THE RIGHT OF PROPERTY AND FREEDOM OF ENTERPRISE IN FRENCH CONSTITUTIONAL LAW

" Property rights and Free enterprise : Constitution in practice"
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The constitutional protection of the right of property and of freedom of enterprise in French law is one of the most interesting developments of the last decades. It has led the Constitutional Council to affirm the basis of such a protection and its scope and extent.
It is an apt illustration of the manner in which a relatively recent legal institution can create a new law in order to protect two fundamental rights. the right of property and freedom of enterprise.

This paper is divided into five parts: Part I analyses the basis of the constitutional protection of these two rights. Part II comments on the scope of the right of property. Part III is devoted to the exact extent of the protection of what are qualified rights. Part IV is on review of compensation. The subject of Part V is the constitutional protection of freedom to contract.

I

THE BASIS OF THE CONSTITUTIONAL PROTECTION OF THE RIGHT OF PROPERTY AND OF FREEDOM OF ENTERPRISE IN FRENCH LAW

The present state of the law cannot be understood without a brief reminder of the heritage of the French Revolution and of the XIXth century.

I.1. The legacy of the French Revolution and of the XIXth century

I.1.1. The Ancien Régime

The law of property under the Ancien Régime was the opposite of that of Roman law, which was a *dominium*, the sovereignty over a thing. The same plot, for example, could be the seat of several distinct uses. Hence the existence of simultaneous, juxtaposed or superposed properties: that of the owner and that or those of the different users[1]. Under the feudal system landlords owned huge lands. Those who used them became de facto owners but had to pay a number of taxes and dues. Hence the distinction between " domaine éminent ", that of the landlord, and " domaine utile", that of the user[2]. In addition there existed collective uses of agricultural lands.

From the XVIIIth century on, such a conception was more and more criticized by the Physiocrats in the name of economic efficiency and individualism.

I.1.2. The legacy of the French Revolution

What took place in France from 1789 on is a part of the political and intellectual evolution of the West during the XVII th and XVIII th centuries, including the main writings of the founders of liberalism (J. Locke, A. Smith, the Physiocrats) and the English and American Revolutions. What Locke wrote on property deserves a special mention. In his "Second Treatise of Government " he affirms strongly the link between property and liberty: "…every Man has a Property in his own Person…The Labour of his Body, and the Work of his Hands

[1] See , M.A. Patault, « Droit de propriété », in *Dictionnaire de la culture juridique*, D. Alland and S . Rials , Eds, Presses universitaires de France, Paris, 2003, p.1253 ff.

[2] F.Terré and Ph. Simler, *Droit civil. Les biens*, Dalloz, Paris, 5th ed., 1998, p. 65 ff.

we may say, are properly his" (§ 27). As to the ends of political society and government Locke writes that men "…unite for the mutual Preservation of their Lives, Liberties and Estates, which I call by the general Name, Property" (§ 123)[3].

The legacy of the French Revolution is contained in two distinct instruments. 1789 saw both the abolition of feudalism and the adoption of the Declaration of the Rights of Man and the Citizen (hereafter: the Declaration). The latter contains a strong affirmation of the right of property. Under its Article 2:

" The aim of all political associations shall be to preserve natural and imprescriptible rights of Man. These rights are liberty, property, security and resistance to oppression".

Liberty and the right of property are thus placed on the same level, as the two foundations of the new liberal order.

Under Article 17:

" Since property is an inviolable and sacred right, no one may be deprived of it, unless it is demanded evidently by public necessity, lawfully ascertained and under the condition of prior and just compensation."

15 years later the Civil Code included the following definition of the right of property:

" Ownership is the right to enjoy and to dispose of things in the most absolute manner, provided that they are not used in a way prohibited by statutes and regulations".[4]

Indeed a very important part of the Civil Code is devoted to property.

One should not, however, overemphasize the absolute character of the right of property thus affirmed, for two reasons. The first one relates to the texts themselves: Article 17 of the Declaration allows for the deprivation of property whenever the conditions stated are met. Article 544 of the Civil Code contains the qualification mentioned above. The second reason is an historical one: the French Revolution saw a huge transfer of property: Both the property of the Catholic Church and that of the " émigrés" were confiscated by the State and sold as "national goods" ("Biens nationaux"[5]).When the Monarchy was restored in 1814 the new Constitutional Charter expressly affirmed the inviolability of *all* property:

" All properties are inviolable, without any exception relating to those called ' national', since the law makes no distinction between them" (Art. 9).

The same clause was inserted into the 1830 Charter (Art. 8).

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[3] J.Locke, *Two treaties of Government*, P.Laslett , Ed, Cambridge University Press, 1960.

[4] Art. 544.

[5] See L.Bergeron," Biens nationaux ", in *Dictionnaire critique de la Révolution française*, F. Furet and M.Ozouf, Eds., Flammarion, Paris, 1992, Institutions et créations , Sp.77 ff.

I.1.3 The XIXth century

Two developments must be mentioned here, a legal and a political one.
In the legal domain two remarks are in order : The first one relates to the contents of the liberal legal order. It rested on the three pillars contained in the Civil Code: Private property freed from previous constraints (Art. 544); the binding effect of contracts[6] and personal liability[7]. The second remark relates to the legal effect of the 1789 Declaration. Throughout the XIXth century and during the first half of the XXth one it had no constitutional value and judicial review of statutes did not exist.[8]
In the political domain the conception of property mentioned above led, from 1791 until 1848 to restrict the right (of men) to vote to those who owned a determined amount of property. The rationale was that property was a *means* of liberty and of political capacity. Only property owners has the capacity, i.e. the interest, in both senses of the word, to take part in elections. Civil rights were distinct from political ones. Hence the distinction, in the 1791 Constitution, between " active citizens" (" citoyens actifs") and the other ones[9]. For a theoretician like Siéyès owners were the " real shareholders of the great social undertaking"[10]. The same idea was expressed by one of the main French liberal thinkers, B. Constant[11]

[6] Under Art. 1134 : « Lawfully arrived at contracts shall be the law of the parties. They may be revoked only by their mutual consent or for causes allowed by statutes. They must be implemented in good faith". The obligations of the debtor in case of non - implementation are stated in Art. 1147.
[7] Under Art. 1382 : « Any action causing a loss to someone obliges the person whose fault caused it to compensate for it". Under Art. 1383:" One is liable of the loss caused not only by one's action but also by that caused by negligence or imprudence". Art. 1384 relates to liability for things or persons under one's custody.
[8] In the XXth century one of the most eloquent attempts to demonstrate its absence of constitutional value was that of R. Carré de Malberg in *Contribution à la théorie générale de l'Etat*, 2 vols., Sirey, Paris, 1922, II, p. 579 ff.
[9] See Title III, chap.I, Section II.
[10] See P.Rosanvallon, « Physiocrates », in *Dictionnaire critique de la Révolution française*, op. cit, Idées, p. 365 ff. On Siéyès see J.D. Bredin, *Siéyès.La clé de la Révolution française*, Ed. de Fallois, Paris, 1988.
[11] B.Constant, *De la liberté chez les modernes .Ecrits politiques,*M.Gauchet, Ed., Librairie générale française, Paris, 1980 ; *De l'esprit de conquête et de l'usurpation dans leurs rapports avec la civilisation européenne,* E.Harpaz, Ed.,Flammarion, Paris, 1986.

I.2. The affirmation, by the Constitutional Council, of the constitutional protection of the right of property and of freedom of enterprise

This affirmation is the outcome of the institution of judicial review of statutes by a new organ, the Constitutional Council , created in 1958 and of the resurrection, by it, of the constitutional value of the 1789 Declaration.

I.2.1. Judicial review of statutes under French law

It did not exist until 1958, due to the traditional doctrine of the sovereignty of Parliament. The intention of the drafters of the 1958 Constitution, in creating the Constitutional Council, was certainly *not* to include judicial review of statutes, within the present meaning of the term, in it. Their purpose was a different one. Since the Constitution included a limitative list of areas on which Parliament might legislate, the Constitutional Council was to be a kind of "watchdog" in charge of preventing Parliament from overstepping such a limitation of its competence. Hence the way its members were appointed and the limited number of the State authorities which could refer a statute to it after its adoption by Parliament and before its publication.[12] The evolution of the last 40 years or so contains a lesson : It is that of the gradual emancipation of an institution which affirms its powers and discovers new legal instruments in order to exercise them effectively and also that of reforms of the Constitution increasing its importance .The different stages of this evolution can be summed up as follows:

A) In 1971 the Council affirmed, for the first time, the constitutional value of the 1946 Preamble to the Constitution, which includes the 1789 Declaration. It did so in a bold decision declaring unconstitutional a statute restricting freedom of association[13].
B) In 1974 a revision of the Constitution allowed 60 members of the National Assembly or of the Senate to refer a statute to it.

[12] The Président of the Republic, the Prime Minister , the President of the National Assembly and that of the Senate.
[13] 71-44 DC, July 16, 1971, p.29.- All decisions of the Council are published immediately in the daily *Journal official* and later on it its annual *Recueil des décisions du Conseil constitutionnel* .They can also be found on the Council's website: http://www.conseil-constitutionnel.fr . For a detailed commentary see L .Favoreu and L.Philip, Eds, *Les grandes décisions du Conseil constitutionnel*, 15th Ed., Dalloz, Paris, 2009; Thierry S. Renoux and Michel de Villiers, Eds, *Code constitutionnel*, Litec, Paris, 2005. All decisions of the Council between 1959 and 2008 are conveniently summed up in Conseil constitutionnel, *Cinquante ans de jurisprudence. Tables d'analyses, 1959- 2008,* 3 vols. Dalloz, Paris, 2009.

C) Until 2008, once a statute had been adopted and published courts were not empowered to refer a statute to the Council in order for it to adjudicate on its conformity with the Constitution or to declare it themselves unconstitutional. However, since Art. 55 of the Constitution gives treaties[14], once signed, ratified and published, precedence over statutes, irrespective of their dates, courts were empowered to set aside a legislative clause inconsistent with a treaty, which did often did. The result was a paradoxical one: the Constitution, which is the supreme law of the land, was less protected than treaties.

D) Under the 2008 revision of the Constitution (Art. 61-1) when, in the course of litigation before any court , a party affirms that a given statute infringes rights and liberties guaranteed under the Constitution, the issue may be referred by the court to the Council. Howewer the Cour de cassation and the Conseil d'Etat (The Supreme Court for administrative law) shall act as " gate- keepers" and decide whether the case should be referred to the Council.

E) This is a very important and welcome reform. I would have preferred a system in which courts would have been empowered to send directly a case to the Council. This reform will have the effect of adding, in time, a constitutional dimension into litigation. This will in turn transform the legal and judicial culture of judges and of lawyers. It will lead, one day, the Council to adjudicate on the constitutionality of laws on which it has been so far silent. The reform is not yet in force; A special statute enacting it has just been published (December 2009).

I.2.2. 1982: The affirmation of the constitutional protection

The Constitutional Council affirmed the protection of the right of property and of freedom of enterprise in 1982[15]. The occasion was a statute nationalizing a high number of important private companies and around 40 banks.

A. The political context was far from being a quiet one for several reasons. The decision of the Council came after 11 years during which the Council asserted its position as an

[14] This includes EC Directives and Regulations.

[15] 81-132 DC, January 16, 1982, p. 18.For a discussion of the parliamentary debate and of that which followed the Council's decision see J.Bell, *French Constitutional Law*, Clarendon Press, Oxford, 1992, p. 176 ff; A.Stone, *The Birth of Judicial Politics in France. The Constitutional Council in Comparative Perspective*, Oxford University Press, London, 1999, p.140 ff; *Les grandes décisions du Conseil constitutionnel*, op. cit., p. 356.

effective instrument of judicial review over statutes, especially in areas relating to civil liberties and fundamental rights. The program of the Socialist party which won the 1981 parliamentary elections included substantial nationalizations. The political and legal debate in the National Assembly was an animated and a heated one and the opposition declared from the start that it would refer the statute to the Council. The attention thus focused on the latter's decision. Warnings could be heard from the Socialist majority: Any move to block the adoption of the statute would be considered as " political" and could bring with it " unforeseeable" consequences. There was no precedent whatsoever in the case law of the Council. At the time of the previous wave of nationalizations, in 1945 -1946, judicial review of statutes did not exist.

B. The Council affirmed the constitutional standing of the right of property and of freedom of enterprise by using the following reasoning: It began by quoting Art. 2 and 17 of the 1789 Declaration. It then used an historical argument, i. e what happened in 1946 during the constitutional debate. A first draft including a new Declaration of the Rights of Man containing principles different from those affirmed in 1789[16], the Council held, had been rejected by a referendum. Since the decision does not elaborate on this point, which is regrettable, it might be of interest to comment on what this 1946 Declaration said on the right of property. Its reaffirmation in classical terms in Art. 35 was accompanied, in the same Article, by a somewhat qualifying clause: " Everyone should be enable to accede to it through work and savings". But there was more to it. Under Article 36:

" The right of property may not be used in a manner contrary to social utility or in such a way as to harm security, liberty, the existence of other persons or their property."

A number of legal commentators, both in law schools and in Parliament, held that Art. 17 of the 1789 Declaration had lost much of its value in view of the historical evolution since the XIXth century and in view of the 1946 Preamble, which mentioned nationalizations.

The Council did not agree:" On the contrary, it held, by two referendums held in 1946 and in 1958 the French people (" le peuple français") approved texts giving full constitutional value to the principles and rights proclaimed in 1789, as shown by the 1946 and 1958 Preambles to both Constitutions. The conclusion was clear :

[16] The constituent Assembly had refused to enshrine the 1789 Declaration. It was especially reluctant to recognize fully the right of property.

"…the very principles stated by the Declaration of the Rights of Man and the Citizen have full constitutional value. This is true for both the fundamental character of the right of property, the preservation of which is one the aim of political society and which has the same rank as liberty, security and resistance to oppression and for the guarantees to be given to the holders of these rights and for the prerogatives of public authorities".

As to freedom of enterprise - which is not mentioned in the 1789 Declaration - the Council deducted it from Art. 4 of the 1789 Declaration : " Freedom consists, in being able to do whatever which does not harm other persons. It cannot be preserved if arbitrary or excessive restrictions were applied to it". Such a deduction from the general principle of freedom affirmed in Art. 4 of the Declaration is a pertinent example of the methods used by Constitutional courts to affirm a right or a liberty not mentioned at all in Constitutions or in Declarations of Rights. The Council used the same method to affirm the constitutional character of other rights, such as the respect of privacy[17].
The 1982 decision of freedom of enterprise has been confirmed on several occasions[18] .

I.2.3 The judicial review of the scope of the nationalizations statute

Several issues arose.
A. Two were related to constitutional clauses.
Unlike other Constitutions the French one mentions explicitly, in Art. 34, the domains reserved to Parliament. One of them is the nationalization of companies and the transfer of property from the private to the public sector. Certain commentators deducted from this clause that Parliament had a blank cheque in this area. The Council dismissed such an idea and held that this clause as indeed others, did not exempt Parliament, whenever it legislates, from the respect of constitutional rules, which applies to *all* public authorities. A timely reminder.

[17] 99-416 DC July 23, 1999, p. 100.See also 99-419 DC, November 9, 1999, p.116; 2003-467 DC, March 13, 2003, p. 211; 2003-484 DC, November 20, 2003, p. 438; 2004- 499 DC, July 29, 2004, p. 126; 2004-504 DC, August 12, 2004, p. 153; 2005-532 DC, January 19, 2006, p. 31; 2007-557 DC, November 15, 2007, p. 360.
[18] See 98-401 DC, June 10, 1998, p. 258 ; 99-243 DC, January 132000, p. 121; 2000-433 DC, July 27, 2000, p. 121; 2000-439 DC, January 16, 2001, p. 42 ; 2001-451 DC, November 27, 2001, p. 145; 2001-455 DC, January 12, 2002, p. 49.

The other clause was paragraph 9 of the 1946 Preamble: "Any property and enterprise the operation of which has or acquires the character of a national public service or that of a *de facto* monopoly must become public property "(' la propriété de la collectivité'). Such a clause may have more than one meaning : Does it mean that the only companies or firms that may be nationalized are those having the characters mentioned supra, not the other ones ? It would then set a maximum and these characters would then be the equivalent of the " public necessity" mentioned in Art. 17 of the Declaration. Or does it mean that whenever these conditions are met, nationalisations are an obligation for Parliament ? It would set a minimum. Others thought that prior and just compensation mentioned in Art. 17 applied to deprivation of property, not nationalizations.

The Council tersely affirmed that this clause may not be used to prevent the implementation of the Articles of the 1789 Declaration mentioned supra to nationalizations.

B. The last issue related to two elements.

a) "Public necessity"

Under Art. 17 of the 1789 Declaration deprivation of property may take place only when the following conditions are met: It must be demanded evidently by "public necessity", lawfully ascertained. There must be prior and just compensation. Was the condition relating to necessity reviewable ? The Council had to choose one of the two following courses: The first one consisted in assuming that the assessment of necessity is by definition an exclusively political choice, to be left to Parliament and thus refrain from reviewing it altogether. The second course was to review it, taking duly into consideration, in addition to the wording of Article 17 of the Declaration, the importance of the two rights mentioned above, the political character of the choices made by Parliament and the inherent limits of judicial review in this domain.

The statute did not mention any " public necessity". The Council had thus to take stock and to evaluate the reasons given by Parliament[19] for this legislation during the " travaux préparatoires": They were necessary, it was said, to face the economic crisis, to promote growth and to combat unemployment and would thus be based on public necessity within the meaning of Article 17 of the Declaration. It then added the following on the scope of its

[19] Or, more exactly, *in* Parliament by the majority and the Government.

review on this point: The evaluation, by Parliament, of the necessity of the nationalizations decided by the statute referred to the Council would not be reviewed by it, unless one of two situations occurred: Either a manifest error of evaluation of the scope of the nationalizations[20] or a situation in which the transfer of property and of companies from the private to the public sec sector would restrict the scope of private property and that of freedom of enterprise in such a way as to violate Articles 2 , 4 and 17 of the Declaration.

b) The scope of nationalizations

The second element concerned the very scope of the nationalizations and the application of the constitutional principle of equality before the law. Under the case law of the Council this principle applies only to identical situations. A difference of situations justifies the application of different rules. This is why the decision held constitutional the exclusion of foreign banks, in view of the international dimension of the consequences and unconstitutional that of friendly and cooperative banks, who, it said, was not justified by their specific character, or the nature of their activities and difficulties of implementation.

[20] This notion, borrowed from the case law of the Conseil d'Etat and other administrative courts, indicates a limited review of administrative action. It had been used in 1981 by the Council: 80-127 DC, January 19 and 20, 1981, p.15.

II

THE SCOPE OF THE RIGHT OF PROPERTY

In its 1982 decision the Council noted the evolution of the right of property since 1789. One of its components is the extension of this right to new individual domains. In a number of decisions the Council gave further information on its scope, that is both its content and the protection of public property.

II.1. Content

- Such a right includes of course both immovables (real estate) and movables. It also includes the right to use one's property, e.g. the right to hunt[21], copyright and connected rights[22], shares[23], trademarks, trade names[24] and intellectual property in general.

It excluded the authorization, given by the Administration, to organise a system of public transportation[25] and the license to operate as a taxi diver[26].

II.2. Protection of public property

The Council held that public property was protected as well as private one[27].It drew the consequences:

Public property may not be transferred to private owners at a price inferior to its value. This would be contrary both to the principle of equality and to the Declaration of 1789[28].

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[21]2000-434 DC, July 20, 2000, p. 107.
[22] 2006-540 DC, July 27, 2006, p. 88.
[23] 81-132 DC, quoted supra n. 15 ; 82-139 DC, February 11, 1982, p. 31; 89-254 DC, July 4, 1989, p. 41; 94-347 DC, August 3, 1994, p. 113.
[24] 90-283 DC, January 8, 1991, p. 11 ; 91-103 DC, January 15, 1992, p. 15.
[25] 82-150 DC, December 30, 1982, p. 86.
[26] 82-125 L, June 23, 1982, p. 101.
[27] 86-207 DC, June 25-26, 1986, p. 81 ; 86-217 DC, September 18, 1986, p. 141 ; 94-346 DC, July 21, 1994, p. 96; 2003-473 DC, June 26, 2003, p. 382; 2008-567 DC, July 24, 2008, p. 96.
[28] 86-207 DC, and 86-217 DC, quoted supra n. 27;2008-567 DC, quoted supra, id.

The constitutional principles mentioned above forbid the creation, on public property, of rights *in rem* without an appropriate compensation taking into account the real value of such property and the public service for which it is used. Parliament is under an obligation to see to it that such a rule is respected.

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III

THE EXTENT OF THE CONSTITUTIONAL PROTECTION : QUALIFIED RIGHTS

Under the case law of the Council neither the right of property nor freedom of enterprise are absolute rights. Taking note of the evolution that took place during the two last centuries it affirmed, in its 1982 decision on nationalizations that one of its components was the limitation of the conditions of their exercise.

III.1. The right of property

III.1.1. A qualified right

The right of property has *never* an absolute one in French law. The situation during the Ancien Régime has been summed up supra. As said above the French Revolution saw the most massive transfer of private property when that of the Catholic Church and of the " émigrés" was sold to private owners. Article 17 of the 1789 did not exclude altogether deprivation of property : it set strict conditions to it. Throughout the XIXth century the law of

expropriation (compulsory purchase of private property by the State) rested on the principles. As to Art. 544 of the Civil Code, often held to contain the affirmation of the most absolute character of the right of property, it mentions an important an important qualification: "… provided that it is not used in a way prohibited by statutes or regulations".

Since the XIXth century indeed, the right of property has been limited or restricted in many ways, in relation with it three classical components: *usus, fructus* and *abusus*. Here are a few illustrations:

Some restrictions were edicted in relation to private third parties: civil law included the notions public nuisance (" troubles de voisinage"), and of misuse of one's right (" abus de droit") in which the use of one's property creating a loss or a nuisance , e.g. to a neighbour may be a tort and empower a court to order its cessation. A number of statutes have progressively given more and more rights to those who occupy or run a property through a lease or a contract: the lessee of a plot in agriculture, the tenant of an apartment or of a business. For the latter one speaks currently of " commercial property". Certain kind of leases (for 99 years) are the equivalent of a provisional but very lengthy transfer of property.

Other legislations gave substantial prerogatives to the Administration and limited the right of property.

One example is urban planning :the existence of a building permit, the classification of land by local authorities into different categories, with important financial consequences for the owner, e.g. when one may not build on a piece of land, together with the pre-emptive right of public authorities over certain pieces of land, when conditions are met.

Another example is legislation the aim of which is the protection and conservation of certain zones: the coast, historical buildings or places of interest.

The consequences were two-fold:

The first one was the affirmation according to which the constitutional value of the right of property should be construed by taking into account this evolution. In fact the Council affirmed this doctrine before the 1980's although it took an added importance in the decision relating to nationalizations. In one of its earliest decisions (1959) it held that principles such as the free disposal of one's property by the owner, the free will of the parties in a contract and the immutability of contracts must be evaluated and implemented by taking into account

the general restrictions introduced by former legislation in order to allow the State to intervene into contractual relations between private parties[29].

The second consequence is that the right of property may be limited or restricted for an aim relating to a stated public interest, as long as two conditions are met: The first one relates to the existence of procedural guarantees. The second one may be summed up as follows: The limitation of the right of property must not be such as to alter completely (“ dénaturer”) the scope and substance of it.

III.1.2. The case law of the Constitutional Council

A. Cases in which the Council held that the restriction of the right of property was not held unconstitutional.

Three examples will be given.

a) The use of agricultural land had been controlled for a number of years. Under a 1984 statute a prior administrative authorization was necessary whenever the surface of the land became inferior to a minimum. The applicants held that this clause restricted gravely the right the owner to run his land and to dispose of his property. The Council held that such legislation indeed limited indirectly the exercise of the right of property, for example by preventing an owner to run himself a property he had bought or by creating an obstacle to its sale if the prospective buyer could not be authorized to run it. However these limitations were not of such a gravity as to alter the scope and content of the right of property[30].

b) A 1985 statute allowed the Administration to impose a prior declaration for certain division of the land in urban zones whenever the local situation required a special protection (natural setting, etc); The Administration was empowered to oppose the division only when, in view of the scope, the number of plots or the works needed to implement the operation, the division would endanger gravely the local landscape and the environment. This, the Council, did not amount to discretionary power: The Administration was under an obligation to base its decision on the reasons stated by

[29] 59-1 FNR, November27, 1959, p.71 ; 60-7 L July 7, 1960, p. 35; 61-3 FNR, September 9, 1961, p. 48 ; 67-44 L February 27, 1967, p. 26; 73-80 L, November 28, 1973, p. 45.
[30] 84-172 DC, July 26, 1984, p. 58.

the statute. Its decision could be reviewed before the administrative courts. The application was rejected[31];

c) Under a 1998 statute the local representative of the Government was empowered to requisition, in cities where an acute housing shortage existed, flats vacant since 18 months belonging to legal persons. The aim was to allow local authorities, such as a municipal council or a housing society, to leaser to specific categories of persons in need of housing and whose income was inferior to a certain amount, these apartments. Compensation could be awarded to the owner by ordinary courts. The decision of the Administration could be reviewed. The Council held that the statute defined sufficiently the scope of the new legislation as to places, persons and procedure. It added that although the statute did not deprive the owner of his right of property within the meaning of Article 17 of the 1789 Declaration, it did limit his right to use his property.

The reason of such a limitation, the decision went on, was a constitutional objective[32]: combating the housing crisis .The limitation did not constitute a complete alteration of the right of property for the following reasons: procedural guarantees existed. The Administration was under an obligation to notify to the owner its intention, the reason of its move and the length of the envisaged requisition. The owner had two months to notify his refusal. The Administration was then empowered to act, by giving the reasons and indicating the beneficiary and the length of the operation. Judicial review existed.

As to substantial guarantees, the local authority who was the beneficiary of the decision was under an obligation to compensate the owner for any loss or damage incurred by him. The owner could always sell the apartment. In addition, when the requisition expired, the person who had been living in the apartment was not entitled to remain in it, even if the Administration did not propose him another housing. The Council held that the statute was valid.

[31] 85-189 DC, July 13, 1985, p. 49.

[32] This notion is a creation of the Constitutional Council. Constitutional objectives are aims which, although not stated in the Constitution, are so important that they may guide and justify legislation, if the appropriate guarantees exist. Among these objectives are the safeguard of public order, the security of persons and of property, the protection of public health , the good administration of justice and the accessibility and the intelligibility of statutes.

B. Cases in which the Council held that the limitation of the right of property was unconstitutional

a) A 1992 statute created in the Ministry of Justice a new service in charge of combating corruption. It was empowered to demand from anyone the communication of any document, irrespective of its nature or age, without giving reasons. It had also the right to keep them without limitation of time. Members of the service could ask a person to appear before them within 48 hours, irrespective of personal or professional circumstances. The statute did not say whether the individual could be accompanied by counsel and whether the minutes of the meeting, signed by both parties, should be kept. The result was that this service was empowered to intervene in many areas relating to personal and professional life. In case of refusal to appear or to communicate a document a fine could be imposed by a court. This article was held unconstitutional on two grounds: It violated personal freedom and contained excessive infringements to the right of property. An interesting example of the link between these two fundamental rights[33].

b) Under a 1996 statute on French Polynesia, an overseas territory any transfer of immovable property between living persons, except if the beneficiary was French and lived there or in the case of a company if its seta was located in Polynesia, had to be authorized by the local Government. Discretion was total. These powers related to varied transactions. The statute said nothing on the grounds, relating to the public interest, on which the decision should be based. Moreover, if the authorization was refused, the operation was void. This, the Council held, was a limitation to the right of an owner to dispose of his property, an essential part of such a right. It was so grave as to alter it totally. The clause was held unconstitutional.[34]

c) A 1998 decision is particularly interesting. A new statute aiming at combating poverty and relating to the situation of debtors contained a clause concerning the following situation: A creditor initiates an action against a debtor who owns an apartment where he lived. The flat is to be auctioned. After the re-evaluation of its price by the court before it auctioned and if there is no bid, the creditor is declared the successful bidder at the fixed price. If he asks so, a new auction takes place at the same price. The only

[33] 92-316 DC, January 20, 1993, p. 14.
[34] 96-373 DC, April 9, 1996, p. 43.

way out for the creditor is to give up entirely his action. If there is no bid the creditor becomes automatically and definitely the owner of the apartment at the price determined by the court.

The reasoning of the Council may be summed up as follows: This clause may force the creditor to become the owner of an apartment in the absence of any intention by him to buy it at the price determined by the court. Such a transfer of property, the Council held, is contrary to the principle of free consent which must apply to the acquisition of property and which cannot be dissociated from the exercise of the right to dispose of one's property. The latter right is in itself an essential part of the right of property.

The matter did not stop there. The only way out for the creditor was to abandon totally his claim. This, the Council said, cannot be assimilated to a decision not to buy: far from being a free decision, it resulted from the constraint arising from fortuitous elements. Besides, the abandon of his action was an obstacle to the collection of his claim.
Finally in case the creditor would sell the apartment after having acquired it forcibly and if the situation of the market had meanwhile deteriorated, the price would be inferior to that determined by the court. Consequently the creditor would suffer a loss of his estate, which would be the equivalent of a deprivation of property without any of guarantees mentioned in Art. 17 of the 1789 Declaration. The Council held the clause unconstitutional.[35]

d) Another case related to the protection of public property. Under a 1994 statute relating to the public domain the Administration was empowered to grant to someone who had lawfully occupied the public domain during a maximum of 70 years a new title containing rights *in rem* (" droits réels", i.e. varied rights relating to the use of the property) on the infrastructures the keeping of which had been accepted. The decision of the Administration should contain the reasons relating to the new substantial works relating to the rehabilitation, extension or changes of these infrastructures. This clause, the Council held, was an obstacle to the implementation of the provisions of the " Code du domaine de l'Etat" the aim of which is to protect it.[36] Such a possibility, after such a long time and which could be renewed without limits set by the statute, was an unconstitutional infringement of the protection to be afforded to public property.[37]

[35] 98 - 403 DC, July 29, 1998, p. 276.
[36] According to one of these clauses constructions built on the State domain become automatically and free of charge its property at the expiration of the permission to use the domain.
[37] 94-346 DC, July 21, 1994.

III.2. Freedom of enterprise

The same approach applies to freedom of enterprise. It is neither a general nor an absolute right[38].Restrictions or limitations may be created as long as they are based on constitutional demands ("exigences constitutionnelles") or on public interest and if they do not alter completely its content and scope. Freedom of enterprise must for example be conciliated with the protection of public health[39]. Here are two examples of decisions holding a statute unconstitutional.

a) A 2001 statute restricted the possibility for employers to dismiss workers on economic grounds. There were only three situations and the cessation of the activity of the company was not one of them. In case of reorganization dismissal was lawful only is the reorganization was indispensable for the safeguarding of the activity of the company and not, as under the previous statute, if it was necessary for safeguarding its competitiveness. Thus it forbade the company to anticipate future economic difficulties by taking steps allowing it not to dismiss later on a larger number of workers. In addition dismissals on economic grounds was subordinated to the existence of serious economic difficulties which could not be overcome other wise. The statute consequently led the courts to substitute its evaluation to that of the employer as to the choice between several courses of action. The sum of these limitations, the Council held, resulted in an excessive infringement of freedom of enterprise in view of the objective, which was to combat unemployment.[40]

b) A 2000 statute aimed at the safeguarding of the commercial diversity of city districts, an objective of public interest. Under the new statute any change of the nature of activity of a shop had to be authorized. This, the Council held, was an infringement of both the right of property and of freedom of enterprise which was disproportionate to the aim pursued. The clause was declared unconstitutional.[41]

[38] 85-200 DC, January 16, 1986, p.9 ; 89-254 DC, July 4, 1989, p. 41 ; 90-283 DC, January 8, 1991, p. 11; 92-316 DC, January 20, 1993, p.14; 97-388 DC, March 20, 1997, p. 31;
[39] See for the prohibition of advertisement for tobacco 90-283 DC, January 8, 1991, p.11 ; for the restriction of advertisement for alcoholic drinks, same decision.
[40] 2001- 455 DC, January 12, 2002, p. 49.
[41] 2000-436 DC, December 7,2000,p. 176.

IV

REVIEW OF COMPENSATION

In case of deprivation of property the constitutional requirement is that of a just and prior compensation[42]. The case law of the Constitutional Council relating to nationalisations and to expropriation contains apt illustrations of this principle.

IV.1. The nationalizations statute

The statute led to the transfer to the State of the property of the shares constituting their capital. The shareholders received bonds in exchange. The statute contained indications on the nature and the rules applying to these bonds, including the calculation of the value of the shares at the date of the exchange. The Council held that the shareholders were entitled to the compensation of their loss, evaluated at the date of the transfer of property, without taking into account the influence, on the value of the shares ,of the perspective of nationalization. After a thorough and extremely detailed examination of the compensation system set-up by the statute, it concluded that the result was not a just compensation. Three Articles of the statute were thus declared unconstitutional[43]. The Council added that these Articles were not severable from the rest of the statute. Consequently the latter could not be published. A new Bill was prepared and sent to Parliament, in order to implement the decision of the Council. The second statute was referred again to the Council. Its second decision is of particular interest. For certain banks not listed on the Stock Exchange, the value of their shares was to be determined by a national committee headed by the President of the Court of Auditors. This value would take into account the net assets and the net profit, and also the relationship between the average Stock Exchange value of the shares of the listed banks and their net profit. In addition, this value would take into account the events which could have had an effect on them during the first semester of 1982.

[42] 81-132 DC, January 16, 1982, p. 18.
[43] Id

Without getting too much into technical details, many elements were missing in this part of the statute. It would have been pointless for the Council to send back again the statute to Parliament and demand that it included into it all the technical rules to be followed. Such a course was excluded for legal , political and economical reasons. The role of Parliament was to set the applicable rules and principles, no more. Politically a second " no" of the Council would have created political turmoil. From an economical point of view, an additional delay would have had adverse consequences for the banks. So what the Council did, and did well, was this: reviewing very carefully the contents of the statute, it deducted for it a set of precise and imperative directives to be applied by the new committee to ensure the just character of the compensation to be awarded. Less than four weeks later the statute was held it to be constitutional[44].

17 years later the Council had to decide whether the compensation awarded to the holders of share or bonds issued before 1917 by the Russian of the Russian Empire or its administrative authorities, following a 1996 memorandum of agreement and a 1997 agreement between the French Government and that of the Federation of Russia. A supplementary budget statute contained provisions relating to the implementation of these agreements. Since the Russian Government had already paid to France the sum of money agreed[45], the next task was to define how the beneficiaries would receive what they were entitled to .The applicants challenged only the compensation to be awarded to holders of bonds relating to State loans. They held that the principle of equality and the right of property of these holders had not been respected . In fact under the system each holder received a lump sum, together with a supplement. It consisted, the Council said, not in a reimbursement of the bonds, but in a " compensation based on solidarity" , in order to implement the agreements. The Council added that this was a peculiar situation in view of the following elements: the ancientness of the loss; the limited amount of the sum intended for compensation ; the disproportion between it and the amount of the imposed deprivation of property ("spoliation") ; the resulting impossibility to set up a compensation strictly proportional to the claims without depriving small holders of any compensation and, finally, the imperatives of simplicity and of rapidity. The conclusion was that the clause of the budget did not infringe the principle of equality before public burdens and the right of property of holders of claims[46].

[44] 82-139 DC, February 11, 1982, p.31
[45] 400 million $, plus the interests.
[46] 99-425 DC , December 29, 1999, p. 168.

IV.2. Expropriation

In 1989 a statute revising the law applying to expropriation, i.e. the compulsory purchase of private property by a public authority was referred to the Constitutional Council. The latter held that the transfer of property was subordinated to the actual payment of compensation., which , in order to be a just one, must cover the entirety of the direct, material and certain loss arising from expropriation. This is exactly what the Code de l'expropriation said on the matter[47]. In case of disagreement between the owner and the public authority, the former must have an effective remedy. A partial payment is lawful, the Council added, if two conditions are met: the existence of pressing justifications relating to a public interest and of guarantees of the rights of the owners[48].

V

THE CONSTITUTIONAL PROTECTION OF FREEDOM OF CONTRACT

The issue of the relationship between statutes and contracts is an important one for theoretical and practical reasons. Freedom of contract is an autonomous rule. But many contracts are linked with the exercise of fundamental rights: an association is a contract between its members and the association must respect their fundamental rights. The same rule applies to an employment contract. A sale contract has obvious links with the right of property and freedom of enterprise. From a more general point of view the protection of existing contracts

[47] Art. L 13-13.
[48] 89-256 DC, July 25,1989, p. 53

is linked with the key principle of legal certainty ("sécurité juridique"). For all these reasons a comment on the constitutional protection of freedom of contract in French law is part of a paper on the protection of the right of property and of freedom of enterprise.

V.1.The case law of the Constitutional Council

It has developed in several stages. In 1994 the Council affirmed briefly that no constitutional norm guarantees the principle of freedom of contract.[49] In 1997 it confirmed this position but added that the violation of the principle of freedom of contract may be invoked if it would lead to the infringement of constitutionally guaranteed rights and freedoms [50].In 1998 it held that a statute may not undermine the very substance of lawfully arrived at contracts and conventions. It based this affirmation on Art. 4 of the 1789 Declaration, another example of the uses of this clause. However there was a threshold: The infringement should be of such a gravity as to violate " obviously" Art.4[51] . In 2000 it abandoned its previous case law and held that freedom of contract was based on Art. 4 of the 1789 Declaration[52]. In 2003 it added two elements to its 1998 ruling on the constitutional protection of lawfully arrived at contracts and conventions. First it broadened its base, adding to Art. 4 of the Declaration its Art.16 under which: "A society in which human rights are not guaranteed and separation of powers not determined does not have a Constitution". Second it held that only a ground based on a sufficient public interest may justify an infringement of this principle.[53]

V.2. Evaluation

Several remarks are in order here. The first one relates to the short span of time during which the Council changed its case law in order to protect freedom of contracts and contracts lawfully arrived at : less than 10 years. The second remark is to underline, again, the uses of Art. 4 of the Declaration, that is that of the principle of freedom. The third observation concerns Art.16 of the Declaration. The link between its two provisions - the guarantee of rights and freedoms and separation of powers- is of paramount importance. The Council has used frequently Art. 16 in order to protect legal certainty, a principle it has not affirmed so far. It did so in holding unconstitutional statutes interfering with judicial decisions, influenced by

[49] 94-348 DC, August 3, 1994, p. 117.
[50] 97-388 DC, March 20, 1997, p.31
[51] 98-401 DC, June 10, 1998, p. 258.
[52] 2000-47 DC, December 19, 2000, p. 190, confirmed later : 2006-535 DC, March 30, 2006, p. 50.
[53] 2002-465, January 13,2003, p.43., confirmed later : 2008-568 DC, August 7, 2008,p. 352.

the case law of the European Court of Human Rights. Another apt illustration is a 1999 decision affirming that the accessibility and the intelligibility of statutes was a constitutional objective. This ruling was based on several Articles of the 1789 Declaration :6 (Equality before the law), 4 (freedom),5 (what is not prohibited by law cannot be banned and nobody may be forced to do what it does not order) and, finally, 16 [54].

The last remark is the following. In France as in most other countries two distinct social and legal trends are at work. On the one hand contract is more and more used not only between private parties but also but also by public authorities, both between themselves and with private parties. On the other hand their contents is more and more regulated, as shown by employment, consumer, housing and insurance law **,** where certain clauses are compulsory and other may not be inserted into the contract or are held illicit. Under French bioethics law some contracts are void: Those imparting a patrimonial value to the human body, its elements or its products[55] and those relating to procreation or to surrogate motherhood[56] **.**

[54] 99-421 DC, December 16,1999.
[55] Civil Code, Art. 16-5.
[56] Id, Art. 16-7.