

Protection of Property in China Changes under the New Chinese Legislation

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*My new tiled house is bright and clean,
Here comes the cart with our sewing machine!*

- Chinese couplet -

I. Introduction

In his memoirs "*Qu'est-ce que la propriété*", Proudhon came to the conclusion that "*propriété, c'est du vol*".² This was in 1840. He considered namely that private property is a *privilege* or a *monopolistic situation* and as such constitutes a blackmailing instrument against the have-nots. According to him one may possess only such means of production which have been produced by the *proprietor himself* or obtained in exchange for other goods.

Proudhon was an anarchist, as we know, and sometimes in his life quite close to Marx. For Marx, as for Rousseau before him, private property connotes much more than mere possession of material things. Marx wrote years later in "*Private Property and Communism*" that private property is the *antithesis* between labor and capital. For him private property is the *result* of alienated labor, but *also* the *means* by which labor is alienated. More importantly, at least in Chinese context, for Marx "*Communism is the positive expression of annulled private property*".³

However, in China where Marxism is still the prevailing ideology,⁴ private property is by no means considered as *theft* or *alienated labor* anymore. In contrary, it is worth to be protected. Thus, on March 14, 2004, the National People's Congress

(NPC) - the Chinese Parliament - passed a landmark amendment to the 1982 Constitution that aimed at the protection of private property in China, *including private property on the means of production*, for the first time since the 1949 Liberation. Based on this constitutional amendment, a property law has been enacted as well, after a similar bill has been taken off the Parliament's agenda the previous year, because critics warned that it would worsen social inequalities and promote the sell-off of state assets by unscrupulous officials.

But why are the constitutional amendment and the property law of such importance?

This constitutional amendment and the private property law based on the constitutional amendment have four-fold significances. First of all, they have an *ideological* significance, as we have just seen. Besides, they have *economic*, *political* and *legal* significances. We will in the following chapters examine the economic and political significances of such legislation while the 4th chapter will give an overview on its legal importance.

II. Expanding economy creates wealthy people

The growth of Chinese economy is well known. Today, China is seen by many as the "Red Locomotive" of the world economy,⁵ which will soon become the second largest export nation of the world after the USA,⁶ surpassing Germany.⁷ It is also expected that the Shanghai Stock Exchange index will rise by 400%, from around 1,400 to 6,000 points in 2007, while in 2006 it rose by 130%.⁸ Also Chinese banks, chemical and internet companies

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² *Pierre-Joseph Proudhon* (1809-1865), *What is Property?* Edited and translated by Donald R. Kelley and Bonnie G. Smith, Cambridge, 1994, p. 13 et seq.

³ *Karl Marx*, *Private Property and Communism*, 1844, 1, <http://www.marxists.org/archive/marx/works/1844/manuscripts/comm.htm>, visited December 19, 2007.

⁴ Preamble of the Constitution of 1982, still in force, states that "[u]nder the guidance of Marxism-Leninism..." the basic task of the nation in the years to come is to concentrate its efforts on socialist modernization. For the full text of the 1982 Chinese Constitution with subsequent changes in 1988, 1993, 1999 and 2004 see <http://english.peopledaily.com.cn/constitution/constitution.html>, visited December 23, 2007.

⁵ See "Die rote Lokomotive", in: *Frankfurter Allgemeine Zeitung* dated November 30, 2007.

⁶ See "China zieht an Deutschland vorbei", in: *Frankfurter Allgemeine Zeitung* dated July 20, 2007.

⁷ *Idem*.

⁸ See "Chinas Anleger kennen keine Furcht", in: *Frankfurter Allgemeine Zeitung* dated May 11, 2007.

are playing increasingly important roles on the world market. Among the ten biggest banks of the world, e.g. three are coming from China, the *Industrial & Commercial Bank* being the world's biggest bank.⁹ At the same time, *Petrochina* is the company with the highest market capitalization at a stock exchange with a market value of USD 724 billion¹⁰ and *Alibaba*, the Chinese equivalent to Google, reached at its first public offer of shares on the Hong Kong stock exchange EUR one billion having, thus, the second most successful stock exchange launch in history, next only, amazingly enough, to Google.¹¹

It is interesting to have a look at who the promoters of such outstanding economic results are? Of course, *Petrochina* and *Alibaba* are state-owned enterprises. However, the overall economic success of the Chinese economy is by no means due to state-owned enterprises alone. Already in 1995, state-owned enterprises represented only 1.61% of all industrial companies in China, while 78.30% were owned by individuals (incl., however, wholly foreign owned-enterprises and joint ventures with foreign partners).¹² Today, there are 42.4 million private companies in China.¹³ The owners of these private companies accumulated considerable wealth in the meantime. No wonder then that China hosts the biggest number of billionaires in the world – right after the USA. In China, there are 800 superrich people owning more than USD 105 millions each in average, among them 106 billionaires. This fact is even more remarkable if we take into consideration that one year earlier there were in China “only” 15 billionaires in USD, the richest person being a woman.¹⁴ In addition, the number of people belonging to the middle class is constantly increasing. A good example demonstrating the increase of the middle class is that while 15 years ago the Volkswagen joint ventures in China

produced and sold some 100.000 cars per year, out of which only 2-3% to private persons, today they are producing and selling more than 800.000 cars a year, most of them to private customers. Those belonging to the middle class today may be estimated at about 250 to 300 million people.

Needless to say, all these people want to be protected in their properties. We have observed the same phenomenon in most socialist countries of Central and Eastern Europe starting by the second half of the 1980s where especially the off-springs of the nomenclatura requested property protection.¹⁵

Could it be that similar reasons are behind the property protection regulations in China as well?

III. Private property in pre-communist times

Before we will examine in more detail the actual situation of the protection of private property in China, it is interesting to take a glance at the pre-communist times, in particular, concerning land ownership which was, of course, the basis for wealth.

In ancient times in China private ownership,¹⁶ especially of land, and a consequent tendency of ownership concentration thereof, date back to the 4th century B.C.¹⁷ In the Song (960-979) and Yuan (1271-1368) dynasties the land ownership belonged already – at least *theoretically* – to the emperor alone who granted, however, the use of land to his chosen supporters. The *practice*, of course, looked differently. In the practice, the use of land allocated by the emperor was a quasi-property leading thus to “dual land ownership”. Under these circumstances the property of land was freely alienable, but this alienation was restricted by the preemptive right in favor of relatives, neighbors and mortgage holders.¹⁸ The Manchu-dynasty (1641-1911) followed this tradition of “dual land ownership” made, however, inalienable grants of land to Manchu chiefs in Manchuria and around Beijing at the beginning of the dynasty.¹⁹ But this “dual land ownership” structure was further complicated by a bewildering

⁹ See „Die größten Banken kommen aus China“, in: Frankfurter Allgemeine Zeitung dated December 1, 2007.

¹⁰ See „Petrochina ist der teuerste Konzern der Welt“, in: Frankfurter Allgemeine Zeitung dated November 6, 2007. See also „Amerika verliert Führungsrolle“, in: idem dated January 5, 2008.

¹¹ See „Märchenhafter Börsenstart für Alibaba“, in: Frankfurter Allgemeine Zeitung dated November 7, 2007.

¹² Justin Yifu Lin/Fang Cai/Zhou Li, State-Owned Enterprise Reform in China, Hong Kong 2001, p. 4.

¹³ Kapitalismus in China, in: <http://www.labournet.de/international-es/cn/schramm2.html>, visited October 24, 2007. The indication of numbers of private companies in China varies according to the sources. Thus, Kellee S. Tsai, China's Complicit Capitalists, in: Far Eastern Economic Review, Vol. 171, No. 1, January/February 2008, p. 13, indicates that today there are over 29 million private businesses in China, employing over 200 million people and generating two thirds of China's industrial output. See also from the same author: Capitalism without Democracy: The Private Sector in Contemporary China, Cornell University Press, 2007.

¹⁴ See „Chinas Superreiche sind weiblich“, in: Frankfurter Allgemeine Zeitung dated October 12, 2007 and Peter Kwong, Princelings and paupers. China's billionaire bubble, in: The International Herald Tribune dated November 17-18, 2007.

¹⁵ See, for example, in Hungary: Harmathy Attila, A polgári jog 1985-2005 között bekövetkezett változásairól, pp. 577-591, as well as Sárközy Tamás, A jog szerepének átalakulása a gazdaságban. A magyar gazdasági jog fejlődése 1988-2005 között, pp. 591-607, in: Jakab András/Takács Péter (eds.), A magyar jogrendszer átalakulása 1985/1990-2005. Jog, rendszerváltás, EU-csatlakozás. Vol. 1, Budapest 2006.

¹⁶ In this paper for reasons of simplification, the notions „property” and „ownership” will be used as synonymous well knowing, nevertheless, the differences between them. While the „property” is defined in Black's Law Dictionary (7th ed., 1990) as the „right to possess, use, and enjoy a determinate thing (either a tract of land or a chattel)” (p. 1232), the „right of ownership” is „the collection of rights allowing one to use and enjoy property, including the right to convey it to others” (p. 1131).

¹⁷ Sybille van der Sprenkel, Legal Institutions in Manchu China. A Sociological Analysis, Oxford 1962, p. 11.

¹⁸ Idem, p. 105.

variety of land sales agreements and rental contracts. On the one hand, there were *official sales contracts*, concluded between landlords and wealthier farmers, on which the state – for a special tax – administered a red seal. In order to avoid such fiscal burdens, on the other hand, less wealthy contracting parties have drawn up *unofficial sales contracts*. This was probably possible because the land sales definition was ambiguous. Most land sales were namely concluded on the general understanding that the seller might at some later time reclaim the land from the buyer at the original purchase price. It was also common understanding that the seller retained “subsurface” rights to the sole while the purchaser could till the land for a period specified in the contract. The consequences of this ambiguous contracting was that in case the price for the land rose or the land went out of cultivation because waterlogged, or was built upon, a maze of legal and financial problems resulted. These problems then often led to family feuds and even murder.²⁰

The Chinese conception of *land ownership* was, at the imperial times, similar to that existing in feudal England. There, according to the feudal theory, no man could own land, save the king. This concept started with the Norman Conquest when the king, William the Conqueror, declared that all the land belonged to him because of his victory at the battle of Hastings in 1066 which resulted in Norman control of England. It is interesting to note that, though it may be a coincidence, both in China and in England the crown claimed land property approximately at the same time. After his victory, William rewarded his chief followers giving them large areas of land and making them thus tenants. These tenants-in-chief, known as barons, granted in turn smaller portions of land to their own followers, the mesne or lords, who were the knights. This way a *pyramid of land-holding* was created.²¹ Still today, the concept that all land belongs to the crown remains legal theory in the UK and all “owners” are merely tenants of one sort or another, unaffected by the Law on Property Acts of 1925, 1987, 1994 and 1997. Thus, the only “owner” of land is still the king or the queen. Everybody else below can only be a “tenant”. The tenancy has, however, no practical consequences as ownership is a relative and not an absolute concept. An owner has, it is true, greater

rights than anyone else in respect of his property, but these rights are always subject to some restrictions imposed by the general law of the time and place in which he lives.²² Thus, registered tenants are quasi-owners.

The comparison between property concepts in Chinese pre-communist times and in England shows that, though the starting points were the same – the emperor viz. the queen or the king owning the totality of land – the legal consequence – in China the “dual land ownership” and a “pyramid of land-holding” in England – were different.

In the republican period in China, after the 1911 Revolution, the *de jure* land use rights have been transformed to property rights this way creating huge accumulation of land by a few owners only. The land redistribution was therefore, already in the 1920s, one of the main objectives of both the Kuomintang (KMT) and the Chinese Communist Party (CCP). It is interesting to note in this context that the KMT and the CCP expressed the same goal, namely the land reform. The basis of this coordinated action laid in a resolution of the Executive Committee of the Communist International (ECCI) of January 1923 which stated the following: “Given that there is only one revolutionary organization in China, the Kuomintang, which is a mixed group of bourgeois nationalists, petty bourgeois, intellectuals and workers, and that the working class does not yet form an independent force... (the) cooperation of the young Communist Party with the Kuomintang is a necessity.”²³ Shortly after its 4th Congress, held in May 1923, the ECCI instructed the CCP to support the land reform program of the KMT: expropriation of the land of the landlords and of temples, distribution of the land among the peasants, abolition of the land tax and cancellation of outstanding rents. The CCP’s own land reform program started only later. The 5th Congress of CCP, held in Wuhan from April to May 1927, accepted the radical measures proposed by the ECCI: confiscation of the land of landowners, and the land of the temples and of “foreign religions”, but not the land of small landlords.²⁴

Thereafter, in early May 1927, the Wuhan-based Central Land Committee of CCP proposed the establishment of self-governing institutions at the local level to handle land distribution problems, including the promise of land to soldiers once the war would have been won.²⁵ The maximum size of

¹⁹ Idem, p. 11. See also WEN Tienjun, Reflexions at the Turn of Century on „Rural Forms in Three Dimensions“, in: China Reflected, Hong Kong 2003, p. 65.

²⁰ Jonathan D. Spence, The Search for Modern China, 2nd ed., New York/London 1999, p. 14.

²¹ Philip S. James, Introduction to English Law, London, 6th ed., 2nd Impression 1968, p. 371 and Cedric D. Bell, Land: The Law of Real Property, London 2005, p. 4.

²² Philip S. James, (n. 21), p. 379.

²³ Laszlo Ladany, The Communist Party of China and Marxism 1921-1985. A Self-Portrait, London 1988, p. 12.

²⁴ Idem, p. 15.

²⁵ Jonathan D. Spence, (n. 20), p. 338.

the land holding was set at 50 *mou* (one *mou* being equivalent to one-sixth of an acre) of good land or the double of poorer land. This land reform program started to be executed in the areas held by the Communists. However, in the early period of the Yan'an era, in the late 1930s, the CCP temporarily forbade to pursue expropriation of the land – for political reasons – but the introduction of a new taxation system for land ownership made it uneconomical to hold large landholdings anyway.²⁶

In the year following the Japanese capitulation in 1945, the CCP intensified its land reform program in the areas they held, while violence against landlords was an integral part of this process.²⁷ As the result, 40% of the cultivated land was seized from the landlords and redistributed, and about 60% of the population benefited there from in some way.²⁸ According to other sources, in the eve of the communist takeover in 1949, landowners and kulaks, forming only 10% of the population, still owned 70-80% of the land.²⁹ This was the situation when on October 10, 1948 the Central Committee of CCP outlined the Land Law which became Land Reform Law in June 1950 introducing a large scale land reform. In 1951 the land redistribution among peasants has been completed.³⁰ But the peasants could not enjoy their ownership for a longtime. The land became subsequently ownership of the communes. The private property on land has been abolished with the exception of small private plots. It was only after the end of the Cultural Revolution that rural families were allowed to increase the amount of land they could till as private plots and to sell the produce resulting from agricultural activities on such private plots on the market.³¹

The land reform was above all a political move and much more than a change of ownership. It was aimed to eliminate the enemies of the Party but did also influence much the agricultural results - nega-

tively. After the land reform the agricultural output and its part in China's GDP dropped radically due, especially, to two factors: First, the increased investments in the industrialization, above all in the heavy industry, and the thus caused withhold of necessary investments from the agricultural sector, and, secondly, the consequent pursuance of the collectivization of the land.³²

In 1950, other sectors of the economy (i.e. industry, trade, and handicraft) have been transformed, after the agriculture, as well though less radically than the latter. To start, new regulations required private industry to work for government projects only if entrusted to it. Private sector industry, trade and handicraft were only gradually nationalized. As a result, while in 1949 63% of the industry was privately owned, by 1956 32% became joint state-private enterprises with decisive state influence, the rest having been transformed into state-owned enterprises. Besides, the KMT owned industry that controlled 90% of iron and steel, 67% of electric power, 45% of cement and all air, rail and non-ferrous metal industries, has also been nationalized.³³

IV. Private property law in today's China

1. Constitutional provisions

Today private property is regulated and protected in China by the constitution, several laws and regulations. But before we examine the actual constitutional provision on property, it is quite interesting to have a glance at the development of this notion through the consecutive constitutions and their amendments in China after the 1949 Liberation.

The first Constitution of the People's Republic of China (PRC) was promulgated in 1954, only five years after the Communists took power.³⁴ During this period of five years only the *property of land* has been seized from landlords and redistributed among the peasants – as far as it was not already the case in the previously liberated areas by the communists. The *property of means of production* and other property (e.g. apartments and houses) has not been affected by nationalization or expropriation yet. The young Chinese communist regime needed the entrepreneurs as far as they were not counter-revolutionaries. The fifth star on the Chinese flag of 1949 even symbolizes “progressive capitalists” in

²⁶ Idem, p. 436. After the Long March 1935-1936, the CCP moved its headquarters to Yan'an (Shaanxi province) which became the center of Communism in China until the move of the Communist leadership to Beijing in 1949.

²⁷ Idem, pp. 466-467. Violence against the landlords remained on the agenda of the land reform even after the Liberation and was extended to „counter-revolutionaries” as well. Thus, Liu Ruilong, in charge of agriculture in the East China Party Bureau, reported in 1951 the following: „The land reform in East China was the first manifestation after the Liberation (1949) of the wisdom and power of the peasants...The land reform was combined with the Resist-US-Aid-Korea campaign and with the suppression of the counter-revolutionaries movement...First, the landlords and the counter-revolutionaries were arrested, and then the anti-feudal struggle went ahead. The land reform was an extremely violent struggle which reached every corner of the country”. See *Laszlo Ladany*, (n. 23), p. 176.

²⁸ Jonathan D. Spence, (n. 20), p. 491.

²⁹ *Laszlo Ladany*, (n. 23), p. 174.

³⁰ Yu-ming Shaw (ed.), *Reform and Revolution in Twentieth Century China*, Taipei 1987, p. 373.g

³¹ Jonathan D. Spence, (n. 20), p. 590. See also *Laszlo Ladany*, (n. 23), p. 177.

³² Brunhild Staiger/Stefan Friedrich/Hans-Wilm Schütte (Hrsg.) unter Mitarbeit von Reinhard Emmerich, *Das große China-Lexikon*, Primus Verlag 2003, p. 422.

³³ R. S. Gupte, *History of Modern China*, New Delhi 1974, p. 324.

³⁴ For the full text of the 1954 Constitution see: *People's China (Peking)*, No.10 (1954), suppl. (Oct.1).

addition to the military, the working class and the peasants forming a half-circle around the biggest star representing the Communist Party. But soon the words “private property” and their “protection” have been banned from legal documents in China. “*Destroy the word ‘private’ whenever it appears*” was the slogan. The first Chinese Constitution after the Liberation with a total of 19 articles did not mention the private property at all. Its protection did not need to be mentioned anymore.

The 1975 Constitution announced in its art. 5 that “[a]t this stage in the PRC there are two main forms of ownership of production: the *socialist people’s property* and the *socialist collective property of the working masses*”.³⁵ What remained from the property of the former capitalists and kulaks (i.e. the landowners having already been expropriated or physically eliminated), the State may expropriate it – as stated in art. 6 para. 3 of the same Constitution – “in accordance with the statutory provisions for land in urban and rural areas and other productive resources” or nationalize it “with or without compensation”. The State only protected – according to art. 9 para. 2 – “the property rights of citizens on their earned income, their savings, their homes and their consumer goods”.

It was not different in the USSR and the most COMECON countries, where citizens could only own households with small backyards, personal belongings and passenger cars, while the ownership of land plots and means of production belonged to the State.

The 1978 version of the Constitution was not different from the previous one so far.³⁶ But both the 1975 and 1978 versions of the Constitution were limited to the then prevailing historical conditions, namely the Cultural Revolution and its aftermath. During this period the private property and its protection was not on the top of the priorities on the agenda of the CCP.

Though the 1982 Constitution, that replaced that of 1978, still emphasized that the “[s]ocialist public property is sacred” (art. 12), it already admitted that the “*individual economy of urban and rural working people...is complement to the socialist public economy*” (art. 11) and therefore their “lawful earned income” (art. 13) shall be protected. At that time, six years after the end of the Cultural Revolution and three years after the enactment of

the joint venture law which aimed to attract foreign *private* capital, the hint to “*individual economy*” was a clear signal of political changes, a prelude of Deng Xiaoping’s slogan: “*To get rich is glorious.*”

Later amendments of the Constitution of 1982 went further. The 1988 amendment explicitly stated in art. 11 para. 3 that the State recognizes and protects “the *private sector of the economy...as a complement to the socialist public economy*” and made it clear in art. 10 para. 4 that *the transfer of land use for value is legal*. The 1999 revised version enhanced the status of the individual and private sector of the economy subject, however, to the limitation that the “State exercises guidance, supervision, and control over the individual and private sector of the economy”. Interestingly enough the above cited amendments of 1988 and 1999, as well as those of 1993, explicitly recognize and protect the private sector of the economy and that of 1999 even admitted that the *private sector* is “an *important component of the socialist market economy*”.

The constitutional amendment made on March 14, 2004 both protects the private property and states that “legally obtained *private property* of the citizens *shall not be violated*” and that expropriation and nationalization are subject to public interest and compensation. This is the first time that these longtime observed taboos have been stated in such an unambiguous way in the Constitution. It provides in art. 11 para. 2 that “[t]he State protects the lawful *rights and interests of the non-public sectors of the economy* such as the *individual and private sectors of the economy*. The State encourages, supports and guides the development of the non-public sectors of the economy and, in accordance with law, exercises supervision and control over the non-public sectors of the economy”. Furthermore, in art. 13 para. 1 it states that the “[c]itizens’ *lawful private property is inviolable*”, adding in paragraph 3 of the same article that “[t]he State may, in the *public interest* and in accordance with law, expropriate or requisition private property for its use and shall make *compensation* for the private property expropriated or requisitioned”. In other words the constitutional amendment of 2004 recognizes the inviolability of private property and states that it may only be expropriated for public use and against compensation.

It is interesting to have a glance at the constitutions of some other countries concerning protection of private property and compensation for taking making thus a comparison to the Chinese constitutional regulations.

The German Grundgesetz of 1949 provides in art. 14 that

³⁵ Emphasis added. For the full text of the 1975 Constitution of the PRC see: http://64.233.179.104/translate_c?hl=en&u=http://www.infopar-tisan.net/archive/mao... visited October 24, 2007.

³⁶ For the full text of the 1978 Constitution see: Documents of the First Session of the Fifth National People’s Congress of the People’s Republic of China, Foreign Language Press, 1978.

“(1) Das Eigentum und das Erbrecht werden gewährleistet. Inhalt und Schranken werden durch die Gesetze bestimmt. ...

(3) Eine Enteignung ist nur zum Wohle der Allgemeinheit zulässig. Sie darf nur durch Gesetz oder auf Grund eines Gesetzes erfolgen, das Art und Ausmaß der Entschädigung regelt. Die Entschädigung ist unter gerechter Abwägung der Interessen der Allgemeinheit und der Beteiligten zu bestimmen. Wegen der Höhe der Entschädigung steht im Streitfalle der Rechtsweg vor den ordentlichen Gerichten offen.”³⁷

In contrast to the German Grundgesetz, the US Constitution of 17 September 1787 did not provide for any protection of private property. However, the Amendment V on Compensation for Taking from 15 December 1791³⁸ and the Amendment XIV, one of the Reconstruction Amendments, first intended to secure rights for former slaves, dated 9 July 1869³⁹, remedied this situation.

The 1791 French constitution provides in Title 1 that “[l]a Constitution garantit l’inviolabilité des propriétés ou la juste et préalable indemnité de celles dont la nécessité publique, légalement constatée, exigerait le sacrifice.”⁴⁰ The consecutive French constitutions, including that of 1958, do not contain similar provisions, but the Constitutional Council has elevated to the rank of constitutional norms the 1789 Declaration of the Rights of Men and Citizens, which

provides in its art. 17 the following: “La propriété étant un droit inviolable et sacré, nul ne peut en être privé, si ce n’est lorsque la nécessité publique, légalement constatée, l’exige évidemment, et sous condition d’une juste et préalable indemnité.”⁴¹ The same is also stated in article 545 of the French civil code.

It follows from the above that in Germany, USA and France the private property is protected in one way or another on constitutional level and its taking is only permitted in the public interest and against compensation and shall be “previously and equitably indemnified”.

2. Legal provisions

Based on the above constitutional changes in China, the NPC adopted on March 16, 2007 the Property Law of the PRC backed by 96,9% of the 2,889 legislators attending the meeting, i.e. with 2,799 votes for, 53 against, and 37 abstentions. The law entered into force on October 1, 2007. It covers the creation, transfer and ownership of property in the mainland (without being applicable in the Special Administrative Regions of Hong Kong and Macao) and will be part of the forthcoming civil code. The Property Law contains 246 articles and is divided into five parts: General Provisions, Ownership, Usufructuary Rights, Security Interest in Property Rights, and Possession. The parts are divided, on the other hand, into XIX chapters.

Drafting of the property law started in 1993 already! After almost ten years of preparation, the Standing Committee of the 9th NPC included the property law in the draft civil code for preliminary deliberation. Some times later, in July 2005, it published the draft property law and collected over 10,000 comments and suggestions. It also held over 100 fora and a large number of meetings where the significance of the new property law has been presented. But it did not help that as general principles for enacting of the property law even Deng Xiaoping Theory and the thoughts of “Three Represents”, as the guidance for it, have been put on the top of the draft.⁴² The resistance against this law

³⁷ The English translation of these provisions of the German *Basic Law* (Constitution) reads as follows:

“Article 14 [Property, inheritance, expropriation]

(1) Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws. ...

(3) Expropriation shall only be permissible for the public good. It may only be ordered by or pursuant to a law that determines the nature and extent of compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In case of dispute respecting the amount of compensation, recourse may be had to the ordinary courts.”

The German Federal Constitutional Court (Bundesverfassungsgericht) made clear in its decision 24 BVerfGE 367, 400 (1968) that taking property cannot be justified simply by providing adequate compensation for the Grundgesetz basically guarantees the property itself, not its equivalent of money.

³⁸ Amendment V reads as follows:

“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” (emphasis added)

³⁹ Amendment XIV reads as follows:

“Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” (emphasis added)

⁴⁰ The English translation reads as follows:

“The Constitution guarantees the *inviolability of property*, or a just and previous indemnity for that of which a legally established public necessity requires the sacrifice.” (emphasis added)

⁴¹ The English translation reads as follows:

“Since property is an *inviolable and sacred right*, no one shall be deprived thereof except where *public necessity*, legally determined, shall clearly demand it, and then only on condition that the owner shall have been *previously and equitably indemnified*.” (emphasis added)

⁴² The general outline of the Deng Xiaoping Theory consists of the “Four Principles” i.e. Marxism and Leninism - Party Loyalty - Subjection to Leadership - Thoughts of Mao Zedong.

The “Three Represents” means that the CCP should be representative to advanced social productive forces, advanced culture, and the interests of the overwhelming majority.

For the full text of the Explanation on the Draft Property Law of the PRC delivered by Wang Zhaoguo, vice-chairman of the Standing Committee of the NPC at the 5th Session of the 10th NPC. See http://news.xinhuanet.com/english/2002-03/08/content_6765323.htm, visited October 29, 2007.

was so vehement that in 2006 it has been set off from the agenda of the NPC.

The purpose of the law is, as stated in art. 1 in general terms, to safeguard the basic economic system of the nation, to safeguard the socialist market economy, to clearly delineate the attribution of ownership to things, to promote the “utilities of things” (i.e. the exploitation of the property), and to protect the real rights of rights holders. More interesting are the provisions of art. 3 of the Law. Stating there first that China is still in “the primary stage of socialism” where the public ownership plays a “dominant role”, it emphasizes that “the State shall ...at the same time encourage, support and guide the development of the *non-public sector* of the economy”. Doing so, “the State implements the socialist market economy, ensuring *equal legal status* and right for development of *all market players*”. Thus, the private property acquired “equal legal status” with state and collective ownership. But what are state ownership and collectively owned properties?

They are defined as follows:

- a) *State ownership* includes mineral resources, water, sea areas (art. 46), urban and rural lands (art. 47), and all natural resources such as forests, mountains, grasslands, unclaimed land and beaches (art. 48), while
- b) *Collectively owned* real and movable properties also include lands, forests, mountains, grasslands, unclaimed land, and beaches – alike state ownership, but in clear delimitation to it – and, in addition, buildings, production devices for land cultivation, and other real and movable properties owned collectively (art. 58).

In chapter 4, article 40, the law divides property rights into three categories: ownership rights, usufructuary rights and security interests in property rights in a very detailed way. In addition, Part V deals with possession.

The *individual ownership* includes real and movable properties such as income, houses, living goods, production tools, and raw materials (art. 64) as well as savings, investment, returns, and right of inheritance (art. 65).

Usufructuary rights include rights to possess, utilize and obtain profits from the real or movable properties owned by others (art. 117).

The law stipulates in art. 170 that the holder of security interest shall have priority in satisfying its claims if the debtor defaults in its obligation. Such security interest covers principal creditor’s right and its interest, penalty, liquidated damages and expenses for storage of pledged assets and enforce-

ment of security interest (art. 173), including right to mortgage (art. 179-2007), right of pledge (art. 208-229) and lien (art. 230-240).

The reader is well advised here to note that the terminology used in the law – and used in this paper, based on the English translation of the law – may not correspond to the legal terminology of other countries. Thus, e.g. while the notion of *security interest* under US law presupposes an *in rem* security device, in China this term would extend also to such *in personam* devices as penalties. Similar terminological dilemmas may be raised to the term *lien*. Generally, a *lien* is a form of security interest granted over an item of property to secure the payment of a debt or performance. The owner of the property, who grants the *lien*, is referred to as the *lienor* and the person who has the benefit of the *lien* is referred to as the *lienee*.

In the United States, the term *lien* generally refers to a wide range of encumbrances, includes other forms of mortgage and characteristically refers to *non-possessory security interests*. According to the new Chinese property law *lien* is actually a right of retention.

The property regulated in the law embraces both real and movable property without, however, giving a definition of them. In general understanding we assume therefore that real property includes, for private purposes, land, apartments and houses, while the movable one (or *personal* or *tangible assets* in US terminology) includes means of production, intellectual property rights, savings and other incomes. On the other hand, virtually all forms of the intellectual property rights (IPR), including patents, trademarks, business secrets, copyright and computer software, are protected by the IPR laws and international agreements,⁴³ while the foreign direct investments by special laws as well, not by the Property Law alone.⁴⁴

From this classification it seems that the influence of the German BGB is predominant at least concerning the regulation of the ownership rights, and usufructuary rights, while the security interest in personal property is more likely to have been primarily influenced by US legislations (i.e. article 9 of the Uniform Commercial Code which deals with transaction secured by security interests).

⁴³ Since the end of the Cultural Revolution, China has built from virtually none to a legal framework for the protection of IPR. See Mark E. Schaub, China: The Art of Law. Chronicling deals, disasters, greed, stupidity and occasional success in the New China, Hong Kong 2006, p. 326 et seq. See also Andrew C. Mertha, Shifting Legal and Administrative Goalposts: Chinese Bureaucracies, Foreign Actors, and the Evolution of China’s Anti-Counterfeiting Enforcement Regime, in: Neil J. Diamant/Stanley B. Lubman/Kevin J. O’Brian, Engaging the Law in China. State, Society, and Possibilities for Justice, Stanford 2005, pp. 161-192.

⁴⁴ See Mark E. Schaub (n. 43), pp. 37-62 and pp. 65-90.

V. Significance of the property law reform

The new property law is certainly a landmark in the Chinese legal history. Analysts see the move as an important step away from Chinese egalitarianism and towards a market economy.⁴⁵ It also protects the right of citizens to own lawfully earned income, savings, houses and other lawful property⁴⁶ and denies the right of the state to expropriate them without prompt and adequate compensation.

However, not everybody is convinced of the positive effects of the new property law. Thus, some Chinese businesspeople have expressed their concerns that the provision stating that "citizens' legally obtained private property shall not be violated" might give local government excuses to declare a citizen's property illegal and seize it at will.⁴⁷ Though Chinese leaders are increasingly worried that the growing gap between rich and poor poses a threat to the country's political stability, farmers and city dwellers are routinely forced out from their homes when developers and local officials decide that the use of land, where farmers and city dwellers have their houses or apartments in property, would be more profitable for a new and luxurious apartment block, government building or shopping mall.⁴⁸ Harsh critics came from the New Left in China as well. Gong Xiantian, professor of law at the Beijing University, wrote in an open letter that the property law is "*handmade for capitalism*" and would only promote the transition of state-owned property to private one.⁴⁹ He further argued that the draft law violated article 12 of the Constitution (which declares that state property is inviolable) and basic principles of socialism. Gong Xiantian published his appeal on the Internet and ignited with it considerable controversy. In late 2006 he even issued a second letter in which he and his supporters attacked the draft law again. However, in this letter Gong Xiantian also made proposals for the modification of the draft law. As the resistance against the draft law rose, the Chinese government launched an extensive campaign to defend the draft law and its constitutionality. Also Xinhua and other state-run media published detail explanations on this issue. Wu Bangguo, the chairman of the Standing Committee of NPC, and other

senior staff members of it also confirmed in press conferences the constitutionality of the draft law creating thus an unprecedented official defense of the constitutionality of a national law.⁵⁰

But others, like James Dorn, a specialist on human rights and economic matters at Washington's Cato Institute, says the changes are more than mere symbolism. According to him, over time these changes will provide a legal basis for private property and a market economy that subsequent laws can build on. According to Dorn more legal cases are going to be brought against the government or against violations of contracts based on the property law.⁵¹

VI. First court decision

The first case concerning China's landmark property law has reached the court just a week after the law came into effect.

A 60-year-old man surnamed Mr. Shen filed a lawsuit against the Zhongjiixin auction company for auctioning off six apartments he bought for RMB 1.2 million in 1998 from a Mr. Yan. Mr. Yan was convicted of taking bribes in 2002 and had his property confiscated. The Intermediate People's Court of Shijiazhuang, in Hebei province, ruled nevertheless that the houses were owned by Mr. Yan and entrusted the Zhongjiixin auction company to conduct the sale. Mr. Shen said that if he failed to retrieve his house, he would sue the Intermediate People's Court of Shijiazhuang and ask for compensation from the government. However, the court hearing was deferred because the auction company "did not receive the subpoena" (i.e. a command to appear at a certain time and place to give testimony upon a certain matter), according to the speaker of the auction house. As Mr. Shen's appeal was in accordance with the articles 4 and 64 of the Property Law ensuring an individual's lawful possession of property and its inviolability, it will certainly be utmost interesting to follow the outcome of this lawsuit.⁵²

More lawsuits may be expected to be filed from those whose apartment and house or agricultural land use rights have first been expropriated and then resold to developers leaving the expropriated persons without any or with only little compensation though the new law explicitly foresees in art.

⁴⁵ See: China announces new property law, <http://news.bbc.uk/2/hi/asia-pacific/6429317.stm>, visited November 10, 2007.

⁴⁶ Better Protection of Private Property Hailed, in: <http://www.china.org.cn/english/2004/Mar/89880.htm>, visited November 10, 2007.

⁴⁷ Idem.

⁴⁸ Maureen Fan, China Looks to Protect Private Property, in: Washington Post dated March 9, 2007.

⁴⁹ Andreas Hoffbauer, Neues Eigentumsrecht in China. Abschied von Marx und Mao, in: Handelsblatt dated March 8, 2007.

⁵⁰ Keith Hand, Can Citizens Vitalize China's Constitution? in: Far Eastern Economic Review, Vol. 170, No. 4, May 2007, p. 17.

⁵¹ Mark Baker, China: How Significant Are The Recent Changes To The Constitution, in: <http://www.globalsecurity.org/wmd/library/news/china/2004/china-040322-rferl01.htm>, visited May 15, 2008.

⁵² See: http://news.xinhuanet.com/english/2007-10/09/content_6853757.htm, visited November 9, 2007. See also <http://www.china-embassy.org/eng/xw/t370764.htm>, visited the same day.

42 that expropriation may only be made for *public use or purposes* and *against compensation*. But what are “public use or purposes”?

In this context it is interesting to see the US case law practice as decided quite recently, for example, in the *Kelo et al. v. City of New London et al.* case by the Supreme Court of USA.⁵³

In this case, after approving an integrated development plan aiming to revitalize its ailing economy, the city of New London, Connecticut, purchased most of the property earmarked for the project from sellers willing to sell but initiated proceeding for taking when the petitioners, the owners of the rest of the property, refused to sell. Petitioners claimed, *inter alia*, that the taking of their properties would violate the “public use” restriction in the Fifth Amendment’s Taking’s Clause. The trial court granted a permanent restraining order prohibiting the taking of some of the properties, but denied relief as to others. The Connecticut Supreme Court upheld all of the proposed takings. It stated that “the takings at issue here would be executed pursuant to a carefully considered development plan, which has not been adopted ‘to benefit a particular class of identifiable individuals’”. Thus, “because that plan unquestionably serves a public purpose, the takings challenged here satisfy the Fifth Amendment”. The Supreme Court held that the city’s proposed disposition of petitioners’ property qualifies as a “public use” within the meaning of the Taking Clause.

In China, there are plenty of places almost in every city where new urbanization plans will be implemented in the future resulting in mass expropriation of property in houses or apartments. It would not be surprising if the Chinese courts would, in such cases, use the above mentioned US notion of “public use” to cover such takings.

VII. What follows?

The constitutional amendment protecting private property and the enactment of the property law are landmarks in the Chinese legislation in the sense that they introduced legal norms that did not exist before neither in the PRC nor in the Eastern European communist regimes. These new provisions strengthen the private initiative in China providing a more secured basis for entrepreneurship and more security for owners of movables and immovables. The question remains, however, *how will the courts apply these new legal provisions?* Based on the above cited US case law, it might be expected that land use rights, houses and apartments will continue to be expropriated whenever development plans will be adapted by local authorities. However, the implementation of such plans would in the future probably be less arbitrary than it was at many occasions in the past. In addition, this new legislation will certainly boost the upcoming entrepreneurial activities in the future.

⁵³ <http://www.law.cornell.edu/supct/04-108.ZS.html>, visited May 12, 2007.