

# REINTERPRETING CHINESE PROPERTY LAW

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## I. INTRODUCTION

The concept of property lies at the heart of intensely significant debates that reach to the root of our social living arrangements. The debates in these areas cut incisively into our personal perceptions of wealth, autonomy, self-governance and community values.<sup>1</sup> No one will doubt that the institution and the concept of property are as central to debates about capitalism, socialism and other post-socialist societies, as are the rights of individuals and the government in relation to self-interest and cooperation.

How China has managed to grow so rapidly without well-defined property rights is puzzling to many legal minds. Without privatization and secure private property rights, one might conclude that there could not be genuine market incentives. However, the actual performance of China's opening and reform policy provides a striking contrast to these expectations. This year is the thirtieth anniversary of China's opening and reform policy. During the past three decades, with double-digit economic growth, China has become one of the most important members of global economic order.

There are various theories to explain the "China phenomenon." Cooperative Culture Theory suggests that economic development can be initiated through a collective-oriented culture, even in the absence of formal or well-defined property rights.<sup>2</sup> Other scholars argue that the ambiguity of property is actually the "lubricant" of economic growth that minimizes transaction costs.<sup>3</sup> My objective is to focus on a different argument; one that takes a closer look at the ideologies underlying the developments of China's property institutions. By examining how historical predicaments in China have shaped Chinese concepts of property, I will provide a different explanation for the choices China has made between the conflicting sets of property values with which political discourse wrestles.

## II. THE MYTH OF PROPERTY LAW

In the Western tradition, from the works of John Locke and Jean-Jacques Rousseau to Karl Marx, there are many brilliant theories of

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<sup>1</sup> JANET MCLEAN, *PROPERTY AND THE CONSTITUTION* (1999).

<sup>2</sup> HU XIAOBO, *PROBLEMS IN CHINA'S TRANSITIONAL ECONOMY, PROPERTY RIGHTS AND TRANSITIONAL MODELS* 7-8 (1998).

<sup>3</sup> David D. Li, *A Theory of Ambiguous Property Rights in Transition Economies, The Case of the Chinese Non-State Sector*, 23 J. COMP. ECON. 1, 15 (1996).

property rights which have laid the foundation for the structures of their respective social frameworks. John Locke set out for the first time the theory of unlimited property as a natural right based on how the original owner mixes his labor with the previously unowned thing; and by commingling labor to the thing, he establishes ownership in it.<sup>4</sup> William Blackstone argued that the “right of property” comprised “the sole or despotic dominion that one man claims and exercises over the external things of the world, in total exclusion of any other individual.”<sup>5</sup> G.W.F. Hegel wrote about the importance of property rights to the integrity of individual personhood.<sup>6</sup> Both Immanuel Kant and Hegel illustrated that the individual will, striving after freedom, requires the existence of a system of private property rights.<sup>7</sup> Within that system, men can work at tasks that will develop their distinct and individual personalities, as well as fit into an acceptable social order.<sup>8</sup> In contrast, Jeremy Bentham rested the property right on the principle of “utility” or the greatest happiness for the greatest number.<sup>9</sup> He offered the classical utilitarian defense of property institutions in terms of their efficiency as solutions to the problem of scarcity and mutual competition. Marx incisively criticized the dehumanizing effects of industrial capitalism and traced the reduction of human beings to commodities to the property relations of capitalism.<sup>10</sup> Later in the 1920s, an American jurist added a new dimension to the understanding of property. Morris Cohen argued property is sovereignty.<sup>11</sup> He argued that property is power over others under state rules. Charles Reich, in his famous article “The New Property,” argued for the treatment of the manifold benefits flowing from state action in the economy, including money, benefits, services, contracts, franchises and licenses, as a new form of private property right.<sup>12</sup>

Broadly speaking, in the Western historical tradition, property institutions are inherently pluralistic. Among these property theories, there are two competing traditions. The first one is the wealth-enhancing concept of property or market property concept. The market property concept is the dominant idea of property, enjoying more recognition than the other tradition. This concept is closely connected with individual liberty to secure a zone of freedom for the individual in the realm of economic activity. Accordingly, the state must not meddle with individual property rights. Its only function is to protect the property rights. The theories of Locke and Blackstone belong to this category.

The second version of property is called “property as propriety.” As noted by Carol Rose, under this concept of property, “[t]he purpose is to

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<sup>4</sup> See JOHN LOCKE, TWO TREATIES OF GOVERNMENT (Thomas I. Cook ed., Hafner Publishing Co. 1966).

<sup>5</sup> W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 471 (GEO. T. BISEL CO. 1922).

<sup>6</sup> G.W.F. HEGEL, THE PHENOMENOLOGY OF SPIRIT (A. V. MILLER trans., Clarendon Press, 1977).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> See C.B. MACPHERSON, PROPERTY: MAINSTREAM AND CRITICAL POSITIONS 47–48 (University of Toronto Press, 1978).

<sup>10</sup> See generally KARL MARX, ECONOMIC PHILOSOPHIC MANUSCRIPTS (1844) (In order to appreciate this proposition fully, please consult the aforementioned work).

<sup>11</sup> See Morris Cohen, *Property and Sovereignty*, 13 CORNELL L. REV. 8 (1927).

<sup>12</sup> See Charles A. Reich, *The New Property*, 73 YALE L. J. 733 (1964).

accord to each person or entity what is 'proper' or 'appropriate' to him or her. And what is 'proper' or 'appropriate', on this vision of property, is that which is needed to keep good order in the commonwealth or body politic."<sup>13</sup> Under this understanding, the basic function of the institution of property is to advance the collective good of society. Individually owned property serves the common welfare and public good. This theory is closely associated with the works of Hegel, Cohen, Reich, and others.

The United States has been called the most market property-oriented society in the world. In modern America, the market is the dominant force in structuring social order. Individuals realize their ability through commodity-exchange relationships within the market.<sup>14</sup> That commodification has been one of America's "cultural commitments of property."<sup>15</sup> Private ownership is protected because it provides incentive to individual actors to realize their full potential in market transactions. And property-as-commodity allows individuals to satisfy their personal preferences and to increase their wealth through market exchange. The successful man is the one who foresees effective demand and makes the greatest profit in the transaction. Individual action in the marketplace has always been a core ideological precept of American modern culture. From the modern view, the autonomous self is, as T.J. Jackson Lears has observed, "a Promethean figure, conquering fate through sheer force of will."<sup>16</sup> Individuals who are freed from restraints can realize their authority through commodity-exchange relationships to generate greater productiveness and wealth.

The political implication of the commodity theory of property is the moral priority of individuals over all the community, a theory commonly associated with Locke. Under this understanding, the property right is a natural right of unlimited appropriation. The purpose of property rights is to create walls that insulate each individual from encroachment by the state and by other individuals. Jennifer Nedelsk describes this view as the following:

To designate property as a constitutional right conveys the idea of property as essentially a private right requiring insulation from public interference and control. In short, constitutionalizing property is an extremely powerful symbol of the public-private divide which designates governmental measures affecting property as public 'interferences' with a sacred private realm-which then bear the burden of justification.<sup>17</sup>

As a fundamental American value, the dominant image of property is a basic individual right against government encroachment. To protect private ownership is to create a zone of security from the threatening of state.

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<sup>13</sup> CAROL M. ROSE, *PROPERTY AND PERSUASION* 58 (1994).

<sup>14</sup> GREGORY S. ALEXANDER, *COMMODITY AND PROPRIETY* 11 (1997).

<sup>15</sup> *Id.* at 17.

<sup>16</sup> T.J. JACKSON LEARS, *NO PLACE OF GRACE: ANTIMODERNISM AND THE TRANSFORMATION OF AMERICAN CULTURE, 1880-1920* 17-18 (1981).

<sup>17</sup> Jennifer Nedelsky, *Should property be constitutionalized? A Relational and Comparative Approach*, in G.E. VAN MAANEN & A.J. VAN DER WALT, EDS., *PROPERTY ON THE THRESHOLD OF THE 21ST CENTURY* (1996).

### III. THE EVOLUTION OF CHINESE PROPERTY SYSTEM

So pervasive is the concept of property as a market commodity that there have been few serious ideological challenges to this dominance. Under this theory, a formal and well-defined system of property rights is the precondition for economic prosperity. The “China phenomenon,” however, defies this widely-accepted system. China’s steady and rapid economic growth derived from a very vaguely-defined property institution.

The fundamental principle of property rights in China is the State’s absolute ownership. All land in China is owned either by the State or by Agricultural Collectives. The State can requisition land from Collectives when the State determines that it needs the land for public purposes. The biggest concern for Chinese private property rights is the threat of government taking. The only limitation placed upon the State is that such takings must be “in the public interest.” The “public use” in relation to takings is undefined or quite vague. Any commercial use can be said to be a “public use” if the government is involved. Although the Constitution requires that the State shall make compensation for land expropriated or requisitioned, many individuals receive significantly less compensation than they would under market values.

Since the late 1970s, as part of a government program to establish market transactions as a means of increasing productivity, property rights have become the leading force of economic reform. In urban areas, China amended its Constitution to provide for the transfer of land use rights.<sup>18</sup> It showed that the Chinese government recognized that a private party may have a right to use land owned by the state in a way that creates a valuable market commodity. This “granted land use right” can last between forty or fifty years for various commercial and industrial uses, and up to seventy years for residential purposes.<sup>19</sup> For the Agricultural Collective-owned land, the “household contract responsibility system” is in practice. Based on the number of laborers in particular households, collectively-owned lands along with adjacent spaces are partitioned and allocated to each household for a fixed term. The households are responsible for managing their allocated lands and are allowed to keep any surplus produce after meeting quotas.<sup>20</sup> The peasants, free to sell their surplus in the open market, now had an incentive to maximize their gains by increasing production. The “household responsibility system” was an immediate success, improving agricultural productivity significantly.

The State-owned enterprise reform introduced more responsibility to the domain of individual directors’ autonomy and gradually separated user rights from state control. The workers and directors in State-owned enterprises (“SOE”) start to generate personal economic rewards for

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<sup>18</sup> XIAN FA amend. art. 10 (1988) (P.R.C.): “No organization or individual may appropriate, buy, sell land or otherwise engage in the transfer of land by any unlawful means. The land-use right may be transferred in accordance with the provisions of laws.”

<sup>19</sup> See generally PATRICK A. RANDOLPH & LOU JIANBO, CHINESE REAL ESTATE LAW 85–93 (Kluwer Law International 2000).

<sup>20</sup> Frank Xianfeng Huang, *The Path to Clarity: Development of Property Rights in China*, 17 COLUM. J. ASIAN L. 191, 216 (2004).

themselves, extractor rights.<sup>21</sup> Extractor rights are similar to “residual control rights” but they give the incentives to the workers and managers of the SOE to produce more efficiently so that they receive more benefits, the extractor rights.<sup>22</sup> Under the old party-state of Chinese socialism, the state owned the industrial system and the decisions regarding management were made by the central government. The economic reform delegates decision-making authority to the managers in the enterprises, allowing them to retain a part of their profits to refurbish their plants and to provide material incentives to workers. And by separating user rights from ownership, the party and central government are excluded from micro-economic decisions, while managers and directors of the enterprises have more autonomy in the decision making arena.

China did not contribute to the original Western legal concept of property law. But the current property framework reflects the creative responses of China to the spirit of the time. It eliminated the extreme socialist equalitarian thinking, allowed private property into the socialist market economy, did not provide jobs to everyone, and gave up the centralized planned economy. Within a short period of time, China underwent drastic changes and achieved stunning outcomes. These outcomes cause one to pause and consider the essential factors and ideological supports which account for these transformations.

For any given system, change does not take place in an intellectual or social void. There are always historical and ideological elements behind the institutional structures. What is the ideology behind China’s choice of an American-style market property theory to carry out its economic reform? It is especially puzzling, considering its civil-law tradition, that China decided not to adopt Germany’s property-as-propriety philosophy.<sup>23</sup> One way to look at China’s choice of property system is by examining the psychologically deep-rooted urgency China takes in searching for national wealth and power. This collective sense of anxiety can be traced down to the late nineteenth century when Chinese cultural tradition clashed with Western forces for the first time. Some, no doubt, would object vehemently to any suggestion that relates China’s choice of a property system with its

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<sup>21</sup> HU XIAOBO, *PROBLEMS IN CHINA’S TRANSITIONAL ECONOMY: PROPERTY RIGHTS AND TRANSITIONAL MODELS 10* (World Scientific & Singapore University Press, 1998).

<sup>22</sup> *Id.*

<sup>23</sup> German constitutional jurisprudence has its roots in civic republicanism. It does not treat property as a market commodity for wealth maximization, as the American economic theory of property holds, but for self-realization or self-development. That is, property is fundamental insofar as it is necessary for individuals to develop fully both as moral beings and participating members of the society. German constitution embraces Sozialstaat (social welfare state.) The notion of public welfare assures that no one lives in poverty and it tries to avoid gross inequalities through the social distribution of wealth. The state is under a constitutional obligation to guarantee a minimal subsistence for its citizens. To Americans, this interventionist character of the Sozialstaat undermines the very idea of individual liberty. But the core of German property right is in favor of a relationship between individual and community in the sense of a person’s dependence on the community . . . . Its purpose is not negatively building up the wall against the state’ intervention; but positively securing the material conditions necessary for individuals to realize their potentials and become responsible members of society. See generally Gregory S. Alexander, *Property as a Fundamental Constitutional Right? The German Example*, 88 CORNELL L. REV., 733-779 (2003).

nineteenth century search for wealth and power. But a candid, retrospective glance would indicate they are closely intertwined. The ideologies from that era shape the intellectual and physical social outlook of modern China. China's property institutions react to the social, political and economic changes in China to define the shared sense of social order and its propriety. The property system is an instrument by which Chinese society seeks to realize the purposes of its members in historical moments.

The Opium Wars of the 1840s and the Taiping Rebellion of the 1850s signaled a perpetual pattern of domestic trouble and foreign invasion in modern Chinese history. The encroachment of the Western powers from the coast to the interior and the total collapse of the Chinese defense occurred in one generation. H.B. Morse has categorized the period 1834–1860 as one of “conflict,” 1861–1893 the as one of “submission,” and 1894–1911 as one of “subjection.”<sup>24</sup> The government of China gradually became a tool in the hands of foreign powers. A helpless, impotent Manchu government allowed foreigners to slice the country into spheres of influence. The humiliating treaties after the two Opium Wars forced China to pay millions of silver taels and cede its land, including Hong Kong, at gunpoint.<sup>25</sup> The crippling defeat in the First Sino-Japanese War and the Treaty of Shimonoseki further reduced China into a dismantled semi-colony. The very survival of their nation and race was at stake.

Chinese traditional order collapsed quickly after encountering the Western powers. When China first became conscious of Western military superiority, many Chinese intellectuals realized that China's lack of wealth and power led to China's defeat at the hands of aggressive Western powers. Thus China would have to master Western knowledge and gain the strength of the Western nations in order to save itself. But what did the West have that China lacked? Where did the crucial difference lie? The question was not raised as a disinterested inquiry. It was thrust forward by urgent, overriding concerns with the very survival of the Chinese state. Waves of national reform and revolution were launched to answer this question. The “Hundred Days of Reform” within the imperial system in 1898, Sun-Yat Sen's revolution and the first Chinese republic in 1911, the May Fourth Student movement in 1919, the establishment of Chinese communist government, and the contemporary reform and open policy are all rooted in this collective effort of strengthening the nation through economic wealth and power.

In the late nineteenth century, Chinese intellectuals, when facing internal decay and external aggression, also began to probe Western political and ideological institutions. They discovered that Western power is more than a matter of the machine of industry and military considerations. Their industrial and military advantage was deeply rooted within the whole political, ideological and social structure of Western society.

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<sup>24</sup> RANBIR VOHRA, *CHINA'S PATH TO MODERNIZATION, A HISTORICAL REVIEW FROM 1800 TO PRESENT* 36 (Prentice-Hall, Inc. 2000).

<sup>25</sup> *Id.* at 31–44.

Yan Fu was one of the first Chinese scholars to introduce Western thoughts into China. His work remains influential and is a fundamental feature of the consciousness of China even today. Yan Fu's biggest contribution was his translation of Thomas Huxley's *Evolution and Ethics*,<sup>26</sup> which introduced social Darwinism into China. According to social Darwinism: "Living things struggle among themselves in order to survive. Nature selects and preserves the superior species."<sup>27</sup> It follows that humans are born in a limited place and they come into conflict with each other. People struggle for survival. There is also a struggle between different nations. The weak invariably become the prey of the strong; the dim invariably become subservient to the clever. This explains why some states are strong and others weak.<sup>28</sup> It is the struggle for existence which leads to natural selection. Hence, within the human realm, it is the same rule of survival of the fittest that demands assertive energy and emphasizes the actualization of human potential in competitive situations. The West has exalted human energy in all its manifestations. The story of Prometheus in the West is one example of a release of energy, exemplified when Prometheus frees himself from the chains with which Zeus had shackled him to a rock. The Promethean surge identifies human spirit not with passivity and withdrawal, but with energy and self-assertion that leads to the realization of individual potential on an even higher level of complexity and heterogeneity.<sup>29</sup> The Promethean nature of Western modernization has led to its people's conquest of external nature and progressive augmentation through wealth.<sup>30</sup> In other words, the Promethean nature of Western civilization has produced the West's enormous output of wealth and power.

These ideas of "natural selection and survival of the fittest" caught the imagination of nineteenth century Chinese reformers because they helped explain the failings of China as a nation. More importantly, it provided a much needed theory for Chinese survival. The survival of China as a nation depended entirely on its capacity to adapt itself to changing environments and to make itself fit and strong. With absolute conviction, China saw self-strengthening as the only way to escape becoming the prey of the strong Western powers.<sup>31</sup> Preserving the state was now inconceivable without "self-strengthening." "Self-strengthening" was no longer possible without movement in the direction of modernization and industrialization. The Chinese started to believe in key terms such as: energy, dynamism, struggle, self-assertion and the fearless realization of all human potential. They also began purposefully to search for the right instruments to apply

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<sup>26</sup> BENJAMIN SCHWARTZ, IN SEARCH OF WEALTH AND POWER, YEN FU AND THE WEST 100 (BELKNAP PRESS OF HARVARD UNIVERSITY PRESS, 1964).

<sup>27</sup> *Id.* at 45-46.

<sup>28</sup> *Id.* at 55.

<sup>29</sup> *Id.* at 236.

<sup>30</sup> *Id.* at 239.

<sup>31</sup> HU SHI relates in his *SSU-SHI TZU-SHU (AUTOBIOGRAPHY AT FORTY)*; Tai Pei, 1954): "Not many years after the translation of *Evolution and Ethics*, it became highly popular throughout the country and became the favorite reading of secondary school students. After China's frequent military reverses, particularly after the humiliation of the Boxer years, the slogans of 'Survival of the Fittest' became a kind of clarion call."

the human energy to the increase of national wealth. The market property system became an agent of this progress. The classical market property releases the energy from individuals and gives them incentives for greater productivity. The myth of Prometheus underlies modern legal culture's perception of the role of market property. Under market property rule, material progress is the result of the actions of individual actors realizing their full potential in market transaction. By freeing individuals from artificial constraints, the concept of market property promotes efficiency and generates more wealth. This line of ideology resonates powerfully with China's desire for national wealth and power. This explains why it is ready to embrace the market property system as a means of achieving its centuries-old desire for national revival. However, this effort of market property reform had been long delayed due to the civil war and communist revolution led by Chairman Mao. It did not occur until the late 1970s after Mao's death.

As mentioned above, Yan Fu's social evolutionism of "survival of the fittest" was widely spread in China beginning in the nineteenth century. It became the underlying theory and was entangled with all the separate ideological currents throughout modern Chinese history: both nationalist and communist.

In fact, communism and nationalism were fused in wartime China. The demands of national crisis, rather than the logic of communism, brought the Communist parties to power. Marxism offered a satisfactory explanation for China's ills at the outset of Russia's revolution. China's weakness was not because of its own tradition, but because of foreign imperialism and feudal warlords.<sup>32</sup> In essence, the Communist Party was seen as the leader of a war-energized, radical nationalist movement. By accepting Marxism, the Chinese would be part of a historical progression that would place them ahead of Western capitalism. The Chinese communist version of Marxist ideology was viewed as an adjunct to Chinese nationalism—that is, as a "national myth" serving the newly created Chinese nation.<sup>33</sup> Under the Communist Party, China finally regained its independence. However, the Socialist Property Theory linked with Mao's plan of mass mobilization literally brought China to an economical collapse, especially during the Cultural Revolution. It called for ideology and politics to remain in command of economical production, yet there was no synchronization between production and demand. The cost was physically and emotionally exhausting. Resources were wasted; machinery broke down.

As early as the inauguration of the People's Republic of China ("PRC"), there were "two lines" on China's path to modernization.<sup>34</sup> Opposed to Mao's ideology were pragmatists who believed that economic development should have precedence over socialization. Their goal was higher production through efficiency. These pragmatists believed material incentives should be allowed to replace Maoist-style social ideological

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<sup>32</sup> VOHRA, *supra* note 24, at 121.

<sup>33</sup> CHALMERS A. JOHNSON, PEASANT NATIONALISM AND COMMUNIST POWER, THE EMERGENCE OF REVOLUTIONARY CHINA 1937–45, at ix. (Stanford University Press, 1962).

<sup>34</sup> By and large, all pragmatists agreed with Liu Shao-qi and Deng Xiaoping, leaning toward the Liusit camp. Those who supported Maoist position are called ultraleftists.

incentives, overlooking the existence of a need for class struggle. After Mao's death, Deng Xiaoping reversed Mao's course and started an economic-oriented path to modernization. The overall intent of the reforms was to make China a modern industrial nation. Facing total chaos and complete economic collapse, which followed the Cultural Revolution in 1976, the spirit of the time called again for national wealth and social order. After 100 years of struggling and searching, China found itself back in the same place, asking the same question: "How can China achieve wealth and power as it struggles for survival as a nation?" The lesson for China was clear: if it is ever to achieve modernization, Mao's approach of "politics in command" has to be reversed and it must orient its people toward economic activities and improve the economic system to release the people's economic energies. This time, nothing could lie in the way of carrying out the modern market property reform, which releases people's economic energy. Under the classical economic view, property as an institution maximizes the wealth most effectively because it satisfies individual preferences and helps individuals realize their full potential.<sup>35</sup> Without property rights, people would have to continually fight for resources as a result of scarcity. Instead, a property institution allocates a different share to each individual. This gives each owner a sense of security so that he will not waste time and energy on fighting but focus on cultivating and manufacturing. In this way, property makes resources more valuable and increases wealth.<sup>36</sup> Besides that, exclusive property rights identify who has what, making trades possible and more efficient. This means that a property system encourages people to work with the resources and then to make gains from trading their things. As a result, value increases.<sup>37</sup> According to this theory, property rights are a sober pursuit of self-interest that result in the positive propulsion of constructive human energies.<sup>38</sup> It gives humans a sense of security in the materials and the capacity to realize their full potential. For these reasons, market property became the vital breakthrough in China's economic reform. In the process of rehabilitation of its national economy, China boosted industrial production, imported Western investment and technology, privatized its economic units and extended its free markets. Market property concept was introduced to replace the public ownership system. Autonomy was returned back to the managers of SOE. The township-village enterprises received a great deal of extractor income rights. Every policy framed since is directly aimed at freeing individuals from the restraints of oppressive and hierarchical socialist authority and releasing individual energies to achieve more economic prosperity.

#### IV. CHINA'S CHOICE OF PROPERTY VALUES

It would be a mistake to assume that China emphasizes private plots and market force only to achieve economic individualism. Beneath the

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<sup>35</sup>See generally ALEXANDER, *supra* note 14.

<sup>36</sup>ROSE, *supra* note 13, at 54.

<sup>37</sup>*Id.*

<sup>38</sup>SCHWARTZ, *supra* note 26, at 59.

property reform, there has been a deeper national concern since the nineteenth century: the collective desire for national wealth and power. China is fully aware of the power of property rights to drive people to maximize their self-interests. They encourage the possibility that individuals may be the beneficiaries in the long run. But, for China, the maximization of individual rights is just a means, not the end. Wealth grows with free competition and through the struggle for survival within the economic sphere. However, all these energies released through a property system are fused and combined in order to serve the wealth and power of the nation state, which must also carry on the struggle for survival on the international stage. Implicitly, the property transformation itself is national prosperity. Every policy, whether household responsibility reforms in rural areas or enterprise reforms separating user-ship from ownership, operates not only to reallocate property rights and redistribute property values based on market transactions, but also carries the familiar preoccupation with national wealth and power. The government continues to have a strong control over the national economy and the social, political order. When the memories from the past last, the determination gets stronger.

In the process of contemporary economic reform, China placed property concepts into its constitutional amendments, the highest legal authority in the land. Until the mid-1980s, public ownership was predominantly believed to be the foundation of the nation. The Constitution of 1982 still insisted that “the basis of the socialist economic system of the PRC is socialist public ownership of the means of production, namely, ownership by the whole people and collective ownership by the working people.”<sup>39</sup> Following the changing economic circumstances, the 1988 Constitutional Amendments formally recognized the private sector as a “complement” to the “socialist public economy.”<sup>40</sup> The Constitution was further revised to add that during the primary stage of socialism, “individual, private and other non-public economies are major components of the socialist market economy.”<sup>41</sup> In addition to raising the status of private ownership, the 1999 Constitutional Amendment introduced the concept of “the primary stage of socialism,”<sup>42</sup> which provides that before true Marxist socialism can be achieved, China must endure a period of market economy. Any form of ownership that meets the criterion of improving social productivity and improving the standard of people’s lives should be seen as serving socialism. In the 2004 Constitutional Amendments, individual private property was sanctified to the same inviolable level as public property and language guaranteeing compensation from the state whenever property is expropriated or requisitioned was added. Under Article Ten of the 2004 Constitutional Amendment, “[t]he state may, as needed in the public interest, take over or use citizens’ private property in accordance with the law, and give compensation.” One may find this proposition strikingly similar to the

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<sup>39</sup> XIAN FA art. 6 (1982) (P.R.C.).

<sup>40</sup> XIAN FA art. 11 (amended 1988) (P.R.C.).

<sup>41</sup> *Id.*

<sup>42</sup> XIAN FA art. 6 (amended 1999) (P.R.C.).

Fourteenth Amendment in the United States Constitution. Could one assume China's adoption of the legal language of the Fourteenth Amendment of the United States Constitution would have the same cultural meaning? And would China's legal system advocate the same values as American property law?

Under liberal political theory, private property releases human energy and guarantees personal autonomy. It is natural that personal liberty and property are intimately intertwined. As Michael Kammen pointed out, "liberty and property . . . have usually been understood as complementary values: deprive or deny one, and the other is instantly in jeopardy."<sup>43</sup> In the market private sphere, if the protection of private property creates wealth and prosperity and makes individuals independent and thus capable of self-government, the State should not interfere with property without extraordinary justification. Consequently, private property should diffuse political power and be insulated against government intrusion.<sup>44</sup>

Locke based his theory of limited government on the idea of private property. Locke defined private property as people's "lives, liberties and estates."<sup>45</sup> Men have a right to private property by nature, not on the approval of an arbitrary ruler. He argued that men know what natural rights they have by consulting their reason. It follows that nobody is a subject of anyone else, and that everyone has the duty not to harm another in his life, liberty or goods.<sup>46</sup> Because government is created through the consent of men who cannot be supposed to give themselves into slavery, no matter what inconveniences in the state of nature they hope to escape, the only sort of government which rational men could ever intend to set up is a constitutional government to secure their natural rights. A legitimate government is limited, constitutional, non-arbitrary and confined to the regulation and securing of men's property. Property, since Locke, became the quintessential example of rights as boundaries. It has been the symbol and source of a protected sphere into which the state cannot enter.

Private property has shaped the structure of the American political system.<sup>47</sup> The framework of the political institutions and categories are compatible with the security of property. In fact, a fundamental American value is private property, characterized as "a basic individual right secure against encroachment, even by the powers of government."<sup>48</sup> The story of limited government in America begins with private property as the clear limit that private rights impose on the government. Constitutional property rights are intended to protect individuals from the encroachment of government. By protecting property rights, people believe that the general

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<sup>43</sup> MICHAEL KAMMEN, SPHERES OF LIBERTY: CHANGING PERCEPTIONS OF LIBERTY IN AMERICAN CULTURE 5 (University of Wisconsin Press, 1986).

<sup>44</sup> LAURA S. UNDERKUFFLER, THE IDEA OF PROPERTY: ITS MEANING AND POWER 142 (Oxford University Press 2003).

<sup>45</sup> See generally LOCKE, *supra* note 4.

<sup>46</sup> *Id.* at II, section 123, 168.

<sup>47</sup> See generally Nedelsky, *supra* note 17. In this book, Professor Nedelsky suggests that American constitutional history from 1787 to 1937 has been one long story of property as market property and property is the wall between private preference and the public weal.

<sup>48</sup> *Id.* at 227.

rights of personal freedom and political liberty are protected from tyrannical exercises of government power.<sup>49</sup> It has been suggested that the lack of protection of property was part of the larger problem of unprotected minority rights; property was essential to the people's liberty.<sup>50</sup> Based upon this familiar image of Lockean property theory,<sup>51</sup> the constitutional protection of property in the Fourteenth Amendment<sup>51</sup> is seen as a classic example of negative law: it provides individual protection from the claims of others, in particular from state action, as opposed to positive law which requires state action.<sup>52</sup> A.J. Der Walt wrote that the American Takings Clause "is a classic example of property clause cast in . . . [the liberal] mould, providing constitutional protection for . . . property as the parameter[ ] of personal freedom and individuality."<sup>53</sup>

Despite the language similarity, China's 2004 Constitutional Amendment does not provide the same fortress for individual liberty from government attack as the American Fourteenth Amendment. On the contrary, today, the greatest systemic threats to Chinese private property rights are government land takings.

In rural areas, the Household Responsibility System decentralizes state authority in management and privatized production.<sup>54</sup> However, peasants in China still cannot own land individually, because all rural land is owned by collectives. Flowing from this system of ownership, transferability is not allowed by individuals. The peasants are not allowed to sell or purchase land. Another limitation on the peasants' rights is that rural land use rights are restricted to farm use only. Any commercial developments on the rural land are prohibited.<sup>55</sup> The law does not stipulate a relationship between collectives and peasants for rural land. This ambiguity allows the government to acquire land in the disguise of "public interest" and sell it to commercial developers at a high price. This becomes a major revenue source for local governments, which leave peasants with very little compensation. Reportedly, illegal takings are the primary cause of widespread social unrest in China's countryside. The official organ of the Party estimated that of the 23,000 rural mass protests in 2006, over half were due to illegal land seizures or expropriation. A report from the Ministry of Labor and Social Security stated that forty million farmers lost

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<sup>49</sup> UNDERKUFFLER, *supra* note 44, at 139.

<sup>50</sup> See generally Nedelsky, *supra* note 17. Morris tied property rights directly to individual freedom. He was able to identify government interference as a fundamental violation of individual liberty. Wilson suggested that the use of property was an element of freedom and that property could provide a sphere of freedom from the power of others and from power of state.

<sup>51</sup> U.S. CONST. amend. V.

<sup>52</sup> UNDERKUFFLER, *supra* note 44, at 138.

<sup>53</sup> A.J. van der Walt, *Property Rights, Land Rights, and Environmental Rights*, in RIGHTS AND CONSTITUTIONALISM, THE NEW SOUTH AFRICAN LEGAL ORDER 461 (David van Wyk, et al. eds., Oxford Univ. Press 1996).

<sup>54</sup> VOHRA, *supra* note 24, at 266.

<sup>55</sup> The reason of limitations lies in the increasing rural migrations to the cities. The government worries the farmers are apt to sell all their land for short term benefits and then move into the cities for new opportunities, if they are allowed to do so. As more and more farmers migrate to cities, the urban unemployment would and has become a serious problem. When cities can no longer sustain the growing rural migrations, farmers can always return to their land. Otherwise, they will lose all the means to make their living which could cause a major social unrest because peasants consist of around 60 percent of Chinese population.

their land over the past decade and another fifteen million will suffer the same fate in the next five years.<sup>56</sup>

The urban land takings are equally serious. In the city, all land is state-owned. Since at least 1988, Chinese law has recognized that a private party may have a right to use land owned by the government in a way that creates a valuable market commodity. This is called “granted land use right.”<sup>57</sup> This “granted land use right” for housing can last up to seventy years and for industrial, public and commercial purposes can last up to 50 years. The State can not take the land away within the contract term except under circumstances when the land is for public use. If the government sought to take property away for public interest, the holder of the right was entitled to compensation for the loss of the right. Again, there are the same kinds of ambiguities in the laws. First, the definition of public interest has never been formally defined. Second, the law does not specify, in detail, how to compensate those being deprived of land. Due to the lack of clarity in property law, the government is not required to satisfy any administrative or judicial test for “public interest” in order to exercise the power of eminent domain. Local governments have virtually unlimited discretion to approve a site for redevelopment and order the existing occupant to make way for new investors. Urban “Demolition and relocation,” or Chai Qian, emerged as the leading cause of public dissatisfaction in recent years.<sup>58</sup> Beijing and Shanghai alone have evicted about four million residents for urban redevelopment.<sup>59</sup>

Though the language in the American Takings Clause is remarkably similar to Article Ten of China’s Constitutional Amendment, the application and meaning of these two passages are totally different in their respective social contexts. The explanation might be that the legal order is more than a series of inscribed words. It is the result of a series of values beliefs, social structures, and power struggles. When the words cross boundaries, the host culture interprets them according to its own moral beliefs and the standards of its own cultural integrity. In this scenario, China transplants an American-style takings clause into its property system, but China is not just transplanting the language from America, it is also alluding to the Chinese legal experience.<sup>60</sup> It deliberately leaves out the qualification of property as the guard of individual liberty and embraces only market property as wealth maximization. Despite the language resemblance, the meaning of Chinese property law differs from its counterpart and is inescapably tied to the specific Chinese cultural and historical disposition. The overriding concern in China is national wealth and power and there is no exception in its property reform.

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<sup>56</sup> Chinese Agency Comments on Rural Land Rights Issue, BBC MONITORING INT’L REPORTS (P.R.C.), Sept. 1, 2006, available at LEXIS.

<sup>57</sup> RANDOLPH & JIANBO, *supra* note 19, at 125–157.

<sup>58</sup> Katherine Wilhelm, *Rethinking Property Rights in Urban China*, 9 UCLA J. INT’L. & FOREIGN AFF. 227 (2004).

<sup>59</sup> See *Old District Rebuilding in Shanghai Benefits 2.5 M Households*, XINHUA NEWS AGENCY, Aug. 9, 2003; *Desperate Measures: China’s Forced Relocations*, THE ECONOMIST, Oct. 11, 2003, at 69.

<sup>60</sup> See generally Pierre Legrand, *The Impossibility of Legal Transplants*, 4 MAASTRICHT J. OF EUR. AND COMP. L. 111 (1997).

China realized if it wanted to achieve the status of a powerful, modern state in the world, it had to commit itself to the pursuit of national wealth and power. Every value was judged as means toward the attainment of that goal. As one scholar has written:

Where the commitment to the preservation and advancement of the societal entity known as the

nation takes priority over commitment to all other values and beliefs, where other values and

beliefs are judged in terms of their relevance to this end rather than vice versa, nationalism in a

precise sense is already on the scene.<sup>61</sup>

For more than a century, the Chinese were preoccupied with an overwhelming anxiety concerning the survival and revival of the State. Within this social context, China began its long process of modernization. The Communist Revolution was fueled by nationalist sentiments. The contemporary economic reform was also rooted in China's eagerness for national power. It is against this background that the changes in its property institution must be judged. Will it preserve and strengthen the nation-state? The property reform was designed to reallocate resources following the market rule. But maximizing wealth and enlarging the state's power must serve as the ultimate justification for the privatization of property rights. Thus, property rights as a manifestation of individual liberty are not appreciated in China. The welfare of Chinese individuals is never an end; the duty of the Chinese individual is not to any fixed values of property rights, but to the survival and growth of China of which the individual is a part.<sup>62</sup> Privatization is not to the benefit of Chinese people, but one of the instruments to achieve national power.

To a degree, this explains why the State retains absolute land ownership from which all other rights are derived. This authoritarian nature of property rights allows the government and investors to largely avoid bargaining costs and tedious procedures in procuring the land, thereby promoting investments and economic growth. The procurement of land in a well-defined property rights system usually involves a long procedure of negotiations, bargaining and hearings. The different interest groups provide a system of checks and balances for each other. The prolonged negotiation process hampers development. China's informal property rights system makes it much easier to complete land transactions because it reduces the efforts necessary to balance conflicting interests held by different interest groups.<sup>63</sup> For example, in the process of building Three-Gorges Dam and hosting the Beijing Olympic Games, China's government vacated residences and procured land with almost unimpeded speed and significantly reduced bargaining costs,<sup>64</sup> of course, at the cost of individual rights. Another concern related to the property system is social stability.

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<sup>61</sup> SCHWARTZ, *supra* note 26, at 19.

<sup>62</sup> *Id.* at 57.

<sup>63</sup> Zhang Xiaobo, *Asymmetric Property Rights in China's Economic Growth*, 33 WM. MITCHELL L.REV. 567 (2007).

<sup>64</sup> *Id.* at 574.

Since the Chinese are concerned with maximizing their wealth, stability is a necessary precondition for economic growth. Looking back in history, popular uprisings, like in Taiping in the nineteenth century and by the Red Guards during the Cultural Revolution, plunged China into bloody turmoil. The Chinese became keenly aware of the dangers of chaos; thus, it became more important for the Chinese to maintain social order than to define individual property rights. More emphasis is placed on creating a stable and business-friendly investment environment than on clarifying property rights. Strong regional protection for investors' rights together with weak protection of individual rights lowers the cost of doing business.<sup>65</sup> The authoritarian regime provides powerful control over social unrest and social dissent in order to achieve national stability for economic growth.

Precisely because Chinese focus is never on the individual but on the national economic performance, the sharp tension between individual interests and the aggressive rivalry of states does not make an impression on them. For the Chinese, the property institution liberates the energies of the individual, then consolidates these energies in the interests of the state.<sup>66</sup> Government organization, such as that found in the property institution, channels the individuals' energy toward constructive goals. Thus, individual interest and national power mutually reinforce each other.<sup>67</sup> The detachment between government and property institutions in China positively affects both individual enterprise and government organization. While the individual enterprise creates the energy, the consolidation of these individual energies in organizations enhances these energies and serves the ultimate goal of enlarging state power. The dichotomy between the individual right and state power is never a big concern in China.

There is another reason why Chinese intellectuals believe the state can channel the individual energy toward a more productive goal. Due to the repressive authoritarianism of China's past, the ruling class believes China failed to encourage the creative energies of the people and that they do not have the capacity for self-government.<sup>68</sup> Traditionally, the Chinese had always placed a high value on strong, paternalistic leadership that could protect, nurture and look after the needs of the people and maintain the established pattern of hierarchical human relationships. The people readily offered their loyalty and obedience to such a leadership. In the nineteenth century and early twentieth century Chinese nationalism rose as a response to the threat of the West and demanded an even stronger state. This demand in turn allowed Chinese politics to turn left and endowed the single-party authoritarian governments of the Communist Party. Most of the intelligentsia supported, rather than condemned, this development. They believed in the unchallenged power of the state, stable state structures,

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<sup>65</sup> *Id.* at 578.

<sup>66</sup> SCHWARTZ, *supra* note 26, at 79.

<sup>67</sup> SCHWARTZ, *supra* note 26, at 75.

<sup>68</sup> Liang Qichao argued, "in the present state the Chinese people can only be united by an authoritarian government. The spirit of the people today is still unenlightened and we must first rely on the power of the sovereign to change it." See LIANG QICHAO, XIN MIN SHUO (Discourse on the New Citizen), in YIN-PING-SHIH WEN-CHI (A collection of writings from the Ice-Drinker's Studio) 14:13 (1916).

authority vested in the managerial class, monetary incentives, and elitist technocrats as key elements in achieving modernization of the State. Hence, at present, it is understood that it is better to let the government take charge of the property system. The government will educate the people, allocate the property rights and find the most efficient way to use them. After all, the Communist Leadership does not completely divest itself of the traditional paternalistic character.

It is not at all surprising that the Chinese government, which made all the changes in the property system toward privatization, did not give up its ownership control of the property institution. Deng's new philosophic guideline for China's reform and modernization known as Deng Xiaoping Theory,<sup>69</sup> tried to reconcile economic pragmatism with an authoritarian state, and appeared to have accomplished the impossible: accelerating market economy while upholding stronger state control. His successor Chinese Communist Party ("CCP") General Secretary Jiang Zeming worked within Deng Xiaoping Theory. In his speech at the Fifteenth CCP National Congress, Jiang Zeming said that "any form of ownership that meets the criterion of raising productivity, living standards and the strength of the nation can and should be used to serve us."<sup>70</sup> It was widely accepted that the Communist Party of China could stay in power only if it delivered on economic growth and national prosperity. The welfare of the individual through property rights is always overshadowed by the more immediate concern with state interests. Property rights are called forth to set up the process of national modernization. Privatizing property serves the end of national wealth maximization,<sup>71</sup> while its function for increasing individual liberty falls away. It is fair to conclude that Chinese property reform is only a means to the advancement of the State's wealth and power.<sup>72</sup>

## V. CONCLUSION

We are all children of the past. The distinctive property systems we are operating today can be best understood in their own historical experience. A parallel exists in the Chinese property system between belief in material incentives and skepticism about individualism. China's property rights are deeply rooted in the goal of national wealth and power. It is impossible to understand the true nature of the contemporary Chinese property institution without considering this ideological force behind it. It is the explosive mixture of a long-frustrated desire of national revival and the new possibility of thought and institutions brought by the West that has propelled China's transformation.

A system of property rights is more than a device or mechanism; it is an intricate web of experiences and hopes. It defines each person in relation to other people and it shapes the social structures. What it defines and the

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<sup>69</sup> See generally *SELECTED WORKS OF DENG XIAOPING* (The Bureau for the Compilation and Translation of Works of Marx, Engels, Lenin and Stalin Under the Central Committee of the Communist Party of China trans., 1984).

<sup>70</sup> Mark O'Neill, *Privatisation Drive Contrary to Socialist Principles*, S. CHINA MORNING POST, Sept 15, 1997, at 7.

<sup>71</sup> SCHWARTZ, *supra* note 26, at 117.

<sup>72</sup> *Id.* at 121.

meanings it sets forth, give direction. The focus of property reflects a faith in the possibility of using tradition itself to affect radical change. The Chinese property institution is a way of organizing society under beliefs that represent the identity of the community and its individual members. It is both the product of Chinese social and economic change and a cause of that change. Could China's property law become a constructive force, bringing the fundamental change to its constitutional values in terms of individual freedom and limited government? The answer remains unknown. Our story began with the puzzle of China's economic growth with its unclear property rights. And the story concludes with the realization that China's rapid economic growth might not be in conflict with its "vaguely defined" property law. It is all part of an upward, evolutionary process, positive fermentation leading to a greater national prosperity. The Sino-centric Chinese were bound to search for an ideology giving a boost to their nationalistic collective ego.

