

THE CONCEPT OF PROPERTY RIGHTS
IN TRADITIONAL CHINA

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Property Rights: A Multiple Level of Analysis

Epistemological Problem for Property Relationship in China

If property rights affect individual decisions and their aggregated outcomes for a society, the study of arrangements in property rights is accordingly a prerequisite to understanding the nature of a society. Yet epistemological problems are always involved when we try to analyze property rights in non-Western societies. In Western societies, the emphasis of

outright ownership under Roman legal tradition has long made clarification of property relationships a common desire for the members of the societies. Many times in history when competitions for property had arisen from increase of population, members of Western societies resorted, as North indicates, to clarification of property rights as a means to protect their welfare. This fact eventually led to considerably well-defined property relationships. Because property relationships are treated in the society as a foundation for other institutional designs, the definition of them calls for a set of terminology to explain their various modes of existence. By doing so, many factors that intervene or constrain the relationships can be identified and possible confusion avoided. In general, an investigator of property relationships in Western societies may encounter fewer epistemological problems than his colleagues in non-Western societies.

In many non-Western societies, property relationships are confounded with other social relationships. As been implicated in other social relationships, property rights are not absolute but relative rights in these societies. The extent of the rights that an individual can enjoy are determined by his relative social status in the community. Efforts to solve conflicts about property are thus aimed at clarifying the dominant social relationship rather than the definition of property rights per

se. Under this situation, the society fails to develop appropriate terminology to describe the property relationships. This presents an epistemological problem for scholars to evaluate the impacts of property relationships in the society. Although students can look into other dominant social relationships to study the implicated property relationships, the situation is complicated by the lack of consensus on the modes of interaction between dominant social relationships and property relationships. This explains why there are so many arguments among scholars in attempts to define Chinese property relationships with Western terminologies. Frank Schurmann (1956: 508-9) thus cautions that “property is an historical and not a logical manifestation;” it is thus wrong to impose terminologies created in Western world on China’s unique social and historical circumstances.¹

The definition of property rights is fundamental to the existence of all human communities. If a clear definition is lacking in certain societies, we should not jump to the conclusion that property rights do not exist. It simply means that the property relationships in these societies do not function independently of other social relationships. While functioning interactively with other social relationships, it becomes indispensable for a student to start with the dominant social relationships before he can understand the arrangements of

property rights in such a society.

The impacts of other social relationships on property arrangements in China are quite apparent. When China compiled its first complete legal codes in the eighth century, the discussions of property relationships were mostly implicated in the chapter about "Household and Marriage" (Tang-lu Shu-i, hu-huen-chan). A term like "ownership," Suo-you-ch'uan, does not even exist in any Chinese dictionary before this century, for functions similar to it have been implemented by other social relationships. In view of this sort of epistemological problems, it becomes important to analyze the dominant social relationships prior to studying property relationship.

Configurational Rules in Human Societies

Terry Anderson and P. J. Hill (1975: 163f) define property rights as the "sanctioned behavioral relationships among men which governs their interaction and their use of resources." As such, the enforcement of property rights relies upon the authority structure of other social relationships. Apparently, the content of property rights will also be modified by changes taking place in other social relationships. The presence of a property right on paper is rendered meaningless,

if its enforcement is denied because of conflicts with other social relationships. Accordingly, property relationships, like other rules in human community, must be analyzed configurationally with other social relationships.

As “sanctioned behavioral relationships among men,” property rights can be seen as rules that require, prohibit, or permit an individual to do certain things. Yet, rules in human society do not exert direct impacts on individual behaviours. Studies conducted by the students of public choices have shown that rules do not prescribe “one and only action or outcome.” Instead, as Professor Elinor Ostrom indicates (1986: 6), rules affect “the structure of a situation in which actions are selected.” As a result, to analyze how rules in general and property rights in particular function to regulate human behavior, it is important to first ask the question of how the structure of situation is affected. Further, as Ostrom continues to note, the structure of situation is normally affected by several rules combined configurationally rather than one isolated or several separable rules (1986. 14), the study of how rules affect individual decisions requires a multiple level of analysis. It is erroneous to presume that any specific rule can hold across all situations to produce similar outcomes for individual behaviors.

If rules are configurationally related to one another, property relationships as a kind of rules must not be treated as

only composed by legal codes or the emperor's edicts. This point confirms our previous argument that the study of property rights in China should include analysis of rules associated with other social relationships. In short, property relationships should be studied on a multiple basis.

Scholars of public choice have suggested two approaches in study of social rules. One is to divide rules in a vertical order and study interactions among different levels. The other is an horizontal approach which categorizes rules within a definite period of time and analyze their configurational relationships. Although these two approaches are interlocked and used interchangeably by scholars, their points of emphasis differ. The vertical approach divides rules into constitutional, institutional, and operational levels. Rules of each level are confined by rules of their above level, and ultimately constitutional rules are confined by common understandings shared by members of a society. This approach is important for us to understand the development of rules and serves as the basis of arguments in previous chapters. The horizontal approach is a cross-sectional analysis of rules in a definite period of time. Its emphasis is to study configurational relationships among rules of various functions rather than their formulating process. As Professor E. Ostrom (1986: 21) has indicated, this approach mainly aims to formalize rules that affect an "action situ-

ation.”.

Since epistemological problems are a great concern in the study of property relationship in the Chinese society, this chapter is mainly organized around the first approach in order to provide a better picture of how and what property relationships were formed in the Chinese society. Discussions about the enforcement of property rights in the subsequent chapters will give more attention to how property rules are configurationally related to other rules. However, it should be noted that the two approaches are interlocked such that the line between them is not always clearly drawn.

In a society where property rights are not clearly defined, it appears difficult to discuss “the” property rules of the society. In addition, the existence of a rule depends upon its enforceability. In this light, some property rights that appear in the following discussion might have only the retical significance in the Chinese history. However, these theoretical concepts lay the foundation for other institutional designs in China, they should not be dispensed as sheer illusion and excluded from the discussion of property rules in China. For these considerations, the term “concept,” instead of “rule,” of property rights is chosen as a title to generalize the discussion in this chapter.

The Formation of Property Concept in China

A Society of Two Traditions

Robert Redfield notes that to study a society, especially Chinese society, students should be aware of the existence of two separate traditions: first, the “great tradition” which is supported by the dominant common understanding in a society and transferred through institutionalized arrangements like a school or temple; second, the “little tradition” which works itself out and keeps itself going in the lives of village populace. These two traditions together constitute the basis for all social concepts and institutions and continuously affect their development (1956. 70-1). Although the line for the two traditions might be an arbitrary one, (considering, for example, that many institutionalized village school might also teach traditions worked out by villagers themselves), this dichotomy provides a useful analytical tool to study property concept in China.

It has been argued in the last chapter that the accepted common understanding of cosmological views has a significant impact on the design of institutions in a society. The arrangements of property relationships in traditional China is not an exception. Nevertheless, because the cosmology developed in

China supports the concept of least government, it is likely that the existence of independent local self-government might interpret the same cosmology in quite a different way. Consequently, the property concept was developed along two different lines. To many scholars, including Redfield, this dichotomy of institutions, or traditions, between “state” and “society” is one of the most distinctive characters observed in China’s political system (Fairbank, 1983: 18-20). In this chapter, the discussion will concentrate on property concepts taught as a great tradition in the Chinese society.

Property Concept in a Hierarchical Structure

The cosmological views of familism presume an ubiquitous hierarchical structure in society. This concept of hierarchical structure, as I maintain in the last chapter, is incompatible with the development of individual rights. It is thus interesting to find out how property rights were arranged in such a hierarchical society. In this regard, Hsun Tzu (298-238 B.C.), a major interpreter of Confucianism, provided us important information. Following Mencius, Hsun Tzu advocated familism and applied it to the structure of political system; his interpretation of the material world and familism reveals the

concept of property rights as perceived by Chinese cosmology.

Hsun Tzu recognized that resources in the world are limited and human beings have unlimited desire to expand their own goods. If allowed to let their desire govern their behaviors, human beings will soon deplete the material world. Preoccupied with the concept of li, Hsun Tzu did not propose legislation to constraint human desire. As a Confucianist, he believed that creation of law would only generate law breakers while the problem remain unsolved. Pursuing the principle of li, he held that the hierarchical structure in society would impose best constraints for human desires. Hsun Tzu noted as follows (1928. 123-24):

When social status are equal, there will not be enough for everybody. When men's power is equal, there will be no unity in the state. When people are equal, no one will be able to command the services of others. . . Two nobles cannot serve each other, and two commoners cannot employ each other. This is a law of nature. When people's power and position are equal and their likes and dislikes are the same, things will not be sufficient to satisfy everyone, and hence there cannot but be strife. Strife will lead to disorder and disorder and disorder will lead to poverty.

with the existence of hierarchical structure, people with the

power of command could constrain the people below him from consuming materials in an excessive way. Since one is qualified as a superior by benevolence, the welfare of the inferior will also be considered within the hierarchical constraints. Yet, using hierarchical structure to constrain material desires deprive the inferior of rights to fight against unequal distribution and inevitably gives the superior an opportunity to benefit themselves with material resources. Hsun Tzu and other Confucian scholars made attempt to justify this situation, at least in theory.

In accordance with the doctrine of filial piety, it is considered reasonable that the superior should enjoy greater material benefit. As Confucius explains, filial piety is “when the elders have troubles, the young take the toil from them, and when the young have wine and food, they set them before their elder” (*Analects*, Bk. 2, Ch. 8). Since community structure is considered the extension of family structure, this doctrine of filial piety is applicable to community life with respect to property relationships. The problem is how to juxtapose the artificial position of the community superior with the naturally endowed status of family elder.

The solution lies in justifying the importance of a community leader’s job. Confucianists view the differentiation of the superior and inferior in community not only as an

adherence to familial tenets, but also as a prerequisite to separate community functions. According to the concept of li, to act in propriety is the key to a harmonious community life. However, how to implement li doctrines in real life was never clearly defined, it is the community leaders who were looked to for a model of selfcultivation and proper behavior. Therefore, a good government, according to Hsun Tzu (1928: 144), “depends entirely on the ruler, not on other.”

The task of self-cultivation is seen by Confucianist as more difficult than the task of preparing for a profession in trade or artisanship. According to Confucius, “[the superior man] cultivates himself so as to give rest to all the people, which is a task so difficult that even [the sage king] were still solicitous about it” (Analect, Bk. 14, Ch. 45). Since self-cultivation is difficult and important, it follows that people who endeavor to achieve it and become the leaders of a community deserve respect like the elders in a family. No material rewards for their hard working would be regarded as excessive. Hsun Tzu makes this point clear (1928: 66):

[W]hen the benevolent man is on his throne, the farmers will engage in cultivation with their strength; the merchangts will engage in [using] wealth with their keenness. . . all will fulfil their official duties with benevolence, generosity, intelligenece, and ability. This

may be called the utmost equality. Then if the ruler's emolument is the whole empire, he will not think it too much for himself; any one who is a gatekeeper, an innkeeper, a guard at a pass, or a nightwatchman, he will not think that his emolument is too little for him.

(my emphasis)

If individual well-beings are dependent on one's position in the social hierarchy, it is expected that people will struggle for higher social status in order to preserve their individual goods. When people are all vying for better positions, the society may fall into chaos. Yet, from a Confucian point of view, if premised on self-cultivation and virtues the striving for positional progress could only lead to harmony and peace in society.

The foregoing theory inevitably results in property rights being treated as a relative concept within the socio-political context. People who occupy the highest position on the socio-political structure becomes the sole owner, as the term is defined in Western tradition, of all properties in his domain. Consequently, the emperor's ownership becomes the dominant concept in the design of property relationships within a hierarchical structure.

The Concept of Emperor's Ownership

Confucius himself conceded that his theory described institutions that had already existed. This statement is true as far as the Confucianists' rationalization of the emperor's ownership is concerned. According to ancient archives, the concept of emperor's ownership emerged in Chinese society long before the establishment of Confucian school. To locate sources of this concept, we need to go beyond Confucian cosmology and review part of the ancient history.

The Meaning of Kuo Chia

The systematic records of Chinese history started around the sixth century B.C. It was the time when China was divided by several regional lords. Since the existence of a nominal emperor and many independent regional lords resembles to the structure of Holy Roman Empire, many scholars categorize this period as China's feudal age, which ended in 226 B.C. with the unification of the Ch'in dynasty. Nevertheless, the term feudalism should be used with caution because its Western connotation does not fit perfectly well in the case of China with respect to the relationship between the emperor and regional lords, known as chu hou in Chinese. The conceptual

differences about the relationships between the emperor and the regional lord have a profound impact for China to develop its different socio-political structure.

Generally speaking, Western feudalism was established on contractual relationships, where the king pledged sustenance and protection, and the vassal reciprocated with promises of loyalty and service. The obligations of vassalage were applied to both contractual parties. The breach of contract from either side would discontinue the vassalage relationships (Pipe, 1974: 49-51). The chu hou-emperor relationship in ancient China was different. It was not established on the contractual relationship of protection and service, but on a specific family arrangements, known as chung fa. Chung fa is actually an arrangement of property division among heirs. When the eldest son was chosen to succeed the throne, his younger brothers were given land and became chu hou who established their own domains outside the area directly controlled by the emperor. Reciprocal connections were weak under chung fa system. Though tributes from chu hous were required to symbolize a nominal unity, no obligation for service was tied to the endorsement of land. The chung fa system even decided the size of land to be given, the determining factor being the relative family status of

individual chu hous. The system was such that even the emperor was unable to modify it. Therefore, chung fa system gave the emperor little flexibility to build up his personal influence by conceding property rights.

Unable to make obligation of service a condition for land endorsement, Chinese emperors lost an opportunity to establish a chain of command on the basis of personal liens. Not surprisingly, the empire was soon divided by chu hous. While family tie was not strong enough to maintain an authority relationships, the emperor's power was confined within his private domain. His advantage of occupying the largest domain was even eroded by the gradual expansion of chu hou's territory. The decline of the command authority soon led China into a period of continuous wars, known as ch'un-ch'iu and chan-kuo shih-tai (722-226 B.C.), when chu hou attacked each other to gain for more territory.

Chung fa system gave the emperor little room to mobilize forces against defiant chou hous. As a nominal head of the royal family, his capability to intervene the rule of chu hous was much limited. This implies that chou hou's power over his own domain was quite extensive. In Chinese language, the domain for a chu hou is known as kuo, and chu hou's family is called chia. As the emperor enjoyed only nominal authority,

“kuo chia” was traditionally referred by Chinese equivalent to the meaning of sovereignty in the West. In addition to the political sovereignty, the concept of relative property rights automatically endorses sovereignty holder in China, as a parental head of a community, the authority of proprietorship. Accordingly, the head of kuo chia, i.e., chu hou, enjoyed an absolute authority over both land and people. Because chu hou instead of the emperor was the actual ruler and property owner, Confucius indicated that as of his time all political power and resources under the heaven belonged to the noble families, i.e., t'ien-hsia wei chia.

If kuo chia was seen as the integration of sovereignty and property ownership, institutions designed on this foundation would appear more for the “management” of property than for the yield of “common goods.” To manage a property, the property owner has two essential concerns: first, to maintain integrity of property ownership; second, to maintain productivity of property. In order to maintain integrity of property ownership, the sovereign and property owner should foreclose any possible challenges from developing inside his property domain. Hobbesian principles, which endorse unlimited authority to the ruler on the basis of a centralized structure are thus preferred in the design of institutions.

Moreover, as property is given by the emperor to his family members, the institutional structure to manage it was necessarily patrimonial in nature, i.e., it must be headed by the owner with a father image, which no popular assembly or a group of aristocracy can substitute. With kuo chia ruler controlled absolute authority over both land and people, people who lived within kuo chia domain, including assistants to the ruler, were thus no better than serf or slave. For individual rights to have protection the initiative could only come from the above; and even if there indeed was an initiative, it was usually the kuo chia ruler's tactics aiming at consolidation of his power. As a result, a "state stronger than society" was created (Wittfogel, 1963: Ch. 3).

Unification of the Chinese Empire

Chung fa system was similar to European feudalism in that it created a decentralized structure, but beyond that their similarity ends. Because sovereignty was treated as the absolute power over land and people, force appears to be the only means to unify China. The absence of "conditional tenure" as implied in the vassalage of Western feudalism made alliance among chu hous only a tactical and temporary maneuver. Alliance under a constitutional king was difficult to develop due to the concept of sovereignty and proprietorship. Al-

though incorporation of sovereignty and absolute property ownership multiply the cost to unify China, unification was seen by people with the cosmology of familism the only solution for their sufferings created by wars. Long before the unification was carried out, Mencius had already predicted that order can only be restored by unification and the China would finally be unified (Bk. I, Pt. I, Ch. 6). The failure of chung fa system did not disrupt the foundation of familial cosmology but rather reinforced people's belief that to maintain a stable patrimonial structure, the emperor must be given more power to realize his familial authority, i.e., to keep the unification was thus not a deviation from but a confirmation to the concept of familism.

Because unification was completed by force, there was no need for the new ruler to trade his absolute property rights for the title of emperor. The original concept of kuo chia remained intact under the new unified regime. To avoid mistakes of the last regime, chung fa system was abolished in the newly established empire. In other words, the emperor became the sole sovereign and property owner in China proper. Historian Ch'ien Mu (1982: 6) remarks:

When China was unified under the Ch'in and Han dynasties, and locally autonomous government of the

fiefs was replaced by a provincial and county administration “a household was made into a [empire]” (hua chia wei kuo), as the ancients phrased it. All the noble households were overthrown but one which then became the “nation-household” (kuo-chia) or [empire].

The quotation demonstrates that when one of the strongest chu hou unified China, there was no structural change but simply extension of authority from kuo to the whole empire. Consequently, no new vocabulary equivalent to “empire” in English is invented to describe the new arisen centralized regime. Although the successful chu hou had assumed a new title of huang ti to represent his unchallengeable authority, his domain, now the size of a continent, was still called kuo chia—the term once used to represent a fief. For Chinese people the empire was no more than a large fief (Ch’ien, 1982: 6). The ancient verse “all lands up to the sea belong to the emperor, and all people under the heaven are his subordinates” had become for the first time in Chinese history a fact rather than an idea.

Entrenchment of the Concept

I have argued for the assumption that property concept in China has its origin in emperor’s ownership, it is thus

revealing to review whether the concept of emperor's ownership had persisted throughout the history—this is always a debatable issue in academic studies. Observing property transactions on village level, there is little evidence to show that the concept of emperor's ownership was directly or extensively involved. However, it is important for researchers to differentiate two assumptions about the concept of emperor's ownership: first, to view it as an enforceable right, and second, to treat it as a common understanding in the design of institutions. If we take the second assumption, we should pay attention to how institutional designs were influenced by the concept, which in turn affect the modes of transaction in the society. Many scholars, preoccupied by the Western definition of ownership, tend to argue that emperor's ownership in China was nothing but a theory, because it did not really affect peasant's "rights" intransferring properties. Yet, once we have realized that all the peasant's "rights" were conditioned by institutions designed according to this "theory" might not be totally insignificant.

Numerous evidences in history show that emperor's ownership is a widespread and long-standing concept in the Chinese society. The result of a survey conducted by Japanese scholars in Taiwan around the turn of this century, though an

outcast of Chinese society,³ still cherished the concept of emperor's ownership. In the survey, a Japanese official questioned a Taiwanese land possessor about the owner of his land. The land possessor, replied unhesitatingly that all lands in Taiwan belonged to the emperor. When asked who was the owner of Mountain Yu, the highest mountain in Taiwan of more than ten thousand feet, the answer was nobody. The land possessor explained that the mountain belonged to nobody because it was practically inaccessible (Tai, 1979: 159).

The dialogue between the Japanese survey official and a local resident demonstrates that the concept of emperor's ownership is not only a popular understanding, but also a concept based on practical considerations. Had it not been a concept based on practical considerations, difficulties might have arisen during the design of institutions, which in turn might have hindered its acceptance in the Chinese society.

The realistic part of the concept is also made manifest in China's traditional policy toward minorities. The aborigines in Taiwan, and many other parts of mainland China, were allowed by the Chinese government to operate on their own property arrangements (Huang, 1980: 223; T. Ch'en, 1966: 20-21). In the case of Taiwan, a line known as tu-niu chieh-pei

was drawn to demarcate areas under the emperor's jurisdiction from the aborigine's land. The same practice was carried out even if the aborigine's land was enclosed in the emperor's territory. This policy shows that emperor's ownership could be acknowledged through ways other than using physical forces.

Traditionally, a foreign land to become a part of Chinese empire was determined by the extent that the inhabitants accepted the Chinese cosmology of familism and recognized the emperor as their paternal authority. This again demonstrates that the emperor's ownership is based on the hierarchical relationships inherent in Chinese cosmology rather than physical occupation alone. Accordingly, it appears meaningless for a Chinese emperor to argue whether the unaccessible Mountain Yu was part of his property or not. For this reason, the legitimate means that a Chinese emperor used to extend his property is not physical invasion but education (chiao-hua) to modify "custom" of the inhabitants (Miyakawa, 1960; Dreyer, 1976: 13). This approach consequently limits the pace of a Chinese emperor in expanding his property ownership. Ch'ien Mu asserts (1982: 2):

[China's] historical development was characterized essentially by integration of an already common culture, rather than by external conquests of alien ethnic communities. Thus, China's political structure,

as a result of having to cope with the problems of governing a more composite and homogeneous populace, was markedly different from that of the Roman Empire.

Because the emperor consistently based his ownerships rights on acceptance of his paternal authority, the Chinese were able to design institutions according to the same cosmology. Areas that rejected this cosmology of familial authority are simply excluded from the domain of China proper, even though that they might be located in China's heartland.

Implications for Emperor's Ownership

Before China's unification the emperor enjoyed ownership mostly in theory; his actual ownership and sovereignty were divided by his regional subordinates through chung fa system. Chu hou within his regional area nullified the emperor's authority by making use of the concept of kuo chia. After China was unified by one of the strongest chu hou, chung fa system was substituted by the extension of kuo chia concept to the whole empire. This change made "ruling" the empire a synonym of "managing" the emperor's property. Its implications in the design of institutions were bound to be significant.

Concerns for Property Security

When China was divided, familism was an important

factor in policy makings of the empire as a whole. Competitions among regional lords and familial ties with the emperor made these lords unable to ignore the role that familism played in consolidating their rule. More importantly, the existence of many regional lords with relatively equal power made violation of constitutional rules punishable. Examples of of this concern are available in conversations between Confucian scholars and several chu hous. There were also cases that a certain chu hou was attacked by other chu hous because the former failed to fulfill his familial obligation and was condemned as enemy of the emperor, or more accurately, enemy of the cosmology.

The situation was changed by unification. When the emperor became the sole sovereign and property owner of the whole China, how to secure his property appeared to be an important concern in his rule, if not more important than to maintain the patrimonial function. This concern was expressed in a debate between government officials and Confucian scholars in 81 B.C. on the subject of whether the empire should monopolize the trade for salt and iron. In the debate, the government officials argued for monopolization on the grounds of protecting the emperor's ownership (Huan, 1957: 11, 13):

If the government allows private persons to produce and trade salt and iron freely, those who manage the business would become rich and strong by income from the profit. They would then use the resources to form their own party and mass supports in the society. Their influence would finally become formidable and could not be restrained by imperial government.

If private persons are allowed to produce salt and iron, for the production purpose, they must organize up to one thousand labors in the distant seaside or deep mountain areas, where the government supervision is weak. Those who participate the production are mainly the vagabonds who left their home villages and cut connection with their families. Under the circumstances, an independent power will quickly grow to threaten the government's authority.

Confucian scholars opposed the proposition by contending that imperial monopoly hurts people's welfare. However, as the emperor was more concerned than anything else with the security of his property, he naturally overruled the opposition. As a matter of fact, the same concern for security exerted great influence in the next two millennia on many imperial policies concerning economic activities and residual property

rights enjoyed by people.

Although the emperor continued to endorse lands to his family members after unification of China, he was not motivated by adherence to familism but by security reasons. There were no longer a defined rule like the old chung fa system to limit the emperor's latitude in distributing land no longer exists. This gives the new emperor much more rooms to maneuver resources to consolidate his power. While primogeniture was practiced in the royal family, the chu hous were required to divide their land equally among their male heirs, which made them difficult to accumulate resources to challenge the emperor. More importantly, endorsement of land was not accompanied by the absolute ruling power. In the new empire what chu hou might enjoy was privileges to collect certain taxes in his domain; the authority to rule was, however, controlled in the hands of a centralized bureaucracy appointed by the emperor. Karl Wittfogel (1970: 3-4) observes that conferring land to nobles in this situation was no more than a payment of salary. While chu hou were deprived of the power to rule, a new ruling class was rising to fill the vacuum. This was the class of ruling bureaucrats.

Rise of a New Ruling Class

The integration of sovereignty and property ownership

constitutes an environment for the emergence of a type of authority which Max Weber describes as ‘patrimonialism.’ This nomenclature is used to imply a specific mode of regime that the ruler organizes his political power in the same essential manner as he does his authority over his household (Pipe, 1974: 22). As sovereign and sole property ownership concentrated in a single hand, the patrimonial ruler monopolizes all authorities over men and things in his domain. As their rights over property and freedom were unprotected under the constitutional law of familism, the officials recruited to manage the empire were in fact the emperor’s personal slaves (Weber, 1958: 298; Pipe, 1974: 45). This slave status was especially obvious in the last Ch’ing dynasty, when all officials, no matter how high his status was, must identify themselves as slave (nu ts’ai) when talking with the emperor.

To manage an empire of continental size the emperor was by no means able to keep himself informed and hold control of all affairs in this domain. Such reality provided opportunity for bureaucrats to “expropriate” some of the ownership rights supposedly belonging to the emperor. As Weber (1958: 297-98) has indicated:

[The prebendary bureaucrat under patrimonialism]
has as a rule had a personal right to the office bes-

towed upon him. Like the artisan who possessed the economic means of production, the prebendary possessed the means of administration.

Consequently, access to political power appeared to be an important means for one to acquire certain de facto property rights. This expropriation of imperial authority has to some extent changed the nature of patrimonialism. This development was characterized by Weber (1958: 298) as “status patrimonialism.”

The expropriation of imperial authority eventually provoked conflicts between the emperor and his subordinate bureaucrats. According to Weber, this situation encouraged efforts from both sides to rationalize public administration. Nevertheless, China differs from other patrimonial states in that its patrimonialism was supported by a common understanding, i.e., the familistic cosmology, which had existed long before establishment of the imperial structure. Patrimonialism in China is not only a consequence of actual integration between sovereignty and property ownership, but also a foundation on which the emperor legitimized his authority. In the course of time, familism and its major interpretator, Confucianism, became the orthodox in Cina's political system. The orthodox was such that even the emperor was obliged to

use scholars trained by Confucian doctrine to be his bureaucratic functionaries. This created a symbiotic relationship between the emperor and his bureaucrats. While bureaucrats relied on the emperor for status and income, the emperor needed the bureaucratic literati, followers of Confucianism, to legitimize his dynastic rule. As a result, despite constant struggles between the emperor and bureaucrats, status patri-monialism has remained a stable structure in China's political system. As emperor's ownership was continuously expropriated by the intermediary ruling class, connections with the imperial government became a requirement for property possession in China. This phenomenon, as Wittfogel (1963: 296) notes, is an important aspect of oriental empires.⁴

The Residual Property Rights

It was unrealistic for a Chinese emperor to directly manage the property of his empire; therefore, an intermediate managerial group was called for. Inevitably, the loss of information and the loss of control allow the members of the intermediate group to enjoy certain de facto property rights. In addition to these de facto rights, there are also property rights which were conceded by the emperor to his direct property users. The

concession was due partly to practical considerations. Denying property rights to the direct users, considerable power must then be conferred to the intermediate officials in order that producers could be managed. However, this concentration of power in the hands of the intermediate class was certainly not to the emperor's interest. Conceding property rights to the direct property users provided the commoners a legitimate ground to check the expansion of the intermediate class and thus helped secure the emperor's power.

The de facto rights enjoyed by the intermediate officials are not the rights recognized by Chinese cosmology and the collateral property concept. They came into existence only because the emperor could not claim his ownership rights all by himself. The rights for the property direct users were recognized by the orthodox Confucianism. Yet, recognition alone did not protect them from possible encroachment from a higher order in the social hierarchy. Doctrine of li that required total submission on the part of subordinates actually denied the property user the right to resist trespassing from his superior. In short, these two rights mentioned above can both be seen as a residual right—residual to the emperor's theoretical authority as China's sole proprietor.

The residual rights controlled by the intermediate ruling

class can be seen as the rights to possess; the residual rights enjoyed by the direct users are the rights of usufruct. I define usufruct rights in a strict sense that it means only rights for the individual who directly works on the land for production purposes. In many cultures, these two rights are difficult to separate and are certainly not necessarily referred to two distinct groups of people. This makes it difficult to justify and enforce discriminated policies between the two. However, in a patrimonial regime like China, the separation of the two was almost a natural tendency. On the one hand, people who labored their mind were reluctant to be involved in the field works and looked down upon those who labored their body (Pipe, 1974: 45). The ideal picture of Chinese rural life was that “benevolent gentlemen [land possessors] composing poetry at their villa windows while loyal tenants toiled patiently in the distant fields” (Wakeman, 1977: 31). On the other hand, as the residual rights of possession was determined by connections with the imperial government, people who tilled the land have few opportunities to become land possessor unless they changed their social status. This situation allows the emperor to make concessions to direct producers without worrying that the power for intermediate ruling class would be enhanced. This division of residual rights into two

separate parts to have them check each other undoubtedly serves an important function to preserve Chinese imperial structure. It is thus significant to review how they were restricted from growing into independent rights.

The Residual Rights of Possession

It is common in patrimonial countries for people to assist the emperor managing his property and be rewarded with certain property rights. Yet, different from many other cultures, the intermediate group in Chinese society was composed by literati rather than by managerial slaves or inherited aristocrats. This means that one must be a literati before he could be recruited as a member of the managerial group, not vice versa. Being a literati, as I have indicated in the last chapter, was assumed to be capable of behaving in accordance with his social position. Since an important nature of property right is the authority to exclude others from intervening in property management, the declaration of the rights appears self-contradictory to the principle of propriety, which requests total submission in response to demands from the superior. Unable to observe propriety, one could be deprived of the title of literati and denied governmental connections; eventually, this would cost him property rights. The propriety requirement apparently restrained the managerial group's effort to

secure their acquired property rights. Barrington Moore (1967: 162-277) notes that this absence of an “independent ideology” to support the motivation of acquisition is the major reason that China were unable to form a middle class defined in the Western sense. To Confucianists, if hierarchical order was distinctive and everyone behaves properly, property conflicts would not exist to be a problem in the society. Accordingly, protecting the rights to possess did not constitute an important concern in the design of institutions.

In addition to the restriction imposed on the literati, the concept of benevolent king was also inhospitable to the development of property rights for the intermediate ruling class. According to Confucianism, a benevolent king was responsible for maintaining harmony in a society. To Confucius, this task could only be accomplished under the circumstances that resources were equally distributed among the commoners. Confucius said (*Analects*, Bk. XVI, Ch. I):

I heard that to govern a state one should worry about unequal distribution of the resources rather than its scarcity; should worry about disharmony rather than poverty. As I understand, if the resources are equally distributed, there should be no real poverty; if harmony prevails in the society, the problem of scarcity

should not exist.

This emphasis of equality strengthened the emperor's authority to intervene in the arrangements of property rights for redistribution. It provided a legitimate ground for Chinese emperors to proceed numerous land reforms in the history.

This idea of equality contradicted to some extent the concept of hierarchical structure. Nevertheless, it resulted in strengthening the connection between officialdom and property rights. The argument for equality made untitled individuals in Chinese society difficult to protect their property from redistribution. Before the eleventh century, an untitled land possessor was normally known as chien-pin chih t'u—the land appropriation rascal, a term indicative of the precarious position of a proprietor. Similar threat to individuals with official titles was much reduced. The latter could always escape the fate of redistribution by their political privileges, which will be discussed in the chapter about bureaucracy.

The Residual Rights of Usufruct

Different from its position on the residual rights to possess, physiocratic Confucianism provided abundant theoretical supports for the protection of usufruct rights. Its emphasis on the importance of land production even constitutes to some extent a theoretical constraint on the emperor's owner-

ship authority. I have mentioned in the last chapter that Chinese cosmology endorses peasants a right to revolt. The spread of peasant revolts in China were viewed as similar to other natural calamities like earthquakes, meteors, volcanic eruptions, and other omens of heaven's displeasure (Wakeman, 1977. 57-58). Further, the revolts were sometimes interpreted as losing of mandate which would accelerate downfall of a dynasty. Although the threat of revolt was not always effective in protecting peasant's rights of usufruct, it undoubtedly provides peasants a theoretical leverage against the emperor's ownership.

The concept of li might neutralize peasant's rights to revolt by inculcating that people of all kinds must behave properly according to the social status. Yet, Confucianists also recognized that peasants with less education would have difficulty comprehending and following guidelines of li. Consequently, they admonished that, in addition to the function of fa, minimum resources for life must be guaranteed to peasants to keep them behave properly. As Mencius (Bk. 1, Pt. 1, Ch. 7) notes:

Only men of education who without a fixed property can maintain a fixed heart [to perform li]. To the commoners, it is certain that without endorsing a fixed

property they will be difficult to maintain a fixed heart, there is nothing which they will not do, in the way of self-abandonment, of moral deflection, of depravity, and of wild license. When they thus have been involved in crime, to follow them up and punish them is simply to entrap the people, which is unjustified for a benevolent ruler.

Therefore, a wise ruler, as Mencius continued, would endorse certain property rights to the commoners so as to make sure that they had sufficient resources to serve their parents and support their wives and children. Since the endorsement of property was to guarantee provision of livelihood for peasants, the production of land appeared an important criteria for the protection of property rights. In other words, the rights to use is in theory to be protected but not the rights to possess.

The rationale to protect the residual rights of usufruct had a considerable impact on imperial policies over land, which in turn deeply affected the transactional practices in the society. As early as the Han dynasty, the imperial government had ruled that “all lands that grows grass are the property of imperial government” (Yeh, 1983: 58-60). This policy was continued in most of the succeeding dynasties.⁵ It suggest that a peasant could lost his right of usufruct by leaving his land

unplowed. The Ch'ing government even regulated that any land holder who left his land desolate without proper cause could be punished by bamboo strokes (Y. Li, 1982: 268).

While people were denied the rights to uncultivated lands, objects involved in transactions were thus limited to the ones that had been improved by human labor.⁶ Transaction contracts in Chinese society normally stipulated that “the land is transacted to become ‘a permanent yeh’ (yung-wei-shih-yeh).” Since yeh was defined as “an object under orderly management”, the implication is clear that the transaction endorsed only the rights to continuously “manage” the property (Tai, 1969: 283). Because the transactions dealt only with “the rights to manage” rather than “the rights to own,” the imperial government was to intervene when the property was not managed properly. Frank Schurmann (1956: 509) thus comments that in Chinese people’s mind, there were only rights of occupancy and possession; exclusive ownership right was a concept foreign to them.

Once the concept of property rights is understood, our next concern is to investigate how institutions are designed to enforce the rights. In the subsequent chapter, we will discuss the tax system in the Chinese empire. Basing upon the concept of emperor’s ownership, tax is not treated as a means to raise

common goods for proprietors, but the collection of rent for the ultimate property owner. When tax is not directly connected with the raise of common goods, its collection constitutes an infringement on the rights of property user or possessor, residual or not. It is thus interesting to see how tax collection was justified under the concept of emperor's ownership.

Endnote

1. In light of this problem, the issue of whether to categorize traditional China as a slavery, feudal, or pre-capitalism society is logically wrong since all of these terms imply a specific type of property relationships unique to Western societies.
2. E. Ostrom (1986: 19) categorizes rules of human society into seven groups according to their different functions. They are rules of position, boundary, scope, authority, aggregation, information, and payoff. This categorization does not deny a vertical connection among rules. It simply gives more emphasis upon their functional configurations.
3. Taiwan is an island separated from mainland China by a strait of average two hundred kilometer width. Before annexed to China in the seventeenth century, the island was occupied

by pirate, foreign forces, and antigovernment groups. During the Chinese rule, Taiwan was notorious for its constant rebellions. The imperial government spent only limited resources for Taiwan's development and Taiwan was traditionally regarded by central government as place for degraded officials. In a time, some high officials even proposed to abandon Taiwan as a territory. If emperor's ownership still persisted under circumstances as such, it is reasonable to assume that no part of the Chinese empire would reject the concept.

4. Wittfogel (1963) notices the same fact of weak property protection in oriental empire. Yet, he does not regard it as a result of common understanding on familism, or the extension of kuo chia concept. Instead, he treats it as a consequence for the maintenance of hydraulic system, which he believes has a tendency to deny private property for other common considerations.

5. This policy applies to both virgin lands and lands that are left desolated by their possessors. In the seventeenth century Taiwan, one who desired to cultivate and possess a piece of virgin land on the island must apply a license from the imperial government. Cultivating virgin land without license was treated as squatter, and were subject to legal punishment and eviction. This practice apparently recognized the rights of the imperial

government over virgin land. Once a license was endorsed, its receiver was obliged to complete the cultivation within a definite period of time, three years in most cases. Failure to complete the cultivation in time would cause the license to be withdrawn and the land be reassigned to other applicants, even though the license holder might be willing to keep the title by paying taxes (S. Chang, 1981: 8-9).

6. After reviewing numerous contracts in various Chinese villages, Frank Schurmann indicates that lands involved in transactions are mostly lands described as t'ien, ch'an, or yeh. These terms are used to describe properties that have been improved by human efforts. Schurmann thus concludes that only land which had been modified by labor could become object of transactions in traditional Chinese society (1956: 509).

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