

Constructing Chinese Property Rights: East and West

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Several studies in this volume examine property rights in specific local contexts within two Asian empires and several others look at the interaction between British property concepts defined by law and political theory and the social realities of England or colonial India. They describe how new imperial laws and changes in the economic power of local actors transformed claims to land. If we shift our attention to the contemporaneous Qing Empire of China (1644 - 1911 CE), we can also find analogous changes. A number of scholars have recently begun to publish studies that pursue these themes.

Here, however, I look at a different, but related question: how Western observers from the eighteenth century to the present have represented Chinese property rights. Even though Europeans never fully colonised China, they shared with British colonial administrators underlying assumptions about the nature of Asian societies which determined their conceptions of Chinese property rights. These stereotypes of imperial property rights, like cognitive maps, imposed static simplifications on unruly practice. Like imperial cadastral surveys, they served as tools in significant political debates and supported European mastery of the East. I aim to criticise the flaws in these conceptions and demonstrate the lineage that links them to imperial concerns. Showing the disjunctures between these schemes and the complexities of practice while recognising multiple forms of definition of property in both

East and West might lead some contemporary theorists to be more modest, more accommodating and less imperial in their mappings as Alain Pottage recommends.¹

The following two quotations display a glaring paradox in common conceptions of the relationship between property rights and economic growth in imperial China:

[1] [China] was a centralized state in which the decisions over property rights emanated from the center and could be and were changed by the whims of an emperor... Chinese history is replete with arbitrary alterations in policies that fundamentally influence opportunities. In his *Oriental Despotism* Karl Wittfogel had the wrong explanation for the centralization [a consequence of an irrigation system], but the right intuition that centralized controls are antithetical to development in the long run.

[2] Highly competitive factor and product markets allowed for the exchange of resources and the production and distribution of goods and services by households...households increasingly contracted with each other to exchange resources of all kinds of procedures based on what I have termed customary law...the imperial state looked upon this activity with approval – even consenting to adjudicate violations of contracts between private parties – these private contracts served as an effective device for greatly reducing transaction costs...The state combined the role of noninterference or slight modulation of the private sector with very limited

¹ Pottage, 2003.

authoritarian allocation of resources so as to create a fairly beneficent economic environment for private enterprise.

The first quotation comes from the Nobel Prize winner in economics, Douglass North.² The second comes from an essay by Ramon Myers, North's student, in a *Festschrift* for Douglass North.³ How can two distinguished representatives of the institutional economic history school come to such contradictory conclusions about imperial China?

We could resolve this question easily by looking at the evidence. The first view relies on no empirical research and cites Wittfogel's long discredited theoretical work. The second, along with many other recent studies of Chinese legal institutions, relies heavily on detailed examination of archival and published primary sources in Chinese, especially land contracts and legal cases in Chinese courts concerning land tenure. On empirical grounds alone, viewpoint 2 wins hands down.

But, I would like to pursue the question further. This radical division of views about imperial China's property rights regime has a long lineage, extending back at least two hundred years, to when Westerners first came into contact with China. Since the eighteenth century, there has been a continual opposition between a theory of 'Oriental despotism' that suppresses and ignores inconvenient evidence about Chinese social realities and a idealised theory of a *laissez-faire* state which has its own limitations. Neither of these abstract models, derived from Western concepts of the 'Oriental other', captures fully imperial China's social complexity. How can we bring theory and empirical research closer together? Although a

² North, 1995, p. 21.

related critique can be made of the *laissez-faire* perspective, I focus here on the ‘Oriental despotism’ view because it still is the dominant one in popular and much scholarly discourse.

The question of the relationship between property rights and economic growth lies at intersection of three distinct theoretical and historical perspectives: those of legal scholars, economists and social historians. All three address the central paradox in different ways. This question is a vital site of convergence of three distinct approaches, but work in each of these areas mostly goes on separately from the others. Ships pass in the night far too often in academic discourse. My goal is to position these three in relation to each other conceptually so as to provoke new research in all these fields.

First, I argue that a highly misleading assertion about the absence of secure property rights in China is surprisingly influential among a variety of Western social theorists who focus on differences between the long-term historical evolution of Asian and Western societies. Second, recent studies by historians of Chinese legal institutions have severely undermined the once-accepted premises on which these theories are built. The empirical scholars, however, have not directly confronted the social theorists and the social theorists have neglected the significance of this new research. By bringing these two literatures together, I hope to point the way toward more productive investigation of these important questions.

Inadequate theories cannot be refuted merely with ‘nasty, ugly facts’. They need conceptual challenges to their underlying presuppositions. Without such challenges, the same theoretical assumptions persist despite inconsistencies. Misunderstanding of the ‘Oriental other’ is

³ Myers, 1982, pp. 280, 296-297.

deeply imbedded in Western theory and may even be necessary to it. But, recent developments in legal, economic theory and social history offer some hope for convergence at the cost of unbundling or dismantling a coherent parsimonious model of economic growth.

Theories of Oriental Despotism

The notion that there is no private property in land in Asia, by contrast with the West, is deeply rooted. We could trace it back as far as Herodotos' contrast between the Greeks and the Persians, but the most systematic exposition of the idea comes from the French Enlightenment. Montesquieu relied on this claim to support his model of 'Oriental despotism', one of the essential building blocks of his theory of laws and states. Following him, Hegel, Marx and many others elaborated different versions of the model, culminating in Karl Wittfogel's notorious book of the same name which blamed the success of Soviet communism on the spread of the Oriental despotic state from its roots in ancient Asia, transmitted by the virus of the Mongol conquest, to imperial Russia. Wittfogel found the malignant traces of the despotic 'hydraulic state', purportedly based on absolute control of water supply in Africa, Asia, Russia - everywhere except Western Europe and the United States.⁴

The ludicrously overblown Wittfogel theory, so clearly a product of the Cold War, no longer carries much conviction except for the ideologically committed, but less strident versions of the 'Oriental despotism' argument have popped up in surprising places. Chinese intellectuals, during the reform period before 1989, invoked 'Oriental despotism' in its Marxist guise, the 'Asiatic mode of production', to explain the extremely destructive totalitarian mobilisation of

⁴ Wittfogel, 1957.

the Maoist period. They linked the lack of individual freedoms and the complete suppression of civic autonomy to the heritage of the imperial bureaucratic state which, they argue, provided no ground for individual property rights and no basis for autonomous civic associations. A prize-winning dissertation in political science by a Chinese author trained in the U.S. has revived much of the despotism model in terms of modern political theory.⁵ I have criticised these arguments elsewhere as excessively determinist and not based on the best available knowledge about the social processes of late imperial China.⁶ It is one thing to argue that the weakness of autonomous civic institutions made possible the communist takeover in 1949 and another to claim that the Communist Party actively built on the despotic legacy of the imperial state, a state, we should remember, which they regarded as completely stagnant, backward and nothing but an obstacle to a modern revolutionary socialist movement.

The influences of this kind of thinking, however, go beyond China. Quite a number of grand social theorists have invoked or alluded to imperial China in attempting to explain the special characteristics of the modern West. Below, I examine briefly a few of their assertions. They all focus on a comparative analysis of legal, economic and social institutions in early modern Europe (ca. 1500-1800 CE) and imperial China (ranging variously over the time period ca. 600 BCE to 1800 CE). Only part of any one theoretical model relies on arguments about property rights in imperial China, but I think that there is a common thread running through these discussions that, in effect, unproblematically accepts the Montesquieu to Wittfogel line of argument. These theories themselves are part of a time-honoured Western tradition counterposing China or the Orient to the West. We may note here two points that link them to their Enlightenment forebears: they are mainly interested in examining the nature of Western

⁵ Yang, 1987.

capitalist society, not in an accurate portrayal of China, and they have implicit or explicit political aims in their critiques for which the Orient serves as a foil, usually a negative one. Montesquieu used China as his image of a despotism which *ancien régime* France must avoid. Wittfogel used China and the Soviet Union as the nightmare that threatened Western liberal society if it did not awaken to the Communist menace. Chinese intellectuals take China's backward 'feudal' past as the legacy to be destroyed by rapid Western-style modernisation. Economic historians tend to describe China as the over-regulated state *par excellence* whose giant bureaucratic apparatus strangled the potential for economic growth. Legal theorists single out China as a place without a Western style 'legal order', one where bureaucracy, custom and arbitrary justice reigned.

So, although it is rather easy to refute the schematic model of 'Oriental despotism', its traces are powerful enough to create a force field that deflects other more sophisticated theories. As a historian, I normally mobilise evidence first and theoretical abstraction second in the service of critique. Here, I can only allude to some of the recent studies that demonstrate the rich complexity of imperial Chinese property rights. Although this study has primarily a deconstructive tone, we may only be able to move forward toward a more nuanced dialogue of social theory and Chinese history after a detailed critique. Although many other facets of these theories deserve discussion, I focus here mainly on the question of property rights, both in the broad sense of the overall relationship of political and social orders to property and the narrow sense of legal cases and procedures concerned with (primarily landed) property.

Montesquieu: L'Esprit des Lois

⁶ Perdue, 1994.

Let us begin with Montesquieu. The political theory of despotism did not begin with *L'Esprit des Lois* (The Spirit of the Laws), published in 1748. The contrast between the free West and the despotic East goes back to Herodotos' contrast between Greeks and barbarians during the period of the Persian Wars.⁷ R. Koebner has traced the changing meanings of the word, "despotism", from Aristotle through the Renaissance.⁸ Lucette Valensi, in a fascinating little book, argues that modern conceptions of the despotic Oriental state originated in Venetian ambassadors' reports from the Ottoman Sultan's court in the sixteenth and seventeenth centuries. They fixed, in the European mind, the memorable image of an all-powerful, unbelievably wealthy sovereign, irredeemably alien to European religion and culture and determined on its eradication. Most appalling, native-born Christians themselves were bred up by Ottoman rulers to be converted to Islam and made loyal slaves of the despot in the notorious Janissary system.⁹ But Montesquieu was the theorist who systematically enunciated the basic principles of the despotic state.

Montesquieu, of course, was also a significant point of reference for the American founders of the Constitution. Both Federalists and anti-Federalists referred with respect to Montesquieu in support of their arguments. Alexander Hamilton thought that Montesquieu provided "a luminous abridgment of the principal arguments in favour of the Union".¹⁰ Anti-Federalists, on the other hand, cited "the celebrated Montesquieu", one of "the greatest and wisest men who have ever thought or wrote on the science of government", to show that "so extensive a territory could not be governed, connected, and preserved, but by the supremacy of despotic

⁷ Anderson, 1979.

⁸ Koebner, 1951.

⁹ Valensi, 1993.

¹⁰ Rossiter, 1961, p. 5; Rose, 1994, pp. 82-83.

power”.¹¹ And the despotisms that Montesquieu and his disciples had primarily in mind were imperial Rome and imperial China.

Regarding China, Montesquieu rejected a competing line of argument, that of the physiocrats, who viewed China as a despotism, to be sure, but one where the power of the sovereign was restrained by natural law and custom. The physiocrat François Quesnay stated, “I have concluded from the reports about China that the Chinese constitution is founded upon wise and irrevocable laws which the emperor enforces and which he carefully observes himself.”¹² Physiocrats also praised the light level of taxation, the apparent absence of venality in government service and the tradition of care for the people embedded in Confucian moral values of ‘benevolence’ and put into practice by institutions and rituals. They cited the emperor’s annual ritual of plowing the soil to show his concern for agriculture, they noted the high productivity of Chinese agriculture and they recognised the value of the ever-normal granary system which stored large quantities of grain around the empire for the purpose of famine relief. Voltaire, Montesquieu’s greatest rival, attacked *L’Esprit des Lois* directly for its distorted conception of despotism:

Recent writers seem to enjoy, I really do not know why, calling “despotic” the sovereigns of Asia and Africa. One used to mean by “despot” a petty European prince who was a vassal of the Turk... This word “despot” originally meant in Greek master of a household, paterfamilias. Now we grant liberally this title to the Emperor of Morocco, the Great Turk, the Pope, the Emperor of China.¹³

¹¹ Ketcham, 1986, pp., 242, 275.

¹² Quesnay, cited in Perdue, 1987, p. 1.

¹³ Koebner, 1951, p. 275.

Montesquieu was unimpressed. To him, China had been and always would be a pure despotism, where the population lived in poverty and slavery:

Our missionaries tell us of the vast empire of China as an admirable government, which mixes in its principles fear, honor, and virtue. If this is so, I have created a useless distinction of principles between the three types of government. I do not know what kind of honor they are speaking of in referring to a people who will never do anything unless they are driven to it by clubs... China is thus a despotic government, whose principle of rule is fear.¹⁴

Because of climate and topography, he argued, there were no restraints on the autocratic power of the emperor. (The inconvenient fact that China does have large mountain ranges, river systems and spans both tropical and temperate zones made no impact on the theory.) As this quotation shows, Montesquieu realized that if China could not be described as a despotism, the fundamental classifications of his theory could not stand.

Montesquieu clearly ignored some obvious evidence about Asia that did not fit his model. He argued, for example, that there could be no dowries in despotic governmental systems because women, like all Asiatic subjects, were nothing but slaves themselves and became the complete property of their husbands after marriage. He surely must have known about the tremendous importance of dowries in both China and India which travellers and Jesuits reported, but he omitted this and other contrary evidence.

¹⁴ Montesquieu, 1951, p. 365-367

In the debate between Montesquieu and his opponents, both sides relied on essentially the same evidence: the voluminous reports by Jesuits from the court at Peking collected in the *Lettres Édifiantes*; other travellers' reports; the general history of China compiled from Chinese sources and translated by du Halde and a few limited translations of portions of Chinese classic texts. Both sides had political points to make at home and they were certainly more concerned with reforms of the French state than with objective descriptions of China. Physiocrats pushed for lighter taxation and more rational allocation of office based on the Chinese ideal, despot theorists warned that the French state could turn into a crushing Asiatic juggernaut if steps were not taken to protect the autonomy of the nobility and to institutionalise checks and balances within the state. China was a mirror on which were projected Western fears and aspirations and the reflections were viewed with distorting lenses.

Yet, other comments by Montesquieu reveal more favourable attitudes toward imperial China. The clear precepts of his abstract model which assumes that governments lacking the restraints of aristocratic or republican institutions can only exhibit arbitrary power based on force contradict his awareness that the formal despotic structure of the Chinese empire, in fact, had produced remarkable cultural and economic achievements. The secular Montesquieu faced the same paradox as his Catholic enemies. They knew, especially the Jesuit observers of the Chinese court, that here was a country without the Christian religion which, nevertheless, maintained moral and cultural order at least as well, if not better than the *anciens régimes* of Europe. The Chinese paradox was an essential element fueling the rational skepticism of the

French Enlightenment.¹⁵ But, the same Chinese paradox implicitly undermined the breathtaking clarity of Montesquieu's political theory.

Montesquieu himself seldom referred to the absence of property rights in Asiatic despotism, but other writers took it for granted. Nicholas-Antoine Boulanger, for example, described the Orient as the land of

... the man who has no will kissing his chains, *the man with no property or safe fortune worshipping his tyrant*, the man with no knowledge of man or reason and whose only virtue is fear; and what is truly surprising and puzzling is that it is there that men take their servitude to heroic extremes, numb themselves to their own existence and with pious imbecility bless the savage whim that often takes their lives, the only thing they might be said to possess but which, according to the law of their prince, belongs to him alone to do with as he pleases.¹⁶

Montesquieu and his supporters connected the purported absence of private property rights in land to personal lack of civil rights and economic backwardness in willful defiance of readily available evidence about the reality of life in the Chinese empire.

Roberto Unger: Law in Modern Society

The work of Roberto Unger, one of the founders of the school of Critical Legal Studies, is of course much more familiar to legal scholars than to historians of China. Unger's focus is "the

¹⁵ Pinot, 1971.

¹⁶ Cited in Valensi, 1993, p. 3, my italics.

place of law in modern society”.¹⁷ By law, he means the specific form of legal order established in the post-Renaissance West. In his analysis, the Western legal order consists of general, autonomous, public and positive rules. It stands apart from other social institutions; it has its own specific style of reasoning and its own occupational autonomy. By contrast, customary law does not make clear distinctions between choosing rules and making decisions under rules and bureaucratic law consists only of explicit rules made by centralised governments.

Unger rightly rejects social theories that posit a universal human nature and argues for the need to respect historically grounded accounts of society. The Western legal order emerged in early modern Europe from two developments. First was the development of group pluralism which forced the state to recognise society as the reign of conflicting interests as community solidarity declined. Sovereigns created rules cutting across class and rank lines which claimed general allegiance, so it was in the interests of all classes to support them. But, the early modern state builders could not create a pure bureaucratic law governed only by their own expediency because the nobility and the third estate opposed them. The structure of the *Ständestaat* (estate order) in Europe ensured that each estate fought for its own interests to curb governmental power, but by a process of compromise in dynamic balance, they created the liberal state.

The second crucial element in the creation of the Western legal order, according to Unger, was the heritage of natural law derived from Greco-Roman and Judaeo-Christian civilization. This fostered the idea of universal regularities both in nature and in social life. The higher

¹⁷ Unger, 1976, p. 44.

law, seen as transcending the human order, made possible radical criticism of society, going beyond following rules to evaluating their rightness. Only in the modern West could the secular order be influenced by sacred God-given natural principles. Thus, liberal society was the result of sacred higher law combined with interest group pluralism, the two tempering each other.

Unger's perspective has much in common with that of Max Weber and many of the same defects. Weber, in analysing the religion of China, stressed the contrast between transcendental religion of the West and the Chinese concept of immanent natural order. According to both Weber and Unger (falsely), the Chinese immanentist theory made radical criticism of existing social conditions impossible. Unger, like Weber, also finds that neither ancient India, Islam or Israel contained the crucial prerequisites for legal order.

In Unger's analysis, even though the Chinese had achieved the separation of state from society and created public-positive bureaucratic law, their society was alien to the rule of law. Chinese religion contained both transcendent and immanent elements, seen in the two concepts of deity in ancient China: *shangdi*, a personified transcendent being, and *tian* (Heaven), an immanent cosmic impersonal force. The transition to a bureaucratic state in the third century BCE proceeded concomitantly with a shift from transcendent *shangdi* to immanent *tian*, removing the possibility of outside critique. Thus, ancient China lacked universal laws, it lacked a priesthood which could check governmental power and it lacked a notion of a personal relationship to God that could support individualism. *Fa* [law] expanded to become positive and public state law, completely subject to the rulers' use, lacking any autonomy from the ruler's commands. *Li* ('custom', in Unger's mistranslation) remained only a commitment to particular social relations and did not form the basis for positive rules. Both

Confucian philosophy, which insisted on the return to *li*, and Legalist philosophy, which demanded faith in coercive regulation, were incompatible with the ‘rule of law’.

William Alford has subjected Unger’s conception of ancient China to a sharp critique which I will only briefly summarise here and add a few comments of my own. As Alford notes,¹⁸ Unger totally misinterprets the meaning of the term *li* which means much more than primitive custom and he completely neglects the significance of other key elements of ancient Chinese political thinking: the Mandate of Heaven, Taoist and Moist philosophy and the existence of written public law before the sixth century BCE. Public law as far back as the twelfth century BCE was not confined to penal law, but also included international treaties, tax regulations, family codes and monetary policy. *Li* are better seen as public rituals that define ‘due process’ behaviour: they do not simply merge what happens and what ought to be done. Confucians did not oppose public law, but insisted that formal rules had to be supplemented by moral suasion. They were not always subject to arbitrary commands by autocratic rulers, but frequently took an independent stance. Even the Legalists, worshippers of a powerful state, stressed not only absolute state power, but stability and predictable order which applied as much to the ruler as to his subjects. And “Taoists seem to have had an intense faith in the capacity of men, and perhaps of all human beings, to transcend the limitations of social arrangements within which they found themselves”¹⁹.

Unger, despite his ambition to transcend the limitations of Western liberal theory, remains solidly within it and shows little respect for the contributions of non-Western philosophy. His discussion of China relies almost entirely on rather old secondary literature and he never

¹⁸ Alford, 1986.

analyses any primary Chinese sources in detail, even though all the major philosophical works are available in translation. Most important for our purposes, he never discusses Chinese legal practice because his discussion is pitched at such a high level of abstraction. Alford, by contrast, has shown by detailed analysis of a single legal case that Chinese law was not merely an instrument of state control. The law codes never uncritically supported a local magistrate's decision, which was always subject to review by higher authorities and the appeal process was, in fact, invoked frequently all the way up to the emperor himself through direct "capital appeal" (*jingkong*).²⁰

Even if we look only at procedural aspects, we should note that an alternative tradition of interpretation of Chinese law in the West focused not on its despotic arbitrariness, but on its carefully structured process of bureaucratic review. Western observers in the eighteenth century had noted with admiration the Autumn Assizes review process which required that all capital sentences be reviewed yearly by the emperor and his councillors. Imperial pardons spared many criminals sentenced to execution. Early modern European rulers, although they might give individual pardons, had no such institutionalised review process.

This abstract discussion takes us far away from the issue of property rights, but it indicates some of the problems with this level of theoretical analysis. These models typically focus on ancient Chinese philosophy, fail to examine original texts in critical detail, neglect social practice and assume that nothing significant changed from 200 BCE to 1911 CE. Their excessively high level of abstraction fails to capture the most important insights of comparative analysis. Imperial China fits very poorly into the schematic tripartite analysis of

¹⁹ Alford, 1986, p. 961.

societies into "tribal", aristocratic and liberal used by Unger and others. Instead of Procrustean efforts to force China into Western typologies, we need a form of analysis that critically reflects on the limitations of Western theorising by seriously respecting the categories of a different time and place.²¹

The implications for property rights, although Unger does not develop them, are clear. With no standpoint of critique outside the state, there could be no security of tenure. If all land belonged to the state, rules for land transfer could only be devised for bureaucratic convenience, not for private gain. The state might want to assist the advance of production in order to increase its tax income, but it would certainly ensure that it gained the lions' share of any surplus created by individual investment or technological advance. Some historians who look at large scale economic change have drawn out the specific implications of these assumptions.

Eric Jones and the Economic Historians

Eric Jones is an economic historian who is not afraid to tackle the big questions. He addresses boldly the contrasts between East and West in two books: *The European Miracle: Environments, economies, and geopolitics in the history of Europe and Asia*²² and *Growth Recurring*.²³

²⁰ Alford, 1984.

²¹ To his credit, Unger has, in later work, moved toward greater respect for Chinese thinking, expressing some admiration for Confucian moralism, but the excessively high level of abstraction remains: Unger, 1987.

²² Jones, 1987.

Jones incorporates environment, population, technology and, loosely speaking, culture into his comparative analysis of why Europe grew so rapidly in the early modern era and Asia, in his view, did not. He also discriminates between different Asiatic empires: the Turkic, the Indian and the Chinese although, clearly, the Chinese empires (Ming, 1368-1644, and Qing, (1644-1911) seem to fit his model least well. The basic model is one of an Asiatic predatory state, one which monopolises control of all economic and political resources, extracts them ruthlessly from its subject populations for purposes of war and wealth and does not redistribute the resources in any institutionalised form to its people. Europe, he argues, had superior devices for redistribution of food and for quarantine against disease when Asiatic empires did nothing. Again, it is the lack of individual property rights in land in Asia that made possible this super-exploitation while the geographical and social fragmentation of Europe created pockets of autonomy where local authorities or subjected peoples could resist the juggernaut of bureaucracy. Jones quotes with approval the terse summary: “property is insecure. In this one phrase the whole history of Asia is contained”²⁴ and, once again, puts forth Montesquieu’s conclusion that “there reigns in Asia there a servile spirit.”²⁵ Differing only slightly from his predecessors, he argues that the Ottoman, Mughal and Manchu empires “were not timeless despotisms. They were regimes of conquest originating from the steppes, unable to survive efficiently without fresh land and spoils, and terrifyingly prone to inhibit development”²⁶.

²³ Jones, 1988.

²⁴ Winwood Reade, *The Martyrdom of Man*, London, Watts, 1925, cited in Jones, 1987, p.165.

²⁵ Montesquieu, 1951, cited in Jones, 1987, p.166.

²⁶ Jones, 1987, p. 171.

Jones' work, though it includes many provocative insights, provides an incredibly rich catalogue of misconceptions about Asian empires. Despite frequent assertions of insecurity of property in Asia, he never bothers to examine property laws in practice. He contents himself with the usual random anecdotes that describe savage rulers amassing extravagant wealth and the confiscation of goods from their subjects. (A telling omission is that even larger European royal confiscations such as Henry VIII's seizure of monastic lands or the French expulsion of the Huguenots never appear in these macroeconomic accounts.) He claims that private merchants lived 'on sufferance' because they had no independent legal system to shield them from state demands. Therefore, imperial China, despite its dramatic technological gains up to the fourteenth century, lapsed into stagnation under Malthusian pressure thereafter because of the blighting effect of its despotic imperial state which was nothing more an "imposed military despotism, revenue pump, and plunder machine".²⁷

Jones' thesis has severe empirical deficiencies as a few simple facts demonstrate. This Asiatic 'revenue pump' extracted only three to four percent of GNP in official tax levies; even doubling this figure to allow for 'informal' levies hardly amounts to devastating impositions. The Qing state bureaucracy governed 300 million people with a salaried official class of no more than 20,000 men. Imperial China, in the eighteenth century, had by far the most extensive and elaborate institutions in the world for redistributing food to people in need.²⁸ It not only recognised but promoted security of tenure, making great efforts to regulate land markets and to return famine refugees to their lands. The individual landholder, self-sufficient on his plot, able to pay taxes in cash to the state, was the ideal of Qing imperial administration. Famine relief measures aimed to overcome social disruption by returning

²⁷ Jones, 1987, pp. 202-222.

uprooted peoples to their land. It was not imperial authorities who engaged in land grabs but powerful local elites; these were the people whom imperial authorities suspected the most and attempted to restrain. Like officials of the late Roman Empire, they recognised the dangers to the state of large landless populations and of land concentration by local elites, but they intervened far more effectively than their European contemporaries who took, at best, local palliative measures, but had few statewide institutionalised civilian provisioning policies.²⁹

We can recognise common styles of analysis that link the political theorist, the legal analyst and the economic historian. The excessively high level of abstraction, the lack of concern with how institutional orders and legal statutes affected social practice, the airy binary generalisations about ‘Europe’ and ‘Asia’ all betray the unmistakable marks of Orientalism. We have not progressed very far, it seems, in the 250 years since *L’Esprit des Lois*. The economic historian, above all, should be interested in the real impact of states and laws on economic behaviour in the long run. The sources are available for such investigations. Jones’ use of rather bizarre and outmoded sources on China which have little grounding indicates more casting around for useful tidbits for a predetermined argument than serious investigation.³⁰

North and Thomas: the Rise of the Western World

²⁸ Will, 1990, reviewed by Perdue and Wong, 1983; Will, Wong, *et.al.*, 1991.

²⁹ For Jones’ unconvincing response to Wong and Perdue; Will, Wong *et al.*, see Jones, 1987, pp. xii-xiii.

³⁰ Jones, like Unger, does provide a more nuanced account of imperial China in his later work, *Growth Recurring* (1988), but many of the basic features of this analysis remain.

Much of the comparative analysis of Jones and other economic historians builds on the premises outlined by Douglass North and Robert Thomas³¹ on the causes of the rise of the Western European economies. Although North and Thomas never mention Asia, they endorse the principle that Europe distinguished itself in the early modern period from the rest of the globe by its ability to generate efficient allocation of labour, capital and natural resources. (Imperial Spain often stands in for the Orient in this model.) The enforcement of individual property rights was the essential factor in allowing the creation of price-forming markets and it was particular policies of certain early modern European governments, particularly, England and the Netherlands, that first made possible the establishment of secure property rights. Once property rights were secured, incentives to individual investors ensured sustained long term growth of per capita income.

What specific legal changes do North and Thomas point to? In fact, they say little about specific legislation regarding the use of landed or commercial property. By ‘property rights’, they mean a much broader climate of protection for possessors: the establishment of international peace and domestic social order, reduction of barriers to mobility of factors of production, limited confiscation and taxation by organized governments and active measures by governments to free up factors of production, especially labour. But, all of these measures could well be accomplished by many other states without creating a special realm of ‘legal order’ and without passing particular items of legislation. Several scholars who view China from North’s perspective have found that imperial China also had most of the features claimed to exist in Europe for the securing of property rights. Chang Fu-mei Chen and Ramon Myers point to the very elaborate array of contracts used to negotiate transfers of land, water,

³¹ North and Thomas, 1973.

goods and persons, the absence of serfdom and the high mobility within the expanding commercial empire and the positive effects on commercialisation of the *Pax Sinica* of the mid-seventeenth to the end of the eighteenth century. No specific sphere of contract law was necessary as long as merchants had sufficient confidence that their agreements would be honoured and could be enforced in the courts. Chen and Myers analyse in detail a few of the voluminous printed records of Chinese contracts to demonstrate their sophisticated use in commercial and family transactions.³²

Thomas Buoye also notes the adaptability of the Qing magistrates to changing commercial conditions.³³ In handling disputes over landed property, local officials upheld ideals of harmonious interpersonal relations as paternalist overseers of their subjects. In practice, they had to develop a body of case law to guide them in resolving conflicts. Among other questions, they had to determine which land sales were enforceable: only those with officially stamped written contracts? Those with written contracts, but without official stamps? Oral agreements? They had to decide when an owner who pawned land had the right to redeem it at the original price and whether the term of redemption had to be specified in the original contract. If it was not specified, what was a reasonable time period? Up to five years after yielding possession? Ten years? In a time of rising land values, land pawners inevitably would struggle with land recipients over the terms of redemption. Magistrates who had to handle these sorts of problems in their courts gradually developed useful precedents which were recorded in provincial legal codes.³⁴ These studies demonstrate the flexibility, pragmatism and evolution toward standardised procedure of Chinese land law as it was

³² Myers and Chen, 1976; *ibid.*, 1978.

³³ Buoye, 1993; *ibid.*, 2000.

³⁴ Perdue, 1987, 2001.

developed by local magistrates in the process of settling disputes. Could we not call this the functional equivalent of ‘common law’ for landed property?

Ad van der Woude and Jan de Vries dub the seventeenth-century Netherlands ‘the first modern economy’ and they cite as characteristic features of property rights in the Netherlands just those attributes described above for both late imperial China and early modern England. They argue that tenant leases in the Netherlands ensured incentives to improve agrarian productivity because tenants were relatively invulnerable from confiscation by landlords or the state. China’s customary law provided the same feature in the form of separate topsoil and subsoil rights. Landlords owned the subsoil rights permanently if they paid taxes and obtained official seals on their contracts, but tenants had full rights to topsoil (usufruct) after paying a fixed rent and they could either lease or alienate this right independently. China’s ‘two lords to one field’ and the Netherlands non-feudal property system, in different ways, provided the same incentives for economic investment.³⁵

Once again, the abstract property rights model is too stereotyped to lead to productive comparative analysis by itself. We need to look at actual cases to test whether or not Europeans or Chinese had functionally equivalent property systems that encouraged commercial growth and investment. When we look at examples of legal systems in social practice, imperial China does not come off badly by comparison.

Empirical Scholarship on Chinese Law

³⁵ van der Woude and de Vries, 1997, pp. 160-162.

Social theorists espousing the despotism model of China have found support in older Sinological scholarship on Chinese law. Derk Bodde and Clarence Morris' classic work, *Law in Imperial China*³⁶ contains an overview of the basic principles of Chinese legal thinking that fortifies the Orientalist perspective. They state:

...the written law of pre-modern China was overwhelmingly penal in emphasis...it was limited in scope to being primarily a legal codification of the ethical norms long dominant in Chinese society... it was nevertheless rarely invoked to uphold these norms except when other less punitive measures had failed. Chinese traditional society, in short, was by no means a legally oriented society despite the fact that it produced a large and intellectually impressive body of codified law...Matters of a civil nature were either ignored by it entirely [for example, contracts], or were given only limited treatment within its penal format [for example, property rights, inheritance, marriage]. The law was only secondarily interested in defending the rights -- especially the economic rights -- of one individual or groups against another individual or groups and not at all in defending such rights against the state.

The official law always operated in a vertical direction from the state upon the individual, rather than on a horizontal plane directly between two individuals (A did not bring suit directly against B, but brought it to authorities); no private legal profession existed. Chinese behaviour was shaped much more by the "pervasive

³⁶ Bodde and Morris, 1967.

influence of custom and the usages of propriety” than by “formally enacted system of law”.³⁷

Bodde and Morris’ work is most useful for providing translations, commentary and excerpts from a casebook of imperial court decisions. This *Conspectus (Xing’an Huilan)* contains over 7600 penal cases, covering the period 1736 to 1885. They provide valuable evidence on how officials interpreted and applied the code in China’s highest level courts. These cases, however, are not a reliable guide to the daily operations of local courts nor can they serve by themselves as a valid basis for generalisation about the legal system as a whole. David Buxbaum discovered how misleading it is to focus only on imperial court cases when he examined a local archive from one district in Taiwan which contained 1164 files of cases from 1789 to 1895.³⁸ In the first place, civil cases did not show up at the highest courts because the highest court of appeal for civil cases was at the provincial level. The Qing code did recognise the difference between civil and criminal cases and local magistrates handled significant numbers of civil cases covering, for example, family law, marriage contracts and land and water rights. These cases were disputes between individuals, not ‘vertical’ relations between one subject and the authorities. About fifteen to twenty percent of the files in the Taiwan archive were civil cases and each file could include up to three or four separate civil cases combined together. Magistrates tried to make it easier for farmers to gain access to the courts by refusing to hear civil cases during the busy farming season. Even rather poor farmers could get their day in court. The vast majority of cases were resolved within a year. The courts did not terrify the population in this district and many people made use of them.

³⁷ Bodde and Morris, 1967, pp. 3ff.

Buxbaum also argues that the Qing system fits quite well into Max Weber's criteria for 'rational' law. Qing China had a coherent law code, a hierarchy of courts and a well-established appeals system from the locality to the emperor; it had procedures for processing cases and for amending statutes, reasoning by analogy and rules that were "uniform and unvarying in application". The main difference between Qing and modern legal practice was its inefficiency: communication was slow, court officers could not easily catch defaulters and those who lived a long distance from the court could not always afford to attend its sessions regularly.

Was nineteenth-century Taiwan exceptional? In the 1980s, foreign researchers gained access to the Qing dynasty archives in Beijing which included a vast quantity of legal cases from the entire empire. Research on these materials has only just begun, but the overall picture, presented most recently in the volume edited by Kathryn Bernhardt and Philip C. C. Huang, confirms Buxbaum's picture. The model cases translated by Bodde and Morris, by design, excluded civil cases, but civil cases were in fact a major part of the caseload of the local courts. "Those who assumed that the formal court system of the Qing dealt little with civil matters were simply wrong". Chinese law was not, to be sure, "liberal assertions of a civil society" or "formalistic reasoning from universal abstract principles". The system comprised adaptations to changing social realities by a state mainly concerned with administration and control. But, Chinese as a whole did not see law as an "arbitrary and terrifying presence to be avoided at all costs". They "turned to that system to assert legally protected rights over property, debt, marriage, and inheritance".³⁹

³⁸ Buxbaum, 1971.

Hugh Scogin, a legal historian, argues that in looking at China, Western scholars cannot “view as universal categories historically contingent patterns found in their own legal culture”.⁴⁰ The “tunnel vision” of Western lawyers until recently only studied articulated legal concepts, in order to defend the ideal of an independent legal order. Not until the twentieth century did newer schools of legal history, like ‘legal realism’, consider legal concepts as historically contingent phenomena influenced by social forces. A positivist approach that views law as a body of rules flowing from the sovereign, or a focus on normative aspects of law rather than historical categories, becomes problematic for China. Not all Chinese law came from the sovereign. Law was seen as part of a broader natural order encompassing both local custom and cosmic principles. Henry Maine, the sociologist who opposed ‘custom’ to ‘law’ as a basis for a typology of societies, would define China as backward, but it is not useful to classify China as advanced or backward on this kind of scale. Nor can we draw conclusions about economic effects of law from the predominance of custom. Chinese commercial activities outstripped those of early modern Europe in scale, yet they were based mainly, then and now, on personal relationships [*guanxi*]. The ‘customary’ codes of Chinese guilds formed a more than adequate substitute for commercial law.

Contract law has been seen as the quintessential expression of the independence of the Western legal order. Finding no autonomous sphere of contract law in China, Western observers concluded that trade and investment could not possibly flourish. But the privileged position of contract as a series of principles independent of the status of the parties was severely undermined in the twentieth century:

³⁹ Bernhardt and Huang, 1994, pp. 4, 9, 11; cf. review by Perdue, 1996.

In twentieth-century practice, many of the elements downplayed by the classical will theory and associated with traditional, nonprogressive societies have been reintroduced as contract law has continued to develop. Such factors as status of the parties, officially mandated elements of contracts, reliance as a basis for enforceability, and the role of commercial custom have been resurrected as important determinants of contractual obligations. When one finds elements such as these at work in traditional China, to maintain that they demonstrate the absence of ‘contract law’ says a great deal about one’s analytical framework, but very little about Chinese practices.⁴¹

The very influential article by Lon Fuller and William R. Perdue⁴² substantially altered the view of contracts in Western legal thinking by introducing the concept of ‘reliance interest’. By showing that law and society are intertwined like *yin* and *yang*, it resurrected ideas formerly associated only with ‘traditional’ societies. In social practice, China and the West were not so far apart.

Thus, Western contract law itself turns out not to be so autonomously rational as claimed. And in China, too, there were functional equivalents to contract conceived as “legal effects of consensual transactions giving rise to a relationship of obligation”. Promises and compacts [*yue*] were widely recognised and enforced in China ever since the Han dynasty. Valerie Hansen’s recent work, *Negotiating Daily Life in Traditional China: How Ordinary People*

⁴⁰ Bernhardt and Huang, 1994, p. 41.

⁴¹ Scogin, 1994, p. 33.

⁴² Fuller and Perdue, Jr., 1936; *ibid.*, 1937.

used Contracts, 600-1400,⁴³ is a superb exploration of the extremely pervasive influence of contracts in Chinese daily life. The oldest extant Chinese land contracts date to the first century CE. They are probably some of the oldest in the world. Documents preserved in the desert and in Buddhist caves dating from the eighth and ninth centuries show that contracts were used by all strata of society, even the poorest, for a great variety of purposes: transfers of land and goods, marriages and family matters. They appear in religious documents and in fictional tales as well as in government archives. The state switched its *de facto* approach to the registration of land as contracts spread: while land tenure was officially recognised only on the basis of land registers in the seventh century, by the tenth century only officially stamped contracts could provide proof of tenure in court cases. People went to court so frequently to assert rights under contract that officials attempted to draw up model contracts so as to resolve ambiguities and prevent litigation. Officials tried to collect significant tax revenue from the growing volume of contracts by imposing a stamp tax, but many evaded paying the tax. They had sufficient confidence in the enforceability even of non-stamped ‘white’ contracts that they felt official registration was unnecessary. These practices, originating in the tenth century, were still actively promoted in provincial legal codes in the eighteenth century.⁴⁴ All of this is powerful testimony to the pervasive influence both of written contracts and of the idea of contractual arrangements in Chinese culture. The Chinese even extended the notion of contract to areas that Westerners would consider out of bounds: they drew up large numbers of contracts with the dead and with supernatural beings. The Chinese treated their gods and ancestors as beings with whom one could bargain and whom one could hold to agreements in other-worldly courts.⁴⁵

⁴³ Hansen, 1995.

⁴⁴ Perdue, 1987.

⁴⁵ Hansen, 1995.

In the Qing dynasty, local magistrates protected private ownership rights, even endorsing the Lockean notion that the investment of labour created rights to wasteland. Although the Qing state regulated market exchange and interest rates, its main interest was in the stability of business practice, not in exploiting the market for rent-seeking gain. A quantitative analysis of several hundred land, marriage, inheritance and debt cases in Taiwan, Sichuan and North China demonstrates that “magistrates almost always adjudicated civil matters in accordance with the code”, following consistent principles.⁴⁶ They generally delivered judgments and did not merely mediate. We must also not forget the very common ‘third realm’ of justice: cases neither settled by kin and community nor finally adjudicated at court, but settled before coming to trial. This ‘third realm’ of out-of court settlement, after all, is not so rare in the West, either.

Ordinary Chinese, in short, were not simply victims of a mythical Oriental despotism, deprived of legal guarantees and subject to the whims of an autocratic state; they lived in a growing commercial-agrarian society governed by a complex mixture of legal provisions and informal procedures not so different from early modern Europe.

Republican China, in the early twentieth century, built on the productive inheritance of the imperial past. One example is merchant dispute mediation in twentieth-century Zigong, the center of the Sichuan salt industry.⁴⁷ For at least two hundred years, Zigong had an active share market, constant investment in salt well drilling and frequent bankruptcies that produced litigation. Usually, merchants settled their disputes by mediation or the local

⁴⁶ Bernhardt and Huang, 1994 p.179

government intervened to assist, but not enforce, debt settlement. Even Chinese commercial culture, so tightly intertwined with family relationships, could be highly litigious. Mothers could sue to recover debts from their son's wife. Although all parties aimed to maintain an atmosphere conducive to investment and the expansion of production, violence often threatened business activity, just as in the Qing.

The legal profession did make reasonable progress in the early twentieth century. At least in Shanghai, modern lawyers, despite very diverse origins and qualifications, did achieve some independence and reasonably high social status and tried to establish basic professional norms. Many women used the new divorce law of the 1930s, one of the most liberal in the world, to escape from unhappy marriages. Most did not employ lawyers, but an "affordable, efficient" court system offered them new opportunities.⁴⁸

The Consequences for Theory and Social Analysis

T. H. Huxley once described tragedy as a beautiful theory destroyed by a nasty ugly fact. Social theorists should not stop writing about imperial China, but they should abandon the claim that imperial China had only bureaucratic law and primitive 'custom' (*li*) and no private law or the argument that only the West produced the form of property rights considered essential for economic development. I detect encouraging signs of convergence between new trends in legal scholarship and social theory in the West and studies of Chinese legal institutions. If the old approaches focused on norms and ideals, not practice, stressed the ideal

⁴⁷ Zelin, 1994.

of an independent legal order and remained concentrated on the figure of the sovereign central power which creates law as a body of rules, the new approaches find law embedded in multiple dispersed social practices and locations intertwined in historically contingent ways with the regulations of legislators, emperors and courts.

Unger's objective is to recast Western social theory fundamentally. Mine is more modest: to make theorists aware of the need to interpret carefully imperial China's experience. I will not devise a comprehensive new comparative theory of the West and China in this space.⁴⁹ But these maxims may offer some useful guidelines. Although the following precepts may be all too banal, they seem to be violated frequently in practice:

First, pay close attention to scale. China is a continent, not a nation. Typical East-West comparisons contrast all of imperial China with one or two European nations, usually the most advanced ones. The proper ratio of comparison for economic or social analysis is all of Europe West of the Urals with all of China or one region of Europe with one region of China. If we compare Southern England or the Netherlands with the Jiangnan (lower Yangzi valley) region of China, China comes out as quite comparable in transport costs, degree of urbanisation, commercialisation of agriculture, monetisation and even development of industry, even into the nineteenth century.⁵⁰ Placing all of Europe against all of China reveals vast diversity and large gaps between advanced and backward area in both regions.

⁴⁸ Bernhardt, "Women and the Law," in Bernhardt and Huang, 1994 p. 195.

⁴⁹ For the best recent discussion of these issues, see Wong, 1998.

⁵⁰ Pomeranz, 2000

Second, allow for contingency. The economic historian N. F. R. Crafts has argued that the Industrial Revolution in England may have been a ‘stochastic event’: i.e. a chance occurrence resulting from the fortuitous combination of a special array of factors at a given time.⁵¹ Singularities are a poor basis upon which to build general theories, but the usual practice is to take industrialising England’s experience as the model against which to measure all other developing countries. Just like Marx and Smith, Western and Chinese scholars today continue this misguided form of analysis.

Third, keep up with recent scholarship. Theories and theorists do improve with time as they take account of new interpretations or catch up with unfamiliar work. Both Jones and Unger have substantially revised their early crude accounts of China in their later work. Promoting dialogue between different disciplinary traditions, in a spirit of mutual respect, is the best way to ensure broad understanding and the highest critical awareness. History, legal studies and economics all have productive insights to share with each other.

Encouraging news comes from recent economic history. Joel Mokyr’s *The Lever of Riches*⁵² is a considerable advance on its predecessors in this genre. Mokyr is concerned with the wellsprings of technological innovation in the early modern world which paved the way for the subsequent Industrial Revolution. He focuses on early modern Europe, but he also has a chapter on imperial China. Unlike Jones’ *Miracle*, but similar to Jones’ *Growth Recurring*, he is aware that imperial China led the world in technological creativity for many centuries up to around 1400 A.D.⁵³ In rice cultivation, iron plows, seed drills, blast furnaces, spinning

⁵¹ Crafts, 1985.

⁵² Mokyr, 1990.

⁵³ Mokyr, 1990, pp. 209-238.

wheels, water power, water clocks, maritime exploration, paper, porcelain and silk - to name only a few fields -, China advanced faster and further than any other civilisation up through the thirteenth century. The real mystery for Mokyr is why China slowed down and even went backward in technological progress after 1400. He cogently rejects most of the current explanations based on culture, political factionalism, 'equilibrium traps' and social structure. Mokyr is aware that the effect of institutional structures on economic growth varies with time and place, that both China and Europe transformed themselves in many ways during this period and that no simple dichotomies will do. Although there is reason to doubt many of Mokyr's assertions - not all technical change stopped completely after 1400 -, on the whole he is quite attentive to scholarship on China published through the 1980s. . Notably, he does not endorse either the general property rights explanation or the parasitic Oriental state paradigm in their pure form. Fewer traces of the old binary dichotomy of stagnant East and dynamic West are left. This gives grounds for hope and a challenge for comparative historians to push ahead.

Mokyr, however, does endorse one of the most common explanations for the ceasing of technological innovation in the early Ming: the notion that the Ming emperor, by cancelling further investments in the great tribute fleets that reached as far as the coast of Africa, single-handedly stopped Chinese technological growth. This assertion is, to be sure, widespread in the historical literature on Ming China. Now, it is time for Ming-Qing historians to respond, by demonstrating how misleading this notion is. First of all, the Ming emperor's decision was strategically and economically rational. Since there was a rising threat from Mongolian state-builders on the northwest frontier, he and his advisors wisely chose to divert scarce resources from the southeast coast to the much more critical northwest. Second, the emperor did not stop technological or economic growth. Despite his prohibitions, coastal trade continued and

grew in the sixteenth century (even though the government castigated these traders as ‘pirates’), monetisation of the economy proceeded as silver imports from the Philippines and Japan grew and the Single-Whip Tax Reform responded to this process by changing many local tax collections from in-kind to money. State-directed technological investment was redirected from ships to the extraordinary logistical network required to supply the garrisons along the Great Wall. These civil engineering achievements deserve just as much credit as nautical engineering but economists neglect them. Third, the assumption that overseas voyages must be the key engine of economic growth rests ultimately on a giant geological contingency: the presence of another continent between the west and east coasts of Eurasia, one completely unanticipated by European explorers. If Columbus and his ilk had found what they expected to find, a westward sea route to the riches of the Orient, their tiny ships would have been quickly marginalised by the much vaster Asian coastal trade, just as the Portuguese, Dutch and other traders had already discovered. With no gold to bring across the Pacific, the Spanish would have had nothing to offer Asia.

Legal institutions and case law may not, however, be the best place to look for explanations of technical change. The law tends to be conservative; it responds to, but seldom anticipates rapid technological change. One may argue that efficient property rights redirect factors of production toward their most efficient uses, but except in the case of patent law, a relatively recent innovation in a meaningful sense, there has not yet been a clear demonstration of how property rights induce innovation. As Mokyr notes, either the government or private individuals may promote new inventions or block them, depending on which interest groups gain or lose from new technology. It all depends on the time and place. He thinks that China, in contrast to Europe, was excessively dependent on imperial support for invention and lost its dynamism when the state turned against new technology after the fifteenth century. This

argument is only partly convincing since the eighteenth-century emperors were, in fact, quite interested in new military technology, at least, and the state dominance over the private economy was much weaker in the eighteenth century than in the fifteenth.⁵⁴

If I were to sketch speculatively the outlines of a more satisfactory explanation, I would focus on the contrast between the competitive European state system and the Chinese imperial structure. This idea has been often thought, but ne'er so well expressed as in Mokyr's analysis, though only in passing.⁵⁵ England became the world's leading power in the eighteenth century not because of its private property rights, but because of its war machine.⁵⁶ In incessant competition with absolutist France, the British drove both technical change in the military sphere and fiscal policy so as to mobilise the maximum amount of resources for economic and military competition. China, too, faced extremely serious military threats from the mid-seventeenth to mid-eighteenth centuries which also impelled military and economic innovation, but after the successful crushing of the last major nomadic empire in 1760 CE, the dynamism went out of the system. For much more on this subject, see my forthcoming book.⁵⁷

Constructing Chinese Property Rights Today

Finally, the legacy of oversimplified dichotomies between East and West persists in the discussion of China's recent economic reforms. The Chinese themselves and Western observers misleadingly polarise the alternatives as a choice between collectivist and

⁵⁴ Waley-Cohen, 1993.

⁵⁵ Mokyr, 1990, pp. 206-208.

⁵⁶ Brewer, 1990.

⁵⁷ Perdue, forthcoming.

completely individualist property regimes. This view relies on a stereotypical image of Western capitalism as based only on a purely individual property regime. It also misrepresents the current status and future directions of property regime changes in China. Zhiyuan Cui, collaborating with Roberto Unger, has argued that new forms of property are now emerging in China, in the form of the township and village enterprises [TVEs] which form the most rapidly growing part of the Chinese economy.⁵⁸ These are neither individually owned nor state-owned, but they have developed diverse forms of ownership structures, ranging from partially representative local government, to partnerships, to joint-stock corporations. Professor Cui has also been informing his Chinese colleagues that the modern West cannot be characterised as an exclusively individual property rights regime. He points to regulations and constraints on individual property uses and the dominant presence of corporate organisation.

He has also noted, like Carol Rose, the paradox of Locke's story of the origins of property. Although in the posited state of nature, individual owners sought only their own self interest, somehow they conceived of the need to cooperate to create an individual property rights regime.⁵⁹ They broke out of the prisoners' dilemma. Where did this impulse to cooperate come from? Setting up the regime itself required psychological attributes that are not present in the individual self-maximizer model. I would suggest that classical Chinese philosophy, which sees the self as social, deals more adequately with this paradox than the exclusively egoistic psychology of classic Western political theory.

⁵⁸ Cui and Unger, 1994.

⁵⁹ Rose, 1994, p. 38.

China today, however, has lost touch with its classical past. It is almost at the stage of Locke's state of nature where the characteristics of a future property rights regime are highly unsettled, but the cultural and political forces encourage only short-sighted individualism. In this situation, there are no clear boundaries defining what should and should not be subject to market forces: almost everything is potentially up for sale, including orphans, libraries, works of art, historical treasures, documents, intellectual property, etc.⁶⁰ The widespread accusations of 'corruption' in China today are a product of inadequate boundaries and unclear enforcement of the line between what is and is not legitimately on the market. Drawing sharp lines between state and individual property, as if there were only two choices, will not lead to enlightenment on these issues. It would be more useful to recognise that both in the Chinese past and in the modern West, property rights are not individual and absolute claims to a thing, but bundles of symbols, texts, narratives and artifacts (e.g. fences) by which possessors persuade a community and state that they are entitled to certain uses of a resource. These claims are dependent on changes in social norms, changing definitions of what is a resource, changing values of resources and state enforcement capabilities and jurisdictions. Such a view sends the social theorist and the social reformer out on uncharted waters because there is no firm anchor of universal reason to be found. It is truer, however, to the historical evidence about how societies, East and West, have developed their characteristic property rights regimes.

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⁶⁰ cf. Alford, 1995.

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