

The relationship between Human Rights and Property and the need for comparison in International Law

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1. *Premise*

International law and comparative law are traditionally concerned not only with two different fields of legal studies but they are also characterised by two divergent ways of looking at legal phenomena. Indeed, international law presupposes the idea of the universality of law, a uniform law that is not upset by the fragmentation of local law which can be regional, national or sub-national law. Conversely, comparative law deals with the differences in law, depending on distinct contexts.

The idea of a close relationship between public international law and comparative law and even the apotheosis of a synthesis between these two different fields of law, therefore, may appear as an impracticable encounter between opposites.¹ Nevertheless, the issue of comparative international law has become a major concern in the recent academic debate among international scholars.

The studies of Prof. Roberts² and her suggestion of establishing comparative international law as a field of research³ was a conversation-starter that succeeded in opening a wide debate among international scholars. Interest was aroused on the basis of a state of evidence, namely the multiplicity and multilevel of sources of law, the variety of the political centres of production of law and the abandonment of a Eurocentric

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¹A Roberts and others, 'Conceptualizing Comparative International Law' in A. Roberts and others (eds), *Comparative International Law* (OUP 2018) 3.

²A. Roberts, *Is International Law International?* (OUP 2017).

³Roberts and others (1) 6.



view of law. These all reveal the inadequacy of some dogmatic categories (such as the presumption that international law is homogeneous) in describing the contemporary world and illustrate the need for the jurist to be equipped with tools capable of tackling the complexity.⁴

The same topic has been addressed by comparatist scholars, who have highlighted how the close relationship between the fields of public international law and comparative law also requires a rethink of some theoretical approaches in comparative law, such as the utility of the traditional classification of legal systems to describe some legal phenomena.⁵

Together with the appreciation expressed for a comparative international law approach there was also some criticism⁶ and concern, which focused attention on many unclear questions: the method of distinction between comparative and international law, the distinction between law and methodology, the enduring value of the traditional categories of law and fields of study, the risk of fragmenting international law, as well as relativising any legal phenomenon.

The aim of this paper is not to answer these difficult questions, but simply to show a few, scattered examples of the utility of comparative international law as a way of looking at legal phenomena. This happens especially in those areas of law, such as property law, that tend to change form depending on the context. The following paragraphs aim to give an insight into this feature of property and formulate some preliminary remarks on the adequate method for investigating it.

2. *Property and contexts: The mutual influence between international Human Rights and national Property Law*

The idea of property calls to mind a variety of linguistic uses and meanings, depending on the different forms of belonging recognised in the legal systems, in the course of history and in the contemporary

⁴ M Koskenniemi, 'The Case for Comparative International Law?' (2011) 20 *Finnish YB Intl L* 1, 4; A Roberts, 'Is International Law International? Continuing the Conversation' (9 February 2018) available at <www.ejiltalk.org>.

⁵ M Siems, *Comparative law* (2nd edn CUP 2018) 291.

⁶ S-E Pantazopoulos, 'Is International Law International? Exploring its normative underpinnings' (2018) 54 *QIL-Questions Intl L* 5-19.



world.⁷ Property is traditionally a field of law where national law is particularly influential and there is a great divide between common law and civil law traditions. This variety of forms of property is also traceable in the history of civil law, comparing the patrimonial nature of property accepted in the *jus commune* from the XII to the XVIII centuries with the absolutist nature of property recognised by the codifications of the XIX century.

The identification of property as a distinctive element of national States makes property a field of law characterised by a major resistance to any process of harmonization of law, both at European Union⁸ and international level. At the same time, property in terms of the right to own, being a value common to all the western legal systems, led to the gradual formation of an international property law. A main (but not exclusive) source⁹ of international property law is the European Convention of Human Rights and Fundamental Freedom (ECHR) that, in Article 1 of the first protocol (hereafter A1P1), guarantees the right to the peaceful enjoyment of possessions.

All these different forms of property do not coexist as watertight compartments, but they contaminate each other so as to create the presence of different notions of property in the same legal system where elements of continuity and discontinuity then come into being.

Along these lines there is a mutual influence between the international and the national ideas of property that is particularly evident when looking at the influence of human rights law on national property systems and vice versa. The following are two examples of this dynamic.

2.1. *The right of respect for home and the domestic exclusiveness of ownership: Examples of contamination*

The power of exclusion is a common feature of ownership in all the western legal traditions, even if exclusiveness is interpreted differently

⁷ Cf L MOCCIA 'Basic Ways of Defining Property' in *Colloqui in ricordo di Michele Giorgianni* (Esi 2007) 761-782.

⁸ Cf art 345 TFEU: "[...] Treaties shall in no way prejudice the rules in Member States governing the system of property ownership".

⁹ Cf JG Sparkling, 'The Emergence of International Property Law (2012) 90 North Carolina L Rev 461-590, who identify four different sources of international property law.



depending on the national property systems. Indeed, in the civil law systems, exclusiveness is closely related to the absolute nature of property, whereas in common law systems the exclusive power of the owner is compatible with a fragmentation of ownership.¹⁰

The need for the national courts to make the power of exclusion of the owner conform with the international human rights law influenced the national definitions of exclusiveness both in common and in civil law and it led scholars to theorise human rights as a reservoir of entitlement.¹¹ Along these lines, a human right could be the basis for opposing the power of the owner to evict the trespasser when the eviction, although lawful, leads to a violation of a human right of the occupier. Scholars have talked about human rights oriented property¹² as a transnational property right modelled on human rights jurisprudence.

The English case law developed on the right to respect for home shows a significant example of this phenomenon. In the famous *Pinnock*¹³ case, the Supreme Court of the UK stated that a public authority may deprive a person of his home only if the order of possession is lawful according to domestic law and is proportional, according to Article 8 ECHR as interpreted by the European Court of Human Rights. As a result, Article 8 ECHR, ‘[...] may, albeit in exceptional cases, justify (in ascending order of effect) granting an extended period for possession, suspending the order for possession on the happening of an event, or

¹⁰ For the first references cf M Graziadei, ‘The Structure of Property Ownership and the Common Law/Civil Law divide’ in M Graziadei, L Smith (eds) *Comparative Property Law. Global Perspectives* (EPL 2017) 71-99.

¹¹ Cf K Gray ‘Land Law and Human Rights’ in L Tee (eds) *Land Law: Issues, Debates, Policy* (Willan 2013) 211-245, at 234; LF O’Mahony, ‘Eviction and The Public Interest: The Right to Respect for Home in English Law’ in RP Malloy, M Diamond (eds) *The Public Nature of Private Law* (Routledge 2016) 89-132 at 92.

¹² A Goymour, ‘Proprietary Claims and Human Rights a “Reservoir of Entitlement”?’ (2006) 65 *Cambridge L* 696; A Goymour, ‘Property and Housing’ in D Hoffman (eds) *The impact of UK Human Rights on Private Law* (CUP 2011) 249-299, at 294; A Hudson (ed) *New perspective on Property law, Human rights and the Home* (Cavendish 2012); on the topic cf JG Sprankling *International Property law* (OUP 2014) 123.

¹³ *Manchester City Council v Pinnock* [2010] UKSC 45, see also *Pinnock v UK* App no 31673/1 (ECtHR, 13 September 2013); cf. Lord Walker of Gestingthorpe ‘The Saga of Strasbourg and Social Housing’ in N Hopkins (eds.) *Modern Studies in Property Law* (OUP 2013) 7, at 3.



even refusing an order altogether'.¹⁴ Lord Neuberger, in his opinion, commented: 'Unencumbered property rights, even where they are enjoyed by a public body such as a local authority, are of real weight when it comes to proportionality'.¹⁵

The question of the use of Article 8 ECHR as a defence against eviction was raised in the English courts also in relation to controversies between private parties. So in the *Malik v. Fassensfelt*¹⁶ case the Court of Appeal did not exclude the use of Article 8 ECHR as a defence against private landlords. In following cases, however, a more restrictive interpretation was accepted. More recently, in the *Macdonald v. Macdonald*¹⁷ case, the Court of Appeal stated: 'There is no "clear and constant" jurisprudence of the Strasbourg court that the proportionality test implied into Article 8(2) applies where there is a private landlord'.¹⁸ Again, in the *Hillingdon LBC v. Holley*¹⁹ case, the Supreme Court of the UK refused permission to appeal against the Court of Appeal's decision according to which the length of the period of residence was not sufficient to establish an Article 8 defence against the prohibition of second succession to a secure tenancy established by English law.

The use of Article 8 ECHR as a defence against eviction has also been analysed by the civil law courts.²⁰ The Dutch Supreme Court²¹ stated that, on the basis of Article 8 ECHR, the judge has to determine the proportionality of eviction. The French *Conseil d'Etat*²² established that the use of force to evict a person from a house could be denied by the competent authority when it infringes upon the dignity of the person. This judgement was criticised by scholars who highlighted the ex-

¹⁴ *Manchester City Council v Pinnock* (n 13) para 62.

¹⁵ *ibid* para 54.

¹⁶ *Malik v Fassensfelt* [2013] EWCA Civ 798.

¹⁷ *Macdonald v Macdonald* [2014] EWCA Civ 1049.

¹⁸ *ibid* para 19.

¹⁹ *Holley v Hillingdon London Borough Council* [2016] EWCA Civ 1052.

²⁰ The effects of art 8 on the owner's power of eviction according to domestic law are particularly evident in the jurisprudence on the protection of the Roman lifestyle, for the first references of P KENNA, D GALLIUTE 'Growing Coordination in Housing Rights Jurisprudence in Europe?' (2013) 6 *European Human Rights L Rev* 606-614.

²¹ Hoge Raad 28-10-2011 (2013) *Nederlandse Jurisprudentie* 153, on the point of M Vols, M Kiehl, J Sidoli del Ceno, 'Human Rights and Protection against Eviction in Anti-social Behaviour Cases in the Netherlands and Germany' (2015) 2 *European J of Comparative L and Governance* 156-181.

²² *Conseil d'État Mme. C*, no 343051 (15th May 2013).

istence of two different meanings of property in the French system: traditional property based on Article 544 of the French civil code and property as patrimony, based on the use and access to patrimony.²³ The protection of human rights may be the basis for a right of property according to the latter meaning, by a person who has no legal title to ownership according to national law.

These examples show how the domestic idea of exclusiveness is influenced by the international human rights jurisprudence, but they are also evidence of the impact of the national courts' interpretation of the right to respect for home, as stated by Article 8 ECHR.

2.2. *The international property right and its contextual variations:
The McMaster v Scottish Ministers case*

The mutual relationship between international human rights law and the different contextual dimensions of property also influences the meaning of the right of property under A1P1. A recent Scottish case, *McMaster v Scottish Ministers*, offers an example of this dynamic.

The background to the case concerns a practice developed by Scottish landlords to avoid the establishment of statutory tenancies for an indefinite period of time under Scottish legislation. It consists of granting tenancy to limited partnership: the owner of the land is the limited partner and the person in charge of the farming operations is the general partner. So, the limited partner can dissolve the partnership and recover the possession of the land by granting notice to the general partner.

In 2002, the Scottish Executive announced an anti-forestalling provision aimed at stopping this practice and to give general partners a security of tenure.²⁴ Landlords reacted by issuing dissolution notices to avoid the application of the provision but Parliament established, by the Agricultural Holding (Scotland) Act 2003, that all the notices granted after the announcement of the anti-forestalling provision were not valid and that the tenancies could continue in existence. The case reached the

²³ Cf V Donier 'Expulsion locative, droit au logement et référé-liberté: réflexions sur quelques incohérences, Note sous CE, ordonnance, 5 novembre 2014, Mme C, no 385431 (2015) *Revue de Droit Sanitaire et Social* 170.

²⁴ Scottish Executive, Draft Agricultural Holdings (Scotland) Bill (April 2002).



Supreme Court in the UK.²⁵ The Court stated that the 2003 Act violated the landlords' right to the full enjoyment of their possession under A1P1. Consequently, the Scottish Ministers in 2014 passed a Remedial Order to correct the defect of the Act. The effect was that the general partners ceased to be entitled to secure tenancies and the landlords were again allowed to terminate tenancies.

In the *McMaster* case some general partners brought a case against the Scottish Ministers before the Outer House, arguing that the Remedial Order was in breach of the A1P1 as it deprived them of possession without an express provision for the payment of compensation. The resolution to the case by the Court required the investigation of a set of legal issues, such as whether the petitioners held a possession under A1P1; whether the Remedial Order interfered with the possession; whether the interference met the test of legal certainty and was justified by the general or public interest; if there was proportionality between the means selected and the end sought to be achieved. Most of these questions necessitated the prior determination of what possession is and what it is not. Indeed, A1P1 is applicable to petitioners only if their position has the nature of possession and the loss of secure tenancy under the Remedial Order has the nature of a deprivation of possession.

The petitioners emphasised that their position had the nature of possession according to the meaning of A1P1 under two forms: the partnership they had at the time of the Remedial Order and the legitimate expectation based upon the 2003 Act to acquire secure tenancy.

In the judgement before the Outer House Lord Clark denied that the expectation to acquire secure tenancy falls under the meaning of A1P1. The concept of possession for the purpose of A1P1 included a legitimate expectation of acquiring possession.²⁶ Legitimate expectations, in the case law of the ECHR, do not have an autonomous relevance, but they must be attached to a proprietary interest. Lord Clark denied the existence of a petitioners' proprietary interest. This solution seems to have been achieved by interpreting the expression 'proprietary interest' according to domestic law. Along these lines, the Scottish property system filters through the concept of 'propriety interest' in the definition of possession and reduces the scope of the international

²⁵ *Salvesen v Riddell* [2013] UKSC 22.

²⁶ *McMaster v Scottish Ministers* [2017] SLT 586 para 127.



property right in the concrete case.

The same dynamic is traceable in the interpretation of deprivation of possession. Again, the idea of property embraced by the interpreter impacts on the meaning of deprivation and influences the effect of the Conventional right. While the expectation to acquire secure tenancy is not possession according to A1P1, Lord Clark accepted that the partnership the petitioners had at the time of the Remedial Order could be qualified as possession. The Order, however, does not deprive the petitioners of possession but it subjects their partnership to a different condition and establishes a different use of their possession. Lord Clark's arguments recall the idea of property as a bundle of rights.

The theory of a bundle of rights conserves the legacy of the feudal system and implies a fragmentation of ownership: the property is constituted by multiple uses pertaining to the land, each one is a right, a stick in the bundle.²⁷ Under this definition any stick in the bundle is property and the loss of a stick is a deprivation of property. Notwithstanding the adherence of the bundle of rights theory, Lord Clark concludes that the deprivation of a right of the bundle is a regulation of the use of property instead of a deprivation. Thus, the notion of property shifts from a subjective idea of property as a bundle of rights to an objective idea of property as a physical entity.²⁸ These different concepts overlap in the opinion of the Lord Justice, with relevant implications for the definition of what possession is and what deprivation is under the A1P1.

The Outer House decision was appealed before the Inner House²⁹ which rejected the appeal and adhered to the definition of possession emerging in the considerations of Lord Clark. In the unanimous opinion delivered by Lord Drummond Young the importance of context in the application of the human property right is underlined more than once. The Court states that the Convention is to be applied in a manner that is practical and effective, having regard to the reality of the situation rather than to legal niceties. This does not mean that the actual validity of a legal position in terms of domestic law may be neglected. The

²⁷ Cf D Maxwell 'Article 1 of the First Protocol and a Tenants Right to Compensation' (2017) 81 *Conveyancer & Property Lawyer* 475-487, at 480.

²⁸ Cf D Maxwell, 'Mistaken Rights to Property, Agricultural Tenancies, and Good Governance: *McMaster v Scottish Ministers*' (2018) 10 *J of Planning and Environmental L* 1076-1089, at 1082.

²⁹ *McMaster v Scottish Ministers* [2018] CSIH 40.



principles of A1P1 must be applied on the basis of the analysis of domestic legislation, in its contextual dimension. ‘Anything else would lead to a total incoherence’.³⁰

The petitioners asked permission to appeal to the United Kingdom Supreme Court under section 40 of the Court of Session Act 1988. The Inner House³¹ refused the permission, rejecting the assumption that the Court did not consider the position of the petitioners as it really was behind domestic classifications: ‘We made it clear in our opinion that we had regard to the reality of the situation rather than to legal niceties, and we applied such an approach throughout’.³² One may wonder if the Supreme Court in the UK or the European Court of Human Rights would use the same method to ‘name’ reality.

3. *Penalty or use of Property? The GIEM v Italy case and the question of method*

The multiple dimensions of property (international, national, transnational) call for the need to look at property law from a point of view capable of distinguishing the different forms that property may assume and, ultimately, to establish what property is and what it is not. The *McMaster* case demonstrates that the problem does not consist simply in the basic question of definition, but it impacts on the application and scope of international property law and on the solution of concrete cases.

The same question, even if partially related to the application of different rules, was recently dealt with by the Grand Chamber of the European Court of Human Rights in the *GIEM v. Italy*³³ case. The decision of the Court demonstrates the impact of the methodology used by a court to ‘name things’ on the determination of the content of international law rules.

The case originated from three applications against Italy. The defendants, who had suffered confiscation of their land because of unlaw-

³⁰ *McMaster v Scottish Ministers* (n 29) para 21.

³¹ *McMaster v Scottish Ministers* [2018] CSIH 64.

³² *McMaster v Scottish Ministers* (n 31) para 4.

³³ *G.I.E.M. S.R.L. and Others v Italy*, App nos 1828/06, 34163/07 and 19029/11 (ECtHR, 28 June 2018) para 564.

ful site development, alleged that Italy had violated, among others, Article 7 ECHR and A1P1.

According to Italian law,³⁴ as consistently interpreted by the Court of Cassation, confiscation is not always connected with a criminal offence, but has the nature of an administrative measure. Indeed, the mere fact of an unlawful site development is a sufficient requirement to apply a measure of confiscation, whereas the presence of the mental element is not always required. The defendants argued that the Italian confiscation was in reality a penalty and its application, regardless of the existence of the mental element, constitutes an infringement of Article 7 ECHR.

The Court had to establish what confiscation actually meant in international law, if the Italian administrative measure was a confiscation according to international law and, behind appearances, if it was in substance a penalty.

In the judgement of the Grand Chamber it clearly emerges that the problem of establishing the nature of confiscation – whether a penalty or an administrative measure – is a manifestation of the influence of the international human rights law on domestic law and of the resistance of the latter to the attractive force of the universal human rights discourse. The scenario of this relationship is the dialogue between the international and national courts, on which a huge part of the judgement is focused. From a reading of the opinions of the Judges, two specular interpretations appear: one privileges a unitary approach, looking at the varying national applications of international law as a risk of fragmentation; another interpretation, conversely, attributes a significant role to national jurisprudence in the definition of the meaning and nature of the international rule.

Judge Pinto de Albuquerque, in his partly concurring and partly dissenting opinion,³⁵ highlighted the importance of keeping the universality of human rights and reaffirmed that in Europe the Court is the first interpreter of this universality. The interpretative authority of the

³⁴ Cf L no 47 of 28 February 1985, repealed and substituted by DPR no 380 of 6 June 2001, regulating the *Testo unico delle disposizioni legislative e regolamentari in materia edilizia*.

³⁵ Judge Pinto de Albuquerque, *G.I.E.M. S.R.L. and Others v Italy* (n 33) para 81.



Court cannot depend on the implementation of Conventional rights by domestic authorities.³⁶

Conversely, an interpretation of confiscation that underestimates the contextual manifestations of the measure risks compromising the effectiveness of the Convention. In her concurring opinion Judge Motoc stated:

‘As European Judges, we look at the dialogue between judges from our own perspective, that of the application of the European Convention of Human rights. But to avoid reverting to a monologue, we need to understand the national authorities and sometimes, as Churchill supposedly once said, “courage is what it takes to stand up and speak; courage is also what it takes to sit down and listen”’.³⁷

Listening to the national authorities implies contemplating the contribution of the domestic authorities in defining the content of confiscation under international law. Thus, the interpreter has to find the right balance between keeping the universal dimension of international law and recognising a role of domestic jurisprudence in defining confiscation.

The opinion of Judges Spano and Lemmens, partly concurring and partly dissenting with the majority, show the utility of comparative law in tackling this challenge. The Judges assumed a functionalist approach and compared the function of confiscation in international law³⁸ and in Italian law in order to ascertain, independently of the use of the legal terms, what Italian law aimed to achieve through confiscation of land. The real nature of Italian confiscation is to be appreciated in the comparison between domestic and international law: Italian confiscation was not a penalty – in their opinion – because the aim of the measure was not the payment of a penalty but the control of the use of land. This

³⁶ Judge Paulo Pinto de Albuquerque, referring the Court jurisprudence on the question of consolidated law, *ibid* 132-133, paras 93-94.

³⁷ Judge Iulia Motoc, *G.I.E.M. S.R.L. and Others v Italy* (n 33) para 72.

³⁸ The meaning and the nature of confiscation in international law are analysed by the Court, *G.I.E.M. S.R.L. and Others v Italy* (n 33) 137 paras 139 ss. The Court investigates some international conventions where a confiscation procedure is established to tackle cross-border crime and concludes that in these international agreements confiscations presume a prior conviction. Conversely, non conviction based confiscation remains relatively exceptional in international law.

approach allows the interpreter to recognise some correlated phenomena such as the rise of a transnational notion of confiscation, that does not entirely correspond to the international definition nor to the national measure for controlling the use of land. This notion results from the attempt of the Italian courts to conform with the Conventional rights, as interpreted by the European Court of Human rights and, at the same time, to uphold the Italian approach to the sanctions mechanism relating to the use of land.³⁹ In fact, under Italian law confiscation remains an administrative measure, but it requires an intellectual link with the unlawful site development when the author of the offence is an individual (not in the case of legal entities). Thus, the opinion of the Judges Spano and Lemmens shows how the distinction between penalty and property and, ultimately, the meaning of confiscation depends also on the method used to ‘name things’.

4. *International Law versus/and contextual law and the utility of comparison: Final (but not conclusive) remarks*

The relationship between human rights and property highlights the double dimension of property, which although a universal concept, changes form according to the specific legal context in which it operates. This feature of property is traceable, to different extents, in all the legal phenomena as the law is a universal experience but, at the same time, has a relative character; it oversteps the contents of rules to take root in the history, culture and society of a system and includes also the lawyer’s way of thinking and expressing legal rules.⁴⁰

In contemporary society, where globalization is gradually erasing legal borders but also emphasising contrasting views of the world and,

³⁹ Judges Robert Spano and Paul Lemmens, *G.I.E.M. S.R.L. and Others v Italy* (n 33) 137 para 6: ‘Or, in the words of the Constitutional Court, they tried to “ascribe a meaning to the provision of national law that [came] as close as possible to that endorsed by the European Court, but the domestic court did not change their assessment about the nature of the confiscation order’. On the topic cf *Sud Fondi S.r.l. and Others v Italy*, App no 75909/01 (ECtHR, 20 January 2009).

⁴⁰ Among the vast bibliography on the topic, for first references on the western legal tradition cf HJ Bernam, *Law and Revolution. The Formation of Western Legal Tradition* (Harvard UP 1983) 7.



consequently, contrasting approaches toward law, a shift in legal methodology is required. Lawyers need a bulk of concepts and legal instruments to help them keep together different and sometimes diverging legal concepts. With regard to the relationship between human rights and property this means overcoming the logic of opposition between universality and contextuality, the uniformity of human rights law and the particularism of national interpretations, in order to attain the logic of 'complementary nature of opposites'.⁴¹ In other words, legal scholars need to read legal phenomena in a way that does not hide the different applications of international rules behind the veil of universality or, conversely, disperse the international meaning of a rule in a local particularism without understanding the common international component of each contextual variation. From this perspective, the benefit of a comparative international approach does not flow from a new field of law, where comparative law and international law blend together, but from the use of comparison as a bridge to build relationships between the different dimensions of law and from which to look at law as a living experience in its relationship with other normative experiences and the world space around them. Therefore, the task of a comparative international approach may consist in exercising a constant *mediumship*⁴² between universality and relativity, encouraging a way of looking at legal diversity from a global viewpoint. Along these lines, the studies of Prof. Roberts and others on the matter represent the express acknowledgement of an insidious but irreversible process of adaptation of legal methodology to a changing (legal) world.

⁴¹ L Moccia, 'Legal Comparison and European law: Or the Paradigm Shift from a Territorial to a Spatial Viewpoint, in the Prospect of an Open and Cohesive Society based on European Citizenship as Model of Plural and Inclusive Citizenship?' (2017) 2 *La Cittadinanza Europea* 27-39, and references *ivi*. The Author quotes the example of the Chinese thinking as *ars contextualis*, *ibid* at 29.

⁴² *ibid* 30.