

# PROTECTION OF THE RIGHT OF PRIVATE PROPERTY IN THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA

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## § Status of the Right of Private Property in the Fundamental Rights System

In modern states with rule of law, the Right to Property, together with the rights of life and of freedom, constitutes the three fundamental right systems that ultimately embody the basic dignity and values of human beings. As the fundamental law of a state and the supreme values system of a commonwealth, the Constitution usually takes the protection of private property as a starting point and the basis of its social pursuits. To achieve the fundamental values embodied by the Right to Property, constitutions worldwide generally provide for the guarantee of the right of private property in principle, boundary and scope, and by laws make corresponding constitutional principles specified, laying legal foundations of the realization of the Right to Property. In the Constitution of China, the right of private property refers to the right of citizens to gain property from their own labor or by other lawful means as well as the right to own, use and dispose that property.<sup>1</sup> It is a vital right in all fundamental rights, and as such, indicates that citizens enjoy the liberty and have access to economic benefits in social life. Generally speaking, the Right to Property stipulated in the Constitution covers all rights that are of property value in both public law and civil law.<sup>2</sup> In Chinese jurisprudence, however, it falls into two categories: the Right to Property in the Constitution and the Right to Property in Civil Law<sup>3</sup>. They are different in nature and function, and belong to separate system of rights respectively. The Right to Property as a fundamental right mainly protects the citizens against public power; while once the Right to Property in civil

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1 Article 13 of the Constitution provides that: The state protects the right of citizens to own lawfully earned income, savings, houses and other lawful property. The state protects by law the right of citizens to inherit private property. See The Constitution of The People's Republic of China, <http://english.peopledaily.com.cn/constitution/constitution.html>.

2 See Han da-Yuan(ed), *Advanced Constitutional Law*, Higher Education Press (2006), pp.270.

3 Right to Property was originally incorporated into the Indian Constitution as a fundamental right under Article 19(1)(f) in 1978, via the 44<sup>th</sup> amendment to the Constitution, its status was reduced to that of a Constitutional right. See, P.K Tripathi, "Right to Property after 44<sup>th</sup> Amendment-Better Protected than Ever Before", AIR 1980 J 49. Also see, A.K Ganguly, "Right to Property: Its Evolution and Constitutional Development in India", 48 JILI (2006) 489.

law written into the Constitution, it will be far from its civil meaning but provide consolidated legal basis for the guarantee of civil Right to Property. It is an inevitable request of a market economy to acknowledge the Right to Property a fundamental one and to enhance its constitutional protection as well. Of the economic relations governed by the Constitution, the guarantee of the right of individual property shall not be neglected because it is not only one of the fundamental rights, but a general principle established by the Constitution.

### § The Changing Society in China and the Development of Right to Property

Since the establishment of the People's Republic of China on Oct 1, 1949, the country has ratified four constitutions, *viz* the Constitution 1954, the Constitution 1975, the Constitution 1978 and the Constitution 1982.<sup>4</sup> The Constitution 1954, also the first Constitution of the People's Republic of China and the first socialist constitution in the history of China, has expressly specified the status of the citizens' Right to Property. The Constitution 1954 provided that "*The state protects the right of citizens to own lawfully-earned incomes, savings, houses and other means of life*"<sup>5</sup>, "*The state shall protect the right of citizens to inherit private property according to law*"<sup>6</sup>, "Citizens of the People's Republic of China enjoy freedom of residence and freedom to change their residence"<sup>7</sup>. The Constitution 1975 and Article 9 of the Constitution 1978 largely followed the provisions of the Right to Property established by the Constitution 1954.<sup>8</sup> Otherwise, compared with the provisions of the Constitution 1954, the Constitution 1982 scores much higher. It extends the scope of the Right to Property to the rights of citizens "*to own lawfully-earned income, savings, houses and other lawful property*" and "*to inherit private property*"<sup>9</sup> from the rights of "citizens to own lawfully-earned income, savings, houses and *other means of life*" and "*to inherit private property*".<sup>10</sup>

4 Some Chinese scholars contend that the constituent power can only be exercised once, thereafter it appears as the power to amend the Constitution, therefore they hold that China has only ratified one Constitution and that the later constitutions are just the revised versions of the Constitution of 1954. Meanwhile some scholars criticize the theory by arguing that the living generation shall not be governed by the dead ones rather than being governed by their own consent. As a logical outcome of this argument, the living generation is entitled to draft and ratify a constitution at their own will. If this is taken into consideration, the argument on how many constitutions China has already ratified is out of question.

5 Article 11 of the Chinese Constitution.

6 Article 12 of the Chinese Constitution.

7 Article 90 (2) of the Chinese Constitution.

8 For details, see Mo Jihong(ed), *Constitutional Law*, Social Sciences Academic Press(2005), p.p.325-326.

9 Article 13 of the 1982 Constitution

10 Article 11 and 12 of the 1954 Constitution. Both *The Basic Law of The Hongkong Special Administrative Region of the People's Republic of China* and *The Basic Law of The Macau Special Administrative Region*

The Constitutions as shown above provide for the protection of the right to own lawful property and to inherit private property rather differently in accordance with the requirements of the changing society in China. However, before the Fourth Amendment to the Constitution 1982 was ratified in the year of 2004, both content and system of those provisions were incomplete, especially respecting and protecting the right to private property lacked social and legal grounds. Problems caused were as follows: (A) lack of consciousness about the protection of private property. (B) objects within the scope of the protection of the Right to Property were undefined, only the means of livelihood such as lawfully earned income, savings and houses being covered while the means of production had been excluded though it had been expected worth its weight in gold<sup>11</sup>. (C) as for the specific norms system and institution of the protection of the Right to Property, the Constitution 1982 did not clarify the constitutional status of the Right to Property nor the principle and process of compensation for the infringement upon property other than the principle to limit property. (D) comparing public property with private property, we find that in the Constitution, the principles of guarantee were on an unequal basis, more positive policies applied to public property while passive policies to private property and the protection of public property distinctly outweighed that of private property. It gave rise to a series of social issues, such as private owners being unconfident of the security of their property, compelling house removal, unlawful acquisitions of land and default on payment of peasant workers. Seeing from the angle of the Constitution, one of the key factors that account for the conflicts between public interest and private interest in the recent social development of China is the ineffective protection of the right of private property.

With the development of the market-oriented economy, the accumulation of private wealth and the improvement of legal consciousness, the public has paid great attention to property issues and increasingly called for effective protection of the Right to Property. It is widely held that the state should establish an effectual legal system to enhance the protection of the right of private property. In responses to such a practical demand, *Jiang Zemin's Report at the 16<sup>th</sup> National Congress of the Communist Party of China*

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*of the People's Republic of China* underline the protection of the right of private property. The Art. 6 of the *HKSAR Basic Law* provides that "The Hong Kong Special Administrative Region shall protect the right of private ownership of property in accordance with law". And The Art. 6 of the *Macau Basic Law* provides that "The Macau Special Administrative Region shall protect the right of private property in accordance with the laws".

11 Unlike the Chinese Constitution, the Indian Constitution does not enumerate the components of "property" that the Constitution seeks to protect. This is left for the Courts to interpret and determine.

said that “*We should strengthen the supervision and administration of the non-public sectors according to law to promote their sound development. We should improve the legal system for protecting private property*”.<sup>12</sup> The amendments of the year 2004 to current Constitution have further advanced the protection of the right of private property by clarifying its status in the Constitution. They are of great importance for the realization of the fundamental values of the protection of private property in the whole society, and urge the governments and public agencies to respect the values of the right of private property and to offer sound legal protection for the private property owners.

## § Nature and Content of the Right of Private Property

### *Nature of the Right of Private Property*

The right of private property had been universally taken as an inviolable and absolute natural right not until the ratification of *the Constitution of the Weimar Republic* in the year of 1919. From then on, following the tendency of relativization of rights around the world, the right of private property is relativized gradually, turning to be a combined right with social responsibility. Four doctrines concerned with the nature of the Right to Property are as follows.

Firstly, the Right to Property itself is a liberty, and an inviolable individual right. Secondly, the constitutional Right to Property is of a legal institution in which the individual enjoys the right according to laws, that is to say, it is of an institutional guarantee of the Right of Private Property. Moreover, Right to Property is a defensive right against the arbitrariness of the State as well as an individual right and some kind of a legal institution. Furthermore, the Right to Property is of dual characteristics, referring to a subjectively defensive property and an objectively existing order of law. As a *defensive right*, it is to protect the citizens against infringement by the State and to set the boundaries of public power. While of fundamental nature as an *institutional guarantee*, it is reckoned as an institution or an objective order of law in which citizens are free to exercise the Right to Property. Because of this, provisions of the Right to Property in the Constitution actually play the role of “*the guardian of freedom*”, which guarantees individual free access to economic conditions of any kinds.

As far as the development of the Right to Property and its nature is concerned, the third doctrine and the fourth doctrine sound more reasonable than the other two and share the same academic foundations. Thus, the

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<sup>12</sup> See *Jiang Zemin's report at 16th Party Congress*, [http://news.xinhuanet.com/english/2002-11/18/content\\_632554.htm](http://news.xinhuanet.com/english/2002-11/18/content_632554.htm).

nature of the Right to Property shall be determined in two aspects: the Right to Property as an individual right and the Right to Property as an institution.

### *The Scope of the Right to Property*

Article 22 of *the Amendment to the Constitution of the People's Republic of China (2004)* provides that: Article 13 of the Constitution, which reads: "*The state protects the right of citizens to own lawfully earned income, savings, houses and other lawful property.*" and "*The state protects the right of citizens to inherit private property according to law.*", is revised. It now reads as follows: "*Citizens' lawful private property is inviolable.*" "*The State protects in accordance with law the rights of citizens to private property and its inheritance.*" and "*The state may, in the public interest and in accordance with law, expropriate or requisition citizens' private property for its use and shall make compensation therefore*".<sup>13</sup> The clause, "*Citizens' lawful private property is inviolable*", refers to that the state has the duty to protect citizens' right property and to take any effective measures to realize the values of the Right to Property. Based on its constitutional nature, the very amendment expands the scope of the right of private property. The Constitution 1982 guarantees the Right to Property through enumeration and originally limits it to the means of livelihood excluding the means of production. The indetermination of scope directly dampens the enthusiasm of the property owners to create wealth and their own property accumulates all along with insecurity and criticism. In the constitutional sense, any legal interest in property that accrues with to social consensus shall be regarded as part of the property guaranteed by the Constitution. The right to own property in the Constitution 1982 is definitely not comprehensive. It is only an aspect of the Right to Property, so it cannot describe complete content of the Right to Property. In order to cover the means of production and to determine the scope of the Right to Property, the very amendment replaces the expression of "*the right to own property*" with "*the right to private property*" and establishes the principle of the Constitution that "*Citizens' lawful private property is inviolable*". In accordance with *Amendment 22<sup>nd</sup>*, both the rights to the means of livelihood and the means of production including the share rights, the right to enter in rural land contract and its operation, and patents are under the guarantee of the Constitution.

The citizens' Right to Property covers a wide range of objects as follows:

#### A. Lawfully Earned Incomes

The lawfully earned incomes refer to the money or income in kind for the citizens to gain on their own work or by other means within the scope of law, which specifically include salaries and wages, wages in kind, bonus,

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<sup>13</sup> Referred to *Constitutional Law*(«??»), China Law System Press(2005), pp.72.

author's remuneration, retirement pension; labour insurances, domestic sideline production, citizens-owned trees and fruiters, cultural relics, books and reference materials; the means of production for the use of individual laborer in the urban and rural units; production instruments and other means of production for the use of self-employed laborers; other lawfully earned incomes of citizens, such as house rental income, interests on bank deposits, donation and property inherited.

#### B. Savings

The savings refer to the money or currency that the citizens deposit in banks or credit cooperatives. The state encourages the citizens to deposit their surplus money in the bank or credit cooperative. Citizens may deposit the money on a voluntary basis and draw their money at will. Banks or credit cooperatives shall observe the principles of paying money at interest and keeping secret the depositors' information. No individual or unit shall be allowed to inquire about, freeze or withdraw any individual deposit except with the approval of judicial organs according to law.

#### C. Houses

The houses fall into the category of the '*means of life*'. Any illegal infringement, seizure, sealing-up or destruction of the citizens' houses wherever in the rural or urban area shall be prohibited. When it is necessary to seize, confiscate or destruct the citizens' houses due to the demand for national construction, the state shall accommodate the house-owners or house-users and compensate for their loss in accordance with relevant regulations.

#### D. Other Means of Livelihood and Production

In China, the scope of the means of life and the means of production for citizens' use is being widely extended. Any domestic products related to citizens' clothing, food, shelter and transportation that are not forbidden by laws shall be taken as subject of the right of private property and shall be guaranteed by the law of the state. With the economic development and the expansion of the scope of citizens' Right to Property, some rights of new kinds such as right to invest, right to run business, etc., are blooming. Moreover, incomes not from work<sup>14</sup> like securities and dividend emerge in the market economy, which needs to be clarified in nature and legal status. In *the Amendments 1988*, *the Amendments 1993* and *the Amendments 1999*,

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14 Art. 6 of the Constitution specifies that: The basis of the socialist economic system of the People's Republic of China is socialist public ownership of the means of production, namely, ownership by the whole people and collective ownership by the working people.

The system of socialist public ownership supersedes the system of exploitation of man by man; it applies the principle of 'from each according to his ability, to each according to his work.'

extending citizens' Right to Property has always been an important target of the legislature, which perfects gradually the system of constitutional protection of citizens' Right to Property by various ways and lays a beneficial foundation of further strengthening of the constitutional protection.

The citizens' incomes mean legitimate incomes that are either from work or not from work. Herein the incomes not from work refer to the money earned from dividends, price difference between buying and selling, and lotteries. With the citizens being well off, legitimate incomes not from work account for larger and larger percentage in whole incomes. Some citizens gain from these sources far more than from work. In addition, incomes not from work are lawfully related to the activities of the means of production. If the state tries to guide the investment, it should recognize the legitimacy of investment incomes at first. There are various ways for the citizens to earn incomes in the real life and it is difficult to enumerate them one by one in the Constitution. Based on the nature of the Right to Property, *the amendments 2004* do not adopt the method of enumeration but establish one principle that the citizens' Rights to Lawful Property shall be equally protected. As for the limits of the Right to Property, the constitutional guarantee is confined to legal property excluding illegal property. Herein, whether legal or not is subject to strict lawful judgment, in the hopes of highlighting the legality of the process of wealth accumulation, urging social members to make money through honesty and hard work and building up a glorious tradition of amassing wealth by legal means.

### § The Doctrine of Public interest and the Limits it sets to the Right to Property

In the modern society of rule of law, the Right of Private Property plays an important role in promoting individual freedom and guaranteeing other kinds of fundamental rights. The essence of the Right to Property is to achieve the end of freedom. It lays down social and material foundations for a man to live with dignity. Therefore, in the sense of social development, to own private property is a vital prerequisite for harmonious development of the society and for the protection of human dignity.

Naturally, the Right to Property is never absolute just like any other right. Its social characteristics determine its limits. Constitutions around the world universally establish the principle of guaranteeing the Right to Property while setting necessary limits to it. Amendment 22<sup>nd</sup> of the Constitution of P.R. China provides that *"The state may, in the public interest and in accordance with law, expropriate or requisition citizens' private property for its use and shall make compensation therefore"*. The provision helps to strike a fine balance

between state power and private rights, between private property and public property, and to ensure appropriate compensation for the property rights infringed. Expropriation and requisition are both the means to restrict private property for the sake of public interest, but they differ from each other in essences and functions, specifically as follows:

- a. expropriation refers to the change in the ownership of the property while confiscation means the transfer of the right to use the property. Confiscation applies to compulsory use in case of emergency. Once the emergency puts to an end, the confiscated shall be returned to the owner;
- b. the prerequisites and standards differ in the adoption of the expropriation and confiscation provisions. Since expropriation causes much more damages to the citizens than confiscation, the compensation for expropriation is much higher than that for confiscation. Before the Amendment 2004, there has been no definite standard or well-designed procedure for the limits to citizens' Right to Property, which results in various or even low-paid compensation. To seek a rational balance between public interest and individual interest, *Amendment 22<sup>nd</sup>* has set up the prerequisites and processes of expropriation and confiscation, and defined cautiously the boundaries of public interest. In accordance with the spirit of the Constitution, the subject of rights is entitled to make judgments on the legitimacy of public interest. The Right to Property can only be violated for the sake of public interest, such as the interests of the whole society, essential state interests in the areas of national defense and diplomacy, etc. When expropriation or confiscation is to be carried out, it is necessary to take into full consideration both the values of national policies out of public interest and the values of social justice. Public interest, differing from interests of a group or a social or business organization, should be defined in a cautious and strict way. The phenomena that some public organs infringe on the citizens' Right to Property in the name of public interest during the social development actually safeguard certain business interests as well as unjustified social public interest.

At the same time, it should be noted that any restriction on the Right to Property for the sake of public interest is not to take away the private property without consideration, reasonable payments must be made as compensation. The expropriation or confiscation out of public interest may cause certain losses to the obligee, so it is essential to offer a sound compensation from the angle of the need to protect the right. The compensation provision in *the Amendment 22* will necessarily have significant



influence on the protection of the right of private property, and enable the citizens to take advantage of the right to claim compensation as a remedy.<sup>15</sup>

§ Functions of the Guarantee System of the Right to Private Property And Its Future

*Functions of the Guarantee System of the Right of Private Property*

That the protection of the right of private property is written into the Constitution will produce great effect on the society and enhance the progress of rule of law in China. Influences potential may be as follows:

- (a) the constitutional protection of the right of private property places a strict restriction on the exercising of public power and sets the boundary of its kingdom;
- (b) it requests all public agencies to respect the right of legal private property according through the Constitution and not to act beyond the limits set by law;
- (c) it encourages the people to engage in creative jobs and make more investments so as to produce more social wealth;
- (d) the constitutional guarantee system of the Right to Property will promote the establishment of the remedy system of individual rights.

*The Future of Constitutional Guarantee System of the Right of Private Property*

Firstly, it is an issue of popular concern whether the right of private property provided by the Constitutional scheme can come true in social life. In this regard the weight shall be attached to the legislature which plays an important part in the future law-making on the Right to Property. The legislation concerned shall severely abide by the Constitutional doctrines and set the standards and limits of the restriction on the Right to Property in accordance with constitutional commission. To lay the constitutional foundation of the protection of the Right to Property, it is necessary to import the theory of administrative presentation, which will meet the demands of the Constitution for its protection of the Right to Property in the sense of formal statutes. The provision of the restriction on the Right to Property shall be stipulated under the package structure, that is, to put the boundary of restriction, the end and the standard of compensation into the same article. Now that the right of private property is stipulated in the system of

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15 The Standing Committee of the National People's Congress of the Republic of China has carried out a plan to draft *the National Compensation Law*.

fundamental rights, the legislator shall weigh the values of the Right to Property under the constitutional protection with the order of the Right to Property in conformity with the social justice in an all-round way, and then respond to the requirements of various interest groups rightly. Any law or policy that restricts the Right to Property shall subject to the ends of the constitutional provisions, especially shall not contradict the spirit of the Constitution concerned. Hence the doctrine of proportionality, the principle of equal protection and the principle of legitimate expectation shall be observed.

Secondly, it can not be justified to restrict the Right to Property out of public interest. So it is necessary to define the reasonable margins of public interest according to the doctrine of proportionality,<sup>16</sup> which has basic requirements as follows:

- (a) the goal of the restriction shall be justified, in other words, the goal is confirmed within the framework of the Constitution, herefore justifying the legislative activities.
- (b) the approaches to the restriction shall be justified, that is, to seek a balance between the approaches and the goal.
- (c) even though the goal is justified concerning the expropriation or confiscation of the Right to Property out of public interest, it still has to strictly observe the doctrine of proportionality so as to avoid illegal violations of the Right to Property. D. In addition, the State or the Government shall endeavor to extend the provinces of the Right to Property in hope of making the obligees feel safe of their legitimate property and have the initiative to accumulate more wealth.

Thirdly, it is necessary to clean up or adjust existing laws and regulations, and repeal or revise those that violate or contravene the Constitution in order to lay the unified legal foundation of constitutional guarantee of the Right to Property. In accordance with the Constitutional Laws, the contents and limits of the Right to Property will come into force in two ways:

- (a) the Constitutional Right to Property is enforced directly by laws;
- (b) the abstract and general provision of the Right to Property is concretized through the administrative activities, though the executive branch has no discretion to extend or reduce the scope of the Right to Property. In practice, a great number of arbitrary restriction or deprivation

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<sup>16</sup> Referred to Han Da-yuan, On the Constitutionalization of the Right of Private Property, *Legal Sciences*, 2004(4).

of individual Right to Property occurs during the process of so-called “concretization” as above shown. The following cases are beyond the range of reasonable restriction:

- (a) a law involving the Right to Property contradicts the Constitution or an administrative regulation violates the law in its contents;
- (b) the administrative organs implement a law that violates the Constitution or a regulation that contravenes the law;
- (c) though the law is constitutional or the regulation is in accordance with law, the executive activity violates the law. At all events, cases as above shown are the restrictions on the Right to Property, for they violate the fundamental Constitutional spirit concerning the Right to Property. The Constitutional Guarantee of the right of private property establishes some principles to be observed and lays a united legislative basis for the making of the law. If the principles of the Constitution were not concretized by laws, in other words, if relevant statutes did not exist, the doctrine of the protection of the Right to Property is no more than a bushwa. The provisions of the Right to Property of *Amendment 22* are important; however, what is more important is to concretize the Right to Property by statutes and institutions and to enable accessible and effective remedies for the Right to Property infringed.

Fourthly, the constitutional protection of the Right to Private Property relies on a mature constitutional interpretation institution. Whenever it comes to make a judgement on the issues of the Right to Property, it is necessary to put into use the norms of constitutional interpretation in an active and effective way. For example, the concepts of property and the Right to Property, the nature of lawful property, the constitutional meaning of expropriation and confiscation, the connotation of public interest, etc. shall be clarified and constructed during the continuous progress of constitutional practice. It is proved from the constitutional practices worldwide that Constitutional interpretation has been a key approach to perfect the protection of the right of private property.

Fifthly, it is necessary to further concretize the doctrines of “*taxation according to law*” and to control the exercising of the taxation power.