

Property Law – Part I

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In January 2013, the Faculty of Law and the Confucius Institute of the University of Geneva organized the first Geneva-Harvard-Renmin-Sydney Law Faculty Conference. Speakers considered the interplay between public and private property, the relationships between intellectual property and property, and the protection of private and public property under international law, in a comparative perspective. The four reports below provide a summary of the main points discussed during the two-day workshop. (See also the news report on the Harvard Law School [website](#).)

Introductory Remarks by Prof. Bénédicte Foëx

In order to emphasize the significance of the right to property, Prof. Bénédicte Foëx started his introductory remarks with an imagination of *What if there were no property?* He argued that property is a time-honored concept that dates back over thirty-seven centuries. Without property rights that provide incentives of property creation, Prof. Foëx claims, big things and collective things are nearly impossible.

From a philosophical and psychological perspective, Prof. Foëx described the attributes of property as an important social institution that contributes to both individual and common well-being, shapes social relations, maintains personal independence and stimulates economic productivity. Taken together, these benefits explain why we need property.

Then, Prof. Foëx delivered his definition of property with implications from the English jurist Blackstone, a judge of the 18th Century who is most noted for writing the *Commentaries on the Law of England*. Namely, property is the sole and despotic dominion which one man claims and exercises over the external things of the world in total exclusion of any other individual. According to this definition, property is a kind of right to the world, keeping “you off the object of property unless you have my permission, which I may grant or withhold”. In addition, property is assigned to private citizens, and endorsed by the state. The defining attribute, right to exclude, contributes to common good.

Nevertheless, Prof. Foëx pointed out that the conventional conception of property has been subjected to growing number of qualifications. First, some things which used to be considered as property are no longer property, such as negotiable paper. Second, the conception has transcended from national level to international level. Third, property becomes not exclusively physical and not necessarily possessory. As such, the traditional theories and institutions of property seem to be increasingly less coherent.

Prof. Foëx concluded his remarks with *What limits to property?* He advocated for a functional and pragmatic approach to constrain property. On one hand, waste of property should not be allowed since it undermines the defining attribute of property to contribute to public good. On the other hand, property should be used as what it is supposed to be. For example, a car should serve as a means of transportation rather than art.

Research Block One

The first research block centered on the complexity of *The Interplay between Public and Private Law*. Prof. Maya Hertig Randall from Geneva University Law School, the moderator of this block, introduced the complexity vividly in the beginning. “The first issue to tell first year law students is about the dichotomy of public-private distinction”, she said, “but it is too complicated to understand until years later.” Four academics from the United States and China addressed the complexity from different perspectives.

Prof. Charles Donahue from Harvard Law School discussed the blurring of the public-private distinction with a historical investigation of the emergence of property in land in twelfth and thirteenth-century England.

The classical philosophical theorists of property claimed that either property is a natural right that existed before the formation of the state (Vitoria, Locke, Hegel on his good days), or it is a creature of the state (Hobbes, Pufendorf, Bentham). Nevertheless, Prof. Donahue’s demonstration that “property” began in England in the late twelfth century put such a prevailing claim into serious question. It is because England was still a feudal monarchy, *in lieu* of a nation-state, in the late twelfth century, suggesting that such period is too late for the former and too early for the latter. Moreover, English societies in that period had few exposures to the distinction between public and private law.

In his demonstration, Prof. Donahue argued that, although most land in feudal England was notionally held by the king, three actions of land adjudicated by the central royal court under the reign of Henry II (*novel disseisin, mort d’ancestor, the writ of right*) did create tenants’ rights of land against the whole world.

Prof. HAN Dayuan from Renmin Law School examined the public-private dichotomy in his speech that focused on *The Protection of Property Rights in Chinese Constitutional Law*. For westerners, the notion of private property immune from state intervention has been popular for many centuries, whereas it was largely new to most Chinese and jurists until the 1970s when China began to replace its planned economy with a market economy step by step. The quick expansion of the private sector of China’s economy was accompanied by the emergence of laws for private property.

Prof. Han first introduced the constitutional provisions with respect to the protection of individuals’ private property rights in China, especially the 22nd Constitutional Amendment in 2004 stating that “Citizens’ lawful private property is inviolable”. He highlighted the dual nature of property rights in China—private property as a fundamental right in the Chinese Constitution and an institutional guarantee of the society. Property as a fundamental right is foremost a subjective defensive right of the citizens against the state, while as an institutional guarantee it maintains a social institution and an objective legal order.

“More than thirty years after the adoption of *the Reform and Opening Up Policy* in 1978”, Prof. Han said, “Chinese citizens’ private incomes have kept growing rapidly in various forms.” Accordingly, the 22nd Amendment has greatly expanded the scope of private property. It replaced the closed list of properties citizens could own lawfully before 2004 with recognition of any property that is not legally prohibited. Furthermore, the 22nd Amendment established the principle of equal protection of socialist public property and private property, which makes private property more protected to state intervention.

Prof. Han analyzed limitations on private property because of public interests considerations. He argued that property should undertake the social obligation of promoting public good. But such limitation cannot be justified without just compensation rendered to property owners. He employed the institutions of real property expropriation and requisition to illustrate how private property can be constrained.

Prof. WANG Yi from Renmin Law School, spoke about Public Interest and the Theory of Norm Arrangements in Chinese Civil Laws. Prof. Wang observed that the consideration of public interest has placed increasing influences on various civil laws in China, e.g., the General Principles of Civil Law of China, the Property Law of China and the Contract Law of China. In non-contractual contexts, public interests constitute legitimate reasons to impose constraints on the maintenance and exercise of private properties. For example, the exercise of government power of eminent domain aiming at promoting public interests leads to permanent transfer of private entitlements on real property.

In contractual cases, public interests may mandate individuals to act in a certain way, which disagrees with the conviction of individual autonomy in civil law. The formality, enforceability and legality of contracts among individuals may all be affected by the emergency of public interests in contractual contexts. For instance, Article 52 of Contract Law of China states that a contract shall be null and void if it infringes public interests.

Nonetheless, specific confining effects of public interest are never self-evident. For the purpose of identifying the confining effects accurately and limiting arbitrary invocation of public interests, Prof. Wang developed a theory of norm arrangements in civil laws. This theory divides all norms in civil laws into different categories in accordance with their legislative purposes. Namely, they include permissive norms, advisory norms, third-party authorization norms, mandatory norms and combinative norms. Each category generates different effects on contracts. For example, a norm stating that a sale contract must include price clause does not necessary fall into the category of advisory norm and cannot invalidate a contract that fails to prescribe good price.

Prof. Thomas Merrill from Columbia Law School, addressed one particular issue regarding the interplay between public and private law—U.S. regulatory takings law. Prof. Merrill challenged the conventional view, prevailing both in and out of the U.S., that American regulatory takings law is a “muddle,” a “mess,” “incoherent,” or worse. To Prof. Merrill, U.S. takings law is no more of a mess than other areas of constitutional law on grounds of stability and predictability, such as certain areas of free speech, equal protection, and separation of powers law. He suggested that the legal doctrines of American adjudications have already provided clear experiences for other jurisdictions.

The Supreme Court in the U.S. has developed a general architecture for resolving takings claims in a doctrinal-historical fashion. The fundamental principle is that the paradigmatic taking is the exercise of eminent domain power by the government, resulting in a compulsory transfer of title to the property. In contrast, the Court has also established a series of categorical rules that deny some government actions as the paradigmatic case of eminent domain, and thus reject any compensations claims. In addition, the Court has generated a series of categorical rules that befall certain cases, or preclude them from the province of eminent domain. In between stands the circumstances in which “suspect” of eminent domain power is examined by the court in an ad hoc fashion, taking conditions recognized by prior precedents into consideration. Prof. Merrill contended that this tripartite doctrine, including

the fundamental principle, the categorical rules, and the ad hoc inquiry in the gray areas, is secure. To him, whatever else one may say about this body of doctrine, it is not a complete mess.

Furthermore, Prof. Merrill offered an explanation for the academic lament about U.S. takings law. He thought the disparity between secure judicial doctrine and academic appealing comes out from a confusion of theory and doctrine. Specifically, academics appeal to advance various, different theories about why the government should compensate when it takes property. However, if you adopt one of these theories, it is not hard to point to some decisions that are consistent with the theory, and others that are not. That being so, the theorist is likely to take the law as a mess.

In discussion, speakers and other audiences debated spiritedly on a wide range of issues on the interplay between public and private law. One of them I found most interesting is the question concerning a U.S. Supreme Court taking case in 2005— *Kelo v. City of New London*—and its world-wide implications brought the academics from four jurisdictions together in a close fashion.

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This paper was reviewed by [Steve Barela](#) and [Maya Hertig](#).