Property Right from Law and Society’s Perspective: A Literature Review

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I. Introduction

Last year, China eventually saw the establishment of its first Property Law since the regime change in 1949 and the initiation of economic reform in 1978. Although many of the provisions in the law are by no means unheard of in practice previously, the formalization of these “laws in action” nonetheless invoked strong suspicion and objection. The conflict of ideas seems originated from the discrepancy in understanding the social functions of property rights and property law. Are they propellants for social growth or coagulants for unequal distribution of economic resources? In this paper, I would like to review the law and society literature on property rights, trying to probe the law and society approach to analyze the socioeconomic functions of the institution of property right.

Property right as a social institution has long been in the center of philosophical inquiries. For example, Aristotle believed that property right was a means to achieve distributive justice, while Bentham, from the utilitarian perspective, argued “Property is nothing but a basis of expectation; the expectation of deriving advantages from a thing, which we are said to posses, in consequence of the relation in which we stand toward it”
(Bentham, 1931). The most deeply rooted philosophical idea about property right in U.S. social and legal tradition may be the liberal Lockean “labor theory of property” (also reflected in the law and society studies discussed below), which claimed, as a “nature right”, one’s right in his or her property or, more specifically, estates was something inalienable to the state through the social contract, and was the cornerstone underlying one’s liberty as well as the capacity to participate in public governance.\(^1\) From a somewhat different angle, the Marxist opinion on property right regards it as part of the superstructure underpinning the power of the ruling economic class.

Much later in time but no less vigorously than the philosophers, economists have shaped up their own tradition of property right theories. Depending on the assumption of human rationality, economists generally believe property right is an institution providing best incentive to internalize costs and benefits inherently involved in the use of scarce resources, which in turn upgrades the allocative and productive efficiency, thus leading to expansion of the overall social wealth (for example, Demsetz, 1967; Barzel, 1997).

Somewhat surprisingly, sociologists have, to a great extent, been absent from the property right discussion and kept unseen in the formation of social theories on this topic. As we will see below, the law and society literature on property rights leans heavily upon

\(^1\) For a very brief review of the utilitarianism, distributive justice and liberalism view about property right, see Cooter & Ulen, 2008.
the philosophical and economic theories discussed above. And oftentimes the sociological input is also intertwined with or even concealed by the inquiries from political and historical point of view. In the rest of the paper, I would like to review the law and society literature on three topics of the property right system: the basic conception of property right, the property right under a legal pluralism structure, and the relationship between property right and politics. Due to the limit on time and space, this review is highly restrictive and relies heavily on the articles in the two main journals, the *Law and Society Review* and the *Law and Social Inquiry*.

**II. The Concept of Property Right**

What is property right, or how the concept of property right is viewed? This is the first interesting question I would like to ask when reviewing the literature. It is also an important question in the sense that it roughly delineates the boundary of the literatures to be reviewed.

In modern social science, many of our views about property right can be traced back to the works of the seventeenth and eighteenth century theorists, such as Hobbes and Locke, whose thoughts were deeply rooted in the scientism and rationalism tradition of that era. The classic view of property right related it to peoples’ fundamental desire to live. To mediate peoples’ conflicting desires and avoid the destroying fight resulted
from these desires, the institution of property allocates exclusive right to different people, thus encourages us to work and trade, which leads ultimately to a higher level of satisfaction of our desire. Therefore, property right, in a direct sense, defines peoples’ entitlements to the scarce resources in the physical world, but in a more subtle sense, it also defines our relationship between each other. Underlying this image of property right is a sound belief in the rationality of human beings, who will always prefer more than less for themselves (Rose, 1990). This line of reasoning is in perfect accordance with the conception of property right in law and economics or, more generally, the economics academia. To economists, property right means the ability of an individual to use or exchange scarce resources (Barzel, 1997; Demsetz, 1998).

A somewhat departing route of thought in the law and society literature regards property right as narrative or storytelling. The framework of this theory was first built up by Carol Rose, who, in the strictest sense, is a historian. After reviewing the classic view of property, she found it mysterious why those rationalism-based thinkers turned nevertheless to a narrative mode to explain the origin of property regime in social history. Rose believes that the pure scientific or predictive mode cannot give us a smooth idea about the establishment of property right as a social institution which inevitably involves cooperation among the individual components of the human society. As she stated (Rose, 1990: 52):
In short, there is a gap between the kind of self-interested individual who needs exclusive property to induce him to labor, and the kind of individual who has to be there to create, maintain, and protect a property regime. The existence of a property regime is not predictable from a starting point of rational self-interest; and consequently, from that perspective, property needs a tale, a story, a post-hoc explanation.

In her eyes, people tell stories to structure the audience’s experience and imagination, thus turning her audience into a moral community. This way, people become more willing to step out of the narrow scope of self-interest and into a cooperative realm achieving the mutual benefits of all. It is interesting to note that this narrative process of property regime formation echoes exactly with Ewick and Silbey’s argument of storytelling as a method to generate resistance and construct legality (Ewick & Silbey, 1998). Or in their broad view of legality, the property regime itself is part of the social schema with which we construct legality and which in turn is the object of our construction. To Rose, and probably to Ewick and Silbey as well, the essential element of storytelling comes from the process which engenders resonance between the storyteller and his or her audience. So “(B)y telling stories to each other we claim more than each other’s attention”. “In presenting an account to an audience, subjective experiences are translated into a common vernacular, employing culturally plausible interpretations … and thus offer a particular definition of the situation” (Ibid: 243). The
property right is so defined. Therefore, when the communication is set up between the storyteller and the audience, a property-like right will be recognized even if the claimer is not _telling a story_ in its literal meaning and his or her claim may not be backed up by the unambiguous sanction of the law, for example, to claim a parking space by shoveling the snow and placing a chair (Rose, 1985). Rose, who took possession as the origin of property in a legal sense, suggests to us that possession itself, as well as the whole property regime is the outcome of a social construction through storytelling.

Applying narrative theory of property right to a field study in Hawaii, Milner revealed to us how groups of people with conflicting interests used the same approach of storytelling to justify their notion of property and ownership. In Hawaii, most of the people who own condominium high rises or townhouses do not own the land on which the building is located. Instead, they lease the land from the landowner and their leases are subject to the “surrender clause” which stipulates that at the end of the lease the land and the building with all its improvements reverts to the lessor. After confronted with a considerable raise of rent in the renegotiation of leases with the landowners, the condo owners organized to demand legislation converting their leasehold rights to freehold fees.

The written testimony left by both sides, the lessor landowners and the lessee condo owners, regarding the 1991 O‘ahu County Council bill that capped lease rents and

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2 Interestingly enough, Ewick & Silbey also use this chair example to identify the property right beyond formal legal rules (Ewick & Silbey, 1998: 21).
required the sale of land to condo dwellers becomes an affluent source for the study on
the conception of property right as a narrative (Milner, 1993).

Although each side frames their stories differently to claim that they deserve the
ownership in land, the testimony also shows that both share the conception of property
right in three aspects: 1) property right stands for some crystallized identity, 2) it relates
to the degree of settlement which in turn is viewed as a symbol of morality, 3) property
right is closely connected to the labor invested in acquiring and maintaining assets, a
straightforward reflection of the Lockean “labor theory of property”.

In the first aspect, the landowners tend to elaborate their family history. They
essentially argue that their ownership in land stemmed from the shared identity with their
family. In contrast, condo owners hardly relate themselves to their extended family in
the written testimony. Rather, their focus is almost entirely on policy matters, and they
are inclined to link the ownership of property with an individualistic identity. Thus, by
different framing, the narratives of these two groups appeal to two probably equally
cherished values in American society: preservation of family and developing autonomy.
In the second aspect, the lessors couch settlement into a notion regarding ethnicity and
length of residence while the lessees frame the issue as a solid intention to stay and
careful plan for the future. Finally, with respect to the labor needed to justify the
endowment of property right, the landowners explicitly describe the history of struggle
and sacrifice of their ancestors, as well as themselves, to overcome the natural and economic obstacles in taking hold of and making use of the land. On the other hand, condo owners also emphasize their struggles associated with home owning: the remodeling, cleaning, termite treating and, above all, the financial struggle to save, pay taxes and make the mortgage (Ibid: 233-244).

The different framing of the narratives coming out of similar basic conceptions of property right perhaps presents a vivid illustration of the process of constructing legal consciousness elaborated by Ewick and Silbey in “The Common Place of Law”. The three aspects underlying both lessors’ and lessees’ conceptions of ownership serve as the “social schema”, a resource as well as restraint on peoples’ construction of legal consciousness. At the same time, the different stories told by these two interest groups indicate their respective participation in the reshaping process of our legal consciousness about property right.

Although the narrative conception of property right originated to fill the gap between self-interested individuals and the collective endeavor necessary to set up the whole property regime, it eventually seems to be perfectly consistent with the (neo)classical utilitarian approach. The common conceptions underpinning different stories are rooted in communities with shared interests. The notion of property is given meaning only when people attempt to exchange resources. Without such exchange or trade, property
right is of no significance as people living in a completely open access community never need to figure out what is yours and what is mine: they do not exchange resources with each other but take directly from the common pool. When people trade they also generate dialogues that animate the “social schema” prescribes the conception of property right. As Adelman correctly addressed:

(W)hat unites people above all is mutual dependence through trade, which in turn generates “interactive virtues,” such as education and socialization. The more people trade, the more they use resources (including their own), and the more they socialize. From this socialization process emerge invented traditions and customs themselves, and these become the meta-frames for rights talk. Custom in turn prevents an unorganized public from becoming an “unruly mob” by channeling peoples’ subjectivities into recognizable and mutually agreed upon interests and values. Trade creates customs, which enables commerce (Adelman, 1996: 1058).

Therefore, narratives ultimately came from nowhere but people’s mutual interest in trade. Sometimes, the background conception of property right is cast in collective languages and appears to supercede individual claims, but it evolved as a result of its ability to widen the channels of trade. However, different individuals or group of individuals still have diverging interests in specific contexts in spite of the abovementioned collective interest. Hence, they will frame their own narratives to back
up these interests accordingly, yet restrained by a big picture of “social schema”. This is just what we have seen in the Hawaii land conversion story. In the long run, stories told by people “still rely on the proposition that people share coherent and self-evident interests (as individuals seeking to balance utility maximizing with notions of civility and manners)”, and people “compete over scarce resources within sets of rules, and these rules change when they are seen to be suboptimal” (Adelman, 1996: 1060). In this sense, Adelman sorted out Rose from the communitarians, and unveiled her elementary lineage to the utilitarianism.

The third kind of property right conception is closely connected to the Lockean idea that property right is an inalienable natural right which protects individuals from undue influence of the state. In this line of reasoning, property right essentially becomes a piece of weapon that defends private persons against the public power. So whenever a certain kind of private interest or entitlement is in danger of arbitrary expropriation by the public power, it will be necessary to treat this interest or entitlement as property right. Actually, this notion can be regarded as yet another functionalist approach: now property right is no longer a tool to maximize social wealth, but one to realize so-called “negative freedom”.

The best illustration of this sort of property right conception may be Reich’s “The New Property”. In this influential article, Reich reviewed the various types of
government-created wealth, or largess, emerging in the 1960s and the applicable legal rules dealing with such largess. He found that although becoming increasingly important to people’s social and economic activities, the government-created wealth, such as occupational licenses and welfare benefits, was suffering unsolidified legal safeguards in both procedural and substantive aspects. To a large extent, the government largess extended the discretionary power of public entities and eroded the independence of private organizations and individuals. Besides, the government largess as well as the government power needed to buttress such largess also created inequality within the private sector as the public power could be captured by private interests. Taken as a whole, the doctrine behind the practice of government largess seems to be that “the wealth that flows from government is held by its recipients conditionally, subject to confiscation in the interest of the paramount state”. In effect, this doctrine resembles the philosophy of feudal tenure: “Wealth is not ‘owned,’ or ‘vested’ in the holders. Instead, it is held conditionally, the conditions being ones which seek to ensure the fulfillment of obligations imposed by the state” (Reich, 1964: 768-769).

To strengthen the status of private claims for government largess, Reich believes that the private entitlements to the largess should be treated as a new kind of property rights. Here he pointed out: “Property is a legal institution the essence of which is the creation and protection of certain private rights in wealth of any kind” (Ibid: 771). Consequently,
to better separate the private from the public sector and ensure the independence of the private society, “(e)ventually those forms of largess which are closely linked to status must be deemed to be held as of right.” “Like property, such largess could be governed by a system of regulation plus civil or criminal sanctions, rather than a system based upon denial, suspension and revocation” (Ibid: 785).

Similar conception of property right underlies the stories told by the conflicting landowners and condo owners in Hawaii. According to Milner’s observation, both sides regard property right as protectors against undeserved and unpredictable outcomes imposed by the state, either, from landowners’ (lessors’) perspective, by unjustified legislation of land conversion, or from condo owners’ (lessees’) perspective, by retaining the unfair status quo of land ownership. As a result, “(T)he lessors and lessees both justify and frame their entitlements in terms of predictability” (Miler, 1993: 245). In the landowners’ narratives, condo owners’ request of land conversion amounts to a pure pillage. They believe that “(P)roperty rights should protect landowners from such pillage, especially because these owners struggled in the proper way to attain their status” (Ibid: 247). On the other hand, condo owners think that the unexpected magnitude of rent increase exposes them to the real threat of losing their ownership in condos. In addition, since the land conversion legislation did pass several years ago providing land ownership to single-family house owners, most condo owners assumed that state would
adopt a similar law applicable to them as well. Therefore, in their eyes, land conversion is not only an issue of predictability but also involves the basic fairness among owners of different types of dwellings. Their stories make it clear that both groups share the fundamental faith in property right as shields against the arbitrary wielding of state power that violates their predictions about the meaning of being a property owner.

It is worth noticing that the above three kinds of conception about property right have one attributes in common: they all deem property right as a separate notion from the legally stipulated property right. In fact, the property right in law is but a subset of the property right functioning in our social life. The law and economics literature which directly succeeds the classic rationality-based conception explicitly calls for attention to the distinction between economic property rights and legal property rights, and declares the latter is a subgroup in the former to which legal enforcement is attached (Barzel, 1998: 3-4). Although the narrative approach and the protector-against-state approach do not make such explicit statements, the same idea is implied in both. They both consider that property right in social life does not come from the prescriptions in law. On the contrary, they believe that the legal framework of property rights should be open and consistently absorb the de facto property rights originating either from the broad social schema or from the material importance in social life. To the believers of any of these three conceptions, property right is, to certain extent, an amorphous being, the domain of
which is constantly evolving in our social, economic and political life, although it does have a stable core.

A quite different conception about property right is seen in the works of Marxism scholars. Due to the limitedness in the breadth of my survey, I did not find any Marxism literature deals specifically with property right, yet as an indispensable part of the capitalist law based upon the capitalism economic system, it is natural for Marxists to argue that property right is merely another tool of the ruling class to control the ruled, or, as Marx once said in *The German Ideology*, the property-based capitalist world just subjected individuals more “to the violence of things”. *Whigs and Hunters* by E.P. Thompson perhaps have shed more light on a Marxist’s understanding of property right.

In this book, Thompson studied the conflicts between a mixed group of foresters defending their customary use rights, or at least interests, against the Hanoverian Whigs who were hoping to gain profit and prestige from the forests, which eventually led to the sanguinary Black Act subjecting an unprecedented large number of offenses on property to capital punishment. In other words, the momentum of this infamous law stemmed from the conflicts of property right. Thompson writes:

> What was now to be punished was not an offence between men … but an offense against property. Since property was a thing, it became possible to define offences as crimes against things, rather than as injuries to men. This enabled the law to assume, with its
robes, the postures of impartiality: it was neutral as between every degree of man, and defended only the inviolability of the ownership of things (Thompson, 1975: 207).

As some commentators pointed out that that behind the scene was the transformation of England from a pre-capitalist to a capitalist society with Whigs standing for the interests of the rising capitalist class (Itzkowitz, 1979). And what crystallized in this transformation was a transition of property system (Vann, 1977; Samuels, 1981). On the one hand, the pre-capitalist property system, together with its coincident use rights and rights held in common, were declining, while on the other, “there arose absolute property ownership in the hands of certain and not other hitherto use-right holders” (Samuels, 1981: 232).

Thompson believed that the adoption of the Black Act was the imposition by Whigs of their own ideology upon those who were under their ruling. He states:

The Black Act could only have been drawn up and enacted by men who had formed habits of mental distance and moral levity towards human life – or, more particularly, towards the lives of the ‘loose and disorderly sort of people’. We must explain, not an emergency alone, but an emergency acting upon the sensibility of such men, for whom property and the privileged status of the propertied were assuming, every year, a greater weight in the scales of justice, until justice itself was seen as no more than the outworks and defenses of property and of its attendant status. In some respects the eighteenth century showed toleration: men
and women were no longer killed or tormented for their opinions or their religious beliefs, as
witches or as heretics; cashiered politicians did not mount the scaffold. But in every
decade more intrusions upon property were defined as capital matters. If in practice the
operation of the laws was modified, this did not alter the definition. While no doubt the
majority of the gentry approved of this definition, there is a sense in which this elevation of
property above all other values was a Whig state of mind (Thompson, 1975: 197).

If we summarize the above discussion about property right, law formation and ruling
power, it appears that the property right is seen to be a function of law, which in turn is a
function of the structure of the ruling power (Samuels, 1981: 233). As such, Marxist’s
definition about property right distinguishes itself from the other three discussed above at
a critical point in that it substantially identifies the conception of property right to legal
property right. Only those property rights that are sanctioned by formal legal rules will
become an object in Marxist’s study because it is legal rights that constitute the capitalist
institution imposed by the ruling class, which is of central interest to Marxism scholars.

*Whigs and Hunters* indicated that what was understood as property right by the ruled
class was simply not right at all, since the ruled class had no way to effectively claim
their “rights” without subjecting themselves to the punishment of the Whiggish law in
general and the Black Act in specific.

As a supporter of the constitutive theory of law who engaged in the “flattening
project” of Marxist legal studies, Thompson did not stop at calling property right yet another tool of the ruling to dominate the ruled, and broaching to throw the “property” baby out with the capitalist legal “bathwater” (Spitzer, 1983). Instead, he argued that law itself was more than empty rhetoric; the rulers themselves were partial prisoners of the law. To Thompson, in spite of the fact that the ruling class could redefine property by adjusting the law to their even bigger interest, nevertheless, once property had been defined on law, it set limits upon the behaviors of rulers as well as of the ruled. He articulated his point as follows:

On the one hand, it is true that the law did mediate existent class relations to the advantage of the rulers; not only is this so, but as the century advanced the law became a superb instrument by which these rulers were able to impose new definitions of property to their even greater advantage, as in the extinction by law of indefinite agrarian use-rights and in the furtherance of enclosure. On the other hand, the law mediated these class relations through legal forms, which imposed, again and again, inhibitions upon the actions of the rulers (Thompson, 1975: 264).

Here again, Thompson implicitly revealed a Marxist’s tendency to equalize property right with legal property right. Obviously, to the extent that the rulers’ actions were inhibited, they were inhibited by the definition of property written in law. This tendency led his book, or presumably the Marxist’s study on property in whole, to focus
on the conflict between ruling and ruled classes about defining the property right in law. But what if disputes about property right arise within the class being ruled? Will they be confined to the legal framework imposed by the outsider to settle their own affairs? Or should an extra-legal property right system come into being under such circumstances? No clue can be found, at least, in *Whigs and Hunters*.

**III. Property Right and Legal Pluralism**

The property right system is a great source of study on legal pluralism. As Demsetz convincingly pointed out that, for any human society, it is impossible not to have a property right system (Demsetz, 1998: 145). It is equally reasonable to believe that property right systems are bound to differ along with the socioeconomic and demographic conditions. In this sense, they provide us with abundant materials to explore legal pluralism in both the classic and the new approaches summarized by Merry (Merry, 1988). The literature I reviewed does show some academic interest in applying these approaches to the property right research.

Banner studied the process of the British imposition of a colonial property right system upon the Maoris in New Zealand. There were fundamental differences between the British and Maori conceptions of property right. British people allocated property in land on a geographic basis, and the owner of each piece of land would command all the
resources within that geographic space. When the landowner died, the ownership passed on to his heirs. The Maori, by contrast, allocated property rights on a functional rather than geographical basis, which means a person would not own a zone of space, but the right to use a particular resource in a particular way. And these use rights were handed down from generation to generation within the family (Banner, 1999: 810-811). Although the fear of a costly war against Maori led the British to respect the Maori system in the initial days, with the advancing process of colonization and an ingrained thirst for land, backed up by the technical and military superiority, the British system eventually took control. Somewhat surprisingly, Banner did not record anything about the resistance from the Maori side against the supersession of their system by the British system despite the fact that the author did attribute the British compromise in early days to the potential for such resistance. The history thus appears proceeding in merely one direction: British eliminated the indigenous property regime and took over most of the land while Maoris were obediently witnessing this process. Here, we saw a picture of legal pluralism giving way to legal singularism.

On the other hand, Christensen and Rabibhadana’s study about Thailand shed light on the conflicts between the formal and customary property right systems in a modern, though still largely agrarian country. As they predicated, “(W)hen addressing conflicts over natural resources, agrarian societies typically assign very low value to the
formal-legal procedures associated with the state as the means for arbitrating disputes” (Christensen & Rabibhadana, 1994: 639). In Thailand, this conflict was reflected in the central government’s effort to impose formal property rights upon the forests to promote the urban commercial activities and the rural community’s persistence in the customary property regime operating on collective basis and directed by an elected elder. This conflict became increasingly fierce with the depletion of open land frontiers, which used to afford the possibility of “exit” for the rural population – the option of avoiding conflict by breaking away from the state (Ibid: 640). Whereas this depletion of open frontier subjected customary property right system more likely to the challenge of the state, the deficiency in administrative skills and resources also led to a comprise of the formal system with the customary system, such as a relief of the formal requirement of land registration based on comprehensive survey (Ibid: 645). This kind of study discloses to us that the failure of the rule-makers to recognize alternative forms of property rights has been the source of conflict and even breakdown of the property regime.

Finally, Cooter explored a possible conduit for the evolution of marketable property rights out of a customary property system in Papua New Guinea (PNG). Like many other indigenous societies, customary groups in PNG have a property system significantly different from the one pervading in the Westernized modern world. This system is characterized with lack of surveyed boundaries or registrations, collective
control over land within kinship groups as well as unbundled rights of full ownership dispersed among different people or groups (Cooter, 1991:766-770). At the same time, a very small portion of land in PNG is held as freehold, with unitary, absolute ownership, by the state or private parties outside customary groups. In addition, the legislation and judicial systems in the country having potential to alter the customary property system are completely organized in line with the Australian colonial tradition. Against such a backdrop, legal pluralism comes into play in reshaping the PNG property regime.

The direct propellant of change comes from the growing opportunities for profitable exchange with outsiders as villages become more and more open to a larger world. One attempt was made from above by the Australian administrators to convert customary land ownership to freehold ownership by individuals. This, however, turned out to be a “political and economic failure” due to the disparate understanding among customary groups about the nature of such conversion. As conversion to freehold is not a power defined in customary law, it remains unclear, within the kinship groups, who has the authority to agree conversion or what procedural are necessary to convert. Many converted land was thus reverted to customary land following the clans’ assertion of involuntary or fraudulent agreement in the original conversion process. Later after the independence of PNG, the land disputes settlement authority is delegated to the land courts by the Land Disputes Settlement Act which “establishes procedures and
institutions for achieving this end but remains silent on the substantive law of property” (Ibid: 783). Although the land court system itself represents a departure from customary dispute resolution, it opens a gate for transforming customary property rights into marketable rights by absorbing more elements in the customary law. Cooter shows that custom does live and adapt to novel situations through the channel of land courts (Ibid: 788). In addition, the Australian heritage of an independent judiciary system with high standards of integrity also contributes to transformation of property regime led by the land court.

The PNG story presents a virtuous interaction between the formal and customary legal systems to achieve the evolution of rules. Essentially, it’s a process of evolving from custom to customary law enforced by the state. PNG’s failure in its earlier attempt at land conversion constitutes a vivid contrast to this assimilating approach. Probably with the PNG and Thailand as well as other similar examples in mind, Collier criticized the Western-trained economists and development experts who have continued to advise developing nations to convert their land ownership as paying no attention to the extant customary norms:

Advisers who would never think of telling Southeast Asian governments to require a single religion seem to think nothing of advising them to institute a single and uniform standard of property holding: private property. Such experts often seem to treat private property as a
simple matter of ensuring that every piece of land has a single legal owner or is under the
direct jurisdiction of a government agency; they often forget the controversial history of,
and complex legal structures that continue to govern, property ownership in Western nations
(Collier, 1994: 584).

IV. Property Right and Politics

The role of property right in politics has long been a hot topic among political
philosophers. I incorporated some of these literatures in this review mainly for two
reasons: first, people’s understanding about the relationship between property right and
politics not only shapes their political philosophy but constructs an indispensable part of
their social and legal consciousness; second, this topic hinges directly upon the
controversy arising during the course of legislation of the Chinese Property Law, which is
the original motivation of this study.

Nedelsky starts her prominent book on private property and American
constitutionalism with the following words:

Private property has shaped the structure of the American political system. The framework
of our political institutions and the categories through which we understand politics
developed around the problems of making popular government compatible with the security
of property (Nedelsky, 1990: 1).
The Lockean-Jeffersonian-Madisonian idea that liberty and the capacity to participate in public governance alike require the possession of property permeates the American constitutional history. The framers of the American Constitution believed that property is an effective symbol for individual liberty because it was “a concrete means of having control over one’s life, of expressing oneself, and of protecting oneself from the power of others, individual or collective” (Ibid: 207). Protecting liberty requires protecting property against the state, and especially against the majority oppression derived from a democratic process. The possession of property as a prerequisite for political participation thus becomes a safety valve for civil liberty. In fact, property right delineates the boundary of state. As a result, property right serves as a conceptual instrument to safeguard any valuable individual interest, privilege or stake against the discretion of government, a scene we’ve seen in Reich’s “new property” regime: to certain extent, right becomes equivalent to property right.

Treating property as an absolute value, the American constitutionalism assures equality given the possession of property while legalizes the “background inequality” rooted in the original distribution of property (Abraham, 1996). Shielding those who with property from the majority oppression in civil liberty, the Madisonian political philosophy imposes a minority dictatorship of the propertied upon the unpropertied in terms of political liberty (Nedelsky, 1990). Reading these, I can’t help recalling the
The communist upbraid of “phony” capitalist democracy as a democracy of the rich we were taught at Chinese schools. Until having this close look at the American constitutionalism, I always shrugged off such criticism as a mere ideological propaganda or brainwash.

Confronting the substantive inequality fertilized by the property-based liberty, some political philosophers have argued for a “positive liberty” starting from a revised vision on property. The centerpiece of this vision is “a conception of man as an inherently social being, dependent on others for his happiness and even survival, and therefore obliged when called upon to lend others assistance and to contribute to the common weal” (Fisher, 1993: 554). Thus, the property right is no longer an absolute value and a negative right in the sense that its central function is to keep the state away from individuals. Instead, “(T)he property right as a positive right would both require and be limited to the satisfaction of a culturally determined level of needs, adequate for the development of participatory competence”. “Beyond that limit, property could cease to be a ‘right’ and become instead an ‘interest’, disposition of which would be based on political decision aimed at maximizing one or another democratically determined social or public interest” (Abraham, 1996: 46-47). This positive image of property right constitutes a theoretical basis for the welfare-state which aims at a substantively equal society using progressive taxes. Under such a scheme, a right “is not only a right to be
left along, free of state interference, but the right to some form of state assistance in the
enjoyment of the right” (Ibid: 35).

This discussion brings me back to the disputes over Chinese Property Law mentioned at the very beginning of this paper. The opponents ostensibly preached a similar slogan against a property institution of substantive inequality as the “positive liberty” theorists did in US. However, the different political context will lead to very different outcomes despite a similar framing of arguments. In a democratic, at least in the procedural sense, society, the major fear comes from those who with property of the redistribution by those who without, thus a negative property regime immunizes the minority from majority oppression at the cost of equal participation in politics. A correction to this means a more equal political participation. In an authoritarian society like China, nevertheless, it is the redistribution from those who with less property to those who with more that is to be feared. Without a democratic political process, the majority less propertied people have little power on the more propertied minority in the first place. In contrast, the more propertied minority, through rent seeking, have colluded with the state power to absorb even more property from the less propertied majority. To some extent, it is the lack of a legitimized right that contributed to the abuse of power and has led to an unequal distribution of wealth during the privatization process, which was the very target at which the opponents of the Chinese Property Law
openly aimed. From this perspective, legitimizing the status quo of property rights is to set a stopper for further abuse of power, and further redistribution from the poor to the wealthy. An illustrative case in this point was shown in a documentary film made by NHK last year, “China in Torrents”. The film recorded a corrupted local government in southwest China, colluding with developers, hastening its abuse of eminent domain power before the implementation of the new Property Law. If this story is true, it displays to us the possible curtailing effect of this law on power abuse. Viewed in this way, even if the positive property argument may be a constructive force in a democratic society in order to realize substantive liberty and equality, it will unfortunately be an anachronism in a totalitarian country. Likewise, many other post-modern ideas are mere unaffordable luxury in the pre-modern Chinese society. Ironically, many Chinese liberalists are now criticized by the liberal Westerners as conservatists due to a misunderstanding caused by such an anachronism. After all, the negative property right lays down the cornerstone for a mansion of positive property right.

From a micro perspective, F. von Benda-Beckmann and K. von Benda-Beckmann provided a very different approach to probe the relationship between property right and politics. They compared the property right and the accompanying political structure between two regions in Indonesia: Minangkabau and Ambon. The economic reliance

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3 I am indebted to Professor Wen-hsin Yeh of the Berkeley History Department for her articulation of this idea of which I have long had a vague feeling.
on rice cultivation requires a substantial amount of cooperation in Minangkubau. As such cooperation comes most directly from close relatives of a matrilineal descent group, the land ownership is also held collectively by such multilayered and segmented lineage groups (this form of land ownership is called pusako). The spatial structure of Minangkabau property categories is relatively simple. Rights of whatever kind almost always relate to demarcated spatial units that belong to certain lineage groups represented by the lineage head. In other words, the social continuity gives rise to the spatial continuity of property. In contrast, Ambonese depend mainly on horticulture for living, and horticulture requires little large-scale cooperation. Thus, the multilayered lineage groups have less significance in terms of land ownership. Property rights are frequently held and passed on within bilateral kinship relationships. At the same time, the spatial complexity of property rights is much higher in Ambon than in Minangkabau. Spatial references are made much more to the various property objects, such as gardens and trees, than to a bounded and permanently fixed space. So the link between spatial continuity and social continuity in larger groups is much weaker (Benda-Beckmann & Benda-Beckmann, 1994: 592-597).

Given the collective nature of land ownership in Minangkabau, even seemingly small property right disputes between members of different sub-lineages are likely to expand and the heads of pusako-holding lineages and sub-lineages become inevitably
involved in the disputes. With such expansion, the original disputes are easily dissolved into group politics. Property right disputes invoke competition among different lineage heads for dominance of the decision making authority because success in mediating conflicts is crucial to gain and keep the lineage head position which in turn leads to economic superiority. Lots of challenges about the legitimacy of other heads’ positions, and “forum shopping”, i.e. subjecting the dispute to one segment within the lineage hierarchy rather than another, are involved in the process. In opposite, since Ambonese lineage groups have less interest in land ownership in the first place, they also have less importance in dispute resolution. The direct holders of property rights in Ambone are often separate from those political representatives of the lineage groups. Therefore, property right disputes usually have a less political character in Ambone and quickly pass on to the top level of village decision making (Ibid: 598-603).

This study indicates that property right is a major origin of political conflicts and the property right structure may decide the severity of such conflicts. On the other hand, property right is always seeking certain kind of political protection, because, as Nedelsky pointed out, “(P)roperty is a right that requires collective recognition and enforcement” (Nedelsky, 1990: 207). Consequently when the customary property right has no exit from the state political impact, it will ultimately seek “voice” in the formal political structure (Christensen & Rabibhadana).
V. Conclusion

This brief review shows that we are still in short of a sociological framework to understand the property right system as a social institution. Every society, aboriginal or civilized, has to decide how to control and make use of the available resources to support lives of its members. It is hence not surprising to see every society have some sort of property right system. However, these systems can be so different in appearances that mislead outsiders to believe that no property right exists at all. A theoretical study on property right thus must answer three basic questions: 1) What is the property right system in a particular society? 2) Why a certain property right system is in its current form? 3) In what direction a property right system may evolve in the future?

Based on the wealth-maximization theory, economists have given some tentative answers to the second and the third questions, yet their scope is, by and large, limited to the modernized, Western centered societies. In other words, due to an insufficient study on the first question, economic theories take a substantially deductive approach: applying a framework amenable to the Western society to other parts of the world, sometimes tailoring the framework a bit, and sometimes distorting the target a bit. In my opinion, sociological studies can contribute a lot to finding out more satisfying answers to the first question, which will further verify the legitimacy of extant theories about property rights,
and put forward new answers to the second and third questions.

Under the economic framework, people’s preferences are shaped strictly for utility maximization. However, unless we identify utility with cold heart money, utility itself incorporates various values cherished by human beings. It incites a deeper inquiry into where our utilities come from. Taken utility as exogenous, economic theory falters in front of some basic questions in property law, such as how to compensate the subjective values in taking. I expect the sociological studies in general and the law and society studies in specific to explain the construction process of utilities, and help figure out some useful indicators for making sensible judgments about the value people attach to their property rights.
References


