

Inflation and Human Rights: Protection of Property Rights against Inflation under the European Convention on Human Rights

ALI RIZA ÇOBAN*

Abstract

The article examines the effect of inflation on legal relationships and how far a state can be held responsible for those effects under Article 1 of the Protocol 1 to the European Convention on Human Rights. First, the effect of inflation on private law relationships and public law relationships is examined separately at a theoretical level and then the Convention organs' relevant jurisprudence is evaluated within this framework. The author concludes that while the Convention organs were too timid to find a violation of property rights relating to the effect of inflation in their early years, it can be observed that interpretation of the Convention has been changing slowly. Following the *Akkus* case the inflation phenomenon became a factor in the breach of property rights. There are still few situations in which the Court has taken the impact of inflation fully into account. Although the Court has provided some shelter against the effect of inflation, it has not established clear criteria for evaluating the effect of inflation on property rights.

1. Introduction

The European Court of Human Rights (hereinafter: the Court) has delivered a number of decisions regarding the effect of inflation on property rights. The cases in which the 'inflation' phenomenon is involved are not rare and should not be ignored. Indeed, within the context of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the Convention), inflation may come on the scene in many different situations in connection with Article 41 and Article 1 of the First Protocol (P1-1). Inflation is an economic problem which any democratic country may face, and some of the members of the Council of Europe which are party to the Convention have been experiencing high rate inflation for many years. There are still many cases involving the inflation phenomenon before the European Court of Human Rights, especially from central and eastern European countries. Even if the inflation problem is becoming less important for the members of the Council of Europe (and of course there is no guarantee that high rate inflation will not arise in Europe in the future), given the interaction between different international and regional human rights protection mechanisms,¹ an examination of the effect of inflation on human rights will be of benefit to other human rights protection systems in the Americas and in

* Dr Çoban is Assistant Professor of Constitutional Law at the Faculty of Law, University of Kirikkale, Turkey. The author thanks Professor John Bell of the Department of Law at Cambridge University and Professor Clive Walker of the Department of Law at Leeds University for their scrupulous reading and valuable comments on an earlier draft of this piece. The opinions expressed and responsibility for them belong to the author.

¹ See the speech of Antonio Augusto Cancado Trindade, President of the Inter-American Court of Human Rights, at the opening of the judicial year 2004 for the European Court of Human Rights on 22 January 2004, available at: www.echr.coe.int.

Africa, where in some countries inflation is running at high levels. Therefore the subject deserves a closer look and a detailed examination. This paper attempts to examine the effect of inflation on property rights, but just satisfaction claims are also indirectly included because they also constitute property in the meaning of P1-1. The concept of ‘possessions’ under the Convention is interpreted expansively to include all pecuniary rights. Accordingly, all kinds of pecuniary debts arising from contracts, torts, or unjust enrichment² constitute property for the purposes of the Convention.³ Therefore, the impact of inflation on such relationships comes within the ambit of P1-1.

Inflation can be defined either as a sustained rise in an economy’s general level of prices or a corresponding fall in the domestic purchasing power of an economy’s currency.⁴ This definition implies that inflation is a dynamic process in which the aggregate level of prices moves upward over time while the purchasing power of money is in corresponding decline. In such a process, if the ‘nominalistic principle’ is applied to legal relations, it causes unjust situations. The nominalistic principle proposes that a pecuniary obligation – an obligation to pay a sum of money – should be discharged in the legal currency of the state at the time of payment and up to the nominal value of the debt.⁵ Accordingly, this principle does not allow account to be taken of monetary erosion when the debt is originally expressed in currency.⁶ Money performs three different functions in legal systems; it serves as a means of payment, a measure of value, and a store of value. Inflation simply destroys the value of money. The real economic value of money is perceived as its purchasing power, and the best measure of purchasing power is a general price index, such as the cost-of-living or wholesale price indexes, or the implicit Gross National Product (GNP) deflator. One of these indexes is employed to determine the value of money in order to protect legal relations from the impact of inflation.⁷

The fall in the value of money causes many legal disputes, besides social and economic problems. Inflation may affect legal relations such as contracts (especially long

² Torts and unjust enrichments are two sources of obligations apart from contracts. A tort is a civil wrong for which a remedy may be obtained in the form of damages, and unjust enrichment means a benefit obtained from another, not intended as a gift and not legally justifiable, for which the beneficiary must make restitution or recompense.

³ L. Sermet, *The European Convention on Human Rights and Property Rights* (Strasbourg: Council of Europe Publishing, 1998) (revised edition), at 11-3; Alberto M. Aronovitz, ‘Individual Patrimonial Rights Under the European Human Rights System; Some Reflections on the Concept of Possession and Dispossession of Property’ (1997) 25 *International Journal of Legal Information* 87; D. Gomien, D. Harris, and L. Zwaak, *Law and Practice of the European Convention on Human Rights and the European Social Charter* (Strasbourg: Council of Europe Publishing, 1996) (reprinted in 1999), at 311; D. Harris, D., M. O’Boyle, and C. Warbrick, *Law of the European Convention on Human Rights* (London: Butterworths, 1995), at 517; Peter Van Den Broek, ‘The Protection of Property Rights under the European Convention on Human Rights’ (1986) 1986-1 *Issues of European Integration* 52; Van Dijk and Van Hoof, *Theory and Practice of the European Convention on Human Rights* (London: Kluwer Law Int, 1998), at 619-625; A.R. Çoban, *Protection of Property Rights within the European Convention on Human Rights* (Aldershot: Ashgate, 2004), ch. 6.

⁴ D. Paarlberg, *An Analysis and History of Inflation* (London, Westport, Conn.: Praeger Publishers, 1994), at 18; R. Green, *Classical Theories of Money, Output, and Inflation: A Study in Historical Economics* (London & Basingstoke: Macmillan, 1992), at 67; J. Hudson, *Inflation a Theoretical Survey and Synthesis* (London: Allen & Unwin, 1982), at 128; H.G. Johnson, ‘A Survey of Theories of Inflation’ in *Essays in Monetary Theory* (1967) at 104.

⁵ F.A. Mann, *The Legal Aspects of Money with Special Reference to Comparative Private and Public International Law* (Oxford: Clarendon Press, 1982) (fourth edition), at 84.

⁶ Council of Europe, The Legal Documentation and Research Division, *Law and Inflation*, Legislative Dossier No. 3 (Strasbourg: Council of Europe Publications Section, 1986), at 128.

⁷ *Ibid.*, at 130

term contracts, employment contracts, rents, insurance, social security annuities) and monetary compensation claims. The influence of inflation on legal relationships can be seen both in private law and public law relationships. It produces inequality between the parties to legal relationships, or compels the public in their dealings with the state to bear costs greater than those strictly required.⁸ This influence of inflation on legal relationships brings it within the orbit of the Convention.

This paper seeks answers to the following questions: Can a State be held responsible, under the Convention, for an individual's loss caused by monetary depreciation; how far should the effect of inflation be taken into account by the State when it interferes with the property rights of individuals; and what is the limit of its margin of appreciation?

2. The Right to Property in the Convention

The Convention regulates the right to property in P1-1 as follows:

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 as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

This article is the only provision of the Convention which deals with an economic right, and, contrary to most other provisions of the Convention, it expressly protects not only natural, but also legal, persons such as companies.⁹ According to established case law of the Court and the former European Commission of Human Rights, P1-1 comprises three distinct rules.¹⁰ The first rule, which is set out in the first sentence of the first paragraph, contains a general guarantee of the right to property. The second rule, which appears in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions. The third rule, which is contained in the second paragraph, recognises that the contracting states are entitled, among other things, to control the use of property in accordance with the general interest.¹¹ As the Court and the former Commission have stated in several cases, these rules are not entirely separate or unconnected. On the contrary, the second and third rules, which are concerned with particular instances of interference with the right to peaceful enjoyment of possessions, are to be construed in the light of the general principle laid down in the first rule.¹² According to the second rule, a state may deprive an individual of his possessions 'in the public interest and subject to the conditions provided by law'. The third rule confers power on a state to 'enforce such laws as it deems necessary to control the use of property in accordance with the general interest' or to secure the payment

⁸ K. S. Rosenn, *Law and Inflation* (Philadelphia: University of Pennsylvania Press, 1982) at 3.

⁹ D. Gomien, D. Harris, L. Zwaak, *Law and Practice of the European Convention on Human Rights and the European Social Charter* (Strasbourg: Council of Europe Publishing, 1996), at 311.

¹⁰ See, for example, *Sporrong and Lönnroth v. Sweden*, 23 Sept. 1982 (Series A no. 52), para. 61; *James and Others v. UK*, 21 Feb. 1986 (Series A no. 98), para. 37; *Lithgow and Others v. UK*, 8 July 1986 (Series A no. 102), para. 106; *Iatridis v. Greece*, 25 Mar. 1999, para. 55.

¹¹ For a criticism of the Court's taxonomy of interferences with property and an alternative classification see A.R. Çoban, *Protection of Property Rights within the European Convention on Human Rights* (Aldershot: Ashgate, 2004), ch. 7.

¹² See for example *Holy Monasteries v. Greece*, 9 Dec. 1994 (Series A no. 301-A) para. 56; *James and Others v. UK*, 21 Feb. 1986 (Series A no. 98-B), at 29, para. 37.

of various fines, taxes and so forth. However, no definition of the notions of 'public interest' or 'general interest' is to be found in either the text of the Convention or the case law. These rules, therefore, vest in contracting states an extensive margin of appreciation in determining what comes within the public or general interest.¹³

As indicated above, Strasbourg organs have interpreted the notion of possession widely.¹⁴ They have held from the beginning that all rights which are well-founded in national law can basically benefit from the guarantee of P1-1. They may be claims, immaterial rights or even rights granted under public law. But the guarantee of the Convention comprises only existing possessions, not the right to acquire property, whether on intestacy or by voluntary disposition.¹⁵

The Court's classification of interferences with property as interference with the substance, deprivation and control on use, which is based on the effect of interference on property rights, is far from giving us clear guidance for determining when compensation is required, and the Court's criteria for each of the types seems to be becoming less and less clear. The Court has a tendency to directly apply a balancing test¹⁶ that makes the distinction between different types of interference less important. However, this represents a threat to the effectiveness and security of the European protection system. Another classification that is based on the purpose of the state's action has been proposed elsewhere.¹⁷ This classification makes reference to three different powers of states and the corresponding three different types of interference. These are: taking of property by power of eminent domain (expropriation, nationalisation etc.), taxation, and controlling the use of property by police powers. This classification can be adapted easily to P1-1.

While the text of P1-1 does not explicitly guarantee payment of compensation for any such interference, the Convention organs have established that compensation for the taking of private property for public use is an inherent feature of the right to property. Therefore, only in the case of the taking of property for public interest is payment of compensation required. In other cases, compensation does not need to be paid. Although it is not always easy to distinguish when interference is through the taking of property and when it is through taxation or police powers, a general criterion can be employed to distinguish between taking and taxation, which is the selective feature of taking.¹⁸ That is, taking imposes the burden of public policies only on some individuals while with taxation everyone is in the same position and bears the burden of public policies on an equal basis. The main distinction between taking and police powers is that the aim of police powers is to prevent the use of property being harmful to the rights of other people.¹⁹ The responsibility of a state for inflation should be assessed taking these points into consideration.

The effect of inflation has been discussed in different contexts before the Convention organs. Now it is necessary to look at the related case law of the Convention organs.

¹³ Yves Winisdoerffer, 'Margin of Appreciation and Article 1 of Protocol No. 1' (1998) 19 *Human Rights Law Journal* 1 at 18.

¹⁴ J. A. Frowein, 'The Protection of Property' in R. Macdonald, F. Matscher, H. Petzold (eds.), *The European System for the Protection of Human Rights* (London: Martinus Nijhoff Publishers, 1993) at 515.

¹⁵ *Marckx v. Belgium*, 13 June 1979 (Series A no. 31) para. 63-65.

¹⁶ Gomien et al., n. 9 above, at 325.

¹⁷ Çoban, n. 11 above.

¹⁸ S. Munzer, *A Theory of Property* (Cambridge: CUP, 1991), at 421.

¹⁹ Joseph Sax, 'Takings and Police Power' (1964) 74 *Yale Law Journal* 36.

3. Responsibility of a State for Inflation under the Convention

The responsibility of a state for inflation can be examined in two different contexts within the Convention. Firstly, it is necessary to evaluate whether a state, having been the cause of inflation, is directly responsible for individuals' losses caused by monetary depreciation. Secondly, if a state is not directly responsible for causing inflation, then the question can be examined as to whether it can be held responsible for being unresponsive to the effects of inflation under the Convention.

In order to determine whether a state is directly responsible for having caused inflation, we need to know what the causes of inflation are. There is no agreement among economists about the causes of inflation. Some economists argue that the quantity of money in circulation determines the level of prices.²⁰ Keynesian economists perceive the cause of inflation as the result of attempts by consumers to buy more goods and services than can be physically produced.²¹ According to proponents of the 'Cost-Push' theory, inflation results from the operation of a wage-price spiral. For example, if labour unions force wage increases in excess of productivity during a period of full employment, these wage increases directly push the prices up.²² Some other theorists explain inflation as a result of fundamental structural maladjustments within a country's economy. Causal or substantial responsibility brings the macroeconomic policies of a state into the orbit of human rights. Whether a state is held responsible for its macro-economic policies causing inflation is a complex problem. Firstly, such an argument presupposes that inflation is a political problem. It assumes that inflation is caused solely by the political decisions of public authorities. However, there is no agreement among economists about the causes of inflation. There are many factors affecting an economy besides political decisions and it is difficult to judge in what proportion the political decisions have an impact upon ongoing inflation. Therefore, it seems difficult to hold a state directly responsible for the losses caused by inflation.

The next question to be raised here is whether a state is liable for the results of inflation. This analysis mainly looks at whether the losses caused by inflation constitute taking (or deprivation) of private property within the meaning of the Convention. In order to answer this question we need to examine separately the impact of inflation on public law relationships (relations between an individual and the state) and private law relationships (relations between two individuals).

3.1 Inflation in Public Law Relationships

3.1.1 *The Effect of Inflation on Monetary Compensation Claims*

As pointed out above, the Convention vests the Contracting States with the power to deprive individuals of their property in pursuance of the public interest. This deprivation

²⁰ This theory is called 'Quantity Theory of Money'. It can be traced back to David Hume in the eighteenth century and was defended by Milton Friedman during the 1950s. See Friedman, 'The Supply of Money and Changes in Prices and Output' in US CONG., JT. ECON. COMM., *The Relationship of Prices to Economic Stability and Growth* 241 (85th Cong., 2nd Sess. 1958); M. J. Huston, *Money and Inflation: A Monetarist Approach* (London: Economic Press, 1982), at 241; E. J. Bomhoff, *Inflation, The Quantity Theory and Rational Expectations* (Amsterdam: Holland Pub. Co, 1980), at 73.

²¹ 'Keynesian economists' are those economists whose theories find their roots in the work of the famous economist John Maynard Keynes (1883-1946): as regards inflation, F. Hahn, *Money and Inflation* (Oxford: Blackwell, 1982), at 68; R. E. Hall, (ed.) *Inflation Causes and Effects* (Chicago: Chicago University Press, 1982), at 128; Rosemn, n. 8 above, at 8.

²² Martin Bronfenbrenner and Franklyn D. Holzman, 'Survey of Inflation Theory' (1963) 53 *Am. Econ. Rev.* 593.

takes place in different ways, such as expropriation, nationalisation, or regulatory taking. However, no express guarantee of compensation for such deprivation is included in P1-1. Nevertheless, the Court has treated a right to compensation for interference with property rights as being an inherent feature of the right to property, in so far as it might form a necessary ingredient in a fair balance between public and private interests.²³ The taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference, which would not be justified under P1-1.²⁴ According to the Court's interpretation, however, P1-1 does not guarantee a right to full compensation in all circumstances 'since legitimate objectives of public interest, such as are pursued in measures of economic reforms, or measures designated to achieve greater social justice, may call for less than reimbursement of the full market value.'²⁵

The problematic impact of inflation on monetary compensation can arise either in the calculation of compensation or in the case of delays in payment of compensation. Regarding the determination of compensation awards for the taking of private property by public authorities, the problem of inflation occurs only in exceptional cases, because compensation is determined generally by reference to the actual value of the expropriated property. But if the value of expropriated property at a previous date is taken as the basis for compensation, it is necessary to examine whether the individual has been protected against the effect of inflation.

This issue was raised in *Lithgow and Others*.²⁶ The applicants complained, *inter alia*, that while the amount of their compensation was being determined, the effect of inflation was not taken into account. The United Kingdom (UK) nationalised shipbuilding and aerospace industries in accordance with the Aircraft and Shipbuilding Industries Act 1977 (the 1977 Act). The 1977 Act tied the amount of compensation to the values of companies at a previous date (the 'Reference Period'²⁷ was September 1973 and February 1974) but that compensation was not paid until some years later (in instalments in 1978, 1979, and 1980). Taken in combination, these facts, it was argued, meant that the applicants had not received fair compensation since no account had been taken of the fall in the value of money between 1974 and the date of payment, which was a period of high inflation.²⁸ The Court dismissed the claims on different grounds for different periods. For the period from Vesting Day²⁹ to the date of payment, the Court noted that 'compensation bore interest – at a rate reasonably close to the average Bank of England minimum lending rate - thus provided some shelter against inflation'. As regards the period between the Reference Period and Vesting Day, the Court considered that the applicants were not deprived of income from their investments since they remained entitled to dividends on the acquired securities in respect of that period.

²³ *Sporrong and Lönnroth v. Sweden*, 23 Sept. 1982 (Series A no. 52).

²⁴ Commission's Report of 17 Dec. 1987 in *Scotts of Greenock Ltd and Lithgow's Ltd v. the United Kingdom* (9482/81).

²⁵ *Lithgow and Others v. the UK*, 8 July 1986 (Series A no. 102), para. 121.

²⁶ *Ibid.*, para. 143.

²⁷ The compensation which the applicants received was based on the value of their shares during the reference period laid down by the 1977 Act, namely 1 Sept. 1973 to 28 Feb. 1974. This period antedated by more than three years the formal transfer of the shares.

²⁸ *Ibid.*, para. 144. (Inflation in the UK, as measured by the official Retail Price Index, was relatively rapid in the years 1974-1980. At the start of Reference Period (Sep. 1973) the index stood at 94.8. It reached 180.3 in April 1977 and 183.6 in June 1977 (Vesting Days) and 275.6 in December 1980 (date of last payment) respectively. See *Lithgow* para. 92).

²⁹ Ownership of the shares was transferred to the public companies on Vesting Day determined by 1977 Act.

The Court also considered that in the interval between the Reference Period and Vesting Day, share prices did not increase to the same extent as the Retail Price Index.³⁰ Accordingly, if the compensation had been adjusted by reference to the inflation rate, it would have provided the applicants with an advantage not available to other investors in securities. As a result, the Court held that, in the circumstances prevailing, the decision to adopt provisions that excluded any allowance for inflation was one which the UK was reasonably entitled to take within its margin of appreciation.³¹ The Court did not reject the idea of protection against inflation, but observed that applied UK policy included sufficient protection against the effect of inflation.

The *Scott Lithgows* application was also related to implementation of the above-mentioned 1977 Act. The former Commission found that the absence of any allowance for inflation in the calculation of compensation for the period between the Reference Period and Vesting Day did not violate the applicant's rights in Article 1, by referencing the Court's above-mentioned decision in *Lithgow and Others*.³² The Commission repeated the same opinion in *S. and Others*.³³ Ignoring the special circumstances of the *Lithgow* case, and misinterpreting the Court's decision, it generalised the Court's opinion to cover all inflation complaints. It noted that: 'absence of any allowance for inflation, and incidence to capital gain tax were found by the Court in the *Lithgow* case to fall within the margin of appreciation accorded to high contracting parties.'³⁴ It is suggested that, rather than reaching this verdict, it should have examined whether the concerned person suffered an unjustified loss as a result of monetary depreciation, and if so, should find for a violation of the Convention rights.

As for the calculation of pecuniary damages, the Convention provides just satisfaction for those whose rights have been violated, if the internal law of the violator state allows only partial reparation (former Article 50, current Article 41).³⁵ In such cases, if the acts violating the Convention rights cause pecuniary damages as well, the question arises whether the effect of inflation should be taken into account in calculation of pecuniary damages.

In these situations, it is necessary to distinguish between the cases in which an inflation claim is submitted to the Convention organs and those in which such claims are made before national authorities. The Court took the inflation rate into consideration when it was calculating pecuniary damages in a number of cases. Regarding the calculation of compensation for damages by national courts, the former Commission refused to examine

³⁰ According to the Financial Times Industrial Ordinary Share Index in February 1973 the average was 316.5. The index declined steadily during 1974, to an average 160.1 in December. Thereafter the general trend was upwards for some time. It reached an average of 406.6 in May 1976. There was then an overall decline until October 1976 when the monthly average was 293.6. Prices then rose again, the average figure in April 1977 being 415.1 and in July 1977 being 443.1 See *Lithgow*, para. 93.

³¹ *Lithgow*, para. 147.

³² *Scotts of Greenock Ltd and Lithgows Ltd v. the United Kingdom* (9482/81) 17 Dec. 1987.

³³ *S. and Others v. the United Kingdom*, (13135/87) 4 July 1988.

³⁴ *Ibid.*, para. 18.

³⁵ 'If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.' The Court affords one or more of the remedies such as payment of pecuniary damages, non-pecuniary damages, and costs and expenses as just satisfaction. That is, pecuniary damages are one of the means of satisfaction and signifies compensation for monetary losses suffered by the victim.

the claims that inflation was not taken into consideration, on the grounds that it found P1-1 inapplicable in the *Ege* application. The applicant complained that he had not been fully compensated by the national court for his real losses because the rate of interest which applied to his compensation claim for a period of nine years (between the date of introduction of his claim in 1985 and the date of payment in 1994) was lower than the rate of inflation during that period. According to the Commission, until national courts had determined that compensation was payable and the amount of any such compensation, the applicant had no 'possession' within the meaning of P1-1. Therefore, examination of the adequacy of the compensation determined by national courts fell outside the Commission's competence *ratione materiae* (by reason of the matter involved).³⁶ However, this interpretation by the Commission of the concept of possession clearly contradicts the Court's authority in such proceedings as the *Greek Refineries*,³⁷ *Pressos Compania Naviera*³⁸ and *Building Societies*³⁹ cases.

Though the Court has not discussed the matter explicitly, it has partly taken the rate of inflation into account in determining pecuniary damages. For example, in *Süreker v. Turkey (2)*,⁴⁰ the applicant was convicted for separatist propaganda and in 1992 was sentenced to pay a fine of 54 million Turkish lira (TRL). The Court found that the respondent state was in breach of Article 10 on account of the applicant's conviction and sentence. The applicant claimed compensation – a total sum of 100,000 French francs (FF) – for the fine imposed on him and paid over. The amount claimed included interest accrued, took account of the high rate inflation in Turkey and was calculated on the basis of an exchange rate from 1992. The Court, having regard to the rates of exchange during the relevant period, considered that the applicant should be awarded 13,000 FF in respect of pecuniary damages.⁴¹ Here the claim of the applicant is confusing because he changed the amount into francs at the exchange rate from 1992 and also added the interest onto the rate of inflation. However, the increase in the exchange rate was relatively close to the inflation rate during the relevant period in Turkey. The Court therefore took the inflation rate into consideration by calculating pecuniary damages on the basis of the exchange rate. In another case, the Court also took the inflation rate into account in calculation of pecuniary damages.⁴² In such cases it is necessary to provide shelter for individuals against the effect of inflation, otherwise it constitutes the taking of private property, an interference with human rights, and requires payment of compensation.

3.1.2 *Delay in Payment of Compensation and the Effect of Inflation*

The most important cases that have brought the inflation problem before the Convention organs are related to a State's delay in the payment of compensation for expropriation and pecuniary damages. According to the established case law of the former Commission and the Court, the adequacy of the compensation would be diminished if it were to be paid without

³⁶ *Ege v. Turkey*, (23887/94) 5 Mar. 1996.

³⁷ *Stran Greek Refineries and Stratis Andreadis v. Greece*, 9 Dec. 1994 (Series A, No.301-B).

³⁸ *Pressos Compania Naviera S.A. and Others v. Belgium*, 20 Nov. 1995 (Series A, No.332).

³⁹ *National and Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom*, 23 Oct. 1997 (Reports 1997-VII), para. 79.

⁴⁰ *Süreker v. Turkey (2)*, 8 July 1999, para. 56.

⁴¹ *Ibid.*, para. 59.

⁴² *Bergens Tirende and Others v. Norway*, 2 May 2000, para. 70.

reference to various circumstances liable to reduce its value.⁴³ Abnormally lengthy delays in the payment of a sum by the state are capable of constituting infringement of P1-1 where the interest is not calculated at a reasonable rate.⁴⁴

In some cases the Court found a breach of the article solely because of the unreasonable delay in payment. For example in the cases of *Guillemin v. France*⁴⁵ and *Almeida Garrett, Mascaranhas Falcao and others v. Portugal*,⁴⁶ without awaiting the end of pending proceedings before the national courts, the Court held that as fourteen and twenty four years respectively had elapsed since the introduction of proceedings, the fact that the final compensation had not been paid constituted a violation of the property rights of applicants. But in another application the Commission found inadmissible the complaints concerning the fact that the State had taken five years to refund sums paid as advance income tax. In this regard, it noted that the relevant authority was obliged to pay interest on the sums refunded at a higher rate than the rate of inflation in the respondent State, and considered accordingly that the delays complained of appeared to be offset by the interest payments made on the refunds.⁴⁷

In the *Akkus*⁴⁸ and the *Aka*⁴⁹ cases the former Commission and the Court expressly revealed their opinions. In *Akkus*, the complaint concerned the authorities' delay in paying the additional compensation. Following the expropriation of the applicant's land in 1987 for the construction of a dam by Turkish authorities, she lodged an application with the first instance court for increased compensation, and requested that the rate of inflation be taken into account when determining the additional loss. On 22 June 1989 the court awarded additional compensation of 271,039 TRL, plus simple default interest at the rate of 30 per cent per annum from the expropriation date. On 17 September 1990 the Court of Cassation upheld the judgment at first instance. This additional compensation was paid in February 1992 (that is, approximately seventeen months after the decision of the Court of Cassation). The applicant complained that the authorities' seventeen months delay in payment of additional compensation violated her right to peaceful enjoyment of possession because the applied statutory interest rate to the compensation was 30 per cent while the inflation rate during the relevant period in Turkey was an average of 70 per cent per annum. The Court accepted the applicant's argument.⁵⁰

The Court was of the opinion that the difference between the value of the applicant's compensation as finally determined by the Court of Cassation and its value when actually paid caused the applicant to sustain separate loss in addition to the loss deriving from the expropriation of her land.⁵¹ The Court noted on this subject that in Turkey the rate of interest payable on debts owed to the State – 84 per cent per annum – was such as to encourage debtors to pay promptly; on the other hand, individual creditors of the State

⁴³ *Akkus v. Turkey* 24 June 1997 (Reports 1997-IV), para. 29; *Stran Greek Refineries and Stradis Andreadis v. Greece*, 9 Dec. 1994 (Series A no: 301-B), para. 82; *Almeida Garrett, Mascaranhas Falcao and others v. Portugal*, 11 Jan. 2000, para. 52.

⁴⁴ *Lithgow*, para. 145.

⁴⁵ *Guillemin v. France*, 21 Feb. 1997 (Reports 1997-I).

⁴⁶ *Almeida Garrett, Mascaranhas Falcao and Others v. Portugal*, 11 Jan. 2000 (Reports 2000-I).

⁴⁷ *Riccardo Travers and 27 Others v. Italy* (15117/89) 16 Jan. 1995, DR 80-B, at 5.

⁴⁸ *Akkus v. Turkey*, 24 June 1997 (Reports 1997-IV).

⁴⁹ *Aka v. Turkey*, 23 Sept. 1998 (Reports 1998-VI).

⁵⁰ *Akkus*, para. 39-42.

⁵¹ *Ibid.*, para. 30.

risked substantial loss if the State delayed payment.⁵² Since the *Akkus* decision more than 100 similar cases have been decided by the Court, and it has found the violation of right to property.⁵³

In the *Aka* case, which was related to the implementation of the same scheme for dam construction, the complaint arose from the insufficiency of the rate of statutory interest payable on additional compensation. The applicant emphasised that his application was concerned with the loss he had sustained between the date he had brought proceedings before the first instance court, and the date he had received relevant sums. He complained that four to five years' delay in payment of his compensation, combined with the high rate of monetary depreciation during the material time in Turkey, had created an unjustified imbalance between his personal interest and the public interest.⁵⁴ Both the Commission and the Court, in that case, found a violation of property rights. The Court reiterated its position in the *Akkus* case, that the difference between the value of the amounts due to the applicant when his land was expropriated and when compensation was actually paid caused him to sustain a separate loss, which, coupled with the loss of his land, upset the fair balance that should have been maintained between the protection of the right to property and the demands of the general interest.⁵⁵ The Court considered the situation in that case came within the second sentence of the first paragraph of P1-1. The Court later reached the same conclusion in similar cases.⁵⁶

In both the *Aka* and the *Akkus* cases the subject matter of the disputes was not the amount of compensation awarded for expropriation by the authorities, but the rate of interest applied to the compensation. In the *Aka* case, when the Court was determining pecuniary damage it considered the duration of time elapsed during the proceedings before the courts as well as the retarded duration. However, there is an inconsistency between this judgment and the Commission's criticised decision in the above-mentioned *Ege* application. In the *Ege* decision it held that until the compensation had been determined by national courts the applicant had no 'possession' within the meaning of P1-1, so an examination of the adequacy of the compensation determined by national courts fell outside the Commission's competence, *ratione materiae*. But in the *Aka* case it did not follow its previous decision, and examined the adequacy of the interest rate that applied to the compensation claim. The latter decision should be the preferred one, in order to protect individual rights against arbitrary acts of public authorities. The Court has provided shelter for monetary awards, and, as a just satisfaction under the Convention, for a long time it has ruled against the effect of inflation by determining the awards in a foreign stable currency (such as French francs, US dollars, or British pounds) rather than the depreciated Turkish lira.⁵⁷ As a

⁵² *Ibid.*, para. 29.

⁵³ See for example, *Yasar and Others v. Turkey*, 14 Nov. 2000 (27697/95); *Hamdi Celebi v. Turkey*, 30 Jan. 2001 (and 23 other judgments on the same date) (App. Nos. 19264- 19288/92); *Ismihan Ozel and Others v. Turkey*, judgment of 27 Feb. 2001 (App. No. 31963/96); *Ali Ozturk v. Turkey*, 10 Apr. 2001 (and other 24 judgments on the same date) (App. Nos. 19289- 19312/92); *Gulnabaz Calkan v. Turkey*, 5 June 2001 (and 19 other judgments on the same date) (App. Nos. 19661-19683/92); *Ciftci v. Turkey*, 7 Oct. 2004 (and 17 other judgments on the same date) (50732/99).

⁵⁴ *Aka*, para. 38.

⁵⁵ *Ibid.*, para. 50.

⁵⁶ *Gaganus and Other v. Turkey*, 5 June 2001 (39335/98); *Akca and Others v. Turkey*, 15 Feb. 2000; *Aktas and Others v. Turkey*, 11 Jan. 2000; *Ali Sen and Others v. Turkey*, 12 Sept. 2000.

⁵⁷ See, for example, *Mentes and Others v. Turkey*, 24 July 1998, *Selcuk and Asker v. Turkey*, 24 April 1998 (Reports 1998-II), *Akdivar and Others v. Turkey*, 1 April 1998 (Reports 1998-II).

consequence of these judgments of the Court, Turkey has amended both its Law on Statutory Interest⁵⁸ and Law of Expropriation.⁵⁹

Regarding monetary compensation, the Court is of the opinion that if the value of damages has been reduced due to inflation in any way, the plaintiff should be protected against the effect of inflation. Otherwise the loss caused by inflation constitutes taking (or deprivation) of property. If the nominalistic principle and a high rate of inflation operate in tandem, inflation benefits the debtor party in legal relationships. If the debtor party is a public authority, the benefit gained thanks to inflation constitutes an unjustified taking of property and an interference with human rights, therefore fair reparation should be awarded to recompense for the unjustified loss of the creditor party.

3.1.3 *The Effect of Inflation on Other Public Law Transactions*

Individuals can have different legal relationships with public authorities, and inflation can affect the individual's interests in these relations. For example, an individual can be an employee of the state and his wages can be adversely affected by inflation, or an individual can be the beneficiary of a public social security institution, and his pension rights can be distorted by inflation, or an individual can be the holder of a savings account, and his savings can erode as a result of inflation. Dramatically most of such relationships are compulsory and individuals do not have a right to bargain about the conditions of such transactions. Public authorities can impose or change the terms unilaterally. In these transactions individuals are in a weak position, and they need to be protected against the effects of inflation. However, it is difficult to establish a doctrinal criterion to determine when protection against inflation is necessary from the point of view of fundamental human rights. Here the case law of the Convention organs relating to savings accounts will be examined as an example. When individuals are forced to open savings accounts in publicly owned institutions, those savings should be protected against the distortions of inflation. If the rate of interest applied to the sums accumulated in those accounts is less than the rate of inflation, the depositors suffer loss because of inflation and the problem of whether these losses constitute an infringement of the right to property arises.

It is necessary, first, to examine whether the state is involved in instituting such savings accounts. According to case law, under P1-1 the State may be responsible, in certain specific circumstances, for interferences with property rights resulting from transactions between private individuals.⁶⁰ However, if the facts complained of are not the result of an exercise of governmental authority but exclusively concern relationships of a contractual nature between individuals, there is no state interference,⁶¹ and therefore it is not the state's obligation under P1-1 to maintain the purchasing power of sums deposited with financial institutions by way of a systematic indexation of savings.⁶² That is, if the state is not actively interfering with the establishment of the savings accounts, it cannot be held responsible for inaction.

But what happens if the state interferes with savings accounts? The Commission has examined some applications relating to such situations. In *R. v. Sweden*⁶³ the subject matter of

⁵⁸ Law No. 4489 (published in the *Official Gazette* on 15 Dec. 1999).

⁵⁹ Law No. 4650 (published in the *Official Gazette* on 5 May 2001).

⁶⁰ *M.N. v. Bulgaria*, (29785/96) 4 Sept. 1996.

⁶¹ *Gustafsson v. Sweden*, 25 Apr. 1996, para. 60.

⁶² *Dobberstein v. Germany*, (25045/94) 12 Apr. 1996.

⁶³ *R. v. Sweden*, (16239/90) 1 July 1991.

the complaint was the Temporary Savings Act 1989. The Act had the effect of forcing taxpayers to save amounts corresponding to three per cent of their income tax, and depriving them of their right to dispose of this money over a certain period of time. The Commission noted that the compulsory savings constituted a measure of controlling property use, to be considered under the second paragraph of P1-1. It considered that the purpose of instituting temporary compulsory savings, which was to limit a dangerous trend in the Swedish economy by reducing consumption, and to counteract growing inflation, was a legitimate aim in the general interest. As a result the Commission found that, since, *inter alia*, the compulsory savings would not exceed three per cent of income tax, they were limited in time and were to be repaid together with interest, and considering the wide margin of appreciation enjoyed by the contracting states, the 1989 Act was not disproportionate to the aim pursued. It can be inferred from this decision that if the savings are compulsory in nature, it is necessary to pay interest at a reasonable rate to compensate for the impact of inflation.

In the *Kuczynska*⁶⁴ and *Rudzinska*⁶⁵ cases the complaints were related to savings for housing. Both applicants opened housing savings accounts in the Polish State Savings Bank and became members of housing co-operatives at different times. This was a State-supported scheme, and the reassessment of the sums accumulated in accounts to offset the effect of inflation was under the guarantee of the State. But after 1990 related legislation was partly amended, and the valuation of sums accumulated in those accounts was subject to new conditions. In its resolution of 29 July 1993, the Supreme Court of Poland decided that, under the provisions of the Civil Code as amended in 1990, the housing savings were not subject to reassessment by the State Treasury, which would have offset the results of inflation in full. The Supreme Court later decided that housing savings awards were not subject to reassessment either. The court observed that the problem concerned approximately five million citizens who had accumulated housing savings. A reassessment by the State Treasury of the housing awards for all persons concerned would not be economically feasible, as it would put an undue burden on the State economy.

Both applicants complained under P1-1 that the State had failed in its obligations as regards financial assistance relating to housing, which it had undertaken towards them in respect of the terms of the housing savings account. They submitted that their savings were not now subject to reassessment such as to offset in full the effects of inflation, and that, as a result, the sum of their savings was ridiculously small, even though they had been saving regularly for years in compliance with the terms of their housing savings accounts. The Commission in the former and the Court in the latter noted that the State aimed to improve the chronic housing shortage by creating a state-supported scheme, and related legislation provided for specific measures in order to safeguard certain pecuniary rights of persons possessing housing savings accounts at the State Savings Bank. In particular, the state guaranteed that the monies deposited in the housing savings accounts were to be reassessed so as to maintain their purchasing power and to offset the effects of inflation.

The Court noted that although the entitlement to housing awards was made subject to certain conditions later, persons who were not entitled to obtain the housing award could any time obtain a reimbursement of their accumulated savings from the housing account, with interest. Thus, the applicants were not deprived of their possessions. The Court

⁶⁴ *Maria Kuczynska v. Poland*, (25696/94) 10 Sept. 1997.

⁶⁵ *Rudzinska v. Poland*, (45223/99) 7 Sept. 1999.

dismissed the complaints regarding the loss of purchasing power in the housing savings account as a result of inflation; it relied upon its established view that a general obligation on states to maintain the purchasing power of sums deposited with banking or financial institutions by way of a systematic indexation of savings cannot be derived from P1-1. It also dismissed the complaints relating to the fact that as a result of the reduction of the scope of guarantees offered by the State to persons possessing housing savings accounts, the applicant could not become the owner of a house for which she had been saving, on the grounds that P1-1 did not recognise any right to become an owner of property.⁶⁶ It is necessary to consider here that the Polish government unilaterally changed the obligations caused by the scheme in favour of the state.

The Court reiterated its established view that a general obligation on states to maintain the purchasing power of sums deposited with banking or financial institutions by way of a systematic indexation of savings cannot be derived from P1-1 in cases such as *Gayduk and Others v. Ukraine*⁶⁷ and *Appolonov v. Russia*.⁶⁸ In these decisions, neither the former Commission nor the Court discussed the adequacy of the rate of interest which was applied to the sums accumulated in housing savings accounts. In material cases, the Court should have examined whether the interest rate applied to the savings account was lower than the inflation rate at the relevant time. If so, the state benefited from the effect of inflation, and the difference between inflation and interest rates constituted a taking of private property without compensation and constituted a breach of the Convention rights. The Court should not have left individual human rights unprotected for the sake of political concerns.

Inflation problems can also arise in relation to public procurement contracts. For example, a long-term contract relating to the supply of materials to a public body can be affected by inflation. Fixed prices for such obligations can be distorted by inflation unless they are revalued. In these situations, generally the amount of the monetary obligation is fixed (liquidated). In most of the member states, the nominalistic principle prevails regarding liquidated obligations. However, the nominalistic principle itself is not immune against the Convention, and the Court can at least review whether it meets the requirements of the balancing test, and the Court can find for a violation of property rights if the application of the nominalistic principle burdens individuals excessively.

3.2 Inflation in Private Law Relationships

Private law relationships between individuals can be affected by inflation if the nominalistic principle prevails. However, the parties can provide some revaluation clauses in their contract to protect themselves against the effect of inflation. Alternatively some corrective mechanisms can be provided through legislation. But what happens if such a clause has not been provided, or if domestic law prohibits revaluation clauses? Do the courts have to take the effect of inflation into account when they are deciding on any disputes that might arise?

Here the question of horizontal applicability of the Convention arises.⁶⁹ Following Hunt's suggestion, according to which Convention rights are not involved in private

⁶⁶ *L. v. Sweden*, (11628/85) 9 May 1986 (DR 47), at 270.

⁶⁷ *Gayduk and Others v. Ukraine*, (45526/99) 2 July 2002.

⁶⁸ *Appolonov v. Russia*, (67578/01) 29 Aug. 2002.

⁶⁹ For literature about the horizontal effect of the Convention see Andrew Drzemczewski, 'The European Convention on Human Rights and Relations between Private Parties' (1979) 26 *Netherlands International Law Review* 163; E. A. Alkema, 'The Third-Party Applicability or "Drittwirkung" of the European Convention on Human Rights' in Matscher and Petzold (eds.), *Protecting Human Rights: The European Dimension* (1988) 33-61; A. Clapham, *Human Rights in Private Sphere* (Oxford: Clarendon Press, 1993); A. Clapham, 'The "Drittwirkung" of

relationships unless the law is involved in such relations between individuals, in which case such a law should be compatible with Convention rights.⁷⁰ So if, although there is no any legal prohibition, the parties ignore the provision of any revaluation clause, the state cannot be held responsible for the loss caused by inflation, unless any other liability can be attributed to it.

According to established case law, a state cannot be held responsible under P1-1 for the losses resulting exclusively from contractual relationships between private individuals unless public authorities are involved in the occurrence of such losses.⁷¹ In *O.N. v. Bulgaria*⁷² the Court found inadmissible the complaints that domestic courts had not taken the effect of inflation into account when deciding on the restitution claim for unjust enrichment. The application was based upon a compensation demand for restitution of unjust enrichment resulting from the rescinding⁷³ of a contract. Under a 1975 contract, the applicant was adopted by Mrs F. and undertook to provide daily care for Mrs F. and her ill sister until the end of their lives, and to pay a certain amount of money (3,800 levs), in exchange for Mrs F.'s undertaking to transfer the ownership of her apartment to the applicant. The contract was rescinded in 1986. The applicant brought an action before the domestic courts seeking restitution of the money he had paid and for the value of the care and services furnished by him under the 1975 contract. In 1991 the domestic court awarded the applicant compensation of 14,1442.62 levs for his services according to prices at the time plus the money he had paid to Mrs F., together with the established legal interest rate, to be accounted as from the date of the bringing of the applicant's action. Appeals that the revaluation should have been made according to up-to-date prices were dismissed. Finally, the applicant was paid the sum of 15,036.33 levs, being the amount decided on by the domestic court in 1991 plus interest (which was far below the rate of inflation).⁷⁴

The applicant complained, *inter alia*, that the Bulgarian courts had delivered unjust decisions when they refused to take inflation into account and awarded him sums many times less than the real value of what he had given to the other party under the 1975 contract. The substance of the applicant's claim was that the responsibility of the state under P1-1 was engaged, in that domestic legislation and judicial practice did not allow recovery of the real value of his claim.⁷⁵

The Court ruled that P1-1:

does not give rise to any positive obligation for the state to maintain the value not only of deposits, but also of claims or any other asset. It does not require from states to apply 'an inflation-rate-compatible' default interest rate to private claims. The Convention cannot be seen as imposing on states obligations

the Convention' in Macdonald et al. (eds.), *The European System for the Protection of Human Rights* (Dordrech: M. Nijhoff, 1993) 163-206; Harris et al., *Law of the European Convention on Human Rights* (London: Butterworths, 1995) at 19-23; Van Dijk and Van Hoof, *Theory and Practice of the European Convention on Human Rights* (London: Kluwer Law Int, 1998) (third edition) at 22-6; Murray Hunt, 'The "Horizontal Effect" of the Human Rights Act' (1998) *Public Law* 423.

⁷⁰ Hunt, n. 69 above.

⁷¹ *Gustafsson v. Sweden*, 25 April 1996 (Reports 1996-II), para. 60.

⁷² *O.N. v. Bulgaria*, (35221/97) 6 April 2000.

⁷³ Rescission of a contract means that it is wiped out from the start. The parties must be put back into the position in which they were before the contract was made. See J.C. Smith, *The Law of Contract* (London: Sweet and Maxwell, 1993) at 149.

⁷⁴ According to applicant's calculation, had the effect of inflation been taken into account, he should have been awarded 595,365.55 levs. See *O.N. v. Bulgaria*, (35221/97) 6 April 2000, at 6.

⁷⁵ *Ibid.*, at 11.

concerning their economic policy in dealing with the effects of inflation and other economic phenomena.⁷⁶

Dramatically, the Court admitted that this judgment left the applicant to bear the consequences of inflation disproportionately, to the benefit of the other party, which seemed contrary to the requirements of justice. However, it noted that ‘imposing on the State the positive obligation to remedy such situations through legislation or judicial decision would be no less than imposing an obligation to guarantee the value of possessions despite inflation or other economic phenomena.’⁷⁷ The Court’s correlation between imposing a positive obligation on a state to remedy the effect of inflation in civil proceedings and imposing an obligation to guarantee the value of possessions seems unfounded. This judgment is also incompatible with the *Aka*⁷⁸ decision. If protection of compensation claims against the effect of inflation is a requirement of P1-1, why should it not be applied here as well?

All acts of a state, whether legislative, executive or judicial, should be compatible with the Convention rights, therefore judicial decisions give rise to responsibilities for a state. Basic fairness requires that public authorities and judicial bodies should not force some individuals to bear a loss in favour of other individuals. Justice may require a state to take some positive actions to exercise fairness. A positive obligation can be inferred from the P1-1. For example, in *Immobiliare Saffi v. Italy*⁷⁹ and *A. O. v. Italy*,⁸⁰ the Court found that lack of police assistance for the execution of a judicial decision (the eviction of a tenant) constituted a breach of applicant’s right to property. It implied that the state had a positive duty to provide police assistance to evict the tenant from the applicant’s apartment. It is also necessary to make a distinction between the effects of price mechanisms and inflation. A state cannot be forced to guarantee always to keep commodity prices at the same level. Prices of commodities can fluctuate according to the conditions of an economy and the results of price mechanism. For example, in this restitution claim the state could not be forced to maintain the value of services at the same level between 1981 and 1996, but it is necessary to pay the current value of services to restore the effect of unjust enrichment.

On the other hand, in *Estima Jorge v. Portugal*⁸¹ the Court ruled that the impact of inflation must be taken into account in the case of procedural delay. In this case the applicant complained that it took thirteen years to execute a notarial deed providing security for a debt. She argued that the delay over the course of the proceedings caused her losses of 2,327,516 escudos (12,655 USD) due to inflation, because in 1981, when she brought her action, her claim was for 553,800 escudos and in 1994 she received 772,135 escudos, being the principal sum due plus interest. She contended that, had the consumer price index been taken as basis, 553,800 escudos in 1981 would have been equivalent to 3,049,651 escudos in 1994. The Court awarded 1 million escudos as pecuniary damages on an equitable basis and also awarded 1 million escudos for non-pecuniary damages. In this case the Court found a breach of Article 6.1, and held the state responsible for the breach.⁸² The amount awarded to the applicant for pecuniary damages was greater than that obtained from a calculation of interest accrued, due at the contractual rate of twelve per cent up to date of payment in full,

⁷⁶ *Ibid.*, at 12.

⁷⁷ *Ibid.*, at 72

⁷⁸ *Aka v. Turkey*, 23 September 1998 (Reports 1998-VI).

⁷⁹ *Immobiliare Saffi v. Italy*, 28 July 1999 (Reports 1999-V), para. 54-6.

⁸⁰ *A.O. v. Italy*, 30 May 2000, (22534/93), para. 25-30.

⁸¹ *Estima Jorge v. Portugal*, 21 April 1998 (Reports 1998-II), at 762.

⁸² See dissenting opinion of Judge Repik in *Estima Jorge v. Portugal*, n. 80 above.

but was not sufficient to compensate for the loss caused by thirteen years of inflation.⁸³ Although some writers find this judgment reasonable,⁸⁴ it seems difficult to infer a clear criterion from this judgment to determine whether a state is responsible for losses caused by inflation in contractual relations between individuals. If a state is responsible for the impact of inflation in the case of a delay in proceedings, why did the Court not award the applicant her loss in full?

Another question is when it should be accepted that a state is interfering with contractual relations. For example, if a rent control law forbids the indexation of rents, should it be accepted as interfering with the contractual relationship between private individuals, and the losses of landlords caused by inflation constitute taking of their property? If the losses caused by procedural delays constitute a deprivation of property, why not the losses caused by rent control laws? It can be said that there is a justifiable aim of rent control laws; they serve the purpose of counteracting inflation. If so, the indexation of deferred obligations also does the same.

However, ideas differ about the inflationary influence of indexation. Detractors claim that indexation will exacerbate existing inflationary pressures and institutionalise the existing rate of inflation. Proponents claim that indexation helps to eliminate inflation by depriving the government and special interest groups of financial incentives by its continuance, and by reducing the unfairness and misallocation of resources normally attributable to inflation.⁸⁵ But the primary purpose of indexation is the alleviation of unfairness and economic distortions caused by inflation.⁸⁶

4. Conclusion

This study shows that, while in their early years the Convention organs were too timid to find a violation of property rights relating to the effect of inflation, it can be observed that interpretation of the Convention has slowly been changing. Following the *Akkus* case the inflation phenomenon became a factor in the breach of property rights. There are still few situations in which the Court has taken the impact of inflation fully into account, and although the Court has provided some shelter against the effect of inflation, it can be said that it has not established clear criteria for the evaluation of the effect of inflation on property rights.

Inflation creates inequality between parties to a legal relationship in favour of a debtor party if the nominalistic principle prevails. In public law relationships, if the debtor party is a public authority inflation causes loss to individuals and benefit to the state. If only a few members of society are subjected to bearing the costs of public policies, their loss should be compensated. For example, if the burden of anti-inflationary policies is imposed only on one group in society (the wages of public employees being frozen for a long time, for example), it results in the relative impoverishment of a group. Therefore the Court should not abstain from evaluating whether such anti-inflationary policies constitute a breach of right to property. Unequal sharing of public burdens can only be justified on the basis of

⁸³ Dissenting opinion of Judge De Meyer in *Estima Jorge v. Portugal*, n. 80 above.

⁸⁴ D. Shelton, *Remedies in International Human Rights Law* (Oxford: Oxford University Press, 1999), at 269.

⁸⁵ Rosenn, n. 8 above, at 371.

⁸⁶ For a similar opinion about the inflationary effect of indexation in wages, see S. Deakin, Jonathan Michie and Frank Wilkinson, *Inflation, Employment, Wage-bargaining and the Law* (Stockwell: The Institute of Employment Rights, 1992), at 6.

redistributive justice considerations or reciprocal benefit. Inflation reallocates resources. Nevertheless, reallocation of inflation serves completely the opposite purpose of redistributive justice considerations. It impoverishes many while it enriches some.

In the area of private law, inflation causes loss for the creditors to the advantage of debtors if the nominalistic principle is strictly applied. The parties can provide some revaluation clauses in their contracts to protect themselves against the effect of inflation. When domestic law allows such clauses and parties ignore the provision of protection clauses, the state cannot be held responsible for the losses creditors have suffered as a result of inflation. But if the state interferes with the situation through judicial or legislative measures and one of the parties suffers loss to the benefit of the other party, it constitutes taking of private property for benefit of other individuals and the state should be responsible for such losses. But, if the conditions of a contract are changed completely as a result of an unexpectedly high rate of inflation, the principle of fairness may require a state to interfere with the contract to revalue the obligations of the parties. If the laws of a state do not allow for the correction of the impact of inflation, where for example a statutory interest law restricts the maximum rate of interest applicable to private contracts at a rate far below the rate of inflation, the state should be held responsible for the losses caused by inflation.

In the case of monetary damage claims, since parties are not in a position to determine protection clauses, damage claims should be protected against the effect of inflation. An important doctrinal device can be the differentiation between debts of value and pecuniary debts. Debt of value or adaptable debt doctrine requires the obligor to pay an economic value rather than a fixed pecuniary sum. If such a doctrine is adopted, then the debt can be readjusted for inflation. Alternatively, statutory interest rates applicable to compensation claims should be indexed to the rate of inflation. Otherwise delayed payments cause losses to creditors, and debtors will benefit from the delay in payment. Such a result is an obvious injustice, and a state that respects the rule of law cannot allow these kinds of injustices. So the Court's decision in *O.N. v. Bulgaria* should be criticised.

In private law transactions it is necessary to distinguish between the effect of inflation and that of price mechanism. A state cannot be obliged to maintain commodity prices at the same level, and cannot be held responsible for price fluctuations in a free market economy. On the other hand, the right to property and the right to fair trial may impose a positive duty on a state to interfere with the private law transactions between individuals to expunge the effect of an unexpectedly high rate of inflation.

This study indicates that the macroeconomic problems and macroeconomic policies of a state are not exempt from coming before the Court. The Court's jurisprudence can improve with regard to the assessment of economic policies of governments, to protect individual rights against them.