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Basic Ways of Defining Property

[in Aa.Vv., *Colloqui in ricordo di Michele Giorgianni*, Napoli, ESI, 2007, pag. 761 ff.]

1. Anyone who engages in a discourse about «property» legally understood is faced at the outset with the need to clarify the variety of uses (or abuses) and meanings of the word.

This essay is not about «definitions of property» in the sense that it does not try to search for and present clear-cut definitions of the term. It assumes however that definitional aspects and problems about property stand as a crucial point from where to approach the property discourse. Thus making the issue of how to define property a core subject. This may be a rather boring subject, yet one that can hardly be avoided in speaking of property rights.

According to a well-known warning, launched by the Roman jurist Javolenus, «any legal definition is dangerous» (*omnis definitio in iure periculosa est*). Indeed, in ancient Roman law no single definition of property as such

was given. But the lawyers of the time had their technical notions to which corresponded various and different forms of *dominium* (*ex iure Quiritium*, *in bonis*, *provincialis*). And the same may be said of English common law (spread over many other English speaking countries), with no one single definition of property, but a wide range of property rights, both legal and equitable, in addition to the sharp distinction (at least as it used to be) between real and personal property. On the contrary, modern Civil law countries and their lawyers have invested great intellectual energies in definitional exercises about the property concept as shown until our times by **[761]** Civil codes. This difference of attitudes, traceable back to a cultural diversity in legal reasoning and styles, does not affect however our subject.

Although legal definitions may be considered, on one side, a risky and useless exercise and, on the other, a tribute to be paid to the (or, better to say, to a certain) idea of «legal science», nonetheless technical notions and their corresponding terms of art are of some importance to lawyers and especially to law scholars in any given legal system worthy of its name. Where they are called upon to act as social scientists engaged not so much (like other scholars of social sciences such as philosophy, history, sociology, economics and politics) in explaining how society works, under the influence of what forces and for what purposes, but much more in helping to solve conflicts of both private and public nature within the frame of social relations to be conceptualised through an apparatus precisely of technical terms and categories, that become in turn useful devices to organize lawyers' science, basically intended as an expert knowledge, in delimiting (but not detaching) legal issues from other kinds of socially relevant issues.

This traditional role of social engineering, so to speak, played by lawyers, both law scholars and legal practitioners, may be exemplified by the Confucian theory, much admired in Europe by French philosophers of the seventeenth century, which attaches social (and moral) order to the correctness of the language in designating things.

The theory is exposed in the *Analects of Confucius* under the heading of the «rectification of names» (*zheng ming*).

Master Confucius was once called to assist the ruler of Wei in the administration of the reign. During the travel to his destination one of his disciples asked: «The ruler of Wei (is) waiting for you, in order to

administer the government. What will you consider the first thing to be done?». Confucius answered: «What is necessary is to rectify names». But that answer left the poor disciple so confused and dissatisfied that he dared to reply: «So! indeed! You are wide of the mark! Why must there be such rectification?». Then the Master severely rebuked his disciple with such words: «How uncultivated you are! A superior man, in regard to what he does not know, shows a cautious reserve. If names be not correct, language is not in accordance with the truth of things. If language be not in accordance with the truth of things, affairs cannot be carried on to success»[1].

Confucius spoke in an era of chaos, disorder and misrule, with an aim to the restoration of an ancient and almost mythic idea of natural order everlasting. When reading that statement, one gets the impression that it spells out a theory about «codification of names», with an aim to fix once and for ever their meaning in accord with the nature of things. But looking better at it, one may come to the opposite conclusion that the **[762]** statement carries a theory, or rather a common sense wisdom, about the need to adapt names to changing circumstances and contexts. This common sense interpretation of *zheng ming* makes it still topical in the field of social sciences (politics and law included, of course), where the relative nature and changing or adaptive uses of names reflect their basic conventional nature of communication means through which a social (both political and legal) order could be attained, at the condition precisely that names do match to the contexts they describe.

But, if this interpretation is correct it then follows, on one hand, that the accordance of names with things cannot be taken to extremes of dogmatism, so to be trapped into the dangerous illusion of believing that names and concepts have an identity of their own fixed once and for ever. On the other hand, neither the conventional character of names can be taken to extremes of relativism, to the point of embracing the dangerous illusion too of a free and arbitrary modification, manipulation and alteration of their stipulated meaning.

In general, this Confucian view on the value of definitions may be referred to a midway approach, trying to avoid both dangers above

[1] Bk. 13, v. 3 (James R. Ware translation, 1980).

mentioned, while pointing to the need for standards of coherence in public discourse, based — as the Master says — on a cautious attitude in the use of names.

What is true even more when dealing with names of common parlance, such as property, once applied to legal contexts, where the variety of their uses soon appears.

Indeed, far from the appearance of being a simplistic term of common parlance, property, when used in legal contexts, proves to be a rather complex and multifarious concept.

Such complexity is due to the fact that the same word carries a diversity of meanings that makes highly problematic if not enigmatic its definitional profile, according to the visual angles through which to look at it.

An obvious understanding of this datum is to interpret it as an evidence of the relativity of the property concept.

But what seems to be a more correct and interesting definitional feature of the property concept is its *resilience*, that is its attitude to change shapes and adapt to a variety of contexts.

This adaptive capacity of property means in its turn the impossibility of such concept to stand alone as a self-sufficient one, without references to defining tools.

In this sense, the *subject* of the right, its *object* or scope, and its *value* as a component part of the social, economic and political constitution of any given legal system, are basic ways of defining property in terms of both correspondence and coherence of its various uses and meanings with regard to the contexts to which it applies.

2. In western languages, both of Latin and Germanic roots, the word «property» (*propriété*, *propiedad*, *Eigentum*) means literally (etymologically) **[763]** what is «proper» of somebody (or of something: this latter meaning being expressed more accurately in the English tongue with the word «propriety», that is the proper or specific quality of a thing).

A problem of understanding that word as used in legal contexts soon arises out of the possibility of referring it both to the subject and the object of the property relation.

Looking at the two main legal traditions in the western world, Civil law and Common law, it is easy to observe that the name «property» is (may be) understood in a twofold meaning, respectively *subjective* and *objective*.

In the subjective sense, property is understood as somebody's right to hold a (physical) thing as his own, with powers of using, enjoying and alienating it, as well as of excluding anyone else. A situation otherwise defined, in strict analogy with the concept of sovereignty, as the full and exclusive domain over a thing.

This notion of property as «right to own» a thing, conceptually based on the physical nature of the object of the right itself, is the product of a long history, starting from ancient Roman times and reaching its apex with the modern codifications, starting from the French one at the beginnings of the XIX century.

But in the experience of European legal systems, as well as in ordinary language, there is also another concept and linguistic use of the word property in the objective sense, understood as synonym of one's own belongings; meaning all the «goods», things and rights alike, belonging to somebody.

This duplicity (and ambiguity) of property affects particularly the legal terminology of the countries on the continent of Europe, where the same word is (may be) used in both sense. Whilst in the English legal terminology the two meanings are, at least in theory, separately designated by the term «ownership», on the subjective side, and «property», on the objective one. But in practice there too the same word property is currently used to mean both the «thing owned» and, in an interchangeable way with the word ownership, as shorthand for «property right», to mean the subjective relation of ownership.

In this respect the expression «ownership of a property» makes evident such distinction, whereby one may speak of the «right to own things» as *ownership* and of the «things (or goods) owned» as *property*.

2.1. The objective or patrimonial notion of property goes back to early medieval times and reflects the idea, of Germanic origin, that included among things not only physical objects (*corpora*), but also rights (*iura*) and, by and large, any kind of interests on both tangible and intangible goods,

such as, for instance, offices, dignities, revenues, privileges, grants, monopolies, rents and the like, having market or monetary value.

Incidentally, it should be here recalled that the ancient Latin word *pe-* **[764]** *cunia*, late used to mean money, was originally used as a synonym of the word *patrimonium* (patrimony).

In medieval times many situations were recognised as proprietary (implying therefore legal ownership of something) regardless of the physical nature (corporeality) of the things owned. There was at the time a great variety of (incorporeal) things able to be included among goods (*bona*), and thus becoming (objects of) property, that is «ownable things».

This use of the word property in its objective sense, to mean one's own belongings, fortune or patrimony (things and rights alike), can be still found in civil codes of present day. Phrases such as «all substances», «all goods» or simply «goods» of one person are referring to the totality of valuable entities belonging to a subject, being his/her patrimony.

Incidentally again, such notion of «patrimony» amounting to one person's properties, changed in times to get the lager and different significance of all the «legal relations», including not only property ones, but also legal obligations (such as money due), that are imputable to the same person (subject). What is especially true of the French notion of *patrimonie*. Whereas in the case the German notion of *Vermögen* is controversial whether it includes also liabilities (*Schulden*)[2].

2.2. With an eye to the patrimonial value of rights understood as goods, in addition to corporeal things, it is worth remembering here the teaching of the ancient Roman jurist, Gaius, who was speaking of rights (*iura*) in terms of «incorporeal things» (*res incorporales*), probably to mean — as it seems — a category of ownable things, capable of being included as

[2] H e L. Mazeaud e J. Mazeaud, *Leçons de droit civil*, I[4] (M. de Juglart ed.), Paris, 1967, n. 282. H. Lehman, *Allgemeiner Teil des Bürgelichen Gesetzbuches*[7], Berlin, 1952, § 49, 2c; *Kohlammer-Kommentar BGB*[11], Stuttgart e al., 1978, § 90, IV, 10: «Die Vermögen ist die Summe aller geldwerten Guter einer Person. Ob dazu nur die Aktiva oder die Aktiva und die Passiva gehören, ist streitig».

objects of property, but excluding at the same time from this category (the right of) ownership[3].

Indeed, according to this teaching, ownership (the right of) was property, that is a component part of one person's patrimony, because of the direct identification of the right itself with its physical object, the «thing» (*res corporalis*), thus making of the right of ownership, understood as the direct relation between a person and a thing, the paradigm of the entire category of «real rights» (*iura in re*), in opposition to «personal rights» (*iura in personam*). Although in Roman times that distinction was originally thought with regard only to procedural (and not substantive) law[4] **[765]**.

The Roman idea about rights being incorporeal things (goods), leaving apart the right ownership being understood as incorporated with the thing itself, has led to develop the classic distinction between things in their natural state of physical objects and things in their legal meaning of physical objects having (acquiring) value of goods, to the extent (and only to the extent) to which they come under the cover of property as things owned (or ownable) by somebody.

2.3. This last point explains the traditional definition technique applied by some civil codes according to which «goods» are the (physical) things that «may be objects of property» (ownership)[5]; or else the things that «are or may be object of appropriation»[6].

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[3] G. Pugliese, *Dalle 'res corporales' del diritto romano ai beni immateriali di alcuni sistemi giuridici odierni*, in *Riv. trim. dir. proc. civ.*, 1982, p. 1137.

[4] *Gai*, 4, 23: «In personam actio est, qua agimus cum aliquo, qui nobis vel ex contractu vel ex delicto obligatus est, id est cum intendimus dare facere præstare oportere»; «In rem actio est, cum aut corporalem rem intendimus nostram esse aut ius aliquod nobis competere».

[5] Former Italian civil code (1865), art. 406: «Tutte le cose che possono formare oggetto di proprietà […]sono beni […]».

[6] Art. 333 of the Spanish civil code (1889, still in force, although with emendments): «Todas las cosas que son o pueden ser objeto de apropriación se consideran como bienes muebles o immuebles». See also the French authors H e L. Mazeaud e J. Mazeaud, *Leçons de droit civil*, I[4], cit., nn. 174, 177, 185; the Belgian R. Dekkers, *Précis de droit civil belge*, n. 717: «considérées en tant qu'objets d'*appropriation*, actuelle ou possible, les choses entrent dans le domaine du droit» ; e n. 718 «les biens sont des choses appropriées».

It then follows that things incapable of being appropriated by somebody could not be qualified as goods in legal sense; such as things in common use of everybody (*res communes omnium*).

But the conditional tense is made nowadays necessary by scientific and technological progresses in the exploitation of natural commons, such as the air, the high sea or the deep space, thus changing their qualification, regardless of the appropriation issue, in terms of goods whose utilities are recognised and protected by national and international laws, on behalf of state and local communities and of the mankind in general.

However, what should be stressed here is that the term «thing» can be legally understood in a twofold sense: *a*) in its corporeality, as ownable object, that is as an entity that strictly speaking may be appropriated (possessed exclusively) by somebody, thus getting value of good as object of ownership, and; *b*) regardless of its tangible or intangible nature, as property belonging to somebody, thus getting value of good as component part of the person's patrimony (fortune). In the first sense, the appropriation capability of a thing, being corporeal, makes it legally significant. In the second sense anything, both corporeal and incorporeal, is legally relevant, to the extent that it is something of value as an object capable of legal relations.

Not surprisingly, therefore, we find on one side certain civil codes that still apply the term «thing» to mean only a corporeal entity, pointing to «corporeal things» as (normal) object of property understood subjectively as right of ownership[7]. On the other side, we find code definitions centred **[766]** around «goods» (not only corporeal entities) as «things that may be object of subjective rights» (not only of the right of ownership)[8]; or centred around «things» as «all that may be object of legal relations»[9].

But what is important to notice once more is the equivalence between things (as *res corporales*), that can be touched (*quae tangitur*), and (subjective)

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[7] See the definition of 'thing' (*Sache*) in the German civil code (BGB), § 90, and more recently the definition of *Zake* in the new Dutch civil code (bk. 3, art. 2), with regard to definition of 'property (respetcively at § 903, and bk 5, art. 1, 1° co.). See moreover Portuguese civil code, art. 1302, stating that «only corporeal things» can be object of ownership.

[8] Italian civil code, art. 810: «Sono beni le cose che possono formare oggetto di diritti».

[9] Portuguese civil code, art. 202, 1° co. «Diz-se coisa tudo aquilo que pode ser objecto de relações juridicas».

rights (as *res incorporales*), that can be only imagined (*quae intelleguntur*)[10]: both of them capable of producing utilities by way of a legal relation whereby such things become goods of patrimonial value (properties) belonging to somebody.

Indeed, the equivalence between «things» and «rights», both of them legally understood as «goods» (components of a person»s patrimony), leads to a change in the scope of the word «ownership» from the strict and classic meaning of «ownership of corporeal things», or property in the subjective sense, to the far wider meaning of «ownership of rights», or property in the objective sense.

2.4. In the period spanning from medieval to modern times during which it took place the experience of the so called Continental *ius commune* made of both Roman and Canon law texts as well as of other materials jointly arranged through doctrinal and judicial interpretations, the idea of including *res incorporales* within the scope of property rights was largely accepted. In contrast with the ancient Roman idea of property as ownership of a material thing (*res corporalis*), the medieval notion of property, lasting until modern times, changed to the opposite side of entitlements over any good of value, be it material or immaterial (things and rights alike).

This patrimonial notion of property rights has long resisted in the Common law tradition, where it stands nowadays as a peculiarity of such tradition faced to the Civil (Continental) law one where, on the contrary, it withered away, save for some exceptions.

One such exception can be observed in the Austrian civil code (*Allgemeine Bürgerliche Gesetzbuch*: ABGB) of 1811, still in force for this part.

It contains a twofold definition of property (*Eigentum*): *a*) in the objective sense, as everything (corporeal and incorporeal) belonging to somebody (*alle seine körperlichen und unkörpelichen Sachen*)[11]; *b*) in the

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[10] «Quaedam praeterea res corporales sunt, quaedam incorporales. Corporales haec sunt, quae tangi possunt [...] Incorporales sunt, quae tangi non possunt, qualia sunt ea, quae in iure consistunt, sicut hereditas usufructus obligationes quoquomodo contractae»: L. 1 § 1 *D. de D.R.* 1.8 (tit. I, *de rebus incorporalibus* 2. 2).

[11] ABGB, § 353.

subjective sense, as the right of ownership (*Eigentumrecht*), on its turn defined **[767]** as «the power to make use freely and at the exclusion of anybody else of the substance (*Substanz*) and the utilities (*Nutzungen*) of a thing»[12].

This last formula is to be understood moreover with regard to the possibility of dividing (separating) the thing in itself (*substantia*) from its use (*utilitas*), *corpus* and *ius*, as two distinct (separate) objects of property (ownership). A reminder this of the old figure called in medieval times «double property» of feudal origin.

The Austrian civil code has kept this ancient figure of property, distinguishing between «eminent domain» (*auf die Substanz einer Sache*) and «effective domain» (*auf die Nutzungen*). With the possibility therefore of two basic types of property situation: *a*) full and undivided entitlement of the right of ownership in one and the same subject, or; *b*) partial and divided entitlement of that right and related powers being assigned respectively to the owner of the thing in itself, called «over owner» (*Obereigentümer*), and the owner of the use of the thing, called «utilities owner» (*Nutzungseigentümer*)[13].

It must be noticed that since the end of the nineteenth century this distinction has in practice lost any interest whatsoever, due to the abolition in the Austrian legal system, already during the second half of that century, of feudal relations of any kind[14].

From a theoretical viewpoint, however, that code formula is of great interest because it still carries on the *ius commune* idea of property. Indeed, according to an authoritative comment of the times when the Austrian civil code was drafted, the concept of property (ownership) should be understood regardless of the corporeality or incorporeality of its object[15].

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[12] ABGB, § 354.

[13] ABGB, § 357.

[14] H. Klang (cur.), *Kommentar zum ABGB*², II, Wien, 1950, *sub* § 357.

[15] F. Zeiller (de), *Commentario sul Codice civile universale per tutti gli stati ereditari tedeschi della monarchia austriaca*, trad. a cura di G. Carozzi, Milano, 1815, II, *sub* § 354.

3. After the terminological and historical references outlined above it is here possible to lay a panoramic view on civil code definitions of «property» (French *propriété*, German *Eigentum*, Italian *proprietà*, Spanish *propiedad*, Portuguese *propriedade*, Dutch *eigendom*).

To start with, one may observe that Continental civil codes, although subjected, over the past decades, to the stress of times, so to speak, to the point that they have considerably reduced their scope as legal sources surrounded by many other special legislative acts, still remain nonetheless signal points of some importance in the scenario of Civil law countries.

The basic general idea of codification as such is of course the attempt to unify substantive or procedural law fields.

In the field of private law in particular, civil codes stand as a culmina-
[768] ting point of a long history of law arrangements, from Roman through medieval to modern times, about institutes or set of principles and rules concerning areas such as family, succession, property, obligations (contract and torts). In other words, they represent, on one side, a factor of historical continuity in the development of the Civil law tradition as based on Roman (ancient) texts and Germanic (medieval) customs, among many others materials added in modern times specially through the efforts of both judicial interpretation and academic legal science. On the other side, they are the product too of a discontinuity because they aimed at substituting previous (past) regimes with new ones.

This tension between tradition and innovation is particularly evident in the case of definitions about property, to the extent to which they reflect the attempt to remove and simplify the *ancien régime* apparatus of property rights and figures, changing it with a unitary notion (and definition) of property (and goods, both moveable and immovable, private and public ones), but without losing sight of more traditional linguistic and conceptual schemes.

Indeed, taking as point of departure of definitions about property Justinian's formula of the right of ownership (*dominium*) as «full power over a thing» (*plena in re potestas*), it is easy to acknowledge at least two ways (or techniques) of definition. The first one (and also the earliest to be applied since medieval times) looks at the right of ownership from a quantitative viewpoint as the sum total of powers over a thing. It thus enumerates (although according to varying lists of) owner's typical powers such as using (and abusing), enjoying, excluding, alienating, vindicating,

and some more. With the implication that the owner may keep in his own hands all the powers or assign (some of) them as separable entities.

As we shall see, this type of definition was applied by the French civil code and followed by other codifications.

As a reaction to it, during the nineteenth century, the German doctrine of the time elaborated a more scientific approach. It concentrates on the essence of the right of ownership being conceived, by reference to the free will of the owner, not as a sum of single (distinct and separable) powers, but in its entirety of total power over a thing, capable indeed of being reduced by assignments made to others of particular utilities, but maintaining its essential as well as abstract integrity. With the implication that the owner keeps always in his hands (or better to say, with his will) the total power, although in a reduced shape, that makes it elastic.

It is time however to look closer to some code definitions about property and their basic aspects that characterise them.

3.1. The French civil code of 1804 gives a definition of property (ownership) as «the right to enjoy and dispose of the things (*le droit de jouir et disposer des choses*) in the most absolute way (*de la manière la plus ab-* **[769]** *solue*), but not to make uses that are prohibited by statute or statutory instruments»[16].

As to the nature of the things that may be object of property, although the use of the word *choses* would appear to restrict the object to corporeal things, there are in the same code other references to the «property of goods» (*propriété des biens*[17]) that have opened the way, backed by the *ius commune* tradition (and Pothier's treaties), for an extension to incorporeal things too, as it is agreed upon in French doctrinal writings and judicial opinions[18].

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[16] Art. 544: «La propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les règlements».

[17] Art. 711.

[18] See, for instance, C. Aubry-C. Rau, *Cours de droit civil français*[4], Paris, 1873, § 190, and more recently F. Zenati, *Pour une rénovation de la théorie de la propriété*, in *Rev. trim. dr. civ.*, 1993, p. 309.

The most innovative characteristic of the French definition of property is to be seen, from both a political and legal point of view, in the idealistic emphasis put on the absoluteness of the owner's powers, being expression of the individualistic climate of the times and of the idea, that was predicated by liberal philosophers, social theorists and economists of the sixteenth to seventeenth centuries, about the origins of the right of ownership directly in the state of nature, pre-existing to the legal order made by the state.

As it was stated in the explanations made by Portalis, one of the most influential draftsmen of the French civil code, at the time of the presentation of the text to the legislative assembly, individual (private) property is to be understood as «part of the natural and divine order» (*faisant partie de l'ordre naturel et même divin*)[19].

In this sense, the code definition (according again to Portalis) was meant to state the character of (individual) ownership as «natural right»[20].

The legal and political effects of such idea (and ideology) of ownership, as an indivisible right which confers on an individual the widest possible powers with regard to a thing, were linked, of course, to French (bourgeois) revolution and the demolition of *ancien régime* feudal apparatus of property rights, by putting individual property at the basis of socio-political and economic organisation, abolishing any state eminent domain[21].

The medieval notion of property (ownership) split, in the emblematic case of land tenements, among various subjects, in a series of hierarchical entitlements (degrees of ownership) descending from the king to over-lords **[770]** and inferior users of such tenements, was substituted with a unitary notion centred around the absoluteness and exclusiveness of the property relation between the subject and the object of the right. A notion quite resembling the ancient Roman idea of *dominium*[22].

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[19] «On a toujours tenu pour maxime libérale que la propriété individuelle du Code civil est considérée comme *faisant partie de l'ordre naturel et même divin*, que les domaines des particuliers son des propriétés sacrées qui doivent être respectées par le souverain lui- même» : quotation taken from G. Marty-P. Raynaud, *Droit civil*, *Les Biens*, II/2, Paris, 1965, n. 35.

[20] J.M.E. Portalis, *Présentation au Corps Législatif et exposé des motifs*, in P.A.Fénet, *Recueil complet des travaux préparatoires du Code civil*, t. XI, Paris, 1836, pp. 112-113.

[21] F. Terré e P. Simler, *Droit civil. Les biens*[4], Paris, 1992, n. 68.

[22] G. Morin, *Le sens de l'évolution contemporaine du droit de propriété*, in AA.VV., *Le droit privé français au milieu du XX*[e] *siècle. Etudes offertes à Georges Ripert*, II, Paris, 1950, p. 5.

This also helps in understanding that the «absolute» character of the right of ownership did not really mean a complete lack of limits to owners' powers, but more precisely the dissolution of feudal bonds, also to make sure commercial transactions, again in the case of land and immovable goods.

But the innovative side of the French model is to be contrasted with a more traditional one, consisting in the enumeration of the powers over the thing, that integrate the contents of the right, thus resting on the summation of such powers. Indeed, this definition technique is traceable back to the patrimonial notion of property of medieval times. Like that notion also the code definition of property seems to imply a divisibility of the utilities of a thing among various subjects in terms of entitlements (property rights) to the use and enjoyment of the thing itself. In a very significant way, these entitlements are currently called *dismemberments* (*démembrements*) of the right of ownership, thus affecting its unitary (indivisible) notion. More officially they are called «limited» or «partial» real rights (such as usufruct, use and servitude) and are formally allowed to exist only in a close number of legally recognized categories or types (*numerus clauses*). So that, at least in principle, private parties cannot by way of contractual relations create new categories or types of such minor rights of property, so to speak[23].

Under the formulation of ownership as an indivisible right one may observe instead a basic continuity with the *ius commune* tradition of divisibility of situations conferring powers over a thing, with regard specially to the use and enjoyment of land and immovable goods. Indeed, apart from the issue whether such situations are strictly limited by the principle of close number or not (with the possibility, then, for the parties to give rise to new types), what matters is precisely, having regard to the patrimonial notion of property above mentioned, the qualification of such situations as property rights, in parallel with corresponding property powers enumerated in the code defining formula.

In this respect, an evidence of the theoretical possibility of interpreting the French code definition as capable of including both the subjective notion of property, as ownership of a thing (corporeal), and the objective

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[23] See, for instance, F. Terré and Ph. Simler, *Droit civil. Les biens*[4], cit., n. 68.

one, as entitlement (ownership) of rights to get utilities, may be seen in the Civil code of Québec, due also to the particularity of the Quebecoise legal system being a «mixed law» (Civil law-Common law). **[771]**

Along the same line of influence that goes back to *ancien régime* legal tradition, as in the case of the French civil code, this code too (in its bilingual version, English and French one) applies a definition technique similar to the one applied by the French code, that under the title of «nature and extent of the right of ownership», carries the following definition: «Ownership is the right to use, enjoy and dispose of property fully and freely, subject to the limits and conditions for doing so determined by law»; but then, in addition, the Quebecoise code states that «*ownership may be in various* modes and *dismemberments*» (italics added)[24]. The modes being special kinds of ownership, such as «co-ownership» and «superficies» (as ownership of an immovable divided from ownership of the land upon which it has been built)[25]. The *dismemberments* being real (property) rights, such as usufruct, use, servitude and emphyteusis[26].

3.2. The German civil code (*Bürgerliches Gesetzbuch*: BGB) of 1900, under the heading of «subject matter [contents of the right] of ownership» (*Inhalt des Eigentum*), in the article (paragraph) titled «powers of the owner» (*Befugnisse des Eigentümers*), states that «the owner of a thing (*Sache*) can, to the extent that a statute or third-party rights do not conflict with this, deal with the thing at his discretion (*mit der Sache nach Belieben verfharen*) and exclude others from every interference»[27].

According to some commentators, the BGB formula refrains from giving a definition of property (ownership)[28].

Indeed, that formula concentrates on the abstract essence of the owner's powers in a double sense. In a positive sense, it points at the power of the owner to deal of the thing as he pleases, if not «arbitrarily»

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[24] Civil code of Québec, art. 947.

[25] Civil code of Québec, art. 1009.

[26] Civil code of Québec, art. 1119.

[27] BGB, § 903: «Das Eigentümer einer Sache kann, soweit nicht das Gesetz oder Rechte Dritter entgegenstehen, mit der Sache nach Belieben verfahren und andere von jeder Einwirkung ausschließen».

[28] See P. Arminjon, B. Nolde, M. Wolff, *Traité de droit comparé*, II, Paris, 1930, p. 333; and similarly R. Saleilles, *Code civil allemand traduit et annoté*, II, Paris, 1906, *sub* art. 903.

(*nach Wilkür*, as stated in a draft text) then «freely» (*nach Belieben*)[29]. In a negative sense, it points at the power of the owner to exclude others, preventing them from using the thing or making any other kind of interference with it[30].

Here again, however, the absoluteness stands as the main characteristic of the right of ownership, linked with the will of the subject, at the basis of the theory of «subjective rights» and their division into the two categories of real and personal rights.

In this theoretical respect, the character of absoluteness is to be meant not really as the power to do everything the owner likes, but as the widest **[772]** possible power attributed to a subject in relation to other subjects with regard to a thing[31].

Together with a much higher degree of abstraction, the German-style definition of property (ownership) is noteworthy moreover for its insistence on the corporeality of the object. Although, in spite of this more systematic approach, it must be added that nowadays such a rigorous conception of the object of ownership has withered away, under the effect of the German Constitution (*Grundgesetz*, art. 14) and the decisions of the Federal Constitutional Court, giving protection to the right of ownership in a wider range of cases extended to incorporeal goods (rights included too)[32].

3.3. Once extinguished, during the nineteenth century, the echo of the revolutionary proclamations about the sacredness and inviolability of the right of ownership, the civil codes that followed the French one, although largely based on its model, were more cautious in their definitions of ownership, avoiding to put individualistic and absolutistic emphasis on it.

An example in this direction is given by the Spanish civil code (*Código civil*) of 1892, where the word *propiedad* is defined in a more discrete way,

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[29] R. Saleilles, *ibid.*

[30] R.Saleilles, *ibid.*

[31] See, for instance, E.J. Cohn (assisted by W. Zdzieblo), *Manual of German Law*², I, *General Introduction, Civil Law*, London, 1968, n. 353.

[32] Cfr. W. Mincke, *Property: Assets or Power? Objects or Relations as Substrata of Property Rights*, in J.W. Harris (*ed.*), *Property Problems From Genes to Pension Funds*, 1997 (Kluwer Law Int.), p. 79.

simply by enumerating the powers of the owner: "to enjoy and dispose of a thing, without other limitations than that established by statutes"[33].

Coming closer to our days, it must be remembered the definition of ownership made by the Swiss civil code of 1907. It concentrates, in a way resembling German-style definition, on the owner's powers, which are typically identified in the following: «to freely dispose of the thing within the limits of the legal order»; moreover, «to vindicate it against everybody»; finally, «to resist any illegitimate interference»[34].

Another example of definition still based on the owner's typical powers, but assembled in a way resembling more French-style definition, is given by the Italian civil code of 1942, where the owner is vested with «the right to enjoy and dispose of the things in a full and exclusive way, within the limits and with the observance of the duties established by the legal order»[35].

The same could be said of the Portuguese civil code (*Código civil*) of **[773]** 1966. After having stated that only corporeal things (*coisas corpóreas*) may be object of the right of ownership (*direito de propriedade*)[36], it refers to the powers (of using, enjoying and disposing) that the owner typically exercise over the things belonging to him, further underlying the subjective profile of the owner, as he who "enjoys in a full and exclusive way (*de modo pleno e exclusivo*)" such powers (within the limits and with the observance of the restrictions established by statutes)[37].

Finally, it must be mentioned the definition approach, close to the German-style and even more abstract, made in recent times by the new Dutch civil code (*Nieuw Burgerlijk Wetboek*: NBW) of 1992. Where it is

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[33] Spanish civil code, art. 348: «La propriedad es el derecho de gozar y disponer de una cosa, sin más limitaciones que las establecidas en las leyes». As it is explained by F. Puig Peña, *Tratado de derecho civil español*, III/1, Madrid, 1958, p. 74: «Esta definición del Código […] tiene el sabor vetusto de las definiciones clásicas que configuraban […] el derecho de propiedad teniendo sólo en cuenta el conjunto de facultades que se consideran esenciales al mismo».

[34] Swiss civil code, art. 641.

[35] Italian civil code, art. 832: «Il proprietario ha diritto di godere e disporre delle cose in modo pieno ed esclusivo, entro i limiti e con l'osservanza degli obblighi stabiliti dall'ordinamento giuridico».

[36] Portuguese civil code, art. 1302: «Só as coisas corpóreas [...] podem ser objecto do direito de propriedade regulado neste código».

[37] Protuguese civil code, art. 1305: «O proprietário goza de modo pleno e exclusivo dos direitos de uso, fruição e disposição das coisas que lhe pertencem, dentro dos limites da lei e com observancia das restrições por ela impostas».

stated that: "ownership is the most comprehensive right which a person can have in a thing"[38]. The statement is then followed by the clause that: "To the exclusion of everybody else, the owner is free to use the thing provided that this use not be in violation of the rights of others and that it respects the limitations based upon statutory rules and rules of unwritten law"[39].

As to the things that may be object of ownership, the NBW, while adopting a wide conception of goods (*goederen*), inclusive of both corporeal things (*zaaken*) and patrimonial rights by and large (*vermogensrechten*)[40], precisely states that may be object of ownership only the things (*zaken*), unequivocally defined there as «corporeal objects susceptible of human control»[41].

But what is more surprising, when one looks carefully at the formula applied by the Dutch civil code, is the fact that notwithstanding its newest appearance, it clearly resembles the ancient Justinian definition of the right of ownership (*dominium*) as "full power over a thing", indeed the maximum or most extensive power a subject may have over a thing with regard to other subjects. Thus, the importance of this ancient formula is confirmed not only as point of departure of the attempts made in order to refine the notion of property (ownership), but also as point of reference still relevant in the panorama of legal definitions about it.

4. We cannot leave our subject without adding at this point a panoramic, although a sketchy view about a further legal context where the word «property» is used with important definitional implications. **[774]**

Indeed the story of property definitions does not stop with codifications, but continues during the twentieth century up untill till nowadays, moving from the private law dimension into the field of constitutional law.

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[38] NBW, 5, art. 1, 1° co.: «Eigendom is het meest omvattende recht dat een persoon op een zaak kan hebben».

[39] NBW, 5, art. 1, 2° co.

[40] NBW, 3, art. 1; see the bilingual (Anglo-French) translation edited by P.C. Haanappel-E. Mackaay, under the title *New Netherlands Civil Code, Patrimonial Law - Nouveau Code Civil Néerlandais, Le Droit Patrimonial*, Deventer-Boston, 1990.

[41] NBW, 3, art. 2.

In this context we find the so called «constitutional property clauses» (or simply «property clauses»), meaning those provisions written in constitutional texts (or texts of constitutional value) that give constitutional recognition and protection either to the right of ownership as such (meaning precisely the right of individuals and corporate bodies to own things) or to the property institute (meaning in a wider and more generic sense the legal possibility for individual persons and corporate bodies to have rights over things).

4.1. From a technical viewpoint the most important definition issue involved in constitutional property clauses concerns the scope of the word property with regard to intangible property in the form of patrimonial interests such as, for instance, vested (contractual) rights, welfare payments, state jobs, public licences and the like, generally known as «new property».

Some constitutions give no definition of the term property, while referring to it generally. Some constitutions refer to certain categories of property such as land or intellectual property.

By and large the tendency is to interpret the concept of property used in constitutional clauses in a liberal and generous way; that is, not to restrict it to ownership or real rights or to rights in tangible property, but to apply it also to intangible property[42].

In this respect the constitutional guarantee affects the private law (more traditional) concept of property, enlarging it to include intangible property, thus giving rise to a great variety of property rights.

4.2. But leaving aside the issue concerning the scope of property, what matters here to stress are the consequences resulting from constitutional property clauses with regard to two important definitional aspects. The value of the right of ownership and the limitations on the use of property.

In some constitutions those aspects are strictly connected, while in others, indeed the great majority of them, they are separated to form two

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[42] See A.J. van der Walt, *Constitutional property clauses. A comparative analysis*, Cape Town, 1999, pp. 19-21.

distinct clauses, usually referred to, respectively, as the «guarantee clause» and the «regulation clause» (or «takings clause»).

Generally speaking the definition issue involved from the viewpoint of both the value and the limits of property concerns the balancing of the individual right of ownership or else to say of private property, on one side, and, on the other (and opposite) side, the public interest and public purpose served by the limitations imposed over it. **[775]**

In this definitional sense all property clauses, while referring either to guarantee or to expropriation and more widely to regulation aspects, reflect the inherent tension between the protection of private (property) rights and the need to protect public and social interests too, through the means of public (social) limitations, both expropriations and regulations (takings).

In this sense there may be observed differences in the styling (and meaning) of property clauses depending on the textual emphasis put on one aspect (guarantee) or the other (regulations or takings) or else on the way of keeping them separated or, on the contrary, of mixing them and shifting emphasis from the guarantee to the regulation (limitation) of the individual (right to) property.

4.3. On the side of the legal value attached to the right of ownership, most constitutional property clauses explicitly state (declare) the fundamental nature of such right, ranking it at the same level of rights of freedom and other so called «human rights».

Classic examples of this kind of clauses may be found in the French Declaration of the Rights of Man and of the Citizen of 1789, speaking of private property as «an inviolable and sacred right»; and in the Fifth Amendment (1791) and Fourteenth Amendment (1868) to the Constitution of the United States (1787), stating that «no person shall be deprived of property without due process of law».

In more recent times an explicit recognition of private property being a fundamental right may be found in the European Convention on Human Rights and Fundamental Freedoms (1950), in Article 1 of the First Protocol, stating that «every natural or legal person is entitled to the peaceful enjoyment of his possessions».

With a view to particular European countries, may be mentioned the Constitution (Basic Law) of the Federal Republic of Germany (1949), Article 14, the first sentence stating that "property and the right of inheritance are guaranteed".

As in the case of French Declaration and the United States Constitution, the property clause in Article 14 of German Basic Law forms part of the so called «bill of rights» (*Grundrechtskatalog*).

This same position of the constitutional guarantee clause of private property being part of those core provisions forming the bill of rights (although called in various ways) is to be found in many other constitutional texts.

Again in Europe, one may cite: the Austrian Basic Law on the General Rights of Nationals (1867), Article 5, first sentence ("Property is inviolable"); the Dutch Constitution (1989), Chapter 1 ("Fundamental Rights"), Article 14 (although the text of the article focuses only on expropriation and compensation matters) and the Swedish Constitution (1989), Chapter 2 ("Fundamental Rights and Freedoms"), Article 18 (dealing only with expropriation and compensation). Moreover: the Danish Constitution (1992), Part VIII ("Individual Rights"), Section 73, first sentence ("The right of **[776]** property shall be (is) inviolable"); the Swiss Constitution (1999, amended 2005), Chapter 1 ("Basic Rights"), Article 26, first sentence ("Property is guaranteed"); the Finnish Constitution (2000), Chapter 2 ("Basic rights and liberties"), Section 15, first sentence ("The property of everyone is protected"). While a mention of its own should be made of the Irish Constitution (1937, revised 1990 with further amendments in 1992 and 1995), being particularly inspired on the point, where in Chapter XII ("Fundamental Rights"), Article 43, 1.1. ("Private Property") declares: "The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods".

Looking at former socialist countries in Eastern Europe the constitutional guarantee of private property is provided for in many constitutions under various heads such as "Fundamental Principles" (Bulgarian Constitution, 1991, Article 17, first sentence: "The right to property and inheritance shall be guaranteed and protected by law"); "Basic Human Rights and Liberties" (Slovakian Constitution, 1992, Article 20, first sentence: "Everyone has the right to own property (…)

Inheritance of property is guaranteed"); "Economic, Social and Cultural Freedoms and Rights" (Polish Constitution, 1997, Article 64, first sentence: "Everyone shall have the right to ownership, other property rights and the right of succession"); "General Provisions" (Hungarian Constitution, 2003, Article 13, first sentence: "The Republic of Hungary guarantees the right to property"); "Human Rights and Fundamental Freedoms" (Slovenian Constitution, 2004, Article 33: "The right to private property and inheritance shall be guaranteed").

Incidentally, a mention may be here made also to the People's Republic of China and its Constitution of 1982 as amended in 2004, incorporating a property clause that provides for the recognition and protection of private property by declaring that «Citizens' lawful private property is inviolable» (art. 13, first sentence). With a formula expressed in terms not only resembling the constitutional texts of western countries, but wide enough to appear even more liberal in its scope as delimited by a generic and formal reference to law and public interest, without any substantial limit as to the structure, contents and exercise of the right of ownership, in accordance with social function, equality or justice.

4.4. With regard to the value private property being a fundamental right and included within the core constitutional provisions forming the bill of rights, a difference in style if not in substance is to be noticed when looking at the Italian Constitution (1948), Part I, titled «Rights and Duties of Citizens», whose Section III, titled «Economic Rights and Duties» (following two other Sections, respectively, on «Civil Rights and Duties», and on «Ethical and Social Rights and Duties») refers (in Article 42) to private property as a right «recognised and guaranteed by the law», but – it seems – not so much in itself, as much more in order «to ensure its **[777]** social function», through limitations and regulations, thus putting emphasis on the regulation rather than on the guarantee aspect.

This quite different textual styling of the property clause downgrading, so to speak, the fundamental value of private property to a mere state (ordinary law) regulated right, due to exist and operate under limitations, in view of the fulfilment of a «social function», is somewhat followed in other constitutions, such as the Greek Constitution (1986, revised 2001, Part II, «Individual and Social Rights», Article 17, first sentence: «Property

is under the protection of the State; rights deriving therefrom, however, may not be exercised contrary to the public interest»); the Portuguese Constitution (1989, revised 1997, Section III, «Economic, Social, and Cultural Rights and Duties», Chapter I, «Economic Rights and Duties», Article 62, although focusing in its first sentence on the right of property in itself: «Everyone is secured… the right to private property and to its transfer during lifetime or by death»); and the Spanish Constitution (1992, Section 2, «Rights and Duties of the Citizens», Article 33, recognising in its first sentence «the right to private property and inheritance», and in the second sentence emphasising «the social function of these rights» as the key-concept for determining «the limits of their content in accordance with the law»).

Mention should be here made again of the German Basic Law, whose Article 14, like its direct predecessor in the Weimar Constitution of 1919, states, in addition to the first sentence above mentioned, that: «Property entails obligations. Its use should also serve to public interest».

4.5. Indeed, as it has been noticed earlier and must be here stressed once more, what characterizes all these different types (and styles) of constitutional clauses in their definitional implications is, although to a various degree, the balance as well as the cultural and political tension between, on one side, a «individual interest» concept of private property, defined as a right that, if not justified in principle by natural law, ranks however at the level of a fundamental (human) right, alike with personal freedoms, and, on the other side, a «collective interest» concept of private property, defined as a right that, originating directly by ordinary state law, is due to carry limitations and perform functions in the interest of the (local and/or national) community, namely in the interest (not so much of the individual owner, bur much more) of the social context in which it is called to operate.

This means, in theory if not in practice, to widen up the sphere of state (and other public authorities) interference with private property: not only through the power to order deprivations and expropriations of property for public use, however subject to compensation; but also through regulations of the use of property in the public interest, such as those issued in order to ensure public safety, health and welfare (so-called

«police power»), and all other kinds of state regulation, even when not referred to a specific public-purpose concern, usually without any compensation, although subject, as the former power, to constitutional (due process) requirement. **[778]**

5. It is worth here summing up, in terms of final observations, some of the main points discussed above.

Very briefly, the complexity of the various legal uses and meanings of the word property can be tackled by making reference to three main ways or perspectives of looking at property rights and law. They concern, respectively, the *subject*, the *object* and the *value* of property.

Of course, other ways or perspectives could be added. But the ones here indicated, apart from having an important definitional impact, have precisely to do with the focal issue of how to define property. They may be called «basic ways of defining property» to the extent to which each of them refers to essential aspects and issues there involved. Whereby in order to develop that point one has to consider, at least, such ways or perspectives.

The first two of them are typically «private law» ways of defining property, in that they focus on the «institute» of property, and may be therefore called «institutional» definitions of property.

The third and additional one is about private property defined as such and concerns not only its notion, but much more the value of (the right to private) property. This other perspective leads to what my be called the «constitutional» definitions of property.

5.1. A first definitional approach is the «subjective» one.

According to it, property, taken as synonym of «ownership», may be defined as the right of somebody to own things.

Historically speaking, such definition of property, as it is to be found in the civil codes, was meant to state the character of individual ownership as «natural right». By and large, however, the underlying idea was, together with the demolition of *ancient régime* feudal apparatus of property rights, to put individual private property at the basis of socio-political and economic order, abolishing any state eminent domain.

But the same character of ownership may be traced in those legal systems, as the English one (and other English speaking countries), where no codification of private law took place and where, in the case of land tenements, the (feudal) principle of Crown or state domain over land privately owned still resists, in theory.

In both Civil law and Common law countries, then, private property or, more accurately, private property rights not only mean, as regards to private persons, to have powers over things, but also, and just because of this individualistic dimension of those rights understood, if not as an attribute of the individual personhood, as an expression of the subject's liberties, to give rise to a system where private property interests stand at the basis of a free market economy.

Nonetheless, the same subjective meaning of property in terms of powers over things belonging to somebody applies to both private (physical and moral or legal) persons and public bodies (the state and other public authorities). **[779]**

This conceptual continuum of property being private or public is due however to break up, when it is taken to its extreme. Indeed, when the state becomes the owner, although it is the same kind of ownership we are talking about with regard to its contents (powers), what happens is a complete shift in the definitional shape of property, no longer carved out of the liberties trunk. And this happens precisely when the private property of certain things (like the so called means of production) is abolished altogether and substituted by «state property» as an expression instead of the supremacy of public interests over private (individual) ones.

We thus speak of «socialist property» as a concept of property that differs from the so called «bourgeoisie property»; the difference consisting essentially in the attribution of the right of ownership to a non-private subject.

Moreover, regardless of the private or public nature of the owner, what makes the definition of the right of ownership problematic are the various and different ways of understanding the subject-object relation and its qualifying characters.

Indeed, one may speak of the owner's relation directly with the thing or with all or some other subjects concerning the thing. Consequently, one may consider the exclusiveness of the relation as an attribute of the right in the first case, but not in the second one.

Further attributes of the right of ownership such the fullness and absoluteness of the powers of the owner over the thing may be questioned depending on the way of looking at that relation.

With regard, however, to both Civil law and Common law traditions, what must be stressed, here, is the historical, cultural and political significance of the shift that took place, especially during the seventeenth to the nineteenth centuries in Europe, from a more traditional understanding of the term «property» as the thing that is owned (by somebody and possibly by various individuals at the same time although in various degrees) to an understanding of the term «property» referred to the right of one subject over a thing.

Finally, going further on the subjective way of defining property we find, as in past times (before the advent of the modern individualistic notion property), a more intriguing and challenging notion of «common (or collective) property», where the same subjective definitional approach seems to wither away, to the extent to which this form of property appears to be neither private nor public. Nowadays one may speak of common properties with regard both to traditional and new types of commons, either local or global, natural and social commons; envisaging the idea of a property whose owner is not a single and specific subject (be it a private person or a state or other public body) but a local community such as a population with regard to its present and future generations alike, or even the mankind at large (as in the case of the ocean, deep space, natural resources). **[780]**

5.2. If the subjective approach represents a rather formal (or formalistic) approach to the definition of property, the objective one may be referred instead to the substance of property, from the viewpoint of its structure, articulation and extent.

Speaking of property from the side of the object means to deal with its «patrimonial notion».

What should be meant by «patrimonial» (or «objective») notion of property is precisely something opposite to the subjective notion of it.

The subjective notion centres around a direct relation between the owner and the physical thing, and ends up with a monolithic or unitary idea of property as an indivisible right that confers on an individual

subject (be it a private person or a public body) the widest possible powers with regard to the thing itself.

According to the objective approach, the word property refers instead to the «thing» owned, thus implying two important definitional consequences.

The first is that not only «physical» things may be object of property, but everything, including an incorporeal item, that is or would be worth of economic value, such as, for instance, contractual rights and other kind of intangible goods (intellectual property rights, welfare benefits and the like). Therefore, the extent or scope of property is much larger than the one possibly identifiable along the lines of the subjective definition of it, in terms of exclusiveness of the direct relation of the owner with the thing physically understood.

The second consequence is that the same «thing» may be owned, although to different degrees and for different times, by a number of subjects, each of them having a property right (interest) over the thing, to use and enjoy it.

This notion of property is traceable back to medieval times and it is characterised by the idea of divisibility of the utilities of a thing as, for instance, in the very emblematic case of land tenements, split among various subjects in a series of entitlements corresponding to varying degrees of ownership.

5.3. Outside the conceptual range involved by property in the field of private law transactions, there stands moreover (and one may say, above all) the problem of the value of private property, seen from the viewpoint of the interplay between the individual and the state or other public bodies.

The answer to the problem is to be found in constitutional laws giving recognition to property.

Here two distinct and different definitional approaches may be detached.

Most western constitutions, including nowadays the constitutions of former socialist countries of Central Eastern Europe, incorporate the right to private property in the so called «bill of rights», that is among the

core **[781]** provisions regarding fundamental principles, basic human rights and liberties of the subject.

Other constitutional texts, as for instance the Italian one, give recognition and protection to private property, but with a lesser emphasis on the guarantee side of the right, not included within the core constitutional provisions forming the bill of rights, but downgraded, so to speak, under the section of «Economic Rights and Duties» within the part entitled «Rights and Duties of Citizens», in order «to ensure its social function», through limitations and regulations, and thus putting emphasis on the regulation aspect of the right.

There may be, then, differences in the styling and meaning of constitutional property clauses, depending on the textual emphasis put on one aspect (the guarantee) or the other (the regulations and takings) or else on the way of keeping them separated or mixing them and shifting emphasis from the guarantee to the regulation (limitation) of the individual (right to) property. But what really matters is in any case the substantial issue of how to balance in the field of property rights the private with the public interest. **[782]**