Expropriation and the 'three rules' in Article 1 of the First Protocol to the ECHR

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Abstract

Article 1 of the First Protocol to the European Convention on Human Rights contains the right to peaceful enjoyment of possessions. The European Court of Human Rights has identified 'three rules' within A1P1, by which state action may be categorised as a deprivation, a control of use or a more general interference with the peaceful enjoyment of possessions. The case law reveals apparent inconsistencies, whereby actions which result in permanent deprivation of ownership are nevertheless categorised in some cases as a control of use. It can be argued that the court is motivated here by values not articulated within the text of A1P1: if the applicant 'deserves' compensation, the state action is more likely to be termed a deprivation; if the applicant is not 'deserving', it will be a control of use. This question of who 'deserves' what in this context raises a more fundamental issue - why protect property as a human right at all?

Introduction

This paper forms part of a larger project which makes use of constitutional property theory, particularly the work of Carol Rose, as a basis for analysis of the jurisprudence of European Court of Human Rights in respect of Article 1 of the First Protocol ('P1-1') to the European Convention on Human Rights ('the Convention'). The project explores the idea that the Strasbourg court vacillates between competing conceptions of property law when determining P1-1 applications. The existence of these different conceptions is not acknowledged within the jurisprudence, and judgments make no reference to which conception has been adopted in a particular case or why. Instead, the court tends to make appeals to concepts such as ‘justice’ and ‘fairness’ in justifying its decisions. The project will argue, however, that these concepts are fairly nebulous in the property law context unless they are tied to some underlying normative understanding of property as an institution. The result is that the case law on P1-1 lacks coherence, diminishing the protection that the right to peaceful enjoyment of possessions can provide.

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The focus of this paper is the distinction drawn between deprivation of possessions and control of the use of property in the Strasbourg jurisprudence. Within the case law, examples can be found of situations in which the action of the state, despite amounting to straightforward removal of the title of the applicant in every normal understanding of that term, are nevertheless categorised as a control of use. The paper posits that this incoherence in the case law results from the Strasbourg court's unexamined adoption of a preference-satisfaction view of property in relation to the requirement of compensation for deprivations. Since the compensation requirement was imposed without explanation of the underlying principle, it has become impossible for the court to discern when exceptions to the rule can be justified. Accordingly, when the court determines – again on the basis of an unarticulated normative value - that a particular deprivation does not merit compensation, it has no option but to categorise the state action as a control. The overall result is that the categorisation of state action as a deprivation or a control has in some areas become divorced from the regular meaning of those terms, making the ambit of the protection offered by P1-1 very difficult to determine.

The paper will begin with a very brief outline of Rose's 'property as preference-satisfaction' framework, the theoretical keystone on which the subsequent jurisprudential analysis is based. It will be argued that the Strasbourg court has largely adopted the preference-satisfaction conception of property within its jurisprudence. In the second section, the paper will go on to explain the 'three rules' contained within P1-1 according to the Strasbourg court, including an explanation of the difference between deprivation of possessions and control of use. The third section will provide several illustrations from the case law of situations in which state action which might normally be considered a control of use has been classified as a deprivation of possessions. In the fourth section, the paper will examine how these categorisations are driven by the requirement of compensation for deprivations, and a call will be made for explicit discussion of the normative values underpinning the decisions of the court within the judgments themselves.

I: Property as Preference Satisfaction

Carol Rose and the practices of property

In a seminal article[2] developing her earlier critique of US takings jurisprudence,[3] Carol Rose suggests that the 'muddle'[4] in the case law results from unacknowledged conflict between two core

[2] C. M. Rose, '"Takings" and the practices of property: Property as wealth, property as "propriety"' (1991) 33 NOMOS 223-247, reprinted in C. M. Rose, *Property and persuasion: essays on the history, theory, and rhetoric*

conceptions of property. Rose first sets out the framework she refers to as 'property as preference-satisfaction'.[5] In this account, the key purpose of any property law regime is maximisation of the satisfaction of individual preferences through maximisation of wealth. Property law facilitates this process of wealth maximisation by enabling legal persons to obtain secure rights in things. A person has an incentive to work on enhancing the value of her things, since her secure rights give her confidence that she will reap the rewards of that effort in due course. In so doing, she increases the wealth of society as a whole.[6] Rose describes this as:

> [T]he standard but very powerful story about property as a preference-satisfying institution. According to that story, a property regime satisfies preferences not by divvying up a finite bag of resources but rather by encouraging behaviour that enhances resources' value, making the total bag a whole lot bigger and more diverse.[7]

In a preference-satisfaction account of property, governmental taking of property should be minimised. Where such takings *are* legitimate – in other words, where societal wealth can be enhanced more effectively through governmental action, paradigmatically by the creation of large-scale infrastructure – compensation must be paid to expropriated owners. This is necessary both to recognise the effort already expended by the owner on her thing, and to reassure other owners that the effort they expend on *their* things will pay off in the end.[8] Society must remain confident that the effort expended on enhancing the value of assets will pay off: otherwise, the effort will not be made and societal wealth as a whole will decline.

The alternative conception of property law rules suggested by Rose is termed 'property as propriety.' In this account, the key purpose of property as an institution is to ensure that each person or entity has 'that which is needed to keep good order in the… body politic':[9] no more and no

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of ownership (Boulder, Colorado, Westview Press, 1994) 49-71. References in these footnotes are to the reprint.

[3] C. M. Rose, 'Property rights, regulatory regimes and the new takings jurisprudence – an evolutionary approach' (1990) 57 Tenn L Rev 577; C. M. Rose, '"Mahon" reconstructed: why the takings issue is still a muddle' (1984) 57 S Cal L Rev 561.

[4] Rose, "Mahon" ibid.

[5] Rose's account here builds on work by Stephen Munzer; see S. Munzer, 'Compensation and government takings of private property' (1991) 33 NOMOS 195-222.

[6] Rose (n2) 52-55.

[7] Rose(n2) 54-55.

[8] Rose (n2) 57.

[9] Rose(n2) 58.

less. Rose aligns this conception of property law with the Jeffersonian ideal of civic republicanism, in which ownership of property allowed individuals the independence necessary to participate in the creation and maintenance of the public good, referred to by Jefferson as the pursuit of 'republican virtue.'[10]

In the proprietarian framework, Government expropriation of property is legitimate where the owner does not require that asset in order to effectively perform her role in society. If a person has more than she needs to meet her societal responsibilities, there is no justification for retaining the excess. Compensation may be appropriate, but it need not be 'market value' – only compensation sufficient to reflect the needs attaching to her social role.

P1-1 and property as preference-satisfaction

An examination of the text of P1-1[11] sheds little light on the question of which of Rose's understandings of property was intended to be incorporated into the ECHR. In fact, the *travaux préparatoires* to the Convention make plain that the text was deliberately drafted in terms which allowed for more than one understanding of the meaning of property, or the purpose of protecting it as a human right. Such ambiguity was necessary because the drafters of the Convention were unable to reach agreement on these issues.[12] The hope was that clarity as to the meaning of the article would emerge over time through the case law on P1-1.[13]

Such clarity has, perhaps unsurprisingly, failed to materialise. However, an argument can be made that the Strasbourg court has tended towards a preference-satisfaction view of property law. No clearly articulated adoption of this ideology can be found within the jurisprudence. However, its

[10] Rose(n2) 61-62.

[11] The English text reads 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 the State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure payment of taxes or other contributions or penalties.

[12] For a detailed treatment of the drafting process, see A. W. B. Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford, OUP, 2001), ch15.

[13] In the Council of Europe, Directorate of Human Rights, *Collected edition of the 'Travaux Préparatoires' on the European Convention on Human Rights* (The Hague, Martinus Nijhoff, 1975), see for example: Mitchison at vol 6, 97-98; Pernot at vol 6, 106.

effects can be seen in the court's approach to defining 'possessions' for the purposes of P1-1.[14] Economic value is at the core of the determination as to what is a possession,[15] whether in respect of tangible[16] or intangible[17] assets. The value must be capable of transfer or some other form of realisation.[18] An interest with no economic value, such as the right to pursue a hobby,[19] or the right to hold a driving licence (when not being used for employment-related purposes)[20] will not constitute a possession. Where an applicant had a legitimately held expectation of acquiring an interest, that in itself will be sufficient to attract the protection of P1-1.[21] In brief, the focus is on property as wealth. The proprietarian understanding of property would tend to argue for a definition of possessions which included rights to the minimum assets required to survive. Traces of this idea can be found in the occasional decision of the Strasbourg court,[22] but as a general rule, the court is clear that P1-1 provides no right *to* property. The preference-satisfaction account of property is more readily discerned in the jurisprudence.

II: The 'Three Rules'

[14] This term has an autonomous meaning for the purposes of the Convention per *Beyeler v* Italy (2001) ee EHRLR 52. For a discussion of the case law interpreting 'possessions', see T. Allen, *Property and the Human Rights Act 1998* (Oxford, Hart, 2006), 40-78.

[15] In the admissibility decision in *Bramelid and Malmström v Sweden* (8588/79), 12 December 1983, the Commission noted that the company shares concerned in the dispute certainly had an economic value and must therefore be possessions.

[16] See for example: *Akdivar v Turkey* (1996) 23 EHRR 143 (ownership of land); *Wittek v Germany* (2005) 41 EHRR 46 (usufruct over land).

[17] See for example: *Intersplav v Ukraine* (803/02) 9 January 2007 (right to a tax refund); *Paeffgen GmbH v Germany* (25379/04) 18 September 2007 (registration of domain names); *Smith Kline and French Laboratories v the Netherlands* (12633/87) 4 October 1990 (patent); *Melnychuk v Ukraine* (2006) 42 EHRR 39 (copyright).

[18] See *Durini v Italy* (19217/91) 12 January 1994, in which a non-alienable usufruct held by the first-born son in respect of the ancestral home was held not to be a possession, in contrast to the transferable usufruct found to be a possession in *Wittek v Germany* (n16).

[19] *RC, AWA and Ors v United Kingdom* (1998) 26 EHRR CD 10.

[20] *X v Federal Republic of Germany* (9177/80) 6 October 1981.

[21] The rules here are usefully elaborated in a series of cases concerning licences, with the broad principle that where a licence has been granted on certain conditions, and the licence holder has dutifully fulfilled those conditions, they have a legitimate expectation that the licence will be retained: see *Batelaan and Huiges v Netherlands* (10438/83) 3 October 1984; *Van Marle v Netherlands* (1986) 8 EHRR 483; *Pudas v Sweden* (1988) 10 EHRR 380; *Trë Traktorer Aktiebolag v Sweden* (1991) 13 EHRR 309. The possession in question here has been identified as the income and goodwill generated by holding the licence.

[22] See, for example, the line of cases in which the court came to accept that payment of a welfare benefit was a possession in the meaning of P1-1: *X v Netherlands* (4130/69) 20 July 1971; *G v Austria* (10094/82) 14 May 1984; *Müller v Austria* (5849/72) 1 October 1975; *Gaygusuz v Austria* (17371/90) 16 September 1996; *Stec v United Kingdom* (2006) 43 EHRR 47; *Andrejeva v Latvia* (55707/00) 18 February 2009; *Moskal v Poland* (10373/05) 15 September 2009.

In *Sporrong and Lönnroth v Sweden*,[23] the Strasbourg court set out the three rules which are said to comprise P1-1:

> The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognises that States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained within the second paragraph.[24]

The relationship between the three rules is open to debate. In a much cited dictum from *James v United Kingdom*,[25] the court indicated that deprivation (the second rule) and control (the third rule) are particular instances of the broader category of interference with peaceful enjoyment of possessions (the first rule), and it seems clear that the court is bound to discount both the second and third rules before it can find the first rule applicable.[26] The court has also suggested that the categories operate as a set of concentric circles, with deprivation a subset of control, which is in turn a subset of general interference with possessions.[27]

The second rule: deprivation of possessions

The second rule covers both formal and *de facto* expropriation,[28] and the court made use of the factual situation in *Sporrong* to discuss when state action falling short of *de jure* loss of title would nevertheless amount to deprivation of possessions for the purposes of P1-1. The two applicants in the case owned properties in Stockholm which had been the subject of expropriation permits for 23 years and eight years respectively. The permits earmarked the buildings in question for later expropriation by the state as part of a redevelopment planned for the area. The properties were subject to a prohibition on construction for 25 years and 12 years respectively for the same reason. The redevelopment design changed over time, and ultimately the permits were cancelled without the expropriation taking place. The applicants contended that the limitations on their properties

[23] (1979) 2 EHRR 350.
[24] ibid., para 61.
[25] (1986) 8 EHRR 123
[26] Ibid, para 37.
[27] *Allegemeine Gold-und Silberscheideanstalt v United Kingdom* (1987) 9 EHRR 1.
[28] *Bramelid and Malmström v Sweden* (8588/79) 12 December 1983 at p82.

throughout the time period in question were so excessive that their property rights had effectively been deprived of any substance.

By a very slim margin,[29] the court disagreed. The focus of the judgement was on the powers that remained to the applicants whilst the properties were subject to the permits. The applicants' rights were certainly precarious whilst the threat of expropriation loomed, and their ability to sell their properties on the open market was therefore considerably reduced. In addition, their rights to develop the properties were circumscribed in many respects.[30] However, the possibility of sale existed nevertheless: the Swedish government provided evidence of properties subject to similar restrictions which had, as matter of fact, been sold during the relevant time period.[31] The court concluded:

> Although the right in question lost some of its substance, it did not disappear. The effects of the measures involved are not such that they can be assimilated to a deprivation of possessions.[32]

The right to dispose of the property in question is central to the question of deprivation, but not determinative. In fact, very few *de facto* deprivations have been recognised by the court in the years subsequent to *Sporrong*,[33] even where the owner is subject to severe restrictions on his use of the property with the result that his ability to dispose of the property is rendered useless in fact, if not in law.[34]

The third rule: control of use

The court has not scrutinised the meaning of 'control of use' in the same level of detail. Effectively, state action will amount to a control when it falls short of the standard required for de facto deprivation, or in circumstances where common sense indicates that the use of the property in question is being regulated. Common examples of state action which will be categorised as a control

[29] 10 votes to 9: see *Sporrong* (n23), para 89 and the Court's Findings.
[30] *Sporrong* (n23), paras 58 and 62-63.
[31] *Sporrong* (n23), para 30.
[32] *Sporrong* (n23), para 63.
[33] A rare example can be found in *Papamichalopoulous v Greece* (1996) 21 EHRR 439.
[34] For an example, see *Mellacher v Austria* (1990) 12 EHRR 391.

include the imposition of rules of taxation[35] or planning legislation,[36] restrictions on rent,[37] licensing laws[38] and the operation of rules of succession.[39]

III: Confusion in the Case Law

The Strasbourg case law provides several examples of situations in which state action which results in *de jure* loss of title by the applicant is nevertheless dealt with as a control of the use of property. These are not cases operating on the boundary between deprivation and control, where excessive regulation might rob a right of so much of its power that it can be categorised a 'regulatory taking' in the US legal vernacular. In these cases, title has been lost entirely, and in some cases the property itself has actually been destroyed. The notion of control of use, taken as having its normal meaning, would not seem to apply easily to these situations.

Three particular examples will be considered. The first concerns cases arising from state confiscation and forfeiture of goods connected with criminal activity. The second relates to confiscation of property in satisfaction of debts owed to the state. The third relates to loss of title by way of adverse possession.

Criminal confiscation and forfeiture

States commonly authorise confiscation and forfeiture of property connected with criminal activity in pursuit of a range of policy aims. Confiscation prevents the property being used in the commission of further crimes, in addition to which the loss of such property sends the message that 'crime does not pay', ensuring the offender does not profit from his nefarious activity whilst simultaneously deterring other would-be criminals from following the same path. It is inherent in each of these policy aims that title to the property in question must be lost by the offender. However, the Strasbourg court routinely examines such practices by the state under the third rule of P1-1, as controls on the use of possessions.

An illustrative example is *Allgemeine Gold-und Silberscheideanstalt v United Kingdom*.[40] Krüggerands (gold coins) had been smuggled into the UK and seized by customs officials. The coins were declared

[35] *Spacek v Czech Republic* (2000) 30 EHRR 1010, *National and Provincial Building Society v United Kingdom* (1998) 25 EHRR 127.
[36] *Agrotexim v Greece* (1996) 21 EHRR 250.
[37] *Mellacher v Austria* (1990) 12 EHRR 391.
[38] *Tre Traktorer Aktiebolag v Sweden* (1991) 13 EHRR 309.
[39] *Inze v Austria* (1987) 10 EHRR 394.

forfeit in the criminal proceedings which followed. The applicant company, which was unaware of the planned criminal conduct, had sold the Krüggerands to the smugglers subject to a retention of title clause providing that the applicant was to remain the owner of the coins until full payment was made. At the time the coins were seized, and when they were subsequently destroyed, payment was still awaited. The applicant unsuccessfully sought return of the coins via the domestic courts before making its application under P1-1, seeking compensation for the property of which it had been deprived.

In determining which of the three rules was applicable to the case, the Strasbourg court found that:

> The prohibition of the importation of gold coins into the United Kingdom clearly constituted a control of the use of property…The seizure and forfeiture of the Krüggerands were measures taken for the enforcement of that prohibition. This did, of course, involve a deprivation of property, but in the circumstances the deprivation formed a constituent element of the procedure for the control of the use in the United Kingdom of gold coins such as Krüggerands. It is therefore the second paragraph [control of use] which is applicable in the present case.[41]

Two further examples serve to demonstrate the consistency with which Strasbourg approaches criminal confiscations in this manner. In *Butler v United Kingdom,*[42] £240,000 in cash found during a random car search was subject to a forfeiture order, based on the belief that it had resulted from, or was intended to be used in, drug trafficking. The applicant had claimed the cash was to fund the purchase of a holiday house in Spain. Neither he nor the owner of the car had ever been convicted of a drug-related offence, and no allegation of wrong-doing was made against them. The court treated the case as a control of the use of possessions, and no violation of P1-1 was found. In *Philips v United Kingdom*,[43] the applicant had been found guilty of drug trafficking offences, but challenged the confiscation and forfeiture of property deemed the proceeds of crime but which had not resulted directly from his criminal activities. (Legislation in the UK adopts a very wide definition of 'proceeds of crime' where a person has been convicted of certain offences, primarily drug trafficking or fraud: essentially any property held by the offender will be deemed proceeds of crime unless she

[40] (1987) 9 EHRR 1
[41] *ibid*., para 51. See also *Riela v Italy* 52439/99 (4 September 2001).
[42] 41661/98, 27 June 2002.
[43] (41087/98) 5 July 2001.

is able to evidence a legitimate source.[44]) The court dealt with the P1-1 implications of the case in very short order, stating that:

> …the confiscation order constituted a 'penalty' within the meaning of the Convention. It therefore falls within the scope of the second paragraph of Article 1 of Protocol No. 1, which *inter alia* allows the Contracting States to control the use of property to secure the payment of penalties.[45]

Again, no violation was found.

Confiscation in satisfaction of a debt owed to the state

In *Gasus Dosier v Netherlands,*[46] the applicant, a German company, had agreed to sell a cement mixer to Atlas, a Dutch company. Payment for the mixer was to be made in instalments, and a retention of title clause was inserted into the contract of sale, which stated that Gasus would remain the owner of the mixer until such times as Atlas had paid its debt in full. Atlas made one payment, and was then subject to enforcement proceedings at the hands of the Dutch tax authorities to whom it was significantly in debt. The Dutch tax authorities seized the mixer and sold it, using the proceeds in part satisfaction of Atlas's debt.

It was clear that in both Dutch and German law, a retention of title clause maintained the seller as the owner of the property until such times as the buyer had purified the conditions of the contract. The applicant was therefore unquestionably the owner of the mixer. Gasus accordingly argued that it, an alien, had been deprived of its property by the Dutch state.

Interestingly, at the Commission stage,[47] it was suggested that the seizure and subsequent sale of the mixer amounted to a deprivation of the applicant's right of ownership. The Commission accepted that, as an expropriated non-national, Gasus would normally be entitled to compensation in terms of the general principles of international law. However:

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[44] For discussion of the legislation currently applicable in England and Wales, see J Ulph, 'Confiscation orders, human rights and penal measures' 2010 LQR 251.

[45] (41087/98) 5 July 2001, para 51.

[46] (1995) 20 EHRR 403

[47] Prior to the entry into force of Protocol 11 to the ECHR in 1998, individuals complaining of a violation of the Convention made applications to a body known as the European Commission on Human Rights. The Commission would make an initial assessment of the case, and if satisfied that it was well-founded, would refer the application to the Court in the name of the applicant.

> The deprivation of property which occurred cannot be compared to those measures of confiscation, nationalisation or expropriation in regard to which international law provides special protection to foreign citizens and companies.[48]

By six votes to six, with the casting vote of the president, the Commission concluded that no violation had occurred.[49] Under subsequent review by the Court, however, it was decided that the actions of the Dutch state did not amount to a deprivation, but rather a control of the use of property to secure the payment of taxes.[50] The court went on to assert that:

> The fact the Netherlands legislature has seen fit to strengthen the tax authorities' position in enforcement proceedings against tax debtors does not justify the conclusion that [the domestic confiscation provisions] is not aimed at 'securing the payment of taxes', or that using the power conferred by that section constitutes a 'confiscation', whether arbitrary or not, rather than a method of recovering a tax debt.[51]

The court accordingly dealt with the case under the third rule, finding by six votes to three that no violation had occurred.

Loss of title by way of adverse possession

In *JA Pye (Oxford) Land Ltd v United Kingdom,*[52] the court was tasked with considering the P1-1 compliance of the English law of adverse possession. This legal doctrine bars any claim to ownership of land by the registered title holder where the land has been occupied as of right for at least 12 years by another person.[53] In the case, the doctrine operated to prevent the applicant asserting any claim to ownership despite being registered as the owner after a couple, Mr and Mrs Graham, who had occupied the land for the necessary period applied to register title in their name. The Graham family had taken occupation originally on the basis of a grazing agreement with the applicant. On the expiration of the agreement, no further contract was made. The Grahams continued to occupy the

[48] *Gasus* (n46), para 63 (Commission decision).
[49] *Gasus* (n46), para 64 (Commission decision).
[50] *Gasus* (n46), para 59.
[51] *ibid*.
[52] (2006) 43 EHRR 3 (Lower Chamber); (2008) 46 EHRR 45 (Grand Chamber).
[53] For a detailed overview of the doctrine, see S. Gardner, *An Introduction to Land Law (3rd ed)* (Oxford, Hart, 2012) ch7.

land in full knowledge of the applicant without any attempt by it to have them removed or even to claim rent payments. The Land Registry accordingly allowed the Grahams to register their title on the basis that the requirements of the doctrine of adverse possession had been satisfied.

When the case was first heard by a Chamber of the European Court of Human Rights, a slim majority of four votes to three categorised the action of the state as a deprivation, based on the fact that the applicant had lost its ownership as a result of the registration of title by the Grahams.[54] However, when the application came before a Grand Chamber, it disagreed with this conclusion. By ten votes to seven, it categorised the action of the state in registering the title as a control of use. It noted:

> The statutory provisions which resulted in the applicant companies' loss of beneficial ownership were thus not intended to deprive paper owners of their ownership, but rather to regulate questions of title.[55]

The state had merely altered the register to reflect the position of the underlying law.[56] No violation was found to have occurred.

IV: Deprivation, Compensation and Preference-Satisfaction

This section will seek to explain these apparent inconsistencies in the court's categorisation of cases under the second and third rules of P1-1. First, the argument that the cases represent a special category of control of use to secure the payment of taxes or other penalties will be considered. An argument will then be made that the court has sought to categorise these cases as controls of use to avoid the need to pay compensation. It will be submitted that, had a clear articulation of the principles underlying the requirement of compensation been set out at the time the requirement was introduced in the case law, there would be no need to avoid categorising the cases in question as deprivations. The failure of the court to make plain its adoption of a preference-satisfaction account of property law has therefore introduced confusion into the case law.

Control of use to secure the payment of taxes and other penalties

In the cases discussed above, an argument is sometimes made by the court that the deprivation in question should be dealt with as a control of use because the intention of the state action is to

[54] *Pye* (Lower Chamber) (n52), para 62.
[55] *Pye* (Grand Chamber) (n52), para 66.
[56] Ibid.

'secure the payment of taxes or other contributions or penalties' as set out in the final sentence of P1-1.[57] Although of relevance in some of the cases cited, it is submitted that this argument cannot provide a complete or coherent explanation for the approach of the court.

In the first place, reading the text in conjunction with the *Sporrong* dicta explaining the 'three rules' does not support the interpretation that state action to secure payments should be categorised as a control of use rather than a deprivation. The final sentence of P1-1 provides:

> The preceding provisions shall not, however, in any way impair the right of the State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure payment of taxes or other contributions or penalties.

Two readings of this sentence are possible. One is that the state retains the right 'to control the use of property…to secure payment of taxes, contributions and penalties.' In other words, controls of use may be justified where they are in the general interest, or where they aim to secure payments. The reference to payments offers a potential justification for a control of use, rather than a reason to retrospectively categorise a deprivation as a control. The second possible reading is that the state retains the right 'to enforce such laws as it deems necessary…to secure payments.' If this reading is correct, there seems no reason why a deprivation resulting from the enforcement of such laws should not be dealt with under the second rule. The key point here is that there are only three rules: deprivation, control or more general interference with the right to peaceful enjoyment of possessions. There is not a fourth rule covering state action to secure payments in particular.

In the second place, the cases cited above cannot consistently be said to involve the payment of taxes, contributions or penalties. In cases of criminal confiscation, the UK has been quick to assert that state action does not represent a penalty, focusing rather on the deterrent effect that such legislation may have.[58] The court here is clearly influenced by the higher standards expected in criminal trials in order for the requirement of due process to be met. Administrative confiscations of the kind discussed above frequently do not meet these higher standards, which could give rise to claims under article 6 if the intention of state action was to penalise applicants. In any event, the

[57] See in particular dicta from *Philips* (n43) cited at p9 above, and dicta from *Gasus* (n46) cited at pp10-11 above.
[58] *R (on the application of Assets Recovery Agency) v Ashton*, *Belton v Assets Recovery Agency* [2005] NIQB 58; *R v Jia Jin He* 2004 WL 3089191

applicants in *Allgemeine Gold-und Silberscheideanstalt* and *Butler* were innocent of any crime, making it difficult to understand why a penalty would be appropriate. These are not cases in which a jewel thief seeks compensation for deprivation of title to his stolen jewels. Confiscation and forfeiture has been designated a control of use in the UK domestic jurisprudence even when the policy aim is purely preventative, as with applications resulting from the seizure and slaughter of animals to prevent the spread of infectious diseases such as foot-and-mouth.[59] The court has even accepted permanent confiscation by the police to be a control of use in circumstances where the police action was unlawful, meaning that no law to secure payments was in question.[60] In the *Pye* case, the question of payments does not arise at all.

It is submitted therefore that an argument built around securing the payments of taxes, contributions and penalties cannot provide a coherent or complete explanation as to the confusion arising in the case law. The underlying policy goals here do play a role, however, and discussion will return to that point shortly.

Deprivation and the requirement of compensation

A better explanation for the confusion in the case law comes from the Strasbourg court's approach to compensation in respect of deprivation of possessions. Although the text of P1-1 includes no express right to compensation, and the drafters of the Convention were unable to reach agreement on whether such provision should be made, over time the jurisprudence has established a requirement that compensation reasonably related to the value of the property should be paid in respect of a deprivation in almost every situation.[61] Where this level of compensation is not made available, the state action will almost invariably be found to be disproportionate, and therefore in violation of P1-1.

The roots of the court's approach to compensation are found in *Lithgow v United Kingdom*,[62] an application arising from the nationalisation of the aircraft and shipbuilding industries in the UK in the 1970s. In a lengthy judgment, the court recognised that the reference to the 'general principles of

[59] *Westerhall Farms v Scottish Ministers* (Unreported, Court of Session, 25 April 2001), *Christopher Shepherd v Scottish Ministers* (Unreported, Court of Session, 1 May 2001); *Booker Aquaculture v Secretary of State for Scotland* (C20-00) [2003] 3 CMLR 6.
[60] *Vasilescu v Romania* (1999) 28 EHRR 241.
[61] *James v United Kingdom* (1986) 8 EHRR 123.
[62] (1986) 8 EHRR 329.

international law' in the text of P1-1 did not have the effect of requiring that compensation be paid for every interference with the right. However:

> The Court observes that under the legal systems of the Contracting States, the taking of property in the public interest without payment of compensation is treated as justifiable only in exceptional circumstances not relevant for present purposes. As far as Article 1 is concerned, the protection of the right of property it affords would be largely illusory and ineffective in the absence of any equivalent principle.[63]

The court in this judgment does emphasise that full compensation may not be necessary in all circumstances, citing measures in the pursuit of economic reform or social justice as potential instances where less than full compensation could be justified. Yet the subsequent case law has called for full compensation even in cases where precisely these ends were pursued by the state action.[64] The only exceptional circumstances the court has been prepared to accept so far relate to the reallocation of property in formerly Communist countries.[65] Here, the court seems willing to accept that owners who acquired property during a Communist regime, and are expropriated of that property post-Communism, may not be entitled to receive (full) compensation where the original acquisition is considered illegitimate.[66] As Tom Allen points out, these cases are really about transitional rather than social justice:[67] the underlying inference in the court's language is that once the transition period ends – with the establishment of a liberal market economy – the 'normal' rules will once again apply and market value compensation will be required.

So compensation is almost invariably required for deprivations. For controls of the use of property, by contrast, no compensation requirement exists. In such cases, the compensation paid, if any, will simply be a factor to be weighed in the broader assessment of the proportionality of the state action.

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[63] *ibid*., para 120.

[64] For some examples, see *Holy Monasteries v Greece*(1995) 20 EHRR 1; *Hutten-Czapska v Poland* (35014/97), (2007) 45 EHRR 4. See also *Schirmer v Poland* (68880/01), (2005) 40 EHRR 47; *Radovici v Romania* (68479/01), (2010) 51 EHRR 32.

[65] *Jahn v Germany* (2006) 42 EHRR 49; *Zvolský and Zvolská v Czech Republic* [2002] ECHR 738; *Pincová and Pinc v Czech Republic* [2002] ECHR 712.

[66] The court would generally take this view where the applicant had acquired the property during the Communist era as a result of its expropriation without compensation from the prior owner.

[67] T. Allen, 'Liberalism, social democracy and the value of property under the European Convention on Human Rights' (2010) 59(4) ICLQ 1055-1078, 1073.

George Gretton posits that an unwelcome result has emerged from this difference between the two categories.

> It might be argued that the court's approach tends to be result-oriented. It first asks itself whether the interference is of a sort which calls for compensation. If the answer is affirmative, it is likely to classify the interference as a deprivation. If not, it is likely to classify it as a control.[68]

This, it is submitted, is the reason for the confusion in the case law outlined above.

Preference-satisfaction and the need for articulation of a normative principle

At this point in the paper, it should be made clear that the logic of avoiding payment of compensation in the cases discussed above is not disputed. Compensating applicants who have had property confiscated is absurd, on the face of it. Similarly, the intention of this piece is not to criticise the policy aims underlying the actions of the states in the cases above, which for present purposes are accepted as sound. Instead, issue is taken with the violence done by the court to the ordinary meanings of the words ‘deprivation’ and ‘control’, which could have been avoided had the court been clear about the normative values underlying its approach to compensation in the first place.

If it is accepted that the court has categorised the cases as controls of use precisely to avoid the payment of compensation, it follows that there must be some basis on which it has decided such compensation should not be payable. David Anderson describes the court as finding some cases of ostensible deprivation 'undeserving' of compensation.[69] On what basis might a case be deserving or otherwise, in the eyes of the court?

In the first place, it is submitted that the requirement of compensation expressed by the court is rooted in a preference-satisfaction understanding of property law. Allen notes the court's assertion in *Lithgow* that deprivation without compensation would render the protection of the property right 'illusory'. This assertion makes sense only if what he terms the 'liberal view' of property correctly describes the intended effect of P1-1.[70] In Rose's framework, the need for compensation aligns the

[68] G Gretton, 'The Protection of Property Rights' in A Boyle, C Himsworth, A Loux and H MacQueen (eds), *Human Rights in Scots Law* (Oxford/Portland, Hart, 2002), 279.
[69] D Anderson, 'Compensation for interference with property' 1999 EHRLR 543-558, 553.
[70] Allen (n67), 1067.

court's jurisprudence with the preference-satisfaction account of property. If compensation is not paid, the security of property rights is undermined, and the goal of societal wealth maximization will be harder to achieve as a result.

The court does not, however, articulate these values. The result, it is submitted, is that the court has no baseline from which to judge whether an exception to the general rule on compensation for deprivation can be justified. In several of the cases discussed above, it would be entirely in keeping with the preference-satisfaction account to allow for deprivation without compensation. For example, the doctrine of adverse possession discussed in *Pye* is arguably designed in part to reward the efforts of the occupier who has maintained the land, which makes sense if property as an institution is focused on wealth maximisation. Similarly, a relatively expansive regime for confiscation of the proceeds of crime could be justified, since illegitimately acquired property does not deserve protection in a preference-satisfaction system. By articulating the preference-satisfaction values underlying its decision-making in these cases, the court could have avoided the confusion caused by categorising deprivations as controls of use, whilst still achieving the same end result.

Clearer articulation of the normative values adopted by the court would, it is submitted, also offer some clarity in respect of cases which do not fit easily within the preference-satisfaction framework. An expansive policy of confiscation in relation to goods which *may* be implicated in the commission of further crime is difficult to reconcile with the certainty required by the preference-satisfaction account. Similarly, state power to expropriate possessions in satisfaction of a tax debt owed by a third party, as in *Gasus*, could be problematic. The court's willingness to allow state interference with property rights in these contexts would fit more easily within a proprietarian account of property. Vacillation between the different accounts of property is in itself a complication which can reduce the coherency of the case law. However, it is submitted that articulation of the court's values would at least make the nature of the tension in the case law explicit. The current approach, by which deprivations which the court does not believe to merit compensation are re-categorised as controls, serves to obfuscate the real problem, which undermines the usefulness of P1-1 regardless of which conception of property is appropriate.

Conclusion

This paper has attempted to explain an apparent confusion in the case law of the Strasbourg court by focusing on the normative values which underscored its decision-making process. It has been argued that, in the cases discussed, the court has sought to categorise state interference with the right to property as a control of use in order to avoid the payment of compensation that would become necessary if the action was categorised as a deprivation. The compensation requirement is closely aligned with Rose's preference-satisfaction account of property. If this normative value underpinning to the compensation requirement was made explicit, the court would be able to justify deprivation without compensation in some of the cases discussed, and the arguable conceptual tension in relation to other cases would be clarified. Clarifying the problem seems necessarily to be the first step on the road to resolving it.

The celebrated aphorism of Kurt Lewin tells us that 'there's nothing so practical as a good theory.' It is hoped the Strasbourg court might embrace theoretical discussions in order to generate practical results for P1-1.

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