

TAGUNGSBERICHTE

International Conference

'Real Rights: Historical Experience, Modern Development and Comparative Perspectives'¹

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The International Conference "Real Rights: Historical Experience, Modern Development and Comparative Perspectives", jointly organized by the Roman and European Law Research Center of East China University of Political Science and Law and the Advanced Research Institute of the Italian University Roma Tre, took place at the said Chinese University (Shanghai) on April 7 and 8, 2007. This was the first large-scale international symposium on real rights after the enactment of the PRC Property Law on March 16, 2007. Over 150 scholars attended this meeting, including 120 Chinese representatives and over 30 foreign representatives from Italy, France, Germany, the Netherlands, Russia, Korea and Japan. The organizer of the conference was Prof. ZHANG Lihong, director of the Roman and European Law Research Center of East China University of Political Science and Law.

In the opening ceremony, chaired by Prof. ZHANG Lihong, Ms. YAO Hong, director of the Civil Law Department of the Legislative Affairs Commission of the Standing Committee of the National People's Congress, briefly introduced the entire drafting process and the great significance of the new PRC Property Law for the ongoing Chinese process of legal modernization. The Supreme People's Court judge Mr. CAO Shibing gave the first lecture on the historical experience of Chinese property law. He discussed the domain of security rights as an example, arguing that although the new Property Law covers security rights on moveable assets and other forms of well-established

security rights, the current security rights system on moveable assets still has great limits, and needs to be improved in judicial practice.

As previously stated, the aim of the conference was to introduce a major national event such as the enactment of the new Chinese law on real rights in the broader cultural and technical context of legal and historical comparison with other relevant experiences of the world, like those of the European legal systems, Russia, Korea and Japan. Within this context, the contributions to the event had been organized into the following five sessions: I. 'The Historical and Contemporary Development of Ownership and Possession in the Continental Legal Systems', II. 'Experiences of Real Rights Legislation in the Continental Legal Systems', III. 'Numerus clausus of Real Rights and Abstraktionsprinzip', IV. 'Credit Rights and Real Rights', and V. 'Establishment and Introspection of the Chinese Real Rights System'.

Session I: "The Historical and Contemporary Development of Ownership and Possession in the Continental Legal Systems", chaired by Prof. WEI Yaorong and Prof. Luigi Moccia

Professor Luigi Moccia (University Roma Tre, Italy) focused on definitions of property as well as their historical evolution. From the traditional perspective of private property law, there are both subjective and objective meanings of property. In the subjective sense, property is analogized with sovereignty; defined as the right of somebody to hold a (physical) thing as his own, with power of using, enjoying and alienating it, as well as of excluding others from doing so. In the objective sense, property is synonymous with one's own belongings; meaning all the 'assets', things and rights belonging to an individual. From the modern 'constitutional' perspective, property is understood as a kind of value and an individual right.

Professor Letizia Vacca (University Roma Tre, Italy) discussed the three main kinds of proprietary relationships that developed during the different ages of Roman law: *dominium ex iure Quiritium* (ownership according to *ius civile*, i.e. the law applicable only to Roman citizens), *in bonis habere* (possession in good faith, ownership according to *jus honorarium*, i.e. the magistrates'-made law), and *ius in solo provinciali* (provincial ownership). *Dominium ex iure Quiritium* was the oldest form of ownership under ancient Roman law and was acknowledged only for Roman citizens. *In bonis habere* originated

¹ The Chinese version of the conference report, written by Prof. ZHANG Lihong, has been published in two prestigious Chinese legal journals: ZHANG Lihong, Wuqian: Dalu faxi de lishi jingyang, xiandai fazhan he zhidu bijiao guoji yang tao hui zongshu (Report on the International Conference "Real Rights: Historical Experience, Modern Development and Comparative Perspectives", in: Legal Science (Faxue), Vol. 5, 2007, p. 158 ss. and in: Xinhua Digest (Xinhua wenzhai), Vol. 390, p. 153.

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from the separation and temporary confrontation between the qualified possessor and the owner according to *ius civile*. *Ius in solo provinciali* originated in the special legal concession of the provincial land which ultimately belonged to the Roman Empire and the Roman Emperor; therefore, the *ius in solo provinciali* actually reflected entitlement to private utilization and possession of the relevant assets. The main function of this system was to promote the utilization rather than the ultimate entitlement to land. The paper delivered by Professor *Mario Talamanca* (University Roma Tre, Italy) related to Professor *Vacca's* contribution and centered on the different forms of property in Roman law.

Chinese Professor *WANG Liming* (Member of the Drafting Group of the Real Rights Law, Renmin University, Beijing) elaborated on the 'equal protection' principle of the new Chinese Property Law. He argued that equal protection under this law means that the subjects of real rights have equal legal status, and enjoy equal protection once their rights *in rem* are violated. He also presented the following reasons: equal protection complies with the Constitution; equal protection is necessarily required by the establishment and improvement of the socialist market economy system; equal protection applies to all state-owned property; and equal protection is an overall protection of all civil subjects.

Italian Professor *Carlo Augusto Cannata* (University of Genova) addressed the topic of ownership and possession in European civil law, from the Roman roots to the private law codifications of the modern age. He analyzed several ancient property rules: those who possess assets which do not belong to others become the owners of these assets; possession is an external and specific reflection of ownership; the possessor shall have a certain subjective awareness of being the owner or the holder of a proprietary right; property law purports to attribute rights to assets, while the law of obligations purports to realize justice. Next, Professor *Cannata* focused on looking back at the historical evolution of the relationship between ownership and possession, arguing that ownership is above all an economic and social concept and endures despite limitations from public and private law. In the last part of his speech, he criticized the inefficiency of the abstract transfer system of German law. The goal of the German abstract transfer system is a subsequent elimination of an unjustified situation which from the beginning should not have been created at all, and pointed out that modern civil law countries would be better off to adopt a causal transfer system. A historical perspective of

possession was also the topic of Professor *Luigi Capogrossi Colognesi's* (University of Rome "La Sapienza", Italy) speech, who analyzed the "*Recht des Besitzes*" (right to possession) of F. C. von Savigny.

Closely related to the above lectures, Italian Professor *Salvatore Patti* (University of Rome "La Sapienza") dealt with the two concepts of 'possession' and 'detention'. Contrary to the traditional prevailing view, he argued that the Italian Civil Code cuts off any connection between these two concepts, and defines possession as a purely factual control without any subjective element. He also argued that detention is not a state of fact, but a state of law, of which the fundamental relationship is always legal in nature. On this basis, he criticized the idea of classifying detention into good faith and bad faith detention, and the idea that detention is a control over assets without the subjective intention by the holder to hold the assets for its own benefit and on the basis of a proprietary title effective as against the owner (i.e. without the so-called *animus possidendi*). Possession, on the other hand, is a control over assets characterized by the subjective element of the above *animus possidendi*. His concluding opinion was that the owner of a rented asset is no longer the possessor once delivery has been performed, since he lost physical control over the asset and he cannot exert his 'possession' through the holder (the rentee).

Professor *Ugo Petronio* (University of Rome "La Sapienza", Italy) analyzed the topic of public property in its historical origin and development. He stressed the private law roots of the modern concept of public property and warned against the risks of the current trend towards privatization, on the basis of some historical examples presented.

Session II: "Experiences of Real Rights Legislation in the Continental Legal Systems", chaired by Prof. *WANG Weiguo, Edgar du Perron* and *CAI Mingcheng*

Prof. *Ansgar Staudinger* (University of Bielefeld, Germany) discussed several problems in the German BGB, such as the legal definition of 'thing' as something tangible, which is being sharply challenged by medical and technological development (e.g. separated human organs, computer programmes, etc.); the existing contradictions between the *numerus clausus* of real rights principle and the economic needs of market agents (e.g. title retention selling or security over moveable assets) and the need to redefine old distinctions like that between moveable and immovable assets. All these problems are raising great challenges to the establishment of a systematic conceptual theory of real rights.

Prof. *Astrid Stalder* (Konstanz University, Germany) analyzed the principles of German law of real rights, consisting in Absolutheitsprinzip (absoluteness), Trennungsprinzip (separation between causal juristic act and real juristic act), Abstraktionsprinzip (abstractness of the real juristic act), Publizitätsprinzip (publicity), Typenzwang (*numerus clausus*), Bestimmtheitsgrundsatz (specificity) and Akzessorietät (accessority). She also discussed the legal nature of some special rights related to real rights and those existing between the different real rights in German civil law, such as possession, expectancy right (Anwartschaftsrecht) and trust.

Italian scholar *Leo Peppe* (University Roma Tre) explored the trust-like devices in ancient Roman law and defined the trust agreement (*pactum fiduciae*) in Roman law as essentially an agreement to utilize things, perfected by way of delivery, through which the person who accepted the ownership of the thing bore the liability to return it, or in a broader sense, abandon it under special circumstances. He also argued that the combination of fidelity and trust was the oldest form of trust-like device; *fiducia*, i.e. the Roman trust, was not necessarily equipped with clauses (*pacta conventa*), expressly prescribing liability to return the trusted asset being such liability implied in the trust. *Peppe* specifically covered the *fiducia cum creditore*, i.e. the trust to security purposes, focusing on the forfeiture clause (*lex commissoria*) in Roman law as well as on the issue of debtor's fraud.

Professor *Tommaso Dalla Massara* (University of Verona, Italy) examined the relationship between eviction and ownership from its Roman origin to current Italian law. He held that two elements had played vital importance in its evolution: the good faith principle and the function of the contract, together with the evolution of its internal structure.

Dutch scholar *Edgar du Perron* (Amsterdam University) introduced the Dutch property law regime, analyzing its fundamental principles and clarifying several issues of taxonomy. He discussed in great detail the assignment of real rights and dealt with two security rights: mortgage with transfer of possession and retention of title. Subsequently, he addressed the principle of protection of third parties in good faith and tackled the issue of limits to real rights.

Professor *Leonid Kofanov* (Moscow University, Russia) confirmed the existence of a Roman system of public law, and stressed impact and limits of the Roman law influence in modern Russian property law. He discussed the classification of "things" in Russian law, pointing out the absence in the Rus-

sian Civil Code of a specific classification of 'public things' as was defined under Roman public law. He held that this defect should be corrected.

Another Russian scholar, *Sergei Karpyuk* (Russian Academy of Sciences), discussed the water-course in neighbouring plots of land. He analyzed a dispute between neighbours in ancient Greece occurring more than 2,300 years ago, then argued that modern Russian law needs special commentaries in this area, as well as more attention to national and world traditions.

Japanese scholar *HAYASHI Tomoyoshi* (Osaka University) gave a general overview of Japanese property law. He discussed the overall system, the essence and the limits of ownership, co-ownership, and how the system relates with Roman law. He concluded that Roman law studies in Japan have become more theoretical and historical since the mid 20th century, concentrating on Roman law in its classical context rather than on its practical application within contemporary law.

Session III: "*Numerus clausus* of Real Rights and *Abstraktionsprinzip*", chaired by Proff. *Letizia Vacca* and *Mauro Bussani*

Chinese Professor *JING Ping* (Member of the Drafting Group of the Real Right Law, China University of Political Science and Law, Beijing) discussed four conflicts encountered in the drafting process of the PRC Property Law: (1) the conflict between the constitutional law ideology and the civil law ideology; (2) the conflict between legality and illegality of property; (3) the conflict between transferability and stability of real rights; and (4) in the domain of security rights, the conflict between the continental and the Anglo-American legal conception.

Chinese scholar *SHEN Weixing* (Tsinghua University, Beijing) presented an analysis of the *numerus clausus* principle confronted with the principle of party autonomy. He argued that: (i) the rule of statutory rights *in rem*, i.e. the idea of a regulation of real rights by way of legislation, includes not only the type and content of a right *in rem*, but also the conditions for assignment of assets; (ii) legal resources measuring statutory rights *in rem* should be expanded to administrative regulations and customary rules; (iii) real juristic acts violating the *numerus clausus* principle should be considered above all as partly valid real juristic acts, then converted into juristic acts valid between the parties only, and last as invalid juristic acts; (iv) the *numerus clausus* principle should be maintained, albeit proper legislative measures should be taken to avoid its rigidity; and (v) many aspects of Chi-

nese property law still reflect the spirit of party autonomy.

Professor *Vincenzo Mannino* (University Roma Tre, Italy) proved that the idea of a *numerus clausus* principle of rights *in rem* is just a myth. First, the foundation of such a device is more or less the absoluteness and non-violability of ownership, which has been depressed and expelled in modern civil laws. Second, both Roman law and modern law allow certain contracts to create a property right. Third, the *numerus clausus* principle should be abandoned for the sake of formal unification of European law.

Professor *ZHANG Lihong* (China University of Political Science and Law, Shanghai) criticized the real juristic act theory (*Abstraktionsprinzip*) from its Roman roots and its modern embodiment in PRC Property Law. He held that the complete theory of real juristic act includes the independency and the abstractness of real juristic act; the creation of this theory by Savigny arose out of a misunderstanding of ancient Roman legal literature. The PRC Property Law does not adopt the real juristic act system; in Germany, the application of this theory is limited by the relativization doctrine; since *Abstraktionsprinzip* is degrading, it would be irrational to incorporate it into the Chinese Property Law.

Professor *Byoung Jo CHOE* (Seoul University, Korea) argued that, since the Korean Civil Law acknowledges neither the self-reliant concept of the real juristic act nor its abstractness from the obligating juristic act, and Art. 548 I 2, which prescribes that a rescission of a contract should not harm a third party's right, it is legally possible to abandon the real juristic act theory. Nonetheless, due to the fact that it is well-established in Korean civil law, it is not recommendable to abruptly abandon this theory.

Italian scholar *Paolo Maria Vecchi* (University Roma Tre) analyzed the *Trennungsprinzip* model and the pure consensus model in the area of transfer of immovables and compared their different influence upon the legal effect of registration. He pointed out that the effectiveness of registration of rights over immovables as against third parties is a revision of the consensus model; its real function is to make the real contract valid for the third party, preventing the latter from getting involved in conflicting acts.

Session IV: "Credit Rights and Real Rights", chaired by Prof. *Salvatore Patti*

Italian professor *Maria Claudia Andrini* (University of Roma Tre) covered very broad issues of purchase of immovable assets, mainly including: (i) the

registration systems in the civil law jurisdictions, in the common law jurisdictions, and in the U.S.; (ii) the preliminary control of the data to be registered; (iii) the progressive privatization of the public functions and its utility for the market; (iv) the need for quickness, certainty and reliability of immovables registration; (v) immovables acquisition in Italy and its registration; (vi) the protection of the future buyer in the preliminary contract for the sale of land. On this basis, she finally reached several convincing conclusions.

Professor *Mauro Bussani* and Dr. *Francesca Fiorentini* (University of Trieste, Italy) dealt with European-wide security rights over moveable assets. They carried on a comparative analysis of the pattern of development of European security rights over movables and of the policy choices underlying the existing rules and practices in this area. A few issues they tackled included non-possessory pledges, revolving pledges, many forms of ownership as security, security over claims, and some relevant aspects of transnational legal integration in this field, together with the connected perspectives of development for legal regimes and practice.

Professor *Maurizio Lupoi* (University of Genova, Italy) presented a survey of the civil law perspective on trusts, focusing on the Italian case. He showed that trusts are by no means unknown in civil law countries, that the obstacles met by trusts in civil law countries stem from a series of conceptual misunderstandings, and that Italy developed an original approach to trusts.

Session V: "Establishment and Introspection of the Chinese Real Rights System", chaired by Proff. *Ansgar Staudinger* and *YU Nengbin*

Professor *CAI Mingcheng* (Taiwan National University, Taipei) elaborated the general characteristics, the development and reforms, as well as the problems of Taiwanese property law, and finally concluded that the property law revision should not be too conservative in modern society.

Professor *SUN Xianzhong* (Member of the Drafting Group of the Real Right Law, China National Academy of Social Sciences, Beijing) held that there are six breakthroughs of the PRC Property Law: (1) establishing the equal protection principle; (2) clarifying the sequence of controlling public properties; (3) acknowledging collective ownership and giving an overall protection to peasants' rights over land; (4) establishing the usufruct over construction land and the condominium right; (5) enriching and improving the Chinese real rights system; and (6) creating new legislative technology in protecting transaction safety.

Professor *FU Dingsheng* (China University of Political Science and Law, Shanghai) tried to figure out the attribute of what Germans call the *dinglicher Anspruch*, i.e. the claim to a property right which is effective as against a specific person. He first pointed out the defects of several doctrines, such as the 'right *in rem*' doctrine, the 'function of right *in rem*' doctrine; the doctrine of a special and independent right co-existing with right *in rem* and right *in personam*. Then he argued that every right has its own essential functions which determine the attribute of the right; the claim to a property right as it is regulated in the new PRC Property Law is a right *in personam*, since its content and function is different from that of a right *in rem*.

In the closing ceremony, chaired by Professor *YE Qin* (Vice Rector of East China University of Politics and Law), Professor *WEI Yaorong* (Member of the Drafting Group of the Real Right Law, Legislative Affairs Committee of the Permanent Commission of the National People's Congress of PRC, Beijing) analyzed Art. 136 of the Property Law, regulating usufruct on construction land. He searched for similar provisions in foreign jurisdictions and proposed several constructive suggestions in many specific details.

Professor *LI Xiandong* (China University of Political Science and Law, Shanghai) considered property law as a declaration of rights. Meanwhile, he argued that property law only deals with formative equality; the final equality should be left to public law. In addition, he also touched on the right of prospecting and the right of mining.

The last speaker Professor *Zhang Junhao* (China University of Political Science and Law, Beijing) pointed out several defects within the Property Law: (i) it is a piece of political legislation, rather than civil legislation; (ii) it is a piece of device-oriented legislation, rather than restating legislation; (iii) it is a piece of behavior-oriented legislation, rather than trial-oriented legislation.

The international conference on real rights in China for the first time put forward a massive amount of materials for discussion. Scholars coming from many different cultural and technical backgrounds elaborated on the crucial sector of property law. The event proved to be a very useful means for a transversal spreading of knowledge through western and non-western legal cultures: it provided the opportunity to show how Chinese lawyers see and make reference to European law to develop their own law and, at the same time, made it possible for European lawyers to get closer to the non-western legal traditions represented in the meeting, especially the Chinese tradition.

The collection of the conference papers, entitled "Real Rights: Historical Experience, Modern Development and Comparative Perspectives", is scheduled to be published by Chinese Commercial Press (Beijing) in 2008.