



«Dans cette diversité des principes d'unité»: intrecci transnazionali nei sistemi di pubblicità immobiliare tra Otto e Novecento

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BOOK REVIEW

«Dans cette diversité des principes d'unité»: intrecci transnazionali nei sistemi di pubblicità immobiliare tra Otto e Novecento, by Elisabetta Fiocchi Malaspina, Collana di studi di Storia del diritto medievale e moderno, Monografie, Vol 11, Rome, Historia et Ius, 2023, 360 pp., ISBN 9791281621015

Throughout her research career, Elisabetta Fiocchi Malaspina has demonstrated her ability to transition from the Italian to the European sphere and even to a global perspective. Her research on Émer de Vattel, the Swiss international lawyer and author of *Droit des gens* (1758) and the dissemination of his thought – whether in the original or translated into various languages across Europe and the Western world – has clearly revealed the extent to which Vattel's ideas were utilised and circulated between the eighteenth and nineteenth centuries.

In the volume under review, a comparative approach is the focus of the author's attention, which is why she has given her work the subtitle *Intrecci transnazionali nei sistemi di pubblicità immobiliare tra Otto e Novecento* (Transnational Intertwining in Immovable Publicity Systems between the Nineteenth and Twentieth Centuries). The scope broadens to encompass the African continent and the outcomes of European colonialism: from the Colony of Eritrea to the Independent State of Congo and the Belgian Congo, and from the German Protectorate of Togo to the international mandate of the League of Nations awarded to France and England. These three case studies serve as exemplary instances in the specific field of investigation, capable of revealing the influences that inevitably arise from one legal system to another and highlighting the weight of traditions developed in land publicity between the nineteenth and twentieth centuries during the transition from one territorial reality to another, which, while more distant, was, in a more or less forced manner, closer to the colonising state.

Space and time are recurring themes in this volume, serving as keywords or parameters with which to 'read' the certainty of transfers of immovables, whose composite purposes vary depending on the context. The first theme, space, is frequently referenced in many works of international science, while the second, time, is inherently more suited to a historical-legal discussion. This is particularly relevant in contexts where past traditions, shaped by time, play a significant role. Property passes from hand to hand, from generation to generation, or through normal contractual relationships, or is influenced by geopolitical factors that undergo frequent changes. Therefore, the shifting balance of power within a territory becomes a crucial element in the need to regulate a property system that meets multiple and diverse needs. In the case of colonialism, these needs pertain to both indigenous populations and, as has often been the case,

colonisers: the latter may prevail, but, even for purely economic reasons, a balance offers greater prospects for development. Here, I have highlighted some of the ‘strong points’ which, as the chapters unfold, illustrate the solutions adopted by each space.

The narrative unfolds in accordance with the structural conventions of Greek tragedy, comprising a *Prologue*, succeeded by a *Parode* (*Parodos*), three *Episodes* delineated by *Stasimi*, and culminating in the *Exode* (*Exodos*). A constant point of reference throughout this discourse is the work of Emmanuel Besson, who, in 1891, at the age of less than 40, published *Les livres fonciers et la réforme hypothécaire: étude historique et critique sur la publicité de transmission immobilières en France et à l'étranger depuis les origines jusqu'à nos jours*, which, as asserted by the author, is a pivotal monograph essential for comprehending the complexity and dynamism inherent in the interrelated issues emerging from the examination of land registers and the process of land registration. Besson's work and his professional career as a tax law specialist, along with winning two Prix du Comte Rossi (established by Pellegrino Rossi's widow) between 1890 and 1893 for *Les livres fonciers et la réforme hypothécaire* and *La législation civile de l'Algérie*, are presented in the *Prologue*. His experience in international law is also noted, both theoretically – having authored *L'arbitrage international et la codification du droit des gens*, published in 1898, the year before the Hague Peace Treaty – and practically, through his work at the Institut Colonial International. The relevant work and initiatives from this institute are examined throughout the volume in all their complexity and diversity, aiming to harmonise them. Besson's writings on land registration ultimately exerted a significant influence on the development of the systems that prevailed at the time. However, Besson was also a man of letters who chose to abandon his ‘passion’ to dedicate himself to his ‘main’ profession. He showcased this delightful activity in *André Theuriet, sa vie et ses oeuvres (1833-1839)* (1890), which is dedicated to the life of his friend, the poet and colleague who had passed away, as well as in *Impressions de voyage au pays de l'enregistrement. Souvenirs d'un directeur parisien (1871-1917)* (1922), where his literary ‘vein’ serves his professional experience, continued with various assignments.

In the *Parode*, Flocchi Malaspina presents in ‘choral’ form, as befits the peculiarities of this phase of Greek tragedy, the three systems of immovables publicity, transcription, land registers and the Torrens system, which, at the time of Besson, were those in use. Besson describes them using a ‘comparative methodology’, arousing criticism from the award evaluation committee regarding the Torrens system, which was deemed unsuitable for extension to other European countries. Besson first focuses on ‘transcription’, highlighting the evolution of the French system of land registration in its origins and transformations, including its ‘exceptions’, from the *ancien régime* to revolutionary legislation and from the *Code Napoléon* to the ‘necessary’ series of reforms in this area. Concerning the *Code Napoléon*, it was essential to balance the positions of ‘protagonists’ such

as Jean-Étienne-Marie Portalis and Félix-Juilien-Jean Bigot de Préamenu, advocates of the consent of the contracting parties as a prerequisite for perfecting the obligation to deliver the thing, as expressed above all in Article 1583 on sales, with the ‘necessity’ of immovable publicity based on the system of registration, which was present in France in the *coutumes de nantissement* and was then ‘referred to’ in the revolutionary legislation of 11 Brumaire Year VII, establishing registration as a means of publicity for the transfers of immovables. The necessary series of reforms in this area, designed to ensure the certainty of immovable transfers, as outlined by the author with a few brief remarks, culminates in the *Loi du 23 Mars de la transcription en matière hypothécaire* (influenced by the Belgian law of 16 December 1851), which extended the immovable publicity regime to all acts between living persons transferring ownership or establishing property rights over immovables.

The Germanic group (46–65), with its land registers and exceptions, places immovables at the centre of publicity: publicity plays a fundamental role in property rights, and there is a probative function present in land registers, in accordance with the principle of public faith and a procedure marked by respect for the so-called ‘principle of legality’. In the Austrian system, based on the *Allgemeines bürgerliches Gesetzbuch* (ABGB) and subsequent interventions, registration (*die ordentliche Eintragung in öffentlichen Bücher*) has a constitutive effect, meaning that the transfer of ownership does not become fully valid until it is transcribed in the land registers, based on a title (contract, succession *mortis causa*, or a court ruling). Regarding subsequent measures, it is necessary to wait for the law of 25 July 1871 on the organisation of provincial tables and land registers. Within the Germanic group, Prussia stands out for its use of investiture, ie, a declaration by the parties formally expressing the transfer of ownership, as provided for in the *Allgemeines Landrecht für die Preußischen Staaten* (ALR) (1794) by means of entry in the land register, and then regulated more specifically by the laws of 1872 on the acquisition of immovables, the establishment of property rights and mortgages, as well as on the effects of registration on the contracting parties, leading to the *Bürgerliches Gesetzbuch* (BGB), followed by Fiocchi Malaspina, from the drafting stage to the final text, confirming the principles that had gradually been established. Following Besson’s line, attention is paid to other territorial realities (56–65), such as Bavaria, Saxony, German-speaking Switzerland, Hungary, and the Russian Empire (59–64), which are diversified in their regimes according to the territory of reference.

Finally, consideration is given to the Australian group and the Torrens system (65–73). This offers a paradigmatic example of a land registration system introduced *ex novo* in the English colonial context, where common law prevails (65), particularly in South Australia in 1858 and devised by Sir Robert Torrens, who was aware of the problems relating to the transfer of ownership in those territories, which were not protected, especially if private individuals had purchased the land.

In the development of this system, as the author points out (55–67), the ‘inspiration’ is the intertwining of the Merchant Shipping Act of 1854 and the land

registration systems of Hamburg, Lübeck, and Bremen, which reflects the use of what appeared useful in different legislations. I would like to assert, in essence, that the practical utility of a comparative approach is evident in the field. At the heart of this is the so-called 'certificate of title', which serves as irrefutable proof of ownership (and is not mandatory for registration), obtained through the verification by the Registrar General of the accuracy and validity of the documents accompanying the application. Consequently, the 'land registry' assumes a fundamental role. The registration of title is constitutive, as it is predicated on the ascertainment of rights and their respective 'registration' (69–70). Besson – as referenced by the author – elucidates the benefits and implementation of this system in various colonial contexts globally since 1861, especially in Queensland and Tasmania. Moreover, there was considerable interest in the 'new' system across Europe, ranging from Spain to Italy (for Eritrea).

This is succeeded by *Episode I*, in which the author addresses various significant issues concerning the private and social function of property, including methods of transfer in relation to spatial and temporal considerations. These perspectives are undeniably of great importance and are critically significant for a legal historian who is attentive to the comparative approach, particularly regarding the distinctions between rituality and solemnity, and regarding the concept of the owner as a 'small sovereign' (a small-scale sovereign), following Herbert Hart's commentary on Jeremy Bentham (75–76). Paragraph IV of Episode I examines, from a historical and legal viewpoint, the land registration system in its profound connection with political and institutional transformations, the pursuit of an order that meets the criteria of 'good government' (90–92), an arrangement of space in the evolving governmental systems of the eighteenth and nineteenth centuries, and the necessity for security in commerce, thereby balancing the interests of the individual with those of the community. This scenario manifests in specific reforms, such as the establishment of the Teresian land registry in the State of Milan and, subsequently, the initiation of land censuses in other Italian states, France, and Switzerland. These territories exhibited a diversity of solutions, particularly in the various Swiss regions and the German-speaking areas, which marked a notable turning point. The institution of the land registry had implications for the transparency of immovable property, which are analysed by Fiocchi Malaspina (104–114) across the different territorial contexts.

Significant attention is directed towards colonialism, an undoubtedly pertinent topic that has been examined from various perspectives by historiography in recent decades. Among the diverse aspects addressed, it is positioned within *Episodes II* and *III*. The author intends to elucidate that in the majority of colonial empires – specifically concentrating on nineteenth-century African colonialism, encompassing Eritrea, which was 'conquered' by the Kingdom of Italy; the Independent State of Congo, a personal possession of Leopold II of Belgium subsequently under Belgian control from 1908; and Togo, colonised by the German Empire – the necessity to address numerous practical and routine

issues and to regulate the relations between local populations and foreigners 'suggested' a review of the actions taken by other colonial empires. Consequently, this compelled them to adopt a comparative perspective.

The individual colonies (on which there is often relatively recent historiographical research consulted by the author) are compared in terms of the regime to which they are subjected during the transition from tried-and-tested models of administration, in their application to specific territories or even when they are simply called into question. This is the case for Eritrea, marking the beginning of *Episode II* (129–134). Its history as an Italian colony is traced from 1869 to 1880 and from 1893, with the various decrees precluding extensive nationalisation, to 1909, which saw the implementation of a 'dual system'. This system consists of a separate regime for state-owned land belonging to Italians or foreign residents and for land reserved for the indigenous population, along with the introduction of a probative land register. By 1926, the land register was given predominantly declaratory value. Among the proposals of the 1891 Commission of Inquiry was the introduction of the Torrens system, which was not pursued.

As for Congo, studied for its complex history between 1885 and 1908, the year of its annexation to Belgian territory (148–170), Belgium utilised transcription as a system of immovable publicity, while land legislation was inspired by the Torrens system, making immovables registration constitutive of private property. From the extensive stationalisation of '*terres vacantes*' (1885) and subsequent recognition of property rights for non-indigenous people to the instruction to introduce the Torrens system, modelled after what the French had done in Tunisia, there was a succession of measures to profitably manage state-owned land. Once again, in this second case study, it is easy to see the transfer of models and experiences from one territory to another.

The third case study focuses on Togo, from the German Protectorate (1884) to the international mandate of the League of Nations (1922). It showcases a succession of varying land registration systems, reflecting the changing political situation in the territory. The German influence is evident in the expansion of land legislation and the *Grundbuch*, as well as in the differing structures that followed the French and English mandates established by the League of Nations, highlighting changes due to different legislation according to the mandating nation. For England, a composite structure was defined, supplemented by a land registration system based on the 'title certificate' model for public land and for private land based on the model of registration of deeds without constitutive effect on ownership (192). In the case of France, acting as a ruler under the mandate of the League of Nations since 1922, a system based on the Torrens was applied (195–196). As the author states, the outcome is the application of hybrid immovable publicity systems (199).

Stasimo II clearly delineates the 'mixture' of various systems within the colonised nations previously examined. In Eritrea, there exists a blend of civil law and common law systems alongside Eritrean traditions and Ethiopian legislation. In the Belgian Congo, the Torrens system was upheld until the enactment of the

1980 law, which designates the state as the exclusive proprietor of the territory, while other entities hold the entitlement to attain '*droits privatifs de jouissance*' of diverse kinds. With respect to Togo, characterised by the author as 'a paradigmatic example' of its kind (206), the Imperial Ordinance of 21 November 1902, which transposed the BGB and the *Grundbuchordnung* of 1897 with certain peculiarities specific to Togo, assumes particular significance. Changes instituted by international mandates, which persisted in French Togo until 1960, have already been noted. In light of the fluctuating political landscape in the territory, various legislative measures were enacted until 2018, culminating in the issuance of the *Code foncier démanial* (209). Within the framework previously delineated, the precise coordinates of which are specified, the author posits that a development of the so-called '*esprit d'internationalité*' has transpired. From the latter half of the nineteenth century, inter-state collaboration materialised through conferences, congresses, and various initiatives, within which the active participation of 'internationalized' legal scholars was evident. The complex issues surrounding colonialism were addressed with a commitment towards resolving them. The Institut Colonial International acted as a platform for discussing these matters and serves as the focal point of *Episode III*. The book chronicles its evolution from 1894, the year of its establishment, through the pivotal stages of its operations, which were interrupted during the First World War and recommenced in 1920 in accordance with a vision of 'rational and scientific colonization', a goal pursued by European states at the time (215–234). This progression led to the internationalisation of colonial discourses and engendered shared reforms across various domains affected by this phenomenon. It also included the training of officials and administrators capable of meeting the needs of the colonised territories and of professionalising the practice of colonial administration. In this context, it is notable that the intriguing initiation of the Scuola diplomatico-coloniale in 1901 was spearheaded by Augusto Pierantoni, an internationalist and parliamentarian who was cognisant of the political implications of emigration and colonial matters, in alignment with the nascent discussions within the Institut Colonial International. Fiocchi Malaspina meticulously follows the initiatives undertaken by this institution, the publications of the Bibliothèque Coloniale Internationale, the Comptes-rendus, the Documents Officiels, the Recueil International de Législation Coloniale (1911), the Annuaire de documentation coloniale comparée, alongside the principal figures who contributed to the advancement of colonial studies, expressing a range of opinions that reflected the political interests they represented. These individuals included Günther Karl Anton and Joseph Chailly Bert, who sought to universalise colonial practices through legal frameworks, thereby creating a form of '*bonne politique indigène*' (238) and establishing a compromise between the rights of the colonisers and those of the indigenous populations. During the 1903 London session, Anton was entrusted with delivering the introductory report advocating for the Torrens system and a designated space for indigenous peoples, alongside enhancements in agricultural techniques and land credit mechanisms aimed at

promoting a more rational development of agriculture. Fiocchi Malaspina reconstructs the discourse through individual contributions and the dialectic of opposing theses, culminating in the significant intervention of the Russian jurist Friedrich Fromhold von Martens. He argued for the necessity to (I translate) ‘obtain and establish principles that compel unity in colonial legislation and the land system that should be applied to the colonies’ (267). Between 1898 and 1905, the focus of the debate was, as the author indicates, on the land tenure systems in the colonies (234–268). *Stasimo III* provides an evaluation of the Institut’s activities and the challenges faced in identifying a colonial policy applicable to all colonies. In the concluding section, the author’s insights emphasise the ongoing evolution of transnational interconnections between practices concerning immovables in Europe and Africa, along with national, colonial, and international law and the interplay of spatial and temporal elements. It remains untenable to maintain that the ‘tragedy’ has reached its conclusion, evoking Sophocles’ tragedy, which inspired the author to address the succession of related issues.

The book of Fiocchi Malaspina concludes with an extensive index of consulted sources. This useful resource encompasses a wide array of materials, including archives, national and international legislation, parliamentary acts, regulations, gazettes and official bulletins, featuring the works of Emmanuel Besson, alongside the volumes of the Institut Colonial International referenced, as well as a rich bibliography. The intertwining and ‘contamination’ between various systems and the resultant comparative approach frequently emerge throughout the volume, vividly illustrated in a continual process of evolution and transformation. Thus, ‘*Dans cette diversité ‘des principes d’unité’*’ are articulated in accordance with the exhortation that, at the dawn of the twentieth century, Martens, vice-president of the Institut Colonial International, communicated to his colleagues at the Institut in 1903.

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