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Taxation and the right to property

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Provisions protecting the right to property in the tax field

- Domestic law

- International law : Article 1 of the first Protocol to the ECHR

  – *"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws at 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."*

  – *A third rule boldly interpreted (ECHR 23 September 1982, Sporrong and Lönnroth v. Sweden, 7151/75 and 7152/75) as not hindering the application of Article 1 to tax matters (EHCR 23 October 1990, Darby v. Sweden, 11581/85).*

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The concept of "possessions" in the sense of Article 1 of the first Protocol

- Autonomous from the notion of goods as defined by the parties to the convention

- Widely understood : movable or immovable property, tangible or intangible interests, including receivables and the legitimate expectation that a certain state of affairs will apply
  - ECHR 29 November 1991, Pine Valley Developments Ltd, 12742/87

- But not as broadly interpreted as to protect the right to acquire property
  - ECHR 13 June 1979, Marckx v. Belgium, 6833/74

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The notion of "legitimate expectation" in the tax field

- A sufficient basis in domestic law is required ; a simple hope is not enough
  - ECHR 28 September 2004, Kopecky v. Slovakia, 44912/98

- Such as…
  - Some clear provisions (ECHR 16 April 2002, SA Dangeville v. France, 36677/97)
  - A settled case law (ECHR 23 July 2009, Joubert v. France, 30345/05)
- But not
  - A favorable statement in first instance and appeal when there is no settled case law (ECHR 19 December 2004, Caisse régionale de crédit agricole mutuel Nord de France, 58867/00)
  - A statement of the Conseil d'Etat deciding to depart from previous case law (CE 19 novembre 2008, Société Getecom, 292948)

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Interferences with the right to property are permissible if they can be justified by the State

• The interference must serve a legitimate objective in the general interest

• It must be proportionate : there must be a « fair balance » between the protection of the right to property and the requirement of the general interest

Does Article 1 of the first Protocol limit the right of the French Parliament to change tax law ?

- According to the Conseil d'Etat, tax law creates no « legitimate expectation » as long as the fiscal year is not closed
  - legally speaking, no tax is due before the end of the fiscal year
  - the tax payer cannot call for the application of specific provisions before the end of the year

Tax law can be changed until 31 December
There remains some « tax suspense » until the end of the fiscal year, which is criticized for leaving tax payers in a state of uncertainty

• But in some particular cases, Article 1 of the first Protocol **may prevent** the French Parliament from changing tax law

CE 9 May 2012, Minister of Finance v. Société EPI, 308996

- French tax law providing a tax credit for firms which would make net job creation on a period of time of 3 years (between 1997 and 2000)
- Tax law repealed by Parliament less than 3 years after it was voted (in 1999)
- Repeal judged contrary to Article 1 of the first Protocol by the Conseil d'Etat

Grounds of the judgement

- The law voted in 1997 had created a legitimate expectation for tax payers given the time condition that was written in it and its incitative purpose
- There was no valid justification to explain the interference with the right to property

Does Article 1 of the first Protocol set limits to the level of taxes a State may levy ?

- As tax obligations are an interference with the right to property, their level has to be proportionate to the general interest which is at stake (ECHR 22 September 1994, Hentrich, 13616/88)
  - A State cannot levy a tax equal to 98% of the dismissal compensation due to Government officials (ECHR 14 May 2013, NKM v. Hungary, 66529/11)
  - A State can decide to levy a wealth tax as long as a capping mechanism makes it sure that the amount of the tax will not exceed the income derived from the capital taxed (ECHR 4 January 2008, Imbert de la Trémiolles, 25834/05 and 27815/05)

- But in this area, the Court only maintains a loose control, considering that States enjoy a wide margin of appreciation

In domestic law, the limits to the level of taxes that may be levied differ from one State to the other

- **<u>In France</u>**, the Constitution forbids that taxes should be confiscatory, but more in the name of equality before public charges than on the ground of the right to property
  - A wealth tax may rely on assets from which no income is derived provided the amount of tax due is related to the contributory capacity of the tax payer (Cons. const. 29 September 2010, Epoux Mathieu, 2010-44 QPC)
  - An extra tax raising to 75% the rate of the tax levied on the income of some tax payers is not proportionate to the contributory capacity of the tax payer as long as it doesn't take into account the income of all the members of the tax household (Cons. const. 29 December 2012, 2012-662 DC)

- There is no « tax shield » stemming from the Constitution

- But the Constitution does not prevent the Parliament from creating a legislative « tax shield »

  – Tax shield defined to 60% of global income (Cons. Const. 29 December 2005, 2005-530 DC)
  – Tax shield defined to 50% of global income (Cons. Const. 16 August 2007, 2007-555 DC)

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• **<u>In Germany</u>**, the Constitutional Court of Karlsruhe bases its control on the right to property and comes to different principles

– A wealth tax (« Vermögensteuer ») based on some assets from which no income is derived infringes on the right to property of the owner because it cannot leave intact the substance of the goods

– The amount paid for taxes should not be higher than half of the income of the tax payer (Court of Karlsruhe 22 June 1995), or at least not be excessive regarding that income (Court of Karlsruhe 18 January 2006)