**private property/私产(Sī Chǎn)**

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| European Perspective | Prof. Thomas GERGEN | 17 Feb 2022 |

The key term is composed of the two terms “property” and “private”. “Property” is generally understood to mean a “thing” or an immaterial “good” that is able to be possessed. Looked at from a historical, social, cultural, and especially from a juridical lens, property is a bundle of rights and entitlements, as well as a category that symbolizes the relationships and behaviors between persons and corporate actors. It is also understood to be a legal model for the attribution of things to persons: natural and legal persons like companies. The influence of the Roman and common law (*ius commune*) *res personae actiones* system is easily seen here. Persons can be individualized, attribution makes them unique.

**I. Property in common and private law**

In terms of lawmaking, property is the result of a public (and compulsive) exercise of power, whereby regulations are made that help to define *what* can be owned and the rights of disposal that accompany ownership, including limiting third-party rights (see “real right” or “property rights”). Furthermore, property and the rights to said property protect the interests of specific groups and, to such an extent, act as a code for the political and cultural order that arise from certain value preferences and rights to act, meaning the determination of who and what will be recognized, protected, and excluded (*droit exclusif*, see also § 823 German Civil Code or § 1382 Code civil). The constitutionally guaranteed property (together with and of the same significance as the right of inheritance) laid out in Art. 14 of the Basic Law for the Federal Republic of Germany (Grundgesetz) affects the rights of citizens and provides them with the basic right so that they may even defend this right against government intervention and, with help of the “third-party effects of fundamental rights” (Drittwirkung der Grundrechte), maintain a strong legal position with regards to private law. Through the right to control (§ 903 German Civil Code) and the concept of “having” or “guarding” (possession as actual ownership, *corpore et animo*), property embodies generally positive and outward-looking characteristics: hard work, competence, skill, and the ability to rise from rags to riches. In the course of cultural developments and legal history, selected groups were deliberately isolated and disenfranchised: slaves, those born into colonies, servants, domestic help and workers, members of certain religious minorities as well as (especially married) women, all of whom were not given the right to own property, nor allowed to manage the matters related thereto in the form of legal transactions. This helped to safeguard a patriarchal society.

**II. The history of property: the genesis of property**

The entirety of history can be structured around the history of property, from the days of antiquity to Ancient Rome, where there were conflicts between those with better titles of ownership and those with worse, between those with a higher legitimation of property and those with less, between the rights of the Lord’s estate (*dominium directum*) and those of the vassal’s (*dominium utile*) in a fiefdom as well as between immovable property and chattels. Moreover, there were differences between how property is understood in the city versus in the countryside, the Roman stance of indivisible tangible property and the dominating practice of shared property as well as shared property rights, and between corporate and individual property. Under “property” or “quasi-property”, the rights to persons, the [right to trial] and banalité are subsumed; positions to this effect can be found in legal sources such as in the historic legal texts of the *Weistümer*, in village laws, and later in state laws. These encompass in their entirety the right of property concerning the right of inheritance, the line of succession following a death, and the transfer of family property.

Thus, the history of property spans from Ancient Rome to the dissolution of the manorial system, the creation of agricultural reforms, the emancipation of peasants, the secularization of society, and the introduction of economic and personal freedom (freedom of movement) all the way up the implementation of modern constitutions in the 19th and 20th centuries. Therewith, liberalism protested against the entrenched system of property distribution. These texts, however, do very little to discuss the history of intellectual property which has developed from being considered a privilege of the early Modern period to a deeply embedded field of law, one that once again finds itself in danger in the digital age.

**III. Accomplishments in European law**

Private law has fundamentally treated domestic and foreign proprietors equally. Limitations to this tenet have emerged from two directions: foreign real estate and intellectual property. National interest to protect domestic economy from competition and “foreign infiltration”, military demands and retorsion measures required by the law of war, and finally racially‑perpetuated ideological beliefs were the sources of unfair treatment that international laws (bi- as well as plurilateral treaties) and supranational organizations like the EU helped to balance out through such measures as the prohibition of discrimination against domestic and foreign persons, reciprocity clauses, and a focus on place of residence (instead of nationality/nationalities). Due to the EU-wide law of succession (E*U-Erbrechts-VO*) dated August 2015, which is *loi uniforme* and can, therefore, take effect across EU countries, the last habitual residence of the deceased as point of reference and an end to a division between movable and immovable property became more clearly defined, resulting in the consideration of the entire inheritance in the form of universal succession, including the sum of various property rights with their respective liabilities. With the departure from citizenship law as an anchoring point, the European law helps property to be seen as a universal human right once more.

**IV. Differentiation criteria**

As an institution under private law, property provides information on the person (who can/may be the proprietor), on the relationship of said person to other subjects of private law (and thereby exclusion of other interested parties), and on the manner of allocation pertinent to the good and its characteristics (the content of the legal position, the scope and extent of the right of control and the right of defence, exploitation rights, and other entitlements).

Peter Häberle developed seven differentiation criteria to this effect (Häberle: 90-92):

* Personal proximity of the property/identity: Personal use and “smaller” forms of property have a higher degree of protection than “larger” forms of property, such as commercial enterprises and real estate, with the degree of protection being influenced by the extent to which the respective property provides its owner a sense of personhood and identity.
* Personal effort/value of work: The greater one’s own contributions and effort are, the higher the degree of protection.
* Social process/social solidarity: The more the property is used by those who are not the proprietor, the higher the degree of protection is, and vice versa.
* Scientific process/economic interests: What obligations as well as economic and business protections are sensible for large as well as small forms of property? What are the legal solutions that best meet economic interests (Keywords Law&Economics)?
* Cultural process/cultural identity: Intellectual and physical property (historical and natural monuments, cultural goods, intellectual works) are determined to belong to the public domain (*domaine public*/ requirement of availability and communitization) or are bound, with regards to disposal over and use of the property, insofar as this is deemed to be indispensable for the common cultural identity.
* Political process/power: Under certain conditions property is viewed as a form of political freedom of protection, and the rights to a property can be restricted through abuses of power. In this context, doctrine discusses the justification of taxes on property, concerning real estate or inheritance taxes.
* Newly arising shortages/curtailments: Unlimited property today can become limited property tomorrow as the result of times of emergency, war, and crises (environmental or pandemic crisis). The recent example of the infringements on property rights as a result of the pandemic laws cannot be ignored: infringements on property rights and other rights relating to assets (occupational and commercial freedom).

These seven points provide a comprehensive heuristic model for historical and comparative analyses.

**V. Real rights**

Real rights accompany property and belong to the group of subjective rights when examined from a classical standpoint (*droits reels*). The rights that make up subjective rights are *droits de la personalité* or right of personality, *droit réel* or *ius in re* according to Roman Law, and legal status or *droit personnel*/*ius ad rem/in personam*.

*Droit réels* are therefore *droits subjectifs* with direct regard to a “thing” without the need for a third-party arbitrator. The French *Code civil*, like the German Civil Code, allows for classical forms of property (*propriéte*) and possession (*possession*) as well as limited real rights such as usufruct (*usufruit*), gages (*gage*), and mortgage (the civil code on land charge, which is an accessory of the requirement that allows for it, does not exist in the *Code civil*!).

The *droits reels* grant its holder (titular) two rights that other subject rights do not currently protect: the *droit de suite* allowing the holder to demand the relinquishment of a “thing” and the preferential right (*droit de préférence*) bestowing the right to demand the satisfaction of claims before other creditors.

The *droit de suite* (Folgerecht in the German IP) is a familiar concept from intellectual property, also appearing somewhat in copyright law, that creates a balance between the latter and tangible property.

**VI. The intellectual property upheaval – immaterial assets**

A radical change is taking place in the perception of *droits intellectuels*, which are certainly considered to be *droits subjectifs,* thus earning them their own category; nevertheless, it is apparent within the term “intellectual property” itself that although it is considered a real right (property), it cannot be considered to be a typical real right due to its invisibility and intangibility (*intangibilité*).

The European wording for “intellectual property” can be more closely examined through the comparison of German and French law. Whereas France has had its *Code de propriété intellectuelle* (with *propriété littéraire et artistique* and *propriété industrielle*), something of this nature was never and likely never will be adopted by Germany. German states did appropriate French legislation with varying degrees of urgency during the 19th century; the terminology was hesitantly accepted and replaced with German expressions, yet these laws were not well‑received as both nations have contrasting perceptions. In France, intellectual and industrial accomplishments were considered to be private goods worthy of protection since the implementation of the revolutionary laws. In contrast, recognition of intellectual achievements occurred at a much slower pace in Germany: Originally, author’s rights only protected printed literary works; the fine arts were included later, and eventually, non-printed works of art were also protected, including protection from forgery. In the music world, not only were the notes themselves protected from plagiarism, musicians also sought protections that prevented unauthorized performances of their musical works. The protection of industrial accomplishments were a cause for concern to German lawmakers in the former German Confederation. Inventions were qualified as generally worthy of protection relatively quickly. A patent protection had a greater validity when it was connected to a disclosure requirement should the invention be considered a necessary instrument for the Industrial Revolution. Inventions would only later find a wider recognition as primarily private-use items with an understanding that this stance was in fact compatible with the interests of the public and the state. This recognition came about after the Vienna Patent Law Congress of 1873 once the debate on the purpose and use of patent protection had died down, a debate that did not garner as much attention in France. The French perspective is essentially all forms of intellectual property are also private property. The acquisition of rights (property allocation) occurs through the individual act of the rights owner or through the creation or use of a trademark. Formalities, in contrast to Germany, have only a regulatory nature. As a result of the importance of privileges in the former German Confederate and former Reich, industrial property rights became an administrative matter (see patent *office*, trademark *office*) through register laws and the accompanying compliance inspections. An attribution of intellectual property rights would require the inventor the submit an application to a competent authority.

Although the term “*geistiges Eigentum*”, lit. intellectual property, is still widely used, jurisprudence speaks of “*Immaterialgüterrecht*”, lit. immaterial goods right. The difference in wording allows for a better representation of the tangible as well as intangible nature of the law, including concepts such as monetization (*volet matériel*), the juridification of real rights (*droits patrimoniaux*), and the protection of intellectual content (*volet moral*) (see moral rights).

Intellectual property is property for a limited time and distinguishes itself thereby from classical physical (tangible) property. Unlike other laws for the protection of industrial property, author’s rights for intellectual property first come into force once the work has been created and not upon acceptance into a register. On the other side, the duration of these rights differs vastly: author’s rights, 70 years after the death of the creator/issuer; patent rights, 20 years; trademark rights, 10 years, though extendable unlike inventor’s rights. Intellectual property is therefore a special form of classical private property and thus better characterized as “*Immaterialgüterrecht*”.

**VII. Publications**

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