PROPERTY LAW : FROM THE SACRED TO THE PROFANE

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French law grants a paradoxical status to property law. On the one hand it puts it on a pedestal and solemnly enshrines it in exultant and sublime texts and terms, and on the other hand it beats it with a cane, if not to say stabs it with a dagger, to the extent that virtually the entire legal doctrine wonders whether property law still actually exists, and, if it does, whether it can still be classified along with the other fundamental laws. "Decline", "withering", "relative law", "subordinate law", "second-level law"… these are expressions frequently heard when the very unremarkable destiny of property law is recounted.

This legal schizophrenia is doubtless not - or no longer - specific to property law, because if we care to carefully consider the evolution of the law over the past few decades, we see that quite a few other essential laws or rights are also undergoing a change or complete alteration, a kind of degeneration due to sociological and ideological evolution, still insufficiently felt and understood, so great is the confusion. When the philosopher Marcel Gauchet writes that "a new man is born out of human rights who no longer has anything in common with his ancestor of 1789"[1], he expresses that which any slightly sociologically or philosophically minded lawyer observes every day, i.e. a sort of legal *Canada Dry* which is still referred to as human rights without any longer being the rights of humans.

This legal illusion is particularly obvious in constitutional law, to such an extent that at the last congress of the French Association of Constitutionalists, a colleague made the remark that everything in our Constitution has become false and unreal: sovereignty no longer exists, nor does the unity of the Republic[2]… and we could certainly add property law to the list of these defunct constitutional principles.

The complexities of the world and the challenges faced by democracies are particularly traumatising for French law and the political philosophy which underpins it. It is beyond doubt that a certain French "legal exception" together with its cultural foundation is particularly threatened and attacked by post-modernism. But everything carries on as if our law-makers and judges and also part of the university doctrine do not yet dare to admit it openly, leading to a certain duplicity in political and legal speech, official France seeming hesitant and torn apart, incapable of knowing what she wants and of saying what she has accomplished.[3]

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[1] GAUCHET (Marcel), *Quand les droits de l'homme deviennent une politique*, Paris, Gallimard, 2000, coll. "Le Débat", n° 110, p. 266.
[2] CUBERTAFOND (Bernard), "La Constitution de 1958: romanesque et démo-despotisme", (5th AFDC Congress, workshop n°2, "Modernité" and Constitution (dir. Anne-Marie Le Pourhiet), AFDC website: www.droitconstitutionnel.org
[3] LE POURHIET (Anne-Marie), *Identité ou liberté: faut-il changer la Constitution ?*, Politeïa, 2002, vol. II, p.55.

"Natural", "unpredictable", "unimpeachable", "sacred", "absolute", the least that can be said is that the Constitution and the French Civil Code are not shy of superlatives to describe property law but this lyrical emphasis is proportional to the weight and frequency of the attacks made on it. The nature and finality of these attacks vary however over time and follow sociological and ideological trends very closely, whilst the "objects" of appropriation have also considerably diversified.

The regarding of property law as sacred, which has both religious and sociological origins was progressively called into question firstly, of course, by the Marxist influence notably present in the Constitution of 1946 before which traditional socialism had been replaced by a more heterogeneous social militantism whose relations to property were just as confused. From Locke and Portalis to the "*droits devant*" association, I am quickly (and thus superficially) going to tell you about this long and dizzy path of property law in three stages.

The holding of property law as sacred

With a majestic formula and a flourish of the quill lacking in today's lawmakers, property law was sanctified in Article 2 of the 1789 Declaration of the Rights of Man and Citizens : "The aim of any political association is the upholding of man's natural and imprescriptible rights. These rights are freedom, ownership, safety and resistance against oppression". The last two rights were only really a means of guaranteeing the first two, it being well understood that the two great revolutionary natural rights are freedom and ownership, inextricably linked in liberal individualism. This was confirmed by Napoleon when he prepared his Civil Code : "Property is the inviolability in the person of what he owns"[4] and what Chateaubriand would confirm in his memoirs from beyond the grave: "Hereditary and inviolable property is our personal defence : property is nothing other than freedom"[5].

However, Article 17 of the Declaration envisages the necessity of undermining property rights through recourse to expropriation, but drawing attention to its derogatory character by preceding it with a peremptory reminder : "*The right of ownership is inviolable and sacred*". Article 544 of the Civil Code next defines the right of ownership in a similar way: "Ownership is a right to enjoy and abuse things in the most absolute way, provided that no usage thereof arises which is prohibited by laws and regulations".

Portalis himself asked questions about the legitimacy of this absolute right known to man with regard to objects and to the origins of this natural right of man to appropriate objects at his convenience. It was shown that the origin of this absolutism goes back to Christian thought, and notably to the idea of a human "domain" conceived as being part of a divine "domain"[6].

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[4] Quote from François Terré, "L'évolution du droit de propriété depuis le Code civil", *Droits*, n°1, 1985, p.2.

[5] LACHAUME (Jean-François) and PAULIAT (Hélène), "Le droit de propriété est-il encore un droit fondamental?" in *Droit et politique à la croisée des chemins*, Etudes en l'honneur de Philippe Ardant, LGDJ, 1999, p.373

[6] RENOUX-ZAGAME (Marie-France), "Du droit de Dieu au droit de l'homme: sur les origines théologiques du concept moderne de propriété", *Droits* n° 1, 1985, pp.17 ff.
RIALS (Stéphane), *La déclaration des droits de l'homme et du citoyen*, Hachette, coll. "Pluriel", 1988, pp. 344 ff.

The natural right of man would thereby be rooted in the absolute right of God towards a world of which He would be the sole master. But by a perversion of this original idea and the obliteration of the ministry entrusted by God to man, the latter freed himself from the divine finality imposed on the usage of objects, and thereby acquired over them a limitless and perfectly subjective right called the rights of man, of which John Locke would of course be the brilliant theorist.[7]

Some authors however have noted that, from the beginning and beneath the façade, relativism was already chipping away at absolutism.[8] Is not the expropriation of Article 17 the negation of the absolute characteristic of a right, finally reduced to the one to be indemnified ? Do not the "prohibited usages" risk quite simply destroying the proclaimed right, not only by law but also by regulations, through their quality and quantity ? The legicentrism which prevailed through three-quarters of the twentieth century, seemingly not even capable of exercising any control on a legislator who excessively undermined any benefit from or exercise over property rights, may doubtless feed the scepticism surrounding the concrete effectiveness of revolutionary principles and the genuine conviction of their authors.

It is true that, conceived above all as a freedom-right of a subjective nature, ownership is just that, as well as being a social right before its time, in the sense that in 1789 its splitting up was considered the most effective means to favour freedom and safety just as much as responsibility and good citizenship. And it could be practically demonstrated.[9] Individual property is thus simultaneously the most complete form of subjective right and the basis of revolutionary social organisation as a factor of social harmony and prosperity.

But it is obviously from Marxism that the great attack on individual property and the massive slide from liberal subjectivism to socialism would later come.

Socialisation of property laws

We are well aware of the Marxist criticism of revolutionary rights accusing them of being nothing more than formal liberties and unfathomable abstracts to the masses of which the effective benefit would be the preserve of the triumphant bourgeoisie, both author and sole beneficiary of the 1789 revolution. European legislators could not fail to be influenced by the idea of a collective appropriation of assets and production means as advocated by socialism.

The Constitutions drafted after the Second World War, notably in Italy, Germany and France, bore the mark of this growing collectivisation and of the social vision of property rights being henceforth expressly acknowledged by public figures.

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[7] MORANGE (Jean), "La Déclaration et le droit de propriété", *Droits*, n° 8, 1988, pp. 101 ff.

[8] GUYON (Yves), "Le droit de propriété devant la Cour de cassation et le Conseil constitutionnel" in *La Cour de cassation et la Constitution de la République*, PUAM, 1995, p. 173.

[9] BOUVERESSE (Jacques), "Droits fondamentaux, Etat de droit: l'héritage dilapidé de 1789" in *Regards critiques sur l'évolution des droits fondamentaux de la personne humaine en 1999 et 2000*, dir. Giles Lebreton, L'Harmattan, 2002, pp. 11-12.

In France, the famous episode of the failure of the first Constitution project in the referendum of 5th May 1946 crystallised the confrontation between those who were perhaps already the proper-thinking élite and "lesser France", which would demonstrate its effective attachment to property rights. The people having refused a Declaration of Rights whose Articles 35 and 36 delivered a significant reduction in the protection of private property, the second representative meeting accepted, in what would become the Constitution of 27th October 1946, a preamble harking back to the 1789 Declaration and simply including a line referring to nationalisation.

Later on, the preamble to the Constitution of 4th October 1958 proclaiming the attachment of the French people both to the liberal Declaration of 1789 and to the social preamble of 1946, would inhibit the Constitutional Council when it decided in 1971 to extend its control over laws to their conformity with the declared rights and liberties and to effect a difficult balancing act between the two philosophies. The famous and controversial decision of 16th January 1982 on nationalisation kicked off a large amount of jurisprudence which finally contained the same duplicity as in the texts. The council gave itself over to a brilliant lesson of political philosophy demonstrating the permanence of French constitutional attachment to liberalism. This remarkable essay of liberal principles is so solemn that, logically, one expects to see nationalisation rejected when, finally, in a last, short, all-purpose preamble, the constitutional judge indicates that, in the absence of a breach of the "pink" line, the legislator has not gone against the Constitution.[10] A philosophical mountain is thereby made out of a legal molehill.

All later decisions relative to property rights repeat the same stereotypical formula according to which the attacks made by the legislator do not have to have "a level of seriousness such that the sense and the application of the rights would be lost". But at what point exactly are they lost ? Nobody knows, and the key to the enigma is not to be found in the image painted by certain authors of "being like an artichoke which stays the same when you remove its attributes, unless you touch the heart, in which case it disappears", since nobody has been able to define exactly what constitutes the "heart" of property rights.[11] The affirmation of these same authors, according to whom "It is neither black nor white, but various shades of grey, the limit is reached when grey tends towards black", which does not help either, unless you have a colour chart showing all the colours of the law.[12] So we find ourselves in the situation of the famous sketch by Fernand Reynaud, where the answer to the question about the time it takes for a cannon to cool down was "some time"; since it concerns the limits of attacks on property rights, the answer is also "a certain limit".

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[10] For a critical analysis of constitutional jurisprudence, see :
- MOLFESSIS (Nicolas), *Le Conseil constitutionnel et le droit privé*, LGDJ, 1997, pp.47 ff. ;
- LE POURHIET (Anne-Marie), "A propos de la bioéthique: la démocratie selon Ponce-Pilate", *Pouvoirs*, n° 59, 1991, p.159 ; *Le Conseil constitutionnel et l'éthique bio-médicale*, Etudes en l'honneur de Georges Depuis, LGDJ, 1992, p. 222.

[11] MATHIEU (Bertrand) and VERPEAUX (Michel), *Contentieux constitutionnel des droits fondamentaux*, LGDJ, 2002, p. 585.

[12] Idem, p.586

Obviously it is the judge himself who fixes at his discretion and on a case by case basis the degree of tolerance, each time testing his capacity to stand up to a political choice. It can well be understood that in 1982 it would scarcely have been possible for the constitutional judge to censure the essential part of a programme upon which the President of the Republic and a considerable number of MPs had just been elected. Not having sufficient legitimacy to halt socialism, he could not of course have imposed liberalism. In the same way we can see how, when examining certain declarations of public benefit, it is difficult for the State Council to announce the cancellation of projects of high political importance, like the construction of nuclear power stations, for example. And if it suits to leave to Caesar what belongs to Caesar, one must be frank and say it rather than hide one's jurisdictional impotence behind a pretence.

So we get to the situation where the legal control over attacks on property rights fails to ring true. We persist in honouring it as an essential, basic and "cultural" right but we systematically allow the most obvious attacks to go through on these rights by only issuing a symbolic censure from time to time on a few measures of minor importance by virtue of a jurisprudential policy which Jean Rivero maliciously summed up with an Arab proverb: "Keep out the mosquito and let the camel through".[13]

But added today to the multiplicity of attacks made on property rights with a traditional social aim, or in the context of an urbanism which has itself become social because the right of every person to their "little castle" has ended up imposing drastic constraints on us all, are other more diverse and heterogeneous preoccupations which complicate the analysis.

"Socialisation" of property rights

Nowadays we qualify as being "societal" (for want of a better word) questions which relate to "society" (again, for want of something better) when they no longer have anything in common with the ancient struggle of the classes but would appear, in certain cases anyway, to relate to the "*bourdivin*" concept of domination which is aimed not at classes but at so-called "dominated" social *categories,* thus portrayed as victims. Henceforth it is no longer bourgeois private property which is globally accused as such. Quite the contrary, it is even perfectly accepted and upheld as a principle but it is certain of its usages or attributes which are contested in the framework of diverse and cacophonic militantism.

First observation: we are almost at the establishment of true *rights to* ownership, i.e. that ownership rights are now conceived less as a freedom-right than a debt-right.[14] "Providential democracy"[15], obsessed by its boundless egalitarianism, can only lead to a backward step for freedom. This collective debt-right nevertheless seems to assert itself on the more commercial and consumerist trend of the bourgeois-bohemian ("bo-bo") than on the more protectionist and economy-minded traditional bourgeois. The post-1968 "homo-festivus"[16], taking over from the good father figure of the Civil Code finds it difficult to adapt to the rules, since he needs "to live without limits and enjoy life without shackles" and he is therefore more of a

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[13] RIVERO (Jean), *Le Conseil constitutionnel et les libertés*, Economica, 1987, 2nd Edition, p. 101.
[14] LACHAUME (Jean-François) and PAULIAT (Hélène), as above, pp.386 ff.
[15] SCHNAPPER (Dominique), *La démocratie providentielle - Essai sur l'égalité contemporaine*, Gallimard, 2002.
[16] MURAY (Philippe), *Après l'histoire*, Les belles lettres, 1999.

spender than a saver. In parallel, the imperative of the democratisation of property rights is in keeping with a reduction in the famous social fracture but translates into measures closer to the soup kitchen than to the proletarian revolution. The compassionate side of post-modernism, which manages to put Father John at the top of the list of favourite French personalities, or which makes road safety, cancer and the "rights" of the handicapped the three main priorities of the President of the Republic, plainly reveals the return of a sort of moralising and charitable catechism in which the philosopher Alain Finkielkraut observes "the triumph of the sentimental over thought"[17].

Second observation: *certain usages* of ownership rights are now denounced as being morally reprehensible, politically incorrect and thus legally punishable because the chief characteristic of post-modernism is to drag before the courts anyone who goes against the trends and the ideas of the time. Thus it is in the name of health or respect for women that company advertising is censured; it is in the name of a right to "decent housing", to "social integration" or to "the commercial diversity of localities" that the free enjoyment of one's assets is shackled, if not to say completely prohibited or at least severely sanctioned; it is in the name of animal rights that human rights are curtailed; it is also in the name of women's' rights or, more exactly, "feminist values" that certain usages or attributes of the property judged to be male chauvinist or "androcentrist" find themselves accused by suitably emasculated "guard-dogs". The philosopher Philippe Muray made a good study of this new ideology via the media lynching of a demonstration by hunters in 1998, finding that "hunting pride" did not receive such a good reception from the level-headed press as the techno-gay-green-parades[18] or other scooter, lollipop or roller-skate demonstrations so revealing of the "Peter Pan syndrome"[19]. So from now on whenever a usage or attribute of ownership rights comes into conflict with one of the trendy ideologies or with one of the categories of interests converted into "rights" by all sorts of associations or "communityisms", the immediate media or political reaction is to suggest a ban or sanctions. One of the most notable recent developments in law is to be seen without any doubt in the deliberate will of the legislator to come down directly on any owner guilty of not having used his asset in a politically correct way. It is a sort of legal McCarthyism which is slowly creeping in.[20]

The attitude of the French constitutional judge is hardly any different for the "sociétal" any more than it was for the social, even though no domestic French text yet delivers any new rights to the third (or fourth) generation. In effect, he does not hesitate to come up with haphazard interpretations to laboriously dig out, generally from the less strict 1946 preamble than from the 1789 Declaration, new rights or flexible objectives, whilst matters of general interest and of "human dignity" tend to become a side-show of French jurisprudence. No sooner has the legislator borrowed one of those long-winded terms particular to French or European technocracy (sustainable development, social integration, good governance, diversity, etc…), then the expression is seen amongst the goals of general interest which legitimise copious attacks on property rights.

Under such conditions, it is understandable that the famous jurisprudential limit keeps receding. It should be added in defence of the judges that, in the rare cases where they seem to

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[17] FINKIELKRAUT (Alain), *La defaite de la pensée*, Gallimard, 1987.
[18] Idem, pp 49 ff.
[19] KILAY (Dan), *Le syndrome de Peter Pan - Ces hommes qui ont refusé de grandir*, Robert Laffont, 1985.
[20] LE POURHIET (Anne-Marie), "Deux conceptions du droit", *Le Débat*, n° 117, 2000, p. 175.

want to give voice and to show a slight exasperation at the mishandling of constitutional principles, they themselves become subject to a media lynching accusing them of upholding outdated and shabby values and a "run-down France" of which they are supposed to be the representatives.

As for European law, it would be vain to go looking there for some protection which would not be guaranteed at a national level, since it is precisely from European law that a good number of the perverse concepts of the rights of man are derived. The Nice European Charter of basic rights, as undemocratic in its adoption procedure as in its content, certainly does not herald a resurrection of the philosophy of the Enlightenment in the near future.

One can see here that property rights have suffered a fate parallel with that of freedom of expression. This was also the subject of preferential treatment in the declaration of 1789 which qualifies it, in Article 11, as "one of the most precious rights of mankind". The Constitutional Council has also paid exaggerated tribute to it through its wonderful decisions about the press and the audio-visual. But today it is the prey of the politically correct chief censors who keep on shutting up their critics with the threat of penal sanctions, crimes of opinion being worryingly widespread throughout French law.

Liberals should be alarmed that the two great rights of the Declaration of 1789, property and liberty, seen as natural and imprescribable, the conversion of which was considered as the end of any political association (and thus any State and any Constitution), are today being instrumentalised, finalised and domesticated so as to subjugate them to a "rights-of-man"-*ism* which is becoming a negation of humanism. The most worrying thing, though, is precisely the complicit silence surrounding this everyday desecration of the rights of man committed in the name of the rights of man, proof of the formidable efficiency of *soft* totalitarianism.