See, in particular, V. Goesel-Le Bihan, "Le contrôle exercé par le Conseil Constitutionnel: défense et illustration d'une théorie générale", RFDC, 2001, p. 67.
[810]CE, Sect., 15 February 1961, *Lagrange*, Rec., p. 121.
[811]Decision no. 80-127 DC of 20 January 1981, Official Journal of 22 January 1981, p. 308.
[812]G. Drago, "Contentieux constitutionnel français", 3rd ed., Paris, PUF, coll. "Thémis", 2011, p. 387.
[813]Decision no. 2014-692 DC of 27 March 2014, Official Journal of 1 April 2014, p. 6232, §§ 11, 21, 25.
[814]Decision no. 2014-391 QPC of 25 April 2014, Official Journal of 27 April 2014, p. 7359, § 8.

property in respect of the aim sought[815], or control of excessive interferences with fundamental rights[816]. All these notions have in common the fact that they can reveal sanctionable unreasonable interferences of the legislator with fundamental rights and freedoms.

The control of a manifest error of appreciation, which forms a basis for the sanctioning of the legislator once it has been found to have committed a flagrant error of appreciation[817], applies to both deprivations and limitations of property. It represents a powerful tool in the hands of the Council to scrutinise the law, as it depends on the will of the constitutional judges to assess what is manifestly erroneous in law. It enables the Council to preserve the power of appreciation of the legislator and, simultaneously, keep a leeway should the appreciation prove to be seriously and apparently erroneous, including when the latter does not conciliate competing interests in a proportionate way[818]. As the control concerns examination of statutes reflecting the expression of the general will of the representatives of people transposed in the texts of the laws, a potential sanctioning of the law for a manifest error of appreciation would explicitly mean that the legislator committed serious and evident errors[819].

But even though constitutional judges are free to determine what constitutes a manifest error of appreciation, the latter is a tool allowing the Constitutional Council to exercise only restricted control of the action of the legislator. Namely, the constitutional judges seem to have demonstrated a certain prudence. They have reiterated that they are not vested with any general power of appreciation and decision-making similar to that conferred upon the parliament, but only with the power to control the conformity of laws with the Constitution[820], and, thus, it is not incumbent upon them to seek whether the objective fixed by the legislator could have been attained by other means as long as the means adopted are not excessive or patently disproportionate to that objective[821], or unless they do not infringe the objective of

[815]Decision no. 2012-283 QPC of 23 November 2012, Official Journal of 24 November 2012, p. 18547, §§ 15 and 20; decision no. 2014-394 QPC of 7 May 2014, Official Journal of 10 May 2014, p. 7873, § 14.
[816]For example, decision no. 85-200 DC of 16 January 1986, Official Journal of 18 January 1986, p. 920, § 17.
[817]M. Disant, "Droit de la question prioritaire de constitutionnalité. Cadre juridique. Pratiques jurisprudentielles", Lamy coll. "Axe droit", 2011, p. 319.
[818]Decision no. 2010-55 QPC of 18 October 2010, Official Journal of 19 October 2010, p. 18695, § 6; decision no. 2010-73 QPC of 3 December 2010, Official Journal of 4 December 2010, p. 21358,§ 13; decision no. 2011-132 QPC of 20 May 2011, Official Journal of 21 May 2011, p. 8891, § 7.
[819]P. Pactet, F. Mélin-Soucramanien, "Droit constitutionnel", Paris, Sirey, 31st edition, 2012, p. 520.
[820]See, for example, decision no. 74-54 DC of 15 January 1975, Official Journal of 16 January 1975, p. 671, § 1.
[821]See, for example, decision no. 83-162 DC, 20 July 1983, Official Journal of 22 July 1983, p. 2267, Rec., p. 49; decision no. 99-416 DC, Official Journal of 23 July 1999, Rec., p. 100; decision no. 2007-555, 16 August

constitutional value of intelligibility and accessibility of law or any other constitutional requirement[822]. In short, the Constitutional Council is not placed to examine whether the objectives laid down by the legislator could be attained by other means. It follows that the Constitutional Council is reticent to proceed to a veritable control of the purpose of interference, as it prefers to avoid engaging in a review of constitutionality that would entail acting quasi-legislatively, and intends to invalidate only manifestly excessive disproportions[823].

Accordingly, only the most serious interferences encroaching upon the core of the fundamental right in question would be declared unconstitutional. There is a clear resemblance to the practice of the ECHR. The Constitutional Council seems to be cautious to avoid meddling with the competencies of the legislator and controlling the pertinence of the choices made by the latter. Indeed, the constitutional judges have been reiterating that it is up to the legislator, pursuant to Article 34 of the Constitution[824], to lay down the rules concerning the guarantees of the exercise of fundamental rights and freedoms and to conciliate the constitutional principles that are susceptible of entering into conflict[825]. This means that they

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2007,Official Journal of 22 August 2007, p. 13959, Rec, p. 310, § 8; decision no. 2010-28 QPC of 17 September 2010, Official Journal of 18 September 2010, Rec., p. 233, p. 16953, § 8; or decision no. 2014-691 DC, 20 March 2014, Official Journal of 26 March 2014, p. 5925, § 23: "Considérant, d'autre part, que le Conseil constitutionnel ne dispose pas d'un pouvoir général d'appréciation et de décision de même nature que celui du Parlement; qu'il ne lui appartient donc pas de rechercher si le but que s'est assigné le législateur pouvait être atteint par d'autres voies, dès lors que les modalités retenues par la loi ne sont pas manifestement inappropriées à cet objectif". In § 7 the Constitutional Council further ruled that limitations imposed by the legislator on property must not result in interferences disproportionate to the aim sought: "limitations liées à des exigences constitutionnelles ou justifiées par l'intérêt général, à la condition qu'il n'en résulte pas d'atteintes disproportionnées au regard de l'objectif poursuivi". See also T. Caffoz, "Le contrôle de l'erreur manifeste d'appréciation dans la procédure de la question prioritaire de constitutionnalité", available at: http://www.droitconstitutionnel.org/congresLyon/CommLA/A-caffoz_T2.pdf.

[822]Decision no. 2001-545, 17 January 2002, Official Journal of 23 January 2002, p. 1526. The Constitutional Council thus disposes of an instrument of control vis-à-vis the legislature consisting in its power to scrutinise the comprehensibility of laws. The objective of constitutional value of intelligibility and accessibility of law imposes on the legislator to adopt norms that are sufficiently precise and unambiguous, and it thus seems to be the condition of the realisation of the legislative competence. See, for example, decision no. 2004-499 DC, 29 July 2004, Official Journal of 7 August 2004, p. 14087; decision no. 2008-567 DC, 24 July 2008, Official Journal of 29 July 2008, p. 12151; decision no. 2009-578 DC, 18 March 2009, Official Journal of 27 March 2009, p. 5445.

[823]S. Pavageau,"Le droit de propriété dans les jurisprudences suprêmes françaises, européennes et internationales", LGDJ, 2006, p. 406.

[824]It is on the basis of Article 34 of the Constitution that the law provides for the guarantees for the exercise of fundamental rights and freedoms. Article 34 of the Constitution provides that "statutes shall determine the rules concerning … civic rights and the fundamental guarantees granted to citizens for the exercise of their civil liberties". On this basis Parliament is at liberty to lay down rules intended to reconcile the objective with the constitutional right.

[825]See, for example, decision no. 2003-467DC of 13 March 2003, § 20: "Considérant qu'il appartient au législateur, en vertu de l'article 34 de la Constitution, de fixer les règles concernant les garanties fondamentales accordées aux citoyens pour l'exercice des libertés publiques; qu'il lui appartient notamment d'assurer la conciliation entre, d'une part, la sauvegarde de l'ordre public et la recherche des auteurs d'infractions, toutes deux

do not intend to substitute for the legislator and that they show respect for the latter's margin of discretion, and, consequently, perform a restricted control of constitutionality that is reduced to flagrant manifestations of unconstitutionality[826]. The use of the control of a manifest error of appreciation seems to reflect the will of the constitutional judges to step back for the benefit of the larger margin of discretion of the legislator[827]. But if there is no legislative provision safeguarding against violations of Article 17 of the Declaration, there is clearly a violation of the Constitution[828].

It is evident that the control of measures adopted to reach the objectives pursued does not involve the examination of the existence of other prospective means which would be less harmful for the right or freedoms in question. The constitutional judges do not examine whether there are other measures, alternative less intrusive measures, which could be employed for the attainment of the objective sought, but whether the actual measure does not exceed what is "strictly necessary for the realisation of the objective"[829], or, in other words, whether the measure is not manifestly inappropriate. The control of necessity, thus, seems to be rather restricted, as it involves only the control of the adaptation of a measure to the aim sought, whereby any examination of the possibility of other means is excluded and the legislator is left a large margin of appreciation. It implies that the examination of a manifest error of appreciation takes into account only the strict necessity of a measure. It may be argued that this approach is identical to that of the ECHR vis-à-vis national parliaments and does not usually examine whether other less intrusive measures could be applied, and, further, that it is quite distant from the examination of necessity within the three-stage test performed by the Czech Constitutional Court. Furthermore, while the Czech Charter enshrines, in a general clause of Article 4 para. 4, an obligation that no limitation may impinge upon the meaning and scope, or the substance, of fundamental rights and freedoms, whereby it imposes restrictions on the legislator in identifying the objectives and measures of property

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nécessaires à la protection de principes et de droits de valeur constitutionnelle et, d'autre part, le respect de la vie privée et des autres droits et libertés constitutionnellement protégés".

[826]Decision no. 2010-28 QPC of 17 September 2010, Official Journal of 18 September 2010, Rec., p. 229, p. 16951, § 8; decision no. 2010-29/37 QPC of 22 September 2010, Official Journal of 23 September 2010, p. 17293, § 12; decision no. 2011-148/154 QPC of 22 July 2011, Official Journal of 23 July 2011, p. 12651, § 22.

[827]J Mercier, "Les principes en conflit dans la QPC: de la prudence de la proportionnalité à l'audace de la pondération", p. 5, 9ème Congrès Français de Droit Constitutionnel, Lyon, June 2014. Available at: http://www.droitconstitutionnel.org/congresLyon/CommLA/A-mercier_T3.pdf.

[828]Decision no. 2010-33 QPC of 22 September 2010, § 4.

[829]See, for example, decision no. 2001-444 DC of 9 May 2001, Rec., p. 59, § 5: "...que cette prolongation, limitée à onze semaines, apparaît comme strictement nécessaire à la réalisation de l'objectif de la loi et revêt un caractère exceptionnel et transitoire; qu'elle n'est donc pas manifestement inappropriée audit objectif".

restrictions, the French Constitution confers upon the legislator more general objective-setting powers in Article 34 of the Constitution by enumerating the legislator's competences[830]. It is, then, primarily upon the Constitutional Council to scrutinise whether the right or freedom in question has not lost its substance, whether it has not been "denatured".

1.7.3.4.1. Control of Proportionality According to the Nature of Interference

The case-law of the Constitutional Council ensures the protection of private property according to the nature of interference at issue[831]. If it concerns the deprivation of property, it may be justified only on the fulfilment of conditions prescribed by Article 17 of the Declaration[832]. It ensues, from Article 17 of the Declaration, that for a deprivation to be found constitutionally conform and proportionate, several cumulative conditions must be fulfilled. Namely, the existence of a legislative basis, the existence of public utility legally stated, and compensation which is just and advance, including the right to appeal[833]. The Constitutional Council established in the decision of 16 January 1982 that in respect of deprivation of property it would exercise restricted control of public necessity and full control of the requirement of just and advance payment of compensation[834]. So, in the framework of assessment of the nature of a measure, the Constitutional Council primarily examines whether a deprivation of property is at stake. It distinguishes between deprivations and limitations of property on the basis of the gravity of interference and the notion of denaturation of the

[830]Some scolars mention that the delimitation of the powers of the legislator in the French Constitution seems to be not for the purpose of protection of fundamental rights and freedoms, but rather for the purpose of stabilizing the separation of powers between the legislator and the executive. R. Bousta, "Contrôle constitutionnel de proportionnalité: la "spécificité" française à l'épreuve des evolutions récentes", VIII ème Congrès mondial de l'A.I.D.C. "La Constitution et les principes", Mexico, 6-10 December 2010, atelier no. 9 "La proportionnalité en tant que principe", p. 8.

[831]As J.-F. Montgolfier remarks, by making difference in protection of private property between the right to use and the right to dispose of property, which enjoys an elevated protection, the Constitutional Council proved to be faithful to the spirit of the Declaration and its travaux préparatoires in which this distinction clearly appears. J.-F. Montgolfier, "Conseil constitutionnel et la propriété privée des personnes privées", Cahiers du Conseil constitutionnel no. 31, March 2011, available at:http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/nouveaux-cahiers-du-conseil/cahier-n-31/conseil-constitutionnel-et-la-propriete-privee-des-personnes-privees.96753.html#NOPAC1100030019.

[832]Decision no. 81-132 of 16 January 1982, §§ 44 and 46.

[833]Decision no. 2012-247 QPC of 16 May 2012, § 4.

[834]Decision no. 89-256 DC of 25 July 1989, §19: "Considérant qu'afin de se conformer à ces exigences constitutionnelles la loi ne peut autoriser l'expropriation d'immeubles ou de droits réels immobiliers que pour la réalisation d'une opération dont l'utilité publique est légalement constatée; que la prise de possession par l'expropriant doit être subordonnée au versement préalable d'une indemnité; que, pour être juste, l'indemnisation doit couvrir l'intégralité du préjudice direct, matériel et certain, causé par l'expropriation; qu'en cas de désaccord sur la fixation du montant de l'indemnisation, l'exproprié doit disposer d'une voie de recours appropriée".

meaning and scope of the right of property[835]. If a measure does not amount to deprivation of property or does not have the effects of denaturing the substance of property, the Constitutional Council examines whether the interference is justified by the general interest and is proportionate to the objective sought. So, as regards deprivations of property, the Constitutional Council appears to examine the degree of intensity of the measure in the framework of the manifest error of appreciation test without explicitly dealing with proportionality in a narrow sense, it exercises a control restricted to a manifest disproportion[836], whereas as regards limitations of property, it seems that the Council submerges in a more subtle assessment entailing the control of the existence of the public interest justifying the interference, on the one hand, and proportionality between the importance of avoiding the restriction of the constitutional right and the importance of attainment of the aim in the public interest, on the other. In other words, it performs a balancing test to determine whether the importance of one side justifies the detriment of the other[837]. It follows that the right of property belongs to fundamental rights, the restriction of which can be sufficiently justified by public interest, and which are subject to a restricted control of proportionality whereby only interferences that are manifestly excessive to the objective sought are sanctioned leaving the legislator with a large margin of discretion. It is the degree of control of proportionality of interferences which leads the Constitutional Council to sanction only manifest disproportions.

Although the Constitutional Council has apparently drawn inspiration from the triple control exercised by the German constitutional jurisdiction in its decision making[838], it is obvious that

[835]Decision no. 84-172 DC of 26 July 1984, § 3; decision no. 85-198 DC of 13 December 1985, § 9; decision no. 96-373 DC of 9 April 1996, § 22; decision no. 2000-436 DC of 7 December, § 18.
[836]T. Meindl, "La notion de droit fondamental dans les jurisprudences et doctrines constitutionnelles françaises et allemandes", L.G.D.J., Paris, p. 94.
[837]B. Schlink, "Proportionality (1)", in *The Oxford Handbook of Comparative Constitutional Law*, M. Rosenfeld, A. Sajó (eds.), Oxford University Press, 2012, p. 725.
[838]There are some "non-property" cases in which the Council has examined the three sub-principles of the proportionality test simultaneously. For example, in decision no. 2008-562 DC of 26 February 2008, Official Journal of 26 February 2008, Rec., p. 89, which concerned a criminal law case, the Council stated rather clearly that the interferences with the exercise of the freedoms in question "must be suitable, necesary, and proportionate to the objective of prevention sought", it is one of the rare decisions in which the Council expressly distinguishes the three elements of the control of proportionality. As regards suitability of the measure, the Council states that "in view of the fact that a post-sentence preventive detention order is a measure which totally deprives an offender of his freedom, the definition of the scope of such a measure must be one which is appropriate in view of such personality disorders" to conclude that "the scope of post-sentence preventive detention appears to be appropriate for the purpose it is sought to achieve". In respect of necessity of the measure, the Council holds that "given the seriousness of the restrictions it places on the freedom of the individual, post-sentence preventive detention can only be considered as being a necessary measure as long as no other measure less invasive of such freedom can offer sufficient guarantees of preventing the commission of acts which seriously endanger the personal safety of others" or that "maintaining a convicted person who has served his sentence in a socio-

in the control of proportionality in limitation of property cases it follows its proper path whereby it examines whether an interference with property has satisfied two cumulative conditions: the existence of the general interest justifying the interference, and proportionality between the gravity of the interference and the importance of the aim in the general interest. As regards the former condition, the constitutional judges have held that, although the legislator has the competence to amend or abrogate anterior legislation, in so doing it cannot deprive constitutional rights of their guarantees, and that it must sufficiently justify all limitations of those rights by the general interest[839]. As to the latter condition, the Constitutional Council clearly examines suitability of a measure[840], which also makes part of the proportionality test exercised by the ECHR and the Czech Constitutional Court.

It follows that as regards limitations of property, that is, cases falling within the ambit of Article 2 of the Declaration, the proportionality test does not rest as much on a relative control of a manifest error of appreciation as it entails a balancing test which has been used in many recent decisions on the question of constitutionality[841], thus leaving little space for arbitrary or

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medico-judicial preventive centre in order to ensure that he benefits from medical, social and psychological treatment must be of a necessary harshness". In respect of the test of proportionality, in a narrow sense, the Council notes the following: "Thus, in order for the measure to continue to be one of strict necessity, Parliament has intended that regular account be taken of the progress made by the person subjected to such measures and whether said person submits himself on a permanent basis to the treatment on offer. The argument based on the fact that unlimited renewal of the measure is disproportionate must thus be dismissed". Apart from the absence of a manifest disproportionality, the Council examines whether the interference is necessary, suitable, and proportionate to the pursued objective in the general interest also, for example, in a decision no. 2013-319 QPC of 7 June 2013, Official Journal of 9 June 2013, p. 9632, § 3.

[839]Decision no. 2007-550 DC of 27 February 2007 Official Journal of 7 March 2007, Rec., p. 81, p. 4368, § 4; decision no. 2011-118 QPC, Official Journal of 9 April 2011, p. 6363, Rec., p. 191, § 7.

[840]See, for example, decision no. 2011-141 QPC, 24 June 2011, para. 3, p. 304; decision no. 2011‑208 QPC, 13 January 2012, § 4, p. 75; decision no. 2011‑212 QPC, 20 January 2012, §§ 3 and 4, p. 84; decision no. 2013-369 QPC, 28 February 2014, §§ 8-11, p. 4119; decision no. 2013-370 QPC, 28 February 2014, §§ 14-18, p. 4120; or decision no. 2014-691 DC, 20 March 2014, Official Journal of 26 March 2014, p. 5925, § 41: "Considérant que les dispositions de l'article 16 de la loi sont en adéquation avec l'objectif poursuivi; que les atteintes qui en résultent à l'exercice du droit de propriété ne revêtent pas un caractère disproportionné au regard de cet objectif".

[841]Decision no. 2010-60 QPC,12 November 2010, Official Journal of 13 November 2010, p. 20237; decision no. 2011-118 QPC, 8 April 2011, Official Journal of 9 April 2011, p. 6363, § 3; decision no. 2011-141 QPC, 24 June 2011, Official Journal of 25 June 2011, p. 10842, § 3; decision no. 2011-151 QPC, 13 July 2011,Official Journal of 14 July 2011, p. 12250, §§ 3, 6 to 8; decision no. 2011-182 QPC, Official Journal of 15 October 2011, p. 17465;decision no. 2011-193 QPC, Official Journal of 11 November 2011, p. 19010; decision no. 2011-201 QPC, 2 December 2011, Official Journal of 3 December 2011, p. 20497; decision no. 2011-207 QPC of 16 December 2011, "The Company Grande Brasserie Patrie Schutzenberger", Official Journal of 17 December 2011, p. 21370; decision no. 2011-208 QPC, 13 January 2012, Official Journal of 14 January 2012, p. 752, § 4; decision no. 2011-212 QPC, 20 January 2012, Official Journal of 21 January 2012, p. 1214, §§ 3- 4; decision no. 2011-215 QPC, 27 January 2012, Official Journal of 28 January 2012, p. 1677, § 3: "En l'absence de privation du droit de propriété, il résulte de l'article 2 de la Déclaration de 1789 que les limites apportées à son exercice doivent être justifiées par un motif d'intérêt général et proportionnées à l'objectif poursuivi". See further, for example, decision no. 2013-302 QPC of 12 April 2013; decision no. 2013-309 QPC of 26 April 2013; decision no. 2013-318 QPC of 7 June 2013; decision no. 2013-319 QPC of 7 June 2013; decision no. 2013-332 QPC of 12 July 2013; decision no. 2013-325 QPC of 21 June 2013; decision no. 2013-337 QPC of 1 August 2013;

creative interpretation in the conciliation of conflicting interests. The constitutional judges examine proportionality between the means employed and the aims sought to be realised[842], on the one hand, and the effects of the measure on the protected right, on the other[843]. The existence of excessive disproportionality is examined in terms of whether an owner bears an excessive burden compared to what the collective is entitled to expect from an individual, which, however, does not necessarily mean that there must be an equilibrium between the burden which the owner has to bear and the advantages brought about by the measure limiting his private property[844].

This reinforced control of property limitations has brought about a higher level of property protection and may be seen as the expression of the will of the Council to frame the discretionary power of Parliament by respecting the particular nature of the latter[845]. Hence, the Constitutional Council may be perceived as a competing body in the resolution of

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decision no. 2013-341 QPC of 27 September 2013; decision no. 2013-346 QPC of 11 October 2013; decision no. 2013-369 QPC of 28 February 2014; decision no. 2013-370 QPC of 28 February 2014; decision no. 2013-371 QPC of 7 March 2014; decision no. 2014-375 of 21 March 2014; decision no. 2014-391 QPC of 25 April 2014; decision no. 2014-394 QPC, 7 May 2014, Official Journal of 10 May 2014, p.7873.

[842]F. Mélin-Soucramanien, "Le contrôle de proportionnalité exercé par le Conseil constitutionnel", in *Petites affiches*, 5 March 2009 no. 46, p. 70 ff.

[843]For example, decision no. 2000-434 DC, 20 July 2000, Official Journal of 27 July 2000, p. 11550, Rec., p. 107, § 24: "... qu'il ne peut être apporté de limitations à l'exercice de ce droit qu'à la double condition que ces limitations obéissent à des fins d'intérêt général et n'aient pas un caractère de gravité tel que le sens et la portée du droit de propriété s'en trouveraient dénaturés". And further also decision no. 2000-436 DC of 7 December 2000, Official Journal of 14 December 2000, p. 19840, §§ 18 and 56; decision no. 2010-60 QPC of 12 November 2010, Official Journal of 13 November 2010, p. 20237, § 6; decision no. 2011-169 QPC of 30 September 2011, Official Journal of 1 October 2011, p. 16527, § 8; decision no. 2011-193 QPC of 10 November 2011, Official Journal of 11 November 2011, p. 19010, § 7; decision no. 2011-209 QPC of 17 January 2012, Official Journal 18 January 2012, p. 1014, § 6; decision no. 2014-691 DC, 20 March 2014, § 7, Official Journal of 26 March 2014, p. 5925; decision no. 2014-394 QPC, 7 May 2014, § 10, Official Journal of 10 May 2014, p. 7873; decision no. 2014-406 QPC, 9 July 2014, § 4, Offcial Journal of 11 July 2014, p. 11613; decision no. 2014-409 QPC, 11 July 2014, § 3, Official Journal of 13 July 2014, p. 11816; decision no. 2014-411 QPC, 9 September 2014, §§ 12-14, Official Journal of 12 September 2014, p. 15020; or decision no. 2014-701 DC of 9 October 2014, Official Journal of 14 October 2014, p. 16656, § 18: "Considérant qu'il est loisible au législateur d'apporter aux conditions d'exercice du droit de propriété des personnes privées, protégé par l'article 2 de la Déclaration des droits de l'homme et du citoyen de1789, et à la liberté contractuelle, qui découle de son article 4, des limitations liées à des exigences constitutionnelles ou justifiées par l'intérêt général, à la condition qu'il n'en résulte pas d'atteintes disproportionnées au regard de l'objectif poursuivi".

[844]The Constitutional Council referred to the disproportionality between the means employed, or their effects, and the objective sought as a breach of equality before public burdens, for example, in a decision concerning a difference of treatment between taxpayers. The Constitutional Council held that: "When deciding to boost the purchasing power solely of those citizens who have built or purchased their main place of residence less than five years ago, the parliament has introduced a difference of treatment between taxpayers which is not justified by the purpose which it seeks to achieve. This tax relief leads to the state having to bear outgoings which are patently disproportionate to the incentives they are expected to constitute, and is thus a patent infringement of the equality of taxpayers before public burden sharing". Decision no. 2007-555, 16 August 2007, Official Journal of 22August 2007, p. 13959, Rec, p. 310.

[845]V. Goesel-Le Bihan, "Le contrôle de proportionnalité exercé par le Conseil constitutionnel", Cahier du Conseil constitutionnel no. 22 (Dossier: Le réalisme en droit constitutionnel), June 2007.

conflicts of value vis-à-vis the legislator[846]. The principle of proportionality seems to have become more intrusive, as in the balancing of interests the Constitutional Council examines not only potential manifest disproportions[847] but it also has resort to a balancing test of proportionality, while, within the control of a manifest error of appreciation, the Council has exercised a limited examination when it has sanctioned only "the most serious and evident errors" of the legislator[848] or manifest disproportions without balancing competing interests. The control of proportionality leads to the reinforcement of the protective role of the Constitutional Council, as it enables it to fill out potential gaps in the interpretation of fundamental rights and liberties while preserving the legitimacy of the legislator in exercising its legislative powers[849].

But although it may seem that the question whether the right of property was denatured has lost its importance for the assessment[850] of property limitation cases, it can be, nevertheless,

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[846]E. Cartier, "La QPC, le procès et ses juges. L'impact sur le procès et l'architecture juridictionnelle", Paris, 2013, Dalloz coll. *Méthodes du droit*, p. 231.

[847]See, for example, decision no. 2011-139 QPC of 24 June 2011, Official Journal of 25 June 2011, p. 10841, § 8: "le législateur a adopté des mesures propres à assurer une conciliation qui n'est pas manifestement déséquilibrée entre le respect de la liberté d'entreprendre et la protection de la santé, ... ainsi que la prévention des atteintes à l'ordre public". The control of a manifest error of appreciation has recently been exercised, for example, in the case of *Commune de Thonon-les-Bains et autre*, decision no. 2014-391 QPC of 25 April 2014, Official Journal of 27April 2014, p. 7359, in which the Constitutional Council ruled that the provisions of the law in question represented a "manifestly disproportionate interference with the free administration of communes".

[848]P. Mazeaud, "L'erreur en droit constitutionnel", in *L'erreur*, Colloque à l'Institut de France of 25 and 26 October 2006.

[849] It is also worth noting that the administrative judges require that the effects of interference cannot bring about a disproportionate burden for the affected individual, for the owner must not bear a "charge special and exorbitant, disproportionate to the sought objective of the public interest" (decision of the Council of State CE, 3 July 1998, "Bitouzet", no. 158592, Recueil Lebon, p. 288). The Council of State developed, in a decision "Ville Nouvelle-Est" CE, Ass., 28 May 1971, *Ministre de l'equipement et du logement v. Fédération de défense des personnes concernés par le projet "Ville nouvelle Est"*, Rec., p. 409, a theory of balance (*théorie du bilan*), which operates according to a cost-benefit analysis, with a view to elaborating its control of the existence of a public utility. It examined a public utility not only from the perspective of whether the public interest is given, but it, moreover, examined in detail the inconveniences and the advantages of the limitations which it traded off in order to determine the real nature of the public utility. The subject-matter of the case concerned the expropriation and demolition of hundreds of houses for the purpose of erecting a new University campus in the city of Lille. The Council of State considered that the project could not be legally declared as being of public utility unless the interference with private property, financial expenses, and, eventually, related social inconveniences were not excessive with regard to the public interest it represented. The Council of State thus examined whether a balance between the advantages and drawbacks of the project, which included its costs, its impact on the environment or its repercussions on private property, was struck. The method of balance entails a scrutiny of incoveniences for the owner, on the one hand, and of the consequences for the public interest, on the other hand.

[850]For example, decision no. 2011-141 QPC of 24 June 2011, Official Journal of 25 June 2011, p. 10842, Rec., p. 304, § 3: "qu'en l'absence de privation du droit de propriété, il résulte néanmoins de l'article 2 de la Déclaration de 1789 que les limites apportées à son exercice doivent être justifiées par un motif d'intérêt général et proportionnées à l'objectif poursuivi"; or decision no. 2011-209 QPC of 17 January 2012, Official Journal of 18 January 2012, p. 1014, Rec., p. 81, § 4: "qu'en l'absence de privation du droit de propriété au sens de l'article 17,

observed in the example of the *Mur mitoyen*[851]case that the Council may not always deal with balancing between the general interest and the protected property rights of individuals, and that it may hold plainly that a measure in the general interest is proportionate to the objective set by the legislator and that, consequently, the measure in question is not grave enough to denature the right of property. This leads to suggest that constitutional judges may sometimes perform an austere exercise rather than a full control of proportionality[852]. This does not, however, change anything about the claim that the test of proportionality conforms to the exigencies of the Strasbourg Court in a more complete manner than permits the control of the absence of denaturation of the right of property which seems to be destined toward extinction in the control under Article 2 of the Declaration[853], and that the Constitutional Council has aligned with the system of Article 1 of Protocol 1 to the Convention in that it performs the same test under Article 2 of the Declaration as the ECHR and exercises a control equivalent to that of the ECHR[854].

In the process of balancing competing interests the judicial bodies take into account many factors including, in particular, the compensation factor. The compensation terms are important for the assessment of proportionality of a national measure interfering with property. While the payment of compensation does not figure as one of the requirements of conventionality in P1-1 of the Convention, it is a constitutional requirement of constitutionality in both the Czech and the French Constitutions.

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il résulte néanmoins de l'article 2 de la Déclaration de 1789 que les atteintes portées à ce droit doivent être justifiées par un motif d'intérêt général et proportionnées à l'objectif poursuivi".

[851]Decision no. 2010-60 QPC of 12 November 2010, Official Journal of 13 November 2010, p. 20237, § 6: "que l'accès forcé à la mitoyenneté prévu par la loi constitue un élément nécessaire de ce régime et répond ainsi à un motif d'intérêt général; qu'il est proportionné à l'objectif visé par le législateur; ... que, compte tenu de ces garanties de fond et de procédure, la restriction portée au droit de propriété par la disposition en cause n'a pas un caractère de gravité tel qu'elle dénature le sens et la portée de ce droit".

[852]J. Mercier, "Les principes en conflit dans la QPC: de la prudence de la proportionnalité à l'audace de la pondération", p. 5, 9ème Congrès Français de Droit Constitutionnel, June 2014. Available at: http://www.droitconstitutionnel.org/congresLyon/CommLA/A-mercier_T3.pdf.

[853]P. Wachsmann, "La transposition en droit constitutionnel français de l'économie de l'article 1er du Protocole additionnel", in *Cohérence et impact de la jurisprudence de la Cour européenne des droits de l'homme. Liber amicorum Vincent Berger*, (eds.) L. Berg, M. Enrich Mas, P. Kempees, D. Spielmann, Wolf Legal Publishers, 2013, p. 452.

[854]Decision no. 2011-207-QPC of 16 December 2011, § 10; decision no. 2011-208-QPC of 13 January 2012, § 8. Both decisions were preceded by a concurrent decision of the ECHR.

1.7.4. Compensation

1.7.4.1. Approach of the ECHR

1.7.4.1.1. Compensation for the Control of the Use of Property

In the framework of a fair-balance test compensation terms under the relevant legislation are material to the assessment of whether the contested measure respects the requisite fair balance and, notably, whether it does not impose a disproportionate burden on the applicant[855]. Due to the fact that a control of the use is a less serious interference with property than a deprivation, the need to provide compensation is not as strong and, compared with the deprivation rule, a reverse rule applies. That is, if under the deprivation rule the owner must receive some compensation save for "exceptional circumstances"; under the control of the use rule the reverse is true – the owner receives compensation only in exceptional cases, as a control of the use "does not, as a rule, contain any right to compensation"[856]. However, where the control of the use of property has substantial economic effects on the owner, the availability of compensation will be relevant in the assessment of proportionality. It is worth noting that there are also cases which, by their nature, exclude any right to compensation, such as cases involving forfeiture of property in connection with committing a criminal offence, the execution of a judgment, or the satisfaction of a tax debt. In assessing proportionality in such cases the weight shifts to examining the existence of adequate procedural safeguards (the due process factor).

It can be claimed that as regards the assessment of proportionality, the due process factor is, in general, more relevant under the control of the use rule than the compensation factor. It is a logical implication of the nature of the kind of interferences falling under the second paragraph of P1-1. The emphasis on procedural aspects is apparent, for example, in the case of *AGOSI v. UK*[857] which concerned the illegal importation of gold coins by smugglers into the UK. As the coins were seized by competent authorities, the applicant company claimed that it was the legal owner of the coins under the retention of title clause and that the seizure was a violation of P1-1. However, the ECHR held that the applicant company had disposed of adequate procedural means of protection affording it a reasonable opportunity of putting its case to the responsible authorities. In any event, it is difficult to determine the boundary between restrictions of the right of property which require compensation and those which do

[855] *Bistrović v. Croatia*, no. 25774/05, 31 May 2007.
[856] *Pinnacle Meat Processors Company and Others v. UK*, 21 October 1998, no. 33298/96.
[857] *AGOSI v. the United Kingdom*, 24 October 1986, § 55, Series A no. 108.

not. As there cannot be a clear line drawn, the ECHR's approach will always be casuistic. This is also suggested with regard to the fact that the magnitude of economic loss resulting from a limitation of property may, in some cases, be as serious as that of a deprivation which requires the payment of compensation. In sum, limitations are not always followed by correlative compensation and the prevailing principle is that of non-indemnisation.

1.7.4.1.2. Compensation for Deprivations of Property

A duty to pay compensation distinguishes deprivation from other types of interference with property, although there is no mention thereof in the text of P1-1. It goes without saying that compared to other interferences with property, the compensation factor is particularly important to assess deprivation of property cases. Due to the fact that national laws concerning deprivation of property usually provide for conditions for compensation for takings, cases where a violation of P1-1 was found by the ECHR for the absence of indemnisation have been rare.

The ECHR has made compensation a rule when it stated that the taking of property in the public interest without the payment of compensation is treated as justifiable only in exceptional circumstances[858], and that the obligation to pay compensation derives from an implicit condition in P1-1 read as a whole[859]. The failure to pay compensation for a deprivation of property is generally treated as the imposition of a disproportionate burden on the owner, and as a violation of P1-1[860]. The principle, therefore, is that the owner should be compensated and that only "in exceptional circumstances" no compensation need be paid[861]. The ECHR, however, does not provide any guidance as to the meaning of "exceptional circumstances" and, hence, enjoys broad discretion as to its interpretation. It appertains to the

[858] *James and Others v. the United Kingdom*, 21 February 1986, § 54, Series A no. 98. In *Urbárska Obec Trenčianske Biskupice v. Slovakia*, no. 74258/01, §115, 27 November 2007 the ECHR held the following: "While it is true that in many cases of lawful expropriation only full compensation can be regarded as reasonably related to the value of the property, Article 1 of Protocol No. 1 does not guarantee a right to full compensation in all circumstances. Legitimate objectives in the 'public interest', such as those pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value. Less than full compensation may also be necessary a fortiori where property is taken for the purposes of fundamental changes of a country's constitutional system or in the context of a change of political and economic regime. A total lack of compensation can be considered justifiable under Article 1 of Protocol No. 1 only in exceptional circumstances".

[859] *Lithgow and Others v. the United Kingdom*, 8 July 1986, § 108, Series A no. 102.

[860] *Former King of Greece and Others v. Greece* [GC] (just satisfaction), no. 25701/94, § 78, 28 November 2002; *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 95, ECHR 2006-V.

[861] See, for example, *The Holy Monasteries v. Greece*, 9 December 1994, § 71, Series A no. 301-A; *Former King of Greece and Others v. Greece* [GC], no. 25701/94, § 89, ECHR 2000-XII; *Broniowski v. Poland* [GC], no. 31443/96, § 176, ECHR 2004-V; *Străin and Others v. Romania*, no. 57001/00, § 52, ECHR 2005-VII.

state to prove the existence of such exceptional circumstances convincingly. By all means, a total lack of compensation cannot be considered justifiable, even in exceptional circumstances, if some of the fundamental principles enshrined in the Convention are breached[862].

As "exceptional circumstances" justifying the absence of compensation was indicated, for example, the manner in which land was generally acquired in *Zvolský and Zvolská v. the Czech Republic*[863], or the unique context of German reunification in the cases of *Von Maltzan* and *Jahn and others v. Germany*[864]. The latter case concerned five applicants, all German nationals, who inherited land that had been allocated to their ascendants, subject to certain restrictions on disposal, following the land reform implemented in the Soviet Occupied Zone of Germany in 1945. In March 1990 the so-called Modrow Law came into force in the German Democratic Republic, lifting restrictions on the disposal of land that had been applicable until then, whereupon those in possession of the land acquired full title to it. After German reunification, however, some heirs (including the applicants) of persons who had acquired land under the land reform were compelled to reassign their property to the tax authorities of their respective Land without compensation in accordance with the second Property Rights Amendment Act passed in July 1992 by the German federal parliament. The heirs of the owners of land acquired under the land reform had to reassign it to the tax authorities if, on 15 March 1990, they were not conducting any activity in the agriculture, forestry or food-industry sectors in the GDR. The applicants complained about the obligation imposed on them to reassign their land without compensation. The Grand Chamber, overruling the Chamber's decision, concluded that in the light of the unique context of German reunification the special circumstances of the case can be regarded as exceptional circumstances justifying the lack of any compensation which does not upset the fair balance that has to be struck between the protection of property and the requirements of the general interest.

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[862] *Străin and Others v. Romania*, no. 57001/00, §§ 53, 59, ECHR 2005-VII. In this case the ECHR held that "in view of the fact that the deprivation in question infringed the fundamental principles of non-discrimination and the rule of law which underlie the Convention, the total lack of compensation caused the applicants to bear a disproportionate and excessive burden in breach of their right to the peaceful enjoyment of their possessions".

[863] *Zvolský and Zvolská v. the Czech Republic*, no. 46129/99, § 72, ECHR 2002-IX.

[864] *Von Maltzan and Others v. Germany* (dec.) [GC], nos. 71916/01, 71917/01 and 10260/02, §§ 111-112, ECHR 2005-V; *Jahn and Others v. Germany* [GC], nos. 46720/99, 72203/01 and 72552/01, § 112, ECHR 2005-VI.

As the compensation terms under the relevant legislation are material to the assessment of whether the contested measure respects the requisite fair balance and, notably, whether it does not impose a disproportionate burden on the applicants[865], the amount, the terms, and the effectiveness of the payment of compensation are generally crucial factors in the assessment of proportionality.

1.7.4.1.3. Amount of Compensation

The question arises as to the amount of compensation that should be paid. The states enjoy a wide margin of appreciation when it comes to calculating compensation terms and the ECHR only exercises a power of review that is limited to examining whether the compensation terms fall within the state's margin of appreciation. The ECHR has held in this respect that the national authorities are, by reason of their direct knowledge of their society, better placed to consider a number of competing interests than an international judge, and that it will respect the state's decision unless it is "manifestly without reasonable foundation"[866]. Accordingly, the states enjoy a wide margin of appreciation both in determining whether compensation is required and in determining the methods of valuation. Inasmuch as in respect of the compensation terms the ECHR respects the states' choice of methods unless it is manifestly without reasonable foundation, it contents itself with the fact that the amount paid by the state "bears a reasonable relation" to the value of the property[867], otherwise the taking of property would normally constitute a disproportionate interference which could not be considered justifiable under P1-1[868]. So, for example, when the ECHR dealt with a claim about the granting of non-adequate compensation for the deprivation of property in the case of *Dervaux v. France*[869], it stated that the expropriated individual should, in principle, obtain compensation reasonably related to the value of expropriated property, even though the

[865] *The Holy Monasteries v. Greece*, 9 December 1994, § 71, Series A no. 301-A; *Papachelas v. Greece* [GC], no. 31423/96, § 48, ECHR 1999-II; *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 95, ECHR 2006-V.
[866] *Lithgow and Others v. the United Kingdom*, 8 July 1986, § 122, Series A no. 102.
[867] *Papachelas v. Greece* [GC], no. 31423/96, § 49, ECHR 1999-II.
[868] *Lithgow and Others v. the United Kingdom*, 8 July 1986, § 121, Series A no. 102; *The Holy Monasteries v. Greece*, 9 December 1994, § 71, Series A no. 301-A; *Papachelas v. Greece* [GC], no. 31423/96, § 48, ECHR 1999-II; *Perdigão v. Portugal* [GC], no. 24768/06, § 59, 16 November 2010; *Vistiņš and Perepjolkins v. Latvia* [GC], no. 71243/01, § 110, 25 October 2012. In *Lallement v. France*, no. 46044/99, §§ 23-24, 11 April 2002, which involved expropriation of property resulting in a loss of income for the applicant, the ECHR noted that the expropriation complained of had made it financially unviable for the applicant to continue to farm the remaining portion of his land and had thus led to the loss of his source of income. Noting that the compensation paid had not specifically covered that loss, the ECHR held that it did not bear a reasonable relation to the value of the expropriated property.
[869] *Dervaux v. France*, no. 40975/07, §§49, 54, 4 November 2010.

objectives of public utility may have called for compensation inferior to the full market value. It found that in the instant case the indemnity granted to the applicant did not impose an exorbitant burden on him and that a fair balance was struck between the general interest and the fundamental right. The notion of "reasonableness", in my view, leaves the ECHR a certain margin of discretion in determining the amount[870]. The vague character of this notion, which gains real contours depending on the circumstances of each individual case, renders it dependant on the subjective consideration of individual judges, thus leaving uncertainty as to whether a national measure is eligible of being considered as disproportionate. On all accounts, the amount of compensation must be calculated on the basis of the value of property at the date on which the ownership was lost. Any other approach could open a door to a degree of uncertainty or even arbitrariness[871]. It may be argued that an important benchmark of reasonableness in the assessment of the amount of compensation to be paid is the preservation of a proportional relationship between the public benefit and the individual burden. Such a fair balance may be achieved without the payment of the full market value for the property taken. Consequently, the requirement that compensation be reasonably related to the value of property cannot be an absolute principle.

It implies that, although compensation must relate to the market value of property, it does not mean that the owner must receive the full market value. Moreover, the case-law suggests that P1-1 does not guarantee a right to full compensation in all circumstances[872]. The payment of less than the full market value can be justified by legitimate objectives of public interest of economic or social character, such as economic reform or achievement of greater social justice[873]. The ECHR has, for example, held that less than full compensation may be necessary where property is taken for the purposes of "such fundamental changes of a country's constitutional system as the transition from monarchy to republic"[874]. It reaffirmed

[870]As regards the notion an amount "reasonably related" to the value of property, it is suggested that it is an amount which the ECHR finds acceptable under P1-1 in view of various rather indefinite criteria such as, for example, the applicant's claims, the nature of the property taken, the valuations submitted by the parties, the possible options for calculating the pecuniary damage, or the lapse of time from the dispossession. See, for example, *Former King of Greece and Others v. Greece* [GC] (just satisfaction), no. 25701/94, §§ 72-79, 28 November 2002.

[871]*Guiso-Gallisay v. Italy* (just satisfaction) [GC], no. 58858/00, § 103, 22 December 2009; *Vistiņš and Perepjolkins v. Latvia* [GC], no. 71243/01, § 111, 25 October 2012.

[872]*James and Others v. the United Kingdom*, 21 February 1986, § 54, Series A no. 98; *The Holy Monasteries v. Greece*, 9 December 1994, § 71, Series A no. 301-A; *Broniowski v. Poland* [GC], no. 31443/96, § 182, ECHR 2004-V; *Padalevičius v. Lithuania*, no. 12278/03, § 66, 7 July 2009.

[873]*Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 97, ECHR 2006-V.

[874]*Former King of Greece and Others v. Greece* [GC], no. 25701/94, § 87, ECHR 2000-XII.

this principle in *Broniowski*[875]in the context of the country's transition towards a democratic regime. Moreover, the ECHR makes a clear distinction between compensation for lawful and unlawful takings when it holds that the lawfulness of a dispossession affects the criteria to be used for determining the reparation owed by the state since the pecuniary consequences of a lawful taking cannot be assimilated to those of an unlawful taking[876]. Likewise, as regards nationalisations, the ECHR has stressed that the standard of compensation required may be different from that required in regard to other takings of property, provided that a fair balance between the public interest and private interests is preserved[877]. The justification of this approach rests on the argument that the valuation of major industrial enterprises for the purpose of nationalisation of the whole industry is in itself a far more complex operation than, for instance, the valuation of land compulsorily acquired[878].

1.7.4.1.4. Procedural Safeguards and the Temporal Factor

It is not only the amount of compensation which may lead to a violation of P1-1, but it is also delays in payment which, if unjustified, may, according to the ECHR, jeopardize the adequate character of compensation, as demonstrated, for example, by the case of *Zubani v. Italy*[879]. In

[875]*Broniowski v. Poland* [GC], no. 31443/96, § 182, ECHR 2004-V. The ECHR specified that rules regulating ownership relations within the country "involving a wide-reaching but controversial legislative scheme with significant economic impact for the country as a whole" could involve decisions restricting compensation for the taking or restitution of property to a level below its market value.

[876]*Former King of Greece and Others v. Greece* [GC] (just satisfaction), no. 25701/94, § 75, 28 November 2002. The ECHR was inspired by the decision of the Iran-United States Claims Tribunal in the *Amoco International Finance Corporation* case in which the Tribunal stated, referring to the judgment of the Permanent Court of International Justice in the Case Concerning the Factory at Chorzów3, that: "a clear distinction must be made between lawful and unlawful expropriations, since the rules applicable to the compensation to be paid by the expropriating State differ according to the legal characterisation of the taking". (Amoco International Finance Corporation v. Iran, Interlocutory Award of 14 July 1987, Iran–U.S. Claims Tribunal Reports (1987–II), § 192).

[877]*Lithgow and Others v. the United Kingdom*, 8 July 1986, § 143, Series A no. 102.

[878]*Ibid*., § 121.

[879]*Zubani v. Italy*, 7 August 1996, § 49, *Reports of Judgments and Decisions* 1996-IV.This case concerned an eighteen-year period for the recovery of part of the sum that had been wrongfully withheld by the municipality. According to the ECHR "the size of the sum awarded by the Brescia District Court cannot be decisive in this case in view of the length of the proceedings". In *Zubani v. Italy* (just satisfaction) [GC], no. 14025/88, § 22, 16 June 1999, the ECHR referred to the fact that the applicants "sustained losses that were compounded by the length of time for which they were deprived of possession of their property". In *Papamichalopoulos and Others v. Greece* (Article 50), 31 October 1995, § 37, Series A no. 330-B, for a *de facto* expropriation continuing for almost thirty years the ECHR awarded compensation for the full value of the property in addition to compensation for non-pecuniary damage. The compensation was not limited to the value of the applicants' properties at the date on which the Navy occupied them, but the ECHR also took as its basis for assessing the impugned interference the length of the occupation and the authorities' inability for years on end to allot the applicants the land promised in exchange. In *Stran Greek Refineries and Stratis Andreadis v. Greece*, 9 December 1994, § 82, Series A no. 301-B, the ECHR held that the adequacy of compensation may be diminished if it is paid without reference to various circumstances likely to reduce its value, such as the lapse of a considerable period of time. Compensation for non-pecuniary damage can also be ordered for a violation not involving a deprivation. See in this respect *Pine Valley Developments Ltd and Others v. Ireland* (Article 50), 9 February 1993, §§ 16-17, Series A no. 246-B.

the view of the ECHR abnormally lengthy delays in the payment of compensation for expropriation lead to an increased financial loss for the person whose property has been expropriated, putting him so in a position of uncertainty, especially when the monetary depreciation which occurs in certain states is taken into account[880]. This includes abnormally lengthy delays in administrative or judicial proceedings in which such compensation is determined, especially when individuals whose property was expropriated are obliged to resort to such proceedings in order to obtain compensation to which they are entitled[881]. The ECHR is generally more severe about the length of proceedings than domestic courts and usually considers that a period of more than four or five years is problematic[882]. So, for example, in the case of *Beaumartin v. France*[883] it ruled that eight years and two months was an excessive period for expropriation proceedings, or in *Guillemin v. France*[884] it found that fourteen years to obtain compensation was not a reasonable time. As R. Hostiou mentions, in the case of *Guillemin v. France* the ECHR intended to compensate not only material damage, but also moral damage incurred by the applicants due to the disproportional delay of expropriation proceedings[885]. That the ECHR does not take into consideration only the material loss corresponding to the value of the property taken is shown in the case of *Lallement v. France*[886]. This case involved expropriation of property resulting in a loss of income for the applicant. The ECHR noted that the expropriation complained of had made it financially unviable for the applicant to continue to farm the remaining portion of his land and had thus led to the loss of his source of income. Noting that the compensation paid had not specifically covered that loss, the ECHR stated that it did not bear a reasonable relation to the value of the expropriated property.

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[880]*Aka v. Turkey*, 23 September 1998, § 50, *Reports of Judgments and Decisions* 1998-VI, in which the ECHR considered that the difference between the value of the amount due to the applicant when his land was expropriated and when actually paid had caused that he had to sustain additional loss, which was due to high monetary depreciation, and which, together with the loss of his land, upset the fair balance. See also *Muhey Yaşar v. Turkey*, no. 36973/97, § 25, 22 July 2004; or *Jorge Nina Jorge and Others v. Portugal*, no. 52662/99, § 58, 19 February 2004.

[881]*Guillemin v. France* (Article 50), 2 September 1998, § 54, *Reports of Judgments and Decisions* 1998-VI. In this case, which concerned an unlawful expropriation of the applicant's property by the municipality for the purpose of developing a residential area, the ECHR also underlined that compensation for the loss sustained must be paid within a reasonable time. It stated in particular that: "Compensation for the loss sustained by the applicant can only constitute adequate reparation where it also takes into account the damage arising from the length of the deprivation. It must, moreover, be paid within a reasonable time".

[882]C. Dupré, "France", in *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States*, 1950-2000, R. Blackburn and J. Polakiewicz (eds.), Oxford University Press, 2001, pp. 326-327.

[883]*Beaumartin v. France*, 24 November 1994, Series A no. 296-B.

[884]*Guillemin v. France*, 21 February 1997, *Reports of Judgments and Decisions* 1997-I.

[885]R. Hostiou, "Note sous Cedh, Guillemin, 21 février 1997", AJDA 1997, p. 403.

[886]*Lallement v. France*, no. 46044/99, 11 April 2002.

1.7.4.1.5. General Principles of International Law

P1-1 also contains a reference to general principles of international law the purpose of which is that general international law protects property of non-nationals against arbitrary expropriation and nationalisation without compensation[887]. The general principles of international law entail the obligation to pay compensation to non-nationals in cases of expropriation[888]. The ECHR has interpreted the general principles as being applicable only to takings of property by the state from non-nationals. In its view, as regards takings of property effected in the context of a social reform or an economic restructuring, there may well be good grounds for drawing a distinction between nationals and non-nationals as far as compensation is concerned with regard to the fact that non-nationals are more vulnerable to domestic legislation since, unlike nationals, they generally do not play any part in national elections. Moreover, although a taking of property must always be effected in the public interest, different considerations may apply to nationals and non-nationals and there may well be legitimate reason for requiring nationals to bear a greater burden in the public interest than non-nationals. On all accounts, since the ECHR's case-law has established that deprivation of property without compensation is in principle incompatible with P1-1, the differentiation between nationals and non-nationals seems to have lost its importance.

1.7.4.2. The Czech Jurisdiction Approach

1.7.4.2.1. Principles

Under Article 11 para. 4 of the Charter the payment of indemnity for deprivations and forced limitations belongs to one of the fundamental conditions of the constitutional protection of

[887]The origins of this phrase are to be found in the history of the drafting process. The drafters could not agree on the inclusion of a general compensation rule in P1-1, but they agreed to include a guarantee of compensation for property takings. Examination of the *travaux préparatoires* reveals that the express reference to a right to compensation contained in earlier drafts of P1-1 was excluded, notably in the face of opposition on the part of the United Kingdom and other states. The mention of the general principles of international law was subsequently included and was the subject of several statements to the effect that they protected only foreigners. In the Court's view, expressed in *Lithgow v. UK*, the inclusion of this reference can be seen to serve at least two purposes. Firstly, it enables non-nationals to resort directly to the machinery of the Convention to enforce their rights on the basis of the relevant principles of international law, whereas otherwise they would have to seek recourse to diplomatic channels or to other available means of dispute settlement to do so. Secondly, the reference ensures that the position of non-nationals is safeguarded, in that it excludes any possible argument that the entry into force of Protocol No. 1 has led to a diminution of their rights.

[888]The Committee of Ministers expressly stated so in their Resolution (52) 1 of 19 March 1952 approving the text of Protocol No. 1 and its opening for signature. It is noteworthy that P1-1 expressly provides that deprivation of property must be effected "in the public interest": since such a requirement has always been included amongst the general principles of international law, this express provision would itself have been superfluous should P1-1 have the effect of rendering those principles applicable to nationals as well as to non-nationals.

property. The Constitutional Court has held, in this respect, that in view of the fact that ownership has, unlike other fundamental rights, an inherent material economic value and that it represents the core element of all market transactions, its restriction requires the granting of compensation[889].The purpose of Article 11 para. 4 of the Charter is that the affected individual be compensated by the subject benefiting from the interfrence (state, municipality), for, in the words of the Constitutional Court, it cannot be fairly demanded that the costs of the society be born entirely by an individual whose ownership sphere is being restricted, which is one of the key aspects that are examined in the framework of constitutional review[890]. This is, clearly, a distinct approach from the practice under the Convention where different rules apply according to the nature of the interference and where limitations of property are compensated exceptionally in view of the fact that a control of the use does not, as a rule, contain any right to compensation.

Although Article 11 para. 4 is directly applicable, which means that the right to compensation can be directly invoked by reference to the Charter, the right to compensation is also enshrined in general or special laws[891]. As regards limitations, as has already been mentioned, a limitation of ownership must reach a certain seriousness so as to be qualified as a forced limitation within the meaning of Article 11 para. 4. It means that not every limitation of ownership will enjoy protection of this provision which conditions the imposition of restrictions by the payment of compensation. Accordingly, Article 11 para. 4 cannot be interpreted in a way that guarantees a fundamental right to compensation to any kind of limitation of ownership laid down by law. If a limitation does not fall within the category of forced limitations, it may not be compensable directly on invoking the Constitution, but only

[889]Judgment no. II. ÚS 268/06 of 9 January 2008.
[890]See, for example, judgment no. Pl. ÚS 8/08 of 8 July 2010; or judgment no. I.ÚS 1607/11 of 25 April 2012.
[891]Besides the Expropriation Act, the principle of compensation for expropriation is stipulated in the Civil Code as well as in other special laws (e.g. the Act on the Protection of Monuments, the Act on Railways, or the Act on the Protection of Nature and the Landscape). Pursuant to Article 1039 para. 1 of the Civil Code, the owner whose ownership was expropriated or restricted is entitled to compensation in "the extent to which his property was interfered with"; para. 2 lays down a rule that "compensation shall be pecuniary, however it can be granted by other means shall the parties agree so". Unlike in the French practice, where the judicial proceedings for issuing the expropriation order are separate from those leading to the judicial assessment of compensation for expropriation, decisions are rendered in one expropriation proceedings before an administrative authority and have two parts - the expropriation award and the compensation award. No appeal against the compensation award shall prevent the expropriation award from taking legal force. In appellate proceedings the compensation award cannot be changed to the detriment of the expropriated party or any third parties. The jurisdiction concerning appeals lodged against expropriation decisions is not uniform: while the expropriation awards fall within the jurisdiction of administrative courts, the compensation awards fall within the jurisdiction of civil courts.

should the statutory law provide for the right to compensation[892]. To the same effect in the French practice, limitations are compensable if the law provides for their compensation, as no right to indemnity for limitations is directly enshrined in the Constitution.

1.7.4.2.2. Amount of Compensation

As the Czech Charter does not offer any qualification as to the details of compensation, the Constitutional Court has referred in this respect to the practice of the ECHR which distinguishes beween a deprivation and a control of use of property in respect of claims for compensation. The Constitutional Court, thus, distinguishes between forced limitations of property and deprivations of property as regards the amount of compensation to be paid. While a deprivation requires the payment of adequate compensation, as concerns a forced limitation, which only precludes the enjoyment of some of the attributes of property, the amount of compensation is to be assessed according to the specific circumstances of each individual case and depends on the extent and seriousness of the limitation[893]. What constitutes an adequate amount of compensation has been interpreted by the Constitutional Court in one of its fundamental decisions dealing with a deprivation of property in the process of division of joint ownership. It held that, by adequate compensation, it was to be understood a pecuniary equivalent in value, an equivalent which enables, in local conditions, provision of a similar thing. It went on to state that in order to be adequate, the compensation must reflect the price dependant not only on the size and age of property, but also on the interest in it[894]. That is, on the demand and supply at a certain time and place. In brief, for the constitutional judges an adequate compensation must represent the price for which the thing in question could be sold.

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[892]For example, in judgment no. Pl. ÚS 34/03 of 13 December 2006, § 93, the Constitutional Court ruled that limitations imposed on property by the Law on Hunting were not to be considered as forced limitations within the meaning of Article 11 para. 4 of the Charter, and that, consequently, no right to compensation arose for the applicants.

[893]Judgment no. IV. ÚS 652/06 of 21 November 2007, § 27: "The question of the amount of compensation can be answered only after the assessment of the scope of the collision between the ownership of the applicant and the interests of the other parties to the proceedings who own, run, and entertain the waterwork. It is obvious that the scope and intensity of the limitation of the applicant's property through the right of way across his property seems to be lesser compared with the limitation of lots on which the other parties to the proceedings erected constructions or fences for the purpose of functioning of the small water plant. The analysis quantifying the scope (and intensity) of such limitation, upon which the amount of the applicant's claim depends, falls fully within the jurisdiction of ordinary courts".

[894]Judgment no. III. ÚS 102/94 of 15 December 1994.

As a rule, damages for forced limitations of ownership do not have to cover the entire injury. Even if only increased costs induced are compensated to the owner, such practice would not be contrary to the Constitution[895]. In its reasoning the Constitutional Court usually refers to the practice of the ECHR according to which Article 1 of Protocol 1 to the Convention does not guarantee the right to full compensation and the amount of compensation can vary as regards nationalisations or another form of deprivation of property, the national authorities disposing great discretion in respect of fixing the amount of compensation. In comparison with the approach of the French Constitutional Council it can be stated that both constitutional jurisdictions apply divergent criteria for the amount of compensation to be paid for limitations of property. While the French constitutional practice requires that compensation reflect the value relationship, whereby it should be adequate and be based on the real value of the property in question, pursuant to the Czech constitutional practice this value criterion applies only to deprivations of property.

So, the established line of reasoning of the Constitutional Court is that the amount of compensation for forced limitations of property does not have to correspond to the value of the property in question. The Constitutional Court has recently dealt with a constitutional complaint, the subject-matter of which had beed rejected by the ECHR as premature by reason of pending proceedings on damages before national courts[896]. The case concerned an obligation of the state to award damages for an alleged breach of the right of property. The constitutional judges, referring to the established case-law of the ECHR, stated that the applicant, whose right to the protection of property under the Convention had been violated, was entitled to damages comprising the material and moral injury incurred. They outlined that in limitation of property cases the amount of compensation may be inferior to the value of property in question. This judgment seems to reflect the general approach of the constitutional judges to the issue of compensation for forced limitations of property. The following general conclusions can be drawn therefrom. Firstly, the obligation of the general courts in proceedings on damages against the state is to repair the injury in such an amount which is laid down by the principles embodied in the jurisprudence of the ECHR, provided that the right of property was violated contrary to P1-1 of the Convention. This means that the Czech judicial authorities shall follow and be bound by the interpretation of the ECHR as to the

[895]Judgment no. IV. ÚS 2005/09 of 26 April 2012, § 35. Namely, it is not contrary to the Constitution if no compensation is granted for lost profits in connection with a statutory limitation of husbandry.
[896]The case of *Lesní společnost Přimda, a.s. v. Czech Republic,* 21 September 2010, no. 11997/05.

amount of compensation. Secondly, in determining the amount of compensation the courts must take into account the real market value of property, which in the case of non-owners will not, in principle, be compensated in full[897]. It follows that the Constitutional Court has endorsed the principle set down by the ECHR whereby, in limitations of property cases, the rule is that if damages are awarded, they do not have to cover the full market value. Accordingly, an interference with the substance of ownership by a control of the use of property without the payment of compensation corresponding to the value of property does not amount to a disproportionate interference with property rights of an individual.

1.7.4.2.3. Procedural Safeguards and the Temporal Factor

The Constitutional Court lends importance to procedural safeguards and relies on the case-law of the ECHR in this area. For example, in dealing with a reopening of proceedings case in connection with a decision of the ECHR in the case of *Chadzitaskos and Franta v. the Czech Republic*[898], it reiterated the findings of the ECHR that the key question in the given case was whether the applicants had access to adequate procedural safeguards warranting effective and fair adjudication of their litigation concerning the amount of compensation for a forced transfer of their shares. The Constitutional Court stressed that, apart from the obligation to grant compensation, the state was obliged to ensure an effective means of redress in property violation cases[899].

The ECHR has also dealt with a complaint about the length of the proceedings for damages, for example, in the case of *Lesní společnost Přimda, a.s. v. the Czech Republic*[900]. While the proceedings for damages were pending, the applicant company pointed out that, given their length, their remedial effect was weakened. The ECHR noted that the applicant company did not submit any relevant argument which, taking into consideration the proceedings for damages at a domestic level, would cast doubt on the availability of an effective remedy.

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[897]Judgment no. II ÚS 3035/12, 5 March 2014, §§ 40-41.
[898]*Chadzitaskos and Franta v. the Czech Republic*, nos. 7398/07, 31244/07, 11993/08 and 3957/09, 27 September 2012. For the lack of effective remedies see also, for example, *Žáková v. the Czech Republic*, no. 2000/09, 3 October 2013.
[899]Judgment no. Pl. ÚS 32/13, 20 May 2014, § 22. The ECHR concluded that, in view of arbitration proceedings having been insufficient and unable to satisfy the procedural requirements of Article 1 of Protocol No. 1, the applicants did not have access to procedures satisfying the requirements of Article 1 of Protocol No. 1 for the determination of their claims that the amount of compensation they received was inadequate, and further that this deficiency upset the fair balance that has to be struck between the demands of the public interest and the need to protect the applicants' right to the peaceful enjoyment of their possessions.
[900]*Lesní společnost Přimda, a.s. v. Czech Republic,* 21 September 2010, no. 11997/05.

Regarding the length of the proceedings, the proceedings were pending before the domestic courts for approximately four and a half years at three levels of jurisdiction, which as such could not, in the ECHR's view, lead to the conclusion that the remedy used by the applicant company was not effective.

1.7.4.3. Approach of the French Jurisdiction

1.7.4.3.1. Principles

With reference to Article 34 of the French Constitution, which empowers the legislator to adopt statutes which shall determine the rules concerning civic rights and the fundamental guarantees granted to citizens for the exercise of their civil liberties and to determine the rules concerning the obligations imposed upon property of citizens, it is up to Parliament to determine compensation for restrictions of property while taking into account constitutional principles. Consequently, limitations of property rights are compensated only to the extent in which compensation is foreseen by law. In other words, as a rule, restrictions of the attributes of the right of property do not give reason for compensation save that provided for by law[901]. There is neither a general principle nor a constitutional provision that would stipulate that compensation be provided for constraints incurred by a limitation of property[902].

The forbearance of the ECHR to sanction the rules on compensation for limitations of property which fall within the states' wide legislative discretion, to which the ECHR pays deference, and which may not include the right to compensation in all circumstances, is apparent, for example, from the case of *Brosset-Triboulet v. France*[903]. The applicants alleged that their right of property guaranteed by Article 1 of Protocol No. 1 was infringed upon as a result of the French authorities' refusal to authorise them to continue occupying the maritime public land on which stood a house that belonged to their family since 1945 and as a result of the order to demolish the house. The ECHR, having reiterated that where a measure controlling the use of property is in issue, the lack of compensation is a factor to be taken into consideration in determining whether a fair balance has been achieved but is not of itself sufficient to constitute a violation of Article 1 of Protocol No. 1, stated that considering that

[901]For example, the Code of public health provides for indemnity for servitudes on behalf of mineral water resources in cases where the owner of the resources is authorised to pursue works on the land of another (Art. L. 735); or the provision of the Code of urbanism on the servitude of passage along the coastline (Art. L. 160-7).
[902]Decision no. 81-133 DC, 30 December 1981, Rec., p. 41, § 21.
[903]*Brosset-Triboulet and Others v. France* [GC], no. 34078/02, §§ 94-95, 29 March 2010.

the applicants could not have been unaware of the principle that no compensation was payable, which was clearly stated in every decision authorising their temporary occupancy of the public property, the lack of compensation could not be regarded as a measure disproportionate to control of the use of the applicants' property, carried out in pursuit of the general interest. The applicants were, thus, not found to have born an individual and excessive burden in the event of the demolition of their house without compensation.

Compared to Article 11 para. 4 of the Czech Charter, Article 17 of the Declaration provides for a guarantee of indemnity, which must be advance and just, only for deprivations of property[904], while limitations are generally considered to be minor interferences with the right of property and, according to the Constitutional Council, shall be compensated exceptionally. The Constitutional Council has not accepted that Article 17 of the Declaration should be a foundation for granting of compensation in cases of limitation of private property[905] and has maintained that interferences with property not amounting to a deprivation are compensable provided that the owner bears a burden that is excessive to what society is entitled to expect from its members[906]. This, apparently, includes limitations which are serious enough to inflict denaturation of the right of property, and, thus, amount to a *de facto* deprivation of property, such as, for example, when an owner is obliged to suffer a significant intervention in his right to dispose of property by virtue of an easement of passage on his property. As a consequence, this strict approach excludes *a priori* any damages in cases which do not pertain to a forced and definitive transfer of private property.

By applying the principle whereby compensation is not excluded in cases where the application of law has caused a special and exorbitant burden which is disproportionate to the pursued public interest, the Constitutional Council has integrated the principles applied by the ECHR into its practice of control of constitutionality. The Council invokes this factor in the

[904]The Constitutional Council referred to this provision, for example, in decision no. 85-198 of 13 December 1985, Official Journal of 14 December 1985, p. 14574, Rec., p. 78, by holding that: "Considérant que les auteurs de la saisine font valoir que, pour être conforme aux principes posés par l'article 17 de la Déclaration des Droits de l'Homme et du Citoyen, l'atteinte portée par le législateur à l'exercice normal et complet du droit de propriété doit, d'une part, être justifiée par une nécessité publique légalement constatée, d'autre part, être subordonnée à l'octroi d'une juste indemnité".

[905]For example, in decision no. 85-189 DC of 17 July 1985 the Constitutional Council explicitly stated that interferences not amounting to a deprivation of the right of property did not fall within the scope of Article 17 of the Declaration: "La loi critiquée n'a ni pour objet ni pour effet d'entraîner la privation du droit de propriété; dès lors elle n'entre pas dans le champ d'application de l'article 17 de la Déclaration de 1789".

[906]See, for example, decision no. 2007-555 DC, 16 August 2007, Official Journal of 22 August 2007, p. 13959, Rec, p. 310; or decision no. 2010-43-QPC of 6 October 2010.

assessment of proportionality of interferences with property[907]. The possibility to claim compensation when a special and exorbitant burden was incurred as a result of the application of law permits the Council to find on the absence of interference contrary to the Constitution[908]. However, in contrast to the ECHR, the Constitutional Council does not find unconstitutional that no compensation shall be awarded for moral injury in expropriation cases. In this respect it found Article L.13-13 of the Code of expropriation in conformity with the Constitution as regards the fact that this provision excludes compensation for a moral damage when it stated that the exclusion of reparation of a moral damage does not flout the rule of a just character of compensation for expropriation for reason of the public interest[909]. The ECHR has already found a violation of the Convention in this respect in the case of *Lallement v. France*[910] when it considered that in view of his specific situation the aggrieved owner should have had the right to claim damages not only for material but also for moral injury.

In this respect it is worth noting that the Constitutional Council holds a distinct approach as regards public property. On ruling first that Article 17 of the Declaration does not concern only private property of individuals, but also, on equal footing, property of the state and public persons, the Constitutional Council has decided that Article 17 prevents the public domain from being durably burdened by real rights without appropriate compensation with regard to the real value of the property and to the mission of public service to which it is

[907]For example, in decision no. 2011-201-QPC of 2 December 2011 the Council held that "the encroachment upon the conditions applicable to the exercise of ownership rights is disproportionate to the objective pursued if the indemnity due upon transfer of ownership does not compensate for the damage suffered as a result of the easement of restraint".

[908]See, for example, decision no. 2011-118-QPC of 8 April 2011, or decision no. 2011-141-QPC of 25 June 2011. In these decisions the Constitutional Council transposed the findings of the Council of State in the case of *Bitouzet,* 3 July 1998, no. 158592, which involved a review of conventionality of the principle of non-indemnisation of servitudes of urbanism, save in exceptional cases when the owner bears a special and exorbitant burden out of proportion with the general interest, under Article 1 of Protocol No. 1. The Council of State found on conventionality with regard to the imperatives of the public interest. It did not consider the servitudes imposed on the applicant as a special and exorbitant burden and as amounting to a deprivation of property, and thus relied on the rule of compensation only in exceptional cases.

[909]For example, decision no. 2010-26 QPC, 17 September 2010, Official Journal of 18 September 2010, p. 16951, Rec., p. 229, § 6; decision no. 2010-87 QPC of 21 January 2011, Official Journal of 22 January 2011, p. 1384, Rec., p, 72, § 5: "Aucune exigence constitutionnelle n'impose que la collectivité expropriante, poursuivant un but d'utilité publique, soit tenue de réparer la douleur morale éprouvée par le propriétaire à raison de la perte des biens expropriés. Par suite, l'exclusion de la réparation du préjudice moral ne méconnaît pas la règle du caractère juste de l'indemnisation de l'expropriation pour cause d'utilité publique".

[910]*Lallement v. France*, no. 46044/99, 11 April 2002. The ECHR had regard to the applicant's specific situation, especially the fragmentation of his exploitation and the type of his farming, and considered that the compensation paid was not reasonably related to the value of the expropriated property since it did not specifically cover the loss of the "working tool" of the applicant.

assigned[911]. So, according to this ruling, the fact that Article 17 of the Declaration does not, in general, provide for limitations of property, and that private property owners whose property rights were curtailed cannot invoke Article 17 as a legal basis of entitlement to compensation, does not mean that public property owners should be excluded from any possibility to seek compensation under this provision. It follows that, as regards compensation for durable limitations of public property, the obligation to award compensation stems directly from Article 17 of the Declaration, as opposed to compensations for limitations of private property that do not have any support in this provision.

So, while, on the one hand, private property owners must bear a burden that is excessive to what society is entitled to expect from them to bear in order to claim compensation, limitations of public property, on the other, must be compensated under the Constitution if durably burdened. Public property limitations that are "durable" do not apparently have to comply with the criteria of "gravity and specialty", as opposed to private property, in order to be compensated. It can only be speculated about the reasons for such a private-public divide as regards the legal grounds and scope of the right to compensation for limitations of property. The Constitutional Council provided a hint of this when it referred to the "real value" of public property, which lies in its public service mission, and which indicates that it is the criterion of performance of public function that elevates public property to direct protection from Article 17 in respect of compensation for its limitations. I suggest that this approach might bear proof of a more contemporary global tendency to give preference to the protection of public interests over the private ones. Another question can be posed as to the meaning of the criterion of "durable" burden and "appropriate" compensation, which, apparently, depends on the circumstances of each particular case.

1.7.4.3.2. Limitations of Property

The right to compensation, if it does not result from Article 17 of the Declaration, finds a legal basis in the principle of equality before the law, or equality before "public burdens" (*égalité devant les charges publiques*), which has constitutional foundations in Article 13 of

[911]For example, decision no. 94-346 DC, 21 July 1994, Official Journal of 23 July 1994, p. 10635, Rec., p. 96, reads that: "Les dispositions de l'article 17 de la Déclaration des Droits de l'Homme et du Citoyen de 1789 relatives au droit de propriété et à la protection qui lui est due ne concernent pas seulement la propriété privée des particuliers mais aussi, à un titre égal, la propriété de l'État et des autres personnes publiques; elles font obstacle à ce que le domaine public puisse être durablement grevé de droits réels sans contrepartie appropriée eu égard à la valeur réelle de ce patrimoine comme aux missions de service public auxquelles il est affecté".

the Declaration[912], and which applies when public authorities impose on an individual an exorbitant burden in the public interest that is not normally incumbent on him. Both the Constitutional Council and the Council of State apply this principle according to which such an injury suffered by an individual which is grave and special, which results from activities of public authorities, lawful acts or decisions, or even from an international convention[913], and which benefits the community as a whole, is compensable provided that the legislator did not intend to exclude all compensation[914]. This principle, on which the French no-fault liability doctrine is based, embodies the right to compensation for any damage that is compensable, not permitting excluding from the right to compensation any element of compensable injury. It implies, among other things, that the legislator is obliged to provide for damages insofar as it enacts servitudes for public works[915]. In such cases the liability of the state for injury caused by permanent public works covers the inconveniences resulting from the execution of public works or from the existence or operation of public works. Such liability gives rise to the right to compensation to those individuals who "sacrificed" themselves for the benefit of the community. The criterion of excessive burden has also been applied in the Czech constitutional jurisprudence in the assessment of compensation for forced limitations, in particular when referring to the established case-law of the ECHR[916].

[912]Article 13 of the Declaration reads as follows: "For the maintenance of the public force, and for administrative expenses, a general tax is indispensable; it must be equally distributed among all citizens, in proportion to their ability to pay".

[913]In the decision CE, Ass., 30 March 1966, p. 257, *Compagnie générale d'énergie radio-électrique*, the Council of State held that under the principle of equality of citizens before public burdens the state could be held liable to ensure reparation for losses on the basis of agreements concluded by France with other states and formally incorporated into the national legal order, on condition, first, that neither the convention nor the Act, which in due course authorizes its ratification, can be interpreted as having intended to exclude all compensation, and, secondly, that the loss for which compensation is sought is of sufficient gravity and special character.

[914]For example, in a decision no. 85-198 DC of 13 December 1985 the Constitutional Council, after having considered that the imposition of an easement on the Eiffel Tower was not deprivation of property within the meaning of Article 17, made use of the principle of equality before public burdens. See further, for example, the decision of the Constitutional Council no. 2007-555, August 16 2007, Official Journal of 22 August 2007, p. 13959, Rec, p. 310, which reads that: "The requirement deriving from Article 13 of the Declaration of 1789 would not be complied with if taxation were to be of a confiscatory nature or subjected a certain category of taxpayers to an excessive burden in comparison with their ability to pay taxes". As regards the case-law of the Council of State, see, for example, CE *Couitéas*, 30 November 1923; CE *Commune de Gavarnie*, 22 February 1963; or CE, 29 December 2004, *Société d'aménagement des coteaux de Saint-Blaine*, no. 257804, which reads that: "Le législateur a entendu faire supporter par le propriétaire concerné l'intégralité du préjudice résultant de l'inconstructibilité de son terrain nu résultant des risques naturels le menaçant, sauf dans le cas où ce propriétaire supporterait une charge spéciale et exorbitante hors de proportion avec l'objectif d'intérêt général poursuivi".

[915]See, for example, decision no. 85-198 DC, 13 December 1985, § 16, which reads that: "Le principe d'égalité ne saurait permettre d'exclure du droit à réparation un élement quelconque du préjudice indemnisable résultant des travaux ou de l'ouvrage public".

[916] For example, the judgment of the Constitutional Court no. IV. ÚS 2005/09 of 26 April 2012, § 28.

But, in comparison with the right to compensation under Article 17 of the Declaration, the application of this principle is subject to several conditions. Not only must there be a causal nexus between the loss suffered by an individual and the lawful act or decision of the public authority, but also the loss must embody specific characteristics such as "specialty" and "gravity". So, the principle of equality before public burdens justifies damages for limitations of the right of property only under specific circumstances of the state liability without fault. It follows that the principle of compensation for the loss of property under Article 17 of the Declaration is less rigorous than that of equality before public burdens which provides only for a limited guarantee to proprietors whose property rights were restricted compared to those who were deprived of their property[917].

Moreover, as regards the Council of State, it added another qualification. Besides the damage having to have a grave and special character and that it should not be considered as a burden normally incumbent on individuals[918], to obtain compensation the damage must equally be a damage that has a "direct" and "certain" character[919]. I suggest that a "direct" damage may be conceived as an injury that immediately results from some administrative activity, and further that "certain" damage may be understood as either a present damage, or as a damage which may be presumed to occur in the future. These considerations once again corroborate the rule that not in all cases is the person affected by limitations of his or her property rights able to obtain compensation, regardless of the fact that the possibility of awarding compensation must not be excluded by the legislator.

The principle of equality before public burdens, which is also used in the assessment of proportionality between the confiscation measure employed and the aim sought, serves, additionally, the purpose of preservation of proportionality between the amount of damages and the value of property[920]. It is, apparently, used to control the "just" character of

[917]F. Luchaire, "La Constitution et le droit de propriété", in *Droit constitutionnnel et droits de l'homme*, Economica-PUAM, 1987, p. 154.
[918]Decision of the Council of State no. 295915 of 12 January 2009: "Les sujétions imposées par un arrêté de protection de biotope peuvent donner lieu à indemnisation lorsque, excédant les aléas que comporte toute activité économique, le dommage qui en résulte revêt un caractère grave et spécial, et ne saurait, dès lors, être regardé comme une charge incombant normalement aux intéressés".
[919]See, for example, the decision of the Council of State, CE, 14 March 1986, *Commune de Gap-Romette*, Rec. 73, AJDA 1986.317, according to which: "Le préjudice ne peut ouvrir droit à réparation que si le législateur n'a pas entendu exclure toute indemnisation et dans la mesure où ce préjudice présente un caractère direct, certain, grave et spécial".
[920]A. F. Zattara, "La dimension constitutionnelle et européennedu droit de propriété", L.G.D.J., 2001, pp. 550-551.

compensation for limitations of the right of property, as will be shown later in an example of a decision of the Constitutional Council concerning Law on the Adaptation of Agricultural Exploitation to the Economic and Social Environment.

1.7.4.3.3. Amount of Compensation

It implies from recent jurisprudence[921] that restrictions of property which are not serious enough so that the meaning and scope of the right is denatured fall in terms of compensation within the scope of application of Article 2 of the Declaration. It can be observed that since the decision of 22 January 1990[922], concerning Law on the Adaptation of Agricultural Exploitation to the Economic and Social Environment, the protection of property has been reinforced, as the Constitutional Council coupled the principle of equality before public burdens with Article 2 of the Declaration guaranteeing the principle of respect of property as a natural and imprescriptible right of man. The case concerned the right of relinquishment of property, under conditions stipulated by law, for compensation which the plaintiffs considered not to be "just and advance". The Constitutional Council qualified the right to relinquish one's property as a demand for purchase made by the owner. Consequently, it stated that Article 17 of the Declaration did not apply and searched for a constitutional provision which would justify the payment of damages. It declared, in particular, that it resulted from the respect to the right of property guaranteed by Article 2 of the Declaration, as well as from the principle of equality before public burdens under Article 13 of the Declaration, that the price for the relinquished property for the benefit of an eligible syndicate should not be inferior to its value. In other words, the amount of damages should be determined according to the market value of property and should not be inferior thereto[923]. This principle, which demonstrates the will of the Constitutional Council to control modalities for awarding compensation for limitations of property, is basically equivalent to the exigency of Article 17 that the compensation for takings be "just". So, as concerns the amount of compensation for

[921]Decision no. 2010-60 QPC of 12 November 2010, Official Journal of 13 November 2010, p. 20237, Rec., p. 321: "En l'absence de privation de ce droit, l'accès à la mitoyenneté autorisé par le texte en cause n'entre pas dans le champ d'application de l'article 17 de la Déclaration de 1789".

[922]Decision no. 89-267 DC, 22 January 1990, Official Journal of 24 January 1990, p. 971, Rec., p. 27, § 18: "Considérant cependant qu'il résulte du respect dû au droit de propriété garanti par l'article 2 de la Déclaration des droits de l'homme et du citoyen, comme du principe d'égalité devant les charges publiques qui découle de son article 13, que le prix d'un bien délaissé au profit d'une association syndicale autorisée ne saurait être inférieur à sa valeur".

[923]For example, decision no. 94-347 DC, 3 August 1994, Official Journal of 6 August 1994, p. 11481, Rec., p. 113: "Considérant cependant qu'il résulte du respect dû au droit de propriété garanti par l'article 2 de la Déclaration des droits de l'homme et du citoyen que le législateur ne doit pas imposer la cession d'actions dans des conditions qui n'assureraient pas le respect de leur valeur réelle".

limitations of property, the application of Articles 2 and 13 of the Declaration should offer an equivalent protection of property to that under Article 17 of the Declaration for property deprivations[924].

1.7.4.3.4. Deprivation of Property – Amount of Compensation

Article 17 of the Declaration requires that a "just and prior"[925] indemnity be paid for deprivations of property, expressing so the economic character of the right of property[926]. The constitutional requirement of "just" compensation implies that compensation must repair the material damage in its integrity, that it must cover "the totality of harm which is direct, material, and certain"[927]. It is founded on both the property guarantee and the principle of equality before public burdens. The principle of integral reparation may be interpreted as entailing the equivalence between the damage incurred and the amount of compensation. The direct character of harm is an objective notion which does not depend on particular circumstances[928] and entails a damage which ensues directly from dispossession, thus excluding any potential harm[929]. By stressing that compensation must cover material damage suffered, the Constitutional Council submits that it would examine whether proportionality between the value of deprived property and the amount of compensation is preserved. In this

[924]A. F. Zattara, "La dimension constitutionnelle et européennedu droit de propriété", L.G.D.J., 2001, p. 575.
[925]For example, decision no. 81-132 DC of 16 January, Official Journal of 17 January 1982, p. 299, § 44, Rec., p. 18: "En vertu des dispositions de l'article 17 de la Déclaration de 1789, la privation du droit de propriété pour cause de nécessité publique requiert une juste et préalable indemnité". Decision no. 89-256 of 25 July 1989, Official Journal of 28 July 1989, p. 9501, § 19, Rec. p. 53: "La prise de possession par l'expropriant doit être subordonnée au versement préalable d'une indemnité".
[926]A just indemnity is guaranteed not only for private owners but also for owners of public law in cases of a transfer of property from the public to the private sector. See, for example, the decision of the Constitutional Council no. 86-207 DC, 26 June 1986, Official Journal of 27 June 1986, p. 7978, Rec., p. 61, according to which it is contrary to the Constitution that property or enterprises which are part of public property be ceded to private persons for a price which is inferior to their value.
[927]Decision no. 89-256 DC of 25 July1989, Official Journal of 28 July 1989, p. 9501, Rec., p. 53, § 19: "pour être juste, l'indemnisation doit couvrir l'intégralité du préjudice direct, matériel et certain, causé par l'expropriation. From the recent jurisprudence, see also, for example, decision no. 2010-87 QPC of 21 January 2011, § 3; decision no. 2010-26 QPC of 17 September 2010, §§ 6 and 7; decision no. 2012‑226 QPC, 6 April 2012, § 3; decision no. 2012‑236 QPC, 20 April 2012, § 3; decision no. 2012-247 QPC, 16 May 2012, § 4; or decision no. 2012‑275 QPC of 28 September 2012, §§ 5-7. From the jurisprudence of ordinary courts see, for example, decision CA Versailles of 7 March 1995, *Acrachoui v. SEMARA*, AJPI 1996 p. 52.
[928]Decision Civ 3° of 25 February 1998, AJPI 1998 p. 627.
[929]Decision Civ. 3° of 21 January 1992, no. 90-70293, Bull. no. 279, *Sté Rivom v. Départ. Côte d'Or,* G.P.1992, Panor. p. 106 and AJPI 1993 p. 266; decision CA Besançon, 30.06.90, *épx Morel v. com. De Montmorot*, G.P. 1993, Somm. P. 13.

regard the expropriated party must, in the event of disagreement on the amount of compensation, dispose of appropriate avenues of judicial redress[930].

The Constitutional Council attaches to the expression of "just indemnity", or adequate indemnity[931], as enshrined in Article 17, the same meaning as the law on expropriation - the Code of Expropriation for the purpose of the public utility (*Code de l'expropriation pour cause d'utilité publique*). The Code safeguards, in Article L13-13[932], the right to the integral reparation of material damage suffered by reason of expropriation. The integral character of material reparation implies that the indemnity takes into account not only the sales value of the expropriated property, but also material consequences which are compensable, and which are in direct relation to expropriation[933], such as all the costs necessarily incurred in purchasing a replacement property and the depreciation in value of the remaining property where only part of it has been expropriated.

The Constitutional Council has also interpreted the constitutional requirement that indemnity be paid in advance[934], a requirement which does not figure either in the Czech Charter or in the Czech constitutional practice on deprivation of property. The Constitutional Council has not adopted a rigorous approach and has interpreted the requirement of a prior character of compensation extensively. For example, the granting of an advance representing the amount of the indemnity due is not incompatible with the exigency of a "prior" payment, provided that it is justified by the public interest and is accompanied by the guarantee of the rights of the owners involved[935]. The prior payment of compensation is also required by the Code of

[930]For example, decision no. 2010-26 QPC, 17 September 2010, Official Journal of 18 September 2010, p. 16951, Rec., p. 229, §§ 6-7; decision no. 2010-87 QPC of 21 January 2011, § 3; or decision no. 2012-247 QPC, 16 May 2012, § 4.

[931]Decision no. 83-162 DC, 19 and 20 July 1983, § 22: "L'article 17 de la D.D.H.C. n'implique nullement que les lois ne puissent restreindre l'exercice du droit de propriété sans une indemnisation corrélative".

[932]Article L13-13, according to which compensation shall include the totality of direct, material and certain damage, reads as follows: "Les indemnités allouées doivent couvrir l'intégralité du préjudice direct, matériel et certain, causé par l'expropriation".

[933]Decision no. 2010-87 QPC of 21 January 2011, Official Journal of 22 January 2011, p. 1384, §§ 4 and 5: "L'article L. 13-13 du code de l'expropriation pour cause d'utilité publique met en oeuvre le droit à la réparation intégrale du préjudice matériel subi du fait de l'expropriation. À ce titre, le caractère intégral de la réparation matérielle implique que l'indemnisation prenne en compte non seulement la valeur vénale du bien exproprié mais aussi les conséquences matérielles dommageables qui sont en relation directe avec l'expropriation".

[934]The taking of possession by the expropriating body shall be subject to a prior payment of compensation. See, for example, decision no. 89-256 DC, 25 July 1989, Official Journal of 28 July 1989, p. 9501, Rec., p. 53; decision no. 2012‑236 QPC, 20 April 2012, § 7; or decision no. 2012-247 QPC, 16 May 2012, § 4.

[935]Decision no. 89-256 DC of 25 July 1989, Official Journal of 28 July 1989, p. 9501, § 20: "L'octroi par la collectivité expropriante d'une provision représentative de l'indemnité due n'est pas incompatible avec le respect de ces exigences si un tel mécanisme répond à des motifs impérieux d'intérêt général et est assorti de la garantie

expropriation. Article L.12-1 of the Code, providing for the transfer of property, stipulates that the expropriating body may take possession of expropriated property, provided that two cumulative conditions are fulfilled: the indemnity has been fixed and paid, and the payment of compensation is equal at least to the offer made by the expropriating body and to the deposit of the supplementary compensation set by the court[936].

In any event, compensation must correspond to the damage suffered and must, in principle, be paid on the day of dispossession[937]. The constitutional requirement of prior compensation applies only to deprivations of property directly imposed by public authorities to which Article 17 of the Declaration applies, not to limitations of property under Article 2 of the Declaration[938].

1.7.4.3.5. Procedural Safeguards and the Temporal Factor

Like other jurisdictions under scrutiny, the Constitutional Council also sanctions the failure of the legislator to provide for sufficient procedural guarantees as a relevant factor in the assessment of proportionality. For example, in the decision of 29 July 1998[939] the constitutional judges examined whether the guarantees were sufficient enough to conclude that the limitations denatured the meaning and the scope of the right of property on the ground that the legislator did not lay down sufficient procedural guarantees. As a general rule, the judges have maintained that obligations that are supported by material and procedural

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des droits des propriétaires intéressés". See also, for example, decision no. 2010-26 QPC of 17 September 2010, Official Journal of 18 September 2010, Rec., p. 229, p. 16951, §§ 6-7.

[936]It is not without interest that the Constitutional Council declared as unconstitutional a provision of the Code of Expropriation allowing for the taking of property by the expropriating body on payment of compensation the amount of which the body itself proposes. In decision no. 2012-226 QPC of 6 April 2012, Official Journal of 7 April 2012, p. 6413, concerning conditions governing the taking of possession which has been expropriated on the grounds of public interest, the Constitutional Council stated that by permitting the expropriating authority to take possession of premises by virtue of the fact that it has paid the amount that it proposed itself as compensation, whereas the difference of the compensation set by the court in expropriation proceedings needs simply be deposited, the provision of Article L.15-2 violated Article 17 of the 1789 Declaration requiring that no person may be deprived of his property other than subject to advance payment of a fair compensation.

[937]Decision 81-132 DC, 16 January 1982, Official Journal of 17 January 1982, p. 299, cons. 44 - 66, Rec. p. 18; decision no. 2012‑226 QPC, 6 April 2012, § 5: "le législateur peut déterminer les circonstances particulières dans lesquelles la consignation vaut paiement au regard des exigences de l'article 17 de la Déclaration de 1789, ces exigences doivent en principe conduire au versement de l'indemnité au jour de la dépossession".

[938]S. Pavageau, "Le droit de propriété dans les jurisprudences suprêmes françaises, européennes et internationales", LGDJ, 2006, p. 335. See, for example, decision no. 94-347 DC, 3 August 1994, Official Journal of 6 August 1994, p. 11481, Rec., p. 113. The case concerned compensation in the form of shares transferable in the period of three years after the dissolution of a company. The constitutional judges stated that although the law provided for such a compensation which can give rise to the granting of untransferable titles in the course of three years, the regime of this compensation had to be regarded as being in compliance with the requirements of Article 2 of the Declaration.

[939]Decision no. 98-403, Official Journal of 31 July 1998, p. 11710, Rec., p. 276.

guarantees do not denature the meaning and the scope of the right of property[940], and that, in the event of disagreement on the determination of the amount of compensation, the expropriated party must have an appropriate right of appeal[941].

It is not only the availability of procedural safeguards as such, but also the length of proceedings, including the length of proceedings on the award of compensation, that are crucial in the assessment of the proportionality of a measure, as "adequate" compensation must also take into account the length of deprivation. This requirement was found not to have been complied with, for example, in the case of *Guillemin v. France*[942], which concerned a claim about unlawful expropriation of property, and in which the ECHR reiterated that compensation for the loss sustained could only constitute adequate reparation when it also took into account the damage arising from the length of the deprivation which must, moreover, be paid within a reasonable time. The ECHR noted that the French authorities had unlawfully expropriated the applicant's property to develop an extensive residential area. By erecting new buildings, later sold individually, the expropriating town council and the corporation in charge of the scheme had permanently deprived the applicant of the chance of regaining possession of her land. Her only recourse was to seek compensation. The court proceedings for compensation, having lasted five years, were found by the ECHR to have exceeded a reasonable time[943]. Likewise, in the case of *Matheus v. France*[944] the ECHR, dealing with a complaint about the non-enforcement of a court judgment on the expulsion of illegal occupants from property which lasted more than sixteen years without any reason of public interest, stated that the refusal to execute the judgment in the absence of justification by the general interest amounted to a sort of "private expropriation the beneficiary of which was the illegal occupant" and that this situation risked leading to a form of "private justice". The judges found a violation of the substance of the right of property and of the right to a fair

[940]Decision no. 2000-436 DC, 7 December 2000, Official Journal of 14 December 2000, p. 19840, Rec., p. 176.
[941]Decision no. 89-256 DC of 25 July 1989, Official Journal of 28 July 1989, p. 9501, § 19, Rec. p. 53; decision no. 2010-87 QPC of 21 January 2011, Official Journal of 22 January 2011, p. 1384, § 3; decision 2012-226 QPC of 6 April 2012, Official Journal of 7 April 2012, p. 6416; decision no. 2012-236 QPC of 20 April 2012, Official Journal of 21 April 2012, p. 7197; or decision no. 2012-247 QPC of 16 May 2012, Official Journal of 17 May 2012, p. 9153.
[942]*Guillemin v. France*, 21 February 1997, § 54, *Reports of Judgments and Decisions* 1997-I.
[943]On the other hand, the conduct of the applicant as a significant factor in procedural delays may lead the ECHR to rule on non-violation. The fact that the applicant accepted the expropriation compensation awarded and that the failure of the abandonment proceedings was attributable to him led the ECHR to find on non-violation of P1-1 in the case of *Phocas v. France*, 23 April 1996, *Reports of Judgments and Decisions* 1996-II. The procedures provided in domestic law were found to afford a remedy sufficient to ensure protection of the right to the peaceful enjoyment of one's possessions.
[944]*Matheus v. France*, no. 62740/00, §§ 71-72, 31 March 2005.

trial. It is notable that French constitutional jurisprudence is in harmony with the case-law of the ECHR in this respect, as both maintain that delays in the execution of judgments may be justified only in exceptional circumstances by virtue of safeguarding the public interest[945].

1.8. Summary

This chapter has dealt with conventional and constitutional safeguards against arbitrary limitations and deprivations of property, as well as with the conventional and constitutional conditions allowing for limitations and deprivations which form one of the fundamental concepts of the modern doctrine of the right of property as a constitutional right[946]. A summary of conclusions drawn from the text of this chapter is followed by an analysis of the influence of the case-law of the ECHR on the national constitutional systems of property protection.

I.

As regards the conventional and constitutional safeguards against arbitrary limitations and deprivations of property, it can be observed that the Convention provides for two norms to which limitations of property are applicable, whereas the Czech and the French Constitutions contain only one guarantee against arbitrary limitations, not distinguishing between a control of the use of property and other types of restriction of property. Unlike the national constitutional jurisdictions under scrutiny that refer to the classical typology of limitations-deprivations of property, the ECHR has elaborated a third autonomous norm applicable to interferences that cannot be qualified either as a deprivation or a control of the use of property, permitting the ECHR to enlarge the scope of its control and to reinforce the protection of the right of property. This does not mean that the right of property would enjoy lesser protection under the Czech and the French Constitution, but this open-ended power of control of the ECHR based on the autonomous norm has counterbalancing effects on a wide margin of appreciation of states enabling Convention rights to be applied differently in

[945]Decision of the Constitutional Council no. 98-403 DC, 29 July 1998, Official Journal of 31 July 1998, § 46. *Matheus v. France*, no. 62740/00, § 55, 31 March 2005: "Un sursis à l'exécution d'une décision de justice pendant le temps strictement nécessaire à trouver une solution satisfaisante aux problèmes d'ordre public peut se justifier dans des circonstances exceptionnelles". The Council of State ruled to the same effect, for example, in CE, 29 March 2002, *SCI Stéphaur*, Rec. p. 117, where it specified that the refusal to execute a court decision on expulsion was susceptible to seriously violate the right of property.

[946]A. Barak, "Proportionality (2)", in *The Oxford Handbook of Comparative Constitutional Law*, M. Rosenfeld, A. Sajó (eds.), Oxford University Press, 2012, p. 739.

different European states. The fact that the qualification of restrictions of property under P1-1 by the ECHR may embody some imprints of ambiguity and that the drawing of the line of applicability of the autonomous norm may be accompanied by a degree of subjectivity in the ECHR's assessment, with regard to the fact that the autonomous norm may be applicable to boundary cases between limitations and deprivations of property, produces effects on the resulting right to compensation for injury. Namely, shall the ECHR decide to apply the autonomous norm to similar facts in one case and in another case the deprivation rule, the right to compensation would vary, which may create inequalities, especially in cases where the economic loss is comparable to that arising from deprivation. The degree of property protection on a European level may, then, be susceptible to fluctuations and to creating uncertainty when interpreting constitutional jurisdictions that follow the case-law of the ECHR.

All in all, both Constitutions under scrutiny contain provisions that more or less reflect the structure of the property guarantee in the Convention. It can be observed that the Czech Charter provides for a more complex property guarantee, the fact of which is connected with the period in which this document was drafted and with its drafting being largely inspired, among other international legal documents, also by the Convention. The provision of Article 11 para. 4 of the Czech Charter, providing for the requirements of constitutionality of limitations and deprivations of property, corresponds in scope to the guarantees of Article 1 of Protocol no. 1 of the Convention. In the interpretation of the Czech Constitutional Court, the notion of forced limitation of ownership is equivalent to the term of control of the use of property under P1-1. Both notions refer to situations in which the owner's mode of using his property is negated by the imposition of a corresponding duty enforceable by sanctions, or in which the owner is curtailed in the exercise of some of his rights. Compared to the Convention or the Czech Charter, the French Declaration does not explicitly set out conditions for limitations of property. But the Constitutional Council settled on Article 2 of the Declaration as a norm of reference for limitations of property representing an equivalent to the control of the use rule of P1-1, undoubtedly with the view to keeping up with the scope of the property guarantee under the Convention.

In all the jurisdictions under scrutiny the gravity of interference is an important factor playing a decisive role not only in the assessment of proportionality of interference, but also in the assessment of the nature of interference, in particular when no transfer of property takes place

the gravity of interference plays an important role in determining a *de facto* expropriation. The jurisdictions under scrutiny differ as regards the applicable provision for *de facto* expropriations. Whereas under the Convention *de facto* deprivations of property come within the ambit of the deprivation rule, under the Czech Charter they fall within the notion of forced limitations, and under the French Declaration they do not fall within the scope of application of Article 17 of the Declaration but under the limitation norm of Article 2 of the Declaration.

From the point of view of the text of the Czech Charter this makes little difference, as the Charter sets out the same conditions of constitutionality for deprivations and forced limitations of property, while P1-1 differentiates a deprivation and a control of the use of property in that it lays down stricter requirements for a deprivation. If we compare the requirements of constitutionality for forced limitations and the requirements of conventionality for deprivations of property, they are the same for both interferences, that is, they must be provided for by law, be in the public interest, and be compensated. However, the difference in qualification has an impact on the amount of compensation that can be claimed, which, pursuant to the Czech constitutional practice, is not the same for forced limitations and deprivations of property. The lesser degree of gravity coincides with the qualification of *de facto* deprivations under the limitation of property rule in Czech and French constitutional practice. Pursuant to French constitutional case-law, as with the Czech constitutional practice, but unlike the practice of the ECHR, *de facto* deprivations fall within the scope of the constitutional norm that is applicable to limitations and not to deprivations of property.

The role of the criterion of gravity in Czech and the French constitutional practice is limited to a distinction between a (forced) limitation and a deprivation of property, whereas in the practice of the ECHR it is a factor that may tilt the scales in favour of either a formal deprivation, *de facto* deprivation, control of the use, or interference with the peaceful enjoyment of possessions. It, thus, seems that in the practice of the ECHR the factor of gravity of interference has a wider application and is not only a significant factor for distinguishing between limitations and deprivations of property, but also for deciding between formal and *de facto* deprivations. Seen from the perspective of P1-1, the Czech and French notions of (forced) limitations, thus, comprises a control of the use of property, *de facto* deprivation of possessions as well as situations which the ECHR qualifies as interferences with the peaceful enjoyment of possessions. With the acknowledgment of Article 2 of the French Declaration as the reference provision for limitations of property, the criterion of gravity appears to be

switching from the benchmark in the assessment of denaturation to a component in a test of proportionality.

The question of gravity of interference is irrelevant in cases involving confiscation of property in connection with the commitment of a criminal offence. The situation is qualified as a control of the use of property by the ECHR or as a forced limitation by the Czech Constitutional Court. A quite distinct approach has been adopted by the French constitutional jurisdiction according to which Article 17 of the Declaration does not apply to confiscations in connection with the commitment of a criminal offence and the conformity of such a type of confiscation is to be examined by virtue of Article 8 of the Declaration providing for the principle of the necessity of punishment. The solution adopted by the French constitutional jurisdiction coincides with the practice adopted by the ECHR and the Czech Constitutional Court in that it does not involve the deprivation norm as norm of control.

From the viewpoint of irreversibility it can be suggested that there are two kinds of constitutionally guaranteed limitations: those that are reversible and those amounting to *de facto* deprivation that are irreversible. It implies that the criterion of irreversibility of the loss of all attributes of property is not an indicative criterion for the determination of whether the deprivation or limitation rule in the Czech Charter or the French Declaration be applied, which contrasts with the practice of the ECHR that takes the issue of irreversibility as one of the characteristic indicators of the notion of deprivation of possessions. Moreover, the criterion of irreversibility of the situation seems to be a significant benchmark in the practice of the ECHR, as the latter can, unlike the national constitutional jurisdictions, apply it against not only the control of the use rule, but also the general rule of P1-1. This fact may account for irreversibility finding its justification in the ECHR's practice, while in the constitutional practice it seems to be a marginalized factor.

II.

The scope of the constitutional and conventional protection of the right of property against arbitrary interferences is determined in keeping with the principles of interpretation embracing the criteria of constitutionality and conventionality laid down by the respective property guarantees. It can be observed that these criteria of justification of interferences with property are basically congruent. Although Convention rights are subject to national margins of appreciation enabling their different application in different member states of the

Convention, both the Czech and the French constitutional jurisdictions have adopted the same interpretative criteria justifying interferences with property as the ECHR. Namely, both apply the criteria of legality, legitimacy, proportionality, and compensation. Therefore, as to the justificatory principles, the constitutional practice in both states under scrutiny is, in general, consonant with the standards set up by the Convention and the ECHR. That being despite the differences of these constitutional bodies in relying on the case-law of the ECHR. Although the French Constitutional Council does not directly apply the case-law of the Convention, as opposed to the Czech Constitutional Court, it can be claimed, in general terms, that it keeps up with the standard of property protection defined by the Convention system. It can be further observed that the Czech Constitutional Court directly applies and refers to the case-law of the ECHR in cases brought before it. This leads to the argument that there is unqualified harmony in the practice on property protection between the Czech constitutional jurisdiction and the ECHR.

As regards the constitutional underpinnings, the Czech Charter is specific in that it lays down the same conditions for deprivations and forced limitations, including the obligation to pay compensation. In the French Declaration the constitutional requirements for interferences with property are expressly laid down only for deprivations, while those for limitations are exclusively judge-made. As both constitutional texts contain, unlike the Convention, a general provision obliging to apply fundamental rights and freedoms by virtue of the principle of equality, it can be claimed that the respective constitutional texts seem to provide for stronger property safeguards than the Convention.

As to the criterion of lawfulness, the practice of the Czech and the French constitutional bodies is consonant with that of the ECHR in conceiving the formal and qualitative aspects of this principle, including the availability of procedural guarantees to challenge the lawfulness of interferences with property. The Czech Constitutional Court has even taken over the ECHR's definition of "law" and has declared that the state has a positive obligation to provide the right of property with procedural guarantees. The approach to the legitimacy criterion by the national constitutional jurisdictions falls within the margin of appreciation bestowed on states under the Convention, affording an area of discretion to national authorities.

Similarly as the ECHR, the national constitutional bodies conceive the notion of public interest as an open-ended and casuistic concept which does not necessarily have to be

connected with the interests of the state or the general public, but that it may also comprise the interests of private parties, provided that the interests are beneficial for the public at large. There is, however, a perceivable difference in the scrutiny of the legislator's liberty of appreciation by the national constitutional bodies. The Czech and French constitutional jurisdictions seem to differ in their approach to the relationship between the constitutional court and the legislature. The French Constitutional Council's conception of the general interest seems to be much broader than that of the Czech Constitutional Court. While the Czech Constitutional Court does not hesitate to declare that the legislator is bound by positive obligations in protecting the right of property, the French Constitutional Council seems to exercise a restricted power of appreciation vis-à-vis the legislator stemming from the prudence to encroach on the latter's powers. Moreover, while the Czech Charter enshrines, in a general clause of the Charter, an obligation that no limitation may impinge upon the meaning and scope of fundamental rights and freedoms, whereby it fundamentally imposes restrictions on the legislator in identifying the objectives and measures of property restrictions, the French Constitution confers upon the legislator more general objective-setting powers in Article 34 of the Constitution by enumerating the legislator's competences. In consequence, it can be claimed that the French legislator seems to enjoy a wide margin of appreciation, similar to that enjoyed by national parliaments under the Convention, and that the French constitutional body, similar to the ECHR, exercises limited control powers in terms of patent incompatibility with the Constitution. It may be argued that such forbearance towards the legislator may possibly generate potential conflicts of compatibility with the Convention in the future[947].

If there is apparent congruence in respect of the principles of lawfulness and legitimacy across the jurisdictions under scrutiny, there is a slight variability in approaches to the criteria of proportionality and compensation, although they are, on a general plane, clearly in harmony.

The ECHR does not apply the proportionality test in a rigorous fashion in property rights cases and its approach to proportionality seems to be less stringent and clearly more lenient with the legislator than that of the Czech Constitutional Court. Namely, the proportionality test as exercised by the ECHR does not, in principle, seem to entail the criterion of necessity

[947]See in this respect E. Lambert Abdelgawad, A. Weber, "The Reception Process in France and Germany", in *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, H. Keller and A. Stone Sweet (eds.), Oxford University Press, 2008, p. 129.

which is regularly and automatically examined by the Czech Constitutional Court, and the ECHR does not examine the existence of less onerous measures. Thus, it can be claimed that the Czech Constitutional Court, by performing the three-stage control of proportionality, ensures a stricter protection against restrictions of property which is far from granting the public authorities a privilege entailing wide discretionary powers in the area of property rights. If the principle of proportionality serves to "neutralize" the legislator's discretion as to the identification of the legitimate aim in the public interest and the choice of measures to fulfil it, the three-tier control of proportionality then evidently represents a stronger defence barrier against arbitrary interventions enabling to put to scrutiny not only the gravity of interference, that is, objective impacts of the restrictive measure, but, as a matter of priority, also the legitimacy of the measure, that is, also the subjective choice of the legislator. Moreover, it seems that, in quite a different form from the Czech constitutional law and practice, which accords to deprivations and formal limitations of property the same standing as concerns the requirements of constitutionality that must be satisfied, the ECHR's test of proportionality does not appear to be the same under the deprivation and the control of the use rule. It can be claimed that the requirement of proportionality differs depending on the applicable rule from a more strict approach under the deprivation rule allowing states a narrower margin of appreciation to a less stringent approach under the control of the use rule.

An opposite tendency can be observed in the practice of the French Constitutional Council which examines only manifestly disproportionate errors of the legislator as regards deprivations of property, but, as regards property limitations, it performs a balancing test of proportionality. Unlike a fair-balance test, the control of a manifest error is a means of a minimum control, as it leaves the legislator with a large power of discretion and is restricted only to a control of "manifest" disproportions. The French constitutional judges apparently do not perform a three-stage proportionality test in property matters. They reduce their proportionality analysis to a control of a "manifest disproportion" or a "manifest error of appreciation" which, in respect of limitations of property, has been giving way to a fair-balance test as performed by the ECHR, whereby the protection of property has been strengthened. If a measure does not amount to deprivation of property, or does not have the effects of denaturing the substance of property, the Constitutional Council examines whether the interference is justified by the general interest and is proportionate to the objective sought. This reinforced control of property limitations, which has brought about a higher level of protection, may be seen as the expression of the will of the Council to frame the discretionary

power of Parliament. It conforms to the exigencies of the ECHR in a more complete manner than permits the control of the absence of denaturation of the right of property. The Constitutional Council, thereby, exercises a control equivalent to that of the ECHR. So, the French constitutional judges do not seem to apply the same rigor in the assessment of proportionality of deprivations and limitations of property. Unlike the ECHR and the Czech Constitutional Court, they do not subject deprivation measures to a fair-balance test. But, like the ECHR and unlike the Czech Constitutional Court, the French constitutional judges do not examine whether the aim of the legislator could have been attained by other less onerous means as long as the means adopted are not excessive or manifestly disproportionate to that objective.

As regards the requirement of compensation, compensation terms provided for in legislation are material to the assessment whether the contested measure respects the requisite fair balance and, notably, whether it does not impose a disproportionate burden on the applicants. All jurisdictions under scrutiny are consonant in that they require that the right to compensation be provided sufficient procedural safeguards and that proceedings should not be burdened by undue delays.

In respect of the amount of compensation, all jurisdictions under scrutiny differentiate compensation for deprivations and limitations of property and compensation for lawful and unlawful takings. As regards compensation for limitations of property, the practice of the Czech Constitutional Court differs from the approach of the ECHR in that the former renders stronger protection to restrictions of property. While, pursuant to Article 11 of the Czech Charter, the Czech Constitutional Court is obliged to award compensation not only for deprivations, but also for forced limitations of property, the ECHR follows a rule whereby property takings require the payment of compensation, save for exceptional circumstances, whereas limitations of property do not. Although the ECHR respects the states' choice of methods unless it is manifestly without reasonable foundation, it is required that the amount of compensation for takings bears a reasonable relation to the value of property and must be calculated on the basis of the value of property at the date on which the ownership was lost. The requirement that compensation be reasonably related to the value of property is not an absolute principle, as it is not necessary that the owner receive the full market value. The payment of less than the full market value can be justified by legitimate objectives of public interest of economic or social character. So, the needs of social justice may justify a departure

from full market compensation for deprivations of property. However, a total lack of compensation for a deprivation as well as a significant disproportion between the amount of compensation and the value of property can only be considered justifiable under P1-1 in exceptional circumstances.

The Czech Constitutional Court maintains, in line with the ECHR, that a deprivation of property requires the payment of adequate, or reasonable, compensation, while the amount of compensation for a forced limitation is to be assessed according to the specific circumstances of each individual case and will depend on the extent and intensity of the limitation. The Czech Constitutional Court has endorsed the principle set down by the ECHR whereby, in limitation of property cases, the rule is that if damages are awarded, they do not have to cover the full market value. In general, it can be stated that Czech constitutional judges obviously follow the interpretative practice of the ECHR in respect of compensation for interferences with property.

The French Constitutional Council, on the other hand, requires that compensation for both deprivations and limitations be adequate and based on the real value of the property in question. French constitutional judges, thus, clearly apply stronger criteria for the amount of compensation for limitations of property than the ECHR and the Czech Constitutional Court. As concerns the amount of compensation for deprivations of property, it implies that the requirements are less demanding under the Convention, for while the ECHR requires that there be a reasonable relationship to the value of property, the Declaration stipulates that the damages must be just and prior, which has been interpreted by the Constitutional Council as the obligation to repair material injury in its integrity counting the totality of harm which is direct, material, and certain. French constitutional judges have maintained that interferences with property not amounting to a deprivation are compensable provided that the owner bears a burden that is excessive to what society is entitled to expect from its members. By applying the principle whereby compensation is not excluded in cases where the application of law has caused a special and exorbitant burden which is disproportionate to the pursued public interest, the Constitutional Council integrated the principles applied by the ECHR into its practice of control of constitutionality. But as opposed to the ECHR and the Czech Constitutional Court, the Constitutional Council does not find unconstitutional that no compensation shall be awarded for moral injury in expropriation cases.

III.

Concerning the influence of the case-law of the ECHR on the national constitutional systems of property protection under scrutiny, it can be claimed that, in general, both constitutional bodies have been influenced by the Convention and the practice of the ECHR. However, the degree of the impact is markedly different. The imprints of the practice of the ECHR are clearly apparent from the decision-making of the Czech Constitutional Court. The latter has drawn on, applied, and directly referred to the case-law of the Convention and there are no exceptional cases when the constitutional judges carried out a control of conventionality rather than a control of compatibility with the relevant constitutional norms of reference. Consequently, the Convention standards are deeply embedded in Czech constitutional jurisprudence and the effect of the case-law of the ECHR is intensive. The approach of the Czech Constitutional Court is connected with the position of the Convention in the Czech legal order which is, pursuant to the interpretation of the Constitutional Court, one of the norms of reference for the review of constitutionality and part of the Czech constitutional order. Consequently, any conflict with the Convention on the part of national authorities means a conflict with the Czech constitutional order. The Constitutional Court can abrogate laws or their provisions if they contradict constitutional law or the Convention. It can be stated that the standard of property protection is identical to that under the Convention, and in certain aspects even a little higher, which is in compliance with the role of the Convention to establish European standards of fundamental rights protection and to harmonise this protection at a minimal level. The Contracting States may then develop higher human rights standards than those enshrined in the Convention.

As some commentators submit, the impact of the Convention on French law is increasing and has become particularly significant over the past twenty years, and the Constitutional Council, although refusing to check the constitutionality of laws against the Convention, seems to integrate some elements of the Convention in its case-law, although indirectly and implicitly[948]. Even though the Convention should, in theory, have a hierarchical standing superior to legal norms, the Constitutional Council refused to be a body of control of

[948]C. Dupré, "France", in *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States*, 1950-2000, R. Blackburn and J. Polakiewicz (eds.), Oxford University Press, 2001, pp. 313, 315; E. Lambert Abdelgawad, A. Weber, "The Reception Process in France and Germany", in *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, H. Keller and A. Stone Sweet (eds.), Oxford University Press, 2008, pp. 129, 143, 157.

conventionality of statutes[949]. So, although the Constitutional Council does not use the Convention in its review of constitutionality, constitutional judges, nevertheless, draw inspiration from it in their interpretation of constitutional principles, such as the principle of equality or the principle of proportionality. These principles are especially important in the protection of private property against unlawful interferences. Having transposed the proportionality test into the control of constitutionality of limitations of property, the Constitutional Council has aligned its practice with that of the ECHR and enhanced control over legislation and, thus, strengthened the protection of the fundamental right of private property by being able to scrutinise the general interest laid down by the legislator. It is apparent that the Constitutional Council has further reinforced the constitutional guarantee of the right of property in that it has set forth Article 2 of the Declaration as the reference provision safeguarding against unlawful restrictions. Hence, the Convention and the practice of the ECHR seem to have been conducive in filling up the gaps in the system of protection of fundamental rights and freedoms[950]. But as the Constitutional Council does not make express reference to the Convention and the ECHR's case-law, the latter's impact on constitutional decision-making is latent and is not as visible as in the case of the Czech Constitutional Court. In any event, the influence of the ECHR on the decision-making of the Constitutional Council and the interpretation of fundamental rights seems to be relatively limited when compared to the influence the Convention has had on the jurisprudence of the Czech Constitutional Court. Even so, it is manifest that the standard of French constitutional property protection is in complete conformity and comparable with the Convention and the practice of the ECHR.

[949]See decision no. 93-325 DC of 13 August 1993.
[950]See in this respect H. Tourard, "L'internalisation des constitutions nationales", L.G.D.J., 2000, p. 290.

Chapter 5: General Outline of the Constitutional Approaches to the Implementation of the Law and Practice of the Convention

The states are obliged to secure for everyone within their jurisdiction the rights and freedoms defined in the Convention, and to provide an effective remedy before a national authority for everyone whose rights and freedoms have been violated. The European Court of Human Rights (hereinafter the "ECHR") authoritatively interprets the Convention and acts as a safeguard for individuals whose rights and freedoms have not been secured at national level.
In pursuance of their delineated competences, what are the principles of interaction between the ECHR and national courts? Can the ECHR be ranked above the national constitutional jurisdictions as the European Constitutional Court? Effective implementation of the case-law of the ECHR requires that national law be interpreted in harmony with it. The way and extent to which the constitutional bodies take into account and apply the law and practice of the Convention varies depending on the status of the Convention within the given legal order and on the relevance of the law and practice of the Convention in the practice of the constitutional jurisdictions. An inquiry into these questions is pursued with a view to outlining the general context in which the French and the Czech constitutional jurisdictions and the ECHR operate, and the extent to which the respective constitutional bodies strive for harmony with the ECHR.

1. Principles of Interaction Between the Courts

The interaction between the ECHR and the national courts is based on the principle of subsidiarity, meaning that the states have the primary responsibility to secure fundamental rights and freedoms, subject to the supervisory jurisdiction of the ECHR, in view of the fact that national authorities are, in principle, better placed than an international court to evaluate local needs and conditions[951]. The Convention system is only subsidiary to the safeguarding

[951]The ECHR has consistently held that the scope of this margin varies according to the circumstances, the subject matter and the background. A wide margin is usually allowed to states under the Convention when it comes to general measures of economic or social strategy, but also when it comes to delicate moral problems where there is no consent among the state parties. Because of their direct knowledge of their society and its needs, the national authorities are, in principle, better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the ECHR generally respects the legislature's policy choice unless it is "manifestly without reasonable foundation". See, for example, *James and Others v. the United Kingdom*, 21 February 1986, § 46, Series A no. 98; *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom*, 23 October 1997, § 80, Reports 1997-VII; Stec and others v. the United Kingdom [GC], Nos. 65731/01 and 65900/01, § 52, ECHR 2006-VI; *Tkachevy v. Russia*, 14 February 2012, No. 35430/05, § 36.

of human rights at national level and does not function as the fourth instance in dealing with human rights cases.

The principle of subsidiarity is reflected in the criterion of the margin of appreciation that the ECHR leaves to states in cases in which there is no broad European consensus[952]. The jurisprudence of the ECHR makes it clear that states enjoy a margin of appreciation in how they apply and implement the Convention, depending on the circumstances of the case and the rights and freedoms engaged. The margin of appreciation goes hand in hand with supervision under the Convention system. In this respect, the role of the ECHR is to review whether decisions taken by national authorities are compatible with the Convention. The explicit reference to the principle of subsidiarity and the doctrine of the margin of appreciation is contained in Protocol no. 15 to the Convention which has not yet come into force[953].

The principles of subsidiarity and margin of appreciation are not the only important elements of the dialogue between the ECHR and the national jurisdictions, and important tools of interpretation which the ECHR has at its disposal. Equally important in the mutual dialogue is European consensus, an implicit consent or a trend emerging in the legal systems, or some of them, of the Council of Europe member states to accept a particular solution as a common standard[954], which serves to restrict the margin of appreciation and to support synergies

[952]Such as, as regards religious symbols in classrooms in *Lautsi v. Italy*, Application No. 30814/06, Judgment of 18 March 2011 (Grand Chamber), § 68. See also, for example, *Vo v. France* [GC], no. 53924/00, ECHR 2004-VIII. The ECHR held that: "It follows that the issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that States should enjoy in this sphere, notwithstanding an evolutive interpretation of the Convention, a 'living instrument which must be interpreted in the light of present-day conditions'. The reasons for that conclusion are, firstly, that the issue of such protection has not been resolved within the majority of the Contracting States themselves, in France in particular, where it is the subject of debate and, secondly, that there is no European consensus on the scientific and legal definition of the beginning of life".

[953]Article 1 of Protocol No. 15 reads as follows: "Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention".

[954]*Vallianatos and others v. Greece [GC],* 7 November 2013, Nos. 29381/09 and 32684/09, § 91. See further, K. Dzehtsiarou, "Interaction between the European Court of Human Rights and member States: European consensus, advisory opinions and the question of legitimacy", in *The European Court of Human Rights an its Discontents: Turning Criticism into Strength*, S. Flogaitis and J. Fraser (eds.), Edward Elgar Publishing Limited, 2013, p. 122. K. Dzehtsiarou, "European Consensus and the Evolutive Interpretation of the European Convention on Human Rights", *German Law Journal*, Vol. 12, No. 10, 2011, p. 1743: "European consensus is a reference to national consent implicitly expressed in national legislation". K. Dzehtsiarou, "Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights", *Public Law*, 2011, p. 534: "it is a general agreement among the majority of Member States of the Council of Europe about certain rules and principles identified through comparative research of national and international law and practice".

between the case-law of the ECHR and the practice of national courts. If the ECHR finds that there is consensus on a particular issue in Europe, the margin of appreciation left to states is correspondingly reduced, and *vice versa* a lack of a relevant consensus amongst states could speak in favour of allowing a wider margin of appreciation than that normally afforded[955]. So, European consensus facilitates interaction between member states and the ECHR and enhances the legitimacy of the judgments. A certain limitation to the margin of appreciation also poses a review of proportionality exercised by the ECHR, which "requires the Court to review the substantive, political decisions of national officials in the context of national law, thereby reinforcing the Court's own structural supremacy"[956], and, further, positive obligations imposed on states whereby the ECHR has extended the scope and impact of Convention rights with a view to promoting effective exercising of rights and freedoms guaranteed by the Convention.

A certain dimension in the dialogue also represents civil law cases between private individuals in which the ECHR deals with the balancing of the rights of private parties. They may give rise to divergence between the ECHR and the state as to the attainment of the reasonable balance of the conflicting interests at stake, as shown by a recent example concerning the issue of retroactive effects of a statute implementing a judgment of the ECHR. The case of *Fabris v. France*[957] pertains to a difference in the treatment of legitimate and illegitimate children for succession purposes. The applicant claimed that on account of his status of a child "born of adultery" he had been refused the right to request an abatement of the *inter vivos* division signed by his mother. Based on the facts, in 2007, the Court of Cassation dismissed the applicant's appeal, reasoning that the distribution of the estate between the two legitimate children had been done before the Law of 2001 came into force, which was why the provisions of that Law relating to new inheritance rights of illegitimate

[955]See, for example, a recent judgment of *Animal Defenders v. the United Kingdom*, Application No. 48876/08, Judgment (GC) of 22 April 2013, § 123. The ECHR stated that there was no European consensus between Contracting States on how to regulate paid political advertising in broadcasting. It underlined that while there might be a trend away from broad prohibitions, it remained clear that there was a substantial variety of means employed by the Contracting States to regulate such advertising, reflecting the wealth of differences in historical development, cultural diversity, political thought and, consequently, democratic vision of those States. According to the ECHR, this lack of consensus also broadens the margin of appreciation to be accorded as regards restrictions on public interest expression. See also *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, ECHR 2005-IX, § 81; or *SH and Others v Austria* [GC] no. 57813/00, §94, ECHR 2011: "[w]here there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider".

[956]A. Stone Sweet, "On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court", in *Faculty Scholarship Series*, 2009, Paper 71.

[957]*Fabris v. France [GC]* No. 16574/08, Judgment of 7 February 2013.

children were not applicable to Mr. Fabris. The 2001 Law implemented the *Mazurek v. France* judgment which declared that inequality of inheritance rights on grounds of birth was incompatible with the Convention. The French State amended the rules of inheritance law by repealing all the discriminatory provisions relating to children "born of adultery". The 2001 Law stipulated that the provisions of that Law were not applicable to inheritance arrangements that had already given rise to distribution before the Law came into force. According to the Government, it was not possible to undermine rights acquired by third parties, in the instant case by the other heirs, and that justified restricting the retroactive effect of the 2001 Law to those successions that were already open on the date of its publication and had not given rise to division by that date. But the ECHR held that the applicant had been deprived of a reserved portion and that he was placed in a different situation from that of the legitimate children regarding inheritance of their mother's estate, and that the legitimate aim of protecting the inheritance rights of the applicant's half-brother and half-sister was not sufficiently weighty to override the claim by the applicant to a share in his mother's estate. It stated that there had been no objective and reasonable justification for the difference in treatment regarding the applicant.

This judgment raises a critical comment, as the ECHR required France to apply its judgment on inheritance law retroactively. To my mind, this case challenges the state's margin of appreciation and involves a clash between the general principle of legal certainty in legal relations and the ECHR's interpretation of the margin of appreciation of states in choosing the means to execute the ECHR's judgment. Although the ECHR admitted that it is not, in principle, required to settle disputes of a purely private nature, it considered that the factual non-retroactive interpretation of the Law by the national court "appears unreasonable, arbitrary and blatantly inconsistent with the prohibition of discrimination"[958]. It basically held that the non-retroactive interpretation of national law by the national courts was in conflict with the Convention. By striving to prevent further violations similar to those found in the *Mazurek* judgment, did the ECHR not catalyze another interference with the rights of the other private party who took up inheritance in good faith? It is evident that the ECHR clearly

[958]In § 60 of the judgment the ECHR stated that: "The Court is not in principle required to settle disputes of a purely private nature. That being said, in exercising the European supervision incumbent on it, it cannot remain passive where a national court's interpretation of a legal act, be it a testamentary disposition, a private contract, a public document, a statutory provision or an administrative practice appears unreasonable, arbitrary or blatantly inconsistent with the prohibition of discrimination established by Article 14 and more broadly with the principles underlying the Convention".

favoured the seriousness of the discrimination against illegitimate children over the retroactive effects of the legislation, and, thus, over legal certainty in concrete inheritance relationships. But is it not positive discrimination to assess that the inheritance rights of the applicant bear more weight than the *bona fide* rights of legitimate children, at the cost of unyieldingly holding on to the retroactive application of the 2001 Law?

These considerations lead me to contemplate whether the ECHR should not be less rigorous in exercising its supervision over decisions of national authorities that seek to balance the interests of private parties. In my opinion, the ECHR's supervision should rather be stricter in vertical cases involving disputes between the state and private persons, for such disputes always entail a certain unbalance of power for the benefit of the state that bears obligations to protect the rights of private persons.

2. Towards Harmony with the ECHR

The influence of the ECHR on national courts takes place foremost by way of the interpretation and application of the ECHR's case-law by the latter. National courts strive to interpret national law in harmony with the ECHR. They apply the ECHR's case-law[959], as they generally try to avoid possible conflicts[960] and desire to reduce exposure to condemnations[961]. In this regard the acting President of the ECHR, Judge Spielmann, observed that the level of the jurisprudential dialogue seems to be constantly improving and the national courts seem to have been adopting more and more frequently legal argumentation of the ECHR in order to reason their own decisions[962].

On becoming member states of the Convention, the Council of Europe member states took upon themselves a commitment to take into account not only individual judgments that are

[959]For example, the German Constitutional Court in its recent case-law established that the judgments of the ECHR serve to orientate and guide ("Orientierungs- und Leitfunktion") national courts in their interpretation and application of the Convention. See *BVerfGE* 128, 326 [368]; *BVerfGE* 111, 307 [320].
[960]C. Lageot, "France", in *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case-law: A Comparative Analysis*, J. Gerards, J. Fleuren (eds.), Intersentia, Cambridge-Antwerp-Portland, 2014, p. 165.
[961]E. Lambert Abdelgawad, A. Weber, "The Reception Process in France and Germany", in *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, H. Keller, A. Stone Sweet (eds.) Oxford University Press, 2008, p. 128.
[962]In his speech at the Conference on the long-term future of the European Court of Human Rights held in Oslo on 7-8 April 2014, the President of the ECHR asserted that: "On voit de plus en plus fréquemment les jurisdictions internes s'appuyer sur la Convention européenne des droits se l'homme telle qu'elle est appliquée à Strasbourg, mais, surtout, s'approprier les raisonnements juridiques de notre cour pour motiver leurs propres décisions".

binding on each and every one of them, but also the findings of the ECHR in general. As Constance Grewe appositely points out, the ECHR's function is "not only to determine specific issues and decide specific cases, it is also to state what the law is, to deliver an authentic interpretation of the Convention, to create a European standard of rights protection"[963]. The case-law of the ECHR generally serves to elucidate, safeguard, and develop the rules instituted by the Convention, thereby contributing to the observance by the states of the engagements undertaken by them as Contracting Parties[964]. The case-law of the ECHR, thus, has the effect *res interpretata* that should be taken into account by the national authorities in their application and interpretation of the ECHR's case-law with a view to harmonising human rights protection norms across the continent and promoting the rule of law for maintaining and furthering the achieved common standard in the protection of human rights.

This *res interpretata* effect of the judgments of the ECHR will be strengthened by Protocol No. 16 to the Convention which should contribute to the enhancement of the interaction between the ECHR and national jurisdictions[965]. On the entry into force of this Protocol the highest national courts and tribunals will have the possibility to request the ECHR to give non-binding advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto. Protocol No. 16, thus, envisages a new form of dialogue, an institutional dialogue, between the highest national courts and the Strasbourg Court in the context of cases pending before these national courts, which will complement the jurisprudential interaction between the courts. To my mind, this Protocol may also be conducive to the strengthening of the subsidiary role of the Strasbourg Court, as the advisory opinions may have the effect that the cases pertaining to alleged violations of human rights will be settled more on a national

[963]Prof. Constance Grewe presented her observations in the framework of a Seminar on the topic "Ten Years of the "New" European Court of Human Rights 1998-2008 Situation and Outlook" held at the European Court of Human Rights on 13 October 2008. The cited text figures in the *Proceedings of the Seminar*, p. 42.
[964]See, for example, *Ireland v. the United Kingdom*, 18 January 1978, § 154, Series A no. 25; *Guzzardi v. Italy*, 6 November 1980, § 86, Series A no. 39; *Karner v. Austria*,no. 40016/98, § 26, ECHR 2003-IX.
[965]The Group of Wise Persons, set up under the Action Plan adopted at the Third Summit of Heads of State and Government of the Member States of the Council of Europe (Warsaw, 16-17 May 2005), stated that: "it would be useful to introduce a system under which the national courts could apply to the Court for advisory opinions on legal questions relating to interpretation of the Convention and the protocols thereto, in order to foster dialogue between courts and enhance the Court's 'constitutional' role". See doc. CM(2006)203, para. 135.

level[966]. It may lead to a more consistent implementation of the Convention across Europe considering that the ECHR is the final arbiter on the interpretation and application of the Convention in all member states of the Council of Europe. These considerations lead to the following question. Can the ECHR be perceived as the Constitutional Court of Europe?

3. The European Court of Human Rights – the Constitutional Court of Europe?

An answer to the affirmative may be tempting in view of the ECHR's standard-setting role in the area of human rights protection. The ECHR has reiterated on many occasions that its mission is also to raise the general standards of protection of human rights and extend human rights jurisprudence throughout the community of the Convention States by determining issues on public-policy grounds in the common interest[967]. But although the ECHR performs a standard-setting role in the area of human rights protection, this should not justify it being considered as the European constitutional court in the right sense of the word. Its role rather consists in serving as a reference point in the area of human rights protection that comprises both the static aspect represented by model norms of standard protection that are shared with the national legal systems and the dynamic aspect consisting of interactions with national courts within the limits of its competence given by the Convention and its protocols.

There are some who believe that the ECHR has attained a constitutional character and that it has, thus, become a European constitutional court[968]. The main arguments put forward by proponents of this idea are that the Convention has been incorporated into the national law of most member states of the Council of Europe, that the case-law of the ECHR is often referred

[966]Judge Spielmann expressed his opinion that advisory opinions will even have the importance comparable to that of the ECHR's landmark judgments. See *Proceedings of the Conference on the long-term future of the European Court of Human Rights*, Oslo, 7-8 April 2014, p. 47.

[967]See, for example, *Capital Bank AD v. Bulgaria*, no. 49429/99, §§ 78 to 79, ECHR 2005-XII; *Rantsev v. Cyprus and Russia*, no. 25965/04, § 197, 7 January 2010; *Konstantin Markin v. Russia*, § 89. In the latter case, the ECHR considered that the subject matter of the application – the difference in treatment under Russian law between servicemen and servicewomen as regards entitlement to parental leave – involved an important question of general interest not only for Russia but also for other States Parties to the Convention. It thus considered that further examination of the application would contribute to elucidating, safeguarding, and developing the standards of protection under the Convention.

[968]See, for example, A. Stone Sweet, "*On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court", in Faculty Scholarship Series*, 2009, Paper 71. S. Greer and L. Wildhaber, "Revisiting the Debate about 'constitutionalising' the European Court of Human Rights", Human Rights Law Review, Vol. 12, No. 4, 2012, pp. 667-668. The authors submit four constitutional characteristics of the ECHR and the Convention system: 1) the Convention is a "constitutional instrument of European public order", 2) human rights litigations are by definition "constitutional", 3) the ECHR is increasingly acquiring "constitutional status" in member states, 4) the ECHR decides broadly the same kind of issues as a domestic supreme or constitutional court, and also in largely similar ways.

to by national courts as well as by the Court of Justice of the European Union, or that the Lisbon Treaty commits the EU to become a party to the Convention.

It is true that some cases may have created the impression that the ECHR has put itself into a position of a supranational court. For example, the *Loizidou* case in which it stated that the Convention is "a constitutional instrument of European public order"[969], or the *Bosphorus* case in which the ECHR claimed that it, and not the European Court of Justice, had the ultimate competence to determine whether EU regulations comply with the Convention when applied by member states[970]. But whatever impression these cases may have left, the ECHR has, at the same time, acknowledged the limits imposed on its action. It has reiterated on many occassions that it is not a court of fourth instance, as its function is not to deal with errors of fact or law allegedly made by a national court, unless and in so far as they may have infringed rights and freedoms protected by the Convention, and that it cannot assess the facts which have led a national court to adopt one decision rather than another[971].

Furthermore, the role of the ECHR as a European constitutional court is not supported by historical facts. It is evident that the drafters of the Convention did not envisage that the Convention should serve as a constitution for Europe, but rather as a bulwark against any revival of a totalitarian system of government. If the ECHR was to become a European constitutional court, it would entail that it would be competent to declare national laws "unconstitutional" in cases of a violation of the Convention in all member states. But not all member states have incorporated the Convention into their constitutional orders, and so there are still discrepancies in this regard. In some countries, such as Denmark, the Convention only forms part of ordinary laws and can be disregarded if it would repugn the constitution, while in other countries the Convention was declared to form part of the constitutional order, such as in the Czech Republic, or to hold a supra-legislative but infra-constitutional status, such as in France.

The ECHR, instead of assuming the role of a supranational constitutional court, should rather adhere to the principle of subsidiarity and its role of supervisory jurisdiction. It is after all the

[969] *Loizidou v. Turkey* (preliminary objections), 23 March 1995, Series A no. 310.
[970] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, ECHR 2005-VI.
[971] *Kemmache v. France (no. 3)*, 24 November 1994, § 44, Series A no. 296-C; *García Ruiz v. Spain* [GC], no. 30544/96, § 28, ECHR 1999-I; *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, § 197, ECHR 2012. See also a dissenting opinion of Judge Costa in *Kononov v. Latvia* [GC], no. 36376/04, ECHR 2010.

direction which was agreed to be followed in the Brighton Declaration[972] and which is presumed in Protocol No. 15 to the Convention. But the general impression that the ECHR has been assuming the role of a supreme European human rights court is not surprising in view of the dynamic, or evolutive, interpretation of the Convention it has adopted.

4. Principles of Interpretation of the Convention

The ECHR has long held that it must interpret and apply the Convention in a manner which renders its rights practical and effective, not theoretical and illusory, and that the Convention must also be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions[973]. Moreover, referring to the "living" nature of the Convention the ECHR reiterates that with regard to the changing conditions in the Contracting States, it must interpret the Convention in light of "present-day conditions" and respond to any emerging consensus as to the standards to be achieved[974].

In view of this, it seems that today the ECHR's jurisprudence has a tendency to enlarge and diffuse into many new areas of law that have little to do with fundamental rights, and, thus, to overstep the role that was originally ascribed to the Convention system. It seems that the object and purpose of the Convention and the role of the ECHR, which was accurately described by the British Judge Sir Gerald Fitzmaurice in his dissenting opinion to the *Marckx* case[975], have expanded over time due to the ECHR's "dynamic" interpretation of the Convention as a "living instrument" which should be interpreted to new spheres of law, such as social security, whereby the ECHR, besides declaring its intent to maintain the

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[972]The Declaration was concluded at the High Level Conference meeting at Brighton on 19 and 20 April 2012 at the initiative of the United Kingdom Chairmanship of the Committee of Ministers of the Council of Europe. The Brighton Declaration sought to amend the Convention to include the principles of subsidiarity and the margin of appreciation. In order to give effect to certain provisions of the Declaration, Protocol No. 15, amending the Convention, was adopted by the Committee of Ministers of the Council of Europe in June 2013.

[973]*Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, §§ 47-48, ECHR 2005-X; *Demir and Baykara v. Turkey* [GC], Judgment of 12 November 2008, §§ 66-67.

[974]See, for example, *Weller v. Hungary*, no. 44399/05, § 28, 31 March 2009; *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, §§ 63-64; or, *mutatis mutandis*, *Stafford v. the United Kingdom* [GC], no. 46295/99, § 68, ECHR 2002-IV.

[975]He stated that: "... in short the whole gamut of fascist and communist inquisitorial practices such as had scarcely been known, at least in Western Europe, since the eras of religious intolerance and oppression, until (ideology replacing religion) they became prevalent again in many countries between the two world wars and subsequently. Such, and not the internal, domestic regulation of family relationships, was the object of Article 8 (art. 8), and it was for the avoidance of these horrors, tyrannies and vexations that "private and family life ... home and ... correspondence" were to be respected, and the individual endowed with a right to enjoy that respect - not for the regulation of the civil status of babies ...".

effectiveness of the Convention, has assumed the power to adjudicate on issues overpassing the sphere of fundamental rights.

That the scope of the ECHR's adjudication has increased to new areas is illustrated, for example, by the judgment in *Stec v. UK*[976] in which the ECHR interpreted the right to the peaceful enjoyment of possessions as encompassing state financed and non-contributory welfare benefits. By virtue of this judgment social support became property within the meaning of Article 1 of Protocol No. 1, which may possibly have a negative impact on potential national welfare reforms pursued by the Council of Europe member states with a view to cutting welfare benefits.

The ECHR considers the evolutive interpretation necessary for maintaining the effectiveness of the Convention. The former President of the ECHR, Luzius Wildhaber, has mentioned that evolutive interpretation is fundamental to the effectiveness of the Convention and the authority of the ECHR which must, in his opinion, seek to take into account the evolution to be able to strike a balance between development and stability of the European standard of protection of human rights, for the proper balance is conducive to the maintenance of the practical and effective nature of rights and to the implementation of the ECHR's judgments on the national level[977]. For this purpose the ECHR has taken account of norms of national and international law[978]. It refers to general international law - international treaties[979] and general principles of law recognised by civilized nations[980], the principles laid down by texts of

[976]*Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, ECHR 2005-X.
[977]L. Wildhaber, "European Court of Human Rights", 40 Canadian Yearbook of International Law 310 (2002).
[978]See *Soering v. the United Kingdom*, 7 July 1989, § 102, Series A no. 161; *Vo v. France* [GC], no. 53924/00, § 82, ECHR 2004-VIII; *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 121, ECHR 2005-I.
[979]For example, the ECHR has interpreted Article 8 of the Convention in the light of the United Nations Convention on the Rights of the Child of 20 November 1989 and the European Convention on the Adoption of Children of 24 April 1967. See in this respect *Pini and Others v. Romania*, nos. 78028/01 and 78030/01, §§ 139 and 144, ECHR 2004-V; *Emonet and Others v. Switzerland*, no. 39051/03, §§ 65-66, 13 December 2007. In *Siliadin v. France*, no. 73316/01, §§ 85-87, ECHR 2005-VII, a reference was made to international treaties other than the Convention. The ECHR, in order to establish the State's positive obligation concerning "the prohibition on domestic slavery", took into account the provisions of universal international conventions (the ILO Forced Labour Convention; the United Nations Supplementary Convention on the Abolition of Slavery; the Slave Trade, and Institutions and Practices Similar to Slavery; and the United Nations Convention on the Rights of the Child).
[980]The ECHR indicated so in *Golder v. the United Kingdom*, 21 February 1975, § 29, Series A no. 18. The Legal Committee of the Consultative Assembly of the Council of Europe foresaw in August 1950 that "the Commission and the Court [would] necessarily [have to] apply such principles" in the execution of their duties and thus considered it to be "unnecessary" to insert a specific clause to this effect in the Convention (Documents of the Consultative Assembly, working papers of the 1950 session, vol. III, no. 93, p. 982, paragraph 5).

universal scope[981], ius cogens[982], or Council of Europe instruments[983]. To determine the meaning of the terms and phrases used in the Convention, the ECHR is guided mainly by the rules of interpretation provided for in Articles 31 to 33 of the Vienna Convention[984]. In accordance with the Vienna Convention, the ECHR is required to ascertain the ordinary meaning to be given to the words in their context and in the light of the object and purpose of the provision from which they are drawn. It may also have recourse to supplementary means of interpretation, either to confirm a meaning determined in accordance with the above steps, or to coin a meaning when it would otherwise be ambiguous, obscure, or manifestly absurd or unreasonable[985].

In my view, the rudimentary nature of the text of the Convention requires that the ECHR use the evolutive interpretation which must not, however, overpass the limits of the Convention. But I have observed that the most important jurisprudence of the ECHR was delivered during the first three decades of its existence and has been constantly and frequently applied to present-day cases brought before the ECHR. Even so, in view of the changing social and economic circumstances it is sometimes impossible to apply a case-law that is forty years old. A pregnant example is the evolving forms of property and economic relations. The nature of the text of the Convention does not contribute much to the evolving aspects of life and requires that the ECHR uses the evolutive interpretation, and it is just this nature of the Convention that allows such interpretation.

The evolutive interpretation provides the ECHR with flexibility necessary in the changing legal, social and economic environment in Europe. Nonetheless, there are also critics of it who argue, for example, that it contradicts the consistency of case-law or the principle of legal

[981]*Soering v. the United Kingdom*, 7 July 1989, § 102, Series A no. 161. The ECHR took into account these principles in developing its case-law concerning Article 3 of the Convention in respect of extradition to third countries.
[982]*Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 55, ECHR 2001-XI.
[983]In particular, recommendations and resolutions of the Committee of Ministers and the Parliamentary Assembly. See, among other authorities, *Öneryıldız v. Turkey* [GC], no. 48939/99, §§ 59, 71, 90 and 93, ECHR 2004-XII. The ECHR has also made reference to norms emanating from other Council of Europe organs, even though those organs have no function of representing States Parties to the Convention, whether supervisory mechanisms or expert bodies.
[984]See, for example, *Golder v. the United Kingdom*, 21 February 1975, § 29, Series A no. 18; *Johnston and Others v. Ireland*, 18 December 1986, §§ 51 et seq., Series A no. 112; *Lithgow and Others v. the United Kingdom*, 8 July 1986, §§ 114 and 117, Series A no. 102; *Witold Litwa v. Poland*, no. 26629/95, §§ 57-59, ECHR 2000-III.
[985]See *Saadi v. the United Kingdom* [GC], no. 13229/03, § 62, ECHR 2008-I.

certainty and predictability[986]. There is some truth to this argument. It is commonplace that the evolutive interpretation is necessary to secure the effectiveness of the system of European human rights protection. On the other hand, its use entails changes in the case-law and, thus, disturbs the predictability of the ECHR's judgments, especially when the ECHR adjudicates on new areas of law that have little to do with fundamental rights. It has an impact on national legal orders of the Council of Europe member states, as the national authorities must take the case-law, outreaching its original "mission" to prevent the recurrence of wars and tyranny, into consideration. It is beyond doubt that the evolutive interpretation improves the effectiveness of human rights protection at the expense of predictability of the case-law. It is, therefore, necessary to seek a balance which the ECHR strives for by having resort to the European consensus doctrine mitigating the "surprise" effect of evolutive interpretation[987].

The consensus may constitute a relevant consideration for the ECHR when interpreting the provisions of the Convention in specific cases. The ECHR has applied it in a number of cases. As regards property, illustrative is the case of *Mazurek v. France*[988]. In this case Mr. Mazurek complained of an infringement of his right to respect for his family life, within the meaning of Article 8 of the Convention, and of discrimination on account of his birth, within the meaning of Article 14, as well as of an infringement of his right to the peaceful enjoyment of his possessions under Article 1 of Protocol No. 1 to the Convention. The ECHR stated that the institution of the family was not rigidly codified, whether historically, sociologically or legally. With regard to the situation in the other member states of the Council of Europe it noted that there was a clear trend towards the abolition of discrimination in relation to adulterine children. It could not disregard such developments in its interpretation, which was necessarily evolutive, of the relevant provisions of the Convention and it found a violation of the right to peaceful enjoyment of property in conjunction with Article 14 of the Convention.

The use of European consensus in the legal reasoning of the ECHR places restrictions not only on the ECHR's evolutive interpretation, but also on the margin of appreciation given to states. Some authors consider it as a mediator between dynamic interpretation and the margin

[986]H. Gribnau, "Legitimacy of the Judiciary", in *Electronic Journal of Comparative Law*, 2002, p. 6.
[987]K. Dzehtsiarou, "European Consensus and the Evolutive Interpretation of the European Convention on Human Rights", in *German Law Journal*, Vol. 12, No. 10, p. 1745.
[988]*Mazurek v. France*, no. 34406/97, ECHR 2000-II.

of appreciation[989]. The ECHR itself has admitted that, being made up of a set of rules and principles that are accepted by the vast majority of states, the common international or domestic law standards of European states reflect a reality that it cannot disregard when it is called upon to clarify the scope of a Convention provision that more conventional means of interpretation have not enabled it to establish with a sufficient degree of certainty[990].

The way the national courts take into account and apply the interpretative practice of the ECHR varies depending on the status of the Convention within a particular legal order and the system of constitutional protection of fundamental rights and freedoms.

5. Status of the Convention within the French Legal Order

Although France was one of the founding states of the Council of Europe, which signed the European Convention on Human Rights on 4th November 1950, it ratified the Convention in 1974[991] and allowed individual petition in 1981[992]. The delay in ratification of the Convention was grounded in the disbelief of the Government that the ratification was necessary to secure fundamental rights and liberties that were already guaranteed in national law and to become subject to supranational control in this area[993].

As regards the superiority of international engagements over statutes, the Convention enjoys a supra-legislative but infra-constitutional status[994]. The French legal order is based on a monist

[989]A. Morawa, "The 'Common European Approach', 'International Trends', and the Evolution of Human Rights Law. A Comment on Goodwin and I v. the United Kingdom", 3 German Law Journal (2002), p. 3, available at http://www.germanlawjournal.com/index.php?pageID=11&artID=172.

[990]See *Sigurður A. Sigurjónsson v. Iceland*, 30 June 1993, § 35, Series A no. 264; *Sørensen and Rasmussen v. Denmark* [GC], nos. 52562/99 and 52620/99, §§ 72-75, ECHR 2006-I. In finding that the right to organise had a negative aspect which excluded closed-shop agreements, the ECHR considered, largely on the basis of the European Social Charter and the case-law of its supervisory organs, together with other European or universal instruments, that there was a growing measure of agreement on the subject at international level.

[991]Decree no. 74-36.

[992]Decree no. 81-917.

[993]L. Heuschling, "Comparative Law and the European Convention on Human Rights in French Human Rights Cases", E. Örücü (ed.), in *Judicial Comparativism in Human Rights Cases*, BIICL, London, 2003, p. 26. Heuschling observes that: "France being the 'patrie', the birthplace of human rights, and having invented legal monuments such as the Code Civil and the judicial review of the administration by the Conseil d'État, comparative law could only be an export, but never an import. This nationalist pride was one of the arguments used by French governments to delay the ratification of the ECHR: if the situation of human rights is already perfect in France due to a long-standing tradition, why should there be a need to adopt the Convention and, even more, to submit to the review of the Strasbourg Court?".

[994]Article 55 of the Constitution reads that: "Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party". The Council of State stated that "si l'article 55 de la Constitution dispose que "les traités ou accords régulierement ratifiés ou approuvés ont, des leur publication, une autorité supérieure a celle des lois sous

view of the operation of international treaties in the national legal order. Thus, international treaties acquire an authority superior to that of ordinary laws by virtue of ratification and on their publication in the Official Journal.

The Convention is not part of the rules of reference for the review of constitutionality, *bloc de constitutionnalité*. From the Constitution it does not imply that the Constitutional Council should assure the principle of superiority of duly ratified or approved international treaties over statues in the framework of the control of constitutionality[995]. Since 1975 the Council has held that despite the principle of precedence of international treaties over statutes by virtue of Article 55 of the Constitution, it was not competent to examine the conformity of statutes with the Convention[996]. In its posterior decisions the Council explicitly stated that if the control of superiority of international treaties over statutes could not be exercised in the framework of the control of constitutionality, it must be exercised by ordinary jurisdictions[997]. So, the precedence of the Convention over national legislation and the effective application of Article 55 of the Constitution ensure, after some period of hesitation, the Council of State and the Court of Cassation. The review of conventionality by these courts "operates as a functional substitute for rights protection under the Constitution"[998]. If the Court of Cassation responded to this invitation rather promptly, in a decision of 24 May 1975[999], the Council of State took almost fifteen years to accept the supremacy of a treaty over a posterior statute[1000]. As a result

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réserve, pour chaque accord ou traité, de son application par l'autre partie", la suprématie ainsi conférée aux engagements internationaux ne s'applique pas, dans l'ordre interne, aux dispositions de nature constitutionnelle (Council of State, 30 October 1998, decision nos. 200286, 200287).

[995]Decision no. 2010-605 DC of 12 May 2010, Official Journal of 13 May 2010, p. 8897, Rec., p. 78.

[996]Decision of the Constitutional Council no. 74-54 DC of 15 January 1975 concerning a voluntary interruption of pregnancy, "Loi relative à l'interruption volontaire de grossesse". This decision was founded on two arguments. Firstly, it is an argument based on the strict interpretation of Article 61 of the Constitution which does not confer on the Council the general power of appreciation identical to that of Parliament but only the power to pronounce itself on the conformity of statutes brought before it with the Constitution. If Article 55 of the Constitution conferred to treaties a superior authority to that of statutes, it does not prescribe or imply that their respect should be guaranteed in the framework of the control of conformity of statutes with the Constitution within the meaning of Article 61 of the Constitution. Secondly, pursuant to the Constitution, the Council disposes of a time-limit of one month. It would be difficult to examine within this short period of time the conformity of statutes with a number of international engagements to which France is party.

[997]Decision no. 86-216 DC of 3 September 1986, Rec., p. 135; decision no. 89-268 DC of 29 December 1989, Rec., p. 110.

[998]E. Lambert Abdelgawad, A. Weber, "The Reception Process in France and Germany", in *Europe of Rights. The Impact of the ECHR on National Legal Systems*, (eds.) H. Keller and A. Stone Sweet, Oxford, 2008, p. 116.

[999]The Court of Cassation has considered the compatibility of national law with international treaties since the decision of *Jacques Fabres*, decision of 24 May 1975, *Société des Cafés Jacques Vabre*, Dalloz 1975 p. 497.

[1000]Decision of 20 October 1989, *Nicolo*, Rec., p. 190. Until 1989 the Council of State ensured the prevalence of international law over such national law which had been adopted before the ratification and incorporation of international treaties into the French legal system. It considered that it would otherwise indirectly monitor the

of the 1975 decision of the Court of Cassation, the conformity of the national law with the Convention is not provided by means of the control of constitutionality (*contrôle de constitutionnalité*), but by means of the control of conventionality (*contrôle de conventionalité)* exercised by ordinary courts that apply the international fundamental rights standards directly. The Council of State affirmed that the superiority conferred upon international agreements by Article 55 of the French Constitution did not, in the internal legal order, apply to provisions of a constitutional nature[1001]. The Constitutional Council exercises only a review of the conformity of laws with the Constitution and international norms are not norms of reference in its judicial review. Disregarding the issue of conventionality of legislation in the review of constitutionality, the Council has ruled that "a statute that is inconsistent with a treaty is not *ipso facto* unconstitutional"[1002]. Even so, the Constitutional Council takes international treaties, including the Convention, into account, although not always, in its review when monitoring the conformity of national laws with the Constitution.

6. Relevance of the Convention and the case-law of the ECHR in the Practice of the French Constitutional Council

Although the Constitutional Council does not take into account the Convention as a norm of reference, it takes it into great consideration as a source of inspiration for interpreting constitutional norms[1003]. The Convention is an instrument for interpreting the Constitution and for convergence between the national constitutional law and European human rights law. The influence of the Convention and the Strasbourg Court on the jurisprudence of the Constitutional Council is purely intellectual, it involves the persuasive authority of the jurisprudence of the ECHR and inspiration that the Council draws from the catalogue of rights that are more recent than the Declaration of 1789[1004].

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conformity of the law with the Constitution, which has been the task of the Constitutional Council (e.g. decision *Syndicat general des fabricants de semoules de France*, CE, 1 May 1968). It changed the course in 1989 when it ruled that international norms had to take precedence over national laws, even over those laws adopted after the ratification of international instruments. Having taken into account Article 55 of the Constitution, the Council of State for the first time had regard to the Constitutional Council's decision of 1975.

[1001]CE, ass., 30 October 1998, *Sarran, Levacher et autres*.

[1002]Decision no. 74-54, 15 January 1975; decision no. 2010-605 DC of 12 May 2010, Official Journal of 13 May 2010, p. 8897, Rec., p. 78.

[1003]See, for example, J.-P. Costa, "The Relationship between the European Court of Human Rights and the National Courts", in *European Human Rights Law Review*, Issue 3-2013, Sweet & Maxwell, p. 272. D. Spielmann, "Jurisprudence of the European Court of Human Rights and the Constitutional Systems of Europe", in *The Oxford Handbook of Comparative Constitutional Law*, M. Rosenfeld and A. Sajó (eds.), Oxford University Press, 2012, p. 1238: "...the Convention can nevertheless be considered as a shadow constitution,...".

[1004]O. Dutheillet de Lamothe, "L'influence de la Cour européenne des droits de l'homme sur le Conseil constitutionnel", Constitutional Council, 2009, p. 3, at http://www.conseil-constitutionnel.fr/.

The dialogue between the Constitutional Council and the ECHR can be described as a spontaneous dialogue[1005] which has been effectuated mostly by the implicit taking into consideration of the ECHR's case-law by the Council. This encounter has permitted it to enrich the principles and objectives of constitutional value. It can be illustrated in the example of the principle of pluralism. While the French Constitution is silent on this notion, the Constitutional Council, having been inspired by the European human rights jurisprudence[1006], stated that the respect for sociocultural streams of expression was an objective of constitutional value and one of the conditions of democracy[1007], or that the freedom of expression was the turning point in the building of a democratic society[1008]. The Council has also considered that the guarantees provided for by Article 8 of the Convention could be applied as constitutional principles, in connection with the imposition of administrative sanctions, including the area of taxation[1009]. The concomitance can be also observed in respect of the rights of defence where the Council considered that defence rights were a fundamental principle recognised by the laws of the Republic[1010].

The Council has also drawn inspiration as concerns the emergence of new rights. Such as: the right to respect for private life or the freedom to marry, which constitute, according to the Council, the personal liberty guaranteed by Articles 2 and 4 of the Declaration[1011]; the principle of human dignity which the Council deduced from the Preamble to the 1946 Constitution[1012]; or the notion of pluralism in thinking and opinion[1013]. Although the Convention does not form part of the norms of reference in the control of constitutionality, some authors observe that despite the persistent refusal of the Council to quote European case-law, the standard of protection rendered by constitutional jurisprudence is largely

[1005]J. Andriantsimbazovina, "La prise en compte de la Convention européenne des droits de l'homme par le Conseil constitutionnel, continuité ou évolution?", Cahiers du Conseil Constitutionnel no. 18, July 2005, p. 3.
[1006]*Handyside v. the United Kingdom*, 7 December 1976, Series A no. 24.
[1007]Decision no. 86-217 DC of 18 September 1986; decision no. 2004-497 DC of 1 July 2004.
[1008]Decision no. 84-181 DC, 10 and 11 October 1984.
[1009]Decision no. 88-248 DC, 17 January 1989.
[1010]Decision no. 80-127 DC, 19 and 20 January 1981. In decision no. 89-260 DC of 28 July 1989 it expressly referred to the interpretation of the ECHR given in *Delcourt v. Belgium*, 17 January 1970, Series A no. 11.
[1011]Decision no. 99-416 DC of 23 July 1999, Rec., p. 100, and decision no. 2003-484 of 20 November 2003, Rec., p. 438, respectively.
[1012]Decision no. 94-343/344 DC of 27 July 1994.
[1013]Decision no. 86-217 DC of 18 September 1986; decision no. 89-271 DC of 11 January 1990.

equivalent to the European one[1014], or in complete conformity with the ECHR[1015]. In some instances the ECHR's findings correspond to those delivered by the Council[1016]. In any event, if the Constitutional Council aspires to guarantee the unity of the legal system and legal certainty, it is desirable that it closely takes into consideration the jurisprudence of the Strasbourg Court[1017].

Although the Council does not, as a matter of principle, expressly refer to judgments of the ECHR, it has done so exceptionally in the decision of 19 November 2004 concerning the Treaty Establishing the Constitution for Europe, in which it referred to a judgment of the ECHR in the case of *Leyla Sahin v. Turkey* with a view to preserving certain values of the Republic[1018]. As regards the recent jurisprudence of the Council, the influence of the ECHR on the amendment of legislation can be perceived in various fields of law. For example, in the declaration of non-conformity with the Constitution of legislative provisions on police detention (*garde à vue*)[1019] that was followed by a reform of the legislation[1020]. In procedural issues the Council had to recognise the right to effective legal remedy within the meaning of Article 6 of the Convention[1021] or that the respect for the rights of the defence implies the existence of a just and equitable process and the related necessity of the equality of arms of the parties[1022].

[1014]R. Tinière, "Question prioritaire de constitutionnalité et droit européen des droits de l'homme. Entre équivalence et complémentarité", Revue française de droit administratif, 28e année – bimestrielle, No. 4, juillet – août 2012, p. 622.

[1015]E. Lambert Abdelgawad, A. Weber, "The Reception Process in France and Germany", in *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, H. Keller, A. Stone Sweet (eds.) Oxford University Press, 2008, p. 137. The authors note that despite a wide range of French authorities having expressed profound irritation at the tendency of the ECHR towards harmonisation.

[1016]Such as in the case of *Célice v. France*, decision of 8 March 2012, no. 14166/09, § 36. The ECHR referred to the Council's findings in a decision QPC no. 2010-38 of 29 September 2010.

[1017]R. Tinière, "Question prioritaire de constitutionnalité et droit européen des droits de l'homme. Entre équivalence et complémentarité", Revue française de droit administratif, 28e année – bimestrielle, No. 4, juillet – août 2012, p. 622. O. Dutheillet de Lamothe, "L'influence de la Cour européenne des droits de l'homme sur le Conseil constitutionnel", at http://www.conseil-constitutionnel.fr/.

[1018]Decision no. 2004-505 of 19 November 2004, Official Journal of 24 November 2004, p. 19885, Rec., p. 173. This decision concerned the principle of secularism which is a value of the Republic recognised in Article 1 of the Constitution. In the framework of the control of conformity of the Constitution with the Treaty establishing the Constitution for Europe, the Council interpreted this principle on the basis of the case-law of the European Court to conclude on compatibility of Article II-70 of the Treaty with the principle of secularism enshrined in Article 1 of the French Constitution.

[1019]Decision no. 2010-14/22 QPC of 20 July 2010.

[1020]Law no. 2011-392 of 14 April 2011 on Police Detention (*loi relative à la garde à vue*), *JORF* 15 April 2011, p. 6610.

[1021]Decision no. 99-416 of 23 July 1999, Rec., p. 100.

[1022]Decision no. 89-260 DC of 28 July 1989, Rec., p. 71, on the basis of a judgment *Delcourt v. Belgium* of 17 January 1970 and *Golder v. the United Kingdom* of 21 February 1975.

It should not be omitted that the judgments of the ECHR finding a violation also have an impact on reopening of judicial proceedings in criminal matters - the Code of Criminal Procedure allows for the reopening of cases at the request of the Minister of Justice, the Advocate-General of the Court of Cassation, or by the person convicted, but only for a finding of guilt rendered by a court dealing with the substance of the case[1023] or by the Court of Cassation[1024]. According to the latter, the condition is that the relationship between the violation and the condemnation must stem from the ECHR's decision[1025]. The case-law of the ECHR, however, has not induced reopening in civil and administrative law matters.

But since the Constitutional Council decided to disregard the Convention in the process of the review of constitutionality, why does it have recourse to it in the interpretation of constitutional norms? It may be explained by its quest for safeguarding legal certainty in the legal order, given that other supreme courts, the Council of State and the Court of Cassation, are bound to conform to the jurisprudence of the Strasbourg Court to avoid being condemned for a violation of the Convention. The more so with regard to the fact that the Convention is an ever-evolving "living instrument" that is dynamically interpreted by the ECHR to keep up with the changing social and economic environment in the member states of the Convention. So, the Council, to my mind, cannot afford to "lag behind" the ECHR's evolving case-law in order, firstly, to preserve the coherence in the decision-making of the supreme courts and, secondly, to avoid that France be sanctioned by the Strasbourg Court for potential violations of the Convention. But is the inspiration by the Convention and the ECHR's case-law for the purpose of interpretation of constitutional norms sufficient for preventing potential conflicts between the findings of the Constitutional Council, on the one hand, and those of the Strasbourg Court and the ordinary supreme courts, on the other hand, and for safeguarding the related legal certainty? This leads to an analysis of the problems connected with the absence of review of conventionality.

[1023]For example, in the case of *Hakkar v. France*, 27 November 1996, application no. 30190/96, the ECHR found a violation of Article 6 §§ 3 b) and c) in conjunction with Article 6 §1 of the Convention, in that in the context of criminal proceedings before the Assize Court of Yonne, as a result of which the applicant was sentenced to life imprisonment, the applicant had not been given the time or the facilities necessary to prepare his defence and was not represented at the trial. Following the ECHR's judgment, the applicant lodged an application for re-examination of the judgment of the Yonne Assize Court together with a request for suspension of his sentence. The Re-examination Board accepted the application to re-examine the life sentence and referred the case to the Hauts de Seine Assize Court to undertake a new trial.

[1024]Cass., Commission réexamen, 15 February 2001, *Voisine, Dall*. (2001, IR) 983.

[1025]Cass., Commission réexamen, 8 November 2001, *Dall.* (2002) 373.

7. Problems Attached to the Absence of Review of Conventionality by the French Constitutional Council

A question arises whether the implementation of the Convention as a "living instrument" is effective when the Council does not exercise the review of conventionality. I consider that a question of effectiveness of the implementation of the Convention's case-law, disregarding the normative text thereof, in view of the fact that it protects rights and freedoms that are basically identical to those protected under the French Constitution, may arise due to the duality of review and due to the fact that the Constitutional Council does not exercise the power of striking down laws that are in conflict with the Convention whereby it could directly eliminate, as well as prevent, possible interferences with the Convention. What are, then, the consequences of the Council's refusal to deal with the issue of conventionality of statutes?

I consider that the consequences are twofold. Firstly, they encompass a potential clash between decisions of the Constitutional Council and the Strasbourg Court. From the fact that the Constitutional Council does not apply the Convention directly to strike down laws that are incompatible with the Convention, firstly, a situation may arise that the Council rules on compatibility of national law with the Constitution, while the Strasbourg Court comes to a contrary conclusion and finds a violation of the Convention. R. Tinière notes in this regard that the existing principal dissemblances between the control of constitutionality and the external control of conventionality exercised by the ECHR can be linked to different tasks these two jurisdictions are entrusted with, implying that the Constitutional Council is primarily a constitutional judge rather than a human rights judge[1026]. Secondly, they cover situations of a potential clash between decisions of the Constitutional Council and ordinary courts exercising the review of conventionality, that is, situations where the Council's decision on constitutionality meets with a decision of the ordinary courts on unconventionality, as well as situations of a potential normative conflict between national law, as such, and the Convention. By way of example, the first situation can be illustrated in a case of legislative validations in which the Council was made to modify its jurisprudence concerning a situation where the ECHR declared a statutory provision that had been held constitutional by the Council contrary to the Convention.

[1026]R. Tinière, "Question prioritaire de constitutionnalité et droit européen des droits de l'homme. Entre équivalence et complémentarité", Revue française de droit administratif, 28e année – bimestrielle, No. 4, juillet – août 2012, p. 623.

In decision no. 93-332 of 13 January 1994 the Council ruled on the conformity of Article 85 of the Act of 18 January 1994 with the Constitution. The provision validated the amount of the so-called special difficulties allowance introduced in 1953 for staff of the social-security bodies administering the general social-security scheme and their dependent institutions in the departments of Asace-Moselle. The ECHR, however, in the case of *Zielinski, Pradal, Gonzales and others v. France*[1027] ruled, referring to its established case-law, that Article 85 was contrary to Article 6 para. 1 of the Convention. It stated that the principle of the rule of law and the notion of a fair trial enshrined in Article 6 precluded any interference by the legislature – other than on compelling grounds of the general interest – with the administration of justice designed to influence the judicial determination of a dispute. According to the ECHR, Article 85 expressly excluded from its scope those court decisions that had become final on the merits which settled, once and for all, the terms of the dispute before the ordinary courts, and did so retrospectively. The ECHR considered that the Constitutional Council's decision did not suffice to establish that Article 85 of the Act of 18 January 1994 was in conformity with the Convention. Subsequently, the Constitutional Council rendered a decision[1028] in which it adapted its jurisprudence according to that of the ECHR. It explicitly relied on the principle of separation of powers in the exercise of control of proportionality between the general interest and interference with the right to recourse. Henceforth, as regards legislative validations, the Council exhibits greater vigilance in the appreciation of sufficiency of the general interest in time[1029] and space[1030].

This evolution shows that originally the jurisprudence of the Constitutional Council was less demanding than that of the Strasbourg Court. One can also perceive that the jurisprudence of the Council and the ECHR on the protection of fundamental rights and freedoms is largely congruent and that the Constitutional Council and the ECHR, in fact, protect the same rights[1031]. Even so, the fact that they protect the same rights does not acquit the Council from the obligation to maintain the standard degree of protection set up by the Convention and its case-law.

[1027]*Zielinski and Pradal and Gonzalez and Others v. France* [GC], nos. 24846/94 and 34165/96 to 34173/96, ECHR 1999-VII.
[1028]Decision no. 99-422 DC of 21 December 1999, Rec., p. 143.
[1029]Decision no. 2001-458 DC of 7 February 2002, Rec., p. 80.
[1030]Decision no. 204-509 DC of 13 January 2005, Rec., p. 33.
[1031]F. Luchaire, "Le Conseil constitutionnel et la Convention européenne des drits de l'homme", Gaz. Pal., 10 June 2007, no. 161, p. 11. It can be claimed that due to the attachment of both the Constitutional Council and the ECHR to the liberal tradition, they have a convergent conception of fundamental rights and freedoms in that the latter represents a limitation of power.

As regards the second situation involving a potential conflict of national norms with the Convention, the ordinary courts do not hesitate to solve it in favour of the latter. The Council of State[1032] and the Court of Cassation[1033] consider that Article 55 of the Constitution provides for the precedence of international law over domestic law, although not over the Constitution. Both of these courts may disapply national legislation in order to ensure the primacy of international instruments. They do not hesitate to refer to the provisions of the Convention in their judicial review. For example, the Council of State has applied Article 8 of the Convention in respect of the law of aliens[1034], or it has referred to Article 6 of the Convention when ruling on the state's liability in a case of conflicting national law[1035]. However, it was reluctant to recognise the application of Article 6 of the Convention in the field of administrative procedure by ruling that an administrative authority could not be considered as a tribunal within the meaning of Article 6 of the Convention[1036]. So, given the absence of review of conventionality by the Constitutional Council, when a law is not in conformity with the Convention, though in conformity with the Constitution, a judge is obliged to refrain from its application. Only an indirect remedy to such a drawback provides, in my opinion, a recent constitutional reform introducing an *ex post* review of the constitutionality of statutes[1037].

8. Consequences of an *ex post* Review of Constitutionality

At present, the Constitutional Council performs two forms of constitutional adjudication. Firstly, since 1975 it has been exercising a constitutional review which is both *ex ante*, in the framework of which statutes may be referred to the Council before their promulgation, and, if found unconstitutional, they never enter into force, and abstract, since statutes can be referred to the Council only by political authorities[1038]. The Council, thus, exercises a prior review of

[1032]See CE, Ass., 30 October 1998, *Sarran, Levacher et autres*.
[1033]See CCass., Ass. Plén., 2 June 2000, *Mlle Fraisse*.
[1034]CE, Ass., 30 November 2001, *Ministre de la Défense v. Diop and Ministre de l'économie, des finances et de l'industrie v. Diop*.
[1035]CE, 9 February 2007, *Gardedieu*.
[1036]See CE, Ass., 3 December 1999, *Didier*.
[1037]The Constitutional Act no. 2008-724 of July 23rd 2008 inserted into the Constitution Article 61-1 and amended Article 62 to introduce a special procedure for an *a posteriori* review of the constitutionality of statutes which came into force on 1 March 2010. Its purpose was threefold : 1) to vest a new right in a person coming under the jurisdiction of the courts enabling him to avail himself of the rights which are conferred on him by the Constitution; 2) to remove unconstitutional provisions from the national legal order; 3) to ensure the paramountcy of the Constitutional Council in the national legal order.
[1038]The President of the Republic, the Prime Minister, Speakers of both Chambers of Parliament and, in most cases, by at least 60 deputies or 60 senators.

the constitutionality of laws[1039]. This type of review has been in place as the founders of the 1958 Constitution designed the Constitutional Council as a means of securing the executive dominance of Parliament, and not to protect fundamental rights, as some claim[1040]. Secondly, since 2010 the Constitutional Council has been exercising a new form of constitutional review which is *ex post*, as it concerns statutes already enacted and concrete, since a person to whom a statute is being applied has the possibility to ask for a priority preliminary ruling on the constitutionality of the statute by virtue of "an application for a priority preliminary ruling on the issue of constitutionality" (*question prioritaire de constitutionnalité*, or "QPC"). The QPC does not provide for the possibility to lodge a constitutional complaint directly before the Constitutional Council but it "only gives the exclusive right to have one's case examined for an eventual transmission"[1041] by the Council of State or the Court of Cassation[1042].

Although the QPC does not change anything about the position of the Convention in the review of constitutionality and its subordinate position to the Constitution in the French legal order, it, nevertheless, affords, in my opinion, an indirect remedy to the absence of a review of conventionality by the Constitutional Council. The indirect remedy consists in the power of the Constitutional Council to abrogate a challenged statute or its provision which the Council finds unconstitutional[1043] and its preventive function, and further in the new competence of

[1039]The binding character of its decisions is limited to the concrete issue on which the Council rules. The consequences of a finding of unconstitutionality of a statute or its provisions is that it may not be promulgated, and, as regards international agreements, the statute providing empowerment to conclude or ratify the agreement may only be adopted after the amendment of the Constitution.

[1040]E. Lambert Abdelgawad, A. Weber, "The Reception Process in France and Germany", in *Europe of Rights. The Impact of the ECHR on National Legal Systems*, (eds.) H. Keller and A. Stone Sweet, Oxford, 2008, p. 144.

[1041]O. Pfersmann, "Concrete Review as Indirect Constitutional Complaint in French Constitutional Law. A Comparative Perspective", in *European Constitutional Law Review*, 2010, p. 237. Any person subjected to the jurisdiction of the courts has the right to argue in support of his claim that a statutory provision infringes the rights and freedoms guaranteed by the Constitution. An application to this effect may be lodged before all courts and at every stage of proceedings. The incumbent court will decide whether the application is admissible and if so, it will then transmit the application to the Council of State or the Court of Cassation that are vested with the power to decide whether this issue of constitutionality should be referred to the Constitutional Council.

[1042]The QPC can only be referred to the Constitutional Council by the two supreme courts, the Court of Cassation and the Council of State. Article 61-1 of the Constitution stipulates that: "When during proceedings before a Court of Law, it is claimed that a statutory provision infringes the rights and freedoms guaranteed by the Constitution, a referral may be made to the Constitutional Council by the Conseil d'Etat or the Cour de cassation, and the Constitutional Council shall give its ruling within a specified time".

[1043]According to Article 62 of the Constitution: "A provision held to be unconstitutional on the basis of Article 61-1 shall be repealed as from the publication of the decision of the Constitutional Council or at a subsequent date as specified by said decision. The Constitutional Council shall determine the conditions in and extent to which the effects of the challenged decision shall be liable to be called into question". See, for example, the decision of the Constitutional Council no. 2009-595 DC of 3rd December 2009,"Institutional Act pertaining to the Application of Article 61-1 of the Constitution".

the Council of State and the Court of Cassation to refer the QPCs to the Constitutional Council. It is no more necessary to pass through the control of conventionality of the law to set aside a statute incompatible with the Constitution. By abrogating incompatible laws, or their parts, with the Constitution, the Council prevents possible present or future discrepancies between national law and the Convention and, hence, potential future rulings of the ECHR on a violation of the Convention, which renders the interaction between these two institutions more effective. The question of validity of a contested statutory provision or a statute will not be subjected to a new proceedings on appeal, cassation or before the Strasbourg Court, notwithstanding whether the contested statute was declared in conformity with the Convention by the Council of State or the Court of Cassation[1044]. Moreover, the introduction of the QPC has brought about a new dimension in relations between the ECHR and the Constitutional Council. It opened up the possibility of scrutinising the Council's decisions in light of the exigencies of Article 6 of the Convention. Until then this provision did not apply to the practice of the Constitutional Council, for Article 6 of the Convention does not apply to *ex ante* or abstract constitutional review as there is no civil litigation or parties.

The QPC has also given the Constitutional Council the opportunity to fix the principles of its control in property matters, which are comparable to those of the European control. The Constitutional Council has systematised the division between the application of Article 17 and Article 2 of the Declaration under which it applies the former to deprivations of property and the latter to limitations of property[1045]. It has, thereby, aligned itself with the system of Article 1 of Protocol 1 to the Convention. It performs the same fair-balance test under Article 2 of the Declaration as the ECHR, whereby the limitations must be justified by the public interest and be proportionate to the aim sought, which has enabled it to exercise a control equivalent to that of the ECHR[1046]. The tendency of the Constitutional Council to model the constitutional standard of property protection on the European model indicates that both levels of property protection seem to be equivalent. This tendency is also apparent as regards the conditions of compensation for damage incurred. In this area the Constitutional Council has integrated the criteria applied by the ECHR into its practice of control of constitutionality, which has lead to the convergence of the requirements of protection. The Constitutional Council has applied a

[1044]Decision no. 2010-1 QPC of 28 May 2010; decision no. 2010-15/23 QPC of 23 July 2010; decision no. 2010-14/22 QPC of 30 July 2010.
[1045]See decision no. 2010-60-QPC of 12 November 2010, decision no. 2010-118-QPC of 23 July 2010; decision no. 2011-141-QPC of 25 June 2011, decision no. 2011-151 QPC of 16 December 2011.
[1046]Decision no. 2011-207-QPC of 16 December 2011; decision no. 2011-208-QPC of 13 January 2012. Both decisions were preceded by a concurrent decision of the ECHR.

principle whereby the indemnisation is not excluded by the legislator in cases where the application of law caused a special and exorbitant burden which is disproportionate to the pursued public interest[1047]. The Council invokes this criterion in cases where the law does not provide for any compensation for injury[1048]. The possibility to claim compensation in cases where a special and exorbitant burden was incurred as a result of the application of law permits the Council to find the absence of interference contrary to the Constitution[1049]. Nonetheless, there may still be some differences in appreciation which make the decision-making of these two jurisdictions complementary. As a consequence, the protection rendered under the Constitution in property matters can prove to be, in some cases, either inferior or higher than that of the Convention as illustrated by a case in which the Constitutional Council did not find it unconstitutional, as opposed to the established case-law of the ECHR, that no compensation be awarded for moral injury in expropriation cases[1050].

The QPC, however, does not respond to the potentiality of jurisprudential conflicts between the Constitutional Council, on the one hand, and the ordinary supreme courts and the Strasbourg Court, on the other, in respect of the compatibility of national law with the Convention. If the Constitutional Council holds that the contested law, or its part, is constitutional, it will continue to exist in the national legal order. The ordinary supreme courts will have to apply it, unless they find it incompatible with a provision of an international treaty or the law of the European Union. So, although the ordinary supreme courts have become subsidiary judges of the constitutionality of laws by exercising their role as a "filter" of the QPCs, they continue to be the judges of conventionality without the power to repeal a statute for its incompatibility with the Convention. The ordinary supreme courts seem to continue to be clenched in between pliers with respect to the Constitutional Council, on the

[1047]The Council relied on this criterion, for example, in decision no. 2010-43-QPC of 6 October 2010.
[1048]In decision no. 2011-201-QPC of 2 December 2011 the Council held that "the encroachment upon the conditions applicable to the exercise of ownership rights is disproportionate with the objective pursued if the indemnity due upon transfer of ownership does not compensate for the damage suffered as a result of the easement of restraint".
[1049]See, for example, decision no. 2011-118-QPC of 8 April 2011, or decision no. 2011-141-QPC of 25 June 2011. In these decisions the Constitutional Council transposed the findings of the Council of State in the case of *Bitouzet,* 3 July 1998, no. 158592, which involved a review of conventionality of the principle of non-indemnisation of servitudes of urbanism save in exceptional cases when the owner bears a special and exorbitant burden out of proportion with the general interest, under Article 1 of Protocol No. 1. The Council of State found on conventionality with regard to the imperatives of the public interest. It did not consider the servitudes imposed on the applicant as a special and exorbitant burden and as amounting to deprivation of property, and thus relied on the rule of compensation only in exceptional cases.
[1050]Decision no. 2010-87-QPC of 21 January 2011. The ECHR, on the other hand, acknowledges, in general, the right to compensation for a moral injury in cases of a violation of the right to peaceful enjoyment of property. See in this respect *Lallement v. France*, no. 46044/99, 11 April 2002.

one hand, and to the Strasbourg Court, on the other. In this dilemmatic situation they do not hesitate to divert from the Constitutional Council, which illustrates a recent case pertaining to the presence of a counsel during police detention (*garde à vue*), which shows their autonomy.

In this case the Constitutional Council entered into conflict with the interpretation of the Strasbourg Court. The Constitutional Council ruled that the legal regime of the police detention, as regards the limitation of the presence of a counsel in respect of certain criminal offences, had already been held in conformity with the Constitution[1051], while finding other contested provisions of the Code of Criminal Procedure unconstitutional[1052]. The case-law of the Strasbourg Court, on the contrary, requires the presence of a counsel during the detention save for exceptions justified by particularly pressing reasons and not depending on the nature of the crime in question[1053]. The Constitutional Council ruled that the challenged provisions found to be unconstitutional would remain in effect until 1 July 2011, after a new law was to be adopted, thereby laying aside the date of the effect of the declaration of unconstitutionality to that date[1054]. The criminal chamber of the Court of Cassation in the framework of the control of conventionality of the same provisions of the Code of Criminal Procedure upheld the conclusion of the Constitutional Council to lay aside the effects of unconventionality until the legal regime of police detention was modified by law on 1 July 2011 at the latest[1055]. A few days before the Court of Cassation rendered its decision, the ECHR delivered a judgment condemning France for the practice that had been challenged before the Constitutional Council and the Court of Cassation[1056]. The plenary assembly of the Court of Cassation, taking into account the condemning judgment of the ECHR, refused to follow the decision of

[1051]Decision no. 2004-492DC of 2 March 2004.
[1052]Decision no. 2010-14/22 QPC of 30 July 2010. The Constitutional Council considered that Articles 62, 63, 63-1 and 77 of the Code of Criminal Procedure were contrary to the Constitution as they did not permit a person who was being interrogated while in police detention to avail of the effective assistance of a counsel.
[1053]Notably in the case of *Brusco v. France*, no. 1466/07, 14 October 2010, the ECHR stated that "the person held in custody has the right to be assisted by a counsel from the beginning of custody as well as during interrogations". See also *Salduz v. Turkey* of 27 November 2008, or *Doynoman v. Turkey* of 13 October 2009. On the basis of the European case-law (*Muller v. France*, 17 March 1997, *Reports of Judgments and Decisions* 1997-II) the legislation on the *garde à vue* had already been modified in 2000 and 2002 as regards its duration. The reform (law no. 2000-516 on presumption of innocence and law "Loi Perben" of 2002) reinforced the procedural guarantee in the application of legislation on the measure of *garde à vue* and created the office of *juge des libertés et de la detention* competent to decide on the appropriateness of such measure.
[1054]The Constitutional Council held that: "l'abrogation immédiate des dispositions contestées méconnaîtrait les objectifs de prévention des atteintes à l'ordre public et de recherche des auteurs d'infractions et entraînerait des conséquences manifestement excessives; qu'il y a lieu, dès lors, de reporter au 1er juillet 2011 la date de cette abrogation afin de permettre au législateur de remédier à cette inconstitutionnalité".
[1055]Crim., 19 October 2010, nos. 10-82.306,10-85.051, and 10-82.902. In order not to "porter atteinte au principe de sécurité juridique et à la bonne administration de la justice".
[1056]*Brusco v. France*, no. 1466/07, 14 October 2010.

the criminal chamber and ruled, on 15 April 2011, on the immediate application of the Convention with a view to preventing the risk of systematic condemnations of France by the ECHR in future[1057]. The Court of Cassation, thus, largely neutralised the postponed effect of the declaration of unconstitutionality by giving an immediate effect to the declaration of unconventionality, and interfered so with the authority of the Council's decision that is binding on all national jurisdictions. This case demonstrates that the control of constitutionality and the control of the conventionality of laws have not ceased to interfere with one another, despite the introduction of the priority question of constitutionality which purported to mitigate these interferences. In this context S. Platon notes that this practice may lead the applicants to develop a "more beneficial litigious strategy" by having recourse to the ordinary jurisdiction with a claim of unconventionality of a law to obtain its immediate inapplicability where the constitutional jurisdiction has decided to lay aside the abrogation of the law that it found to be in conflict with a fundamental right or liberty[1058]. In any event, the decision of the ordinary judges does not have the same effect as that of the Constitutional Council, as the former entails only the relative inapplicability of legislative provisions found unconventional.

To my mind, the QPC preserved the persisting isolation of the constitutionality review from the international context. The consequences that arise therefrom only confirm what has already been discussed, that is, the potentiality of clashes in the courts' findings and the resulting weakening of legal certainty, and a constitutional "autonomy" which is disconnected from the European context and, thus, excluded from the dialogue of judges. I think that potential conflicts would be prevented if the Council exercised both the review of constitutionality and conventionality of laws. This would also lead to a more coherent interpretation and application of the norms and jurisprudence of the Convention on the national level and to a closer synergy between the Constitutional Council and the Strasbourg Court. Yet, the review of conventionality of laws by the Council would be "toothless" if the latter did not have the power to render normative provisions inoperative for their conflict with the Convention. This would require that, in the hierarchy of norms, the Convention be endowed with the same legal power as the Constitution, such as was established by the Czech Constitutional Court.

[1057]Decision no. 10-17.049, CCass., Ass. plén., 15 April 2011.
[1058]S. Platon, "Les interférences entre l'office du juge ordinaire et celui du Conseil Constitutionnel:'malaise dans le contentieux constitutinnel'?", Revue française de droit administratif, 28e année-bimestrielle, No. 4, juillet-août 2012, p. 645.

9. Status of the Convention within the Czech Legal Order

As regards the position of international treaties in the Czech legal order, until the entry into force of the so-called Euro-amendment of the Constitution, on 1 June 2002, international human rights treaties, including the Convention, were directly applicable and took precedence over the law[1059]. The Euro-amendment abolished this special category of human rights treaties by amending Articles 10 and 87 paras. 1a) and b) of the Constitution which referred to these treaties as norms of reference for the review of the constitutionality of laws by the Constitutional Court.

The new wording of Article10 of the Constitution introduced an incorporation clause relating to all international treaties, including human rights treaties[1060]. The grammatical interpretation of Article 10 would lead one to think that it is the ordinary courts that are competent enough to exercise the review of compatibility of laws with international treaties and that are entitled to give application priority to an international treaty in case of conflict. The Constitutional Court refuted any considerations to this effect. Shortly after the promulgation of the Euro-amendment it rendered a judgment in which it considered that "no amendment to the Constitution can be interpreted to the intent that it would lead to a limitation of the already achieved level of procedural protection of fundamental rights and freedoms"[1061]. It further stressed that the ratified and promulgated international human rights treaties formed part of the constitutional order of the Czech Republic, and that the incorporation clause could not be interpreted to the effect that these international treaties would cease to be the norms of reference in the review of the constitutionality of domestic law by the Constitutional Court.

Accordingly, although it implies from Article 10 of the Czech Constitution that promulgated and ratified international treaties are of supra-legislative value and have application priority over statutes that are in conflict with them, the Constitutional Court has interpreted this provision in a way that international human rights treaties form part of the constitutional order and are the norms of reference in the control of constitutionality of laws. The Constitutional

[1059]J. Malenovský, "Mezinárodní právo veřejné: jeho obecná část a poměr k jiným právním systémům, zvláště k právu českému" [Public International Law: the General Part and the Relationship to Other Legal Systems, Especially to the Czech Law], Masaryk University, Brno, 2008, pp. 464-471.

[1060]The current text of Article 10 of the Constitution reads as follows: "Promulgated international treaties, the ratification of which has been approved by Parliament and which are binding on the Czech Republic, shall constitute a part of the legal order; should an international treaty contain a provision contrary to a law, the international treaty shall be applied".

[1061]Judgment of the Constitutional Court no. Pl. ÚS 36/01 of 25 June 2002, published under no. 403/2002.

Court, thus, adopted an extensive interpretation of the constitutional order under Article 112 para. 1 of the Constitution, whereby it argued that the scope of the notion of the constitutional order cannot be interpreted only in light of Article 112 para. 1 of the Constitution, but also in view of Article 1 para. 2, according to which the Czech Republic honours its obligations under international law. This decision was largely criticised by the doctrine as judicial activism encroaching on legislative power, and as an impermissible overstepping of the competences of the Court in enlarging the scope of Article 112 para. 1 of the Constitution[1062]. Even so, the Constitutional Court reiterated its stance in its following case-law[1063].

It follows from the jurisprudence of the Constitutional Court that the Convention has been "constitutionalised" to form part of the norms of reference for the review of constitutionality and part of the Czech constitutional order. As a consequence, any conflict with the Convention on the part of national authorities entails a conflict with the Czech Constitution. The Constitutional Court may then avail of its competence and strike down the conflicting statute or other legal regulation, its provision, or a conflicting individual decision of a public authority.

10. Relevance of the Convention and the case-law of the ECHR in the Practice of the Czech Constitutional Court

As to the approach of the Constitutional Court toward final judgments of the ECHR, one of the former judges of the Constitutional Court observed in his report at a seminar of the Venice Commission on "The Value of Precedents (national, foreign, international) for Constitutional Courts" the following: "The case law of the Czech Constitutional Court generally reflects that of the European Court of Human Rights. There are no great differences between them, nor is there any noncritical application"[1064].

[1062]J. Filip, "Nález č. 403/2002 Sb. jako rukavice hozená ústavodárci Ústavním soudem", in *Právní zpravodaj*, 3/2002, no. 11, pp. 12-15; V. Sládeček, "Ústavní soudnictví", 2nd ed., C.H. Beck, Prague, 2003, pp. 104-106; J. Malenovský, "Euronovela Ústavy: "Ústavní inženýrství" ústavodárce nebo Ústavního soudu či obou?", in J. Kysela (ed.), *Deset let Ústavy České republiky: východiska, stav, perspektivy*, Eurolex Bohemia, Prague, 2003, pp. 173-189.

[1063]See judgments no. Pl. ÚS 34/02 of 5 February 2003; no. I. ÚS 752/02 of 15 April 2003; no. Pl. ÚS 44/02 of 24 June 2003; no. Pl. ÚS 44/03 of 5 April 2005. In judgment no. Pl. ÚS 44/02 the Constitutional Court annulled a part the Bankruptcy Act for its inconsistency with Article 1 of Protocol No. 1 to the Convention.

[1064]S. Balík, speech at the seminar on "The Value of Precedents (national, foreign, international) for Constitutional Courts" (Baku, 2-4 September 2004): A few notes on the Case Law of the Czech Constitutional Court, the European Court of Human Rights and the European Court of Justice and its role in the Czech

The Constitutional Court has described its stance to the case-law of the ECHR as follows: "The Constitutional Court does not cast any doubt on the content of a binding judgment of the European Court in the cases against the Czech Republic representing a commitment of the Czech Republic which follows from international law. The Czech Republic is obliged to abide by such commitments not only under international law, but also under Article 1 para. 2[1065] of the Constitution"[1066]. So, apart from the international commitment undertaken under the Convention, the obligation to abide by the judgments of the ECHR and to implement them implies directly from the Constitution. The Constitutional Court draws its competence for implementing the ECHR's case-law from Article 87 para.1 para. i) of the Constitution, pursuant to which it "shall rule on measures essential for the implementation of a ruling by an international court, which is binding for the Czech Republic, unless it can be implemented in a different manner".

The Constitutional Court has also expressed itself on the importance of interpretation of the Convention by the ECHR for national authorities. It has considered that the relevance of the ECHR's judgments reaches "constitutional quality" in the Czech law and that "public authorities have a general duty to take into account the interpretation of the European Convention by the European Court in the cases brought before the Court against the Czech Republic, as well as in those concerning other member states of the Convention if the nature of the latter also makes them important for the interpretation of the Convention in the Czech context"[1067].

The Constitutional Court takes into account the case-law of the ECHR and quotes it on a regular basis. As the Convention was declared by the Constitutional Court to form part of the constitutional order, or the Constitution in the larger sense, the Constitutional Court has also referred to it when striking down parts of statutes or statutory provisions for their incompatibility with the Convention. As the Convention is directly applicable, the Court has directly applied its provisions, for example, to deal with the issue of the state's responsibility for compensation of immaterial injury incurred as a result of the illegal deprivation of

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Republic: Report, September 2004, p. 6;available at:http://www.venice.coe.int/webforms/documents/?pdf=CDL-JU(2004)047-e.

[1065]According to this provision "The Czech Republic shall observe its obligations under international law".

[1066]Judgment no. II.ÚS 604/02 of 26 February 2004.

[1067]Judgment no. I. ÚS 310/05 of 15 November 2006.

personal liberty[1068], the issue of squeeze-outs[1069], or the long-term inactivity of Parliament as regards adoption of legislation regulating unilateral augmentation of rents and other matters related to rents[1070]. As concerns the ordinary courts, it can be claimed that, in comparison with the 1990's when the Constitutional Court was, in relation to the ordinary courts to a certain extent, a pioneer in the application of constitutional norms, the situation has changed in that these courts also regularly refer to the provisions of the Convention and use the European case-law in their argumentation[1071].

From amongst the judgments of the ECHR finding a violation of the Convention, which have had an impact on the amendment of the domestic legislation, can be adduced, for example, the case of *Rashed*[1072] which induced an amendment of the Act on Asylum, the case of *Macready*[1073] which brought about an amendment of the Act on Courts and Justices introducing a motion for setting a time-limit for procedural actions as a preventive measure against delays in judicial proceedings, or the case of *Hartman*[1074] which induced, in 2006, the adoption of a law providing for compensation for immaterial injury.

As regards the issue of the reopening of proceedings following judgments of the ECHR finding a violation, a reopening of proceedings before the Constitutional Court is possible in both criminal and civil matters. Pursuant to Article 119 of the Act on the Constitutional Court, if the Constitutional Court rendered a decision in a matter in which an international court later found that a human right or fundamental freedom had been infringed in conflict with an international treaty, a petition for reopening may be submitted against such decision of the Constitutional Court under the conditions set down in that statute. The institute of reopening of proceedings in criminal matters before the Constitutional Court was introduced in 2004 by an amendment of the Constitutional Court Act in reaction to the judgment of the

[1068]Judgment no. I. ÚS 85/04 of 13 July 2006.
[1069]Judgment no. III. ÚS 2671/09 of 3 March 2011; or judgment no. I. ÚS 1768/09 of 21 March 2011. The Constitutional Court made reference to cases concerning the squeeze-out dealt with by the ECHR in the judgment of *Kohlhofer and Minarik v. the Czech Republic*, nos. 32921/03, 28464/04 and 5344/05, 15 October 2009.
[1070]Judgment Pl. ÚS 20/05 of 28 February 2006. The Constitutional Court referred to Article 1 of Protocol No. 1 to the Convention.
[1071]P. Holländer, "The Role of the Constitutional Court in Application of the Constitution by the Ordinary Courts", in *Law in Transition, Transition in Law,* the Ljubljana Law Faculty, 2003, pp. 89-111.
[1072]*Rashed v. the Czech Republic*, no. 298/07, 27 November 2008.
[1073]*Macready v. the Czech Republic*, nos. 4824/06 and 15512/08, 22 April 2010.
[1074]*Hartman v. Czech Republic*, no. 53341/99, ECHR 2003-VIII (extracts).

ECHR in the case of *Krčmář and others*[1075]. As of 1 January 2013, to reopen proceedings before the Constitutional Court is also possible in civil matters by virtue of an amendment of the Constitutional Court Act from 2012. The case of *Krčmář* is interesting in that it was the first judgment in which the ECHR found a violation of the Convention by the Czech Republic.

11. Summary

The dialogue between the national supreme courts and the ECHR is conducive to the attainment of greater effectiveness in the protection of fundamental rights and freedoms by way of the harmonisation of their interpretation and application. The interaction between the ECHR and the national courts is based on the principle of subsidiarity allowing the national courts a wide margin of appreciation. In this regard I would refer to the relationship between the ECHR and the national jurisdictions as that of balancing of power. Both the national and European jurisdictions have tools of their own enabling them to exercise their sphere of power vis-à-vis one another. While the ECHR has the power to restrict the margin of appreciation of the states by way of application of the European consensus doctrine or by specifying the measures that need to be adopted so that the legislation be rendered to conform with the Convention, the national jurisdictions dispose of great discretion with regard to the determination of the public interest justifying restrictions of the rights guaranteed by the Convention. The use of European consensus in the legal reasoning of the ECHR places restrictions not only on the margin of appreciation given to states, but also on the ECHR's evolutive interpretation of the Convention. The fact that the ECHR has interpreted the Convention progressively in the light of the "living instrument" doctrine should not be perceived as the former having assumed a status of a supreme European human rights court. The principle of subsidiarity remains to be the major principle of interaction between the ECHR and national courts, which was confirmed by the recent adoption of Protocol No. 15 to the Convention.

The extent to which the national constitutional courts implement the case-law of the ECHR varies depending on the status of the Convention within the particular legal order and the system of constitutional protection of fundamental rights and freedoms, and on the judges' will to apply the Convention. Pursuant to both national constitutions in France and the Czech

[1075] *Krčmář and Others v. the Czech Republic*, no. 35376/97, 3 March 2000.

Republic, international human rights treaties enjoy a supra-legislative force, but are inferior to the Constitution. The Czech Constitutional Court, however, considers these treaties as forming part of the constitutional order and, therefore, treats them as being superior to ordinary laws. Due to the constitutional value of the Convention accorded by the Constitutional Court, the latter takes it as a norm of reference in the control of constitutionality and applies it directly in its decision-making, which means that it can strike down legislation and decisions of ordinary courts that are contrary to the Convention. The implementation of the case-law of the ECHR is, thus, rather intensive. This is, however, not the case of the French Constitutional Council. Since it refuses to control the compatibility of laws with the Convention, it seems not to be influenced by the law and practice of the Convention. This situation may give rise to potential conflicts with the ECHR. The Constitutional Council did not accord, as opposed to the Czech Constitutional Court, a constitutional status to the Convention. The duality in review of constitutionality and conventionality, and the fact that the Constitutional Council does not exercise the power of striking down laws that are in conflict with the Convention, whereby it could eliminate, as well as prevent, possible interferences with the Convention, runs the risk of the potentiality of clashes between the findings of the Constitutional Council, on the one hand, and those of the ECHR and the ordinary courts of the control of conventionality, on the other. These potential clashes involve situations where the Council rules on compatibility of national law with the Constitution and the ECHR finds that the same national law violates the Convention, and situations where the findings of the constitutionality and conventionality of laws do not meet and unconventional legislation remains part of the legal order. A recent constitutional reform introducing the institute of a priority question of constitutionality does not clear away this imminence. Potential differences in the assessment of the constitutionality and conventionality of laws seem to be a point of friction in the relationship between the courts of review of conventionality and the Constitutional Council, and a finding of a violation of the Convention by the ECHR may potentially lead an ordinary judge to interfere with the authority of the Constitutional Council. There seems to be rather a dialogue between the ECHR and the supreme courts of the control of conventionality which perform the task of harmonising national law with the law and practice of the Convention. Moreover, as a consequence of the introduction of the priority question of constitutionality, these courts have become *de facto* and *de jure* constitutional judges. The ECHR has, undoubtedly, helped to improve human rights guarantees through domestic case-law. In this regard it can be said that there has been a Europeanisation of protection, as the law of the Convention is integrated in

the decision-making of courts, including the Constitutional Council. But it is obvious that the effectiveness of the implementation of the norms and the case-law of the Convention on the national level would be enhanced if the Convention were incorporated into the bloc of constitutionality and, thereby, obtained constitutional force. The constitutional review and the role of the Constitutional Council would, thus, be reinforced to the level of the Czech Constitutional Court.

Chapter 6: Conclusion

The question as to what extent the constitutional protection of property in France and in the Czech Republic is in harmony with the property protection standards laid down by the European Convention on Human Rights was analysed by virtue of research into several specific areas: the philosophical and theoretical foundations, the meaning and scope of the property guarantees and their judicial interpretation, limitations and deprivations of property, and the constitutional approaches to the implementation of the law and practice of the Convention. The inquiry has embraced two fundamental concepts that can be distinguished from the point of view of constitutional rights: the scope of the constitutional right of property and the limitations to which it is subject. While the scope of the constitutional right of property defines its content and boundaries, the limitations on property entail the constitutional conditions under which the right may be restricted in a proportional manner by laws. The scope of the constitutional right of property is determined in keeping with the principles of constitutional interpretation. The same applies to rights and freedoms enshrined in the European Convention on Human Rights and the principles of their interpretation by the ECHR.

I. Philosophical and Theoretical Foundations

Through examination of principal philosophical ideas underlying property guarantees in the Convention and in the constitutions of France and the Czech Republic it ensues that it is primarily an idea of natural rights, in addition to a mainly republican or civic influence, that affected the justification of the property guarantee in those documents. It entails a justification of property based on the ideal of autonomy – if an individual produces or gains something by labour or by contract without breaching the rights of others, he is entitled to the fruits of his action, an entitlement representing his autonomy. The natural rights theory influenced the ideological substance of the fundamental property protection clauses being studied - all assure property to be a natural, imprescriptible, inviolable, or sacred fundamental right and the obligation of the state to allow interferences with it only under strictly defined conditions. The Czech and French constitutional guarantees of property also share the accentuation of the principles of liberty and equality that can be traced to the natural law influences.

The common characteristic of the approaches to property under scrutiny is that they recognise the dual function of property comprising the individual and the social, or public, function of property. They are reflected in property guarantees which recognise property as a fundamental right and the power of state to interfere with property for public, or general, interest.

The individual function of property aims at protecting material wealth and prosperity which are necessary preconditions for social stability and maintaining democratic governance. From this point of view property may be conceived as a subjective public right comprising an enforceable entitlement of the individual to claim specific duties from the state, whereby the state is obliged to ensure the undisturbed enjoyment of property rights of the individual and to protect them against interferences. Accordingly, it is not sufficient that the state only refrains from interferences with subjective rights of the individual, but it must also act in order to safeguard their protection. As concerns the Czech Constitution, it clearly implies from the property guarantee that the state secures the same content of property rights and the same protection for every owner, whereas the French Declaration lacks any similar provision, although both the negative and positive obligations of the state to protect the natural rights of every man is implied indirectly from the general wording of the Preamble of the Declaration pursuant to which the Declaration may remind the legislative and the executive power, denoted as "all members of the body politic", of their "duties".

Although the purpose of property protection clauses is to safeguard personal autonomy in property matters, the social function of property suggests that the reason for the recognition of the institution of property is to advance the collective good of society. The acknowledgment of the duty of men to satisfy others' needs is an idea that stands behind the conception of property as a social function not only in the constitutions under scrutiny, but in the Convention as well.

From a philosophical point of view, there is no great difference between the property guarantee in the Convention and in the constitutions under scrutiny, though the latter guarantees compensation for property takings in the public interest. The aim of the recognition of property is not limited to a classical liberal idea of the minimalist state, that is, to creating a sphere of security from state interferences, but it is also to facilitate the individuals to realize their human potential and live a dignified life. In this regard the Czech Constitution goes further than the French in that it explicitly stipulates that ownership obliges

and prohibits the owner from using his property in a harmful way. The insertion of duties that are attached to ownership in the property guarantee implies that individuals have obligations to participate in the creation of a society that preserves human dignity. This idea essentially entails the justification of the power of the state to regulate social relations which can also be seen in the property guarantee in the Convention.

The fundamental property protection clauses do not only protect the rights of individuals, they also provide for their duties. Hence, the fundamental right of property as a subjective public right is a multilayered right in a generic sense comprising as it does both right and duty elements - property comprises a sphere of liberty, or freedom from the right or claim of another, as well as claim-rights to its protection, and it implies duties and liability to sustain an alteration of property which corresponds to a power of the state to limit or take property from an individual. This conception of property as a bundle of rights becomes relevant when a property protection clause distinguishes different interferences, such as in the Convention and in the constitutional property guarantees under scrutiny. It is helpful to establish whether an interference with property constitutes a deprivation or a control of the use of property. Namely, Hohfeld's opposites and correlatives prove to be useful in the framework of a fair-balance test – in a balancing of interests and assessing the impact of restrictive measures on individual property rights. When one right from the bundle of rights is lost or restricted with the owner retaining the remainder of the rights from the bundle, the interference does not entail a deprivation of property. Only a total loss of all attributes of ownership would amount to a deprivation. Hence, Hohfeld’s theory of rights or correlatives highlights the social and political dimension of property rights.

II. Meaning and Scope of the Property Guarantees

i. Concept of Property

The ECHR defined its autonomous concept of property and thus determined the scope of protection of property under the Convention in terms of objects. Accordingly, the notion of property under the Convention is independent of any national concepts of constitutional property. It is not limited to the ownership of physical goods and comprises all vested rights of pecuniary value, including some public law rights, such as pensions and social benefits. The essential criterion is the economic value of the interest, notwithstanding that the national law of the contracting state does not recognize the right as property.

As regards the approach of the Czech and French constitutional jurisdictions, it appears that from the point of view of the ECHR's practice of interpreting the notion of property rather broadly, each constitutional jurisdiction has adopted a distinct approach. In France the constitutional concept of private property as objects, as interpreted by the French Constitutional Council, seems to be more restricted than the one under the Convention. The Constitutional Council interprets the scope of the right of property more strictly in comparison with the ECHR, as it does not recognize every patrimonial value as property protected by the constitution, notwithstanding that the scope of the constitutional concept of property is wider in that it also comprises property of public persons, which is, under the Convention, excluded by definition, as the purpose of Article 1 of Protocol No. 1 is to protect natural or legal persons from arbitrary interferences with their possessions by the state. Nonetheless, the constitutional interpretation of the concept of property is not binding for the Council of State or the Court of Cassation in their exercise of the control of conventionality and they are, thus, free to adopt a broad interpretation and adhere to the patrimonial value criterion.

The Czech Constitutional Court, on the other hand, refers to the case-law of the ECHR and does not hesitate to assess cases in the light of the conventional notion of property - it adheres to the notion of property under the Convention and directly applies it in its practice. It follows that, in terms of property as objects, the Czech constitutional practice shows appreciably greater harmony with and openness to the external influence of the ECHR than the French Constitutional Council.

ii. Scope of the Property Guarantee

As regards the scope of the protection of property under the Convention, the ECHR has identified three distinct rules that comprise the property guarantee under P1-1. Accordingly, P1-1 involves a general guarantee of the peaceful enjoyment of possessions, and clauses protecting against arbitrary limitations and deprivation of property.

In France, with regard to the fact that Article 17 of the French Declaration has only a limited application to property takings, the scope of the constitutional property guarantee had long lagged behind the European standard laid by the Convention until the French Constitutional Council recognized two distinct constitutional rules on limitations and deprivations of property with a definitive effect. By acknowledging Article 2 of the Declaration as the norm

of reference for the examination of limitations of property, whereby the constitutionality of restrictions is conditioned by the requirements of the general interest and proportionality, the Constitutional Council attained to the structure of P1-1. But the guarantee in Article 17 of the Declaration, which lays down protection against unlawful takings, provides for greater protection than P1-1 of the Convention in that it requires payment of compensation.

The content of the Czech property guarantee is more comprehensive than that of the French Declaration which is obviously due to different periods in which these two documents were drafted and by the fact that the texts of the Czech Constitution and the Charter were largely influenced by international human rights documents adopted in the 20th century in addition to other factors. This is why the Czech Charter, unlike the French Declaration, provides for a structure of the property clause that is notably similar to that of P1-1 and, moreover, attaches duties to ownership.

Hence, it can be stated that constitutional property protection in both countries corresponds in scope to the structure of Article 1 of Protocol No. 1 to the Convention, which means that they provide more-or-less equivalent protection to property. Although the practice of the French Declaration is dispersed between two distinct provisions, its scope follows the structure of P1-1. The level of property protection, thus, seems to be convergent due to the interpretative practice of the Constitutional Council. Moreover, in both countries under scrutiny the property protection against takings oversteps the potential of P1-1 in that they provide for compensation.

As regards the approach to property as a bundle of rights, to which the practice of the ECHR seemingly adheres, it can also be claimed that both constitutional jurisdictions under scrutiny conceive property as a multitude of independent rights of the owner through a thing where an interference with one of the attributes of property leaves intact the others. By recognizing the social function of property, that is, that ownership entails obligations vis-à-vis society, the constitutional jurisdictions apparently do not conceive property as a monolithic aggregate of entitlements over a thing giving the owner an ample sphere of negative freedom within the civil law meaning of the notion. Although they depart from the civil law concept of property, they enlarge it by a dynamic interpretation under the perception of property as a constantly evolving institute.

III. Judicial Interpretation of Property Guarantees

i. Acknowledgment of the Social Dimension of Property

Although, historically, the right of private property has been regarded as an essential precondition for the creation of a private sphere of autonomy of an individual, the right of property is also unique in that the recognition of one person's property rights necessarily implies a restriction of the property rights of others. The right of property is not exercised in a vacuum, but within the context of the society in which it interacts and clashes with other rights. Moreover, property rights are the prerequisite for the exercise of all other rights to the extent that they determine access to the basic means of subsistence. The right of property is not an absolute right, but a right whose purpose and scope is constantly changing and evolving in consonance with the evolution of society and its changing economic, social, and political needs that are reflected in the general or public interest - the objectives and the conditions for the exercise of the right of property have undergone an evolution characterized both by a significant extension of its sphere of application to particular new areas and by limitations required in the name of the public interest. The latter has enabled the ECHR and the national constitutional jurisdictions to take into account the social function of the right of property which resides in satisfying the needs of society. Hence, the individualistic conception of the right of property formerly set out in the French Declaration has been slowly substituted by the idea of property limited by its function to serve public good in the name of social solidarity. The scope of the right of property, in general, is being narrowed down and oscillates between constitutional guarantees and restrictions. This is what all jurisdictions under scrutiny have in common.

Accordingly, in the interpretation of the property protection clauses all three jurisdictions under scrutiny recognise the social character of property and take into account its evolution. For the ECHR the Convention is a dynamic "living" instrument which responds to the evolution of society and which must be interpreted in light of present-day conditions. Further, constitutional judges have not perceived property as a static institute, but rather as an ever-developing one which has taken on many new forms, and for which the definition of the Civil Code is no longer sufficient. Both constitutional jurisdictions draw on the civilian conception and conceive property as a sphere of autonomy of the owner in disposition of his property which is not absolute, but restricted by the limits of law and by subjective rights of other persons. In line with the ECHR, to promote dynamism permitting the adaptation of property

to new domains, they have conceived constitutional property as enlarged in scope and overlapping the individual dimension. The congruence in approach is significant considering the case-law of the ECHR evolves according to the social evolution in the member states of the Convention.

ii. Interpretation of Justificatory Interferences with Property

The evolutive tendency for property rights is that property as objects has been constantly enlarging, while property as rights has been experiencing ongoing restrictions in the name of the public interest. This "narrowing down" of property freedom is significantly influenced, along with other factors, by the way property as a fundamental right is interpreted by the "guardian" judges of the constitution. It is, beyond doubt, that it is a utility, on behalf of society, that influences the modern understanding of property. The ECHR as the standard-setting body in the area of fundamental rights has grown in relevance in national legal systems, as it has had a significant influence on the way in which fundamental rights are interpreted and strengthened on the national level. One of the inquiries was directed at the extent to which the constitutional jurisdictions under scrutiny stay in harmony with the standards set by the Convention organs in respect of the justificatory criteria of interferences with property.

The examination has revealed that there is, generally speaking, conformity with the practice of the ECHR and that the means of interpretation of the respective property protection clauses by the constitutional jurisdictions under scrutiny is comparable with the law and practice of the Convention.

It was established that although national constitutional judges do not refer to an autonomous norm applicable to interferences that cannot be qualified either as a deprivation or a control of the use of property, it does not mean that they would render lesser protection to property on a national level. It was, rather, suggested that the potential subjectivity and ambiguity connected with the application of the autonomous norm is susceptible to bringing about not only inequalities as to the right to compensation, especially in cases where the economic loss is comparable to that arising from deprivation, but also fluctuations in the degree of protection of property, and may create uncertainty as to the interpretation of the property guarantee for national constitutional jurisdictions that follow the case-law of the ECHR.

It was further established that for all jurisdictions under scrutiny the gravity of interfrence is an important factor in the assessment of not only proportionality of interferences, but also their nature, especially in cases that amount to a *de facto* deprivation of possessions which is, in the national constitutional practice under scrutiny, treated under the limitation rule as opposed to the practice of the ECHR which applies the deprivation rule. Such a difference in qualification has an impact on the amount of compensation. If, in the Czech and French constitutional practice, the criterion of gravity is limited to the distinction between a limitation and a deprivation, it has a wider application in the practice of the ECHR which may also avail of it in the assessment of applicability of the general rule prohibiting interferences with the peaceful enjoyment of possessions.

As regards the justificatory principles of interferences with property, it was adduced that they are, in substance, congruent with the standards set up by the Convention and the ECHR and comprise the criteria of legality, legitimacy, proportionality, and compensation. The principle of lawfulness is conceived in harmony comprising as it does both formal and qualitative aspects, including the availability of procedural guarantees to challenge the lawfulness of interferences with property. Similar to the ECHR, the national constitutional bodies conceive the notion of public interest as an open-ended and casuistic concept which does not necessarily have to be connected with the interests of the state or the general public, but it may also comprise interests of private parties, provided that the interests are beneficial to the public at large. In this respect the French Constitutional Council's conception of the general interest seems to be much broader than that of the Czech Constitutional Court, as the former seems to exercise a restricted power of scrutiny vis-à-vis the legislator, which means that the French legislator seems to enjoy a wide margin of appreciation similar to that enjoyed by national parliaments under the Convention.

Although there is apparent congruence of the national constitutional practice under scrutiny with the practice of the ECHR regarding the criteria of lawfulness and legitimacy, as concerns the other criteria that are judge-made - proportionality and compensation - there are some slight differences in its approach compared to the ECHR, but they do not disturb the global harmony that has been achieved and maintained between the French and Czech constitutional jurisdictions, on the one hand, and the ECHR, on the other. It follows that the ECHR does not apply the test of proportionality in property cases in the same rigorous fashion as the Czech Constitutional Court, as it shows leniency with the legislator and does not apparently deal

with the aspect of necessity of a measure or the existence of less onerous means. A similar approach has been adopted by the French Constitutional Council which examines only manifestly disproportionate errors of the legislator in deprivation of property cases, thus leaving the latter with wide powers of discretion. However, it performs a more severe control with respect to limitations of property, and, thus, conforms to the exigencies of the ECHR, by examining whether an interference is justified by the general interest and is proportionate to the objective sought. The Czech Constitutional Court, by exercising a three-tier control of proportionality, sets up a stronger defence against arbitrary disproportionate interventions than the ECHR, and it scrutinises not only the gravity of interference, but also the subjective choice of the legislator. It follows that the Czech constitutional judges perform a more stringent control of proportionality compared to the ECHR and their French counterparts. In the area of compensation all jurisdictions under scrutiny differentiate between compensation for deprivations and limitations of property and require compensation for takings. In general, the divergences pertain mainly to the conditions of payment and the amount of compensation for limitations.

The way the constitutional guarantee of property has been interpreted by the constitutional jurisdictions is also influenced by the status of the Convention within the respective national legal orders and within the system of constitutional review. In adherence to the interpretative practice of the ECHR in the field of property protection the Czech practice seems to be, from a global perspective, more convergent than the French one, as the Constitutional Court relies directly on the Convention and its Protocols and on the case-law of the ECHR and considers the Convention as part of the constitutional order, whereas for the French Constitutional Council the Convention does not represent a norm of reference in the control of constitutionality. As the French Constitutional Council does not make express reference to the Convention and the ECHR's case-law, the latter's impact on its decision-making is latent and not as visible as in the case of the Czech Constitutional Court. Accordingly, the influence of the ECHR on the interpretation of fundamental rights seems to be relatively limited when compared to the influence the Convention has had on the jurisprudence of the Czech Constitutional Court. Hence, the difference between the Czech and French constitutional practice is that the Convention is only a source of inspiration and does not form part of the bloc of constitutionality for the French Constitutional Council, whereas the Czech Constitutional Court has awarded international human rights treaties a constitutional force and, thus, derogative effects.

With regard to the findings of the inquiry in specific areas it can be stated that the standard of protection of private property in the constitutional orders under scrutiny is in harmony and complies with the standard of protection under the Convention. Although the French Constitutional Council does not, as opposed to the Czech Constitutional Court, directly interpret and apply the Convention nor consider it as forming part of the constitutional legal order, the analysis has manifestly ascertained that the standard of the French constitutional property protection is in complete conformity and comparable with the Convention and the practice of the ECHR.

Bibliography

Ackerman B. A., "Private Property and the Constitution", Yale University Press, 1977.

Ahman K., "The Right of Property in Conflict with other Protection-meriting Rights or Interests", in *Human Rights: Their Limitations and Proliferation*, P. Wahlgren (ed.), Scandinavian Studies in Law, Stockholm Institute for Scandinavian Law, Vol. 55, 2010.

Alexy R., "A Theory of Constitutional Rights", Oxford University Press, 2002.

Alexy R., "Rights and Liberties as Concepts", in *Comparative Constitutional Law*, M. Rosenfeld, A. Sajó (eds.), Oxford University Press, 2012.

Allen T., "The right to property in commonwealth constitutions", Cambridge University Press, 2000.

Allen T., "Closing the door on restitution", in *Transitional Jurisprudence and the ECHR*, A. Buyse and M. Hamilton (eds.), Cambridge University Press, 2011.

Allen T., "Liberalism, Social Democracy, and the Value of Property under the European Convention on Human Rights", *International and Comparative Law Quarterly*, Vol. 59, 2010.

Alexander G. S., "Constitutionalising Property: Two Experiences, Two Dilemmas", in *Property and the Constitution,* Janet McLean (ed.), Hart Publishing, Oxford-Portland Oregon, 1999.

Andriantsimbazovina J., "La prise en compte de la Convention européenne des droits de l'homme par le Conseil constitutionnel, continuité ou évolution?", *Cahiers du Conseil Constitutionnel no. 18*, July 2005.

Aranjo de C., "Justice constitutionnelle et justices européennes des droits de l'Homme. Étude comparée: France-Allemagne", Bruylant, 2009.

Auby J.-B., "Le recours aux objectifs des textes dans leur application en droit public", *RD publ.*, 1991.

Aziz M., "The impact of European rights on national legal cultures", Hart Publishing, Oxford - Portland Oregon, 2004.

Barak A., "Proportionality (2)", in *The Oxford Handbook of Comparative Constitutional Law*, M. Rosenfeld, A. Sajó (eds.), Oxford University Press, 2012.

Beitz C., "The Idea of Human Rights", Oxford University Press, 2011.

Bell J., "French Constitutional Law", Oxford University Press, 2001.

Berlin I., "Two concepts of Liberty", in *The Proper Study of Mankind: An Anthology of Essays*, New York, Farrar, Straus&Giroux, 1998.

Berlioz P., "La notion de bien", L.G.D.J., 2007.

Bernard A., Huyghe M., "Expropriation des biens", 2006.

Biglione F., "La notion de privation de propriété, Étude relative a la propriété immobilière", PUAM, 1999.

Boguszak J., Čapek J., Gerloch A., "Teorie práva", Eurolex Bohemia, Prague, 2001.

Bon P., "La question prioritaire de constitutionnalité après la loi organique du 10 décembre 2009", *RFDA*, no. 6, novembre –décembre 2009.

Bonnard R., "Les droits publics subjectifs des administrés", *RDP*, 1932.

Boulet M., "Questions prioritaires de constitutionnalité et réserves d'interprétation", *RFDA*, juillet-août 2011.

Bousta R., "Essai sur la notion de bonne administration en droit public", L'Harmattan, Paris, 2010.

Bratza N., "Living Instrument or Dead Letter – The Future of the European Convention on Human Rights", *European Human Rights Law Review*, 2 (2014).

Brunet P., "Les garanties de la propriété par le juge constitutionnel", in *La propriété*, Vol. LIII, 2003, Travaux de l'Association Henri Capitant, Société de législation comparée, 2006.

Bühler O., "Die subjektiven öffentlichen Rechte und ihr Schutz in der deutschen Verwaltungsrechtsprechung", Kolhammer, Berlin/Stuttgart/Leipzig, 1914.

Čapek J., "Evropský soud a Evropská komise pro lidská práva", Linde Praha a.s., Prague, 1995.

Capitant R., "L'illicite. L'impératif juridique", Paris, 1928.

Carré de Malberg R., "*Contribution à la théorie générale de l'État"*, Vol. II, Paris, CNRS Éditions, 1985.

Cartier E., "La QPC, le procès et ses juges. L'impact sur le procès et l'architecture juridictionnelle", Dalloz, Paris, 2013.

Christoffersen J., "Straight Human Rights Talk – Why Proportionality does (not) Matter", in *Human Rights: Their Limitations and Proliferation*, P. Wahlgren (ed.), Scandinavian Studies in Law, Stockholm Institute for Scandinavian Law, Vol. 55, 2010.

Coban A. R., "Protection of property rights within the European Convention on Human Rights", Ashgate, 2004.

Conac G., Debene M., Teboul G., "La déclaration des droits de l'homme et du citoyen de 1789", Economica, Paris, 1993.

Condorelli L., "Premier protocole additionnel, article 1", in *La convention européenne des droits de l'homme, commentaire article par article*, L.-E. Pettiti, E. Decaux, P.-H. Imbert (eds.), 2nd ed., Economica, 1999.

Connil D., "L'étendue de la chose jugée par le Conseil constitutionnel lors d'une question prioritaire de constitutionnalité: observations dubitatives sur l'état de la jurisprudence", *RFDA*, juillet-août 2011.

Constantinesco V., Pierré-Caps S., "*Droit constitutionnel"*, Paris, PUF, coll. "Thémis", 2004.

Costa J.-P., "The Relationship between the European Court of Human Rights and the National Courts", *European Human Rights Law Review*, 3 (2013).

Costa J.-P-, "Some aspects of the Influence of the European Convention on Human Rights on Domestic Law", in *Comparative Law before the Courts*, G. Canivet, M. Andenas, D. Fairgrieve (eds.), British Institute of International and Comparative Law, London, 2004.

Coste-Floret P., "La nature juridique du droit de propriété d'après le Code civil et depuis le Code civil", Sirey, 1935.

Crowder R., "Restitution in the Czech Republic: Problems and Prague-nosis", *Indiana International and Comparative Law Review* 5 (1994).

David R., Brierley J., "Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law", Stevens and Sons, London, 1968.

Dedek H., "From Norms to Facts: the Realization of Rights in Common and Civil Private Law", *McGill Law Journal / Revue de droit de McGill*, Vol. 56, No. 1, December 2010.

Deswarte M.-P.,"L'intérêt général dans la jurisprudence du Conseil constitutionnel", *RFD const*., 1993.

Disant M., *"*Droit de la question prioritaire de constitutionnalité. Cadre juridique. Pratiques jurisprudentielles*",* Lamy coll. "Axe droit", 2011

Drago G., "Contentieux constitutionnel français", 3rd ed., Paris, PUF, 2011.

Duguit L., "The Law and the State", (1917) 31 *Harvard Law Review* 1.

Duguit L., "Les transformations générales du droit privé depuis le Code napoléon", 2nd ed., 1920.

Duguit L., "Études de droit public, p. I: L'État, le droit objectif et la loi positive", Paris, A. Fontemoins, 1901.

Duguit L., "Traité de droit constitutionnel", 3rd edition, Paris, Ancienne librairie fontemoing, 1930, Vol. III.

Dupré C., "France", in *Fundamental Rights in Europe: The European Convention on Human Right and its Member States, 1950-2000*, R. Blackburn, J. Polakiewicz (eds.), Oxford University Press, 2001.

Dupré de Boulois X., "Jurisprudence administrative et Convention européenne des droits de l'homme", *RFDA*, mai-juin 2012.

Dworkin R., "Prendre les droits au sérieux", PUF, 1995.

Dzehtsiarou K., "Interaction between the European Court of Human Rights and member States: European consensus, advisory opinions and the question of legitimacy", in *The European Court of Human Rights and its Discontents: Turning Criticism into Strength*, S. Flogaitis and J. Fraser (eds.), Edward Elgar Publishing Limited, 2013.

Dzehtsiarou K., "European Consensus and the Evolutive Interpretation of the European Convention on Human Rights", *German Law Journal*, Vol. 12, No. 10., 2011.

Dzehtsiarou K., "Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights", *Public Law*, 2011.

Edmundson W. A., "An Introduction to Rights", Cambridge University Press, 2004.

Eisenmann C., "La justice constitutionnelle et la haute cour constitutionnelle d'Autriche", Paris, PUAM-Economica, 1986.

Eissen M.-A., "Le principe de proportionnalité dans la jurisprudence de la Cour européenne des droits de l'homme", in *La Convention européenne des droits de l'homme, commentaire article par article*, L.-E. Pettiti, E. Decaux, P.-H. Imbert (dir.), 2en ed., Economica, 1999.

Emerich Y., "La propriété des créances: approche comparative", L.G.D.J., Paris, 2007.

Esmein A., "Eléments de droit constitutionnel français et comparé", 8th edition, Sirey, Paris, 1927.

Fartunova M., "Report on France", in *The National Judicial Treatment of the ECHR and EU Laws: A Comparative Constitutional Perspective*, G. Martinico, O. Pollicino (eds.), Europa Law Publishing, 2010.

Favoreu L., "Les libertés protégées par le Conseil constitutionnel", in *Conseil constitutionnel et Cour européenne des droits de l'homme*, Dominique Rousseau, Frédéric Sudre (eds.), Actes du Colloque de Montpellier des 20-21 janvier 1989, Éditions STH, Paris, 1990.

Favoreu L., "Bloc de constitutionnalité", PUF, Paris, 1992.

Favoreu L., Philip L., "Les grandes décisions du Conseil constitutionnel", 13th ed., Dalloz, Paris, 2005.

Favoreu L., "Une Grande Decision", in *Nationalisations et Constitution*, Économica, 1982.

Filip J., "Nález č. 403/2002 Sb. jako rukavice hozená ústavodárci Ústavním soudem", *Právní zpravodaj*, no. 11, 3/2002.

Filmer R., "The Original of Government", in *Patriarcha and other Writings*, Johann P. Sommerville (ed.), Cambridge University Press, 1991.

Flauss J.-F. "Les droits sociaux dans la jurisprudence du Conseil constitutionnel", in *Droit social*, 1982.

Flauss J.-F., "Dualité des ordres de juridiction et Convention européenne des droits de l'homme", in *Gouverner, administrer, juger*, Dalloz, Paris, 2002.

Foster F. H., "Restitution of Expropriated Property: Post-Soviet Lessons for Cuba", *Columbia Journal of Transnational Law* 34 (1996) 621.

Friedmann D., Barak-Erez D., "Human Rights in Private Law", Hart Publishing, Oxford-Portland Oregon, 2003.

Fromm E., "To Have or to Be?", ABACUS ed., London, 1982.

Frowein J., Peukert W., "Europäische Menschenrechts-konvention, EMRK-Kommentar", 2nd edition, E. P. Engel Verlag, Kehl, 1996.

Garapon A., "Les limites à l'intérprétation évolutive de la Convention européenne des droits de l'homme", *Revue trimestrielle des droits de l'homme*, no. 89, 2012.

Garlicki L., "L'application de l'article 1er du Protocole no. 1 de la Convention Européenne des droits de l'homme dans l'Europe centrale et orientale: problèmes de transition", in *Propriété et droits de l'homme-Property and human rights*, H. Vandenberghe (ed.), Bruylant&die Keure/ La Charte, 2006.

Garnsey P., "Thinking about Property – from Antiquity to the Age of Revolution", Cambridge University Press, Cambridge, 2007.

Gauksdóttir G., "The Right to Property and the European Convention on Human Rights, A Nordic Approach", Lund University, 2004.

Gaus G., "Property, Rights, and Freedom", *Social Philosophy and Policy*, Vol. 11, 1994.

Gaus G., "Property, Rights, and Freedom", in *Property Rights*, E. Frankel Paul, F. Miller, J. Paul (eds.), Cambridge University Press, 1994.

Genevois B., "Une catégorie de principes de valeur constitutionnelle: les principes fondamentaux reconnus par les lois de la République", *RFDA*, 1998.

Genevois B., "La jurisprudence du Conseil constitutionnel. Principes directeurs", Editions STH, 1988.

Genevois, B., "Le Conseil d'État et la Convention européenne des droits de l'homme", *Gazette du Palais*, no. 163, 2007.

Genevois B., "Le contrôle *a priori* de constitutionnalité au service du contrôle *a posteriori*", *RFDA*, janvier-février 2010.

Glenn H. P., "Legal traditions of the world", 2nd ed., Oxford University Press, 2004.

Goesel-Le Bihan V., "Le contrôle exercé par le Conseil Constitutionnel: défense et illustration d'une théorie générale", *RFDC*, 2001.

Goguel F., "Objet et portée de la protection des droits fondamentaux", Colloque international d'Aix-en-Provence des 19, 20, 21 février 1981, *Revue internationale de droit comparé*, 1981.

Greer S., "The margin of appreciation: interpretation and discretion under the Euroepan Convention on Human Rights", Council of Europe Publishing, Strasbourg, 2000.

Greer S., Wildhaber L., "Revisiting the Debate about "constitutionalising" the European Court of Human Rights", *Human Rights Law Review*, Vol. 12, No. 4, 2012.

Grewe C., "Les droits sociaux constitutionnels: propos comparatifs à l'aube de la Charte des droits fondamentaux de l'Union européenne", *Revue universelle des droits de l'homme*, 2000, No. 3-5.

Grewe C., Ruiz Fabri H., "*Droits constitutionnels européens"*, Paris, PUF, coll. "Droit fondamental", 1995.

Grewe C., "Methods of Identification of National Constitutional Identity", A. S. Arnaiz, C. A. Llivina (eds.), *National Constitutional Identity and European Integration*, Intersentia, Cambridge-Antwerp-Portland, 2013.

Gribnau H., "Legitimacy of the Judiciary"*, Electronic Journal of Comparative Law*, 2002.

Groussot X., "'European Rights' and Dialogues in the Context of Constitutional Pluralism", in *Human Rights, their Limitations and Proliferation*, P. Wahlgren (ed.), Scandinavian Studies in Law, Stockholm Institute for Scandinavian Law, Vol. 55, 2010.

Halpérin J.-L., "Histoire du droit des biens", Economica, Paris, 2008.

Harris D. J., O'Boyle M., Warbrick C., "Law of the European Convention on Human Rights", Butterworths, 1995.

Harris J. W., "Property and Justice", Clarendon Press, Oxford, 1996.

Harris J. W., "Is Property a Human Right?", in *Property and the Constitution*, J. McLean (ed.) Hart Publishing, Oxford-Portland Oregon, 1999.

Havlan P., "Vlastnictví státu", Masaryk University, Brno, 2000.

Hayem M., "Essai sur le droit de propriété et ses limites", in *Librairie nouvelle de droit et de jurisprudence*, 1910.

Hayek F. A., "The Constitution of Liberty", University of Chicago Press, 1960.

Hayek F. A., "Liberalism", in *New Studies in Philosophy, Politics, Economics and the History of Ideas*, Routledge and Kegan Paul, London, 1978.

Heuschling L., "Comparative Law and the European Convention on Human Rights in French Human Rights Cases", E. Örücü (ed.), in *Judicial Comparativism in Human Rights Cases*, BIICL, London, 2003.

Hoetzel J., "Zájmy veřejné. Slovník veřejného práva československého", Vol. V., Eurolex Bohemia, Prague, 2000.

Hohfeld W. N., "Fundamental Legal Conceptions", Yale University Press, Fourth printing, New Haven and London, 1966.

Holländer P., "The Role of the Constitutional Court in Application of the Constitution by the Ordinary Courts", in *Law in Transition, Transition in Law,* Ljubljana Law Faculty, 2003.

Honoré A. M., "Making Law Blind", Clarendon Press, 1987.

Hostiou R., "Note sous Cedh, Guillemin, 21 février 1997", *AJDA* 1997.

Ihering R., "Geist des römischen Rechts", Vol. 3, 10th ed., 1993.

Ihering R., "Recht und Sitte", A. Langen publ., München, 1924.

Imbert J., "Les droits de l'homme en France", la Documentation Française, no. 4781, 1985.

Jellinek G., "System der subjektiven öffentlichen Rechte", Tübingen, 1905.

Jellinek G., "System der subjektiven der öffentlichen Rechte", 2nd ed. , Verlag Von J. C. B. Mohr, 1919.

Jennequin A., "L'intelligibilité de la norme dans les jurisprudences du Conseil constitutionnel et du Conseil d'État", *RFDA*, septembre-octobre 2009.

Jílek D., Hofmann M., "Czech Republic", in *Fundamental Rights in Europe: The European Convention on Human Right and its Member States, 1950-2000*, R. Blackburn, J. Polakiewicz (eds.), Oxford University Press, 2001.

Josserand L., "De l'esprit des droits et de leur relativité, théorie dite de l'abus des droits", 2nd ed., 1939.

Kalvoda J., "Czechoslovakia's Socialist Constitution", *American Slavic and East European Review*, Vol. 20, No. 2, 1961.

Kant I., "The Metaphysical Elements of Justice", Bobbs-Merrill, Indianapolis, 1965.

Klatt M., Meister M., "Proportionality – a benefit to human rights? Remarks on the I.CON controversy", *International Journal of Constitutional Law*, Vol. 10, no. 3, 2012.

Klíma K., "Ústavní právo", Bohemia Iuris Kapitál, a.s., Prague, 1997.

Knapp V., "Teorie práva", 1st ed., C. H. Beck, Prague, 1995.

Komesar N. K., "Law's limits: the rule of law and the supply and demand of rights", Cambridge University Press, 2001.

Labayle H., "Question prioritaire de constitutionnalité et question préjudicielle: ordonner le dialogue des juges?", *RFDA*, juillet-août 2011.

Labayle H., Sudre F., "Jurisprudence de la Cour européenne des droits de l'homme et droit administratif", *RFDA*, juillet-août 2009.

Lageot C., "France", in *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case-law: A Comparative Analysis*, J. Gerards, J. Fleuren (eds.), Intersentia, Cambridge-Antwerp-Portland, 2014.

Lambert Abdelgawad E., Weber A., "The Reception Process in France and Germany", in *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, H. Keller, A. Stone Sweet (eds.), Oxford University Press, 2008.

Lang R., "Unlocking the First Protocol: Protection of Property and the European Court of Human Rights", *Human Rights Law Journal*, Vol. 29, no. 6-12, 2008.

Laubadère de A., Delvolvé P., "Droit public économique", Dalloz, 5th edition, Paris, 1986.

Lametti D., "The Deon-Telos of Private Property: Ethical Aspects of the Theory of and Practice of Private Property", unpublished D. Phil. Thesis, Oxford, 1998.

Larroumet C., "Droit civil. Les Biens. Droits réels principaux", Vol. II, 5th ed., Economica, Paris, 2006.

Lavrysen L., "The scope of rights and the scope of obligations", in *Shaping Rights in the ECHR*, E. Brems, J. Gerards (eds.), Cambridge University Press, 2013.

Lawson F. H., Rudden B., "The Law of Property", 3rd ed., Oxford University Press, 2002.

Letsas G., "A Theory of Interpretation of the European Convention on Human Rights", Oxford University Press, 2007.

Leturcq S., "Standards et droits fondamentaux devant le Conseil Constitutionnel français et la Cour Européenne des droits de l'homme", L.G.D.J., Paris, 2005.

Levinet M., "Théorie générale des droits et libertés", 2nd ed., Bruylant, Bruxelles, 2008.

Locke J., "Two Treatises of Government", Cambridge University Press, 1994.

Locke J., "The Second Treatise of Government", Barnes & Noble, Inc., 2004.

Londras de F., "Dual Functionality and the Persistent Frailty of the European Court of Human Rights", *European Human Rights Law Review*, 1-2013.

Luchaire F., "La Constitution et le droit de propriété", in *Droit constitutionnnel et droits de l'homme*, Economica-PUAM, 1987.

Luchaire F., "Le Conseil constitutionnel et la protection des droits et des libertés du citoyen", in *Mélanges M. Waline*, Paris L.G.D.J., 1974.

Luchaire F., "Le Conseil constitutionnel et la Convention européenne des droits de l'homme", *Gaz. Pal.*, 10 June 2007.

Luchaire F., "Brèves remarques sur une création du Conseil constitutionnel: l'objectif de valeur constitutionnelle", *RFD const.*, no. 64, 2005.

Luchaire F., "La lecture actualisée de la Déclaration de 1789", in *La Déclaration des droits et la jurisprudence*, PUF, 1989.

Macey J., "Property Rights, Innovation, and Constitutional Structure", in *Property Rights*, E. Frankel Paul, F. Miller, J. Paul (eds.), Cambridge University Press, 1994.

Magheru M., "La conception philosophique de la notion de la propriété en France", Jouve & Cie, Paris, 1935.

Malaurie P., Aynès L., "Les biens", Defrénois, Editions juridiques associées, Paris, 2003.

Malenovský J., "Mezinárodní právo veřejné: jeho obecná část a poměr k jiným právním systémům, zvláště k právu českému", Masaryk University, Brno, 2008.

Malenovský J., "Euronovela Ústavy: "Ústavní inženýrství" ústavodárce nebo Ústavního soudu či obou?", in *Deset let Ústavy České republiky: východiska, stav, perspektivy*, J. Kysela (ed.), Eurolex Bohemia, Prague, 2003.

Marcus-Helmons S., "Le droit de propriété est-il un droit fondamental au sens de la Convention européenne des droits de l'homme?", in *Les nouveaux droits de l'homme en Europe*, Bruylant, Bruxelles, 1999.

Marguenaud J.-P., "Les grands arrêts de la Cour européenne des droits de l'homme", P.U.F. , Paris, 2011.

Mattei U., "Basic Principles of Property Law: A Comparative Legal and Economic Introduction", Greenwood Press, Connecticut, 2000.

Matscher F., "Methods of Interpretation of the Convention", in *The European System for the Protection of Human Rights*, R. Macdonald, F. Matscher, H. Petzold (eds.), London, 1993.

McBride J., "Proportionality and the European Convention on Human Rights", in *The Principle of Proportionality in the Laws of Europe*, E. Ellis (ed.), Hart Publishing, Oxford, 1999.

Meindl T., "La notion de droit fondamental dans les jurisprudences et doctrines constitutionnelles françaises et allemandes", L.G.D.J., Paris, 2003.

Melin-Soucramanien F., "Le principe d'égalité dans la jurisprudence du Conseil constitutionnel. Quelles perspectives pour la question prioritaire de constitutionnalité?", *Cahiers du Conseil constitutionnel no. 29*, October 2010.

Michael L., "The Double Conflict: Human Rights in Conflict Within and Between Legal Systems", *Annuaire International des Droits de l'Homme*, Vol. IV/2009.

Michelman F., "Constitutions and the Public/Private Divide", in *Comparative Constitutional Law*, M. Rosenfeld, A. Sajó (eds.), Oxford University Press, 2012.

Michoud L., "Théorie de la personnalité morale", 2nd Vol., Paris, 1906.

Morange J., "La Déclaration et le droit de propriété", in *Droits: Revue française de théorie juridique*, 1988.

Morawa A., "The 'Common European Approach', 'International Trends', and the Evolution of Human Rights Law. A Comment on Goodwin and I v. the United Kingdom", *German Law Journal* 3 (2002).

Mostert H., "The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany", Springer, 2002.

Mowbray A., "Between the will of the Contracting Parties and the needs of today", in *Shaping Rights in the ECHR*, E. Brems, J. Gerards (eds.), Cambridge University Press, 2013.

Mowbray A., "Cases and Materials on the European Convention on Human Rights", Butterworths, 2001.

Munzer S., "A Theory of Property", Cambridge University Press, 1990.

Munzer S., "Property as Social Relations", in *New Essays in the Legal and Political Theory of Property*, S. R. Munzer (ed.), Cambridge University Press, 2001.

Nagel G., Kessler F., "Social Security Law, Council of Europe", Kluwer Law International BV, 2010.

Nickel J. W., "Making sense of human rights", 2nd ed., Blackwell Publishing, Oxford, 2007.

Nivard C., "Le régime du droit de propriété", *RFDA*, no. 4, juillet-août 2012.

O'Boyle M., "The Role of Dialogue in the Relationship between the European Court of Human Rights and National Courts", in *The Realisation of Human Rights: When Theory Meets Practice*, Y. Haeck, B. Mcgonigle Leyh, C. Burbano-Herrera, D. Contreras-Garduno (eds.), Intersentia, 2013.

Oliver D., "Common values and the public-private divide", Butterworths, 1999.

Pactet P., Mélin-Soucramanien F., "Droit constitutionnel", Sirey, 31st ed., Paris, 2012.

Patault A.-M., "Introduction historique au droit des biens", Presses Universitaires de France, Paris, 1989.

Pauliat H., "Le droit de propriété dans la jurisprudence du Conseil Constitutionnel et du Conseil d'État", Vol. I, Université de Limoges, 1994.

Pavageau S., "Le droit de propriété dans les jurisprudences suprèmes françaises, européennes et internationales", Université de Poitiers, 2006.

Pavlíček V., "Ústava a ústavní řád České republiky. Komentář. 2. díl. Práva a svobody", Linde Praha a.s., Prague, 1999.

Pavlíček V., "Ústavní právo a státověda, II. díl. Ústavní právo České republiky", 1st ed., Leges, Prague, 2011.

Pekárek M., Průchová I., "Pozemkové právo", Masaryk University, Brno, 2003.

Pellonpää M., "Reflections on the notion of "deprivation of possessions" in Article 1 of the First Protocol to the European Convention on Human Rights", in *Protecting human rights: studies in memory of Rolv Ryssdal*, Köln, 2000.

Penner J. E., "The Idea of Property in Law", Oxford University Press, 1997.

Pfersmann O., "Concrete Review as Indirect Constitutional Complaint in French Constitutional Law. A Comparative Perspective", *European Constitutional Law Review*, 2010.

Philip L., "La valeur juridique de la Déclaration des droits de l'homme et du citoyen du 26 août 1789 selon la jurisprudence du Conseil constitutionnel", in *Études offertes à Pierre Kayser*, Presses universitaires d'Aix-Marseille, 1979.

Philip L., "La valeur juridique de la Déclaration des droits de l'homme de 1789 selon la jurisprudence du Conseil constitutionnel", Vol. 2, Mélanges Kayser, PUAM, 1979.

Philippe X., "Le contrôle de proportionnalité dans les jurisprudences constitutionnelles et administratives françaises", PUAM, 1990.

Platon S., "Les interférences entre l'office du juge ordinaire et celui du Conseil Constitutionnel:"malaise dans le contentieux constitutinnel"?", *RFDA*, no. 4, juillet-août 2012.

Pogány I., "International Human Rights Law, Reparatory Justice and the Re-Ordering of Memory in Central and Eastern Europe", *Human Rights Law Review* 10 (2010).

Polakiewicz J., "The Status of the Convention in National Law", in *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States*, 1950-2000, R. Blackburn, J. Polakiewicz (eds.), Oxford University Press, 2001.

Popović D., "Protecting Property", Eleven International Publishing, 2009.

Praduroux S., "Getting Property Right: The European Dimension of Property as a Fundamental Right and its Impact on French and Italian Law", University of Helsinki Faculty of Law, 2012.

Prévédourou E., "La justice administrative devant la Cour européenne des droits de l'homme", *Annuaire International des Droits de l'Homme*, Vol. III, 2008.

Průcha P., "Základní pojmy a instituty správního práva", Masaryk University, Brno, 1998

Průchová I., "Restituce majetku podle zákona o půdě", C. H. Beck, Prague, 1997.

Randa A., "Držba. Právo vlastnické", ASPI Wolters Kluwer, Prague, 2008.

Rawls J., "Theory of Justice", Harvard University Press, 1971.

Reboul-Maupin N., "Droit des biens", Dalloz, Paris, 2006.

Reich C. A., "The New Property", Yale Law Journal 73, 1964.

Remy P., "La propriété privée considérée comme un droit de l'homme", in *La protection des droits fondamentaux*, Presses Universitaires de France, 1993.

Remy-Granger D., "The Ambiguities of the State Based on the Rule of Law: a Unitary System à la Française", in *Ambiguity in the Rule of Law: The Interface between National and International Legal Systems*, T. Vandamme and J.-H. Reestman (eds.), Proceedings of the Annual Colloquium of the G. K. van Hogendorp Centre for European Constitutional Studies, Europa Law Publishing, Groningen, 2001.

Repetto G., "The Constitutional Relevance of the ECHR in Domestic and European Law: An Italian Perspective", Intersentia, 2013.

Rials S., "La Déclaration des droits de l'homme et du citoyen", Hachette, Paris, 1988.

Robert M., "Propos sur le sauvetage d'une liberté", RDP, 1971.

Robertson M., "Liberal, Democratic, and Socialist Approaches to the Public Dimensions of Private Property", in *Property and the Constitution*, J. McLean (ed.), Hart Publishing, Oxford-Portland Oregon, 1999.

Robertson A. H., Merrills J. G., "Human rights in the world. An introduction to the study of the international protection of human rights", 4th ed., Manchester University Press, Manchester and New York, 1996.

Robbins L., "*The Theory of Economic Policy in English Classical Political Economy*", Macmillan, London, 1961.

Romieu G., "La propriété, Ses Rapports avec l'État, la Société et l'Individu", Les Presses Universitaires de France, Paris, 1923.

Rook D., "Property Law & Human Rights", Blackstone Press Limited, London, 2001.

Roussillon H., "Le Conseil constitutionnel", Dalloz, 2nd ed., Paris, 1994.

Rousseau J.-J., "The Social Contract", Penguin Books, 2004.

Rousseau D., "Droit du contentieux constitutionnel", 2nd ed., Montchrestien, Paris, 1992.

Ryan A., "Property", University of Minnesota Press, 1987.

Ryan A., "Property and Political Theory", B. Blackwell, New York, 1984.

Samuel G., "The Many Dimensions of Property", in *Property and the Constitution*, J. McLean (ed.), Hart Publishing, Oxford-Portland Oregon, 1999.

Sappideen R., "Property rights, human rights, and the new international trade regime", *The International Journal of Human Rights*, Vol. 15, no. 7, October 2011.

Schlatter R., "Private Property: The History of an Idea", Allen & Unwin, London, 1951.

Schlink B., "Proportionality", in *Comparative Constitutional Law*, M. Rosenfeld, A. Sajó (eds.), Oxford University Press, 2012.

Schmidtz D., "The Institutin of Property", in *Property Rights*, E. Frankel Paul, F. Miller, J. Paul (eds.), Cambridge University Press, 1994.

Scholz S., Tremm B., "Staathaftungs und Entschädigungsrecht", Vahlen, 5th ed, Munich, 1994.

Sedláček J., Rouček F., "Komentář k československému obecnému zákoníku občanskému a občanské právo platné na Slovensku a v Podkarpatské Rusi", Vol. II, Prague, 1935.

Sermet L., "The European Convention on Human Rights and property rights", *Council of Europe Press, Human Rights files No. 11*, Strasbourg, 1992.

Sermet L., "Le droit de propriété dans la convention européenne des droits de l'homme", *dossier droits de l'homme no. 11*, Conseil de l'Europe, Strasbourg, 1998.

Shiffrin S. V., "Lockean Arguments for Private Intellectual Property", in *New Essays in the Legal and Political Theory of Property*, S. R. Munzer (ed.), Cambridge University Press, 2001.

Simmons J., "Original-Acquisition Justifications of Private Property", in *Property Rights*, E. Frankel Paul, F. Miller, J. Paul (eds.), Cambridge University Press, 1994.

Simpler P., "Les biens", 2nd ed., Presses Universitaires de Grenoble, 2001.

Singer J. W., "Sovereignty and Property", *Northwestern University Law Review* 1 (1991).

Singer J. W., "The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations", *Harvard Environmental Law Review* 30 (2006).

Skulová S., "Správní uvážení, základní charakteristika a souvislosti pojmu", Masaryk University, Brno, 2004.

Sládeček V., V. Mikule, J. Syllová, "Ústava České republiky. Komentář.", 1st ed., C. H. Beck, Prague, 2007.

Sládeček V., "Ústavní soudnictví", 2nd ed., C. H. Beck, Prague, 2003.

Spielmann D., Bruck V., "La Cour européenne des droits de l'homme et le droit au respect des biens: une synthèse", *Journal des tribunaux Luxembourg*, no. 24, December 2012.

Spielmann D., "Jurisprudence of the European Court of Human Rights and the Constitutional Systems of Europe", in *The Oxford Handbook of Comparative Constitutional Law*, M. Rosenfeld and A. Sajó (eds.), Oxford University Press, 2012.

Stern B., "Le droit de propriété, l'expropriation et la nationalisation dans la convention européenne des droits de l'homme", Droit et pratique du commerce international (DPCI), 1991.

Stolleis M., "Public Law in Germany, 1800-1914", Berghahn Books, 2001.

Stone Sweet A., "On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court", *Yale Law School Faculty Scholarship Series*, Paper 71, 2009.

Stone Sweet A., "Sur la constitutionnalisation de la Convention européenne des droits de l'homme: cinquante ans après son installation, le Cour européenne des droits de l'homme conçue comme une cour constitutionnelle", *Revue trimestrielle des droits de l'homme*, no. 85, 2011.

Strickler Y., "Les biens", Presses Universitaires de France, Paris, 2006.

Struillou J.-F., "Protection de la propriété privée immobiliere et prérogatives de puissance publique, contribution a l'étude de l'évolution du droit francais au regard des principes dégagés par le Conseil constitutionnel et par la Cour européenne des droits de l'homme", L'Harmattan, 1996.

Sudre F., "La protection du droit de propriété par la Cour européenne des droits de l'homme", Dalloz, 1988.

Sudre F., "Droit européen et international des droits de l'homme", 6th ed., Presses Universitaires de France, Paris, 2003.

Sudre F., "Les conflits des droits de l'homme", *Annuaire International des Droits de l'Homme*, Vol. IV/2009.

Sumner L.W., "The Moral Foundation of Rights", Clarendon Press, Oxford, 1987.

Tamanaha B. Z., "On the rule of law: history, politics, theory", Cambridge University Press, 2004.

Thomasses W., "The vital relationship between the European Court of Human Rights and national courts", in *The European Court of Human Rights and its Discontents: Turning Criticism into Strength,* S. Flogaitis, J. Fraser (eds.), EE Publishing Inc., 2013.

Tinière R., "La notion de "pleine juridiction" au sens de la Convention européenne des droits de l'homme et l'office du juge administratif", *RFDA*, juillet-août 2009.

Tinière R., "Question prioritaire de constitutionnalité et droit européen des droits de l'homme. Entre équivalence et complémentarité", *RFDA*, no. 4, juillet – août 2012.

Tourard H., "L'internationalisation des constitutions nationales", L.G.D.J., Paris, 2000.

Tully J., "A discourse on property – John Locke and his adversaries", Cambridge University Press, 1980.

Underkuffler L. S., "The Idea of Property", Oxford University Press, 2005.

Vedel G., "La place de la Déclaration de 1789 dans le "bloc de constitutionnalité"", PUF, Paris, 1989.

Veitch S., Christodoulidis E., Farmer L., "Jurisprudence: themes and concepts", Routledge-Cavendish, London and New York, 2007.

Wachsmann P., "Naturalisme et volontarisme dans la déclaration des droits de l'homme de 1789", *Revue francaise de théorie juridique – Les droits de l'homme*, Vol. 2, 1985.

Wachsmann P., "La transposition en droit constitutionnel français de l'économie de l'article 1er du Protocole additionnel", in *Cohérence et impact de la jurisprudence de la Cour européenne des droits de l'homme. Liber amicorum Vincent Berger*, L. Berg, M. Enrich Mas, P. Kempees, D. Spielmann (eds.), Wolf Legal Publishers, 2013.

Waldron J., "The right to private property", Clarendon Press, Oxford, 2002.

Waldron J., "The Normative Resilience of Property", in *Property and the Constitution*, J. McLean (ed.), Hart Publishing, Oxford-Portland Oregon, 1999.

Wildhaber L., "European Court of Human Rights", *Canadian Yearbook of International Law* 310 (2002).

Wildhaber L., Wildhaber I., "Recent case-law on the Protection of Property in the European Convention on Human Rights", in *International Investment Law for the 21st Century*, C. Binder, U. Kriembaum, A. Reinisch, S. Wittich (eds.), Oxford University Press, 2009.

Windscheid B.,"Lehrbuch des Pandektenrechts", 9th ed., Rütten & Loening, Frankfurt a M., 1906.

Wolfe A., "The future of liberalism", Alfred. A. Knopf, New York, 2009.

Worms F., "Droits de l'homme et philosophie", CNRS Éditions, Paris, 2009.

Xenos D., "The Positive Obligations of the State under the European Convention of Human Rights", Routledge, London, 2011.

Zattara A.-F., "La dimension constitutionnelle et européenne du droit de propriété", L.G.D.J., Paris, 2001.

Zemánek J., "The Czech Human Rights Doctrine as Challenged by the EU Charter of Fundamenal Rights**",** in *The European Union: An Ongoing Process of Integration*, J. W. de Zwaan, J. H. Jans, S. Blockmans (eds)., T. M. C. Asser Press, The Hague, 2004.

Zucca L., "Conflicts of fundamental rights as constitutional dilemmas", *Annuaire International des Droits de l'Homme*, Vol. IV/2009.

Zucca L., "Constitutional Dilemas: Conflicts of Fundamental Legal Rights in Europe and the USA", Oxford University Press, 2007.

Table of Cases

Table of Cases before the European Court of Human Rights

Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland [GC], no. 45036/98, ECHR 2005-VI

Bowler International Unit v. France, no. 1946/06, 23 July 2009

Bramelid and Malmström v. Sweden, decision of 12 October 1982, DR 29

Brannigan and McBride v. the United Kingdom, 26 May 1993,Series A no. 258-B

British-American Tobacco Company Ltd v. the Netherlands, 20 November 1995, Series A no. 331

Broniowski v. Poland [GC], no. 31443/96, ECHR 2004-V

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Decision no. 2011-631 DC, 9 June 2011

Decision no. 2011-138 QPC, 17 June 2011

Decision no. 2011-141-QPC, 25 June 2011

Decision no. 2011-151 QPC, 13 July 2011

Decision no. 2011-148/154 QPC, 22 July 2011

Decision no. 2011-170 QPC, 23 September 2011

Decision no. 2011-175 QPC,7 October 2011

Decision no. 2011-180 QPC, 13 October 2011

Decision no. 2011-182 QPC, 14 October 2011

Decision no. 2011-227L, 10 November 2011

Decision no. 2011-201-QPC, 2 December 2011

Decision no. 2011-151 QPC, 16 December 2011

Ddecision no. 2011-207-QPC, 16 December 2011

Decision no. 2011-644 DC, 28 December 2011

Decision no. 2011-645 DC, 28 December 2011

Decision no. 2011-208-QPC, 13 January 2012

Decision no. 2011-209 QPC, 17 January 2012

Decision no. 2011‑212 QPC, 20 January 2012

Decision no. 2011-224 QPC, 24 February 2012

Decision no. 2012‑226 QPC, 6 April 2012

Decision no. 2012‑230 QPC, 6 April 2012

Decision no. 2012‑236 QPC, 20 April 2012

Decision no. 2012‑247 DC, 16 May 2012

Decision no. 2012-263 QPC, 20 July 2012

Decision no. 2012‑275 QPC, 28 September 2012

Decision no. 2012‑277 QPC, 5 October 2012

Decision no. 2012‑283 QPC, 23 November 2012

Decision no. 2012‑285 QPC, 30 November 2012

Decision no. 2013-302 QPC, 12 April 2013

Decision no. 2013-309 QPC, 26 April 2013

Decision no. 2013-318 QPC, 7 June 2013

Decision no. 2013-319 QPC, 7 June 2013

Decision no. 2013-325 QPC, 21 June 2013

Decision no. 2013-332 QPC, 12 July 2013

Decision no. 2013-674 DC, 1 August 2013

Decision no. 2013-341 QPC, 27 September 2013

Decision no. 2013-346 QPC, 11 October 2013

Decision no. 2013-687 DC, 23 January 2014

Decision no. 2013-369 QPC, 28 February 2014

Decision no. 2013-370 QPC, 28 February 2014

Decision no. 2014-691 DC, 20 March 2014

Decision no. 2014-692 DC, 27 March 2014

Decision no. 2014-391 QPC, 25 April 2014

Decision no. 2014-394 QPC, 7 May 2014

Decision no. 2014-694 DC, 28 May 2014

Decision no. 2014-406 QPC, 9 July 2014

Decision no. 2014-409 QPC, 11 July 2014

Decision no. 2014-411 QPC, 9 September 2014

Decision no. 2014-701 DC, 9 October 2014

Table of Cases before the French Council of State

CE, 17 January 1923, *Piccioli*

CE, 30 November 1923, *Couitéas*

CE, Ass., 11 July 1956, *Amicale des Annamites de Paris*

CE, Sect., 15 February 1961, *Lagrange*

CE, 22 February 1963, *commune de Gavarnie*

CE, Ass., 30 March 1966, *Compagnie générale d'énergie radio-électrique*

CE, 1 May 1968, *Syndicat general des fabricants de semoules de France*

CE, Ass., 28 May 1971, *Ministre de l'equipement et du logement v. Fédération de défense des personnes concernés par le projet „Ville nouvelle Est"*

CE, 14 March 1986, *Commune de Gap-Romette*

CE, 16 April 1986, *Téqui*

CE, 20 October 1989, *Nicolo*

CE, Ass., 3 July 1996, *Koné*

CE, 3 July 1998, *Bitouzet*

CE, Ass., 30 October 1998, *Sarran, Levacher et autres*

CE, Ass., 5 March 1999, *Rouquette*

CE, Ass., 3 December 1999, *Didier*

CE, Ass., 21 December 1999, *Confédération nationale des associations familiales catholiques et autres*

CE, 6 April 2001, *SNES*

CE, Ass., 30 November 2001, *Ministre de la Défense v. Diop and Ministre de l'économie, des finances et de l'industrie v. Diop*

CE, 29 March 2002, *SCI Stéphaur*

CE, 29 January 2003, *Synd. départemental de l'électricité et du gaz des Alpes-Marimes et Cne de Clans*

CE, 29 December 2004, *Société d'aménagement des coteaux de Saint-Blaine*

CE, 8 July 2005, *Fédération des syndicats généraux de l'Éducation nationale et de la recherche publique SGEN-CFDT*

CE, 24 March 2006, *KPMG*

CE, 9 August 2006, *Association des avocats conseils d'entreprises*

CE, 9 February 2007, *Gardedieu*

CE, 17 October 2007, *Département de Seine-et-Marne*

CE, 16 June 2008, *Fédération des syndicats dentaires libéraux*

CE, 18 June 2008, *Commune de Tremblay-en-France*

CE, 25 July 2008, *Fédération nationale de l'aviation marchande*

CE, 29 Octobre 2008, *LEEM-Les entreprises du médicament*

CE, 22 July 2011, *Commune de Saint-Martin d'Arrossa*

CE, Ass., 13 November 2013, *M. D.*

Table of Cases before the French Court of Cassation

Ch. mixte, 24 May 1975, *Société des Cafés Jacques Vabre*

Cas. Ass. plén., 6 January 1994 , *Cts Baudon de Mony C/ EDF*

Cass. Crim., 14 May 1996, Bull. Crim. no. 204, p. 577

CCass., Ass. plén., 2 June 2000, *Mlle Fraisse*

Cass., Commission réexamen, 15 February 2001, *Voisine, Dall*.

Cass., Commission réexamen, 8 November 2001, *Dall.*

Cass. Crim., 19 October 2010, nos. 10-82.306, 10-85.051, and 10-82.902

CCass., Ass. plén., 15 April 2011, no. 10-17.049

Table of Cases before the German Constitutional Court

BVerfGE 7, 198 [205]

BVerfGE 128, 326 [368]

BVerfGE 111, 307 [320]

Résumé en français

La question de savoir dans quelle mesure la protection constitutionnelle de la propriété en France s'harmonise avec les normes de protection de la propriété fixés par la Convention européenne des droits de l'homme est analysée aux moyens d'une recherche dans plusieurs domaines spécifiques: les fondations philosophiques et théoriques, signification et portée des garanties de la propriété et leur interprétation juridique, les limitations et les privations de la propriété, et les approches constitutionnelles au regard de l'implementation du droit et de la pratique de la Convention. L'enquête a embrassé deux concepts fondamentaux que l'on peut distinguer du point de vue des droits constitutionnels: l'étendue du droit constitutionnel de la propriété et les limites qui lui sont assignées. Tandis que l'étendue du droit constitutionnel de la propriété définit son contenu et des frontières, les limites de la propriété comprennent les conditions constitutionnelles sous le régime desquelles le droit peut être restreint dans une mesure proportionnelle par les lois. L'étendue du droit constitutionnel de la propriété est déterminé conformément aux principes de l'interprétation constitutionnelle. Ceci s'applique aux droits et libertés consacrés par Convention européenne des droits de l'homme et les principes de leur interprétation par Cour européenne des droits de l'homme (la « CEDH »).

1. Les fondations philosophiques et théoriques

L'examen des principales idées philosophiques qui sous-tendent les garanties de la propriété dans la Convention et dans les constitutions de la France et de la République Tchèque montre que c'est principalement l'idée des droits naturels, outre une grande influence républicaine et civique, qui a fourni la justification de la garantie de la propriété à ces documents. Les origines des garanties de la propriété dans la Convention et dans les constitutions de la France et de la République Tchèque proviennent majoritairement de la conception libérale classique de la propriété. Empruntant largement à la théorie de la propriété de Locke comme droits naturels, ils se concentrent sur l'individu comme valeur suprême dans les affaires socio-politiques et mettent l'accent sur le lien entre une société libre et le droit à la propriété privée. Elles impliquent une justification de la propriété fondée sur l'idéal de l'autonomie – si un individu produit ou gagne quelque chose par son travail ou par un contrat sans qu'il lèse les droits d'autrui, il a le droit de bénéficier des fruits de son action. Ce droit représente son autonomie. La théorie naturelle des droits a influencé la substance idéologique des clauses fondamentales de la protection de la propriété – toutes garantissent la propriété en tant que

droit fondamental naturel, imprescriptible, inviolable ou sacré et l'obligation qu'a l'État de n'autoriser les ingérences que dans des conditions strictement définies. Les garanties constitutionnelles françaises et tchèques de la propriété partagent également l'accent mis sur les principes de liberté et d'égalité dont on peut repérer l'origine dans les influences de la loi naturelle.

Le concept libéral de propriété est construit sur les valeurs clés de la liberté et de l'égalité. Le premier indique que la propriété comme droit fondamental sert une fonction individuelle : elle offre un domaine d'autonomie pour les individus dans lequel l'État ne doit pas s'ingérer mais qu'il doit protéger. La fonction individuelle de propriété a pour but de protéger la richesse matérielle et la prospérité, lesquels sont des pré requis pour assurer une stabilité sociale et l'entretenir une gouvernance démocratique. De ce point de vue, la propriété peut se concevoir comme un droit public subjectif comprenant le droit exécutoire qu'a un individu à réclamer une certaine action du gouvernement, à savoir que l'État est dans l'obligation de permettre la jouissance naturelle des droits de propriété d'un individu et de les protéger de contre toute ingérence; ou comme un droit « négatif » qui protège les individus de l'action d'un État. Aussi ne suffit-il pas que l'État se refreine de s'ingérer dans les droits subjectifs de l'individu, mais il doit aussi agir de sorte à les sauvegarder. Pour ce qui concerne la Constitution tchèque, elle tire clairement de la garantie de la propriété que l'État assure à chaque propriétaire le même niveau de droits de propriété et la même protection, alors que la Déclaration française est dépourvue de disposition similaire, malgré les obligations négative et positive de l'État sur la protection des droits naturels de tout personne qu'implique indirectement la formulation générale du Préambule de la Déclaration en vertu duquel la Déclaration peut rappeler à leurs «devoirs » les pouvoirs législatif et exécutif, autrement nommés « tous les membres du corps politique ». La valeur d'égalité indique que la propriété comme droit fondamental sert aussi de fonction sociale pour promouvoir la solidarité et l'égalité. Bien que les droits de la propriété constitutionnellement protégés soient par nature des droits de l'homme «individuel», ils sont ancrés dans un contexte social. En conséquence, la fonction sociale est inévitable et intrinsèquement liée aux droits de la propriété sous protection conventionnelle et constitutionnelle, c'est leur indivisible et inhérente partie. Selon les mots de Laura Underkuffler, les droits de la propriété, sont, par nature, des droits sociaux[1076]. La protection des clauses de la propriété dans la Convention européenne des droits de l'homme, la

[1076]L. S. Underkuffler, "The Idea of Property", Oxford University Press, Oxford, 2005, p. 145.

Déclaration française des droits de l'homme et la Charte tchèque représentent la fonction sociale de la propriété en ce qu'elles rendent possibles le retrait et la limitation de la propriété.

Il est suggéré que la propriété n'est pas un droit unique mais une multitude de relations juridiques entre des personnes sur une une chose qui comprend des éléments de droit et de devoir. Cette approche « des branches dans un fagot » indique que la propriété comprend une sphère de liberté, ou la liberté contre le droit ou la demande d'autrui, droit-demandes à sa protection et devoirs de soutenir les ingérences dans l'intérêt public. Dans cette approche, il est clair que la concept constitutionnel de propriété implique aussi des obligations qui sont corrélatives au pouvoir de l'État de limiter ou retirer la propriété en certaines circonstances.

La caractéristique commune des approches de la propriété ici étudiées est que ces dernières reconnaissent la fonction duale de la propriété qui comprend la fonction individuelle et sociale, ou publique de la propriété. Elles sont reflétées dans les garanties de la propriété par la reconnaissance de la propriété comme un droit fondamental du pouvoir de l'État de régler la propriété dans l'intérêt public ou général.

Bien que le but des clauses de protection de la propriété soit de sauvegarder l'autonomie personnelle dans les affaires de propriété, la fonction sociale de la propriété vise à faire progresser le bien collectif de la société. La reconnaissance d'un devoir des hommes à satisfaire les besoins d'autres hommes est une idée à l'œuvre derrière la conception de la propriété comme une fonction sociale, non seulement dans les constitutions ici étudiées, mais aussi dans la Convention.

Du point de vue philosophique, il n'y a pas de grande différence entre la garantie de la propriété dans la Convention et dans les les constitutions ici étudiées, sauf que les dernières garantissent une compensation pour les confiscations ayant un intérêt public. Le but de la reconnaissance de la propriété n'est pas limitée à l'idée libérale classique d'un État minimal, c'est-à-dire de créer une sphère de sécurité à l'abri des ingérences de l'État, mais c'est aussi de faciliter pour l'individu la réalisation de son potentiel humain et de vivre une vie digne. À cet égard la Constitution tchèque va plus loin que la la Constitution française en ce qu'elle stipule que la propriété interdit au propriétaire d'employer sa propriété à des fins dommageables. L'insertion de devoirs attachés à la possession dans la garantie de la propriété implique que les individus ont certaines obligations de participer à la création d'un société qui

préserve la dignité humaine. Cette idée entraîne la justification du pouvoir de l'État de réguler les relations sociales qui peuvent être aussi vues dans la garantie de la propriété dans la Convention.

Comme les clauses de de protection fondamentale de la propriété ne protègent pas seulement les individus mais aussi leur confèrent des devoirs, le droit fondamental de propriété comme droit public subjectif est un droit multidimensionnel dans le sens générique qui comprend des éléments de droit et de devoir – la propriété comprise comme une sphère de liberté, ou la liberté vis-à-vis du droit ou de la demande d'autrui, tout autant que les droits—demandes visant à sa protection et il implique aussi des droits et des obligations de supporter une altération de la propriété qui correspond au pouvoir de l'État de limiter ou de retirer la propriété d'un individu. Cette conception de la propriété comme un ensemble de droits devient pertinente quand une clause de protection de la propriété distingue entre diverses sortes d'ingérences, telles que celles inscrites dans la Convention et dans les garanties constitutionnelles de la propriété ici étudiées. Elle aide à établir si une ingérence dans la propriété constitue une privation ou un contrôle de l'emploi de la propriété. En d'autres ternes, elle s'avère utile dans le cadre d'un test de juste équilibre – dans la mise en balance des intérêts et en évaluant l'impact des mesures restrictives envers des droits individuels de propriété. Quand un droit de l'ensemble des droits est perdu ou restreint, mais que le propriétaire conserve le reste de l'ensemble des droits, l'ingérence n'entraîne pas une privation de la propriété. Seule une perte complète de tous les attributs de la possession équivaudrait à une privation. Il s'ensuit que la la théorie des droits ou de ses corrélatifs de Hohfeld met en valeur la dimension politique et sociale des droits de la propriété.

II. Signification et portée des garanties de la propriété

i. Le concept de propriété

Les origines de la garantie de la propriété dans la Convention européenne des droits de l'homme ont été accompagnées par de longues discussions et des désaccords aussi bien pour ce qui concerne son inclusion dans un traité international que pour ce qui a trait à son étendue. La sauvegarde de la propriété, qui a finalement été intégrée le Premier Protocole Additionnel de la Convention a été acceptée comme devant réaliser la fonction de garantie de l'indépendance de l'individu contre les menaces potentielles de confiscation par les régimes

totalitaires. Il a été ainsi conçu comme droit naturel de toutes les personnes naturelle et juridique servant à respecter leur propriété qui ne doit pas être sujette à une confiscation arbitraire et qui doit être soumise à des limitations dans l'intérêt public ou social. Dans cet esprit les termes de l'Article 1 du Protocole n°1 de la Convention reflète un effort pour réconcilier la conception sociale de la propriété avec l'interdiction de des confiscations arbitraires, et a ainsi une double fonction. La fonction sociale de la propriété est clairement exprimée dans la seconde phrase du premier paragraphe et dans le second paragraphe. Ces dispositions prévoient que le droit de propriété peut être limité par la loi et que chaque État membre peut décider sous quelle forme et dans quelle mesure le droit de propriété des individus peut s'accorder avec l'intérêt général. Bien qu'il ne fournisse pas de droit à des compensations, en raison de sa formulation « dans les conditions prévue par la loi » la clause de propriété a autorité la CEDH a établir une garantie de compensation qui est devenue une norme habituelle.

Le concept de propriété au titre de la Convention est autonome et indépendant des concepts nationaux de la propriété constitutionnelle, quel que soit le degré de correspondance. Il n'est pas limité à la possession de biens matériels, il comprend tous les droits acquis de valeur pécuniaire. Il embrasse toute ressource de valeur patrimoniale existante, ou qu'il est légitime de pouvoir acquérir et qui comprend des droits *in rem* et revendique des droits, y compris des demandes de droit public comme des allocations sociales, des permis, des autorisations, ou de la bonne volonté. Le critère essentiel est la valeur économique de l'intérêt, même si le droit national de l'État contractant ne reconnaît pas le droit de propriété. Ainsi la jurisprudence de la CEDH traite la propriété non seulement comme des objets mais aussi comme des droits distincts qui génèrent une multitude de relations juridiques, propriété qui, si elle possède une valeur patrimoniale, bénéficie de la protection au titre de la Convention. Un tel concept a permis à la CEDH de procéder à une large interprétation et à réévaluer le concept de propriété sachant que la Convention est conçue comme un « instrument vivant » à interpréter à la lumière des « conditions actuelles ».

Concernant les origines françaises de la garantie constitutionnelle de la protection de la propriété, c'est dès 1789 que cette dernière survient avec l'adoption de la Déclaration des droits de l'homme. Au niveau constitutionnel, elle est apparue dans la Constitution de 1791 qui adoptait les principes de l'Article 17 de la Déclaration. Tout au long de l'histoire constitutionnelle française la Déclaration de 1789 a été soit une source d'inspiration pour les

clauses constitutionnelles de la propriété soit un texte de référence. La garantie de propriété se fonde sur le même socle philosophique libéral que la Convention et est conçue comme un droit naturel, inviolable, imprescriptible, inaliénable et sacré qui est à préserver de paire avec la liberté et la sécurité de l'homme. Cependant, jusqu'à 1971 la Déclaration n'était pas une partie du bloc constitutionnel, n'étant pas reconnue comme ayant une valeur constitutionnelle. Le caractère fondamental du droit de propriété a été créé par la jurisprudence constitutionnelle en deux étapes. D'abord, en 1971 le Conseil Constitutionnel a intégré la Déclaration et ainsi la garantie de la protection de la propriété, dans les normes de référence du contrôle de constitutionnalité, parallèlement à la Constitution de 1958, au préambule de la Constitution de 1946, à la Charte de l'Environnement, aux principes et objectifs constitutionnels et aux principes fondamentaux reconnus par les lois de la République. En second lieu, la reconnaissance explicite de la constitutionnalité des dispositions de la Déclaration de 1789 a été exprimée par le Conseil Constitutionnel dans une décision de 1982 sur les nationalisations. En reconnaissant que la propriété privée pouvait être lésée par des confiscations ou des limitations pour des raisons d'intérêt public, le Conseil Constitutionnel a simultanément reconnu que le statut de la propriété sert une fonction sociale. Jusqu'à la décision de 1982, le statut constitutionnel de la propriété n'était pas sûr et avait systématiquement été remis en question. La raison principale en était que le droit de propriété avait été circonscrit de telle manière par la législation qu'il était difficilement concevable de considérer la propriété dans le sens du droit décrit dans la Déclaration.

La notion de propriété telle que garantie par les articles 2 et 17 de la Déclaration n'est pas identique à la définition de « possessions » dans la Convention qui comprend tout bien de valeur patrimoniale. Il est plus restreint, la juridiction constitutionnelle ne reconnaissant pas, par exemple, les autorisations, les concessions ou les allocations sociales comme soumises à ces dispositions, mais d'autre part, son étendue est plus grande car elle comprend aussi la propriété des personnes publiques et privées dont la protection est du ressort de la Convention, le but de l'Article 1 du Protocole n° 1 étant de protéger les individus et les personnes juridiques des ingérences arbitraires de l'État dans leurs possessions. Cependant, la notion de propriété telle qu'interprétée par le Conseil Constitutionnel n'est pas le seul concept pertinent, car ce sont aussi les cours suprêmes ordinaires qui développent leur propre conception de la propriété dans le cadre de la vérification de la conformité constitutionnelle de la loi nationale et ces cours ne sont pas en ce domaine liées par l'appréciation du Conseil Constitutionnel.

En République tchèque, les origines de la protection constitutionnelle de la propriété privée remontent aux Constitutions austro-hongroises de 1849 et 1867. Bien que la garantie de la protection soit apparue bien plus tard que la Déclaration française, il n'y avait aucun doute sur son caractère constitutionnel. La garantie de la propriété a été aussi incluse dans la Constitution de la première République en 1920 qui reconnaissait, outre « la liberté de propriété », que la propriété peut être limitée par la loi. Dans l'histoire constitutionnelle ultérieure la protection constitutionnelle de la propriété fut progressivement et parallèlement affaiblie par l'installation d'un régime socialiste qui établissait une stricte différence sur la propriété selon les catégories auxquelles il attachait un degré différent de protection. La propriété socialiste comprenant la propriété de l'État et diverses coopératives devint le type le plus privilégié de propriété, tandis que la propriété privée était discriminée et ne jouissait pas du même niveau de protection constitutionnelle. Par ailleurs le trait premier du développement constitutionnel sous le régime communiste était que la situation constitutionnelle, politique, économique, sociale et sociétale en général était en contradiction flagrante avec la situation constitutionnelle *de jure*. La Constitution de 1960 ne contenait même pas une quelconque disposition de protection de la propriété privée. L'actuelle clause de protection de la propriété est fournie par la Charte fondamentale des droits et libertés qui est une partie de l'ordre constitutionnel incluant la Constitution de 1993 et d'autres lois organiques. La rédaction de la garantie constitutionnelle de la propriété fut inspirée également, entre autres sources, par la Convention européenne des droits de l'homme en ce que le texte de la clause de propriété possède un grand nombre de similarités avec l'Article 1 du Protocole 1 de la Convention. La structure de la clause constitutionnelle de propriété correspond essentiellement à l'Article 1 du Protocole 1 de la Convention en ce qu'elle comprend la garantie générale de la propriété et les règles de limitations et de privations. La clause tchèque sur la propriété est plus étendue en ce qu'elle attache généralement des obligations délimitées au droit de propriété et au fait qu'elle fournit des dédommagements pour les privations et limitations de la propriété.

En résumé pour ce qui concerne l'approche des juridictions constitutionnelles tchèque et française, il semble que, du point de vue de la pratique de la Cour européenne des droits de l'homme qui interprète la notion de propriété assez largement, chaque juridiction constitutionnelle ait adopté une approche distincte. En France, le concept constitutionnel de propriété privée comme objet, en tant qu'il est interprété par le Conseil constitutionnel français, semble être plus restreint que celui prévu par la Convention. Le Conseil

constitutionnel français interprète la portée du droit de propriété plus strictement par rapport à la Cour européenne des droits de l'homme parce qu'il ne reconnaît pas chaque valeur patrimoniale comme propriété protégée par la Constitution, en dépit du fait que la portée du concept constitutionnel de propriété est plus large, car il comprend aussi la propriété des personnes publiques, laquelle est exclue par définition en vertu de la Convention, le sens de l'Article 1 du Protocole 1 de la Convention étant de protéger les personnes naturelles ou légales contre les ingérences arbitraires de l'État dans leurs biens. Quoi qu'il en soit, l'interprétation constitutionnelle du concept de propriété ne lie pas le Conseil d'État et la Cour de cassation dans l'exercice du contrôle de conventionnalité et ils sont ainsi libres d'adopter une large interprétation et d'adhérer au critère de valeur patrimoniale. La Cour constitutionnelle tchèque, en revanche, se réfère à la jurisprudence de la CEDH et n'hésite pas à évaluer les requêtes à la lumière de la notion conventionnelle de propriété. Elle adhère à la notion de propriété selon les termes de la Convention et l'applique directement dans sa pratique. Il s'ensuit qu'en termes de propriété comme objet, la pratique constitutionnelle tchèque témoigne d'une plus grande harmonie avec la Cour européenne des droits de l'homme et montre une ouverture à l'influence externe de la CEDH plus que ne le fait le Conseil constitutionnel français.

ii. Portée de la garantie de la propriété

Concernant la portée de la protection de la propriété aux termes de la Convention, la CEDH a identifié trois règles distinctes qui incluent la garantie de la propriété aux termes de l'Article 1 du Protocole 1 de la Convention. Selon ces règles, celui-ci contient une garantie générale de jouissance paisible des biens et des clauses protégeant contre les limitations arbitraires et les privations de la propriété. Les trois règles distinctes sont liées entre elles. La deuxième et la troisième règles définissent les conditions en vertu desquelles l'État peut s'ingérer dans la jouissance paisible des biens d'une personne aux travers d'une privation ou d'un contrôle de l'utilisation de la propriété, et fournit ce faisant une autre qualification de la garantie générale de la première règle. La finalité de la garantie de la propriété est de protéger les personnes contre les ingérences arbitraires de l'État dans la propriété privée et également de requérir de l'État la prise de mesures positives de protection.

En France, eu égard au fait que l'article 17 de la Déclaration française a une application limitée aux seules limitations de propriété, la portée de la garantie constitutionnelle de

propriété était longtemps restée en retard par rapport aux niveaux européens créés par la Convention, jusqu'à ce que le Conseil constitutionnel français reconnaisse deux règles constitutionnelles distinctes sur les limitations et privations de propriété avec un effet définitif. Ce processus progressif est marqué par la décision sur les nationalisations par laquelle le Conseil constitutionnel français a élargi la portée de la protection normative fondamentale de la propriété en invoquant, outre l'article 17 de la Déclaration française, l'article 2 de la Déclaration, comme norme protectrice applicable aux limitations. Le Conseil s'est ainsi engagé dans l'élargissement de la portée de la clause de protection de la propriété aux termes de la Déclaration. Cependant, jusqu'à une décision de 2010, la pratique du Conseil a varié en ce que ce dernier s'est appuyé exclusivement sur l'article 17 dans des cas de limitations du fait que la garantie de la propriété aux termes de l'Article 1 du Protocole 1 de la Convention comprend trois règles distinctes de protection. Cette pratique n'a pas accédé au niveau des standards de l'Article 1 du Protocole 1 de la Convention. Une décision (la no. 2010-60 QPC) qui a établi avec effet définitif la dualité de la protection en vertu des articles 2 et 17 de la Déclaration, a mis la garantie de la propriété dans le cadre de la Déclaration telle qu'interprétée par le Conseil constitutionnel français en relation avec la structure de l'Article 1 du Protocole 1 de la Convention qui comprend trois normes distinctes par lesquelles l'article 2 de la Déclaration se rapporte aussi bien à la première (la garantie générale) qu'à la troisième (contrôle de l'utilisation des règles) de l'Article 1 du Protocole 1 de la Convention. Aussi, bien que la notion de la propriété constitutionnelle ne corresponde pas en étendue à celle de la Convention, cela ne signifie pas pour autant que le niveau de la protection constitutionnelle de la propriété est ainsi réduite. Bien que le libellé des dispositions constitutionnelles applicables soit distinct de celui de l'Article 1 du Protocole 1 de la Convention, par exemple en ce que l'article 17 de la Déclaration française fournit des compensations pour les prélèvements, le niveau de la protection de la propriété semble être largement convergent du fait de la pratique interprétative du Conseil constitutionnel français et de celle en premier lieu des juges ordinaires exerçant le contrôle de constitutionnalité des lois. Par exemple, le Conseil constitutionnel français applique le même système d'examen des requêtes qui lui sont présentées que celui de la CEDH quand elle les évalue selon la règle de la dépossession et subséquemment de la règle de la limitation de la Déclaration Elle applique également le même test de proportionnalité dans les affaires de limitations. Le Conseil constitutionnel français a, de la même manière, reconnu que la propriété comprend le droit d'utilisation, le droit de jouissance et le droit de disposer librement de la propriété comme droits distincts de la propriété qui bénéficie d'une protection constitutionnelle égale. En résumé, en

reconnaissant l'article 2 de la Déclaration comme norme de référence pour l'examen des limitations de propriété par lesquelles la constitutionnalité des limitations dépend des obligations de l'intérêt général et de la proportionnalité, le Conseil constitutionnel français a accédé au niveau de l'Article 1 du Protocole 1 de la Convention. Mais la garantie dans l'article 17 de la Déclaration française qui établit la protection contre les confiscations illégales offre une protection plus large que l'Article 1 du Protocole 1 de la Convention en ce qu'elle requiert le paiement de compensations.

Pour ce qui concerne la République tchèque, la manière dont est interprétée la garantie constitutionnelle de la propriété par la Cour constitutionnelle tchèque a été influencée par la réputation de la CEDH dans l'ordre juridique tchèque. Comme la CEDH forme une partie de l'ordre constitutionnel et qu'elle est une des normes de référence pour le contrôle de constitutionnalité des lois, la Cour constitutionnelle tchèque a interprété les Droits et libertés fondamentaux à la lumière de la CEDH. Elle s'est directement appuyée sur le concept de propriété dans le cadre de l'interprétation faite par la CEDH et a exercé sa compétence pour écarter des lois ou des parties de lois contraires à la sauvegarde de la propriété sous l'Article 1 du Protocole 1 de la Convention Il s'ensuit que la signification et la portée du concept de propriété dans la Constitution tchèque est en consonance avec la notion et la portée de la protection de la propriété selon la CEDH. Cela s'applique aussi bien à la conception de la propriété comme multitude de droits que comme fonction sociale de la propriété pour le dernier aspect, le droit constitutionnel tchèque et sa pratique diffèrent en étendue de la pratique selon la CEDH du fait que la clause constitutionnelle de propriété ne s'applique pas aux allocations sociales comme dans la garantie constitutionnelle française.

Le contenu de la garantie de la propriété tchèque est plus large que celui de la Déclaration française ce qui est évidemment dû aux différentes périodes durant lesquelles ces deux documents ont été rédigés et du fait que les textes de la Constitution tchèque et la Charte fondamentale des droits et libertés ont été largement influencés par, outre d'autres facteurs, les documents internationaux sur les droits de l'homme adoptés au XXe siècle. C'est pourquoi la Charte fondamentale des droits et libertés, à la différence de la Déclaration française, fournit une structure de la clause de propriété largement similaire à celle de l'Article 1 du Protocole 1 de la Convention et, par ailleurs, attache des devoirs à la propriété de biens.

Il s'ensuit qu'on peut avancer que la protection constitutionnelle de la propriété dans les deux pays correspond en étendue à celle de la structure de l'Article 1 du Protocole 1 de la Convention, ce qui signifie qu'elle fournit essentiellement une protection équivalente de la propriété. Bien que la pratique de la Déclaration française soit divisée en deux dispositions distinctes, sa portée suit la structure de l'Article 1 du Protocole 1 de la Convention. Le niveau de protection de la propriété semble ainsi convergent du fait de la pratique interprétative du Conseil constitutionnel français. Par ailleurs, dans les deux pays étudiés, la protection de la propriété contre les confiscations dépasse le potentiel de l'Article 1 du Protocole 1 de la Convention en ce que ces pays fournissent un dédommagement.

Concernant l'approche de la propriété comme un faisceau de droits à laquelle la pratique de la CEDH adhère de toute apparence, on peut dire que les deux juridictions constitutionnelles à l'étude conçoivent la propriété comme une multitude de droits indépendants du propriétaire par le moyen duquel une ingérence dans l'un des attributs de la propriété laisse les autres intacts. En reconnaissant la fonction sociale de la propriété, c'est-à-dire que la propriété contient des obligations vis-à-vis de la société, les juridictions constitutionnelles ne conçoivent apparemment pas la propriété comme un agrégat monolithique de droits sur une chose qui donne au propriétaire une ample sphère de liberté négative selon la définition de la notion par le droit civil. Bien qu'elles s'éloignent du concept de droit civil de la propriété, elles l'élargissent par une interprétation dynamique via une perception de la propriété comme instrument en constante évolution.

Une similarité entre les droits constitutionnels français et tchèque repose en ce qu'ils sont opératoires respectivement avec la notion de la Constitution au sens large représentant le bloc de constitutionnalité et l'ordre constitutionnel, et aussi en ce que la liste des Droits et libertés fondamentaux est comprise dans un document séparé à valeur constitutionnelle, respectivement pour chacun des deux, la Déclaration française et la Charte fondamentale des droits et libertés. Les deux notions de la Constitution dans le sens large sont strictement limitées dans le texte de la Constitution, mais tandis que le concept du bloc de constitutionnalité peut-être élargi par l'interprétation du Conseil constitutionnel français eu égard aux principes et objectifs de valeur constitutionnelle et eu égard aux principes reconnus par les lois de la République, la portée de l'ordre constitutionnel tchèque qui comprend une série de lois organiques est, lui, strictement limitée par la Constitution et ne peut être élargie que par des lois organiques, c'est-à-dire seulement par exception. La Cour constitutionnelle

tchèque a cependant étendu ce concept en décidant que les traités internationaux des droits de l'homme forment une partie de l'ordre constitutionnel en dépit du fait que cette constatation n'est nullement inscrite dans le texte de la Constitution. En conséquence la Cour constitutionnelle tchèque prend la Conventioncomme l'une des normes de référence du contrôle de constitutionnalité et s'y réfère directement lors de sa prise de décision sur les plaintes constitutionnelles et rejette les lois et dispositions légales qu'il trouve non-conventionnelles. La pratique du Conseil constitutionnel français est distincte dans ce domaine, il ne traite pas directement des plaintes constitutionnelles sur les violations des droits de l'homme, mais fournit un contrôle constitutionnel des lois aussi bien *ex ante* qu'*ex post*. Comme la Cour constitutionnelle tchèque, il peut rejeter des lois qu'il pourrait trouver contraires à la Constitution, mais il n'examine pas leur compatibilité avec la Convention. En ce sens, le contrôle français est plus compliqué et plus dispersé que la pratique tchèque en ce qu'il est exercé par trois juridictions suprêmes pour le contrôle de conventionnalité de la législation qui entre dans la compétence du Conseil d'État et de la Cour de cassation. Les compétences de cette dernière dans le contrôle de conventionnalité sont analogues à celles de la Cour constitutionnelle tchèque hormis le fait qu'elles ne peuvent, au contraire de la Cour constitutionnelle tchèque, annuler une loi ou une partie de celle-ci pour incompatibilité avec la Convention.

Pour ce qui concerne la portée de la protection normative de la propriété, la Déclaration française était originellement plus concise que la Charte tchèque en ce qu'elle ne délimitait pas clairement quelles dispositions s'appliquaient aux limitations de la propriété, puisque la pratique constitutionnelle n'était pas établie sur cette question. La protection constitutionnelle a été répartie entre deux articles, l'article 2 et l'article 17 de la Déclaration avec effet définitif en 2010 et ainsi la propriété constitutionnelle a atteint le niveau de protection normative des standards de la CEDH et aussi celui de la Charte tchèque Mais à la différence de la clause constitutionnelle de la propriété tchèque, ni l'article 2, ni l'article 17 de la Déclaration n'attachent de devoirs à la possession de biens.

Au niveau du droit substantiel les différences essentielles entre la protection constitutionnelle de la propriété en France et en République tchèque est dans la portée de la garantie constitutionnelle de la propriété Alors que la Déclaration fournit une garantie négative en mettant en place une sphère de liberté inviolable, imprescriptible, sacrée et autonome du propriétaire qui devrait être réservée, sauf circonstances exceptionnelles pour des raisons

d'intérêt du public, la Charte fondamentale des droits et libertés est plus tangible, son article 11 ne conçoit pas explicitement le droit de propriété comme un droit naturel, bien que cela soit impliqué par son préambule, mais plutôt comme un droit des individus à posséder des biens qui est restreint par des limitations qui impliquent généralement des devoirs imposés au propriétaire. L'attachement à des obligations de la propriété indique que la Charte fondamentale des droits et libertés est une Charte des droits fondamentaux plus modernes que la Déclaration. En conséquence, elle fournit une garantie de la propriété plus limitée que la Déclaration qui correspond à l'évolution de la conception de la propriété depuis 1789 vers un concept social impliquant des limitations accrues en raison de l'intérêt public considéré comme intérêt de la société en général. La Charte fondamentale des droits et libertés, en stipulant que toute personne a le droit de posséder un bien, n'exprime pas seulement que chaque propriétaire a le droit sous la Constitution à une sphère de liberté, c'est-à-dire à un droit subjectif négatif à non-ingérence, mais aussi à un droit subjectif positif vis-à-vis de l'État qui l'assure de la possibilité de devenir propriétaire. Le fait que, contrairement à la Déclaration, la Charte fondamentale des droits et libertés met en avant l'égalité de chaque propriété pour ce qui est de ses contenus et de sa protection, et le droit à l'héritage, dérive de circonstances historiques différentes dans lesquelles chacune de ces garanties a été mise en oeuvre. Les concepts constitutionnels de propriété dans les deux Constitutions sont autonomes et incluent la propriété publique.

Concernant la portée de la protection constitutionnelle deux repères d'évolution peuvent être observés: la limitation de la propriété et l'extension du droit de propriété à de nouveaux objets. Pour ce qui est de la sphère d'extension de l'application du droit de propriété à de nouveaux domaines, la notion de propriété telle qu'elle est conçue par les juridictions constitutionnelles, va au-delà de la signification originelle de la propriété comme objet meuble et immeuble pour intégrer diverses formes de propriété intellectuelles. L'extension de la sphère d'application à de nouveaux domaines et à de nouvelles limitations dans l'intérêt public peut être interprétée d'une manière telle qu'elle lie deux faits: le fait individuel qui permet à l'individu d'affirmer son pouvoir sur de nouveaux objets et le fait social qui permet à l'homme de vivre en société pour défendre les intérêts collectifs. Aucun de ces deux faits n'exclut l'existence de l'autre, et aucun des deux ne peut être supérieur à l'autre.

Considérant le fait que la signification et la portée de la sauvegarde constitutionnelle de la propriété en France et en République tchèque ont été formées sur la base de leur interprétation

par les juridictions constitutionnelles, elles ont atteint une forme qui reflète constamment des ingérences de plus en plus grandes de l'État dans les relations de la propriété et le renforcement de la perception de la propriété comme fonction sociale.

En France et en République tchèque, la portée de la marge d'appréciation a été formée davantage dans le sens de la perception de la propriété comme fonction sociale. En conséquence, je considère que le droit de jouir du droit de propriété devient de plus en plus dépendant des intérêts de la communauté et que le bien commun est une prémisse pour la jouissance des droits individuels. Aussi, l'importance du droit de propriété, en termes de réalité et de portée de sa protection, devient plus justifié du fait du service rendu au bien commun et il est donc ainsi déterminé par les intérêts des autres qui peuvent bénéficier de ce droit.

Comparé aux articles 2 et 17 de la Déclaration française, l'article 11 de la Charte fondamentale des droits et libertés offre une fonction sociale de la propriété dans quatre sous-paragraphes sur cinq, ainsi la portée de la dimension sociale constitutionnellement reconnue de la propriété qui restreint la propriété de manière significative dépasse les dispositions de la Déclaration. Bien que le préambule de la Constitution française de 1946 énumère plusieurs principes sociaux impliquant un nombre de droits sociaux pour les citoyens français, la Constitution française n'impose pas d'obligation explicite aux propriétaires qui seraient attachés au bénéfice de leur droit de propriété comparable à celle contenue dans l'article 11 de la Charte fondamentale des droits et libertés. Cependant, je pense que le principe inscrit dans le Préambule de la Constitution de 1946, en vertu duquel la propriété privée qui acquiert un caractère de service public national ou qui est un monopole peut devenir une propriété publique, peut être mis au même rang que l'obligation en vertu de l'article 11 du paragraphe 2 de la Charte fondamentale des droits et libertés qui permet qu'une propriété privée spécifique soit acquise exclusivement par l'État. Bien qu'étant un principe fondamental, à l'instat de l'article 11 du paragraphe 2 de la Charte fondamentale des droits et libertés, il permet au législateur d'adopter des lois à cet effet. Aussi les deux dispositions délèguent la compétence au corps législatif d'envisager ces aspects spécifiques de la fonction sociale de la propriété dans la législation et donnent au législateur des lignes de conduite concernant la portée par laquelle il peut restreindre le pouvoir de jouissance individuelle d'un bien par le propriétaire pour des raisons de bien public.

III. L'interprétation juridique des garanties de la propriété

i. Reconnaissance de la dimension sociale de la propriété

Bien qu'historiquement le droit de la fonction sociale de la propriété ait été considéré comme une condition première pour la création d'une sphère privée d'autonomie de l'individu, le fonction sociale de la propriété est aussi unique en ce que la reconnaissance de l'un des droits de la propriété de la personne implique nécessairement une restriction des droits de la propriété d'autres personnes. Le fonction sociale de la propriété n'est pas pratiquée dans un vide, mais dans un contexte de la société dans lequel il interagit avec d'autres droits et auxquels il est confronté. De plus, les droits de propriété sont des pré-requis pour l'exercice de tous les autres droits dans la mesure où ils déterminent l'accès aux besoins essentiels de subsistance. Le droit de propriété n'est pas un droit absolu, mais un droit dont le but et la portée sont en contant changement et en évolution qui résonne avec l'évolution de la société et ses besoins changeants, économiques, sociaux et politiques reflétés dans l'intérêt général et public - les objectifs et les conditions pour l'exercice du droit de propriété ont subi une évolution caractérisée aussi bien par une extension significative de la sphère d'application à de nouveaux domaines que par les limitations requises au nom de l'intérêt public. Ce dernier a permis à la CEDH et aux juridictions constitutionnelles nationales de prendre en compte la fonction sociale du droit de propriété satisfaisant les besoins de la société. En conséquence la conception individualiste du droit de propriété inscrite formellement dans la Constitution française a été remplacée progressivement par l'idée de propriété limitée par sa fonction à servir le bien public au nom de la solidarité sociale. La portée du droit de propriété en général est réduite et oscille entre garantie constitutionnelle et restriction, c'est ce que les juridictions ici étudiées ont en commun.

De ce fait, dans l'interprétation des clauses de la protection de la propriété, les trois juridictions étudiées reconnaissent le caractère social de la propriété et prennent en compte son évolution. Pour la CEDH, la Convention est un instrument vivant, dynamique, qui répond à l'évolution de la société et qui doit être interprété à la lumière des conditions présentes. Aussi, les juges constitutionnels n'ont pas perçu la propriété comme un instrument statique mais plutôt comme un instrument qui se développe en permanence et qui a pris de nouvelles formes pour lesquelles la définition du Code Civil n'est plus suffisante. Les deux juridictions constitutionnelles s'inspirent de la conception civile et conçoivent la propriété comme une

sphère d'autonomie du propriétaire qui a la disposition de sa propriété, laquelle n'est pas absolue mais restreinte par les limites de la loi, d'une part, et par les droits subjectifs d'autres individus d'autre part. En accord avec la CEDH afin de promouvoir le dynamisme permettant une adaptation de la propriété à de nouveaux domaines, ils ont conçu la propriété constitutionnelle comme élargie en portée et dépassant la dimension individuelle. La congruence d'approche est significative du fait que la jurisprudence de la CEDH change selon l'évolution sociale des États-membres de la Convention.

ii Interprétation des justifications de l'ingérence dans la propriété

La tendance évolutive des droits de la propriété est que la propriété comme objet a été en permanence élargie, tandis que la propriété comme droit a connu des restrictions régulières au nom de l'intérêt public. Cet affaiblissement de la liberté de propriété est influencé de manière significative, entre autres facteurs, par le fait que la propriété comme droit fondamental est interprétée par les juges gardiens de la Constitution. Il ne fait aucun doute que c'est l'utilité au nom de la société qui influence la compréhension moderne de la propriété. La CEDH en tant que corps créant des nouveaux critères dans le domaine des droits fondamentaux a gagné une pertinence grandissante dans les systèmes juridiques nationaux, car elle a eu une influence significative sur la manière dont les droits fondamentaux sont interprétés et renforcés au niveau national. Une des enquêtes a été dirigée sur la portée avec laquelle les juridictions constitutionnelles ici étudiées sont en harmonie avec les critères fixés par les organes de la Convention à propos des critères justifiant les ingérences dans la propriété.

Concernant les moyens de sauvegarder la Convention et la Constitution contre des limitations et privations arbitraires de la propriété, on peut observer que la Convention offre deux normes auxquelles les limitations de la propriété sont applicables, tandis que les Constitutions tchèque et française ne contiennent qu'une garantie contre les limitations arbitraires ne distinguant pas entre le contrôle de l'utilisation de la propriété et d'autres types de restriction de la propriété. À la différence des juridictions constitutionnelles nationales ici étudiées qui se réfèrent à la typologie classique limitations-pertes de propriété, la CEDH a élaboré une 3e norme, applicable aux ingérences, qui ne peut être qualifiée ni de privation, ni de contrôle de l'utilisation de la propriété, ce qui permet à la CEDH d'élargir la portée de son contrôle et de renforcer la protection du droit de propriété. Cela ne signifie pas que le droit de propriété jouirait d'une moindre protection en vertu des Constitutions tchèque et française, mais ce

pouvoir illimité de contrôle de la CEDH basé sur la norme autonome a des effets compensateurs sur une large marge d'appréciation des États qui fait que les droits de la Convention sont appliqués différemment dans différents États européens. Le fait que la qualification des restrictions de la propriété par la CEDH en vertu de l'Article 1 du Protocole 1 de la Convention puisse avoir quelque élément d'ambiguïté et que la ligne marquée de l'application de la norme autonome puisse être accompagnée d'un degré de subjectivité dans l'évaluation de la CEDH en considération du fait que la norme autonome peut être applicable à des cas limites entre limitations et privations de propriété, produit des effets sur les droits à compensation pour violation. Notamment si la CEDH décide d'appliquer pour des faits similaires à un cas la norme autonome et à l'autre cas la règle de privation, le droit à compensation varierait ce qui créerait des inégalités, particulièrement dans des cas où la perte économique est comparable à celle venant d'une privation. Le degré de protection de la propriété au niveau européen peut être ensuite susceptible de fluctuations et créer une incertitude dans l'interprétation pour les juridictions constitutionnelles qui suivent la jurisprudence de la CEDH.

En résumé, les deux Conventions étudiées ont des dispositions qui reflètent plus ou moins la structure de la garantie de la propriété dans la Convention. On peut observer que la Charte fondamentale des droits et libertés tchèque offre une garantie une garantie plus complexe, ce fait étant lié à la période durant laquelle ce document a été rédigé, elle a aussi été largement inspirée par la Convention, entre autres documents juridiques internationaux. La disposition de l'article 11 § 4 de la Charte fondamentale des droits et libertés tchèque qui offre des critères de constitutionnalité dans le domaine des limitations et de la privation de la propriété correspond à l'étendue des garantie de l'Article 1 du Protocole 1 de la Convention. Dans l'interprétation de la Cour constitutionnelle tchèque la notion de limitation forcée de la possession est équivalente aux termes de contrôle de l'utilisation de la propriété sous l'Article 1 du Protocole 1 de la Convention. Les deux notions se réfèrent à des situations dans lesquelles le mode d'utilisation de sa propriété par le propriétaire est nié par l'imposition d'un devoir correspondant contraignant sous peine de sanctions ou dans lesquelles le propriétaire est limité dans l'exercice de certains de ses droits. Comparée à la Convention ou à la Charte fondamentale des droits et libertés, la Déclaration française n'indique pas de conditions explicites pour les limitations de la propriété. Mais le Conseil constitutionnel français a tranché sur l'Article 2 de la Déclaration comme norme de référence pour les limitations de la propriété représentant un équivalent du contrôle de la règle de l'utilisation de l'Article 1 du

Protocole 1 de la Convention, ayant sans aucun doute à l'esprit d'être au niveau de l'étendue de la garantie de la propriété sous la Convention.

Dans toutes les juridictions ici étudiées, la gravité de l'ingérence est un facteur important qui joue un rôle décisif dans l'évaluation de la proportionnalité de l'ingérence, mais aussi dans l'évaluation de la nature de l'ingérence. Particulièrement lorsque aucun transfert de propriété n'a lieu, la gravité de l'ingérence joue un rôle important pour déterminer une expropriation de facto. Les juridiction étudiées ici diffèrent en ce qui concerne la disposition applicable pour des expropriations *de facto*. Alors que selon la Convention les privations *de facto* de la propriété relèvent de la règle de la privation, selon la Charte tchèque, elles sont soumises à la notion de limitation forcée, et selon la Déclaration française elles ne sont pas soumises à l'étendue de l'application de l'article 17 de la Déclaration française mais se trouvent régies par la norme de limitation de l'article 2 de la Déclaration.

Du point de vue du texte de la Charte tchèque, cela fait peu de différence, puisque la Charte développe les mêmes conditions de constitutionnalité pour les privations et les limitations forcées de propriété, tandis que l'Article 1 du Protocole 1 de la Convention fait la différence entre la privation et le contrôle de l'utilisation de la propriété, en ce qu'il établit des critères plus stricts pour une privation. Si nous comparons les critères de constitutionnalité pour les limitation forcées et les critères de conventionnalité pour les privations de propriété, ce sont les mêmes pour les deux ingérences, c'est-à-dire qu'ils doivent être exigés par le droit, être dans l'intérêt public et se voir compensés. Cependant la différence de termes a un impact sur le montant de la compensation qui peut être réclamé, qui, en accord avec la pratique constitutionnelle tchèque, n'est pas la même pour les limitations forcées et les privation de la propriété. Le moindre degré de gravité coïncide ainsi avec la qualification de privation de facto selon la règle de la limitation de la propriété dans les pratiques constitutionnelles tchèque et française. Conformément à la jurisprudence constitutionnelle française et à celle de la pratique constitutionnelle tchèque, mais différemment de la pratique de la CEDH, les privations *de facto* relèvent du pouvoir de la norme constitutionnelle appliquée aux limitations et non aux privations de la propriété.

Le rôle du critère de gravité dans la pratique constitutionnelle tchèque et française est limitée à une distinction entre une limitation (forcée) et une privation de la propriété, tandis que dans la pratique de la CEDH, c'est un facteur qui peut faire pencher la balance ou bien en faveur

d'une privation formelle, une privation *de facto*, un contrôle de l'utilisation ou bien d'une ingérence dans la jouissance paisible des biens. Il semble ainsi que dans la pratique de la CEDH, le facteur de gravité de l'ingérence a une application plus large et n'est pas seulement un facteur significatif pour distinguer entre limitation et privation de propriété, mais aussi pour décider entre privation formelle et *de facto*. Vu de la perspective de l'Article 1 du Protocole 1 de la Convention, la notion française et tchèque de limitation (forcée) comprend ainsi un contrôle de l'utilisation de la propriété, une privations *de facto* de la propriété, ainsi que des situations que la CEDH qualifie d'ingérences dans la jouissance paisible des biens. Avec la reconnaissance de l'article 2 de la Déclaration française comme disposition de référence pour la limitation de la propriété le critère de gravité semble passer du repère dans l'évaluation de la dénaturation à un élément dans le test de proportionnalité.

La question de la gravité de l'ingérence n'a pas de rapport avec les affaires qui impliquent une confiscation de la propriété liée à la commission d'un délit. La situation est qualifiée de contrôle de l'utilisation de la propriété par la CEDH ou à de limitation forcée par la Cour constitutionnelle tchèque. Une approche vraiment différente a été adoptée par la juridiction constitutionnelle française. Elle a clairement dit que l'article 17 de la Déclaration française ne s'applique pas aux confiscations liées à la commission d'un délit criminel et que la conformité avec un tel type de confiscation doit être examinée sous l'angle de l'article 8 de la Déclaration qui fournit le principe de la nécessité de la punition. La solution adoptée par la juridiction constitutionnelle française coïncide avec la pratique adoptée par la CEDH et la Cour constitutionnelle tchèque en ce qu'elle n'implique pas la norme de privation comme norme de contrôle.

Du point de vue de l'irréversibilité, on peut suggérer qu'il y a deux sortes de limitations garanties constitutionnellement: celles qui sont réversibles et celles qui relèvent de la privation *de facto* qui sont irréversibles. Cela implique que le critère d'irréversibilité de la perte de tous les attributs de propriété n'est pas un critère indicatif pour la détermination de savoir si doit être appliquée la règle de la confiscation ou de la restriction dans la Charte tchèque ou dans la Déclaration française, ce qui tranche avec la pratique de la CEDH qui prend l'enjeu de l'irréversibilité comme l'un des indicateurs caractéristiques de la notion de privation de propriété. Par ailleurs le critère d'irréversibilité de la situation semble être un élément significatif dans la pratique de la CEDH, puisque cette dernière peut, à la différence des juridictions constitutionnelles nationales l'appliquer non seulement au contrôle de la règle

d'utilisation, mais aussi à la règle générale de l'Article 1 du Protocole 1 de la Convention. Ce fait peut expliquer l'irréversibilité trouvant sa justification dans la pratique de la CEDH tandis que dans la pratique constitutionnelle cela semble être un facteur marginalisé.

L'étendue de la protection constitutionnelle et conventionnelle du droit de propriété contre les ingérences arbitraires est déterminé en congruence avec les principes d'interprétation embrassant le critère de constitutionnalité et de conventionnalité dans les garanties respectives de la propriété. On peut observer que ces critères de justification des ingérences dans la propriété sont fondamentalement congruents. Bien que les droits de la Convention soient sujets à des marges nationales d'appréciation qui permettent une application différente selon les différents États membres de la Convention, les juridictions constitutionnelles française et tchèque ont adopté les mêmes critères d'interprétation que la CEDH pour justifier les ingérences dans la propriété, c'est-à-dire que les deux appliquent les critères d'égalité, de légitimité, de proportionnalité et de compensation. Ainsi, pour ce qui concerne les principes de justification, la pratique constitutionnelle dans les deux États étudiés est en général en consonance avec les critères fixés par la Convention et la CEDH, et ce en dépit des différences de ces corps constitutionnels qui suivent la juridiction de la CEDH. Bien que le Conseil constitutionnel français n'applique pas directement la jurisprudence de la Convention contrairement à la Cour constitutionnelle tchèque, on peut prétendre en termes généraux qu'il suit les critères de la protection de la propriété définis par le système de la Convention. On peut en outre observer que la Cour constitutionnelle tchèque applique directement la jurisprudence de la CEDH et s'y réfère pour les requêtes qui lui sont soumises. Cela conduit à remarquer qu'il y a, pour la pratique de la protection de la propriété, harmonie entre la juridiction constitutionnelle tchèque et la CEDH.

Concernant les soubassements constitutionnels, la Charte tchèque est spécifique en cela qu'elle fixe les mêmes conditions pour les confiscations et les restrictions forcées incluant l'obligation de payer des dommages. Dans la Déclaration française, les obligations constitutionnelle pour les ingérences dans la propriété sont expressément fixées pour les seules confiscations tandis que celles pour les restrictions sont du ressort exclusif du juge. Comme les deux textes constitutionnels contiennent, à la différence de la Convention, une disposition générale obligeant à appliquer les droits et libertés fondamentaux du fait du principe d'égalité, on peut avancer que les textes constitutionnels respectifs semblent fournir de meilleures sauvegardes de la propriété que la Convention.

Concernant le critère de légalité des juridictions constitutionnelles française et tchèque, il est en consonance avec celui de la CEDH qui conçoit les aspects aussi bien formels que qualitatifs de ce principe incluant la disponibilité des garanties procédurales pour contester la légalité des ingérences dans la propriété. La Cour constitutionnelle tchèque a même été jusqu'à adopter la définition de la « loi par la CEDH et a déclaré que l'État a l'obligation positive de lier le droit de propriété à des garanties procédurales. L'approche du critère de légitimité par les juridictions constitutionnelles nationales relève de la marge d'appréciation des États sous le régime de la Convention, offrant un champ discrétionnaire aux autorités nationales.

De la même manière que la CEDH, les corps constitutionnels nationaux conçoivent la notion d'intérêt public comme un concept ouvert et casuistique qui ne doit pas nécessairement être lié aux intérêts de l'État ou du public général, mais il peut aussi prendre en compte les intérêts des parties privées à condition que les intérêts soient au profit du public plus généralement compris. Il y a cependant une différence perceptible dans l'étude de l'appréciation de la liberté du législateur par les corps constitutionnels nationaux. Les juridictions constitutionnelles française et tchèque semblent différer dans leur approche quant à leur relation avec la Cour constitutionnelle et le corps législatif. La conception du Conseil constitutionnel français de l'intérêt général semble bien plus large que celle de la Cour constitutionnelle tchèque. Tandis que la Cour constitutionnelle tchèque n'hésite pas à déclarer que le législateur est tenu par des obligations positives de protéger le droit de propriété, le Conseil constitutionnel français semble exercer un pouvoir d'appréciation restreint vis-à-vis du législateur né d'une prudence quant à l'empiètement sur le pouvoir de ce dernier. De plus, tandis que la Charte tchèque intègre dans une clause génale de la Charte l'obligation selon laquelle aucune limite ne peut empiéter sur la signification de l'étendue des droits et libertés fondamentaux en ce qu'ils imposent fondamentalement des restrictions sur le législateur en identifiant les objectifs et les mesures des restrictions de la propriété, la Constitution française confère au législateur des pouvoirs d'objectifs plus généraux dans l'article 34 de la Constitution en énumérant les compétences du législateur. En conséquence on peut dire que le législateur français semble bénéficier d'une large marge d'appréciation similaire à celle dont jouissent les parlements nationaux en vertu de la Convention et que le corps constitutionnel français, à l'instar de de la CEDH, exerce des pouvoirs de contrôle limités en termes d'incompatibilité patente avec la Constitution. On peut avancer q'une telle tolérance envers le législateur peut générer à l'avenir des conflits potentiels de compatibilité avec la Convention.

S'il y a une apparente congruence concernant les principes de légalité et de légitimité au travers des juridictions étudiées, il y a une légère variabilité dans les approches du critère créées par le juge de proportionnalité et de compensation, bien qu'elles soient sur un plan général clairement en harmonie.

La CEDH n'applique pas le test de proportionnalité d'un manière rigoureuse dans les cas de droit de la propriété et son approche de la proportionnalité semble être moins stricte et clairement plus tolérante envers le législateur que celle de la Cour constitutionnelle tchèque. Notamment le test de proportionnalité tel qu'exercé par la CEDH ne semble pas, en principe, avoir en soi le critère de nécessité qui est régulièrement et automatiquement examiné par la Cour constitutionnelle tchèque, et la CEDH n'examine l'existence de mesures moins onéreuses. Aussi l'on peut dire que la Cour constitutionnelle tchèque, en faisant le contrôle de proportionnalité en trois étapes, permet une meilleure protection contre les limitations de la propriété qui est loin de donner aux autorités publiques des pouvoirs discrétionnaires larges dans le domaine du droit de propriété. Si le principe de proportionnalité sert à « neutraliser » la pouvoir discrétionnaire du législateur quant à l'identification du but légitime dans l'intérêt public et le choix de mesures pour le faire respecter, le contrôle en trois étapes de la proportionnalité semble représenter une barrière de défense plus forte contre les interventions arbitraires permettant de surveiller non seulement la gravité de l'ingérence, c'est-à-dire les impacts objectifs de la mesure restrictive, mais également, comme priorité, la légitimité de la mesure, c'est-à-dire le choix subjectif du législateur. De plus, il semble que à la différence de la loi et de la pratique constitutionnelle tchèque qui accorde aux confiscations et aux limitations formelles de la propriété le même niveau d'intérêt concernant les exigences de la constitutionalité devant être remplies, le test de proportionnalité de la CEDH n'apparaît pas être le même sous e régime de la confiscation et du contrôle de la règle de l'utilisation. On peut dire que l'obligation de proportionnalité diffère selon la règle applicable depuis une approche plus stricte conformément à la règle de la confiscation permettant aux États une marge d'appréciation plus étroite jusqu'à une approche moins stricte sous le contrôle de la règle de l'utilisation.

Une tendance opposée peut être observée dans la pratique du Conseil constitutionnel français qui examine seulement des erreurs manifestement disproportionnées du législateur concernant la privation de propriété, mais pour ce qui concerne les limitations de la propriété il agit seulement en faisant un test d'équilibre de proportionnalité. Contrairement au test de juste

équilibre, le contrôle de l'erreur manifeste est un moyen de contrôle minimum parce qu'il laisse au législateur un large pouvoir de discrétion et est seulement restreint à un contrôle de « disproportion manifeste ». Les juges constitutionnels français ne font apparemment pas un test de proportionnalité en trois étapes dans les matières de propriété, ils réduisent leur analyse de proportionnalité à un contrôle d'une disproportion manifeste ou à une erreur manifeste d'appréciation qui en matière de limitations de la propriété a laissé place à un test de juste équilibre tel qu'il est fait par la CEDH, ce par quoi la protection de la propriété a été renforcée. Si une mesure ne devient pas une privation de la propriété ou n'a pas l'effet de dénaturer la substance de la propriété, le Conseil constitutionnel français examine si l'ingérence est justifiée par l'intérêt général et proportionnée à l'objectif recherché. Ceci renforce le contrôle des limitations de la propriété qui a abouti à un plus haut niveau de protection et peut être vu comme l'expression de la volonté du Conseil constitutionnel français d'encadrer le pouvoir discrétionnaire du Parlement. Il se conforme aux exigences de la CEDH d'une manière plus complète qui permet le contrôle de l'absence de dénaturation du droit de propriété. Le Conseil constitutionnel français exerce ainsi un contrôle équivalent à celui de la CEDH. Ainsi les juges constitutionnels français ne semblent pas appliquer la même rigueur à l'évaluation de la proportionnalité des privations qu'aux limitations de la propriété. Au contraire de la CEDH et de la Cour constitutionnelle tchèque, ils ne soumettent pas les mesures de confiscation à un test d'équilibre, en revanche comme la CEDH et contrairement à la Cour constitutionnelle tchèque, les juges constitutionnels français n'examinent pas si le but du législateur pourrait avoir été atteint par d'autres buts moins dispendieux tant que les moyens adoptés ne sont pas excessifs ou disproportionnés à cet objectif.

Concernant les exigences de compensation, les termes de compensation fournis par la législation sont essentiels pour l'évaluation de savoir si la mesure contestée respecte l'équilibre jugée nécessaire et particulièrement s'il n'impose par un fardeau disproportionné sur les requérants. Toutes les juridictions étudiées sont en consonance, en cela qu'elles requièrent que le droit de compensation fournisse des sauvegardes procédurales suffisantes et que les processus ne soient pas alourdis par des retards indus.

Considérant le niveau de compensation, toutes les juridictions étudiées font la différence entre la compensation pour les privations et les limitations de la propriété et aussi entre les compensations pour les confiscations légales et pour les non légales. Concernant la

compensation pour les limitations de la propriété, la pratique de la Cour constitutionnelle tchèque diffère de la CEDH en ce que la première crée une protection des limitations de la propriété tandis que, suivant l'article 11 de la Charte fondamentale des droits et libertés, la Cour constitutionnelle tchèque est obligée de donner des compensations, non seulement pour les confiscations, mais aussi pour les limitations forcées de la propriété. La Cour suit une règle par laquelle les confiscations nécessitent le paiement de compensations, sauf en cas de circonstances exceptionnelles, tandis que les limitations de la propriété ne suivent pas cette règle. Bien que la CEDH respecte le choix des méthodes de l'État, sauf s'il est sans fondement raisonnable, il est demandé que le niveau de compensations pour les confiscations soit en relation raisonnable avec la valeur de la propriété et qu'il soit calculé sur la base de la valeur de la propriété à la date à laquelle la propriété a été due. La condition que les compensations soient raisonnablement reliées à la valeur de la propriété n'est pas un principe absolu, car il n'est pas nécessaire qu'un propriétaire reçoive la pleine valeur du marché. Le paiement d'un moindre paiement que la valeur du marché peut être justifié par des objectifs légitimes d'intérêt public ou d'économie à caractère social, donc les besoins de justice social peuvent justifier une différence d'avec la compensation du marché pour la privation de la propriété. Cependant un manque total de compensation pour une confiscation, aussi bien qu'une disproportion significative entre le niveau de compensation et la valeur de la propriété peuvent seulement être considérés justifiables, en vertu de l'Article 1 du Protocole 1 de la Convention, dans le cas de circonstances exceptionnelles.

La Cour constitutionnelle tchèque maintient en concordance avec la CEDH qu'une privation de la propriété nécessite le paiement d'une compensation adéquate ou raisonnable, tandis que le niveau de compensation d'une limitation forcée doit être évaluée selon les circonstances spécifiques de chaque cas individuel et dépendra de l'étendue et de l'intensité de la limitation. La Cour constitutionnelle tchèque a validé le principe fixé par la CEDH par lequel, dans les cas de limitations de la propriété la règle est que si des dommages sont attribués ils ne doivent pas couvrir la pleine valeur du marché. En général on peut dire que les juges constitutionnels tchèques suivent clairement la pratique interprétative de la CEDH en matière de compensation pour les ingérences dans la propriété.

Le Conseil constitutionnel français, d'autre part, demande à ce que la compensation aussi pour bien la confiscation que pour la limitation soit adéquate et fondée sur la valeur réelle de la propriété en question. Les juges constitutionnels français appliquent donc clairement un

critère plus strict pour le niveau de compensation des limitations de la propriété que la CEDH et la Cour constitutionnelle tchèque. Concernant le niveau de compensation pour la privation de propriété, cela implique que les conditions sont moins strictes en vertu de la Convention, parce que, tandis que la CEDH demande qu'il y ait une valeur raisonnable vis-à-vis de la valeur de la propriété, la Déclaration stipule que les dommages doivent être justes et antérieurs, ce qui a été interprété par le Conseil constitutionnel français comme l'obligation de réparer la violation matérielle dans son intégralité en comptant la totalité de la nuisance qui est directe, matérielle et certaine. Les juges constitutionnels français maintiennent que les ingérences dans la propriété qui ne sont pas des confiscations sont compensables pourvu que le propriétaire supporte une charge considérée comme excessive par la société. En appliquant le principe par lequel la compensation n'est pas exclue des cas où l'application de la loi a causé une charge spécial et exorbitante qui est disproportionnée à l'intérêt public poursuivi, le Conseil constitutionnel français a intégré les principes appliqués par la CEDH dans sa pratique du contrôle de constitutionnalité. Mais en opposition à la CEDH et à la Cour constitutionnelle tchèque, le Conseil constitutionnel français ne trouve pas inconstitutionnel qu'aucune compensation ne soit offerte pour violation morale dans les cas d'expropriation.

Concernant l'influence de la jurisprudence de la CEDH sur les systèmes constitutionnels nationaux de la protection de la propriété étudiée, on peut dire en général que les juridictions constitutionnelles française et tchèque ont été influencées par la Convention et la pratique de la CEDH. Cependant, le degré d'impact est visiblement différent. Les marques de la pratique de la CEDH sont clairement apparentes dans le processus de décisions de la Cour constitutionnelle tchèque. Cette dernière s'est inspirée directement de la jurisprudence de la Convention et s'y est référée, et les cas ne sont pas exceptionnels où les juges constitutionnels ont plutôt fait un contrôle de conventionnalité qu'un contrôle de compatibilité avec les normes de références constitutionnelles pertinentes. En conséquence, les critères de la Convention sont profondément intégrés dans la jurisprudence constitutionnelle tchèque et l'effet de la jurisprudence de la CEDH est apparemment forte. L'approche de la Cour constitutionnelle tchèque est liée à la position de la Convention dans l'ordre juridique tchèque qui est en concordance avec l'interprétation de la Cour constitutionnelle tchèque, une des normes de référence pour le contrôle de constitutionnalité et partie de l'ordre constitutionnel tchèque. En conséquence, tout conflit avec la Convention de la part des autorités nationales signifie un conflit avec l'ordre constitutionnel tchèque. La Cour constitutionnelle tchèque peut abroger des lois ou leurs dispositions, si elles sont en contradiction avec la loi constitutionnelle ou la

Convention. On peut dire que le niveau de protection de la propriété est identique à celui en vertu de la Convention, et pour certains aspects un peu supérieur, ce qui conrrespond au rôle de la Convention qui établit des standards européens de droits fondamentaux et d'harmoniser la protection à un niveau minimal. Les États contractants peuvent alors développer des standards de droits de l'homme plus hauts que ceux fixés dans la Convention.

Comme certains commentateurs l'écrivent, l'impact de la Convention sur le droit français s'est accru et est devenu particulièrement significatif durant les 20 dernières années et le Conseil constitutionnel français, bien que refusant de vérifier la constitutionnalité des lois en rapport avec la Convention, semble intégrer quelques éléments de la Convention dans l'article 17 de la Déclaration française bien qu'indirectement et implicitement. Bien que la Convention devrait avoir un niveau hiérarchique supérieur aux normes juridiques, le Conseil constitutionnel français refuse d'être une institution de contrôle de la conventionnalité des statuts. Aussi, bien que le Conseil constitutionnel français n'utilise pas la Convention dans son contrôle de constitutionnalité, les juges constitutionnels en tirent leur inspiration dans leur interprétation des principes constitutionnels, comme le principe d'égalité ou le principe de proportionnalité. Ces principes sont particulièrement importants dans la protection de la propriété privée face aux ingérences illégales. Après avoir transposé le test de proportionnalité dans le contrôle de constitutionnalité des limitations de la propriété, le Conseil constitutionnel français a aligné sa pratique avec celle de la CEDH et a augmenté le contrôle sur la législation et ainsi a renforcé la protection du droit fondamental de la propriété privée grâce à la possibilité d'observer et de contrôler l'intérêt général fixé par le législateur. Il apparaît que le Conseil constitutionnel français a encore davantage renforcé la garantie constitutionnelle du droit de propriété en ce qu'il a fixé l'article 2 de la Déclaration comme la disposition de référence de sauvegarde contre des restrictions illégales. Ainsi la Convention et la pratique de la CEDH semblent avoir permis de combler les lacunes dans le système de protection des droits et libertés fondamentaux. Mais comme le Conseil constitutionnel français ne fait pas référence expresse à la Convention et à la jurisprudence de la CEDH, l'impact de cette dernière sur la prise de décision constitutionnelle est latente et n'est pas visible comme dans le cas de la Cour constitutionnelle tchèque. De toute façon, l'influence de la CEDH sur la prise de décision du Conseil constitutionnel français et l'interprétation des droits fondamentaux semble relativement limitée quand on la compare à l'influence que la Convention a eue sur la jurisprudence de la Cour constitutionnelle tchèque. Malgré cela, il est manifeste que le niveau

français de protection constitutionnelle de la propriété est en complète conformité et comparable avec celle de la Convention et la pratique de la CEDH.

Le dialogue entre les cours suprêmes nationales et la CEDH conduit à atteindre une plus grande efficacité dans la protection des droits et libertés fondamentaux en harmonisant leur interprétation et leur application. L'interaction entre la CEDH et les cours nationales se fonde sur le principe de subsidiarité permettant aux cours nationales une large marge d'appréciation. En ce domaine, je voudrais me référer à la relation entre la CEDH et les juridictions nationales comme pouvoir d'équilibre. Les juridictions aussi bien nationales qu'européennes ont les instruments leur permettant d'exercer leur sphère de pouvoir vis-à-vis de l'une comme de l'autre. Alors que la CEDH a le pouvoir de restreindre la marge d'appréciation des États en appliquant une doctrine européenne consensuelle ou en spécifiant des mesures qui doivent être adoptées pour que la législation soit rendue conforme à la Convention, les juridictions nationales disposent d'une large discrétion en rapport avec la détermination de l'intérêt public qui justifie les restrictions des droits garantis par la Convention. L'utilisation du consensus européen dans le raisonnement juridique de la CEDH place des restrictions, non seulement sur la marge d'appréciation donnée aux États, mais aussi sur l'interprétation évolutive de la CEDH de la Convention. Le fait que la CEDH a interprété la Convention progressivement à la lumière de la doctrine de « l'instrument vivant » ne devait pas être perçu comme si elle assumait le statut d'une cour européenne des droits de l'homme suprême. Le principe de subsidiarité reste le principe majeur de l'interaction entre la CEDH et les cours nationales, ce qui a été confirmé récemment par l'adoption du protocole n°15 de la Convention.

L'étendue par laquelle les cours constitutionnelles nationales mettent en oeuvre la jurisprudence de la CEDH varie en fonction du statut de la Convention dans chaque ordre juridique particulier et du système de protection constitutionnelle des droits et libertés fondamentaux et aussi de la volonté du juge d'appliquer la Convention. Conformément aux deux Constitutions nationales en France et en République tchèque, les traités internationaux des droits de l'homme jouissent d'une force supralégislative, mais sont inférieurs à la Constitution. La Cour constitutionnelle tchèque, cependant, considère ces traités comme formant une partie de l'ordre constitutionnel et les traite comme supérieurs aux lois ordinaires. Du fait de la valeur constitutionnelle de la Convention par la Cour constitutionnelle tchèque, cette dernière la prend comme une norme de référence dans le

contrôle de constitutionnalité et l'applique directement dans son processus de décision, ce qui signifie qu'elle peut réduire ou abolir une législation et les décisions des cours ordinaires contraires à la Convention. La mise en œuvre de la jurisprudence de la CEDH est ainsi très intense. Ce n'est cependant pas le cas pour le Conseil constitutionnel français. Comme il refuse le contrôle de compatibilité des lois avec la Convention, il ne semble pas être influencé par le droit et la pratique de la Convention, cette situation peut aboutir à des conflits potentiels avec la CEDH. Le Conseil constitutionnel français n' pas accordé, contrairement à la Cour constitutionnelle tchèque, un statut constitutionnel à la Convention. La dualité du contrôle de constitutionnalité et de conventionnalité et le fait que le Conseil constitutionnel français n'exerce pas le pouvoir d'annuler des lois qui sont en conflit avec la Convention, ce par quoi elle pourrait éliminer et empêcher des ingérences possibles avec la Convention, entraîne un risque de clash potentiel entre les conclusions du Conseil constitutionnel français d'un côté et celles de la CEDH et des cours ordinaires de contrôle de constitutionnalité de l'autre. Ces clashs potentiels impliquent des situations où le Conseil constitutionnel français décide sur la compatibilité de lois nationales avec la Constitution et où la Cour trouve que la même loi nationale viole la Convention et des situations où les constatations et la conventionnalité des droits ne s'accordent pas et la législation non-conventionnelle reste une part du droit juridique. Une récente réforme constitutionnelle introduisant l'institution d'une Question Prioritaire de Constitutionnalité (QPC) ne gomme pas cette question. Les différences potentielles dans l'évaluation de la constitutionnalité et de la conventionnalité des lois semblent être un point de friction dans les relations entre les cours qui exercent le contrôle de conventionnalité et le Conseil constitutionnel français. Et une conclusion de violation de la Convention par la CEDH peut potentiellement mener le juge ordinaire à s'ingérer dans l'autorité du Conseil constitutionnel français. Il existe apparemment un dialogue entre la CEDH et les cours suprêmes ordinaires sur le contrôle de conventionnalité qui examinent la tâche d'harmoniser la loi nationale avec le droit et la pratique de la Convention. De plus, en conséquence de l'introduction de la QPC, ces cours sont devenues *de facto* et *de jure* des juges constitutionnels. La CEDH a sans aucun doute aidé à améliorer les garantie des droits de l'homme à travers la jurisprudence interne à cet égard, on peut dire qu'il y a eu une européanisation de la protection, puisque le droit de la Convention est intégré dans le processus de décision des cours, y compris le Conseil constitutionnel français. Mais il est évident que l'efficacité de la mise en œuvre des normes et la jurisprudence de la Convention au niveau national serait améliorée si la Convention était incorporée dans le bloc de conventionnalité et obtenait ainsi une force constitutionnelle. Le contrôle constitutionnel et le

rôle du Conseil constitutionnel français seraient ainsi renforcés au niveau de la Cour constitutionnelle tchèque.

iii. Résumé

L'examen a révélé qu'il y a généralement conformité avec la CEDH et que les moyens d'interprétation des clauses respectives de protection de la propriété par les juridictions constitutionnelles étudiées est comparable avec le droit et la pratique de la Convention. Il a été établi que bien que les juges constitutionnels nationaux ne se réfèrent pas à une norme autonome applicable aux ingérences qui ne peut pas être qualifiée de privation ou de contrôle de l'utilisation de la propriété, cela ne signifie pas qu'ils offriraient une moindre protection au niveau national. Il a été suggéré que la subjectivité et l'ambiguïté potentielles liées à l'application de la norme autonome est susceptible d'amener non seulement des inégalités concernant le droit à compensation, spécialement dans les cas où la perte économique est comparable à la privation, mais aussi des fluctuations dans le degré de la protection de la propriété et pourrait créer une incertitude en ce qui concerne l'interprétation de la garantie de la propriété pour les juridictions constitutionnelles nationales qui suivent la jurisprudence de la CEDH.

Il a été encore davantage établi que pour toutes les juridictions étudiées, la gravité de l'ingérence est un facteur important dans l'évaluation, non seulement de la proportionnalité des ingérences, mais aussi de leur nature, spécialement dans les cas qui équivalent *de facto* à la confiscation de possessions, ce qui est dans la pratique constitutionnelle nationale étudiée traitée sous la règle de la limitation au contraire de la pratique de CEDH qui applique la règle de la privation. Une telle différence de qualification a un impact sur le montant de la compensation. Si dans les pratiques constitutionnelles tchèque et française le critère de gravité est limité à la distinction entre une limitation et une privation, il a une application plus large dans la pratique de la CEDH qui peut en retirer un bénéfice dans l'évaluation de l'applicabilité de la règle générale interdisant les ingérences de la jouissance paisible des possessions.

Concernant les principes justificatifs des ingérences dans la propriété, il a été représenté qu'elles sont pricipalement en concordance avec les standards fixés par la Convention et la CEDH et comprennent les critères de légalité, légitimité, proportionnalité et

de compensation. Le principe de légalité est conçu dans une harmonie plus large comprenant aussi bien des aspects formels que qualitatifs incluant la disponibilité de garanties procédurales pour faire face à la légalité des ingérences dans la propriété. De manière similaire à la CEDH, les corps constitutionnels nationaux conçoivent la notion d'intérêt public comme un concept ouvert et casuistique qui n'a pas nécessairement à être lié à des intérêts de l'État ou du public général, mais il peut aussi comprendre les intérêts des parties privées, pourvu que ces intérêts bénéficient à un public plus large. A cet égard, la conception du Conseil constitutionnel français de l'intérêt général semble être beaucoup lus large que celle de la Cour constitutionnelle tchèque, puisque cette dernière semble exercer un pouvoir restreint de contrôle par rapport au législateur, ce qui signifie que le législateur français semble avoir une marge d'appréciation plus large similaire à celle dont les parlements nationaux jouissent en vertu de la Convention.

Bien qu'il y ait une congruence apparente de la pratique nationale constitutionnelle étudiée ave la pratique de la CEDH concernant le critère de légalité et légitimité, pour ce qui concerne les autres critères créés par le juge - proportionnalité et compensation – on trouve quelques différences d'approche par rapport à la CEDH, mais elle ne dérangent pas l'harmonie globale qui a été créée et maintenue entre les juridictions constitutionnelles française et tchèque d'un côté, et la CEDH de l'autre. Il s'ensuit que la CEDH n'applique pas le test de proportionnalité dans les affaires de propriété de la même rigoureuse manière que la Cour constitutionnelle tchèque, puisqu'elle montre une certaine tolérance envers le législateur et ne traite apparemment pas de la nécessité d'une mesure ou de l'existence de moyens moins coûteux. Une approche similaire a été adoptée par le Conseil constitutionnel français qui examine seulement les erreurs manifestement disproportionnées du législateur dans les cas d'affaires de privation de propriété laissant à ce dernier un large pouvoir de discrétion. Cependant il fait un contrôle plus sévère dans le cadre des limitations de la propriété et ainsi se conforme aux exigences de la CEDH en examinant si l'ingérence est justifiée par l'intérêt général proportionné à l'objectif recherché. La Cour constitutionnelle tchèque en faisant le contrôle en trois étapes de proportionnalité fixe une défense plus forte contre les interventions arbitraires disproportionnées que la CEDH et elle surveille non seulement la gravité de l'ingérence mais aussi l'objectif du législateur. Il s'ensuit que les juges constitutionnels tchèques font un contrôle de proportionnalité plus fort que celui de la CEDH et de leur homologue français. Dans le domaine de la compensation toutes les juridictions étudiées ici font la différence entre compensation pour privation et limitations de la propriété et requièrent

une compensation pour les confiscations. En général les divergences ont trait principalement aux conditions de paiement et au montant de la compensation pour les limitations.

La manière dont la garantie constitutionnelle de la propriété a été traitée par les juridictions constitutionnelles est ici influencée par les statuts de la Convention dans les ordres juridiques nationaux respectifs et à l'intérieur du système du contrôle constitutionnel. En adhésion avec la pratique interprétative de la CEDH dans le domaine de la protection de la propriété, la pratique tchèque semble être, dans une perspective globale, plus en convergence avec la pratique française puisque la Cour constitutionnelle tchèque se fie directement à la Convention et à ses protocoles et à la jurisprudence de la CEDH et considère la Convention comme une partie de l'ordre constitutionnel, alors que pour le Conseil constitutionnel français, la Convention ne représente pas une norme de référence dans le contrôle de constitutionnalité. Comme le Conseil constitutionnel français ne fait pas de référence directe à la Convention et à la jurisprudence de la CEDH, l'impact de cette dernière sur la prise de décision est latente et n'est pas visible comme c'est le cas pour la Cour constitutionnelle tchèque. De fait, l'influence de la CEDH sur l'interprétation des droits fondamentaux semble être relativement limitées quand on la compare à l'influence que la Convention a eue sur la jurisprudence de la Cour constitutionnelle tchèque. D'où il s'ensuit que la différence entre la pratique constitutionnelle et française repose sur le fait que pour le Conseil constitutionnel français la Convention est seulement une source d'inspiration et ne forme pas une partie du bloc de constitutionnalité tandis que la Cour constitutionnelle tchèque a donné au traités internationaux des droits de l'homme une force constitutionnelle et ainsi des effets dérogatoires.

Concernant les résultats de l'enquête dans des domaines spécifiques, on peut dire que le standard de la protection de la propriété privée dans les ordres constitutionnels étudiés s'harmonise et obéit aux standards de protection en vertu de la Convention. Bien que le Conseil constitutionnel français, au contraire de la Cour constitutionnelle tchèque, n'interprète pas directement la Convention, ni ne l'applique en la considèrant comme formant une partie de l'ordre juridique constitutionnel, l'analyse a manifestement montré et prouvé que le standard de la protection constitutionnelle française est en conformité complète et comparable avec la Convention et la pratique de la CEDH.

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THE LAW OF PROPERTY IN EUROPE, A COMPARATIVE STUDY OF NATIONAL LAW AND THE LAW OF THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS/ LE DROIT DE PROPRIÉTÉ EN EUROPE, ÉTUDE COMPARATIVE DE DROIT INTERNE ET DU DROIT DE LA CEDH

Résumé

La thèse traite de la protection de la propriété privée, d'une part dans le droit et la pratique de la Convention européenne des droits de l'homme, et d'autre part dans le droit constitutionnel et la pratique des systèmes tchèques et français. Elle fournit une enquête comparative sur la portée des clauses respectives de protection de la propriété et de leur interprétation juridique dans le but de faire ressortir les éléments aussi bien convergents que divergents des approches normatives et jurisprudentielles de la protection de la propriété en tant que droit de l'homme. L'objectif principal de cette enquête a été d'examiner et de comparer le traitement de la propriété dans la la Convention européenne des droits de l'homme et dans les Constitutions de la France et de la République tchèque. Le sujet de la recherche est traité sous la forme d'une recherche dans plusieurs domaines spécifiques: les fondements théoriques et philosophiques, le sens et la portée des garanties assorties à la propriété et leur interprétation juridique, les limites et les privations de propriété, et les approches constitutionnelles quant à leur mise en oeuvre dans le droit et la pratique de la Convention.

mots-clés: propriété, droit, comparative, protection, droits fondamentaux, droits de l'homme, CEDH, France, République tchèque, droit constitutionnel, Convention.

Résumé en anglais

The thesis deals with the protection of private property in the law and practice of the European Convention on Human Rights and in the Czech and French constitutional law and practice. It provides a comparative inquiry into the scope of the respective property protection clauses and their judicial interpretation with a view to extracting convergent and divergent elements of the normative and jurisprudential approaches to the protection of private property as a human right. The main focus of the inquiry is to examine and compare the treatment of property in the European Convention on Human Rights and in constitutional law of France and the Czech Republic. The topic is analysed by virtue of research into several specific areas: the philosophical and theoretical foundations; the meaning and scope of the property guarantees and their judicial interpretation, limitations and deprivations of property; and the constitutional approaches to the implementation of the law and practice of the Convention.

key words: property, law, comparative, protection, fundamental rights, human rights, ECHR, France, Czech Republic, constitutional law, Convention.