OBSERVING THE STATE'S ROLE IN PROPERTY LAW: A CHINESE PERSPECTIVE

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Abstract:

This article examines the public nature of property law by analyzing the state's roles in shaping property systems. It argues that, within the ambit of Chinese law, state actors perform four distinct yet interrelated roles: gatekeeper of individual liberty, enabler of economic efficiency, coordinator of social cohesion, and regulator of political dynamics. By elucidating these roles, the study advances discourse on the "publicness" of property law, moving beyond the established consensus to construct a more nuanced framework for understanding how state power operates through private legal institutions. Engaging with law-and-economics literature and the foundational work of Douglass North, this article makes two contributions. Theoretically, it adopts a multi-faceted model of the state. Empirically, it mitigates Western-centric bias in property scholarship by grounding its analysis in the rich and complex realities of the Chinese legal landscape. Methodologically, the paper combines thematic analysis with case studies. For each state role, the article utilizes a tripartite framework. First, it articulates the role's conceptual premise; second, it explores theoretical foundations drawn from Hobbes, Locke, Olson, Ostrom, and Kant; and finally, it examines specific legal mechanisms, including rules of accession, the commons, residence rights, and rural collective land rights. Ultimately, the article concludes that property law is not a static repository of private rights, but a dynamic, hybrid construct balancing freedom, efficiency, social harmony, and political order. This framework not only elucidates the complex reality of property law in China but also provides a robust analytical tool for comparative studies of property regimes globally.

Keywords: Property Law, State Role, Social Contract Theory, Economic Efficiency, Public-Private Law Interface

I. INTRODUCTION

Traditional civil law has always been underpinned by the principle of private autonomy, especially evident in domains such as contract law, which embody the idea of voluntary exchange

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justice. Property law, however, has a distinctly different character, as it concerns not only exchange but also distribution. Public law and private law converge in property law; property rights and the related theories of ownership are closely intertwined with theories of the state in political philosophy. This convergence is illustrated by the stark differences in the legislative processes and public reception of the Contract Law and the Property Law of the People's Republic of China—spanning from the late 20th century to 2007.

If a consensus regarding the "public" nature of property law exists, the next question becomes: to what extent is property law more public than other branches of private law? How should we conceptualize the publicness of property law, and by what methods should it be examined?

This article addresses these puzzles of publicness through the lens of the state's role, namely by examining why and how state actors operate within and through property law. Such a paradigm was previously employed by North,[1] who conceptualizes the function of property law as a state-endorsed institutional incentive scheme, playing a decisive role in promoting the development of Western economies. This article extends North's framework in two respects: theoretically, by adopting a multi-faceted approach to the role of the state; and empirically, by addressing the enduring critique of Western bias in property law scholarship through the use of evidence from the Chinese context.

This article argues that state actors perform four distinct but interrelated roles in the development of property law: gatekeeper of individual liberty, enabler of economic efficiency, coordinator of social connectedness, and regulator of political dynamics. Methodologically, it employs thematic and case analysis. Parts II through V provide theoretical elaborations on each of these four roles, followed by an examination of how the corresponding theoretical accounts are borne out in Chinese property law. Part VI concludes.

II. STATE AS GATEKEEPER OF INDIVIDUAL LIBERTY

A. ARTICULATING THE GATEKEEPER ROLE

Classical theories have often justified private property on moral grounds: the state safeguards individual liberty through property rights, granting individuals both independence in making property decisions and the freedom to exit the market. This normative expression of private autonomy in civil law is reflected in concepts such as the sanctity of ownership. Prominent assertions in this tradition include: "people are born with rights to liberty,

[1] DOUGLASS C. NORTH & ROBERT PAUL THOMAS, THE RISE OF THE WESTERN WORLD 4 (Li Yiping & Cai Lei trans., Huaxia Publishing House 2009) (1973).

security of property, and resistance to oppression—of which property security is both the direct foundation and an essential element of personal freedom"; "without property, there can be no personality"; or, as Hegel put it, ownership is "the embodiment of freedom."[2]

B. EXPLORING THE THEORETICAL TENETS

In *Leviathan*, Hobbes depicts the "state of nature," where individuals exist in a condition of equality and absolute liberty.. Such equality and freedom, however, give rise to unrestrained plunder and even violent bloodshed in the pursuit of self-interest, culminating in a "war of all against all." Although natural law is present in this condition, humanity must establish a public authority—through a social contract—to secure common interests and overcome mutual hostility. By surrendering part of their rights, individuals create public institutions that safeguard natural rights, thereby effecting a transition from the state of nature to civil society. In this way, the state emerges as a third party standing above individual interests and neutral in its distribution of benefits.[3]

In *Two Treatises of Government*, Locke contends that in the state of nature all individuals possess natural rights, and no one may infringe upon the life, liberty, or property of others. Property, for Locke, exists prior to and independently of government, and the central purpose of political society is to provide stronger protection for these property rights. Government authority is therefore legitimate only insofar as it is exercised with the consent of the governed, rendering it merely an agent entrusted by the people. When laws are violated or power abused, the government betrays this trust, and the people retain not only the right but also the duty to dissolve it and establish a new government in its place.[4]

Rousseau likewise grounds his socio-political theory in the concept of the state of nature. While this condition affords freedom, it also engenders factual inequalities, ultimately giving rise to private property. In *The Social Contract*, Rousseau advances the idea of securing equality through a collective pact, whose essence lies in the transfer of all rights from all to all. This establishes a political union in which each individual obeys only themselves, thereby remaining free. The "general will," distinct from the mere aggregation of individual wills, consistently serves the public interest and is expressed in political practice through law, with legislative authority at its core. Crucially, Rousseau

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[2] GEORG WILHELM FRIEDRICH HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT 54 (Fan Yang & Zhang Qitai trans., The Commercial Press 1961) (1821).

[3] THOMAS HOBBES, LEVIATHAN 92–97, 128–42 (Li Sifu & Li Tingbi trans., The Commercial Press 1985) (1651).

[4] JOHN LOCKE, TWO TREATISES OF GOVERNMENT (PART II) 3, 77, 94, 139–57 (Ye Qifang & Qü Jünong trans., The Commercial Press 2016) (1690).

differentiates between the state and the government: sovereignty resides in the people, whereas the government functions solely as their trustee and executor of the law. If the government violates the general will, the people retain the right to dissolve the contract and reclaim their transferred rights.[5]

Social contract theory holds that the contract is voluntarily formed among equals, whereas relations between unequals necessarily involve coercion. Although this assumption departs from historical reality, its primary aim is not to trace the actual origins of the state but to justify its legitimacy and functions. The theory provides ideological grounds for resisting autocracy and asserting rights, serving both as a powerful tool of revolutionary mobilization and as a framework for designing modern political institutions. While it accounts for the initial establishment of property systems, it does not explain how diverse interest groups subsequently adjust their actions to maximize benefits—particularly given that the state, as both a third party to the contract and the ultimate source of coercion, remains the central arena for redistributing welfare and income in favor of specific groups.

C. EXAMINING THROUGH PRACTICAL SCENARIOS

In contemporary legal practice, the protection of property rights raises a central question: should property rights be recognized as fundamental rights? A useful framework for analyzing this debate is the distinction between property rules and liability rules.

Civil legislation has revolved around two core axes: the affirmation of individual freedom rights (empowerment) and the establishment of an effective competitive order (regulation). Guido Calabresi and Douglas Melamed, in their seminal article, identified three modes of protecting legal entitlements[6]: (1) *property rules*—entitlements that cannot be transferred between private parties without consent, representing a preemptive, *ex-ante* form of protection; (2) *liability rules*—entitlements that may be taken without consent but require compensation determined through collective valuation, functioning as an *ex-post* remedy; and (3) *inalienability rules*.[7]

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[5] JEAN JACQUE ROUSSEAU, THE SOCIAL CONTRACT 18–30, 108–19 (He Zhaowu trans., The Commercial Press 2008) (1762).

[6] The term entitlement has been translated differently by various scholars. Its meaning differs from that of right. Calabresi and Melamed, as legal realists, regarded dispute resolution as something granted by the state rather than the delineation of rights between individuals or between individuals and the state, and viewed law as a policy tool of judges (representatives of the state). See Jian Zixiu (简资修), *Beiguang Xia De Dajiaotang: Zhaoxun Shiluo De Jiaoyi Guize* (背光下的大教堂：找寻失落的交易规则) [*The Cathedral in the Backlight: Seeking the Lost Transaction Rules*], 1 NANJING DAXUE FALÜ PINGLUN (南京大学法律评论) [NANJING UNIVERSITY LAW REVIEW] 3, 4 (2018).

[7] See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); Singer, J., Berger,

The protection of property rights should rest primarily on property rules rather than liability rules, since safeguarding the defensive function and continuity of property takes precedence over merely preserving its economic value. Central to this protection is the owner's right both to transact and to refuse to transact—an essential component of contractual freedom. A clear example arises in cases of forced demolition: where valuation authority lies with the homeowner, failure to reach an agreement leads to post-demolition compensation , determined by the market or the government. In such circumstances, the protection of property shifts from property rules to liability rules.

Indeed, the C&M Framework also aligns with considerations of economic efficiency, addressing externality problems through different institutional arrangements. The assessment of ex ante efficiency concerns the potential impact of the relevant rules on the future behavior of actors, whereas the evaluation of ex post efficiency primarily involves comparing the transaction costs and valuation costs associated with those rules. When transaction costs are high, liability rules tend to be more efficient.

However, liability rules can only capture the original value of a legal entitlement; they cannot reflect its potential or long-term value, nor can they facilitate the allocation of resources to the most efficient users. Apart from reducing negotiation costs, liability rules provide no further efficiency guarantees for the transfer of legal entitlements. Accordingly, in situations where the cost of allocating entitlements through market transactions is low but valuation costs are high, property rules prove to be more efficient.

III. STATE AS ENABLER OF ECONOMIC EFFICIENCY

A. ARTICULATING THE ENABLER ROLE

Alongside moral considerations, the state's role in property law is also framed in utilitarian terms, weighing the costs and benefits of alternative property rights structures. For example, Richard Posner argues that among the many facets of justice, efficiency is not only highly significant but also the most practical criterion for judges.[8] When multiple allocations are equally fair, the more efficient one should be preferred. Su Yongqin likewise places strong emphasis on efficiency, contending that property law should serve the function of enhancing overall social welfare, and that

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B., & Davidson, N., supra note 5, at 353; Ling Bin (凌斌), *Falü Jiuji De Guize Xuanze: Caichan Guize, Zeren Guize Yu Kameikuangjia De Falüjingjixue Chonggou* (法律救济的规则选择：财产规则、责任规则与卡梅框架的法律经济学重构) [*The Choice of Legal Remedies: Property Rules, Liability Rules, and the Law-and-Economics Reconstruction of the C&M Framework*], 6 ZHONGGUO FAXUE (中国法学) [CHINA LEGAL SCIENCE] 5, 8–14 (2012).

[8] RICHARD ALLEN POSNER, ECONOMIC ANALYSIS OF LAW (Jiang Zhaokang trans., Law Press China 2012) (2007).

when gains in efficiency would result in distributive injustice, corrective intervention should come through *lex specialis*. Such a combination would enhance the coherence of private law.[9]

B. EXPLORING THE THEORETICAL TENETS

The predatory theory of the state (also known as the theory of violence) emphasizes the positive and negative impacts that state-designed property schemes can have on economic efficiency. Olson identifies three primary means by which individuals acquire resources: (1) productive labor, (2) voluntary exchange, and (3) violent plunder. Actors tend to choose the method that maximizes the difference between benefits and costs. Because the strong are inclined to adopt the lowest-cost method—violent plunder—violent conflict between individuals and groups has persisted throughout human history. The power that enforces compulsory submission through violence is termed authority. To understand peace, one must first understand conflict; and to grasp the emergence of order, one must understand the logic of power.[10]

In the Chinese historical context, Olson's "bandit" theory can be illustrated through the example of the warlord Feng Yuxiang. Under the logic of survival and profit maximization, roaming bandit groups engage in predatory "killing the goose that lays the golden eggs," without regard for the social losses such plunder inflicts or for the eventual depletion of resources, which ultimately reduces the returns of banditry for all. When roaming plunder ceases to be profitable, a powerful bandit leader may occupy a fixed base—such as Weihu Mountain or Liangshan Marsh—shifting from "killing the goose for eggs" to "raising the goose for eggs." Local inhabitants, harassed by other roaming bandits, are then drawn to this leader, willingly paying tribute in exchange for protection. By adopting this strategy, the bandit chief can amass greater wealth and expand his domain, until confronted by geographical constraints or challenged by a rival bandit power of comparable strength.

The stationary bandit gradually evolves from a bloodthirsty outlaw into a crown-wearing autocratic ruler who provides public goods. Even the emergence of a despotic state represents progress compared with anarchy, for it maintains peace, protects property rights, and fosters cooperation within a certain scope. A crucial variable in this transformation is the presence of an encompassing interest—that is, the close alignment between the ruler's personal income and society's overall income. The greater this alignment, the stronger the ruler's incentive to consider how his actions affect total social output. Olson vividly describes how a rational, self-

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[9] SU YONGQIN (苏永钦), XUNZHAO XIN MINFA (寻找新民法) [IN SEARCH OF A NEW CIVIL LAW] 293–314 (2012).

[10] MANCUR OLSON, JR., POWER AND PROSPERITY: OUTGROWING COMMUNIST AND CAPITALIST DICTATORSHIPS 1–18 (Su Changhe & Ji Fei trans., Shanghai People's Publishing House 2005) (2000).

interested roving bandit leader seems, as if guided by an invisible hand, to transform into a stationary bandit and don a crown. This "invisible hand," however, Olson calls the "invisible left hand," set in contrast to Adam Smith's metaphor of the market as the "invisible right hand."[11]

Of course, the state's monopoly on violence is not the only possible form of organizing coercion. In primitive societies, clans also wielded violence; during Europe's feudal era, manors exercised violent power; and corporations such as the East India Company were likewise capable of commanding violence. This raises the question: is it preferable for violence to be centralized in the state, or dispersed among various communities and associations?

In *The Logic of Collective Action*, Olson points out that small groups are inevitably confronted with the free-rider problem. Defense, as a public good, generates positive externalities: those who contribute nothing to defense nevertheless enjoy the security provided by those who do. The most effective solution, Olson argues, is for government to establish authority and levy taxes on all beneficiaries. In other words, by supplying institutions, the state is able to overcome the free-rider problem and reduce transaction costs on a national scale. This advantage explains why the state naturally comes to monopolize violence, emerging as the organization with a comparative advantage in violence.[12]

From the predatory perspective, the relationship between state theory and property rights theory is as follows: the government, acting as the agent of a particular group or class, functions to extract income from members of other groups or classes in the interest of its principals. In Marxist terms, the state is the product of predation or exploitation—an instrument through which rulers plunder and exploit the ruled. Public authority is employed to define a property rights system that maximizes the interests of the ruling coalition, while disregarding the welfare of opposing groups and of society at large. Consequently, such an arrangement fails to enhance overall social efficiency and, in the long run, inevitably evolves into an inefficient property rights regime.

C. EXAMINING THROUGH PRACTICAL SCENARIOS

To enhance economic efficiency, the state begins by ***addressing externalities*** through the allocation of property rights. In 1968, Garrett Hardin published his seminal article *The Tragedy of the Commons*. A common-pool resource as a form of property, has many holders, each possessing the right to use it but none with the right to exclude others. As a result, each individual is inclined to

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[11] MANCUR OLSON, JR., THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 138–191 (Chen Yu, Guo Yufeng & Li Chongxin trans., Shanghai People's Publishing House 2006) (1965).

[12] *Id.* at 121–28.

overuse the resource, ultimately leading to its exhaustion.[13] Overharvested forests, depleted fisheries, and heavily polluted rivers and air are classic examples of the tragedy of the commons, where negative externalities remain uninternalized.

An externality arises when an individual's actions produce positive or negative effects that are not fully borne or enjoyed by the actor. The greater the proportion of external costs, the more likely such behavior will occur—for instance, when a factory emits pollutants into the air without paying compensation. Internalizing externalities requires institutional costs, such as the expense of installing environmental protection equipment. Common-pool resources, because property rights over them are difficult to define due to high exclusion costs, are inevitably overused or appropriated in a competitive manner. For the tragedy of the commons to occur, a resource must be scarce, rivalrous in consumption, and non-excludable.

One solution is the Leviathan approach—top-down government regulation or direct control of common-pool resources (for example, setting grazing limits on public land or issuing fishing quotas). Such measures, however, are often undermined by rent-seeking and principal–agent problems. A second solution is privatization, typically involving the state's appropriation of common resources and the redistribution of private rights—yet this, too, remains vulnerable to similar difficulties. A third alternative is collective self-governance. In Governing the Commons, Elinor Ostrom—the first woman to receive the Nobel Prize in Economics (2009)—demonstrates how interdependent individuals can self-organize to manage common-pool resources, overcoming free-rider and market-failure problems without centralized command. She introduces the idea of "self-financed contract enforcement games," in which users pool resources to design and implement effective agreements that promote the sustainable use of shared resources.[14]

Reducing transaction costs through property allocation constitutes the second means by which the state pursues economic efficiency. In this article, transaction costs refer to the expenses associated with establishing, maintaining, and exercising property rights, including negotiation, coordination, and litigation. Ronald Coase examines why some transactions take place within firms while others occur through markets. Although competitive markets can allocate resources efficiently, transactions inevitably generate costs. When the internal coordination costs of a firm are lower than the costs of market exchange, firms internalize transactions to reduce these expenses. Coase's landmark article *The Problem of Social Cost* is widely regarded as the starting point

[13] Garrit Hadin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

[14] ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 36–50 (Yu Xunda trans., Shanghai Translation Publishing House 2000) (1990).

of the field of law and economics.[15]

Thomas Merrill and Henry Smith add the concept of information costs—for example, publicizing property rights reduces the cost for potential transactors to verify ownership.[16] Unified real estate registries lower these costs but require significant social expenditure to establish and maintain (e.g., the Roman cadastral survey, the Ming dynasty's "fish-scale maps"). Laws, including property law, aim to reduce social and information costs to facilitate transactions, up to the point where the marginal social cost of enforcement is less than its marginal benefit. To ensure resources are still optimally used when transactions fail, the law should allocate property to the most efficient user. Steven N.S. Cheung integrates these into the concept of institutional costs—a good system reduces both transaction and information costs.[17] The Coase Theorem holds that in the absence of such costs, the allocation of property rights does not affect economic efficiency.

The third instrument employed by the state to promote economic efficiency, particularly in legislative and judicial contexts, is the ***use of ex ante and ex post perspectives***. The *ex-post* stance seeks to maximize social welfare after an event has occurred, focusing on case-specific justice. The *ex-ante* stance emphasizes structuring laws to induce future actors to choose more efficient behaviors, giving weight to incentives and long-term effects. The root of the problem lies in the fact that decisions made from an ex post stance often generate *ex-ante* effects, distorting others' future behavioral incentives.

Consider, for example, the rules of accession in property law: how can the law create ex ante incentives that protect the original owner? One approach is to penalize bad-faith processors, ensuring that those who knowingly interfere with another's property are motivated to negotiate with the owner in advance to determine whether their processing will increase or decrease value. Even where the value added through processing far exceeds the value of the raw materials, courts may, in line with the principle of maximizing the utility of property while protecting innocent parties, award ownership of the finished product to the material's original owner. Alternatively, by refraining from granting automatic ownership to good-faith processors, the law gives processors—uncertain about ultimate ownership—an incentive to incur information costs to clarify the property's legal status before acting.

In sum, property rights endow holders with the capacity to make decentralized decisions in situations of social coexistence. Such decentralized decision-making serves as a crucial driving

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[15] Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

[16] THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 1–40 (Foundation Press, 2017).

[17] STEVEN N.S. CHEUNG (张五常), JINGJI JIESHI (经济解释) [ECONOMIC EXPLANATION] 60–74 (2019).

force for the emergence, development, and freedom of markets. Accordingly, property law constitutes the foundation of the market economy. By clearly defining property rights, it removes obstacles to private agreements, reduces transaction costs, and enhances the efficiency of resource use. Through regulating the circulation of property and safeguarding transactional security, as well as promoting credit and financing via security interests, property law ultimately fulfills its primary function: improving economic efficiency.

IV. STATE AS COORDINATOR OF SOCIAL CONNECTEDNESS

A. ARTICULATING THE COORDINATOR ROLE

State actors play a coordinating role in harmonizing social relations. More specifically, in exercising property rights, individual owners must consider whether their practices implicate the public interest. This article conceives of the public interest in two distinct yet not mutually exclusive dimensions. The first concerns externalities—tangible, specific, and calculable forms of public interest that were addressed in the preceding section. The second, which will be the focus here, is social connectedness: an understanding of public interest at an abstract level, where society is conceived as a unified and harmonized whole bound by collective ties.

B. EXPLORING THE THEORETICAL TENETS

Kant's principle of the "coexistence of everyone's freedom" lays down the order for shared social life:[18] while property owners make decentralized decisions, they must also coordinate for communal living, balancing social needs so that everyone's freedom can be realized. Based on the concept of balancing interests, Rudolf von Jhering argues against absolute ownership that ignores social interests.[19] Scholars such as Theodor Kipp and Max Menger, influenced by strong ideas of social equilibrium, inherit this view. Léon Duguit's notion of "social solidarity obligations" includes the social obligations of ownership: in modern society, property rights are no longer purely subjective rights but must also serve social functions.[20]

The inherent dominion and exclusivity of property, together with the scarcity of resources, makes property rights different from personality rights—which can be equally enjoyed by everyone.

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[18] IMMANUEL KANT, THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT 108–114 (Shen Shuping trans., The Commercial Press 1991) (1797).

[19] R. VON JHERING, THE SPIRIT OF THE ROMAN LAW AT THE VARIOUS STAGES OF ITS DEVELOPMENT 7 (4th ed. 1878).

[20] LÉON DUGUIT, THE GENERAL CHANGES IN PRIVATE LAW SINCE THE NAPOLEONIC CODE 12–13, 23–28 (Xu Diping trans., China University of Political Science and Law Press 2003) (1920).

Once ownership of property is established, others cannot hold the same rights over it; to gain rights, one must comply with the owner's will. The emergence of taxation reflects that property is no longer confined to the private sphere but carries a duty to contribute to society. Its legitimacy lies in making property serve multiple values—including liberty, efficiency, fairness, social welfare, justice, personal security, and human dignity. These values are incommensurable and cannot be ranked by universal rules; instead, they must be weighed competitively in the sense developed by Robert Alexy.[21] Justice in property rights is therefore contextual, embedded within specific social and legal relationships rather than existing as an abstract principle.

The dimension of social connectedness in property law permeates the legal system. It is particularly evident in private law sectors, where restrictions often apply—for example, prohibitions on acquiring ownership of certain inalienable goods, such as narcotics, natural resources like land, and public goods such as the radio spectrum. It also manifests in mechanisms of compulsory deprivation of property rights, including liability rules, acquisitive prescription, good-faith acquisition, and accession. Further, limitations on the content of ownership arise through doctrines governing neighbor relations, condominium ownership, co-ownership partition, land subdivision, and statutory parcel registration requirements. Additional restrictions are imposed on the use and transfer of rights in specific objects—such as corpses, human organs, and cultural relics.[22]

This dimension of social connectedness is equally prominent in public law settings,[23] manifesting in the compulsory sacrifice of property through expropriation, requisition, and taxation, as well as in special legislation requiring owners to use their property in prescribed ways or to refrain from certain uses in the interest of public welfare. Illustrative examples include urban planning, environmental protection, cultural heritage preservation, the protection of historic towns and villages, traffic regulations (such as vehicle restrictions), and the safeguarding of energy infrastructure. Nevertheless, if property rights are conceived as fundamental rights, it remains an open question whether administrative regulations and local ordinances have the authority to impose such restrictions.

C. EXAMINING THROUGH PRACTICAL SCENARIOS

This section will examine the coordinating role of the state actor through a case study on the right of residence (habitation).

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[21] ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 54 (Julian Rivers trans., Oxford University Press 2002).

[22] Xie Hongfei (谢鸿飞), *Caichanquan de Gonggongxing* (财产权的公共性) [*The Publicity of Property Rights*], 5 SHANGHAI ZHENGFA XUEYUAN XUEBAO (上海政法学院学报) [JOURNAL OF SHANGHAI UNIVERSITY OF POLITICAL SCIENCE AND LAW] 1, 9 (2022).

[23] *Id.* at 1–18.

Within the traditional civil law system of usufructuary rights (personal servitudes), the right of residence exemplifies a property right that embodies strong social connectedness. This theme can be examined through three types of personal servitudes in Roman private law—usufruct (*usufructus*), use (*usus*), and habitation (*habitatio*). Usufruct emerged first, with use and habitation later derived from it; when applied to houses, the substantive content of these three rights was very similar. Usufruct functioned as a tool of differentiating rights, paired with ownership in classical law, and became a powerful economic and legal instrument for making full use of another's property. Its social dimension was most clearly reflected in testamentary succession, which represented both the earliest and most important application of usufruct.

Testamentary grants of usufruct were primarily designed to provide livelihood support for widows, unmarried daughters, and other family members, thereby balancing the interests of heirs (legitimate sons) with those of non-heirs (such as widows). This institutional design also explains why consumables were not excluded from the scope of usufruct: the purpose of sustenance endowed usufruct with a highly personal character, making it neither transferable nor inheritable. Subsequently, Emperor Justinian issued an imperial constitution establishing habitation (*habitatio*) as an independent right, distinct from usufruct and use, and granting the right-holder the ability to lease the dwelling. This development was not the result of abstract doctrinal reasoning, but rather a practical response to the needs of everyday life.

In modern law, the right of residence also has both social connectedness and economic efficiency functions. The "investment-oriented" right of residence in the Property Rights Book of China's Civil Code follows the principles of policy neutrality and private autonomy, established by agreement as an independent usufruct, extracting the common core of residence rights. In contrast, the socially-oriented right of residence—reflecting state regulation and policy—appears in the Marriage and Family Book and the Succession Book of China's Civil Code, and special laws, established by statutory, contractual, or judicial means, forming a general–specific structure for the external framework of residence rights.

China's Civil Code introduced the right of residence as a new property type but unfortunately failed to clarify its functional positioning. Other Books did not define socially-oriented residence rights, and several provisions in the Property Rights Book confused social and investment-oriented residence rights. This produced overly strict limitations on the subjects, objects, powers, extinction, and transferability of residence rights—making interpretation and application unnecessarily difficult, hindering the investment-oriented right's functions, and reducing the utility of usufructuary rights in the market.

Another example concerns the testamentary creation of a right

of residence. Given the gratuitous and personal nature of wills, such rights—though contractual—display a typical protective function and thus a socially-oriented character. A testamentary right of residence falls within the estate. If the will grants a right of residence to a mandatory heir while assigning ownership of the property to another as consideration, ensuring the heir's future living standard, it should be recognized as meeting the requirements of the forced share. Because of this social orientation, special protection should be given to the right holder in debt settlement: the residence right ranks after other estate debts in priority.

In the first stage (upon the testator's death), the right is established directly under Article 230 of the Civil Code, temporarily belonging to the estate community without registration. In the second stage (upon division of the estate), the right holder may demand that the estate administrator assist in registering the right of residence, which is formally established upon initial registration. If the court divides the estate, the right is established upon the judgment taking effect. To favor the right holder, between the will taking effect and the first registration, they may, based on a valid will, possess, use, and profit from the property, and apply for provisional registration.

V. STATE AS REGULATOR OF POLITICAL DYNAMICS

A. ARTICULATING THE REGULATOR ROLE

Property law also performs a regulatory function—though often overlooked in property analysis—by enabling the state to engage effectively with its citizens in political dynamics. That is to say, property law is not merely a framework of private rights; but also a mechanism for managing the multi-level allocation and effective control of property in society, thereby constructing the foundational order of social property. In doing so, it reflects the influence of national political and economic systems and regulatory objectives.

B. EXPLORING THE THEORETICAL TENETS

North contends that neither social contract theory nor predatory theory, taken alone, can adequately account for all forms of the state. Social contract theory fails to explain how different interest groups, once an agreement is reached, recalibrate their actions to maximize benefits, while predatory theory neglects the question of the initial allocation of property rights—that is, who first benefits from contractual arrangements. To address these limitations, North advances the theory of the distribution of violence potential, conceptualizing the state as possessing both predatory and contractual attributes, and as an organization with a comparative advantage in the use of violence. Where violence

potential is distributed equally among citizens, a contractual state emerges; where it is unequally distributed, a predatory (or exploitative) state takes shape.[24]

North's "economic man" hypothesis of the state posits that the state provides protection and justice to its citizens, who pay taxes to maintain its functioning—a form of "exchange relationship." To maximize revenue, the state divides citizens into groups and designs differentiated property rights structures for each—acting as a "discriminating monopolist," akin to a monopoly firm setting discriminatory prices for different consumers. Potential competitors—other states or groups within the existing political-economic unit—limit the state's ability to define property rights in ways that would cause citizens to defect to rivals.[25] North's account generates two theoretical presumptions for property law.

First, the state is a coercive institutional arrangement—without it, property cannot exist. The essence of property rights is the exclusive power to control resources, achieved through the potential use of violence. The state's role in forming property rights lies in defining and clarifying them to maximize rulers' revenue, and in reducing transaction costs in property definition and transfer to maximize social output. Yet there is an inherent conflict: an efficient property rights structure may benefit society's output but not necessarily maximize the ruler's revenue. The state promotes efficient property rights only within the scope of maximizing rulers' welfare, meaning both efficient and inefficient property rights historically relate to the state. The state is both key to economic growth and a potential cause of economic decline—the greatest guarantor and the greatest threat to individual rights.

Second, all property structures are essentially mixed in nature. North's analysis shows that property rights are inextricably linked to a society's political economy and the distribution of power among social classes, thereby endowing property law with the function of structuring social relations. For regulatory purposes, different categories of property may require distinct ownership and rights arrangements: (1) where there is no private ownership and the state exercises direct control in its capacity as sovereign; (2) where ownership is vested exclusively in the state, while market-oriented use rights are granted to private parties for economic purposes; (3) where state ownership is confined to specific cases prescribed by law, with private ownership permitted in all other circumstances; and (4) where private ownership is established but remains subject to general content limitations imposed by the state, regulatory expropriation and requisition, and redistribution through fiscal instruments such as taxation. Whether the state extracts rent in its capacity as owner or levies taxes in its capacity

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[24] DOUGLASS C. NORTH, STRUCTURE AND CHANGE IN ECONOMIC HISTORY 20–34 (Chen Yu & Luo Huaping trans., Shanghai People's Publishing House 1994) (1981).
[25] *Id.*

as sovereign, it remains an active participant in the distribution of property-derived income.

From this perspective, all property-rights regimes can ultimately be understood as forms of mixed property. The choice of which model to adopt depends on a range of factors; there is no ownership structure that is universally justified under all circumstances. Rather, the determination rests on a comparative assessment of management costs, exclusion costs, aggregate benefits, degree of social connectedness, negative externalities, and enforcement costs, all of which should be considered in light of the principle of proportionality. For example, certain categories of property may require rules oriented toward economic freedom and market transactions; others, due to their strong social embeddedness, may need to be assigned to state or collective ownership, or subjected to concessionary regimes, so as to reconcile public and economic objectives. With respect to state ownership, moreover, the question arises whether it should be understood and regulated within the framework of public property rather than private property rights. These are the central issues around which the principal chapters of this book are organized.

C. Examining Through Practical Scenarios

This section will examine the state's regulatory role along two dimensions: an abstract dimension, comprising the legal concepts and normative structures of general civil law; and a specific dimension, comprising the contexts of traditional Chinese property law and modern Chinese property law.

To begin with, the legal construct of ownership can be understood as an 'evening dress' cloaking the political arrangements of property within a given society, embodying a trinity of political, economic, and legal dimensions designed by state actors. The earliest notion of *mancipium* reflected a strong political character and sovereign significance. As clan-based and familial power declined, individualism rose, and jurists gradually reshaped ownership as a subjective right. By the late Republic, the notion of civic ownership (*dominium ex iure Quiritium*) exhibited distinctly individualistic and legal features. In the imperial period, the concept of ownership was reduced to economic and legal significance alone, with a greater emphasis on the functional decomposition of powers rather than on questions of political belonging. The evolution of ownership, therefore, represents a process in which the political dimension receded, while legal and economic dimensions steadily expanded.

Beyond a single legal construct, the state's regulatory role is also demonstrated through embedding the prevailing macro political-economic context into the emergence and consolidation of the entire property-rights framework. Indeed, from a longue durée perspective, legal institutions are secondary: they are

endogenous to deeper economic and social variables.[26] On the one hand, within the legal system itself, the systematization of property rights represents the gradual construction of a doctrinal framework through the continual generation and refinement of diverse categories of property rights. On the other hand, from the perspective of the broader social system, the structure of property rights functions as a mechanism for the multilayered distribution of social wealth, thereby establishing the foundations of socioeconomic order. The state directly intervenes in, adjusts, and drives the allocation and utilization of property and social resources, leaving distinct and lasting marks on the development of the property-rights regime. A large proportion of property-law norms, in fact, regulate relationships between private actors and the state rather than exclusively between private parties. Thus, the property-rights regime has never been merely a private-law architecture of entitlements; rather, it is a hybrid construct that weaves together private rights, distributive interests across social strata, and the regulatory purposes of the state.

The traditional Chinese land-rights system and its property-rights structure illustrate the regulatory role of the state, comprising a macro-level land order shaped by political authority and a micro-level land order that emerged spontaneously within civil society. In traditional China, the land rights regime was profoundly constrained by state power. Landholders' rights could not be expressed as "ownership" in the sense of an absolute, exclusive right. The turbulence and alternation of political authority repeatedly reshaped landholding patterns, as seen in recurring episodes of land revolution, land concentration, and clandestine occupation throughout history. State power provided a set of services—such as the exchange of protection and local stability for taxes—and sought to reassure landholders through promises such as "no new taxes." Yet these arrangements ultimately degenerated into fixed burdens upon the land. Beyond this, the state neither had the capacity nor the will to institute necessary regulatory frameworks, resulting in the absence of a functioning bureaucratic law in rural society. Instead, rural society developed its own refinements of land rights based on customary practice. Within what Hayek described as a framework of "evolutionary rationalism," a native micro-level land regime emerged, with contracts serving as its chief instrument. Individuals divided and allocated the benefits of land along functional and temporal dimensions, generating a series of flexible, open, and plural transactional forms—such as dianmai (conditional sale with right of redemption), huomai (redeemable sale), juemai (absolute sale), and various tenancy arrangements.

The nature of this regulatory role is also evident in

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[26] YAO YANG (姚洋), TUDI ZHIDU HE NONGYE FAZHAN (土地、制度和农业发展) [LAND, INSTITUTIONS, AND AGRICULTURAL DEVELOPMENT] 1–25 (2004).

contemporary Chinese property law. The property-rights structure of rural collective land is a composite system, integrating governance functions at the level of public law, subsistence-security functions, and market-oriented private-law functions. Collective land has gradually evolved from a tool of governance and social security into a private-law institution embodying substantive rights and obligations. This transformation was made possible by the gradual retreat of state power from the countryside and the concurrent institutional consolidation of rural collective economic organizations. Looking ahead, reform may proceed by differentiating between two stages: an initial allocation of land rights primarily serving social-security functions, and the subsequent free circulation of land rights primarily serving market functions. Through this two-stage framework, the existing rural collective economic organizations could be restructured into "civil collectives"—voluntary associations within the sphere of private law, organized along cooperative principles.

In the realm of land-space use and public easements, the state, acting as regulator, categorizes private-law instruments by their character as onerous or gratuitous, statutory or contractual in basis, and exclusive or non-exclusive in effect. On this foundation, it develops corresponding legal constructs—for instance, the onerous transfer of spatial construction land use rights, the gratuitous allocation of such rights, contractually compensated spatial servitudes, statutorily compensated public servitudes, and statutorily gratuitous spatial neighbor relations. These doctrinal constructions are subsequently applied in practical domains such as public transportation, mining, pipelines, power grids, and underground infrastructure.

Viewed through the lens of the Calabresi–Melamed framework, these instruments correspond respectively to property rules and liability rules, thereby illustrating the state's multi-layered control over land-space resources and its varying degrees of intervention. In this framework, the state operates in multiple capacities: as the owner of urban land and space, governing cities through the establishment of construction land use rights; as the monopolistic supplier in the primary land market, allocating and controlling collective land-space resources through expropriation procedures; as the definer and arbiter of public interest, conferring legitimacy on expropriation decisions and the creation of public servitudes; and as the planner and regulator of technical standards, including those governing neighbor relations, which delineate and adjust the content and scope of spatial interests among all parties.

The significance of protecting a legal interest under a property rule lies in the fact that it entails the minimal degree of state intervention, whereas liability rules involve additional state intervention and collective allocation decisions. In the traditional Calabresi–Melamed framework, liability rules were treated as an improved form of market transaction. However, Guido Calabresi

has more recently argued[27] that liability rules can also serve as independent tools for implementing collective allocation decisions or achieving certain socio-democratic objectives, being used to replicate the outcomes of regulatory law. For example, massive punitive damages reflect a form of collective decision-making that approaches inalienability, whereas low damages insufficient to cover the loss reflect a collective decision to encourage certain conduct that results in changes of entitlement (effectively a subsidy). As Morton Horwitz observed, nineteenth-century tort law was in effect a subsidy supporting industrialization. Many developing countries often adopt low-priced liability rules as a means to stimulate industrialization and economic competitiveness.

Turning to collective construction land use rights, these are classified into three categories according to their purposes and uses: the right to use collective commercial construction land, the right to use collective public-welfare construction land, and the right to use homesteads. At present, only collective commercial construction land is permitted to enter the market, and solely through compensated transfer by means of public bidding. Once acquired, such land may circulate in the secondary market via transfer, exchange, equity contribution, donation, or mortgage. The overarching aim of China's property-rights reform is to transition from the unitary land-supply model—characterized by 'land-use control over collective land plus expropriation'—to a dual-track system comprising 'expropriation for public-welfare construction land' alongside 'market-based transactions for non-public-welfare construction land.'

Under the expropriation model, collective income derives from "fair and reasonable expropriation compensation," while the state captures the residual balance of the land grant premium obtained after expropriation (once the land has been converted to state ownership) minus the compensation paid. Under the transaction model, the state's income is drawn from a "land value increment adjustment fee" levied on the collective, while the collective's income is the land value increment realized through market entry minus the adjustment fee. Provided that the balance between the land grant premium (or adjustment fee rate) and the compensation standard is appropriately maintained, the economic effects of the expropriation and transaction models are not significantly different; in essence, both reflect the state's participation in the distribution of land-derived income through alternative configurations of mixed property rights.

In this logic, the homestead use right may also be regarded as a statutory form of non-commercial construction land. Subject to

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[27] GUIDO CALABRESI, THE FUTURE OF LAW AND ECONOMICS: ESSAYS IN REFORM AND RECOLLECTION 146–149, 159–160 (Ge Zheng trans., China University of Political Science and Law Press 2019) (2016).

compliance with land-use planning, the three categories of collective construction land should be allowed to convert into one another. The processes of rights conversion and market entry can thereby be organically integrated. This would enable rural households—without compromising their basic residential security—to transfer the homestead use right together with house ownership to non-collective members, or alternatively to transfer only the homestead use right by first converting it, in accordance with planning requirements, into collective construction land use rights and then, through the collective economic organization, completing the land grant procedure and paying the requisite premium.

The regulatory role of the state in property law has already permeated deeply into Chinese family relations, most notably in the sphere of residential property within marriage—a subject that has, in recent years, provoked widespread public debate. Amid the rapid transformation of China's marital patterns, demographic structure, and housing conditions, property issues in marriage can no longer be regarded merely as matters of doctrinal application or interpretive choice within civil law. Rather, they necessitate legislative responses framed from the perspective of state governance.

From a normative standpoint, beyond upholding the traditional civil-law principle of party autonomy and the protective function of family law, the legal framework should also be harmonized with China's family and population policies. This entails adopting positive incentive mechanisms—such as safeguarding parental contributions to housing and moderately narrowing the scope of community property between spouses—so that the marital property regime does not become a disincentive to marriage and childbearing.

The current Chinese law of succession leaves unresolved the question of whether household rural land contract and management rights may be inherited. It is proposed that the "household," as the formal holder of such rights, should be understood as comprising the substantive members of the household, thereby granting the contract and management right the character of an inheritable asset. Accordingly, interpretive approaches should be tailored to the specific circumstances in order to advance the objectives of national rural governance: where the heir is a member of the collective, inheritance would require only "filing with the contracting party for the record"; where the heir is outside the collective, inheritance would require the "consent of the contracting party.

From an economic efficiency perspective, allowing the inheritance of rural land contract and management rights would generate a stability effect on land rights, significantly improving farmers' productivity and incentives for long-term land investment. To address the problem of farmland fragmentation caused by

multi-heir inheritance, measures such as a "single-heir system" could be adopted for contract and management rights tied to the "minimum cultivation unit." The root of the inheritance issue for homestead use rights likewise lies in the need—at the level of state governance—to determine whether the value premise of the homestead as a tool for livelihood security should be maintained.

Under the framework of the "three types of land" reform, heirs eligible to retain homestead use rights may inherit such rights independently; otherwise, the collective economic organization should reclaim them. Where a house has been built on the homestead, the principle of the unity of land and housing creates a conflict between the inheritability of the house and the uncertainty over whether the homestead use right can be inherited. If the heir is ineligible to retain the homestead use right, the land's status would be converted into compensated, fixed-term collective commercial construction land use rights, and the heir would need to pay the corresponding land grant premium. Alternatively, the heir could choose to transfer the house for compensation to an eligible member of the same collective entitled to a homestead, or to return the homestead use right to the collective economic organization, which would then redeem the house or provide value compensation. In institutional design, the focus should not be limited to the rights holder's perspective while neglecting the interests of the collective economic organization and the long-term interests of other members of the collective.

VI. CONCLUSION

A longstanding theme within the civil law tradition posits that public and private law converge in the realm of property law. Through the lens of the evolution of Chinese property law, this paper seeks to clarify and refine this hybrid character by examining four roles of the state—gatekeeper, enabler, coordinator, and regulator. The first two roles are generally associated with the sphere of private law, whereas the latter two are more often regarded as core functions of public law.

More specifically, the role of gatekeepers highlights how states employ property law to safeguard individuals' possessions and ensure freedom in transactions. When acting as enablers, states use property law to address negative externalities and lower transaction costs. As coordinators, state actors invoke property law to preserve abstract, unified, and harmonious social relations. Finally, in their regulatory capacity, states emphasize the function of property law in balancing the broader politico-economic environment of society.

This paper engages theoretically with North's accounts by advancing a fourfold typology of the public functions of property law and by testing this framework deductively within the context of Chinese property law. In doing so, it also addresses the

empirical gap arising from Western bias by presenting property law materials from a representative developing jurisdiction in the Global South. Furthermore, it strengthens the interpretive capacity of legal instrumentalism in relation to emerging legal phenomena (e.g., land-space rights) and contentious reforms (e.g., the "three types of land") in China.

Of course, this framework has its limitations. As a theoretical account of property law, the four-fold role approach has thus far been explored primarily through doctrinal analysis. Future research may therefore employ empirical methods (e.g., ongoing socio-legal approaches) to further test, refine, and critique this account. Moreover, although the distinction between common law and civil law systems is narrowing, this approach—particularly the latter two roles—has been developed within a property law context rooted in Chinese localities, thereby potentially raising questions about the universality of the theory.