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**Public Interest in Takings Cases in Italy
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Abstract

IT *L'articolo compara l'interpretazione del requisito dell'interesse pubblico dell'espropriazione sviluppata dalle corti italiane e francesi, sulla base dei rispettivi testi costituzionali. È altresì analizzata la giurisprudenza della Corte europea dei diritti dell'uomo in materia di tutela del diritto di proprietà, al fine di determinare se, e in quale misura, essa limita l'esercizio del potere espropriativo degli Stati ai soli casi in cui all'espropriazione consegue un beneficio per la collettività.*

Keywords: comparative law- right of property – expropriation – public interest – ECHR

EN *The paper discusses whether, despite the different language of domestic constitutional texts, Italian and French courts have developed a shared approach to the definition of the public interest requirement that must be observed to proceed to the compulsory transfer of private property. Within this framework, it addresses the understanding of the public interest requirement developed by the European Court of Human Rights and critically considers whether, and to which extent, its jurisprudence can be used to guarantee that States use their powers to authorize takings only when some public benefit arises from it.*

Keywords: chiave: diritto comparato - diritto di proprietà – espropriazione – interesse pubblico – CEDU

PUBLIC INTEREST IN TAKINGS CASES IN ITALY AND FRANCE: THE CONSTITUTIONAL AND HUMAN RIGHTS DIMENSION[♦]

SABRINA PRADUROUX*

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1. Introduction

The idea that the state can interfere with, and even taken away, proprietary rights for public purposes existed under Roman law and has developed alongside the modern notion of the right of property.¹

Modern constitutions and bills of rights protect the right to private property by laying down limitations on states' power to regulate and expropriate private property. One such limitation, the 'public interest' or 'public purpose' requirement for a proposed expropriation by the state, tasks legislators and courts with assessing whether and to what extent the interests of individual property owners should give way to the public or general interest.² As such, it is intended to prevent capricious and arbitrary takings of property by the state. Article 42 of the Italian Constitution provides that private property is recognized and guaranteed by laws on its acquisition and enjoyment and its limits in order to ensure its social function ("funzione sociale") and to make it accessible to all. Property can be expropriated where permitted by law, for

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¹ See, S. Reynolds, *Before Eminent Domain. Toward a History of Expropriation of Land for the Common Good*, University of North Carolina Press, Chapel Hill, 2010.

² As explained in this paper, there is in practice no difference between "public purpose" and "public interest", accordingly these terms are used interchangeably.

reasons of *public interest* (“*motivi di interesse generale*”) and with compensation.³

On the other side of the Alps, the French Constitution provides that property is an inviolable and sacred right of which no-one may be deprived unless *public necessity* (“*la nécessité publique*”), legally ascertained, clearly demands it and where fair and prior compensation is paid (Article 17 of the Declaration of the Rights of Man and the Citizen of 1789).⁴ However, the French Civil Code, which is seamlessly linked to the Declaration of 1789,⁵ provides that no-one may be compelled to give up property, unless for *public purposes* (“*pour cause d'utilité publique*”) and with fair and prior compensation (Article 545).

At supranational level, Article 1 of the First Protocol (“*Article P1-1*”) to the European Convention on Human Rights (“*ECHR*”) recognizes that contracting states have the power to expropriate in the *public interest* provided that this complies with domestic and international law.⁶

These provisions demonstrate that the notion of public interest plays a central role in setting the limits within which the state can use its power of expropriation.

This paper discusses whether, despite the different language of these constitutional texts, the approach adopted by courts in the interpretation of the concept of public interest leads to a shared approach to the assessment of the reasons that can justify a compulsory acquisition of private property by the state. The analysis of the relevant case law will highlight the role that courts play in ensuring that states use their power to expropriate only when some public benefit results.

Assuming that the dynamics underpinning the development of expropriation laws are affected by underlying legal and political traditions, I will start with a short introduction to constitutional property law in Italy and France as well as under the ECHR.

³ “La proprietà privata può essere, nei casi preveduti dalla legge, e salvo indennizzo, espropriata per motivi d'interesse generale.”

⁴ “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.”

⁵ The Civil Code consolidated the most important reforms of the French Revolution with respect to the rules on property rights. Cfr. P. Sagnac, *La législation civile de la Révolution française, 1789-1804. Essai d'histoire sociale*, Hachette, Paris, 1898 ; R. Schlatter, *Private Property. The History of an Idea*, G. Allen & Unwin, London, 1951; G. Lepointe, “Le concept de la propriété dans le Code civil : ses origines et son évolution durant le XIX siècle”, in *Etudes de droits contemporains*, Paris, 1962.

⁶ “(1) 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. (2) 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.”

2. The Right of Property at the Interface between National Legal Traditions and the ECHR

The Italian Constitution follows a socialist model of property rights, while the French follows a liberal model. Article P1-1 was born out of the tension between the two.

The Italian Constitution of 1948 broke with the liberal tradition that permeated its predecessor (the Constitution of the Kingdom of Italy or “*Statuto Albertino*”) and marked a paradigm shift in the constitutional definition of property rights. It gave constitutional status to the principle of the social function of property, replacing the principle of the inviolability of property under Article 29 of the *Statuto Albertino*. The provision in Article 42 of the Italian Constitution that restrictions to property rights may be imposed to achieve its social function illustrates the interplay between individual and general interests. Moreover, a general reference to compensation (“*indennizzo*”) for expropriations replaced the fair compensation (“*giusta indennità*”) requirement in the *Statuto Albertino* that granted compensation to the expropriated owner of the full economic loss suffered.

In France, the constitutional basis for the protection of the right of property is in Articles 2 and 17 of the Declaration of 1789. Article 2 lists the right of property alongside liberty as one of “the natural and imprescriptible rights of man” that every political association aims to preserve; whereas Article 17 proclaims the inviolability and sacredness of property. Even so, the idea that property rights should have their share of social responsibility has not been neglected in French constitutional history. Indeed, on 19 April 1946, the French Constitutional Assembly approved a constitution that moved away from the principle of the sacredness of the right of property, subordinating it to social utility. However, this constitution was rejected by a referendum and never entered into force. Subsequently, during the drafting of the Constitution of 1958, the concept of social utility was revived in a proposal to include in the preamble a provision stating that restrictions to property rights could be imposed only for imperative reasons when required by the common good. In the end, however, this proposal was also rejected because the reference to common good as both the foundation of and limit to the regulatory power of the state was considered to be inappropriate and the concept too elusive.⁷

As stated above, the final text of Article P1-1 in the ECHR is a compromise between the liberal and socialist ideologies. The recognition of everyone’s right to the peaceful enjoyment of property expresses the individualistic function of property rights, while the reference to public and general interest as a

⁷ See, G. Merland, *L’intérêt général dans la jurisprudence du Conseil Constitutionnel*, Librairie Générale de Droit et de Jurisprudence, Paris, 2004.

requirement for every interference with the right of property reflects its social function.⁸

Having briefly described the letter of the law, I now examine its spirit as illustrated in the case law of the Italian Constitutional Court, the French Constitutional Council and the European Court of Human Rights (“ECtHR”). When the Italian Constitutional Court came into operation in 1956, it was asked to determine the constitutionality of laws imposing harsh restrictions on the exercise of property rights as well as substantial obligations on owners that had been adopted by the legislature of the early 20th century, despite the proclaimed inviolability of property rights under the *Statuto Albertino*. In its landmark judgment No. 6 of 1966,⁹ the Italian Constitutional Court held that Law No. 1849 of 1932, which allowed public authorities to impose predial servitudes that severely affected the exercise of property rights, was unconstitutional because it did not provide for any compensation for restrictions that amounted to a deprivation of property rights (i.e. that fell short of expropriation). The Constitutional Court thus confirmed that the expropriation provision in the Italian Constitution (Article 42) should also apply to restrictions that have the effect of taking away the content of property rights by affecting enjoyment of it so as to make it useless or to cause a significant loss in its market value. It follows that, where a servitude or other restriction on property rights considerably impairs the content of the property right, the legislation that imposes it cannot be regarded as a mere regulation of property.

This approach shows that, while the Italian Constitution embraces a socialist-oriented concept of property, the Italian Constitutional Court has been ready to declare unconstitutional laws that, although adopted at a time when property rights were declared inviolable, were nevertheless intended to give priority to the public interest. This may at first appear a paradox, but it illustrates the development of a new constitutional order in which the courts began to defend civil rights and thus limit parliamentary supremacy. However, subsequent case law shows that the Italian Constitutional Court has developed standards of judicial review that entail proportionality considerations and whose purpose is restricted to safeguarding the very essence or substance of the right of property, showing thus a deferential attitude towards the legislature with respect to laws interfering with property rights.¹⁰

The French Constitutional Council, ruling on the Nationalization Act 1982 which provided for the transfer to the state of the entire privately owned stock

⁸ See footnote 6: the second paragraph of Article 1 refers to ‘general interest’.

⁹ Constitutional Court, 20 January 1966, judgment No. 6.

¹⁰ For an analysis of the Italian Constitutional Court’s case law on property rights, see S. Praduroux, *The Protection of Property Rights in Comparative Perspective. A Study on the Interaction between European Human Rights Law and Italian and French Property Law*, Europa Law Publishing, Groningen, 2013.

of nationalized companies,¹¹ gave general consideration to the constitutional protection of property rights.¹² First, it affirmed the constitutional value of the principles of the Declaration of 1789 i.e. ‘public necessity’ as the only legitimate ground for deprivation of property protecting against arbitrary expropriations. Then it acknowledged that since 1789 the notion of property rights had undergone significant change, in particular because of the extension of its scope of application or, alternatively, repeated restrictions on its scope as required by the ‘public interest’.¹³ In this way, the Constitutional Council paved the way for the public or general interest as a requirement for the constitutional legitimacy of legislation interfering with property rights, despite there being no reference to it in the text of Article 17 of the Declaration of 1789.¹⁴

So, despite the liberal matrix of the Declaration of 1789, the acknowledgment by the French Constitutional Council that the public interest limits property rights embraces an idea of property deeply intertwined with the social context and that opens the doors to the development of social policies that advance the general interest.

The ECtHR has developed its own concept of property and defined the scope of the protection afforded to it by the ECHR through an interpretative approach intended to reflect societal ideas and values of present-day European democratic societies. Given the different legal cultures co-existing among the contracting states, the ECtHR has never departed from the compromise in Article P1-1. Thus, even though the ECtHR seems to favor the liberal model of property rights, some of its judgments still contain strong elements of social-democratic thinking.¹⁵

3. Putting the Public Interest Requirement into Context: Scope and Meaning of the Protection of Property Rights

Albeit at different points in history, the French Declaration of 1789 and the ECHR were adopted with the predominant aim to protect individuals from tyranny and the abuse of state power. It follows that the guarantee against

¹¹ Constitutional Council, 16 January 1982, decision No. 81-132 DC, *Rec.* 18.

¹² It is worth noting that this was the first time that the Constitutional Council had been asked to apply Article 17 of the Declaration of 1789 as parameter of constitutionality.

¹³ See, decision No. 81-132, *supra* note 11, para. 16 : “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*” (emphasis added).

¹⁴ Further on this point, see S. Pavageau, *Le droit de propriété dans les jurisprudences suprêmes françaises, européennes et internationales*, LGDJ, Paris, 2006, especially at pp- 354 ff.

¹⁵ See, T. Allen, ‘Liberalism, Social Democracy and the Value of Property under the European

Convention on Human Rights’, *International and Comparative Law Quarterly*, Vol. 59, No. 4, 2010, pp. 1055-1078.

arbitrary deprivation of property is at the very core of Article 17 and Article P1-1. In particular, the protection of property rights in the French Declaration of 1789 has a strong symbolic value: it marked the break with the feudal system and the overcoming of the *Ancien Régime*. Private property was – and to some extent still is – seen as closely connected with individual liberty. Accordingly, under Article 17 of the Declaration of 1789 takings of property are allowed provided that “legally ascertained public necessity” so requires. However, at the beginning of the 19th century the drafters of the French Civil Code replaced the public necessity requirement by a ‘public purpose’ requirement.¹⁶ Under Article 545 of the French Civil Code: “[n]o-one may be compelled to give up property, unless for public purposes (“*pour cause d'utilité publique*”) and with fair and prior compensation”. The public necessity requirement enshrined in Article 17 of the Declaration has had a limited impact on the development of French expropriation law and indeed has rarely been applied since, throughout the 19th century and until the 1970s, the principle of parliamentary supremacy prevented the invalidation of legislation on the grounds that it infringed a fundamental right.

Starting from decision No. 89-256, the French Constitutional Council has consistently affirmed that, in order to comply with the public necessity constitutional requirement, the law may only authorize the expropriation of properties or real rights in order to carry out an initiative the *public purpose* (“*utilité publique*”) of which has been established by law.¹⁷

While Article 17 of the Declaration of 1789 has not changed, French expropriation law has evolved following two diametrically opposed ideologies. Until the beginning of the 20th century, laws on expropriation were organized in a way to protect private property rights. After World War I, the liberal model of the state was ousted by a *dirigiste* state more prone to intervene in economic and social spheres and expropriation became a tool to advance the public interest to the detriment of proprietary interests.¹⁸ Moreover, 19th century socially-oriented legal thinkers began to question the individualism that was to characterize society born from the French Revolution. The idea of social solidarity gained momentum favoring the adoption of social policies that advanced the general interest and the development of judicial doctrines that gave priority to public interests over private ones.

¹⁶ See, J.-F. Couzinet, ‘De la nécessité publique à l’utilité publique: les évolutions du fait justificatif de

l’expropriation’, in G. Koubi (Ed.), *Révolution et propriété. Actes du colloque de Toulouse, 12 et 14 octobre 1989*, Éditions du Centre national de la recherche scientifique, Paris, 1990, p. 197.

¹⁷ Constitutional Council 25 July 1989, decision no. 89-256 DC, *Rec.* p. 9501. Paragraph 19 of the decision reads: “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” (emphasis added).

¹⁸ J. Lemasurier, *Le droit de l’expropriation*, Economica, Paris, 2001, p. 11.

Under the ECHR, the protection of the right of property is intended to serve its main aim of maintaining justice and peace in the world by ensuring that certain civil and political rights are protected at the national level under the supervision of an international court. So, after proclaiming that “[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions”, Article P1-1 states that “[n]o 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”.¹⁹ Interpreting Article P1-1, the ECtHR has affirmed that the object and purpose of Article P1-1 “is primarily to guard against the arbitrary confiscation of property”.²⁰

By contrast, the Italian Constitution of 1948 was intended mainly to define the institutional structure of the new Republic. Marking the transition from the liberal to the socialist state, the Italian Constitution broke with the traditional idea that the foundation of and justification for the right of property is closely linked to the preservation of individual freedom through the appropriation of goods which the individual needs to live and flourish. Indeed, Article 42 is in Title III, which concerns economic relations. Moreover, giving constitutional status to the social function principle, it supports the idea that property is justified as an institution insofar as it conducive to the realization of the public interest. Accordingly, Article 42(3) provides that: “[w]here provided for by the law and with provisions for compensation, private property may be expropriated for reasons of public interest”;²¹ and that: “[p]rivate property is recognized and guaranteed by the law, which prescribes the ways it is acquired, enjoyed and its limitations so as to ensure its social function and make it accessible to all”.

¹⁹ According the French version of Article P1-1, deprivations are permitted only “*pour cause d'utilité publique*”.

²⁰ App. No. 8793/79, *James and others v. The United Kingdom* [1986] ECtHR, para. 42.

²¹ On the contrary, Article 29 of the *Statuto Albertino* followed the pattern of Article 17 of the Declaration of 1789, stating that compulsory transfer of property could occur when required by “legally established public interest”. As explained by the commentators of the *Statuto Albertino*, the state could not take private property for the sole purpose of economic profit, but it had to use its power of expropriation to realize the public interest, which did not necessarily correspond to the interest of the state as a whole since the satisfaction of the interest of a part of the population was sufficient. The public interest was to be understood broadly as to include the embellishment of public spaces or improvement of public comfort besides those of social conservation or amelioration. See, F. Racioppi & I. Brunelli, *Commento allo Statuto del Regno*, Vol. II, Unione Tipografico-Editrice Torinese, Torino, 1909, pp. 171-172.

4. Looking for the Meaning of Public Interest through the Lens of Courts

As stated above, the public interest requirement is a guarantee against the misuse of state power to expropriate. Since administrative authorities determine whether there is public interest in the private property to be acquired, judicial control lies with the administrative courts. The Italian Constitutional Court and the French Constitutional Council can hear challenges to legislative acts that lay down the terms and conditions under which the administrative authority can adopt a declaration of public purpose. Both administrative and constitutional courts are therefore involved in defining the scope of the notion of public purpose in expropriation litigation. In its early case law, the Italian Constitutional Court distinguished between takings for public purposes under the law on expropriation (Law No. 2359 of 1865) and acquisitions of property under agrarian reform laws. Article 16 of Law No. 2359 of 1865 allowed takings in consideration of the intrinsic characteristics of the property and the public interest it was intended to serve.²² By contrast, agrarian reform laws aimed at the redistribution of lands for a partial economic reorganization of land ownership. Accordingly, the latter affected owners in proportion to the size of their estates, not a property in view of a specific public interest.²³ As the Constitutional Court emphasised, the aim of acquisitions under agrarian reform laws was not to transfer to the state or a public authority ownership of properties objectively suitable for achieving a goal of public interest but rather to suppress large landed estates.²⁴ Laws on agrarian reform were thus adopted on the basis of social, economic and legal considerations. By contrast, expropriations for public interest concern properties that are objectively suitable for the realization of a specific project of public interest. This rules out the possibility for public authorities to have recourse to the power of expropriation on the basis of general economic and social considerations.²⁵

Interpreting the expropriation clause in Article 42(3) of the Italian Constitution, the Constitutional Court does not distinguish between the notions of public interest and public purpose. Indeed, it has affirmed that the term “public interest” (“*motivi di interesse generale*”) is synonymous with “public purpose” (“*utilità pubblica*”) and both are to be interpreted as requiring the

²² Rules governing expropriation are now in the Code of Legislative Provisions and Regulations on Expropriation in the Public Interest (“the Code on Expropriation”), i.e. Presidential Decree No. 327 of June 8, 2001.

²³ Constitutional Court, 9 March 1959, judgment No. 8.

²⁴ Constitutional Court, 17 March 1961, judgment No. 25.

²⁵ Constitutional Court, 25 February 1975, judgment No. 30. The Constitutional Court was asked to decide on the constitutionality of legislation that imposed a compulsory extension of tenancy agreements. It denied that the provision could be considered as expropriation. In the Constitutional Court’s opinion, the restriction imposed on the landlord’s right of property met the social function requirement and was legitimate.

existence of important community interests (“*ragioni importanti per la collettività*”).²⁶

However, the Italian Constitutional Court places great emphasis on the public interest requirement that— according to its case law —expropriations must be necessarily and directly related to the satisfaction of actual and specific needs of the community. It follows that an expropriation intended to transfer to the state an asset for a future hypothetical use to serve a specific public interest will not meet the public purpose requirement.²⁷ Expropriation cannot therefore be justified on the basis of the mere suitability of a property to be used to satisfy a community need.²⁸ Following this logic, the Italian Constitutional Court has, for instance, declared contrary to Article 42(3) the renewal of zoning plans by a public authority without considering whether the interests of industrial development (which had justified the adoption of the plans at issue) were still present.²⁹

Although Article 42 refers to the broad notion of public interest, the main focus of expropriation of property in the Italian legal order is the realization of public works, which is interpreted extensively. Indeed, Article 1 of the Code on Expropriation provides that the Code applies to the transfers of immovable properties or rights in rem on immovable properties to the state or to a private party for the purpose of public works. Works necessary to grant to the community the use of a specific land or property are considered to be public works. It is not necessary that the property is radically and irreversibly altered, since a partial alteration to grant its public use is sufficient.³⁰ As the administrative courts have acknowledged, the notion of public works is extremely broad and encompasses all public and social infrastructures e.g. parks, gardens and sports facilities³¹ as well as works relating to public utilities services e.g. plants for the production of wind energy.³²

The recognition that an expropriation for a public purpose could entail a private-to-private transfer implies that entrepreneurial interests could trigger a taking of property. A classic case concerns the building of new hotels or conversion or extension works on existing ones. This scenario was regulated

²⁶ Constitutional Court, 06 July 1966, judgment No. 90, *Giust. Civ.* 1966, I, 246.

²⁷ *Ibidem*. More precisely, the Constitutional Court declared the unconstitutionality of a provision of the law that fixed the purpose of the expropriation —namely, the construction of a public work, but did not set the deadline for its implementation, thereby allowing expropriations intended to meet community needs that no longer existed.

²⁸ Council of State, Plenary Session, 29 April 2005, judgment No. 2, *Foro it.* 2006, 2, III, 71; Court of Cassation, Joint Panels, 16 July 2008, No. 19501, *Giust. civ. Mass.* 2008, 7-8, 1148.

²⁹ Constitutional Court, 25 July 2011, No. 243, *Foro it.* 2012, 7-8, I, 2001.

³⁰ Regional administrative tribunal for Calabria, Sec. I, 6 December 2010, judgment No. 2876, *Foro amm. TAR* 2010, 12, 4040. The case concerned the arrangement of a park area that did not require the construction of buildings or the material transformation of the land.

³¹ Regional administrative tribunal for Emilia-Romagna, Sec. I, 30 March 2007, judgment No. 352, *Foro amm. TAR* 2007, 03, 0922.

³² Regional administrative tribunal for Sicily, Sec. II, 9 February 2010, judgment No. 1775.

by the Royal decree no. 1473 of 1938,³³ which was repealed by the Code on Expropriation. However, according to the administrative courts, the repeal only related to the procedure to follow and accordingly, the interests set out in the royal decree were still to be considered.³⁴ The building or extension of a hotel complex cannot be considered *ipso facto* a public purpose, but it is up to the administrative authority to declare the public purpose of the works on the basis of a comparative assessment of all the interests concerned. Thus, for instance the regional administrative tribunal for Lazio ruled out a proposed extension of a hotel that was already oversized with respect to tourism demand.³⁵

In France, the scope of the notion of public purpose has continually evolved with the evolution of the role of the state. From the early 19th century to the beginning of 20th century, the tasks of the state were limited and the scope of the notion of public purpose covered the realization of public works. Accordingly, specific legislation allowed the expropriation of housing considered as irretrievably unhealthy³⁶ or environmentally hazardous properties,³⁷ for the prevention of technological risks,³⁸ for implementing town planning schemes,³⁹ for reforestation of mountains,⁴⁰ for building tramlines,⁴¹ for installing telegraph wires or telephone lines,⁴² for building

³³ The decree governed the procedures through which municipalities, other public authorities and private parties could promote the expropriation of immovable property or other rights *in rem* in order to build new hotels, or carry out extension works with regard to the existing ones.

³⁴ Council of State, Sec. IV, 29 February 2008, judgment No. 795, *Foro amm. CDS* 2008, 2, I, 425.

³⁵ Regional administrative tribunal for Lazio, Sec. II, 28 June 2013, judgment No. 6453.

³⁶ Law of 13 April 1850 on unhealthy housing. For comment, see A. Des Cilleuls, *Commentaire de la loi du 13 avril 1850 sur les logements insalubres*, Imprimerie et Librairie Générale de Jurisprudence Cosse, Marchal, Paris, 1869.

³⁷ Law No. 95-101 of 2 February 1995 on strengthening of environmental protection, *Journal Officiel de la République Française* No. 29 of 3 February 1995, p. 1840. In particular, according to Article 11 the state can expropriate properties prone to landslides, avalanches or floods that seriously threaten human lives.

³⁸ Law No. 2003-699 of 30 July 2003 on the prevention of technological and natural risks and their compensation, *Journal Officiel de la République Française* No. 175 of 31 July 2003, p. 13021

³⁹ See for instance, decree of 26 March 1852 on Paris streets, *Bulletin des Lois*, 10e S., B. 514, No. 3914.

⁴⁰ Laws of 28 July 1860 and 8 June 1864. See, Ministère des Finances, Direction générale des Forêts, *Lois du 28 juillet 1860 et du 8 juin 1864 sur le reboisement et le gazonnement des montagnes précédées des rapports et exposés qui ont motivé leur présentation au Corps législatif, et suivies du Décret du 10 novembre 1864 portant règlement d'administration publique pour leur exécution*, Imprimerie Impériale, Paris, 1870.

⁴¹ Law of 11 June 1880 on local railways and trams, *Journal Officiel de la République Française* of 12 June 1880, p. 17520.

⁴² Law of 28 July 1885 on the establishment, maintenance and operation of telegraph and telephone lines.

sports facilities⁴³, to protect historic buildings or natural sites,⁴⁴ to constitute land reserve⁴⁵ and to realize a profit.⁴⁶

With the broadening of the tasks of the state, the notion of “public purpose” (“*utilité publique*”) started to fade and blur with that of the public or general interest. Declaring the validity of an expropriation to build an amusement park, which was a purpose not specifically covered by existing legislation, the French Council of State affirmed that the concerned project could be declared to have public purpose by reason of its general interest.⁴⁷

Following this logic, the administrative courts consider that the public purpose requirement is met when the pursued aim falls within the (wide) scope of the notion of general interest.

Even an expropriation that benefits a private party could meet the public purpose requirement if it also satisfies some public interest. In the 1970s, the French Council of State established the principle according to which expropriations that directly benefit the interests of a private company are in the public interest insofar as they favor economic regeneration.⁴⁸ The leading case is *Ville de Sochaux*, where the Council of State found that an expropriation to modify the road network to directly favor a car company complied with the public purpose requirement since it satisfied the general interest of developing an industrial estate of relevant importance for the local economy.⁴⁹

The French Council of State has thus overcome the traditional split between private and public interests, however it has made it clear that an expropriation that benefits only the interests of a private party would be declared invalid.⁵⁰

⁴³ Law of 25 March 1925 on expropriation in the public interest for building sports fields.

⁴⁴ Law of 30 March 1887. See, Société française d'archéologie, *Loi du 30 mars 1887 pour la conservation des monuments et objets d'art ayant un caractère historique et artistique*, Henri Delesques Imprimeur-Editeur, Caen 1887.

⁴⁵ Financial Act No. 67-1253 of 30 December 1967, *Journal Officiel de la République Française* du 3 janvier 1968, p. 3.

⁴⁶ Law of 6 November 1918 on expropriation on public utility, *Journal Officiel de la République Française* of 12 November 1918, p. 9797. This allows municipalities to expropriate private properties that would benefit by an increase in value due to public works in order to resell them and keep the profit.

⁴⁷ Council of State, 20 December 1938, *Rec. Lebon*, p. 962.

⁴⁸ See for instance, Council of State, 23 May 1979, judgment No. 97145, *Rec. Lebon*, concerning the building of a branch in a railway line that favored a manufacturer of marble; Council of State, 7 November 1979, judgment No. 09649, *DA* 1979, comm. No. 404, concerning an urban renewal project to build a shopping mall.

⁴⁹ Council of State, 20 July 1971, judgment No. 80804, *Rec. Lebon*, p. 561.

⁵⁰ See for instance, Council of State, 7 May 1969, judgment No. 74438, concerning the construction of a helipad for a town councilor; Council of State, 20 November 1981, No. 21743, concerning the expropriation of a private road for the sole benefit of a private party; Council of State, 17 September 1999, No. 176174, *AJDI* 2000, p. 131, concerning the expropriation of private properties to build a road for the sole benefit of a single inhabitant of the town.

The existence of a public interest can be raised before the ECtHR. As made clear by the European Commission on Human Rights (“ECommHR”),

“[a]lthough there is no reference to "expropriation" as such in the Article, its wording, especially the phrase "deprived of his possessions except in the public interest" and the reference to the "general principles of international law", shows clearly that it is intended to refer to formal (or even de facto) expropriation, that is to say the action whereby the State lays hand-or authorizes a third party to lay hands-on a particular piece of property for a purpose which is to serve the public interest . This interpretation is confirmed by the "Travaux préparatoires" for Article I of the First Protocol.”⁵¹

Accordingly, the ECommHR stated that Swedish legislation which empowered majority shareholders in a company to acquire the shares of minority shareholders did not amount to a deprivation of property within the meaning of Article P1-1. More specifically, the Commission considered that the legislation at issue was,

“the practical expression of a general legislative policy towards private companies and concern[ed] principally relations between shareholders. The general intention of this type of legislation is naturally to favour whatever interests are considered most worthy of protection, which has nothing to do with the notion of "public interest" as it arises in the context of expropriation.”⁵²

However, according to ECtHR case law, it is not necessary that a deprivation of property benefits the community at large, provided that its purpose is other than to confer a private benefit on a private party. Indeed, a compulsory transfer of property from one individual to another may in principle be considered to be in the public interest if the acquisition is in pursuance of legitimate social policies. Thus, in the *James* case the ECtHR found that English legislation that conferred on certain tenants the right to compulsorily purchase the freehold from the landlord on certain terms and conditions constituted a legitimate means for promoting the public interest.⁵³ In general terms, the ECtHR 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.”⁵⁴

⁵¹ App. no. 8588/79 and 8589/79, *Bramelid and Malmström v. Sweden*.

⁵² *Ibidem*.

⁵³ App. No. 8793/79, *James and others v. The United Kingdom* [1986] ECtHR.

⁵⁴ *Ibidem*, para. 45.

ECommHR and ECtHR case law follows the principles stated in the *James* case and acknowledges that certain aims can legitimize compulsory transfers of property between private persons, such as the rationalization of agriculture,⁵⁵ the execution a slum clearance plan⁵⁶ and the restitution of property that had been expropriated contrary to the rule of law⁵⁷ or that was intended to redress infringements of human rights under communist governments.⁵⁸

Finally, according to the ECtHR, there is no real distinction between the notion of public interest and that of general interest in the second paragraph of Article P1-1 to define the state's discretion in regulating the use of someone's property; both should be given an extensive meaning.⁵⁹ Examples of cases where the ECtHR found that deprivations of property were supported by a public interest include the following: nationalization of certain industries,⁶⁰ building a Freeport zone,⁶¹ building social housing,⁶² to ensure ecological conservation⁶³ and to manage road traffic in a more efficient way.⁶⁴

5. Questioning the Public Interest of Takings: Which Standard of Judicial Review?

Judicial review of the public interest of an expropriation is a particularly difficult task because it entails public welfare considerations with respect to which the executive and legislative powers have more knowledge than judges. The courts considered in this paper tend to grant to the legislature and the executive broad leeway to decide when an expropriation is in the public interest.

In view of this, the French Constitutional Council carries out a narrow review of the public purpose of a deprivation of property. Considering that the assessment of public interest lies with the legislature, the French Constitutional Council, as a rule, requires the legislature to be precise about the public interest aims pursued by legislation referred to it; but it does not

⁵⁵ App. No. 11855/85, *Håkansson and Sturesson v. Sweden*, [1987] ECommHR.

⁵⁶ App. No. 37448/06, *J. Lautier Company Limited v. Malta*, [2008] ECtHR.

⁵⁷ App. No. 58182/00, *Karl-Heinz Mitzov v. Germany*, [2006] ECtHR.

⁵⁸ See, *ex multis*, App. No. 36548/97 *Pincova and Pinc v. The Czech Republic*, [2003] ECtHR.

⁵⁹ See footnote 7.

⁶⁰ App. No. 9006/80, 9262, 9263, 9265, 9266, 9313 and 9405/81, *Lithgow and others v. The United Kingdom* [1986] ECtHR.

⁶¹ App. No. 2226/10, *Frendo Randon and Others v. Malta*, [2012] ECtHR.

⁶² App. No. 14796/11, *Deguara Caruana Gatto and Others v. Malta*, [2013] ECtHR.

⁶³ App. No. 2243/10, *Curmi v. Malta*, [2011] ECtHR.

⁶⁴ App. No. 64792/10, *Trimeg Limited v. Malta*, [2011] ECtHR.

carry out a far-reaching review of their actual suitability to achieve the stated public interest.⁶⁵

A more penetrating review of the public interest in expropriation cases is conducted by French administrative courts. Until the early 1970s, the administrative courts did not inquire into the circumstances surrounding expropriations, thus avoiding referring to the suitability of the use of the power to expropriate made by public authorities. In 1971, the French Council of State broke fresh ground by stating that an expropriation can be said to meet the public purpose requirement only if the prejudice to private property, the financial cost and the social disadvantages do not outweigh the public interests related to the expropriation.⁶⁶ Asked to rule on the legality of a project entailing the expropriation and demolition of about a hundred houses to build a new urban area including university campus and residences, the Council of State affirmed that given the importance of the project, it had a public interest despite its costs and the impairment to property rights.

The Council of State went further than checking the legality of the expropriation with regard to compliance with substantive and procedural rules and considered its economic and social efficiency. In other words, it pronounced on the suitability *in concreto* of the expropriation.

A year later, the Council of State referred to other public interests liable to be affected by the realization of the works for which the expropriation is required as among the factors to be considered when assessing the suitability of an expropriation.⁶⁷ Among these, for instance, are the protection of the environment⁶⁸ or monuments.⁶⁹

This 'cost-benefit analysis' as developed by the Council of State gives it a broad discretion to review the public interest of a project since it covers all potential drawbacks, including any prejudice to private property rights.

⁶⁵ See, Constitutional Council, 16 January 1982, decision No. 81-132 DC, especially para 19-20, *Rec.* 18. Declaring the constitutionality of the Nationalization Act of 1982 the Constitutional Council considered, on the one hand, that nationalizations respond to a public necessity insofar as they were intended to give the government means to cope with the economic crisis, to promote economic growth and fight unemployment, and, on the other, it limited itself to remark that the assessment made by the Parliament on the need for nationalizations was not flawed by any manifest error, without considering the actual suitability of nationalization measures to respond to the stated public necessity.

⁶⁶ Council of State, 28 May 1971, judgment No. 78825, *Rec. Lebon*, p. 409.

⁶⁷ Council of State, 20 October 1972, judgment No. 78829, *Rec. Lebon*, p. 657.

⁶⁸ *Ex plurimis*, Council of State 9 December 1977, judgment No. 01859, *Rec. Lebon*, the Council stated that concerns for environmental protection opposed a project of parceling out a picturesque place; Council of State, 26 March 1980, judgment No. 01554, *Rec. Lebon*, the Council stated that the declaration of public purpose of a project of building a seaside resort was unlawful because it would have seriously deteriorated the natural site.

⁶⁹ Council of State 3 March 1993, judgment No. 115073, *Rec. Lebon*, concerning the building of a new route to Paris.. The Council found that the harmful effects on historic buildings were not severe enough to invalidate the declaration of the public purpose of the project.

The case law of the Council of State shows however that it is cautious when it comes to annul a declaration of public interest. In principle, the Council of State is more prone to set aside a declaration of public interest when it finds that various interests are adversely affected by the project. Moreover, only in a few cases has the cost-benefit analysis lead the Council of State to conclude that the public interest of a given project could not justify a taking of property because it excessively impaired private property rights. The case of *Eroux X* decided on 25 November 1988 is one example. The expropriation was planned to implement a project of reforestation of an area belonging to a small municipality that already had several parks and gardens. According to the Council of State, the project had a limited public interest, considering the heavy burden imposed on the claimant's property.⁷⁰ It is worth noting that the concern for the protection of property rights prevailed over the public interest because the reforestation project lacked a relevant economic and social interest. Under the cost-benefit analysis, the weight of property rights is thus inversely proportional to the economic and social interest of the project concerned. However, the Council of State attaches great weight to property rights when they contribute to the realization of a public interest. Thus, for instance, in a case concerning the taking of a piece of land to realize a public housing project, the Council of State found that the project pursued an aim of public interest, but it then considered the drawbacks of the expropriation. In particular, the Council of State stressed that the expropriation would have prevented the expropriated owners from carrying out extension works on their hotel, which entailed economic and tourism interests. Accordingly, the Council stated that because of the impairment to private property rights and to the public (economic and tourism) interest linked to them, the project of expropriation was not in the public interest, despite the social interest of the planned work.⁷¹

A final scenario in which the concern for the protection of private property rights would lead the administrative courts to question the legality of the act declaring the public interest of an expropriation is where the public authority had already at its disposal a piece of land enabling the realization of the project.⁷²

In conclusion, ruling on the public interest of an expropriation, the French Council of State has overstepped the boundaries of the review of legality to rule on the suitability of the project.⁷³ However, the Council of State has made

⁷⁰ Council of State, 25 November 1988, judgment No. 74232, *Rec. Lebon*.

⁷¹ Council of State, 20 February 1987, judgment No. 44864, *Rec. Lebon*.

⁷² Council of State, 19 October 2012, judgment No. 343070, concerning a taking of private property to build social housing despite the fact that the municipality owned several pieces of land that could have been used to carry out the social housing development plan.

⁷³ See Council of State judgment No. 83261 of 26 October 1973, where it denied the public utility of a project to build an aerodrome since the project was insufficient to meet the need

a cautious use of the discretion implicit in the cost-benefit analysis to appraise the public interest of a project. The cases in which the declaration of public interest is set aside are rare and mostly related to projects of interests concerning small communities. Indeed, the Council of State has never denied the public interest of projects concerning public works of national interest, even when serious doubt had been cast on the economic efficiency of a project.⁷⁴

Similarly to the French Constitutional Council, the ECtHR applies a low level of scrutiny on the public interest issue. Considering that “national authorities are in principle better placed than the international judge to appreciate what is “in the public interest””, and that “the decision to enact laws expropriating property will commonly involve consideration of political, economic and social issues on which opinions within a democratic society may reasonably differ widely”, the ECtHR has affirmed that it “will respect the legislature’s judgment as to what is “in the public interest” unless that judgment be manifestly without reasonable foundation”.⁷⁵ Since it cannot substitute its own assessment for that of the national authorities, its role should be limited “to make an inquiry into the facts with reference to which the national authorities acted”.⁷⁶

Once the ECtHR has established that the taking of property is in the public interest, it considers whether the expropriated property has actually been used to serve the stated public purpose. However, cases where the ECtHR found that property that had been lawfully expropriated but not used in accordance with the stated public interest are rare. The first case where the ECtHR considered that the non-use of the expropriated property raised an issue in respect of the public interest requirement is *Motais de Narbonne v. France*.⁷⁷ The case concerned a property that had been expropriated under French legislation that allowed certain public authorities to expropriate to obtain a land reserve for future development. The property was intended to be used to build social housing but the expropriated land laid unused for nineteen years. The ECtHR affirmed that the public interest requirement in Article P1-1 entails the assessment *in concreto* of the public interest, namely the actual realization of the

of business aviation and benefit the small number of inhabitants of the municipality who did aerial sports.

⁷⁴ For instance, the State Auditors' Department questioned the profitability of the high-speed Paris-Lyon railway line but the Council of State considered that the project was in the public interest despite its costs and the uncertainty of its profitability. See Council of State judgment No. 02910, 03109, 03128 of 21 January 1977, *Rec. Lebon*, p. 30.

More generally, it has been observed that, with regard to projects that fall within transport policy, the Council of State relies on an abstract notion of the public interest, which gives priority to government policy. See, J. Lemasurier, *Le droit de l'expropriation*, Economica, Paris, 2001, p. 97.

⁷⁵ *James and others*, cit. *supra* footnote 40, para 46.

⁷⁶ *Ibidem*.

⁷⁷ App. No. 48161/99, *Motais de Narbonne v. France*, [2002] ECtHR.

project. However, the ECtHR affirmed that the placing in reserve of expropriated property, even for a long period of time, does not necessarily entail a breach of Article P1-1. It found that Article P1-1 was contravened because the applicants had been deprived of the significant increase in value of the expropriated land.

The ECtHR adopted the same approach in the case of *Vassallo v. Malta*,⁷⁸ concerning an expropriation for building a social housing project that had not been started for almost thirty years. Also in this case the ECtHR found a breach of Article P1-1 on the ground of the general principle of proportionality. However, it considered that the requisite balance had not been struck because the applicant had not received any compensation.

This approach reveals that the public interest requirement as applied by the ECtHR offers a weak protection to private owners against misuse of the state's power to expropriate. In fact, the ECtHR has never found a breach on the basis that an interference was not in the public interest, although in some cases it cast doubt on the reasons of public interest raised by the respondent governments. An example of this is the *Lecarpentier* case, where the applicants complained about the retroactive application of legislation governing loans that had the effect of depriving them of their legitimate expectation of being able to recover a certain sum. The ECtHR was in doubt as to whether the interference was in the public interest insofar as the legislation at issue was not plainly supported by overriding reasons of general interest.⁷⁹ Nevertheless, the ECtHR maintained that there had been a violation of Article P1-1 on the grounds that the measure had placed an abnormal and excessive burden on the applicants and that interference with their possessions had been disproportionate.

Thus, the ECtHR's test in expropriation cases is a fair balance test, under which the availability and amount of compensation, as well as the existence of adequate procedural protection for the right of property, carry more weight than the public interest.

Finally, in Italy, the public purpose requirement does not play a significant role in expropriation litigation. Despite the plain language of the Italian Constitution that distinguishes social function (which pertains to the exercise of property rights) and public interest justifying the exercise of the state's power of expropriation, the distinction has become blurred over time. Indeed, the Italian Constitutional Court does not consistently distinguish between regulation of property and expropriation, avoiding a rigorous application of the second and third paragraph of Article 42. As stated above, the Italian Constitutional Court has found a breach of the constitutional protection of property where the right to property is extinguished or diminished without compensation, even though the owner has not been deprived of actual

⁷⁸ App. No. 57862/09, *Vassallo v. Malta* [2011] ECtHR.

⁷⁹ App. No. 67847/01, *Lecarpentier v. France* [2006] ECtHR, especially para. 48-49.

ownership. Thus, in certain circumstances, the Italian Constitutional Court equates regulation to expropriation, with consequent implications in terms of compensation.⁸⁰

On the other hand, the Italian Constitutional Court has referred to the social function principle in order to declare the constitutionality of ‘constructive expropriation’. The constructive expropriation rule has been developed by the Italian courts since the late 1970s to resolve disputes concerning the occupancy of a private property by public authorities for a longer time than allowed by law and without completing the expropriation procedure. Confronted with cases in which the landowner had lost *de facto* use of the land since local authorities had taken possession of it and a public works project had been undertaken, the Italian courts had to decide whether the landowner had lost title to the land as a consequence of the mere fact that the work had been carried out. The Italian Court of Cassation has developed different lines of case law on this. The prevailing solution is that public authorities acquire title to the land from the outset without the need for an expropriation procedure if public works were completed there even after the land was occupied and irrespective of whether such occupation was lawful. The expropriated private owner is entitled to compensation under tort law.⁸¹ Addressing the specific issue of the constitutionality of this principle, which, as developed by case law, linked the transfer of ownership to the unlawful action of public authorities, the Italian Constitutional Court held that constructive expropriation amounted to a mode of acquiring property whose rationale lay in the balance between public and private interests and that its regulation was a concrete manifestation of the social function of property. Considering that the realization of public works on land transformed it so that there was no longer a distinction between the land acquired by the public authority and that taken from the private owner, the Italian Constitutional Court ruled that constructive expropriation was not within the scope of Article 42(3) and considered it instead as a case of original acquisition of property.⁸² This theory of constructive expropriation as a mode of acquiring property was then codified in Article 43 of the Code on Expropriation, which provides that, in the absence of an expropriation order, or a declaration stating that the expropriation is in the public interest, the land that had been altered following the construction of public works is transferred, by means of an act of

⁸⁰ This approach has been criticized by some scholars for being a drift towards a liberal model of property no longer relevant in the Italian Constitution of 1948. Cfr., M. Luciani, “Corte costituzionale e proprietà privata (a proposito della sentenza n. 260 del 1976)”, *Giur. cost.*, 1977, II, p. 1385; S. Rodotà, “Art. 42”, in G. Branca (ed.) *Commentario della Costituzione. Rapporti economici*, Vol. II, Zanichelli-Foro Italiano, Bologna-Roma, 1982, pp. 69 ff.

⁸¹ Court of Cassation, joint panels, 26 February 1983, judgment No. 1464, *Foro it.* 1983, I, 626.

⁸² Constitutional Court, 23 May 1995, judgment No. 188, *Foro it.* 1996, I, 464.

acquisition adopted *ex post*, into the ownership of the authority that had altered it. In this case, the former owner of the land was entitled to damages. This mode of acquisition exists even where town planning measures, or the declaration that the expropriation was in the public interest, have been set aside.

Even though Article 43 of the Code on Expropriation requires the public authority to use the unlawfully occupied property for public interest purposes, it empties the public interest requirement set down in Article 42(2) of all meaning. Indeed, to provide for an effective guarantee against arbitrary actions of public authorities, the declaration of public interest should be issued before the expropriation of the private property to make sure that the taking of property responds to real and actual needs of the community. To allow the public authority to adopt the declaration of public interest after it takes possession of the property raises the risk that the public interest is made out *ex post* to justify the use of an unlawfully occupied property.

The Italian Constitutional Court declared that Article 43 of the Code on Expropriation is unconstitutional in its judgment No. 293 of October 8, 2010. The Court found that the Code is in breach of Article 76 of the Italian Constitution, which governs the exercise of delegated legislative powers by the government.⁸³ This is now regulated by Article 42-*bis* of the Code on Expropriation under which the act declaring the transfer of property must specifically state the exceptional reasons of public interest that justify the taking of property, after due consideration of the owner's interest and where there is no reasonable alternative.

6. Conclusion

The above comparison between Italian and French legal traditions, as well as at the supranational ECHR level, shows that, in the field of the protection of private property, underlying cultural and political aspects can play a greater role than specific constitutional language. Indeed, although the French Constitution does not provide for social obligations with respect to property rights, French governments have been more active than Italian ones in enacting social policies and the French Constitutional Council has proved to be willing to sanction social limitations on property rights.

Even though the Italian Constitution clearly establishes that expropriation in the public interest can take place in the cases permitted by law and with compensation, the Italian Constitutional Court has recognized, to some extent, expropriations that did not follow procedures laid down by law. One such example is the Italian Constitutional Court's judgment No. 6 of 1966 interpreting the concept of expropriation to include the extinction or diminishment of the right of property without compensation, even though the

⁸³ Constitutional Court, 8 October 2010, judgment No. 293, *Foro it.* 2010, 12, I, 3237.

owner has not been deprived of actual ownership. Another is the principle of constructive expropriation initially described by the Italian Constitutional Court as a way of acquiring property in keeping with the social function clause.⁸⁴

In Italy the public purpose requirement does not play a significant role in expropriations litigation. The Italian Constitutional Court has however made clear that for an expropriation to be in the public interest, the expropriated property must be used to satisfy an actual and specific need of the community. French courts and scholars have paid more attention to the public interest requirement than their Italian counterparts. In particular, French administrative courts have developed the cost-benefit analysis that, at first sight, appears to introduce the principle of proportionality in expropriations litigation. However, a closer analysis reveals that cost-benefit analysis serves a different function to the proportionality test. The latter is intended to protect individuals against misuse of state discretion, condemning state acts that place on the individual a burden that is excessive in relation to the public interest concerned. On the contrary, the cost-benefit analysis is intended to assess the socio-economic efficiency of a project. In other words, French administrative courts ensure that expropriations serve public interests that are relevant and real, by assessing *in concreto* the appropriateness of the contested expropriation taking into consideration all conflicting private and public interests affected by the realization of the project already declared of public interest. However, from the case law it is not possible to extrapolate objective criteria to use for ranking the various public interests. The Council of State seems to apply a sliding scale balancing the scope and degree of importance of the project against the nature of the other public interests involved. Among them, economic interests carry significant weight.

Acting from a different perspective, the ECtHR has adopted an extensive interpretation of the concept of deprivation of property in order to offer a far reaching protection to individuals against arbitrary confiscation of property. The ECtHR allows contracting states a wide margin of appreciation in determining whether expropriations further the public interest, and only in a few cases has it checked *in concreto* the actual existence of the general interest invoked by the respondent government. This approach can easily be

⁸⁴ A prototype of the constructive expropriation doctrine can be found under French law. Relying on the principle of intangibility of public works, courts denied ordering the restitution of land that public authorities had irregularly occupied and on which a public work had been built. However, the Court of Cassation condemned this approach affirming that a compulsory transfer of property can take place only in compliance with expropriation proceeding rules. See, Court of Cassation, plenary session, 6 January 1994, App. No. 89-17049, Bull 1994, I, p. 1. On this subject, see J.-F. Strillou, *Protection de la propriété privée immobilière et prérogatives de puissance publique: contribution à 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'Harmanattan, Paris, 1996, pp. 69 ff.

understood if one considers that there is no European legal consensus on a specific model of property and the notion of public interest is a symbolic representation of the values that a given society considers to be of overriding importance with regard to the owner's interests. Moreover, there is a direct link between the scope of the public purpose requirement and the tasks of the state in a given society. The deference showed by the ECtHR towards national decision-makers of what is in the public interest is thus an expression of ECtHR's willingness to provide individual justice while respecting national legal traditions and cultures.

However, in ECtHR case law, the weak control on the actual public interest of expropriations is counterbalanced by a strict scrutiny of compensation under the fair balance test. Requiring – as a rule – the state to pay full compensation corresponding to the market value of the expropriated property should discourage self-interested acts of public authorities.

In conclusion, from the perspective of the protection of the right to private property, the suitability of the public interest requirement to offer an effective protection to private owners against arbitrary takings of property rights could be questioned considering the vagueness of the notion of public interest itself. On the contrary, the fair balance test developed by the ECtHR giving property rights greater weight than competing public interests offers a strong protection to property rights. The right of property prevails unless the state demonstrates that the interference with it is proportionate.