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From Public to Private: The Newly Enacted Chinese Property Law and the Protection of Property Rights in China

Mo Zhang†

Abstract: Protection of Property Rights has become a pressing issue in China since the country strived to move from a planned economy to a market economy in late 1970s. The passage of the Property Law of China on March 16, 2007 marked an historic change in the country from public to private with respect to property rights. Effective on October 1, 2007, the Property Law for the first time in Chinese history grants an equal protection to both public and private properties, breaking up the orthodox ideology in favor of public ownership against private ownership and individual liberty.

With a notable civil law tradition, the Property Law is intended to set forth comprehensive rules regulating creation, alteration, alienation as well as termination of property rights, and protecting private property rights in China, a country where the public or state ownership is still playing a leading role in the nation's economy. Many aspects of the Property Law, which are different from those in other countries, particularly common law countries, are unique not only in their content but also in their application. The land use rights typically reflect a Chinese reality, in that the ownership of land is separated from the possession and use of it.

Adoption of the Property Law in China is a substantial step toward protection of private property rights in the nation. The greatest challenge facing the country, however, is how to enforce the law so that the private property rights are effectively protected, especially in situations where public ownership is involved. The "Nail House" syndrome that has spread across the country indeed raises the serious issue of compensation in cases of government takings. Whether or not compensation for takings will be just and reasonable remains to be answered.

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I. INTRODUCTION

The Book of Songs (also translated as the Book of Poetry or Book of Odes), a collection of Chinese folk songs describing part of China’s history during the period of West Zhou (1100 to 770 B.C.), contains a song named “Bei Shan” (North Mountain). The song includes a very famous verse: “All land under the heaven belongs to the King, and all people on the earth are the subjects of the King.” The verse was widely cited in later history and even today because it stated the view that a ruler is not only the governor of the people, but also the sole owner of the land of the country.

Indeed, for over two thousand years in China, it was well-established that the emperor had the right to determine the ultimate fate of all kinds of property in the country. With regard to an individual person, an axiom from the governing Confucian rites held that if the ruler wanted a subject to die, the subject must die. Thus, the emperor was in control of both property and the very lives of his citizens. Since Confucianism was adopted as the orthodox state ideology during the Han Dynasty (206 B.C. to 220 A.D.), the Confucian rites have become the highest moral standard and fundamental legislative principles in China. Until the fall of the Qing Dynasty (1644–1911), there had

1. In Chinese literature, there are five books known as the FIVE CLASSICS (Wu Jing): the BOOK OF SONGS (Shi Jing), the BOOK OF HISTORY (Shu Jing), the BOOK OF CHANGES (Yi Jing), the BOOK OF RITES (Li Jing), and the SPRING AND AUTUMN ANNALS (Chun Qiu). The BOOK OF SONGS contains folk poems, along with royal and ritual poems compiled by Confucius (551-479 B.C.). The FIVE CLASSICS together with four other books are commonly called FOUR BOOKS AND FIVE CLASSIC (Shi Su Wit Jing). The FOUR BOOKS are the GREAT LEARNING (Da Xue), the DOCTRINE OF THE MEAN (Zhong Yong), the ANALECTS OF CONFUCIUS (Lun Yu), and the MENCUS (Meng Zhi).

2. See Bei Shan, in THE BOOK OF SONGS (SHI JING); for an English translation, see ARTHUR WALEY, THE BOOK OF SONGS: THE ANCIENT CHINESE CLASSIC OF POETRY (Grove Press 1996).


4. The core of the Confucian rites consists of the so-called “three cardinal guides and five virtues” (San Gang Wu Chang). The three cardinal guides were “ruler over subject, father over son and husband over wife,” and the five virtues included benevolence, righteousness, propriety, wisdom and fidelity. See ZHANG JIFAN, THE TRADITION AND MODERN TRANSITION OF CHINESE LAW 51, 82 (2d ed., Law Press 2005).

5. In the early Han Dynasty, Dong Zhongshu, who served as Prime Minister for Emperor Wu, put in place a state policy known as “Proscribing all other schools of thought and espousing the Confucian orthodoxy only.” See WU SHUCHEN, HISTORY OF CHINESE LEGAL THOUGHTS 191 (Law Press 2004).

6. Even Han Feizi, the leading opponent of Confucianism and founding father of legalism, acknowledged the importance of the three cardinal guides. According to Han, “Subject serves ruler, son serves father, and wife serves husband—if all of the three are followed, the country then would be in good shape; or if the three were violated, the country would be in chaos—these are the common sense
been a strong belief that everything was at the mercy of the emperor. Chinese history books have commonly portrayed the reality that when an official is removed from office, the government may conduct a thorough search of his residence without notice and may confiscate his property without a hearing.

The history of China reveals that the concept of private property was never really developed in the country's past, as private ownership scarcely reached the level of being properly respected and legally protected. Even after the Republic of China—a government structured to a great extent under the ideas of western democracy and liberty—was established in 1911, the concept of private property continued to receive little attention or legislative protection due to chaotic battles amongst Chinese warlords. Under Chiang Kai-shek (1887–1975), who reigned from 1927 to 1949, a civil code was adopted in 1930. The 1930 Civil Code consisted of five parts, with Part III dealing with "Rights over Things" (a civil law concept for "Property"). Unfortunately, the 1930 Civil Code was not applied due to Japanese occupation, followed by China's eight-year war against Japan and then its three-year civil war. In 1949, when the Communist party came into power, the 1930 Civil Code along with five other codes were entirely annulled.

From 1949 to 1976, China experienced a painful period of internal class struggle in Chairman Mao's era. Driven by the former Soviet Union model and socialist ideology, Mao pushed very hard for a system that would diminish both private ownership and individualism. As a result, private interests and private property rights became synonymous with capitalism and the bourgeoisie—both enemies of socialism. During this period, people were trained to follow the lead of the proletariat (meaning the class of people with no assets or property) and do whatever the Communist party commanded. This made it impossible for Chinese citizens to make any claims of property rights on the earth. See Han Feizi, Loyalty and Filial Piety; 1 W.K. Liao, The Complete Works of Han Fei Tzu (Arthur Probsthain 1939).


8. In some situations, the "Imperial Edict" from the emperor would be read on the spot. See Zhang Jinfan, supra note 4, at 541-543.

9. The five parts in the 1930 Civil Code were: General Principles, Obligations, Rights of Things, Family and Succession. Part I was adopted on May 23, 1929, and took effect October 10, 1929; Parts II and III were promulgated in November 1920, and effective May 30, 1930; Parts IV and V were enacted in the end of 1930. See Joseph An-Pao Wang, Studies in Chinese Government and Law, Civil Code of the Republic of China (University Publications of America 1976) (1930).

10. The 1930 Civil Code and other five codes were known as the "Six Codes." In addition to the Civil Code, the Six Codes included the Constitution, Commercial Code, Criminal Law, Criminal Procedure and Civil Procedure. The Six Codes were repealed by the Communist party in February 1949. See Ralph H. Folsom et al., Law and Politics in the People's Republic of China: In a Nut Shell 25 (West 1992).

11. Mao divided people into different classes depending on the status of the people (e.g. working class, peasants, intellectuals, etc.). According to Mao, the human history is actually a history that one class of people struggles against other classes. See Stanley Lubman, Bird in a Cage, Legal Reform in China After Mao 41, 42 (Stanford University Press 1999).
against the government since the government could take away all private property, even at the whim of a low-level officer. The ten-year Cultural Revolution stripped the people of China still further, if not completely, of any private property and property rights.\textsuperscript{12}

After 1978, when the country adopted its famous “Opening-Door” policy and undertook vast economic reforms, China entered into a stage of lining up with the rest of the world and shifting from its rigid planned economy to a market economy. Ever since, the shift has dramatically changed the way people think about public interest \textit{vis-à-vis} private interest. A striking consequence is that the concepts of freedom and individual liberty are no longer taboo in the country. For nearly three decades, people in China began to regain consciousness of their private property rights and sought further protection of these rights. Private property gradually gained its independence from public property.

On March 16, 2007, the long awaited and highly debated Property Law of China passed the National People Congress (NPC) after a fourteen-year legislative marathon.\textsuperscript{13} Effective since October 1, 2007, the Property Law has been widely hailed in the country as a milestone of modern Chinese history, granting legal protection to private property rights.\textsuperscript{14} Indeed, the Property Law is a significant piece of legislation in China because it fills in the country's “legal blank” with regard to private property and property in general. Furthermore, it helps enhance the legal infrastructure of the country by establishing a framework that is badly needed for the regulation and protection of property rights. Perhaps more importantly, the Property Law reinforces the inviolable nature of private property in China, a concept that was constantly denied in the country until 2004, when the 1982 Constitution was amended for the fourth time.\textsuperscript{15}

The Property Law is intended to be comprehensive legislation on property. It contains five parts and nineteen chapters consisting of 247 articles in total.

\textsuperscript{12} As it has been observed, the Anglo-American conception of “rights” is basically associated with individuals and is often linked with defying state authority, while in China “rights” are more commonly related to the public or collectives. See NEIL DIAMANT, ENGAGING THE LAW IN CHINA, STATE, SOCIETY, AND POSSIBILITIES FOR JUSTICE 14 (Stanford University Press 2005).

\textsuperscript{13} The drafting of the Property Law started in 1993 and the draft was submitted in 2002 to the National People's Congress for the first reading. See WANG SHENMING, QUESTIONS AND ANSWERS TO THE STUDY OF THE PROPERTY LAW 2 (China Democracy and Legality Press 2007); see also Su Yongtong, Road to Legislating China's Property Law: Never so Tortuous, Never so Resolute, Mar. 23, 2007, available at http://www.sinofile.net/saiweng/sip_blog.nsf/d6plinks/YZHI-6ZKAZJ.


\textsuperscript{15} XIAN FA art. 13 (1982) (P.R.C.) (The English translation is available at http://english.people.com.cn/constitution/constitution.html). The current Constitution of China was adopted in 1982, and was amended in 1988, 1993, 1999 and 2004. Under Article 13 of the Chinese constitution, as amended in 2004, citizens’ lawful private property was declared “inviolable.” It was the first time that the private property was written into Chinese constitution after 1949.
The five parts include “General Provisions,” “Ownership,” “Usufructuary Right,” “Right of Security Interest,” and “Possession.” The “General Provisions” cover basic principles as well as creation, alteration, alienation, termination, and protection of property rights. “Ownership” covers state ownership, collective and private ownership, partitioned ownership of buildings, neighbor relationships, and common ownership. “Usufructuary Right” deals with rights related to contracted management of land, land use for construction, and land use for housing and easements. The “Right of Security Interest” concerns the rights involving mortgages, pledges, and liens. “Possession” has to do with contractual possession, remedies for property damage, the right to accrued interests, and restitution.

However, it is important to note that in China, as in many other civil law countries, the term “res” (things) is commonly used to refer to property and as such the property rights are normally phrased as “real rights” (jura in re). One possible reason for this is that the term “property” is considered overly broad, as it could potentially include anything of value.16 Meanwhile, “things” generally has a narrower definition, referring to tangibles and intangibles of certain economic value.17 In this context, a more restrictive definition limits the thing to tangibles or corporeal res.18 Although some argue that the use of the term “things” rather than “property” is merely a matter of Chinese tradition,19 it is important to note that under the definition of “thing,” creditor rights would not be regarded as a “thing” or “res,” but such rights may be deemed a kind of “property.”20

Under the civil law tradition, the law regulating civil matters has two major components: one dealing with “things” and the other dealing with “obligations.” Thus, the law of “things” is meant to protect the rights over property against any other person, while the law of obligations has a function of safeguarding the right of a creditor against a debtor. In common law countries, no such line seems to exist as to the laws regulating property and obligations. Despite the difference, however, it is without question that “things” are property and “real rights” are property rights. In this context, and also to avoid confusion, this Article uses the term “property law” instead of “real rights law,” as commonly used in China.

The objective of this Article is to offer an analytical review of Chinese

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16. For example, in the United States, property may denote everything which is the subject of ownership. This can be objects that are corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal, or that which has an exchangeable value or which goes to make up wealth or estate. BLACK’S LAW DICTIONARY 1216 (8th ed. 2004).
18. See id. at 2.
19. See id. at 60.
property law, with the central theme focused on the protection of private property rights. Part II of the Article discusses how the concept of private property emerged and evolved recently in China along with the economic reform of the country, as well as the ideological change in the nation toward the value of private interest and personal liberty. Part III provides an analysis on the equal protection issue relating to private property as opposed to the state and collective property. Part IV examines key property principles embedded in the Property Law and the significance of these principles in their application to property rights, including some comparisons to American property law. In addition, the Chinese reality with regard to property rights and the right to use the land in contrast to the ownership will be addressed. Part V takes a special look at the "Nail House" phenomenon arising from the disputes over the taking of private property, discussing compensation and other remaining issues facing the Property Law.

This Article does not attempt to simply browse or describe provisions of the Property Law, but rather it focuses on certain important principles and rules that typically reflect the unique characteristics of the Property Law, while analyzing how such principles and rules are to be applied and what impacts they may have on the development of a property system in China. In conclusion, Part VI of the Article suggests that the adoption of the Property Law of China (at least in its text) brings an end to the ignorance of private property rights in the country and represents a significant move from public to private in property rights protection. The most important point is that the Property Law places private property on equal footing with public property. One issue that lies ahead, however, is the debate over how to implement the Property Law in a manner that properly respects and protects private property and private property rights.

II. LIBERTY V. GOVERNMENT CONTROL: RECOGNITION OF PRIVATE PROPERTY RIGHTS

In the Western world, property is a concept more closely associated with individual entitlement or private assets that are individually owned. In the United States, for example, the concept of property denotes a citizen’s right to possess, use, and dispose of his property. Property rights are generally understood as held by individuals, making the concept of ownership by a social collective virtually unknown. In the Anglo-Saxon legal tradition, the right of

24. See Friedman, supra note 22, at 342.
property, the right of life, and the right of liberty are all deemed fundamental.\(^\text{25}\)

This is certainly not the case in China. Historically, China was a country where the "imperial power" or the "power of emperor" was the supreme authority of the land. Pursuant to Confucianism, to rule a country is like ruling a family. The father has absolute power to decide everything for the family, and each individual member in the family must subordinate his or her own interest to the family interest. This was imperative to holding the family together, and all individuals within the family were subject to the paternal power. Thus, in a society structured on the stratification order of familism or kinship,\(^\text{26}\) the individual's way of life, rights, and obligations were not decided in the way best to benefit the individual. Instead, rights and obligations were determined by the need of the rulers or the government.\(^\text{27}\)

Since the Qin Dynasty (221–206 BC), each Chinese dynasty followed a pattern of having a highly-centralized state power with an easy reach over every corner of the country and ultimate control of the people. Even after the dethronement of the last emperor in 1911, many revolutionaries, including Dr. Sun Yat-sen and his followers, still believed that it was necessary to establish a government with an "all-purpose" function, with each individual under government power, ready to sacrifice personal interests in order to preserve such power.\(^\text{28}\) Although Dr. Sun Yat-sen based his idea of revolution on nationalism, democracy, and equalization, he actually tried to promote a so-called "guided democracy," because he believed that people in China were not ready yet to exercise democracy.\(^\text{29}\)

After the founding of the People's Republic of China in 1949, socialism became the dominant force in the nation. In Chairman Mao’s theory, the core of socialism was public ownership. One idea that was widely upheld is a concept translated from one of Lenin’s books that became a creed in China for many years: "We do not recognize anything private."\(^\text{30}\) Under Mao’s guidance, a movement called the "socialist transformation" took place in the country during the mid-1950s. All private properties were either confiscated or transformed into public use, and all private ownerships were replaced by public ownerships.\(^\text{31}\)


\(^{26}\) See Tung-Tsu Chu, Law and Society in Traditional China 9-10 (Rainbow Bridge Book Co. 1965).

\(^{27}\) See Xu Zhong Min & Ren Qiang, The Legal Spirits of China 414-415 (Guang Dong People's Press 2007).

\(^{28}\) See id. at 416-417.

\(^{29}\) See Richard Hooker, Modern China, available at http://www.wsu.edu:8080/~dee/MODCHINA/SUN.HTM.

\(^{30}\) See Jiang Ping, supra note 17, at 4-5.

\(^{31}\) From 1953 to 1956, a nationwide campaign labeled "Three Big Socialist Transformations" swept over China. Its only purpose was to turn agriculture, handicraft, and capitalist industry and
Therefore in Chinese history, a system or institution of private property never developed, and the right of property never became a fundamental right of individuals. For decades after the birth of People’s Republic of China, the country was structured both politically and economically for the sole promotion of public ownership, because it was believed that only public ownership could keep China on the socialist track. Maintenance of government control and Communist party leadership was deemed of paramount importance over individual rights. Concepts such as individual liberty, freedom, or democracy were considered capitalist and evil, and everyone from an early age was educated to be prepared to give their lives for the cause of Communism, despite the fact that few people really understood what Communism was. Thus, during that period, people barely had anything that could be claimed and recognized as privately owned.

As noted, not until 1978 when the economic reform took place in China did private ownership become a subject of discussion. But it still took another twenty-six years for the country to finally recognize private property rights in 2004. There are various reasons for this slow pace of recognition, but perhaps the most significant is the clash between the drives for socialism and the concerns about capitalism. More specifically, there had always been heavy debates in the country among scholars and legislators over private rights, individual liberty, and private property. At the center of the debate is how to keep the socialist ideology untarnished while maintaining the stability of state control and public ownership.

A. Private Rights v. Socialist Ideology

China is known as a socialist country. By definition, the term “socialism” originally referred to the ideology aimed at improving society through collective and egalitarian action. Applied in China, however, socialism seemed to be more closely associated with political endeavor than social needs, and at most times was ill-defined. Under Mao’s interpretation, the very purpose of socialism was to eliminate all capitalist elements and abolish all exploitation systems. Affected by the strong belief that “only socialism may save China,” commerce over to public ownership. By the end of 1956, state and collective ownership in China reached over 92.9 percent of the country's economy. See Meng Lingwei, Standing in the Beginning of 21st Century to Look Back to the Three Transformations Campaign, available at http://www.tecn.cn/data/detail.php?id=98.

32. See Jones, supra note 8, at 25. Since the movement of history is to finish the class struggle by establishing communism, there can be no such concept as an inviolable right in the traditional western sense. The only real “right” that existed at this stage of history was the right—and indeed the duty—of the proletariat and its instrument, the Communist party, to eliminate the domination of the bourgeoisie and establish the socialist system.


34. In Mao’s view, capitalism is established on exploitation of man by man. For example, if a landlord hired a person to work on his land, the landlord would be deemed to have exploited the person
Mao adopted a policy in early 1949 of "leaning to one side" for the country as a commitment to the Socialist bloc led by the former Soviet Union.\footnote{According to Mao, after World War II, the world was divided into capitalist and socialist blocs, and China belonged to the socialist bloc. See id.}

Thus, Chinese socialism was basically Soviet-style. China had a centrally planned economy, and the state owned all of the means of production. Marxism-Leninism became the ruling ideology of the country and was regarded as universal truth. Strikingly, through a "socialist transformation," all industries were nationalized and agriculture was collectivized for the purpose of establishing public ownership throughout the nation at an accelerated pace during the country's First Five-Year Plan (1953–1957).\footnote{See William C. Jones, \textit{The Constitution of the People's Republic of China}, 63 \textit{WASH. U. L.Q.} 707, 717-718 (1985); see also Meng Lingwei, \textit{Standing in the Beginning of the 21st Century: The Movement "Three Transformations" Revisited}, http://zhidao.baidu.com/question/24579373.html?fr=qrl3.} As a result, private enterprise was virtually extinguished and private ownership was rooted out.\footnote{See \textit{ZHANG QINFU \& HAN DAYUAN, STUDIES ON THE 1954 CONSTITUTION} 163 (2005).}

Ideologically, the socialist pursuit was uniformly imposed upon everyone by the coercive power of the government. At that time, a popular social norm was that no individual could claim private rights other than to make selfless dedication to the common good. All personal interests were subordinated to the public or state need. The illusion that everyone would be better off without pursuing private interests was promulgated among the general public. A classic model was the one of "being the first to bear hardship but the last to enjoy life"—supporting the idea of giving up anything individual for the endeavor of socialist construction. Hence, individual rights were deemed to be at odds with socialism, as private property was considered as an element dangerous to public ownership.

Therefore, public ownership was the sole ownership in China for many years, including collective and state ownership. In the meantime, an extremely strong bias against individual rights and private ownership developed, as people were led to believe that individual rights and socialist ideology were mutually exclusive. Moreover, under Mao's revolutionary doctrine, people were divided by "class": whoever followed the Communist party's leadership and stayed with socialist public ownership was a "revolutionary." All others were deemed "counter-revolutionary." Such classification was further radicalized during the ten-year mess of the Cultural Revolution (1966–1976), which was meant to get rid of all "capitalist roaders."\footnote{Invented by Mao himself, the phrase was used to refer to those in power who were alleged to tend to lead the country in a capitalist direction, namely to turn public ownership of the means of production to private ownership. See FOLSOM ET AL., \textit{ supra} note 10, at 33.} One of the charges against such capitalist roaders was their sympathy towards individual rights and

by taking away the "surplus value" that the person created from his work. The "surplus value" is an idea from Marxist political economy. See Mao Zedong, \textit{On the People's Democratic Dictatorship}, in \textit{SELECTED WORKS OF MAO ZEDONG} 4, 411-424 (Beijing Foreign Language Press 1969).
private ownership.  

After 1978, when the economic reform began in the country, people started to question Mao’s socialist theory and wonder whether private rights should be respected in the course of development of socialism in China—particularly during the nationwide discussion in the late 1970s about “Practice as the Sole Criterion for Testing the Truth,” a theme advanced to reevaluate Mao and his legacy.  

The country finally woke up from blind worship of Mao and the superstition of Maoism, as people were liberalized from a long period of ideological confinement. Finally, they felt free to explore different thoughts. This led to a restoration of the public faith in private rights.

Unfortunately, the discussion on the criterion of truth was used more often to help the victims of Mao’s purge regain their power than to promote liberal ideas in the nation. Concerned about the official ideology of the country and the leadership of the party, Deng Xiaoping, though determined to carry on the economy reform, attempted to unify the country politically by setting forth the so-called “the Four Cardinal Principles” as the core value of the nation.

Because of their stubborn nature and vague content, the Four Cardinal Principles actually became an obstacle to further liberalizing people’s thinking, creating fear among the public of being labeled “anti-socialist.” With this in mind, the Chinese people remained uncomfortable using the term “private” when discussing ownership. A major concern was that using the word “private” might be interpreted as capitalism.

Nevertheless, the economic reform changed China in an unprecedented manner. One significant change was that the reform brought an end to the single public ownership structure of the country and generated public rethinking about socialism. As part of the reform, the country was repositioned at the “preliminary stage of socialism” in the early 1980s, meaning an

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39. A famous slogan spread all over China during the Cultural Revolution was “strike hard the word ‘private’ that flashes through one’s mind,” which meant nobody should even think about the word “private.” See PEOPLE’S DAILY EDITORIAL, Oct. 6, 1967.

40. The discussion was initiated and advocated by Deng Xiaoping and his followers as an effective means to deal with “the ossified leftist view” that insisted in the faction of so-called “two whatevers”: whatever Chairman Mao had said must be followed and whatever Chairman has decided must be observed. See HONG YUNG LEE, FROM REVOLUTIONARY CADRES TO PARTY TECHNOCRATS IN SOCIALIST CHINA 318 (1990).

41. See id.

42. The Four Cardinal Principles were “to stick to Marxism-Leninism-Mao Zedong thought, to persist in the Socialist road, to uphold the People’s Democratic Dictatorship, and to adhere to the leadership of Communist party. According to Deng Xiaoping, China must hold firmly to the four principles during the course of its modernization. See id.

43. See id. at 319:

The specific contents of the principles, however, are so ambiguous that they have given party leaders the freedom to crack down on anything they deem unsocialistic.” They were “effective as a control mechanism for the top leaders, but not as the basis for forming a new ideological consensus.
underdeveloped commodity economy. A notable result was the country’s move from planned economy to market economy and from pure public ownership to co-existence of multi-ownerships. In 1992, the ultimate goal of economic reform was reset to the establishment of a system of a socialist market economy. Although the term “socialist market economy” did not seem to be clearly defined, the market economy was not the symbol of capitalism anymore in China.

A direct impact of the economic reform is the ideological change of the country. The infusion of the market concept ignited social desire for materialism or getting rich, and the existence of non-public ownership gave rise to the need to respect private rights. In 1986, China adopted the General Principles of Civil Law of China (the Civil Code), whose stated purpose was protection of lawful civil rights and the interests of citizens. Despite the fact that the Civil Code still shied away from using the term “private rights” at the time of its enactment, a common belief that has developed ever since is that private rights ought to be protected no matter what the socialist ideology is about.

It should be noted that with its reform endeavor, China is now on course to develop a so-called “socialism with Chinese characteristics.” What the “Chinese characteristics” exactly mean is ambiguous, but they obviously serve a two-fold goal. First, China needs to show to the world that the country has actually departed from the Mao socialist ideology and has become more rational in respecting private rights, while maintaining state ownership in a dominant position. Secondly, the Communist party has a profound interest in keeping its authority unchallenged and wants to be able to hold the reins of the country in its own way.

B. Individual Liberty v. State Power

Closely related to, but different from, private rights is the concept of individual or personal liberty. They are related because without rights there would be no liberty—and vice versa. On many occasions, the two together are

46. According to Deng Xiaoping, the very purpose of socialism is to develop production force and achieve common wealth. To that end, the first step is to allow a group of people to get rich in the market economy. See People’s Daily, Deng Xiaoping Wet with American Quests, Oct. 24, 1985.
47. See Jiang Ping, supra note 17, at 4-5.
49. See Walter Dellinger, The Indivisibility of Economic Rights and Personal Liberty, Cato
simply termed "liberty rights." However, they differ in that private rights primarily deal with what people may own or have as individuals, while personal liberty is more concerned with how much people may own or how far their private rights may reach. In the United States, liberty is generally defined as freedom from all restraints except those that are justly imposed by law. This includes the right to be free of arbitrary physical restraint or servitude and the right of citizens to be free to use their facilities in all lawful ways; to live and work where they will; to earn their livelihood by any lawful calling; and to pursue any livelihood or vocation.

In Western jurisprudence, liberty and property are related to each other so intimately that "you can't give up one without losing the other." It is believed that property rights are the cornerstone of liberty because the right to own and use private property is among the most essential human rights and is the essential basis for economic growth. A popular dictum by Daniel Webster is that no other rights are safe where property is not safe. Thus, in the context of property, liberty explicitly means two things: right to private property and freedom against arbitrary interference by government. Although the scope of property rights is allocated and defined by law, which means that government power is necessary to the creation of property rights, the rights are so fundamental to individuals that no government may interfere with them without due process of law.


50. See Charlie Savage, Foes Cite Alito's Stance on Liberty, BOSTON GLOBE, Dec. 27, 2005, available at http://www.boston.com/yourlife/health/women/articles/2005/12/27/foes_cite_alitos_stance_on_liberty/. In recent decades, the Supreme Court has invoked liberty rights to strike down laws forbidding contraception, abortion, interracial marriage, and gay sex between consenting adults; a zoning law that prevented extended families from living together; and a law that forced parents to let grandparents visit their children.

51. See SINGER, supra note 21, at 5. "Rights" are claims, enforceable by state power, that others act in certain manner in relation to the right holder. "Liberties" are permissions to act in a certain manner without being liable for damages to others and without others being able to summon state power to prevent those acts.

52. See Liberty, BLACK'S LAW DICTIONARY (8th ed. 2004).


55. See TIMOTHY SANDEFUR, CORNERSTONE OF LIBERTY: PROPERTY RIGHTS IN 21ST CENTURY AMERICA (Cato Institute 2006).

56. See 3 DANIEL WEBSTER, SPEECHES IN THE CONVENTION TO AMEND THE CONSTITUTION OF THE STATE OF MASSACHUSETTS 15 (1890).

57. See Jeremy Paul, The Hidden Structure of Takings Law, 64 S. CAL. L. REV. 1093, 1402 (1991) (property rights serve "twin roles—as protector of individual rights against other citizens, and as safeguard against excessive government interference").

58. See SINGER, supra note 21, at 676.

59. In the United States, for example, the Constitution mandates that "no person shall . . . be deprived of life, liberty or property, without due process of law." For more discussion about due process and protection of property rights, see SIEGAN, supra note 25, at 105-08.
Individual liberty and private property rights unfortunately had a different fate in China. Although Mencius (372–289 B.C.), the Chinese philosopher, understood that people would not have a persistent life if their private property was not secure, his words were never taken seriously because of the country’s historical structure based on a highly centralized government and a self-sufficient natural economy where people heavily relied on the benevolence of government. In other words, in its thousands of years of history, China never reached the point of becoming such a civil society as the one developed in the West to uphold individual liberty and democracy. As a result, people in China seldom saw the rise of private property, while state control remained the center of attention.

A conceptual difference between China and the West is the basic view of rights in general. In China, few inalienable rights exist for individuals. Whatever rights are recognized are considered to be given or granted. In the West, it is widely accepted as self-evident that people are endowed with inherent and inalienable rights—including life, liberty, and the pursuit of happiness. The substantial difference is that when the rights are deemed to be given or granted, they may be taken away at the pleasure of government, but if the rights are considered inherent, they may not be alienated or deprived of without a compelling reason and a just process.

For a long time after the Communist party took power in China in 1949, maintenance of state ownership and the leadership of the Communist party was China’s top priority. In an effort to carry out the “class struggle” against capitalism and the bourgeoisie, China was led into a course of construction of socialism to which all citizens must devote. Thus, during that period, individual liberty was regarded as a bourgeois pursuit, and democracy was labeled a capitalist idea. A typical misconception created among the public was that to seek individual liberty was to attempt to diminish the state control or to reverse the socialist path of the country—an act considered completely intolerable.

However, there were two occasions after 1949 during which China was considered to be at the edge of moving toward individual liberty and


61. The term “civil society” can be traced through the works of Cicero and other Romans to the Ancient Greek philosophers, but John Locke was deemed as one of the first to really articulate it, followed by George Hegel who developed a notion of civil society as a domain parallel to but separate from the state, and emphasized individual freedom. The idea was said to grow out of the mounting demand for liberty, as manifested in French resolution. For more discussion about civil society, see Sudipta Kaviraj & Sunil Khilnani, CIVIL SOCIETY: HISTORY AND POSSIBILITIES (Cambridge University Press 2001). See also He Jinghua et al., Pursuit of the Rule of Law: Comparison of Ideologies, Paths and Models 66-71 (Beijing University Press 2005).

62. See Declaration of Independence ¶ 1 (1776).

63. Zhang Qinfu & Han Dayuan, supra note 37, at 276-289.
From Public to Private
democracy. The first occurred during 1956 to 1957, when the country was
called upon to help the Communist party with the “party rectification,” and
people were encouraged to freely and openly express their view on the
Communist party’s policies and the role of government. Inspired by the slogan,
“Let a hundred flowers blossom and a hundred schools of thought contend,” (or
the “Double Hundred Policy”), intellectuals took the lead in criticizing the
party and government for their lack of respect toward individual liberty and
private interests and excessive state control. Many strongly advocated a
liberalized political climate and the restoration of freedom.  

This widespread intellectual criticism, however, was soon viewed as an
attempt to undermine the Communist party leadership and to invite capitalism
into China. Consequently, a nationwide crackdown known as the Anti-Rightist
Campaign was launched to suppress all divergent thoughts. Many critics were
jailed or sent to labor camps. Suddenly, the rising voice for individual liberty
was silenced, and the emerging democratic atmosphere vanished. Although the
Double Hundred Policy may have produced a certain sobering effect on the
leadership, a significant drawback of the Anti-Rightist Campaign was that the
Communist party’s exclusive control was reinforced and Mao’s socialism was
firmly reestablished as the country’s orthodox ideology.

The second occasion was the student movement in the late 1980s.
Motivated by the liberal ideas of then-ousted leader and reformer Hu Yaobang
(1915–1989), and outrage over ever-spiraling government corruption,
university students held open demonstrations in Beijing and many other cities,
calling for political reform. The strongest themes of the demonstrations were
liberty and democracy—concepts students apparently learned from the West
during the decade of economic reform. Unfortunately, the demonstrations
ended with bloodshed in June 1989, followed by a countrywide cleanup of the
“idea of bourgeois liberalization”—a term used to refer to any attempt to depart
from the Four Cardinal Principles.

However, a major difference between the 1950s Anti-Rightist Campaign

64. See LASZLO LANDANY, LAW AND LEGALITY IN CHINA: THE TESTAMENT OF A CHINA—
65. See Library of Congress Country Studies, China, The Transition to Socialism (1953-57),
available at http://workmall.com/wfb2001/china/china_history_the_transition_to_socialism_
1953_57.html.
66. In the early 1950s, as a gesture of forming a people’s democratic government, a number of non-
Communist members were appointed ministers in the country’s cabinet. However, they were soon
dismissed during the “anti-rightist” movement to ensure the supremacy of the communist party’s
leadership. See FOLSOM ET AL., supra note 10, at 29.
67. See Library of Congress Country Studies, China, Policy Toward Intellectuals, available at
http://lcweb2.loc.gov/cgi-bin/query/r?frd/cstdy:@field(DOCID+cn0124).
68. Hu Yaobang became General Secretary of the Communist Party of China in 1980 and Party
Chairman in 1981. He was dismissed in 1987 for being sympathetic about the student movement for
politic reform. See Joseph Kahn, China to Give Memorial Rite to Hu Yaobang, Purged Reformer, N.Y.
TIMES, Nov. 15, 2005.
and the 1980s repression of student demonstration was that the former actually sent the country into a dark period in which the desire for individual liberty was frozen, while the latter never had the effect of preventing people from thinking differently. As a matter of fact, the ongoing economic reform not only increased the public desire for change, but also pushed the Communist leadership to become more tolerant toward ideas prevalent in the West. Even Deng Xiaoping, who played a decisive role in the crackdown of the 1980s student demonstration, asked for an end to the debate over whether China was headed in a socialist or capitalist direction, to help clear up ambiguity over the reforms.69

The most obvious change in China to come out of this reform has been the acceptance of a market economy based on private ownership and free enterprise.70 To maintain its socialist image, however, China termed it a "socialist market economy," attempting to tie public ownership to a market economy. Nevertheless, the terminology is not nearly as relevant as the actual introduction of a market economy in China. As a result, China began to recognize individual liberty and private ownership, even imposing certain restraints on governmental power when private interests were concerned.71

Behind these changes stands a rethinking of socialist ideology. Many concepts that had been linked to capitalism have been reclassified as necessary elements to the preliminary stage of socialism. The notions of liberty, democracy, and human rights are now considered values consistently pursued by human beings throughout history, instead of the unique characteristics of capitalism alone.72 This allows China to remain socialist, while embracing

69. Deng had a famous cat theory that "a cat is a good cat if it could catch a mouse no matter whether the cat is white or black in color." Analogizing the cat theory to his call to stop debating meant that either capitalism or socialism, whichever makes China prosperous, would be good. For general discussion about Deng's cat theory, see Suisheng Zhao, Deng Xiaoping's Southern Tour: Elite Politics in Post-Tiananmen China, Asian Survey, Vol. 33, No. 8, 739-756 (University of California Press 1993).

70. See Michael Watts, What is a Market Economy?, http://uninfo.state.gov/products/pubs-market (explaining that market economies may be practical, but they also rest upon the fundamental principle of individual freedom: freedom as a consumer to choose among competing products and services; freedom as a producer to start or expand a business and share its risks and rewards; freedom as a worker to choose a job or career, join a labor union, or change employers). The market economy is defined as "[a]n economic system in which economic decisions and the pricing of goods and services are guided solely by the aggregate interactions of a country's citizens and businesses and there is little government intervention or central planning." See Forbes, Investopedia, http://www.investopedia.com/terms/m/marketeconomy.asp.

71. See, e.g., Administrative Procedure Law art. 2 (promulgated by the NPC, Apr. 4, 1989, effective Oct. 1, 1990), translated at http://www.cecc.gov/pages/newLaw/adminLitigationENG.php (providing a legal vehicle for regular citizens to sue government agencies against their misconduct or abuse of power). See also State Compensation Law art. 2 (promulgated by the NPC May 12, 1994, effective Jan. 1 1995), translated at http://www.cecc.gov/pages/newLaw/stateCompensationENG.php (allowing the victims of State infringement actions upon the right of their person or property to sue the government for damages, although the standards of compensation are criticized as too low and basically compensatory rather than punitive).

72. See Wen Jiabao, Speech on Several Questions about Historical Tasks of the Preliminary Stage of Socialism and the Foreign Policies of China (Feb. 26, 2007), available at
individual liberty and private property rights.

C. Recognition of Private Property Rights

Legally speaking, private property rights were not officially recognized in China until 2004 when the 1982 Constitution was amended. Since 1949, China has had four constitutions. The first was adopted in 1954, followed by new versions in 1975 and 1978. The current Constitution was adopted in 1982, although it has since been amended four times (in 1988, 1993, 1999, and 2004). Because of their transitional nature, both the 1975 and 1978 Constitutions only existed briefly and therefore are not considered as important as the other two.

The 1954 Constitution was important in China for a number of reasons. It was the first socialist Constitution in China and was meant to hold the country together as it entered into a peaceful period of construction and development after eight years of war against the Japanese and three years of civil war. Secondly, the 1954 Constitution was based on the blueprint of the Common Program—a principal legal document jointly drafted in early 1949 by the Communist party and other parties to serve as an interim or provisional constitution for the new China. One important characteristic of the Common Program was its theme of promoting democracy by granting the citizen ample freedoms, including freedom of speech and freedom of religion. Thirdly, the 1954 Constitution was adopted at a time when China was believed to be on a path, though limited, to building a democratic country, and many provisions in


76. The First Amendment to the 1982 Constitution was approved on April 12, 2988, the Second Amendment was approved on March 29, 1993, the Third Amendment was approved on March 15, 1999, and the Fourth Amendment was approved on March 14, 2004. Id.

77. Because the 1975 Constitution was adopted a year before the Cultural Revolution ended, it was considered to be full of fallacies from the Cultural Revolution. The 1978 Constitution was promulgated right before the adoption of the Opening Door Policy, and was regarded as falling behind the need of the Country’s economic reform. See William Jones, The Constitution of China, in UNDERSTANDING CHINA’S LEGAL SYSTEM 712-13 (2003).


79. Under Article 5 of the Common Program, the people of the People’s Republic of China shall have freedom of thought, speech, publication, association, correspondence, person, domicile, change of domicile, religious belief and the freedom of holding processions and demonstrations. See id.
the Constitution reflected to a certain extent democratic ideals. Even Mao himself admitted that it was necessary to have "a broad people's democratic united front composed of all democratic classes, democratic parties and groups, and people's organizations." As laid out in the 1954 Constitution, China's economic system consisted of four different forms of ownership: state ownership, collective ownership, individual working people ownership, and capitalist ownership. Under the 1954 Constitution, with the state ownership as the core, the other three forms of ownership (particularly the two private ownerships—individual working people ownership and capitalist ownership) were legally recognized and protected, although each faced the possibility of being transformed into state ownership. In this context, the 1954 Constitution was acclaimed by many Chinese constitutional scholars as a socialist constitution with Chinese reality in allowing private ownership to coexist with public forms of ownership.

Unfortunately, but not surprisingly, the 1954 Constitution was never really enforced as intended and died a few years after its passage. This was partly due to inherent flaws in the 1954 Constitution, as whatever forms of democracy were provided in the constitution were to be strictly within the iron framework of the Communist monopoly of power. More significantly, the unlimited controlling force of the Communist party made it ultimately possible for Mao to take the country into a period of lawlessness in which the people's democracy was replaced with Mao's "democratic centralism." The law became merely a weapon used to eliminate capitalism and other counter-

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80. Despite the fact that the 1954 Constitution was intensively influenced by the 1936 Constitution of the former Soviet Union, it contained a list of individual rights that was deemed more impressive than the corresponding section of the 1936 Soviet Constitution. See Franklin Houn, Communist China's New Constitution, 8 W. Pol. Q. 199, 203-204 (1955).
83. See ZHANG QINFU & HAN DAYUAN, supra note 37, at 4-5.
84. See id. at 164-165.
85. See Houn, supra note 80, at 233. Whatever form of democracy the Constitution provides, it will probably operate strictly within the iron framework of the Communist monopoly of power. Thus, the Communist Party of China is always the controlling force behind the formal arrangement of government structure.
86. See LANDANY, supra note 64, at 52-78.
87. "Democratic Centralism" refers to the principles of internal organization used by Leninist political parties. The democratic aspect describes the freedom of members of the political party to discuss and debate matters of policy and direction, but once the decision of the party is made by majority vote, all members are expected to uphold that decision. This latter aspect represents the centralism. See Wikipedia, Democratic Centralism, http://en.wikipedia.org/wiki/democratic_centralism. Under Lenin's description, democratic centralism consisted of "freedom of discussion, unity of action." Mao, however, used it to impose his will on the country. Id.; see also Frank Ching, All Eyes on Future of "Inner Democracy" in China, CHINA POST, Sept. 19, 2007, available at http://www.chinapost.com.tw/print/123161.htm.
revolutionists. Economically, the multi-ownership structure set forth in the 1954 Constitution was abruptly destroyed, leaving public ownership the only form of ownership in the country.

After the death of the 1954 Constitution, private ownership completely disappeared from the country’s economy, and no private property rights were recognized. Not until 1988 when China was redefined at the preliminary stage of socialism did private ownership return as a topic of discussion. Realizing the need to allow non-public forms of ownership to exist in order to revive the country, China amended its 1982 Constitution in 1988 to legalize private ownership and to protect private property rights. The 1988 Amendment permitted “the private sector of the economy to exist and develop within the limits prescribed by law,” recognized the private sector of economy as “a supplement to the socialist public economy,” and protected “the lawful rights and interests of the private sector of the economy.” In addition, the 1988 Amendment provided for transfer of the right to the use of land among individuals, creating a concept of a transferable property interest that could be privately owned.

The tone of the 1988 Amendment with regard to private property rights was very cautious. It did not use the terms “private property” or “private ownership,” but rather the vague term “private economy.” In addition, it made the private sector merely a supplement to the country’s public economy. Moreover, it granted the state the power to exercise “guidance, supervision and control over the private sector of the economy.” At the time the 1982 Constitution was initially amended, China was determined to keep the country on the track of economic reform, but was skeptical of moving away from the road of socialism. Nevertheless, the 1988 Amendment was regarded as a legal watershed for the overall economic reform in China in the sense of legalizing private ownership.

88. See Landany, supra note 64, at 54-55.
89. See Zhang Qinfu & Han Dayuan, supra note 37, at 162-163.
90. See 1988 Amendment to the 1982 Constitution of China, supra note 15, at art. 1. Note that in China, “complement” was preferred to “supplement.”
91. See id.
92. See id.
93. See id.
95. See id.
Eleven years later, the 1982 Constitution was further amended in 1999. One significant change in the 1999 Amendment was to treat the “individual, private and other non-public economics” as “major components of the socialist market economy,” a highly notable step forward in granting legal status to a private economy. The latest amendment to the 1982 Constitution was made in 2004. The 2004 Amendment holds that the state “protects the lawful rights and interests of the non-public sectors of the economy such as individual and private sectors of the economy” and “encourages, supports and guides the development of the non-public sectors of the economy,” but also emphasizes that the “citizen’s lawful private property is inviolable.”

With regard to private property rights, the 2004 Amendment was historical. It was the first time in Chinese history that private property was clearly stated in the country’s constitution. More importantly, it was the first time in China that private property was deemed constitutionally inviolable. It is true that the effective protection of the private property rights is dependent upon the mechanism of enforcement of the constitution, but to the extent that “it is the fundamental law of the State and has supreme legal authority,” the constitution indeed provides a safeguard for private property and private property rights. Pursuant to the constitution, the Property Law was adopted to specifically define and protect private property and the rights of private property holders.

Under Article 64 of the Property Law, private property includes lawful income, housing, livelihood goods, production instruments, raw materials, and other moveable and immovable property. This provision is said to be based on Article 75 of the 1986 Civil Code, where the personal property of a citizen is defined to consist of lawful income, housing, savings, livelihood goods, cultural relics, book materials, woods, livestock, and production materials permitted by law to be owned by the citizen as well as other lawful

97. XIAN FA (1982), supra note 15, at art. 16.
98. See id. at art. 5.
99. See id. at art. 6.
100. In the past, private property only referred to inheritance. The 2004 Amendment changed Article 13 of the 1982 Constitution from “the State protects according to law the right of citizens to inherit private property” to “the State protects according to law the private property right and inheritance right of citizens.” See id. at art. 13.
102. Article 1 of the Property Law provides that:
In accordance with the Constitution, the present Law is enacted with a view to maintaining the basic economic system of the state, protecting the socialist market economic order, clearly defining the attribution of the res, bringing into play the utilities of the res and safeguarding the real right of the right holder.
103. See id. at art. 64.
properties.\textsuperscript{104} A big difference between Article 64 of the Property Law and Article 75 of the 1986 Civil Code is that the Property Law explicitly uses the term “private property” while the Civil Code is limited to “personal property” in order to avoid using the term “private.” Another difference is that the Property Law adopts the legal term “private person,” instead of the political term “citizen,” because “private person” includes both citizens and non-citizens. Still, it is necessary to consider the inclusion of the word “lawful.” Although “lawful” is used to exclude any unlawfully gained income or property, the word indeed provides leeway for the government to define what is lawful and what is not.

III. PRIVATE PROPERTY V. PUBLIC PROPERTY: AN OUTCRY FOR EQUAL PROTECTION

Under the Chinese Legislation Law, the enactment of a law at the national level requires three readings by the Standing Committee of the NPC before the drafting of the law is submitted to the general meeting of the NPC for a vote by all delegates attending the meeting.\textsuperscript{105} With regard to the Property Law, there were eight readings in the Standing Committee before the NPC passed it in March 2007.\textsuperscript{106} The delay and debate were not only because the Property Law is vitally important to both the general public and the nation, but also because many issues involved at the time of drafting were so controversial that hardly any consensus could be reached.

One of the most controversial issues was the legal status of private property. At the heart of the issue was whether private and public property should be treated and protected equally. Underlying this question is the debate over the conception of “public” and “private.” A significant impact of the economic reform is that it broke up the monopoly of public ownership and brought into China’s economic system the coexistence of multiple forms of ownership. But views differed sharply with respect to the legal treatment of private property and private property rights, though nobody challenged the legality of the existence of private ownership anymore.

\textsuperscript{104} See 1986 Civil Code, \textit{supra} note 48, at art. 75.
\textsuperscript{106} On July 10, 2005, the Draft Property Law was also published for a nationwide discussion. During July 10 and August 20, 2005, the Standing Committee received about 11,543 suggestions from the general public, and received comments from twenty-six provinces, fifteen large cities, forty-seven central government agencies, sixteen big companies, and twenty-two law schools and institutes. See Legal Committee of the Standing Committee of the NPC, \textit{Report on the Changes of the Draft Property Law of the People's Republic of China} (Oct. 19, 2005), \textit{available at} http://www.law-lib.com/fzdt /newshtml/20/20051023173231.htm.
A. Supremacy of Public Ownership

It has been observed that socialist economies were all centered on public ownership, but the dominance of public ownership was unrealistically overstated for decades in China so that the entire country was dragged into efforts to maintain and defend public ownership against any non-public ownership—even at the cost of nearly driving the nation to bankruptcy. This practice had the effect of convincing the Chinese people that public ownership is superior to all other forms of ownership, even if non-public forms of ownership are allowed to coexist with public ownership.

From a legal perspective, the superiority of public ownership was first stressed in the 1954 Constitution. Under Article 6 of the 1954 Constitution, ownership by the whole people, represented by the state-run economy, was “the leading force in the national economy and the material foundation of the socialist transformation.” The state was determined to ensure “the priority of the development of the State-run economy.” The 1975 Constitution not only emphasized the leading force of the state-run economy, but also added the principle that “socialist public property is inviolable.” This principle was then carried over verbatim into the 1978 Constitution.

The 1982 Constitution further emphasizes this principle by adding the word “sacredly,” making it read: “socialist public property is sacredly inviolable.” Although the reason for the change was not given in the official report on the draft revision of the 1982 Constitution, it is clearly an indication of a more serious stance toward the protection of public property. This stance can also be seen in the 2004 Amendment, in which protection of private property becomes a constitutional mandate. While Article 12 of the 1982 Constitution (as amended in 2004) holds socialist public property as “sacredly inviolable.”


108. A typical example is the “Great Leap Forward” campaign from 1958-1960, aiming at eliminating all private elements in the countryside by bringing (if not forcing) millions of farmers into people’s communes, the basic forms of public ownership, where the farmers would not work for themselves but for the communes to ensure that everyone will follow the party’s policy to “speedily run into communism.” A direct result of the “Great Leap Forward” was the disaster of severe famine in the early 1960’s that led millions of people die of starvation. See LUBMAN, supra note 12, at 80; see also JASPER BECKER, HUNGRY GHOST (Free Press 1997).

109. In China, public ownership includes state ownership and collective ownership. State ownership, also called the ownership by the whole people, controls both industry and commerce. Collective ownership used to mean the ownership held in the rural people’s communes through a three-level structure including communes, the production brigade, and the basic level called the production team. XIAN FA (1975), supra note 74, at art. 7. Now it is referred to ownership held by rural collective economic organizations through the household-based output-related contracted responsibility system. XIAN FA (1982), supra note 15, at art. 7.

110. See XIAN FA (1954), supra note 73, at art. 6.
111. XIAN FA (1975), supra note 74, at art. 8.
112. XIAN FA (1978), supra note 74, at art. 8.
Article 13 holds lawful private property of citizens as merely "inviolable." While these two articles differ by only one word, it is clear that public property is more stringently protected than private property in China.

Protection of public property has long been an issue of national concern. Instead of determining whether or not to protect public property, however, China has been debating the best method to protect public property. Behind the issue is concern about the possible erosion of state ownership, particularly when the matter of private property is involved. Since 1979, for example, China has witnessed through its period of economic reform three nationwide major debates, all of which involved the socialist nature of the country and the supremacy of public ownership.

The first debate occurred during 1981 to 1984, when the concept of a socialist commodity economy was introduced and the idea of "relying mainly on the planned economy but using market force as a secondary regulator" was promoted. The center of the debate was whether the public ownership-based planned economy could be regulated by market force. Opponents of market force insisted that a planned economy is not a commodity economy and that the market force is an element of a capitalist economy. The underlying argument was that promotion of a commodity economy would undermine socialist plans and public ownership. The debate ended with the issuance of the Communist Party Central Committee's "Decision on the Reform of Economic Structure" in October 1984, confirming the socialist economy of China to be a "planned commodity economy."

114. Id.
115. A carefully reading of these two constitution articles further reveals the difference: for "socialist public property," Article 12 uses the words "shen sheng bu ke qinfan" (is sacredly inviolable), while for "private property," Article 13 says "bu shou qinfan" (may not be infringed). See XIAN FA (1975), supra note 74, at art. 12, 13.
117. The main theme of the socialist commodity economy was to recognize the market force as a regulator of the economy. Although it is believed that a market economy is nothing but another version of commodity economy from the angle of the commodity circulation, the term "market economy" was still a taboo at that time. See id. at 180-184.
118. See WU JINGLIAN, SELF SELECTED WORKS OF WU JINGLIAN 66-70 (Shanxi Economic Press 2003); see also MA GUOCHUAN, supra note 116, at 176-179.
119. See WU JINGLIAN, supra note 118, at 66-67.
120. See id. at 67.
121. The "Decision" was announced on October 20, 1984. A full text of the "Decision" is available at http://www.china.org.cn/chinese/archive/131659.htm.
122. The "Decision" was adopted in response to the widespread household-based production units in the countryside as a result of the economic reform. By the end of 1983, more than 175 million households in the countryside became independent production units, accounting for over 94.5 percent of total households of farmers. In addition, the number of privately-owned small enterprises in rural areas reached 41,950 at the same time. See THE YEARBOOK OF CHINA ECONOMY 50-52 (Economic Management Press 1984).
The second debate began in 1989 and lasted until 1992. This debate was triggered by the attempt to lead China into a market economy and centered over whether a market economy would help maintain public ownership and serve the socialist economy. A prevalent view in the past was that a market economy is tied to capitalism, while socialism stands entirely separate from the free market.\textsuperscript{123} In order to pave the way for further reform, Den Xiaoping made his famous "Southern Tour,"\textsuperscript{124} where he made it clear that a "planned economy is not equivalent to socialism because there is planning under capitalism too; a market economy is not capitalism, because there are markets under socialism too."\textsuperscript{125} The crux of Deng's remarks was that a market economy is not an indicator of capitalism. Thanks to Deng, who brought the second debate to an end, the reform entered into the phase of building socialism on a market economy.\textsuperscript{126}

The third debate started in 2004 with an argument about the restructuring of state-owned enterprises. The focus of the argument was whether the restructuring would necessarily lead to the draining of the state assets—the backbone of public ownership. The argument then went into a broader question about the nature of the last two decades of economic reform. Concerned about the possible loss of dominance of public ownership, some questioned the legitimacy of the reform and argued that the past reform was \textit{de facto} led by mainstream Western neo-liberalism\textsuperscript{127}—in other words, free enterprise and privatization.\textsuperscript{128} On this ground, detractors strongly opposed the state's encouragement of developing non-public forms of ownership.\textsuperscript{129} In 2006, the Communist Party Central Committee announced its "Decisions on Several Major Issues related to the Building of Socialist Harmonious Society." The "Decisions," which assured the continuing reform in China in the way that

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\textsuperscript{123} See WU JINGLIAN, ECONOMIC REFORM OF MODERN CHINA 391-94 (Shanghai Far-East Press 2003).  
\textsuperscript{124} It referred to his visit to the southern part of China, including Shenzhen, Zhuhai, Wuhan, and Shanghai during January 18 to February 21, 1992. See Suisheng Zhao, supra note 69, at 739-40.  
\textsuperscript{126} After Deng's "Southern Tour," the "socialist market economy" became a new term in Chinese vocabulary. See MA GUOCHUAN, supra note 116, at 182.  
\textsuperscript{128} Neo-liberalism is a set of economic policies that have become widespread in the west during the last twenty-five years or so. One of the main points of neo-liberalism is to liberate "free" enterprise or private enterprise from any bonds imposed by the government, no matter how much social damage this causes, and another main point is to privatize by selling state-owned enterprises to private investor. See Pierre Bourdieu, The Essence of Neoliberalism, available at http://www.analitica.com/bitblio/bourdieu/neoliberalism.asp; see also Wikipedia, Neoliberalism, available at http://en.wikipedia.org/wiki/neoliberalism.  
\textsuperscript{129} The opposition was essentially the repetition of the 1989-1992 argument about whether the reform would keep China on the "socialist" rather than "capitalist" road. See MA GUOCHUAN, supra note 116, at 181-182.  
\end{flushleft}
some more harmonized measures would be taken, marked a conclusion of the third debate.

Still, these debates between public and private ownership never truly ended. During the drafting of the Property Law, one of the most contentious issues was the treatment and protection of private ownership. Many advocated equal protection, but met resistance from those who strongly held the supremacy of socialist public ownership over all other forms of ownership. Some even cited constitutional language, arguing that protection of private property equal to protection of public property is unconstitutional.

B. Constitutionality of Equal Protection for Private Property

The constitutionality of providing equal protection to public and private property was openly raised by a professor at the Beijing University Law School. This professor became a prominent opponent of equal protection after writing an “Open Letter” to challenge the constitutionality of granting the private property an equal protection. The Open Letter, which was sent to the Chairman and the Standing Committee of the NPC on August 12, 2005, generated more than a year of legal turmoil with regard to private property protection. It was also believed that because of the Open Letter, the draft of the Property Law was taken out of the agenda of the 2006 General Meeting of NPC, thus delaying the passage of the Property Law by one year. Although the validity of this belief seems to be questionable, the Open Letter did catch the attention of many Chinese legislators.

The main assertion of the Open Letter was that the draft of the Property Law violated the Constitution and was against basic socialist principles. Trained at a law school in the former Yugoslavia, the author of the Open Letter contended that the draft of the Property Law was unconstitutional because it failed to state that socialist public property is sacredly inviolable and it intended to place both private property and public property on an equal footing. According to the Open Letter, public ownership is the most important difference between socialism and capitalism. It also noted that public

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130. The Decision was made on October 11, 2006, at the 6th general meeting of the 16th Central Committee of the Communist Party. A full text of the Decision is available at http://news.xinhuanet.com/politics/2006-10/18/content_5218639.htm.
131. See JIANG PING, supra note 17, at 172-177.
132. See id. at 175.
135. See Gong Xiantian, supra note 133.
136. See id.
ownership and state property are the most important and fundamental bases of safeguarding the property rights of individual people. The Open Letter concluded that the draft of the Property Law was totally contradictory to the socialist tradition and to the concept of the Soviet civil code, as it catered to the falsehoods of Western neo-liberalism.

The Open Letter premised its arguments entirely on Article 12 of 1982 Constitution and Article 73 of the 1986 Civil Code. As discussed above, both of the articles include the principle that "the public property is sacredly inviolable." In the published draft of the Property Law, it was provided that state, collective, and individual ownership are protected by law and any encroachment upon or damage to any of these entities is prohibited. This provision did not single out public property to make it sacredly inviolable, but rather listed public property together with private property to provide them equal legal protection.

The Open Letter denounced the draft for having actually abolished Article 12 of the 1982 Constitution and Article 73 of the 1986 Civil Code, insisting that private property should not be protected to the same extent as public property. One of the major points of the Open Letter was that the privatization in the Property Law would lead to a disparity between rich and poor and would become a source of social instability, eventually destroying the Communist party leadership. The Open Letter did not tie the supposed constitutionality of equal protection to the Constitution itself, instead focusing on socialist orthodoxy and Communist party leadership.

Nevertheless, a vast majority of the Chinese disagreed. Many believed that equal protection would not be unconstitutional if the law did not use the same words or phrases as the Constitution. They believed that granting protection to private property does not necessarily constitute a denial of

137. See id.
138. See id.
139. Article 12 of the 1982 Constitution provides:
   Socialist public ownership is sacredly inviolable. The State protects socialist public
   property. Appropriation or damage of state or collective property by any organization or
   individual by whatever means is prohibited.

140. See Article 47 of the published Draft Property Law, available at http://www.law-
lib.com/law/lfbj/lfbj_view.asp?id=10379.
141. See Gong Xiantian, supra note 133.
142. See id.
143. On February 25, 2006, a group of well-known civil law and constitutional law scholars and
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protection to public property. In addition, the 1982 Constitution contains a provision encouraging, supporting, and promoting the development of non-public forms of ownership, as the draft of the Property Law actually followed a constitutional spirit. It was further argued that the draft actually highlighted the superior position of public property by emphasizing the special status of state property.

C. Equal Footing and Equal Protection: A Civil Principle

Under general jurisprudence, law can be classified into public law and private law. The public law is the law that regulates the relationship between individuals and the state, while private law is the law that primarily governs the relationships among individuals and entities—or, to use a more generic term, civil relationships. There is no doubt that the Property Law is private law. Despite its being affected one way or the other by the public law, such as the Constitution, the Property Law remains in the domain of private law due to its civil nature, and it is subject to principles that are embodied in private law.

A significant characteristic of private law is that the relationship governed by the law is horizontal. In other words, parties in the relationship maintain a civil status of equal footing and should be dealt equally. Thus, what has become a rudimental principle in private law is that all players in civil matters are equal. Applied to property rights, this principle requires that owners of property shall be equally protected, regardless of the form of ownership. Equal protection is vitally important in China because of the country's long existing bias against private ownership and its government's overreaching power, especially when public property is involved. Many in China believe that without equal protection, public confidence in creating social wealth would be dampened and the very purpose of enacting the Property Law would be frustrated.

Scholars calling for equal protection argue that as an important civil principle, equal protection is unequivocally stated in the 1986 Civil Code and should be embodied in the Property Law. Under Article 3 of the 1986 Civil Code, all parties in civil activities have equal status. The gist of Article 3 is

144. See JIANG PING, supra note 17, at 2.
145. See id.
146. According to Article 48 of the Draft Property Law, no entity or individual shall acquire ownership over movable and immovable that exclusively owned by the State. See supra note 140.
148. See WANG LIMING, supra note 20, at 247-250; see also HU KANGSHENG, EXPLANATIONS TO THE PROPERTY LAW OF THE PEOPLE'S REPUBLIC OF CHINA 7-9 (Law Press 2007) (Hu serves as the head of Legislative Affairs Committee of the Standing Committee of NPC).
149. See 1986 Civil Code, supra note 48, at art. 3.
that parties to civil matters should be treated equally.\textsuperscript{150} Many addressed equal protection from a constitutional ground and pointed out that equal protection is a constitutional principle in China, because under the Constitution, all people are equal before the law.\textsuperscript{151} Without equal protection in property, there would be no value of the equality and individual rights and personal liberty would not be realized.\textsuperscript{152}

A popular argument in favor of equal protection rests with the idea of promoting a market economy in China. It is believed that equal protection is essential to the market-based economic system.\textsuperscript{153} Therefore, since China is determined to stay with the socialist market economy, it must follow the market rules.\textsuperscript{154} One such rule is to grant equal protection to market players, enabling them to enjoy equal rights and assume corresponding responsibilities.\textsuperscript{155} This argument was well-received among legislators during their review of the draft of the Property Law. They believed that a market economy demanded equal protection of different property owners and that without equal protection the market economy would fail.\textsuperscript{156}

The Property Law follows the majority view and makes equal protection a basic principle of the law of property. Under Article 4 of the Property Law, the property rights of the state, collective, individual, or any other right-holder shall be protected by law and shall not be infringed by any entity or individual.\textsuperscript{157} Obviously, Article 4 grants no special status to public property—state or collective. Further, private property is protected in the same manner as public property pursuant to Article 4. Article 4 is clear that a violation of property rights is prohibited, regardless of the type of property owner.

For the purposes of Article 4, equal protection contains at least three elements. The first element is the equal status of property owners. With regard to property rights, nobody shall be discriminated against on the basis of the nature of ownership.\textsuperscript{158} This notion is also underscored in Article 3 of the Property Law, which provides that the state protects the equal status and

\begin{footnotesize}
\textsuperscript{150} Civil Law Office of the Legislative Affairs Committee of the Standing Committee of the National People's Congress (hereinafter Civil Law Office of NPC), \textit{THE PROPERTY LAW OF THE PEOPLE'S REPUBLIC OF CHINA—PROVISION EXPLANATION, LEGISLATIVE REASONS AND RELATED RULES} 5 (Beijing University Press 2007).
\textsuperscript{151} See JIANG PING, supra note 17, at 176. All citizens of the People's Republic of China are equal before the law. XIANG FA (1982), supra note 15, at art. 33.
\textsuperscript{152} See id.
\textsuperscript{153} See HU KANGSHENG, supra note 148, at 29; see also HUANG SONGYOU, UNDERSTANDING AND APPLICATION OF THE PROVISIONS OF THE PROPERTY LAW OF THE PEOPLE'S REPUBLIC OF CHINA 54 (People's Court Press 2007) (Huang is the Vice President of the Supreme People's Court of China).
\textsuperscript{154} See HU KANGSHENG, supra note 148, at 29-30.
\textsuperscript{155} See id.; see also YAO HONG, DETAILED EXPLANATIONS TO THE PROPERTY LAW OF THE PEOPLE'S REPUBLIC OF CHINA 8 (People's Press 2007).
\textsuperscript{156} See JIANG PING, supra note 17, at 173; see also HU KANGSHENG, supra note 148, at 7-8.
\textsuperscript{158} See WANG LIMING, supra note 20, at 245; see also HUANG SONGYOU, supra note 153, at 55.
\end{footnotesize}
development rights of all market players. The second element is an application of the same rules. It is important that if a dispute over property occurs between the state and an individual, each party has the same right of claim, the same access to legal redress, and is subject to the same rules. The third element is equal liability. Whenever a property right is infringed, the infringer shall bear the same liability, no matter whether the infringer is the state or an individual.

However, it should be noted that Article 4 equal protection may not be used to belittle public ownership. In fact, it is easily discernable that public ownership is placed in a uniquely prominent position. First, the Property Law does not take the single term approach to simply using “property rights” to cover all properties, but instead uses a separate term mechanism to differentiate the state or collective property right from individual or other holder’s property rights. Second, the Property Law emphasizes the backbone role of public ownership in the Chinese economy by providing that the state upholds the principal role of public ownership in the nation’s economy. Third, there is a general consensus in China that equal protection does not necessarily mean an equal role for public property and that the leading force of public ownership must be maintained.

Of course, it is highly commendable that the Property Law grants equal protection to private property rights. But whether or not private property rights will actually be protected equally to state property in practice is an important question going forward. Given the supremacy of public ownership and the increasing concern about the possible looting of state assets during the process of privatization (or, in less sensitive words, the course of “absorbing private investment”), it remains to be seen how private property rights are to be effectively protected, particularly when public property is at issue (e.g., the acquisition of assets or shares of a government-owned enterprise).

IV. STATUTORY PRESCRIPTION OF PROPERTY RIGHTS: CIVIL LAW TRADITION AND CHINESE REALITY

China is a country whose legal system bears a great deal of civil law tradition. This tradition is also reflected in the Property Law in that many

159. See Property Law, supra note 102, at art. 3.
160. See WANG LIMING, supra note 20, at 246.
161. See HUANG SONGYOU, supra note 153, at 245.
162. See Property Law, supra note 102, at art. 3. In addition, Article 41 of the Property Law explicitly provides that no entity or individual may acquire ownership of real estate and chattel that exclusively belong to the state as prescribed by law. Moreover, there are twenty-five articles (from Article 45 to Article 69) in the Property Law that specify state ownership, collective ownership, and private ownership.
163. See HU KANGSHENG, supra note 148, at 7, 28; see also YAO HONG, supra note 155, at 8.
provisions are rooted in the civil code of civil law countries, such as Germany and Japan. Still, considerable references were taken from the practices of the common law system during the drafting of the Property Law. Another aspect from which the civil law tradition is typically visible is that the Property Law, like all other major laws of China, contains “General Provisions” that provide basic principles and rules.

As a national law regulating property, the Property Law is defined to apply to the civil relationships arising from attribution and utilization of the “res” or things. Under this definition, the Property Law is meant to govern civil relationships among people with regard to things. These civil relationships are limited to those incurred from attribution and utilization of things. To speak loosely, attribution means the ownership of things and utilization concerns the power over things. Again, it is important to keep in mind that a “civil relationship” denotes a horizontal relationship under which all related parties are equal.

The “General Provisions” of the Property Law have three major parts. The first part states basic principles. The second provides rules concerning creation, alteration, alienation, and termination of property rights. The third part involves protection of property rights. The “General Provisions” are important because the principles and rules prescribed therein not only serve as the grounds for other provisions to rely on, but also have practical significance for courts in applying the Property Law—especially when some provisions are ambiguous. Note, however, that there are certain approaches that are not implicated in the Property Law, though they were extensively discussed during the drafting. In practice, these approaches are likely to be taken into consideration.

A. The Numerus Clausus Principle

A well-known civil law principle that governs property is that property rights must be prescribed by law and may not be created by and between parties. This principle is widely stated in civil law countries as the “Numerus

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164. See Civil Law Office of NPC, supra note 150, at 6-11. In its explanation to each provision of the Property Law, the book lists all relative provisions contained in major foreign countries’ civil codes to indicate source or origin. Many of the provisions are cited from German Civil Code as well as Japanese Civil Code.

165. For example, in real estate registration, the common law country’s “Torrens System” (Registration System) was considered. See WANG LIMING, supra note 20, at 310. For “Torrens System,” see SINGER, supra note 21, at 562.

166. See Property Law, supra note 102, at art. 2.


168. See Property Law, supra note 102, at arts. 1-38.
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_Numerus Clausus,_ a classic Roman concept meaning that "the number is closed." As applied to property, the _Numerus Clausus_ is aimed at excluding the autonomy of the property owner to invent any property interest that is not named or provided by the law. It is considered a substantial limitation on the definition of property implicated in the code. In common law systems, the concept of the _Numerus Clausus_ is understood to mean that property rights must conform to certain standardized forms.

The _Numerus Clausus_ principle is also provided in the Property Law of China. Pursuant to Article 5 of the Property Law, the kinds and contents of property rights shall be prescribed by law. In other words, without statutory prescription, nothing may be deemed a property right or property interest, and the legal dimensions of property must be within the boundary clearly stated by law. In this context, the provisions concerning property rights are generally compulsory and may not be varied by the conduct of any right owner. But under Article 5 of the Property Law, the principle of _Numerus Clausus_ applies only to the types and contents of property. One interpretation is that other aspects—such as the formality of change of ownership, the way to exercise the property right, the method of publicity, and the effect of property rights—need not be included in the _Numerus Clausus_, because they do not involve in the possible creation of property rights or interests.

The idea underlying the _Numerus Clausus_ is that a property right is an absolute right or a right against all others. Unlike the contractual right that is related only to relevant parties, the property right is the right between the owner of the right and anyone else. Thus, if an owner is allowed to create property rights or interests at will, the creation would affect all other people. This notion is also accepted in common law to the extent that the _Numerus Clausus_ serves to prevent situations in which too many individuals have a veto right

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170. See id.


172. See id. at 4. The article actually says that in contrast to civil law systems, where numerus clausus is recognized explicitly, "[i]n the common law, the principle that property rights must conform to certain standardized forms has no name." Id.

173. As described in an English case, "incidents of a novel kind cannot be devised and attached to property at the fancy or caprice of any owner." Keppell v. Baily (1834), 39 Eng. Rep. 1042, 1049 (Ch.).

174. See WANG LIMING, _supra_ note 20, at 265.

175. See JIANG PING, _supra_ note 17, at 126-128. Also, under the 1986 Civil Code, transfer of property rights on movables may be made in the way as agreed upon by the parties. See 1986 Civil Code, _supra_ note 48, at art. 72. Unless the law stipulates otherwise or the parties concerned have agreed on other arrangements, the ownership of property obtained by contract or by other lawful means shall be transferred simultaneously with the property itself.

176. See HU KANGSHENG, _supra_ note 148, at 30. A similar concept in U.S. property law is the "fee simple absolute," meaning that ownership lasts forever. See SINGER, _supra_ note 21, at 308.

177. See WANG LIMING, _supra_ note 20, at 266.

178. See JIANG PING, _supra_ note 17, at 129.
over the use or disposition of a resource. One of the positive reasons to have the *Numerus Clausus* is to ensure the safety of property transactions, as the principle has the effect of clearing title to the property. Another reason is that the *Numerus Clausus* may help reduce measurement costs of property rights.

During the drafting of the Property Law, there was a suggestion that it should adopt a limited *Numerus Clausus* to leave the door open for the kind of property rights that may come up in the future. For example, in one draft presented during the legislative hearing, it was suggested that the kinds and contents of property rights shall be provided by law, while rights that are not provided by law but meet the nature of property rights shall be deemed as property rights. This suggestion was rejected by the majority of legislators due to a concern that the creation of property rights may become immeasurable. On the other hand, it is believed that even if a new kind of property right emerges in the future, the gap could be easily filled in through a legislative interpretation of law.

A question lingering over the *Numerus Clausus* principle is how to define the term "law" as used in Article 5 of the Property Law. More specifically, the issue is whether term includes administrative regulations, judicial interpretation, or customs with respect to application of the *Numerus Clausus*. This is critical, because it directly affects the actual determination of legally prescribed property rights. Many in the judiciary believe that for the purposes of Article 5 of the Property Law, "law" shall only mean the statute passed by the national legislature—i.e., the NPC or its Standing Committee. Still, a common understanding is that a violation of the *Numerus Clausus* principle may only result in voiding the property rights so claimed.

**B. Registration: Publicity Mechanism**

Given the "against all others" nature of property rights, a certain formality

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179. See Merrill & Smith, supra note 171, at 6.
180. See Wang Liming, supra note 20, at 266.
181. See Merrill & Smith, supra note 171, at 8. "When property rights are created, third parties must expend time and resources to determine the attributes of these rights, both to avoid violating them and to acquire them from present holders." Id.
182. See Huang Songyou, supra note 153, at 60-61.
184. Under the Chinese Law of Legislation, the national legislative interpretation of law has the same effect as law in the nation. See Legislation Law of China, supra note 105, at art. 47.
185. Note that in China courts have no authority to interpret law but to interpret application of law. Thus, the interpretation of law is deemed as a legislative action, and the interpretation of application of law is a judicial function. See Xian Fa (1982), supra note 15, at art. 67 (The Standing Committee of National People's Congress exercises the following functions and powers: ... (4) to interpret laws); see also The Organic Law of People's Courts of China art. 33 (adopted on July 1, 1979, amended on Sept. 2, 1983 and Oct. 31, 2006), available at http://www.dffy.com/faguixiazai/xf/200611
/200611001194362.htm.
186. See Huang Songyou, supra note 153, at 61.
187. The voidance may not, for example, affect in any way the validity of contract involved. See id.
is required whenever there is a change of such rights, so that the change is made known to the public. This process is commonly called a system of publicity for property rights.\textsuperscript{188} It is important to follow the required formality, because failure to do so may adversely affect the property acquired and the right of owners to their property. Another important aspect of the publicity lies with the safety of property transactions and the certainty of property ownership. But it should be noted that the publicity mostly deals with immovable property or land.

The most common publicity mechanism is registration, but countries differ in the effect granted to registration. In civil law countries, there are two major registration systems: one is known as “effective by registration” and the other one is termed “against third party.” The “effective by registration” system can be found in countries such as Germany and Switzerland, where registration is a prerequisite to the acquisition of ownership in land.\textsuperscript{189} Under the “effective by registration” system, the change of property rights in land does not take effect until registration is made. The system of “against third party” is employed in countries like Japan, where registration may not necessarily affect the change of property rights but may serve as a defense against a third party. Under the Japanese civil code, for example, acquisition, loss, or alteration of rights in immovable property may not be made against a third party without registration, which renders registration essential only to make the rights available against a third party.\textsuperscript{190}

In common law countries, a widespread mechanism for land registration is called the “Torrens” system. Introduced by Sir Robert Torrens of Australia in 1858, the “Torrens” system established a legal procedure whereby property is transferred by registration instead of deeds and the state guarantees the owner’s indefeasible title to the property registered.\textsuperscript{191} In the U.S., a comparable system called “recording” is used instead of registration.\textsuperscript{192} But in most states, recording is not required to validate the transfer of the property interest, although it is deemed “essential to both to provide an official record of the state of the title and to protect the buyers against any competing claim that may be created by the grantor in others.”\textsuperscript{193}

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  \item \textsuperscript{188} The term “publicity” is popular in China to refer to the formality for the change of property. See Wang Liming, supra note 20, at 306.
  \item \textsuperscript{189} Under section 891 of the German Civil Code, the registration of a property right in the land register is required for obtaining the ownership of the land. See Michael Wendler et al., Key Aspects of German Business Law 121-130 (3d ed., Springer 2006). According to section 656 of Swiss Civil Code, the entry thereof in the land register is necessary to the acquisition of ownership in land. See The Swiss Civil Code 155 (Boston Book Company 1915).
  \item \textsuperscript{190} See Kazuo Hatoyama, The Civil Code of Japan Compared with the French Civil Code, 11 Yale L.J. 354, 362 (1902).
  \item \textsuperscript{191} See Jesse Dukeminier et al., Property 615-623 (6th ed. 2006).
  \item \textsuperscript{192} Today, only a few states in the United States use registration for the title of land. See id. at 617.
  \item \textsuperscript{193} See Singer, supra note 21, at 545.
\end{itemize}
China seems to follow a combined civil law practice. At first, it makes registration a basic mechanism of publicity for the change of property rights. Under Article 9 of the Property Law, the creation, alteration, alienation, or termination of the rights to immovable property shall not become effective until registered. Unless otherwise provided by law, the change will have no effect without registration. A careful reading of Article 9 leads to at least four points: (1) the change of property rights includes creation, alteration, alienation as well as termination; (2) no change becomes effective before registration; (3) registration only applies to immovable property; and (4) the registration is subject to exceptions.

On the other hand, the Property Law adopts a "delivery" approach for moveable property. According to Article 23 of the Property Law, the creation or alienation of property rights to moveable property shall come into effect upon delivery except when otherwise provided by law. Thus, registration is not a condition for the effectiveness of change of property rights when moveable property is at issue. Note, however, that ships, aircraft, and vehicles are all classified as moveable property in China. However, with regard to a change of the property rights to those moveable properties, no claim may be made against a bona fide third party if the change is not registered.

In addition, there are some exceptions to the registration requirement. The first concerns natural resources. Pursuant to Article 9 of the Property Law, no registration is needed for the ownership of national resources that belong to the state. The second exception deals with certain situations in which the effectiveness of change of property rights is not dependent on registration. One situation is the change caused by a legal document issued by a court, arbitration body, or a government decision of expropriation. Another situation is the acquisition of property rights by inheritance. Also a situation is the change of property rights as a result of factual acts, such as construction and housing demolition that are lawfully undertaken.

Under the Property Law, the exception to registration also applies to the change of rights to certain use of land. As will be discussed later, no individual in China may own the land—only the right to use land. Land use is divided into different categories, such as the right to the contracted management of land, the right to perform construction on land, and the right to use house sites. With

194. See Property Law, supra note 102, at art. 9.
195. See id. at art. 23. The easement shall be established at the time when the easement contract comes into effect. Where the related parties request to have the easement registered, they may apply to the registration agency for the registration. Without being registered, no easement shall be made against a bona fide third party.
196. See id. at art. 24.
197. See id. at art. 9.
198. See id. at art. 28.
199. See id. at art. 29.
200. See id., art. 30
regard to the right to contracted management of land or the right to the use of house sites, registration is not required for these rights to become effective, although it may be necessary for the claim against a third party. The same rule also covers such property interests as easements.

As far as registration is concerned, the Property Law requires that property registration be handled by the registration agency of the place where the property is located and a unified registration system be employed nationwide. It is prohibited under the Property Law for a registration agency to ask for an appraisal of real property, to register the property repeatedly in the name of annual inspection, or to conduct any activities beyond the scope of registration responsibilities.

C. "One Thing, One Right" Doctrine

Among Chinese property law scholars, there is an ongoing debate about a civil law doctrine known in China as "one thing, one right." The doctrine emphasizes that property should be considered a "thing" with an exclusive right of ownership. In other words, no two conflicting property rights may exist over any "one thing" and, as such, the subject of property rights must be specific and ascertainable. The debate is on whether the "one thing, one right" doctrine should be made a principle of Chinese property law.

In civil law theory, property rights can be divided into two major categories: plena in re potestas (complete and absolute property rights) and jura in re aliena (certain property rights to the property owned by others). It is commonly understood that the plena in re potestas basically denotes ownership or dominium, and the jura in re aliena mainly refers to other property rights such as usufructuary rights and rights on securities. Given the difference between the plena in re potestas and the jura in re aliena in terms of the degree of exclusivity, it is debatable whether the "one thing, one right" doctrine applies narrowly to the issue of ownership or to property rights as a whole. This debate has also raised the issue of whether the "one thing, one right" doctrine is necessary at all.

Some Chinese scholars have argued that the "one thing, one right" doctrine is both the core and the very foundation of property rights in China and,

201. See Property Law, supra note 102, at arts. 127, 155.
202. See id. at art. 127
203. See id. at art. 158.
204. See id. at art. 10.
205. See id. at art. 13.
206. See JIANG PING, supra note 17, at 116.
207. See HUANG SONGYOU, supra note 153, at 43.
208. See LUIGI MIRAGLIA, COMPARATIVE LEGAL PHILOSOPHY APPLIED TO LEGAL INSTITUTIONS 523-524 (John Lisle trans., Boston Book Company 1912).
209. See WANG LIMING, supra note 20, at 264.
therefore, the doctrine should be embraced in the country’s legal property scheme. The argument is based on the proposition that because property rights are absolute and exclusive, it is impossible to establish two ownerships on any given property. In addition, it is believed that the sole or unique nature of property rights gives rise to the necessity to have a singular right only to any one thing. Some try to modify this argument by limiting the application of the “one thing, one right” doctrine to ownership in particular. They point out that “one thing” means “one ownership” because only ownership possesses both exclusivity and universality, which requires “one right,” while other property rights such as usufructuary rights might not necessarily be exclusive.

Those who oppose the “one thing, one right” doctrine argue that with the diversification of real rights, the doctrine has become obsolete because it is now common to see a “thing” with multiple real rights over it (e.g., multiple ownerships of a condominium building, especially the common areas). Moreover, the “one thing, one right” doctrine was created with tangible things in mind, but the property in today’s world contains many intangible things (e.g., intellectual property), and it is unrealistic to have property rights that govern only “one thing.”

A very practical matter facing the “one thing, one right” doctrine is the emerging conflict between the independent civil status of state-owned enterprises and state ownership. The conflict directly involves the attribution of property ownership over state-owned enterprises. As players in the market, state-owned enterprises must be able to act independently, including the ability to dispose of property they control. On the other hand, state-owned enterprises are not the actual owners of property and have no right to dispose of the property. Many believe that the “one thing, one right” doctrine is clearly inapplicable in this situation. Some suggest the approach of “dual ownerships,” under which the state owns the value of property, while state-owned enterprises own the value of the use of the property.

The Property Law is evasive to the adoption of the “one thing, one right” doctrine. It does not directly endorse “one thing, one right,” but defines

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211. See Jiang Ping, supra note 17, at 115-116.
212. See Xu DiYu, supra note 210, at 27.
213. See Jiang Ping, supra note 17, at 120-21.
214. See id. at 121.
215. Ownership is considered to comprise a bundle of rights, including right to possession, right to use, right to interest and right to disposition. Among those rights, the right to disposition is deemed as the most crucial one. See Singer, supra note 21, at 2-3.
216. By analogy, State and a state-owned enterprise are deemed as shareholder and a company where a shareholder owns equity of the company but does not have the ownership to the value he contributed to the company, and company is the owner of the property of the company. See Xu DiYu, supra note 210, at 32.
property rights as the exclusive right of control over a specific thing.\textsuperscript{217} Although some argue that the exclusive right to a specific thing actually means "one thing, one right,"\textsuperscript{218} many argue that the Property Law only addresses the exclusivity of the property and does not necessarily lead to "one thing, one right."\textsuperscript{219} Still, the Property Law does have a provision called "advanced registration," which is designed to prevent a "thing" from becoming subject to dual ownership.

Under Article 20 of the Property Law, parties entering into a purchase agreement for a house or other immovable property may apply for advanced registration to ensure their singular ownership in that property.\textsuperscript{220} After advanced registration, no other person may dispose of the property without consent from the owner that registered in advance.\textsuperscript{221} Note, however, that in the context of Article 20, the advanced registration essentially deals with rights of claim or a creditor's rights related to future rights of immovable property.\textsuperscript{222}

\textbf{D. Priority of Property Rights over Creditor Rights}

In civil law systems, property rights and creditors' rights are regarded as two different, but closely related, classes of rights.\textsuperscript{223} They are different in that the former is the right over a thing and the latter is the right arising from a contractual relationship. They are related because creditors' rights are often created by a property right. For example, when two parties enter into a contract in which party A agrees to transfer a piece of property to party B, which agrees to pay a certain amount of money in return, party B has a creditor's right over party A's property. If party A defaults in delivering the property, party B has a contractual claim against A and under some circumstances can assert its right over party A's property.\textsuperscript{224}

Since a property right and a creditor's right can both attach to a piece of property, one of those rights must be superior to the other. Generally, there are

\begin{itemize}
\item \textsuperscript{217} See Property Law, supra note 102, at art. 2.
\item \textsuperscript{218} JIANG PING, supra note 17, at 121-122.
\item \textsuperscript{219} See Hou SHUPING ET AL., ANALYSIS ON THE ISSUES OF PROPERTY LAW 93 (Law Press, China 2007).
\item \textsuperscript{220} See Property Law, supra note 102, at art. 20.
\item \textsuperscript{221} See id.
\item \textsuperscript{222} Pursuant to Article 20 of the Property Law, the advance registration will be vacated if after the advance registration the creditor right is extinguished or the registration is not applied within three months from the date when the immovable can be registered. See id.
\item \textsuperscript{223} See XU DIYU, supra note 210, at 3; see also CUI JIANYUAN & SHEN WEIXING, STUDY ON THE THORNY ISSUES OF PROPERTY LAW LEGISLATION OF CHINA 111-134 (Tsinghua University Press 2005).
\item \textsuperscript{224} For instance, under Article 20 of the Property Law, where the parties concerned conclude a purchase agreement on a premise or other real property, they may apply to the registration organ for advance notice registration to guarantee the realization of the property right in the future. After the advance notice registration, any disposal of the real property without obtaining the consent of the holder of the advance notice registration shall produce no effect of property right. See Property Law, supra note 102.
\end{itemize}
two situations in which the priority between property rights and creditors' rights becomes an issue. One situation involves a sale of property to two buyers, one of which has possession of the property. The other situation concerns a security interest between a creditor and a debtor.\(^2\)

During the drafting of the Property Law, some suggested that it should adopt a principle granting property rights priority over creditors' rights. In the first draft of the Property Law, there was a provision that if a specific immoveable or moveable property was subject to both a property right and a creditor's right, the property right should receive a priority unless otherwise provided by law.\(^2\) A similar provision was provided in the second draft.\(^2\)

Proponents of this priority scheme asserted that priority should be determined by the nature of the right, as property rights are exclusive, while creditors' rights are not. Thus, when a property right is in conflict with a creditor's right, the property right should generally have priority.\(^2\) These proponents also argued that, pragmatically, priority of property rights would help identify the attribution of certain property in which multiple creditors' rights are involved.\(^2\) Still, there are certain exceptions, one of which is in leased property. For example, when an owner sells his property during a valid leasing period, the lessee's interests should remain unharmed by the change of ownership.\(^2\)

Opponents have argued that this priority scheme did not clearly address the nature of property rights and actually neglected essential elements of the law that provide for changes in property rights.\(^2\) In addition, these opponents have challenged whether any workable definition about the term "priority" has developed to determine which property right has priority. Moreover, they believe that no such scheme exists in the property legislation of any other country and therefore China would be wise not to be the first.\(^2\)

Due to this controversy over the priority doctrine and the concerns of some

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\(^2\) See Jiang Ping, supra note 17, at 166.

\(^2\) See id. If there were both property right and creditor right on a specific immovable or moveable, the priority of protection shall be given to the property right, except for otherwise provided by law.


\(^2\) See Jiang Ping, supra note 17, at 166-167.

\(^2\) In China, a lease is not regarded as a property interest, but as a contractual relationship. And as such the lease is provided in contract law other than in property law. See Contract Law of the People's Republic of China ch. 13 (adopted by NPC on March 1999, effective October 1, 1999), Contracts for Lease, available at http://www.cclaw.net/lawandregulations/chinese_contract_law.txt.

\(^2\) For example, a buyer of a house who has possession of the house may not have a valid claim against other buyers who also have signed contract with the seller because registration is the prerequisite to the effectiveness of the change of the property right. Even if a buyer of a house who has registered would take the house against all other buyers, it is not because of the priority of the property right, but because of the registration that enables him to own the house. See Jiang Ping, supra note 17, at 167.

\(^2\) See id. at 171.
legislators regarding the confusion it may cause, the priority provision was taken out of later drafts of the Property Law. The major concern was that legislators did not know what effect such a priority scheme would produce if enacted. In practice, however, it is highly likely that the courts will give more weight to property rights over creditors' rights in conflicts that arise between the two.

E. Property Rights without Land Ownership

It is important to emphasize that property rights in China are not necessarily identical with the right to own a piece of land. Under the Chinese constitution, land in urban areas are owned by the state and land in the rural and suburban areas are owned by collectives, except for those that belong to the state according to law. No individual or organization may own land. On this constitutional ground, Article 47 of the Property Law provides that urban land, and land in rural areas that belong to the state as provided by law are owned by the state. Article 58 of the Property Law defines the collectively owned property as including land that belongs to collectives, under the provision of law.

Thus, no private ownership of land exists in China. There is, however, a kind of “non-ownership” interest in land that is commonly called “the right to use the land” or “the land use right.” In the Property Law, the land use right is defined as a usufructuary right, namely the right to the property owned by others. As noted, the Property Law further divides the land use right into three categories: the right to the contracted management of land, the right to the use of construction land, and the right to the use of house sites. The common character of the right to the use of land is that the user of the land has the right to possess and use the land and the right to gain interest from the land, but has no right to dispose of or sell the land. In addition, as a property interest, the right to the use of land is inheritable.

Therefore, the owner of a house in China is actually the holder of the right to use the respective land. In other words, ownership of a house may reach everything affixed to the house, but not the land on which it is built. Additionally, the right to use land is on a term basis, and acquisition of such a right has an economic value which is included in the purchase price of the

233. See id.
234. See Wang Liming, supra note 228; see also YANG LIXIN, supra note 225, at 35.
236. See Property Law, supra note 102, at art. 47.
237. See id. at art. 58.
238. See RANDOLPH & JIANBO, supra note 94, at 85.
239. Article 10 of the Chinese constitution explicitly prohibits organization or individual from appropriating, buying, selling, or in any other ways unlawfully transferring land. XIAN FA (1982), supra note 15, at art. 10.
house. Under the 1990 State Council Interim Provisions for the Granting and Transferring of Land Use Rights on State-owned Land in Cities and Towns, the maximum term for the use of land for a residential purpose is seventy years.\textsuperscript{240} The term is renewable but a fee for the renewal may be levied.\textsuperscript{241}

Pursuant to Article 40 of the 1990 Provisions, the state shall retain the land use right and ownership of other fixtures for free when the term of right to the use of land expires.\textsuperscript{242} Thus, despite a commonly accepted principle that a request for renewal of land use rights may not be denied without a legitimate need for public interest,\textsuperscript{243} there is a public concern about a possible loss of the right to the use of land during the renewal process, particularly for land that is used for residential buildings.\textsuperscript{244}

In response to this public concern, the Property Law adopts an automatic renewal approach to land use rights for residential buildings. Under Article 149, the term of a right to use construction land for a dwelling house shall be automatically renewed.\textsuperscript{245} This automatic renewal, however, does not apply to the right to use non-dwelling construction land. In accordance with Article 149 of the Property Law, the renewal of land use rights for non-dwelling construction land shall be determined by law. The attribution of the houses and other immoveable property on the land shall be made according to the contract between the related parties or relevant law if there is no contract or the provisions in the contract are unclear.\textsuperscript{246}

Still, with automatic renewal for the term of use, the right to use land does not mean ownership of the land. The differences between the two are obvious. One of the most striking differences is that ownership of land contains the right to own everything on the land, under the land, and to a certain extent, above the land. The right to use land does not contain these additional rights. Furthermore, ownership of land embraces a right to the disposal of land, while the right to the use of the land does not.

\textsuperscript{240} The Provisions put the right to use of land into different categories and each category has a different term for the use. Under Article 12 of the Provisions, the maximum term for each category is as follows: Residential: seventy years; Industrial fifty years, Education, Science and Technology, Culture, Public Health, or Athletic Facilities: fifty years; Commercial, Tourist, or Recreation: forty years; Combined or other purposes: fifty years. A full text of the Provisions in Chinese is available at http://www.jincao.com/fa/law19.95.htm. Chengzhen guoyoutudi shiyongquan churang he zhuanrang zhanxingtiaoli [Temporary regulation for transfer of the right to use the state owned land] Order No. 55 by St. Council of China. See also RANDOLPH & JIANBO, supra note 94, at 127-128.

\textsuperscript{241} See id. at art. 41 (Provisions).

\textsuperscript{242} See id. at art. 40 (Provisions).

\textsuperscript{243} See HUANG SONGYOU, supra note 153, at 447.

\textsuperscript{244} See Civil Law Office of NPC, supra note 150, at 274-275.

\textsuperscript{245} See Property Law, supra note 102, at art. 149.

\textsuperscript{246} See id.
V. "NAIL HOUSE" SYNDROME AND UNRESOLVED ISSUES

"Nail House" is a symbolic phrase used in China to refer to a household that defies the public notice or order of "demolishment and removal" by the government for real estate development in the area where the house is situated and sticks out like nails in an otherwise changed environment. The house is called a nail because it remains intact, no matter what has happened in the surrounding area. As to the owner of the household, the word "nail" conjures up the image of a stubborn owner who refuses to be hammered down.

In recent years, the "Nail House" syndrome seems to have become commonly caused by the direct conflict between household owners and real estate developers. Still, there are many cases in which the conflict is actually between households and the government. In the past, the "Nail House" syndrome in land development could not have existed in China, as no individual rights in property were recognized. After private property was officially recognized in the country, the "Nail House" phenomenon came to the fore when many urban areas in China became massive development zones. The issue of whether there should be fair treatment and just compensation in such situations then arose.

Perhaps the most notable "Nail House" incident attracting national attention occurred in early 2007 in the city of Chongqing. Reported in the media as the "strongest nail house in history," the incident involved a couple who lived in an old two-story house located at 17 Hexing Road, Jiu Nong Po District, Chongqing. In 2003, the district government sold the right to the use of the land to a private developer in order to make the area more business-oriented. Approximately 280 households were affected as development commenced in the summer of 2004.

Unfortunately, after several attempts, the developer failed to reach an agreement with the couple on the replacement value of the house or relocation alternatives. The couple—husband Yang Wu and wife Wu Ping—responded by refusing to move out. By October 2004, the surrounding area was torn down, leaving the house standing alone. Since then, the house has been without water, electricity, or even a proper exit, because the developer dug a ditch more than ten meters deep around it.

After unsuccessful negotiations, the developer filed an administrative petition with the district housing management bureau ("district housing bureau"). On January 11, 2007, an administrative decision was issued against


248. The development plan was actually made by the city in 1993, but for some reason the process of implementing the plan was delayed until 2003. See id.
the couple, ordering them to voluntarily move out to a relocated place within fifteen days after the issuance of the decision. The couple disagreed with the district housing bureau and took no action to comply with the administrative order. On February 1, 2007, the district housing bureau filed an enforcement petition with the district people's court. After a hearing on March 19, the court ruled in favor of the district housing bureau, ordering the couple to comply on or before March 22, 2007.\textsuperscript{249}

But, the couple refused to comply. On March 23, the case went into the process of forced enforcement of judgment. On March 29, a notice of forced enforcement was sent to the couple urging them to obey the court order. Facing continued resistance from the couple, on March 30, the court issued a public notice ordering the couple to voluntarily move out by April 10 or else face demolition of the house and relocation by court order.\textsuperscript{250}

While battling in court, the couple tried to seek public support by talking to the media. On March 19, China Legal Daily first published an interview with Wu Ping about the case. Wu Ping and her "Nail House" became a national flashpoint immediately, allowing her to fight to protect her property. According to Wu, their demand was simple: to be given an apartment unit in the building that is to be built in the same area with comparable square-footage to the house she currently owns. This demand was refused by the developer, who claimed it was impossible to comply. In order to attract more public attention, the couple flew a Chinese national flag on the roof of the house, and met with reporters in front of it, holding a copy of the Chinese constitution in their hands.

Ironically, during the time when the district court ordered the couple to move out, the General Meeting of the NPC was held in Beijing to discuss the passage of the Property Law. Many regarded this case as a test of the protection of private property rights that the Property Law is supposed to promote.\textsuperscript{251} Dealing with tremendous public pressure, the district court made additional efforts to try to bring the parties together for a settlement.\textsuperscript{252} In the meantime, the chief officer of local government also met with Wu Ping in person to discuss her options for a settlement.\textsuperscript{253} On April 2, an agreement was finally reached on a mutually compromised basis, under the auspices of the district court,\textsuperscript{254} ending the three-year long standoff.

The most widely publicized "Nail House" has gone, but many legal issues


\textsuperscript{250} See id.


\textsuperscript{252} See supra note 249 (Court Statement).

\textsuperscript{253} See id.

\textsuperscript{254} See id.
remain. Aside from the merits of the dispute over compensation, the "Nail House" has become a microcosm of the status quo of private property rights in China. The rights in many cases are not well-respected or properly protected, although they have been constitutionally recognized.

One legal issue is the process of taking. In the United States, the Fifth Amendment of the Federal Constitution explicitly prohibits private property from being taken without just compensation.\textsuperscript{255} In China, there was no such constitutional clause to govern government taking until the latest amendment to the 1982 Constitution was adopted in 2004. Under the 2004 Amendment, the state may, for the public interest and in accordance with law, expropriate or requisition private property of citizens for its use and make compensation for the property expropriated and requisitioned thereof.\textsuperscript{256}

Obviously, the Chinese constitution does not seem to make proper compensation a prerequisite for a taking. Unlike the Fifth Amendment in the U.S., the Chinese constitutional provision does not have any effect of curbing government power over private property to the extent that proper compensation is guaranteed. In the United States, property rights are deemed to serve a dual role: to protect individual rights against other citizens and to safeguard against excessive government interference.\textsuperscript{257} Unfortunately, the role of safeguarding against excessive inference from government appears to be considerably overshadowed by the overreaching authority possessed by government agencies at all levels in China.

The Property Law contains a more detailed provision with respect to government expropriation. Under Article 42 of the Property Law, private premises or other real property may be expropriated for the public interest under statutory discretion and procedure. In the case of expropriation, compensation shall be made for demolishment and relocation, and the lawful rights and interests of the owner of expropriated property shall be maintained. When a private house is expropriated, the living condition of the owner shall be ensured.\textsuperscript{258}

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{255} See DUKEMINIER, supra note 191, at 941; see also SINGER, supra note 21, at 677.
  \item \textsuperscript{256} XIAN FA (1982), supra note 15, at art. 13.
  \item \textsuperscript{257} See Paul, supra note 57, at 1409-10.
  \item \textsuperscript{258} See Property Law, supra note 103, at art. 42. The full text of Article 42 of the Property Law reads:

\begin{quote}
In order to meet the demands of public interests, it is allowed to requisition lands owned collectively, premises owned by entities and individuals or other realties according to the statutory power limit and procedures.

When requisitioning land owned collectively, it is required to, in accordance with law and in full amount, pay land compensation fees, placement subsidies, compensations for the above-ground fixtures of the lands and seedlings and other fees, arrange for social security fees for the farmers with land requisitioned, guarantee their livelihood and protect their lawful rights and interests.

When requisitioning the premises owned by entities and individuals or other realties, it is required to compensate for demolishment and relocation in accordance with law and protect the lawful rights and interests of the owners of the requisitioned realties; when
\end{quote}
\end{itemize}
\end{footnotesize}
However, much like the 1982 Constitution (as amended in 2004), the Property Law sets no standard or requirement to guarantee a fair and just process for the taking. Instead, the Property Law leaves the door open by using vague terms, such as “under the statutory discretion and procedure.” It is understood in China that the legal authority referred to in the Property Law is the Law of Land Management of China and other relevant regulations, such as the Regulation of Administration of Demolishment and Relocation of Urban Houses (Urban Houses Regulation). The Land Management Law was first adopted in 1986 and was amended in 1988 and 1998, basically dealing with land use and farmers’ interests associated with land.

The most relevant and controversial law pertaining to the taking is the Urban Houses Regulation. Promulgated by the State Council in 2001, the Urban Houses Regulation is currently the major regulation that governs the demolishing and relocating of houses in urban development. Although there is disagreement among Chinese scholars as to whether demolishment and relocation in urban areas is equivalent to an expropriation, as ownership of land is not at issue, it is believed that the nature of demolishment and relocation indeed constitutes a taking, for which a fair process shall be established and a reasonable compensation shall be made.

The problem, however, is that the Urban Houses Regulation has a focus on the advancement of urban development, and as such it does not make the fair process for takings a priority. On the contrary, it has a bias against owners of households. For example, under the Urban Houses Regulation, a developer may not undertake demolishment and relocation without obtaining a license from an administrative agency of local government, but the license may be issued without any knowledge of the owner of the household affected. In addition, as soon as the license is issued, the owner of the household is obligated to enter into a contract with the developer for demolishment and relocation. Moreover, if the owner and developer fail to reach an agreement, the developer may seek a decision by the local administrative agency. If the house’s owner disagrees with the administrative decision, the owner may file a lawsuit with a

260. See WANG LIMING, supra note 20, at 425.
262. See id. at art. 13.
263. See id. at art. 16.
people's court. During the legal proceeding, execution of demolition and relocation shall not be halted if money compensation is made or a relocation house is provided. Finally, if the owner of the household refuses to move, a forced demolition and relocation may be imposed.

The second issue is the purpose of takings. Both the 1982 Constitution and the Property Law allow a taking to take place for public interest. The question then is what constitutes the public interest to justify a taking. During the drafting of the Property Law, many suggested the "public interest" should be well-defined in order to help prevent abuse, particularly when commercial development is involved. Others preferred to have a generalized provision for various reasons, including, among others, that (a) it is impossible to make a complete list of public interests; (b) the public interests shall have a broad content in order to meet the different public needs in a constantly changing environment; and (c) the law in many other countries does not limit public interests within certain categories.

Facing difficulty in defining public interest, the Property Law simply makes public interest a general criterion for the taking without bothering to specify what it means. Courts will have to determine what constitutes public interest on a case-by-case basis. Still, trying to differentiate public interests from commercial use in many cases is a thorny issue because the two are closely tangled. Thus, the Property Law has been criticized for failing to make any substantial improvement in protecting individual property interests in cases of taking. Nevertheless, in order to help identify public interests, some scholars have proposed a factor-based approach under which the following factors would need to be considered to determine public interests: (a) scope of beneficiaries, (b) burdens on the general public, (c) priority of interests involved, and (d) availability of alternatives.

The third issue is compensation. This issue is perhaps the primary attribute to the occurrence of nail houses. Interestingly, all laws in China in relation to takings provide for compensation, but none of the laws require compensation to be reasonable. As noted, for instance, under Article 13 of the 1982 Constitution (as amended 2004), the requirement for expropriation of private property is to

264. See id.
265. See id. at art. 17.
266. For example, one scholar proposed defining the public interest to include public roads and transportation, public health, disaster prevention and treatment, courses of science, culture, and education, environmental protection, preservation of cultural and historical relics and national scenery, protection of water sources and land for water channeling and draining, protection of forests, and other public interests as provided by law. See LIANG HUIXING, ARTICLES, EXPLANATIONS, RATIONING, AND LEGISLATIVE REFERENCES OF PROPOSED DRAFT PROPERTY LAW 191-192 (2000).
267. See HUANG SONGYOU, supra note 153, at 162-163.
268. See JIANG PING, supra note 17, at 287-288.
269. See WANG LIMING, supra note 20, at 420.
"make compensation," yet no standard for the compensation is provided.\(^{270}\) Although the Land Management Law for expropriation of land provides a calculation formula for compensation, reasonableness is not a criterion.\(^{271}\) Since the compensation is not defined, it creates a situation that leaves the owner of private property far under-compensated in many cases.

In response to the public outrage at the inadequate compensation in cases of taking or expropriation, the Property Law tries to deal with this issue in a seemingly reasonable manner by specifying the nature of the subject expropriated with more detailed compensation means such as "compensate for demolishment and relocation," "protect the lawful rights and interests," and "guarantee the housing conditions."\(^{272}\) Still, no requirement for a reasonable and just compensation is set out in the Property Law. Thus, as long as compensation is made, the level of the compensation in terms of reasonableness may become irrelevant, because the lawful rights and interests as well as the living condition as stated in the Property Law are too vague to be measurable.

In reality, the idea behind undefined compensation is that the compensation is a matter of local concern.\(^{273}\) Thus, it is asserted that since the actual standard of compensation is provided by local government in consideration of local needs and development level, it is difficult to establish a general or uniform standard.\(^{274}\) However, many scholars view this matter differently. They argue that it is necessary to provide a national standard or principle because without it there is no way to ensure adequacy of compensation and, as a matter of fact, the local government always has a tendency to keep the compensation as low as possible in order to reduce development costs.\(^{275}\) Many suggest that, as a common practice, the uniform standard for the compensation should be the reasonableness standard, and reasonableness shall be determined by the court if a dispute occurs.\(^{276}\)

VI. CONCLUSION

If it is true that during the mid-1950s campaign of socialist transformation, China made a historical move from private to public in the means of production


\(^{271}\) See Land Management Law, supra note 259, at art. 47 (requiring that for expropriation of land, compensation be given in accordance with the original use of the expropriated land).

\(^{272}\) See Property Law, supra note 102, at art. 42.

\(^{273}\) See YAO HONG, supra note 155, at 71.

\(^{274}\) See HU KANGSHENG, supra note 148, at 102-103.

\(^{275}\) See WANG LIMING, supra note 20, at 427.

\(^{276}\) See id. at 429. During the drafting of the Property Law, four major standards were proposed: reasonable compensation, proper compensation, adequate compensation, and marker price compensation. But legislators chose to keep "compensation" undefined, leaving power to determine the standard for compensation to local governments and other central government agencies. See HU KANGSHENG, supra note 148, at 103.
and property ownership, then it is equally true that the passage of the Property Law in 2007 legally reversed the course and posted a historical change in the property rights from public to private. In this context, the Property Law is a landmark legislation bringing China into the mainstream global economy and laying down a foundation for the market economy that the country has been trying to pursue.

However, nothing in this Article is intended to suggest that the protection of property right in China is secure. On the contrary, several legitimate concerns remain regarding how the Property Law is to be implemented. Further, many provisions in the Property Law are either ambiguous or need to be further defined. To speak more explicitly, a big challenge facing China in the legal realm of property is changing the ideology of the supremacy of public property to really put a legal framework in place to guarantee an equal protection of both public and private property.

Perhaps the biggest challenge is limiting government power to interfere with individual liberty and private property rights. The interference in most cases originates from the government’s strong appetite for control as well as its desire to try to maintain social stability. Surely, there is nothing wrong with the government’s maintaining social stability, but the issue is whether stability should be achieved at the cost of loss of property or rights of particular individuals, or if it should be maintained by preventing the misconduct of government. Unfortunately, the focus in China has been largely on the behavior of individuals rather than on government actions. This is affected by the fact that lower level Chinese government officials care more about their job performance report than actual citizens dealing with these issues.

Nevertheless, the Property Law represents significant progress in China for protecting private property rights. It is conceivable that many existing rules and regulations will be modified to be consistent with the Property Law, as some new rules and regulations will be adopted to help implement the Property Law. It is also highly expected that the Supreme People’s Court of China will exercise its function of judicial interpretations from time to time to facilitate application and enforcement of the Property Law and, in the meantime, to help clarify certain ambiguities that are contained in the Property Law.

277. For example, in a “Nail House” situation, the owner of the household is normally blamed for not respecting the government, and rarely were people led to think that there was something wrong with the government. See Su Sengxiang, How Should We Treat “Nail House”?, Mar. 22, 2007, available at http://news.xinhuanet.com/legal/2007-03/22/content_5879558.htm.

278. In China, many government officers are “position-oriented,” not “service-oriented,” meaning that they tend to do what they think their superior wants in order to keep their positions stable and have a chance at promotions, rather than listen to what the people they are supposed to serve would like. See Cai Huihong, Cultural Shackles—On the Slow Pace of the State Owned Enterprises Reform of China, available at http://www.myshow.com.cn/class/oBarticle1.htm. In China, local, county, and provincial government overlords all have an interest in power, and were they to coincide, the power is going to come down very hard on the neck of the average citizen. See Randolph, supra note 94.