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978-1-107-12543-8 - The Constitutional Protection of Private Property in China:

Historical Evolution and Comparative Research

Chuanhui Wang

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Introduction

A man's house is his castle. This is the most famous expression used to describe the sanctity and inviolability of a person's property or home. It is commonly regarded as an important doctrine originating from and solidly rooted in the English common law system. It is generally traced to the expression of English Jurist Sir Edward Coke in his *The Institutes of the Laws of England* as early as 1671.¹ Following Coke, Blackstone emphasised the castle analogy by saying: 'For every man's house is looked upon by the law to be his castle of defence and asylum, wherein he should suffer no violence', and '[t]he law of England has so particular and tender a regard to the immunity of a man's house, that it stiles it his castle, and will never suffer it to be violated with impunity.'² In the United States, the castle metaphor is also regarded as 'the fabric of the Fourth Amendment' of the *U.S. Constitution*, which prohibits government from unreasonably seizing a citizen's property.³ It is commented that the *Fourth Amendment* confers on individual owners a nearly absolute right over their property, particularly the right to preclude other individuals and the government from seizing it.⁴ Although the original expression containing the absolute exclusion right has been eroded by increasing government power to regulate and seize property, the castle doctrine continues to demonstrate the importance of private property protection, which concerns both the security and dignity of property owners. The invasion of government power in a person's home is allowed under specific situations only and must be

¹ Coke's original complete expression is: 'For a man's house is his castle, et domus sua cuique tutissimum refugium [his home is his safest refuge].' See Coke, *The Third Part*, p. 162. In fact, this quotation's origin is found in an earlier time. For example, a similar expression can be found in William Lambard's *Eirenarcha*, published in 1581. See Cuddihy and Hardy, 'A Man's House', 371. Moreover, in the *Pandects* (Roman Law Digest, 533 AD) can be found the saying, '[o]ne's home is the safest refuge for everyone.' See Green, 'Castles and Carjackers', 4 (fn16).

² Blackstone, *Commentaries*, at Book 3: chap. 19; Book 4: chap. 16.

³ Hafetz, 'A Man's Home', 175. ⁴ Penalver, 'Property Metaphors', 2972.

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subject to strict constitutional principles, legal rules and just procedures. In the case of *Weeks v. United States*, the U.S. Supreme Court ruled that '[r]esistance to these practices (searches and seizures) had established the principle which was enacted into the fundamental law in the 4th Amendment, that a man's house was his castle, and not to be invaded by any general authority to search and seize his goods and papers'. This ruling strengthened the constitutional castle value by citing Judge Cooley's words: 'The maxim that "every man's house is his castle" is made a part of our constitutional law in the clauses prohibiting unreasonable searches and seizures, and has always been looked upon as of high value to the citizen.'⁵

In China, a man's house has never been, nor is it now, his castle.⁶ A man's house may become his castle in the future, but that day remains distant. By examining Communist China's experience over more than sixty years (from 1949 to now), we can trace a development route from the times of little recognition and protection of private property in the first thirty years after 1949 to the gradual strengthening and even constitutionalisation of private property protection in the second thirty years.

For China, given the country's transformation from planned economy to market economy, the protection of private property is one among several most important and arguable reform issues. Compared with her fast-developing economic growth, the pace of China in strengthening the protection of private property is criticised as unsatisfactory and even laggard. As Dorn points out, although China is the fastest-growing economy in the world, it still needs time to form 'a true market system with widespread private ownership and a political system that respects human rights'.⁷ Dorn is correct in observing the mismatch between fast economic growth and slow individual-right-oriented political reform in China. According to Dorn, if the Communist Party government hinders the reform favouring private property, spontaneous market order, free expression and free association, 'the future of China's civil society will be in jeopardy'.⁸ In the eyes of many Western scholars, privatisation and strong protection of private property are a premise for developing market economy and civilisation. The notion that private property is the

⁵ *Weeks v. United States*, 232 U.S. 383, 390 (1914).

⁶ In China, people ironically use 'China', the English name of their country, to denote the demolition activities (particularly of houses) concerning expropriation, because the English pronunciation of 'China' is similar to the Chinese pronunciation of 'demolition' (*chai*).

⁷ Dorn, 'Trade and Human Right', 81. ⁸ *Ibid.*, 83.

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foundation of civilisation has been rooted in both the academic literature and the legal traditions in Western countries.⁹ Private property, as a core component of the institutional framework that influences economic development, plays an important role in stimulating economic growth and efficiency. An empirical study that covers 115 market economies between 1960 and 1980 found that the politically open countries, which are subject to the institutional framework's binding features of private property, rule of law and market allocation of resources, have a growth rate of three times the rate enjoyed by those economies in which such property rights and freedoms are proscribed. As for the measurement of efficiency, politically open countries have 2.5 times that of those with opposite political institutions.¹⁰ However, for China, a country governed by the Communist Party of China (CPC), strengthening private property protection is a politically sensitive issue. Unlike Russia's shock therapy, transitional reform in China has been gradual. Private property reform in China was addressed relatively late compared with other reform issues. China initiated its reform and opening policy in the late 1970s. However, legal reform encompassing fundamental changes in private property law was not instituted until 2004 when clauses were added to the constitution recognising the constitutional status of private property and limiting the government's eminent domain and expropriation powers.

It is difficult to fathom that China has experienced more than thirty years of rapid economic development within a legal framework ensuring the protection of private property which is weaker than that in developed countries. Why have foreign investors flooded into China in the past thirty years despite insufficient protection of their property? To a large extent, the rapid growth of foreign investment has been driven by many stimulating preference policies offered exclusively to overseas investors. However, with China's demand for foreign investment falling in recent years, the number of preference policies that act as motivational factors has been reduced since early 2000. For overseas investors, however, a stable, predictable and rational legal environment in host countries is becoming more important than preference policies. As for domestic citizens, after

⁹ As Hagan observed, such a notion was seldom argued in the late eighteenth and nineteenth centuries in the United States. Hagan also pointed out that for the proponents of severalty in India, it is an accepted fact that private property is essential to civilisation. See Hagan, 'Private Property', 127.

¹⁰ Scully, 'The Institutional Framework', 661.

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many years of opening up to the outside world, they are demanding stronger protection of private property similarly to overseas investors. With reforms in the economic sector, the Chinese public's request to transform its orthodox communist society into a civil society with wide recognition and strict protection of private property and other individual liberties has quickened. In fact, a 'quiet revolution' towards civil society has been occurring, accompanied by the pace of economic reforms made since 1978.¹¹ Thus, in the mid-2000s, China began implementing constitutional reforms concerning private property in response to demands for social development. After the revision of the *Constitution* in 2004, the *Property Law (Wuquan Fa)* was promulgated in 2007,¹² and a new regulation concerning the expropriation of urban houses was enacted in 2011.

With the quickening pace of urbanisation and industrialisation, the expropriation and taking of land and houses by governments has increased rapidly in recent years. Violent conflicts between the owners of houses and land rights on the one hand and local governments on the other have increased, particularly in the past ten years. The increase in the government's powers of eminent domain leads to a significant and urgent research topic: learning how to restrain the Chinese government's eminent domain powers through the constitutional protection of citizens' private property. Or, more neutrally, learning how the constitutional balance between government power and individual property rights can transform China into a civil society.

I view society as a sea in which various superficial and embedded, inside and outside currents conflict and converge with each other to form the sea's flow. Thus, this book put the research within the historical background and social context to explain how the constitutional protection of private property in China has been evolving to the current situation, and then to answer where it would go on to move in the future. In this book, I have three main objectives. The first objective is to identify the driving social forces that influence the evolution of legal reform in China with respect to private property during the era of globalisation. The second objective is to analyse the main constitutional issues with respect to the protection of private property in China. The third objective is to design

¹¹ Dorn, 'Trade and Human Right', 77.

¹² *Wuquan Fa [Property Law]*, enacted by the Fifth Session of the Tenth NPC on 16 March 2007 and put into force on 1 October 2007. The Chinese text is available at www.gov.cn/flfg/2007-03/19/content_554452.htm.

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and suggest feasible reform measures for the revision of the constitution and the strengthening of the constitutional review mechanism.

To achieve the research objective, the following three questions are analysed:

1. What are the driving forces behind both globalisation and localisation that influence the evolution of private property protection in China?
2. How do public authorities and courts in China apply the constitutional principles and relevant rules concerning private property (three prongs) in cases regarding the taking of property?
3. What feasible and constructive reform measures can be implemented to improve China's private property protection through the application of the constitution?

Three research methods are used to address these three questions. Through historical analysis, the evolution of private property and its protection in China as well as the forces influencing such evolution are identified. More importantly, through a review, it is determined that the change in the policies of the CPC government has significant influence on both constitutional legislation and on its adjudication. When analysing the three prongs of the 'taking clause', a comparative method and case study are employed. I compare China with the United States, a representative common law country; with Germany, a representative continental law country; and with India, which, similar to China, is a leading developing country plagued by serious conflicts caused by land expropriation. Through these comparisons, while the discrepancies in both their constitutional stipulations and their applications are found, the experiences of these countries are helpful in identifying the problems within China's system and in offering inspiration for China's further reform. A case study is used to examine private property protection in its social context. An important aspect of my research is that it links relevant legislation and its application to social change and observes legal reform in action. By so doing, the complicated conflicts of interest among individuals, collectives, government and private developers can be identified. Accordingly, the attitudes and practices of public authorities and courts can be analysed. Furthermore, the application of the constitution and the type of institutional mechanism that should be incorporated to guarantee that the constitution is being effectively and appropriately applied are explored. Figure 1.1 exhibits the overall framework with respect to the research objectives, questions and methods in this book.

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Method	Research question	Nature	Objective
Historical Method	What forces are driving the evolution of private property protection in China?	Exploratory	To identify the social context
	↓		↓
Comparative Method + Case Study	How and why do governments and courts in China address the constitutional issues concerning private property?	Explanatory	To identify the problems and their causes in the social context
	↓		↓
Institutional Analysis	How can China reform the constitutional review and adjudication system to improve private property protection?	Constructive	To design the institutional resolutions and evaluate their effect

Figure 1.1 Research Framework

After the introduction in this chapter and the outline of basic theories about and the constitutionalisation models of private property in Chapter 2, this book makes a historical review of the constitutional protection of private property in China first, especially linking China's evolution of the constitutional protection of private property with its path of immersing itself into globalisation to analyse the change in conflicting social forces that have been influencing the constitutionalisation of private property and relevant legislative reform. Then, after the detailed analysis on the three prongs of the taking clauses in the constitution – public interest, just compensation and procedural guarantee – I suggest some

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feasible and enforceable reform measures with the aim of strengthening the protection of private property, with a premise that such measures do not conflict with the current fundamental political system of Communist Party government.

Chapter 2 begins with the theoretical perspectives of property. The understanding of property from ‘right’ and ‘relationship’ perspectives is especially helpful in analysing China’s property system, which is characterised by the division of public rights and private rights. Through the comparison of these two concepts (commons and anticommons), the tension between the justification of private property protection and the social function of property is identified and its resolution is reflected in the three-prong design in the constitution. Thus, the constitutionalisation is then analysed, and Germany and the United States are characterised as having a constitutionalisation model. Although China moved towards the constitutionalisation of private property after its opening and reform, compared with India, which removed the constitutional protection of private property in the late 1970s, it is still very weak with respect to the practical protection of private property. The research in this chapter is normative.

Chapter 3 traces the history of the tumultuous fate of private property in China’s constitutions. After a short-term recognition of private ownership in the 1950s and prior to China’s opening and reform, private ownership of land and other productive means was eliminated. Beginning in the late 1970s, private property rights began a slow revival. Finally, with the adoption of the *2004 Amendment*, the inviolable status of private property was entrenched in the *1982 Constitution of China*, and three limits on expropriation were fully established. However, individuals were still not allowed to have full ownership of the land they held; they were given only limited use and transaction rights. This then resulted in a ‘public ownership–private use right’ division of land. To explain this twisted structure and its evolutionary path, the relevant social forces are analysed, and globalisation and localisation form the context of the analysis. The social forces influencing the reform of property law in China are distinguished and analysed first from the perspective of globalisation and then from that of localisation. The interaction among the forces and their influence on Chinese property law reform are then illustrated. A popular understanding is that globalisation pushes forward the process of the rule of law in China. In fact, however, the real situation is more complicated as the social forces include pressure from the global society, the demands of the FDI investors, the reform behaviours of the CPC, the

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citizens' rights consciousness, the rent seeking of the developers and the expansion of fiscal revenue at the level of the local governments. The historical review of the change to the constitutional and legal status of private property in China reveals two facts. The first of these inspirations is that the globalisation process in China in the past more than thirty years has produced a stronger demand for a higher level of private property protection from both overseas investors and domestic citizens. The second fact is that the globalisation process strengthens the motivation of local governments to take private land right and houses. More accurately, the extent to which the constitution restricts eminent domain is decided by the change of the interaction between various social powers in the globalisation process. Moreover, these forces changed and will change during different stages of transitional development, thus resulting in the dynamic character of such interactive social forces. The analysis in this chapter is descriptive.

Chapters 4, 5 and 6, which are based on the preceding normative and positive research and apply comparative method and case study, respectively examine three prongs of the eminent domain or taking clause in the constitution, which are public interest, compensation and procedural restraint.

Chapter 4 opens with an analysis of the explanation of public interest, or a similar principle, in Germany and the United States. Through the division of eminent domain and other government powers, the mode of 'authorised by law' in Germany and that of 'statutory deference' in the United States are compared. In both countries, when explaining and applying the public interest doctrine, the proportionality principle is used in limiting the possible misuse of the power of eminent domain. However, in China, the doctrine of public interest has very little influence in practice and is instead merely symbolic of a constitutional doctrine. The focal issue regarding economic development as public interest is then analysed. By comparing China and India, it is determined that because of the ruthless scope of land expropriation caused by the weak limits of public interest, violent incidents and social unrest have plagued both countries. In turn, both countries responded by implementing reforms that restrained the scope of public interest. China, however, made minimal progress in clarifying the scope of public interest with respect to the expropriation of only urban houses. Moreover, such clarification did not exclude or substantially limit economic development projects. Through the analysis of the *Gushi* case, it is found that the enclosure movements driven by the motivation of economic growth and the enlargement of

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local revenue slowed the pace of reform in restraining the expansion of expropriation through the narrowing of the scope of public interest.

Chapter 5 examines the compensation issue. In Western countries, the market value based on the comparable sale price is the main compensation standard. However, in China, this standard currently applies only for the calculation of compensation of the expropriated urban houses. For the expropriation of rural land, this standard is not applicable for two reasons. One is that the lack of an effective transaction market of land and land rights results in it being impractical to apply such a standard. The second reason is that the local governments are motivated to lower rather than to raise compensation levels because of their need to enlarge local revenue through land expropriation. The recent reform with respect to the uniform land section price may result in insufficient compensation to those farmers who produce more output than the average in a specific area. In addition to inefficiency, the discrimination in the compensation standards between urban residents and farmers appears to violate the equal treatment doctrine in the constitution. To borrow from India's experience and consider China's reality, two feasible and exact reform measures – 'market value + going-up adjustment' for urban houses and 'minimum standard + solatium' for rural land – are suggested.

Chapter 6 reviews the U.S. due process doctrine and its application in eminent domain cases. The authorisation modes adopted by Germany and India are then analysed. It is found that, compared with the popular practice in the procedural guarantees of private property in democratic countries, even after China's reform in 2004, the expropriation procedures in China remain greatly flawed. This can be reflected in the lack of full information made available to property owners, the inefficient nature of hearing opportunities, the lack of opportunity to challenge the public nature of the concerned project and the lack of advance payment before compulsory occupation. With respect to the institutional mechanism for enforcing constitutional doctrines, China has adopted neither the U.S. nor the European mode, as the Chinese courts play essentially no role in applying the constitutional provisions when trying cases. Accordingly, the review mechanism under the Standing Committee of National People's Congress (NPCSC) is useless in correcting lower-level unconstitutional regulations and rules.

Chapter 7 ends the whole research with concluding remarks and reform suggestions. Considering the CPC political system, which is characterised by public property control and centralised governance power, I am not optimistic about the advocacy of substantial privatisation of

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state-owned enterprises (SOEs) or about publicly and collectively owned lands and resources. In the end, some feasible and constructive suggestions are offered. As to the amendment to the constitution, it is suggested that it be revised. First, it must propertise land use rights; second, it must fundamentalise private property; third, it must ensure the equal treatment of all property rights; fourth, it must establish much clearer limits on compensation such that it be 'full' or 'just' compensation. Regarding the revision of legislation, a main improvement would be the authoritative explanation of public interest and compensation by the NPCSC. The most difficult reform is that of the institutional mechanism of constitutional review. As the total transplantation of the U.S. or European mode is nearly impossible in the near future, partial improvement is, at the very least, suggested. A specific review body under the auspices of the National People's Congress (NPC) can be established to be responsible for the constitutional review, and it should, upon any court's request, give timely response with respect to the constitutionality of the inquired legal rules. The Supreme People's Court (SPC) should be given the power to interpret, independently or with a joint review body, the constitution. The jurisdiction level of the court that hears expropriation cases should be raised to reduce the interference of the local governments.