

# State Legalism and the Public/Private Divide in Chinese Legal Development

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*From total rejection to reluctant acceptance and eventually to full acceptance with new justifications, the Chinese attitude towards the public/private divide has undergone several stages in theory and practice. During the early stages of the People's Republic of China (PRC), Chinese scholars of law and political science firmly rejected the divide between the public and the private as being a distinction made in bourgeois law that should be replaced by a new socialist legal system, which would acknowledge no such difference. Since the start of reforms in the late 1970s, the newly ascendant private sector of the economy called for legal recognition of its status, but due to ideological constraints inherited from the pre-reform era, it was not easy to give meaning to the existence of the private sector. Debates were waged among Chinese scholars over the distinction between the public and the private for the purpose of recognizing private ownership. Eventually, the distinction was recognized. The Chinese case is obviously a very good example to show that such a distinction does play a role in shaping or improving a legal system. The emergence of "social law," however, has blurred the demarcation between the two, calling for new theorization. The "publicization of private law" and "privatization of public law" have further strengthened the ambiguity with respect to the public/private divide.*

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## INTRODUCTION

Does the distinction between public and private law perform worthwhile functions in contemporary legal systems? This is a general question that requires a specific answer. The development of the legal system in the People's Republic of China (PRC) presents an interesting case for discussion. From total rejection to reluctant acceptance and eventually to full acceptance with new justifications, the Chinese attitude towards the public/private divide has undergone several stages in theory and practice.

Due to China's specific political culture, which discourages views different from that of the government, legal theorists usually follow the lead of the government; rarely do they speak in different voices publicly. During the early stages of the PRC, which was founded in October 1949, Chinese scholars of law and political science firmly rejected the divide between the public and the private as being a distinction made in bourgeois law that should be replaced by a new socialist legal system, which would acknowledge no such difference. Since the start of reforms in the late 1970s, with the introduction of the free market and private ownership, the Chinese economic system has seen unprecedented change. The newly ascendant private sector of the economy called for legal recognition of its status, but due to ideological constraints inherited from the pre-reform era, it was not easy to give meaning to the existence of the private sector, whose production outcome made up an increasingly large part of China's GDP.

Debates were waged among Chinese scholars over the distinction between the public and the private for the purpose of recognizing private ownership. There was no agreement among the scholars who participated in the debates as to whether such a distinction could be justified, but the view that a distinction should be made between the two, so that laws protecting private ownership and interest could be enacted, prevailed nonetheless. This debate has been vividly captured by remarks made by Professor Jiang Ping, China's most vocal scholar of legal reforms and former president of the Chinese University of Political Science and Law:

Strictly speaking, in the 30 years of reform what I did was call for private rights. I chose civil law and private rights because those areas were weak in China, or rather, in a China with such strong public powers, private rights were always in a weak position. Private rights include the rights of private enterprise, of private property, and perhaps even broader personal rights.<sup>1</sup>

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1 See Jiang Ping, *China's Rule of Law Is in Full Retreat*, CHINESE L. PROF. BLOG (Feb. 21, 2010), [http://lawprofessors.typepad.com/china\\_law\\_prof\\_blog/2010/03/](http://lawprofessors.typepad.com/china_law_prof_blog/2010/03/)

Eventually, the distinction was recognized. The word “private” no longer carries negative connotations, even though the word “public” still dominates and seems to have more legitimacy in current Chinese legal literature. This recognition happened gradually with China’s legal development towards serving a freer market and a growing private sector in the national economy. The distinction between public law and private law has enabled private rights to grow out of the monopoly of public power and public rights, thus making it possible for contemporary Chinese law to better suit the need for economic development.

The Chinese case is obviously a very good example to show that such a distinction does play a role in shaping or improving a legal system. With the implementation of more reforms and laws as well as the introduction of Western legal theories, the understanding of this divide has been elevated to a new level of sophistication. The emergence of environmental law, economic law and other laws that fall into the category of “social law” has blurred the demarcation between the two, calling for new theorization. The “publicization of private law” and “privatization of public law” have further strengthened the ambiguity with respect to the public/private divide.

This Article attempts to trace that development by beginning with a discussion on China’s reformative context in which the debates on the public/private distinction took place. It looks at the debates to see what justifications were offered by those who either supported or discredited this distinction and what role, positive or negative, it has played in China’s legal reform. The Article also explores the relations between China’s legal development and economic development, in addition to focusing on the public/private distinction. Part I starts with a brief review of China’s legal tradition, which was purely public, albeit in an imperial sense. Part II explains the main characteristics of the contemporary mainstream Chinese legal theory, which I characterize as “state legalism,” which focuses law in the direction of the public, elevates the state interest, and almost denies the existence of private rights. Parts III and IV discuss the changing role played by the public/private distinction at different stages of the PRC’s history: Part III deals with the period following the founding of the PRC in 1949, while Part IV deals with the years that followed the 1970s reform. Part V presents the most recent understanding and discussion of this topic by Chinese scholars who view the public/private divide in a broader social context. The last Part concludes.

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[jiang-ping-chinas-rule-of-law-is-in-full-retreat.html](#) (a speech made at a gathering celebrating Jiang Ping’s eightieth birthday).

## I. TRADITIONAL LEGACY: NO DISTINCTION BETWEEN PUBLIC AND PRIVATE LAW

### A. A Comprehensive Body of Law

Our knowledge of the Chinese legal tradition comes from a number of primary and secondary sources. The most important source is the written codes of the successive dynasties. The Tang Code<sup>2</sup> and the Great Qing Code,<sup>3</sup> for instance, are among the best-known Chinese written laws. The Three Dynasties, namely Xia, Shang, and Zhou (2700-255 B.C.), may be considered the formative era in Chinese history, during which legal rules and legal institutions gradually took shape.<sup>4</sup> The early laws passed down from the Three Dynasties then became highly developed during the Spring and Autumn periods (770-475 B.C.). However, a sophisticated tradition of legal codification did not emerge until the Tang dynasty (618-907 A.D.). From the Tang to the end of the Qing Dynasty (1631-1911 A.D.), very few changes took place in Chinese legal codes. The earliest forms of these codes were similar to other ancient codes, such as the laws of Hammurabi, the Twelve Tables, or the German Codes of

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- 2 The Tang Code consists of 502 articles divided into twelve books: (1) General Principles; (2) The Imperial Guard and Prohibitions; (3) Administrative Regulations; (4) The Household and Marriage; (5) The Public Stables and Granaries; (6) Unauthorized Levies; (7) Violence and Robbery; (8) Assaults and Accusations; (9) Fraud and Counterfeit; (10) Miscellaneous Articles; (11) Arrest and Flight; and (12) Judgment and Prison. The Tang Code covered most legal problems and thus became a monumental work, laying the foundation for the development of law not only in China but also in the neighboring states of Japan, Korea, and Vietnam. In terms of structure, the Tang Code can be considered to be divided into two parts: the initial part illustrates the general principles, while the second part sets forth the specific crimes covered, together with the penalty for each criminal act. For an English translation of the Tang Code, see TANG LÜ (唐律) [THE TANG CODE] (Wallace Johnson trans., 1979-1999) (China).
  - 3 The Great Qing Code, Da Qing Lu Li or Ta Tsing Lu Li, was based on the Great Ming Code, which in turn was based on the Tang Code. The Great Qing Code was translated into English by George Staunton as early as 1810. A much better translation was made by William C. Jones in 1994. See TA TSING LEU LEE (大清律例) [THE GREAT QING CODE] (Sir George T. Staunton trans., 1810); DA QING LÜ LI (大清律例) [THE GREAT QING CODE] (William C. Jones trans., 1994).
  - 4 See A HISTORY OF THE CHINESE LEGAL SYSTEM (Fan Zhongxin & Chen Jingliang eds., 2010) (China).

the Middle Ages, which were based on customary law and usually consisted merely of compilations of existing legal materials.<sup>5</sup>

All branches of Chinese law were arranged in a single comprehensive code, rather than in separate laws. The Tang Code (653 A.D.) had twelve chapters incorporating 502 articles, including laws governing matrimonial matters, granary management, and trial procedures. Finally, the *Da Qing Lu Li* (The Great Qing Code) had thirty chapters incorporating 436 articles and 1047 sub-statutes.<sup>6</sup>

The introduction of Western civilization into China during the eighteenth and nineteenth centuries resulted in significant changes within the political, economic and cultural structures of Chinese society. From 1902 till the collapse of the Qing Dynasty in 1911, under the pressure of foreign and domestic demands for reforms, the late Qing government made great efforts to modernize the Chinese legal system. With the assistance of foreign legal scholars, the newly created Ministry of Law Reform drafted various modern laws, such as The Qing Current Criminal Law, The Qing New Criminal Law, The Qing Draft Civil and Criminal Procedure Law, The Qing Draft Commercial Law, etc. Some of these laws were promulgated, although most were still in draft form when the revolution led by Dr. Sun Yat-Sen turned China into a republic in 1911.<sup>7</sup>

After the overthrow of the Qing Dynasty in 1911 and prior to the Communist takeover in 1949, the ruling governments, the Republicans, Warlords and Nationalists (KMT) renounced the traditional Chinese law remaining from imperial times and enacted a new body of law based largely on European-style civil law. The primary models were the French, German, and Japanese codes. For the first time in Chinese history, a comprehensive modern legal system was established. The laws were organized into six different categories: Constitutional Law, Criminal Law, Civil Law, Criminal Procedure, Civil Procedure and Administrative Law. The books containing all these statutes were called “The Complete Collection of Six Laws.”<sup>8</sup>

Together with that effort came the importation of Western legal ideas and theories, which introduced into China, among other things, the distinction between the public and the private in law.

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5 See generally CSABA VARGA, CODIFICATION AS A SOCIO-HISTORICAL PHENOMENON (1991).

6 See *supra* notes 2-3.

7 ZHANG JINFAN (张晋藩), ZHONGGUO FAZHI SHIGANG [AN OUTLINE HISTORY OF THE CHINESE LEGAL SYSTEM] (1986) (China).

8 See LAW PRINTING HOUSE, THE COMPLETE COLLECTION OF THE SIX LAWS OF THE REPUBLIC OF CHINA (1943) (China).

## B. Legal Thinking

A four thousand year history of rewarding the good and punishing the evil has naturally fostered a strict and powerful legal tradition.<sup>9</sup> In their competition for the position of authoritative ideology in Chinese history, Taoists, Confucians, Moists, and Legalists have respectively praised or devalued the idea of governing by law, resulting in a cluster of vague ideas and statements about law, which would become eternal sources of dispute and misunderstanding for Chinese as well as foreign scholars.<sup>10</sup> For instance, the Legalists were well known for promoting the use of law as a means for the Kings and Emperors to rule while Taoists, Confucians and Moists favored more flexible ways of governing by morality or non-action or universal love. These ideas and statements, however, never went beyond one theme: whether it is wise to use law, and if it is, how law should be used, whether to reward or punish.<sup>11</sup> In fact, almost no study was devoted to the essence and other ontological problems of law. Neither the question regarding what law is, nor the distinction between public and private law, has ever attracted enough attention of traditional Chinese intellectuals.

In Chinese moral and legal tradition, primarily based on Confucianism and Legalism, the principles and rules of public affairs and private family affairs are the same. The principles and rules of family life are usually extended to public life, as epitomized by this famous dictum regarding what a man should aspire to: “One should refine himself, tidy up his family, rule a country and level the world.”<sup>12</sup> The fact that dynastic laws never made a distinction between criminal and civil laws is another example in this regard. This fusion of public and private affairs and non-distinction between the public and private worlds were practiced in all feudal dynasties of China and strengthened by the dynastic laws, which prevented the differentiation between the public and private spheres, leaving virtually no space for the distinction between

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9 See generally DEREK BODDE & CLARENCE MORRIS, *LAW IN IMPERIAL CHINA* (1967); TUNG-TSU CHU, *LAW AND SOCIETY IN TRADITIONAL CHINA* (photo. reprint 1961) (1947); ZHANG, *supra* note 7.

10 See JOSEPH NEEDHAM, *2 SCIENCE AND CIVILIZATION IN CHINA* 518-83 (1956); ROBERTO UNGER, *LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY* (1976); William Alford, *The Inscrutable Occidental? Implications of Roberto Unger's Uses and Abuses of the Chinese Past*, 64 *TEX. L. REV.* 915 (1986).

11 See Liang Zhiping (梁治平), *Zhongguo Fa de Guoqu, Xianzai yu Weilai: Yige Wenhua de Jiantao, Bijiaofa Yanjiu* [*The Past, Present and Future of Chinese Law: a Cultural Examination*], 17 *BIJIAO FA YANJIU* [COMPARATIVE LEGAL STUDIES] 19-20 (1987).

12 See LI JI (礼记) [THE BOOK OF RITES] ch. 42, available at <http://baike.baidu.com/view/73645.htm>.

public law and private law to grow. In a narrow sense, all laws in traditional China were public laws, that is, the emperor's order was public order and the emperor's law was public law.

Ancient Chinese law was primarily concerned with power but not with rights. The distinction between public and private law was not culturally conceivable. The dynastic rulers all embraced the argument that "[u]nder the whole heaven, [e]very spot is the sovereign's ground; [t]o the borders of the land, [e]very individual is the sovereign's minister."<sup>13</sup> The most direct consequence of this type of legal mentality was a failure to develop a concept of private rights, the foundation for the development of private law. In *Analects*, the Duke of Sheh informs Confucius: "Among us here there are those who may be styled upright in their conduct. If their father has stolen a sheep, they will bear witness to the fact." Confucius replies: "Among us, in our part of the country, those who are upright are different from this. The father conceals the misconduct of the son, and the son conceals the misconduct of the father. Uprightness is to be found in this."<sup>14</sup> On being asked what was the right thing for a king to do when his father has committed a crime, either turn in his father or give up his kingdom, Mencius, the Sage Minor, replied that the king should carry his father on his shoulders and run away to live happily ever after with his father in the remote seaside of the East Sea.<sup>15</sup> In the Confucian understanding, then, there was no separation of public and private life. What might be justifiable in family life was also considered to be true in public life. Standards for addressing family relations were also standards for public relations. Any separation of the two spheres of life, public and private, did not appeal to Confucian thinkers as a way of addressing the moral and practical dilemmas presented to them.

## II. THE CONCEPT OF STATE LEGALISM

After the founding of the PRC in 1949, Marxism and Communism took the place of Confucianism and became the only correct legal ideology in China. No contending schools of legal thought were allowed to exist. Only one

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13 See the early collection of Chinese poems and one of the Five Classics of Confucianism, CONFUCIUS (孔子), SHIJING (詩經) [THE BOOK OF SONGS] ch. 20, available at <http://baike.baidu.com/view/109844.htm>.

14 See CONFUCIUS (孔子), LUN YU (论语) [THE ANALECTS OF CONFUCIUS] ch. 13, available at <http://ctext.org/analects>.

15 See MENCIOUS, BOOK 7A, para. 35, available at <http://www.acmuller.net/con-dao/mencius.html>.

officially sanctioned version of legal thought provided the guiding principles for lawmaking, law enforcement, and legal consciousness.

What China has been promoting and practicing with regard to law since the founding of the PRC can be described as state legalism: a combination of authoritarian ideology and distorted liberal legal institutions. It utilizes law as a political as well as economic instrument to advance the state's interest, rather than as an embodiment of basic human values and protector of human rights. State legalism has produced a regulatory social framework that relies on the use of law to maintain social stability and facilitate economic growth, while sacrificing human rights for economic development. State legalism concentrates overwhelmingly on legal rules made by the state and the obedience of citizens to those rules. Law, in this model, is regarded purely as an instrument parallel to other methods of social control and enjoys no supremacy.

In a society characterized by state legalism, the different departments of the legal system actually do not differ much. The courts are similar to any other bureaucratic organization and there is nothing special about them, except for the fact that they concentrate on disputes. A judge is no more than a civil servant or an administrative official. It is hard for the public to distinguish judges from police officers. No matter what differences there may be among the legislative, administrative or judicial positions, they all belong to the government bureaucracy. However, there are few theoretical differences among these government departments and, subsequently, few substantial conflicts either.

The fundamental differences between state legalism and the rule of law can be demonstrated by the status of law, the implementation of constitutionalism, the protection of human rights, and the relationship between the judiciary/administration and politics. Under the framework of state legalism, law is neither stable nor predictable; government policies prevail over, and sometimes even replace, laws. As modern Chinese laws did not emerge naturally from Chinese history and culture, but were transplanted and imposed on the people by the government, their implementation faces considerable resistance from the general populace who are accustomed to obeying not laws but moral standards. Furthermore, the legislation-centered approach of state legalism puts judicial and legal enforcement institutions in subordinate positions. Meanwhile, the judicial system is defined as part of the state machine and treated like any other administrative organ, in which the judge is not a neutral adjudicator but a single link in the entire national chain and carries the same responsibility as administrators and legislators.

State legalism treats the state as an abstract entity, which plays the role of lawgiver, interpreter, and enforcer, and is therefore above the law. It cherishes the idea of a perfect legal system and pragmatic law enforcement



policy. In other words, it presents a strange combination of legal essentialism and pragmatism. While legal essentialism regards the quest for the essence of law as the starting point for constructing a legal theory and as a focus for legal studies, legal pragmatism regards the law as a tool for state-building and economic development.

Legal essentialism holds that an object may possess several characteristics, but only one (some say more than one) plays a decisive role in shaping the nature of the object. The decisive characteristic is called the essential character or essence of the object.<sup>16</sup> Taking law as an example, it may have more than twenty characteristics, such as stability, predictability, normativity, coercive character, etc., but only one of these characteristics determines the nature of law. Legal essentialists believe that law is an outcome of irreconcilable class struggle, and its essence is an expression of the will of the ruling class. Law is an instrument with which the ruling class exercises its rule, and it will wither away with the disappearance of class.<sup>17</sup> On this view law is only a sledgehammer for crushing class enemies. Whoever is unfortunate enough to be counted as one of the enemies, is bound to be crushed without hesitation.

Furthermore, because legal essentialism looks at the world through the lenses of class struggle, it tends to associate everything with class essence. As a result, the possibility for discussing basic jurisprudential categories is suffocated. For instance, the concepts of justice, freedom, rationality, rights are all class-permeated categories to legal essentialists and these concepts do not differ very much because they have the same class essence. Under legal essentialism which views the essence of law as class-oriented, law is inevitably politicized to punish those who have doubts or are not in line with the government. The Chinese criminal law maintained a particular crime called the crimes of counter-revolution for a fairly long time.<sup>18</sup> It was widely used to bag those who were considered “enemies” of the people. It did not cease to exist until 1997 when China revised its criminal law.

Pragmatists see law as an instrument for shaping society. For them, law is not an end in itself, but a tool through which dominance or social harmony is attained. That also means law is absolutely malleable to human will, i.e., law is not merely an instrument, but one that changes at the disposal of those

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16 ZHUXUE CIDIAN [THE COMPLETE DICTIONARY OF CHINESE PHILOSOPHY] 154 (Liu Yanbo et al. eds., 1983).

17 Du Feijing & Wang Yongqing, *Makesi Zhuyi Yu Faxue* [Marxist Jurisprudence] ZHONGGUO FAXUE [CHINESE LEGAL SCIENCE] 19 (1988).

18 See ZHONGHUA RENMIN GONGHEGUO XINGFA (中华人民共和国刑法) [THE CRIMINAL LAW OF THE PEOPLE'S REPUBLIC OF CHINA] (1984), available at <https://www.fas.org/irp/world/china/docs/counter.htm>.

who make and enforce it. The pragmatic conception of law can thus explain the two major stages of Chinese law development since 1949. Immediately after the founding of the PRC, the Chinese Communist Party sought to lead the society towards socialism. The extermination of antagonistic forces was considered critical to reaching this objective, and law was seen as an instrument of class struggle. Specifically, it was regarded as an instrument of class dominance, which would allow the proletariat to dominate and thereby eventually extinguish the bourgeois class and all other reactionaries. As the political focus moved from class struggle towards economic development, the primary role of law as an instrument changed from class struggle to economic construction. Contrary to the practice of the first thirty years of the PRC, since the reforms of the 1970s law has been regarded as an instrument of economic development. The next two Parts will discuss the developments in Chinese law during both periods by focusing on the distinction between public and private in each.

### **III. TERROR OF THE PUBLIC: BANISHING THE PRIVATE**

Soon after its inception in 1949, the government of the PRC abolished the old Nationalist laws and began building a socialist legal system. In January 1947, Mao Zedong dictated:

It is quite necessary to carry out legal research from a new point of view. On the one hand, the new democratic law is different from socialist law; on the other hand it is different from bourgeois laws of Europe, America and Japan. Please carry out your research in this spirit.<sup>19</sup>

The immediate problem confronting Chinese legal scholars was simple but almost unanswerable: in what way should socialist law differ from bourgeois law? From the outset, it seemed quite clear to Chinese legal scholars that any attempt to distinguish socialist law from bourgeois law in terms of formality and structure would never yield any significant results. Instead, these scholars attempted to explain the differences between bourgeois and socialist law by drawing on legal essentialism, as explained above, which holds that the nature of an object is determined not by its form and structure, but by its essence. Thus, socialist law differs from bourgeois law in that it reflects the will of the entire people, while bourgeois law only reflects the will of the bourgeois class. The discovery of the essence of law opened the possibility for Chinese

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19 MAO ZEDONG (毛泽东), MAO ZEDONG SHU XIN SHOU JI XUAN [SELECTED LETTERS OF MAO ZEDONG] 280 (1983) (China) (translated from Chinese by the author).

legal scholars to construct a legal theory, which was urgently needed in the drive for a new socialist legal system. Modeling from the Soviets and drawing lessons from the bloody class struggle going on in China at that time, they were able to rig up an officially acceptable, albeit dogmatic, theory of law. This theory is summed up by the following excerpt:

According to this theory, (1) the origin of law is an outcome of irreconcilable class struggle, (2) the essence of law — law is an expression of the will of the ruling class, (3) the function of law — law is an instrument with which the ruling class exercises its rule, (4) the development of law — law will wither away with the disappearance of class.<sup>20</sup>

Two factors functioned to produce that legal theory. First, the Chinese version of Marxist legal theory was a replica of A.Y. Vyshinsky's model in its entirety. Vyshinsky's theory of law espouses the same substance and assertions as Chinese legal theory, and it is an undisputed fact that there was a campaign of transplanting from the Soviet Union in the early years of the PRC.<sup>21</sup> However, there is something that is not completely explained by this factor alone. Faced with more than one options for transplanting, why did China choose Vyshinsky instead of Pashukanis? Drawing upon the strand of Marx's ideas about law, which links law to economic development, E.B. Pashukanis developed a different version of Marxist legal theory. He saw law as a fundamentally commercial phenomenon, reaching its apogee in bourgeois society. It was based, for him, on the abstract individuality, equality and equivalence of the legal parties. It treated all legal institutions, including the family, criminal law and the state, according to the model of contract between individuals and its quid pro quo.<sup>22</sup>

Of course, it could be said that Pashukanis's theory had already been criticized at the time when Chinese began to transplant. But the Chinese have always emphasized the importance of combining foreign theories and ideas with Chinese reality. The Chinese Marxist legal theory was also a reflection of the social reality of China at that time. The whole society was engulfed in class struggles aimed at consolidating the dominance of the new political power and suppressing the opposition of any sort and magnitude. In fact, law has not been the only field in which class nature was advocated. Large

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20 Du & Wang, *supra* note 17.

21 See Zhang Shangzu, *An Yang Weixinsiji dui Falu Kexue de Zhuoyue Gongxian [A.Y. Vyshinsky's Remarkable Contribution to the Legal Science]*, 51 ZHENGFA YANJIU [POL. & LEGAL STUD.] (1955).

22 See Eugene Kamenka, *Three Marxist Theories of Law*, 456 BEIHEFT 14 (1983).

scale invasion of class nature could also be found in literature, philosophy, and political science.

The concept of the essence of law enabled Chinese legal scholars not only to construct a basic theory of law and distance it from bourgeois legal theories, but also to construct theories of constitutional and substantive law. For instance, the official constitutional theory adopted by the Chinese government holds that the essence of the constitution lies in the fact that it is an outcome of political struggle between different classes. The constitution is made by the politically and economically dominant class to safeguard and consolidate its dominant position. It is an expression of the will and interest of the ruling class.<sup>23</sup> The same argument can be found in the theory that views criminal law purely as a powerful weapon with which the ruling class crushes the resistance of the ruled.<sup>24</sup> Even in the field of civil law where the smell of gunpowder is relatively weak, some scholars have tried very hard to extend the class essence to civil disputes, saying that civil law consists of the behavioral norms of a certain class meant to safeguard the economic institutions and order advantageous to it.<sup>25</sup>

For a long time, Chinese legal scholars generally denied the distinction between public and private law, believing that any such distinction was unique to bourgeois legal theory and capitalist legal institutions. Several arguments were offered. First, from the perspective of ownership, the foundation of private law is private ownership of productive means, whereas in a socialist society public ownership of productive means is practiced, offering no basis for the private law to exist and thus causing the distinction between the private and public law to disappear. Second, any such distinction cannot be meaningful once the people have seized the power of the state, because it would alienate the people from the state power. Presumably, the state represents the people and the interests of the people and of the state, respectively, are unified. Third, it is social relations that the law regulates: a socialist society does not recognize any type of private law and everything in the economic field belongs to the sphere of public law, not private law. A socialist society practices a planned economy and public ownership and all economic activities are coordinated from above by the central government. Almost all social relations, including

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23 AN INTRODUCTION TO CONSTITUTIONAL JURISPRUDENCE 4-15 (Xiao Weiyun et al. eds., 1985).

24 Yang Chunxi & Zhang Wen, *The Essence of Law from the Perspective of Criminal Law*, in *THEORY AND PRACTICE OF THE SOCIALIST LEGAL SYSTEM IN CHINA* 62 (Zhang Guohua ed., 1986).

25 LING XIANQUAN, AN INTRODUCTION TO THE CIVIL LAW OF THE PEOPLE'S REPUBLIC OF CHINA 17-18 (1986).

family relations, are regulated as public by government policies and rules. Fourth, from the perspective of law as an instrument of the ruling class, any such distinction erases the class nature of law. At its most extreme, this argument does not even recognize the distinction. Since law reflects the will of the ruling class, it must all be public. Fifth, from the perspective of the historical development of law, such a distinction is a uniquely capitalist phenomenon which the new type of law, the socialist law, must abandon. Sixth, in a socialist society, social interests are unified and there is no antagonism between the social interest and individual interest. Therefore, the distinction between public and private law would be meaningless in a socialist society.<sup>26</sup>

Consequently, it was believed by socialist legal scholars that making a distinction between public and private law under a socialist system was unnecessary. Making such a distinction would have diluted the class nature of socialist law. Rather, they thought that law in a socialist society should remain strictly public by nature. Scholars who held this view cited Lenin's remarks that nothing in the economic field is private as their theoretical basis.<sup>27</sup> This belief was further strengthened by the practice of a command economy and public ownership in the early years of the PRC. Since its inception in 1949, the PRC government had practiced a command economy, under which all economic activities including production and consumption were strictly controlled by the central government.

Under the command economy, industrial production and agriculture were managed according to compulsory administrative plans drawn up by local and central governments. Even the proportions of types of grains to be produced were strictly planned. Peasants were not allowed to enter the circulation market. Most of the agricultural products were contributed to the state, which then distributed them among the people throughout the country, including urban residents. Some would be saved as seeds for the next year and the rest would be divided among producers according to work-points they had earned and how many heads there were in a family. If what was given to the peasants was not enough to help them survive, the state would then provide relief in a centralized manner. Such a system of production and circulation excluded

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26 Li Maoguan, *fa xué jiè guān yú gōng fa yu sī fa huà fēn wèn tí de zhēng lùn* (法学界关于公法与私法划分问题的争论) [*Jurisprudential Debates on the Distinction Between the Public Law and the Private Law*], QIUSHI 44 (1996), available at [http://www.lw23.com/paper\\_135221911/](http://www.lw23.com/paper_135221911/).

27 See 42 LIENING QUANJI (列宁全集) [COMPLETE WORKS OF LENIN] 173 (1987) (China); see also BEN SHE YI MING, TAO XIJIN WENJI [COLLECTED WRITINGS OF TAO XIJIN] (2008) (China). Tao (1908-1992) was a Deputy Director of the Law Committee of the National People's Congress who oversaw the making of several important laws in China at the beginning of the reforms after 1978.

peasants from the market and seriously hindered their motivation to produce more agricultural products.

The command economy was practiced in China for thirty years without making China rich and prosperous. Then, in 1978, after the Great Cultural Revolution, the Chinese government, aware of the severe economic situation it faced, decided to launch economic reform. Guided by the above understandings, for several decades China had not had laws or regulations addressing civil disputes or commercial activities or private relationships among the people. The first law regulating civil relations was promulgated in 1987 — ten years after China began its economic reforms. Before that there was no mention of private interests and rights. Even in the 1987 law, which was called the General Principles of Civil Law (GPCL),<sup>28</sup> the drafters were very careful not to let the word “private” slip into the statute. Instead, “individual property” and “citizen’s property” were the terms used to describe property owned by private property holders. Moreover, the GPCL covered many fields of civil legal relations, including contracts and property rights, and provided three types of property ownership. However, public ownership was given precedence in the GPCL as the major form of property ownership, and only little room was left for the protection of private property.

The belief that a socialist legal system must not make any distinction between public and private law, and the practice of a command economy and public ownership, rendered private ownership and private law rather ineffectual. Not only that, in the political campaigns launched after the founding of the PRC, the word “private” and terms such as private interests, private property, and private concerns had become targets of attack. An asymmetrical distinction between the public and the private was drawn to glorify the former and demonize the latter. The public interest had to be put ahead of everything else and private desires and interests had to be suppressed.

It bears mention that in the Chinese language “private” also suggests “selfishness,” and thus the word “private” was made infamous by successive political campaigns. For a long time, “private” and “selfish” were despised concepts and not only legally impossible, but also politically and morally incorrect. Many were in fact persecuted for not having completely given up the idea of the “private.” The infamous campaigns during the Cultural Revolution — euphemistically called “fighting selfishness and repudiating revisionism” — were aimed at purging those who had different views from

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28 See ZHONGHUA RENMIN GONGHEGUO MINFA TONGZE (中华人民共和国民法通则) [GENERAL PRINCIPLES OF THE CIVIL LAW OF THE PEOPLE’S REPUBLIC OF CHINA] (1987), available at [http://www.china.org.cn/china/LegislationsForm2001-2010/2011-02/11/content\\_21898337.htm](http://www.china.org.cn/china/LegislationsForm2001-2010/2011-02/11/content_21898337.htm).

Mao and not only claimed many people's lives, but also eventually succeeded in banishing the word "private" from the Chinese vocabulary in daily use.

#### **IV. REHABILITATION OF THE PRIVATE**

##### **A. Emergence of the Private Sector in the Chinese Economy**

Starting from 1978, experiments in reform were first introduced in rural China and then gradually evolved into full-scale reforms of economic institutions throughout the country. The general trend of the reform was a move from a state-planned to a market-oriented economy, although it was not clear what kind of market economy the leaders had in mind. The slogan the government employed to garner popular support and justify its policy was "socialist market economy" or "planned commodity economy." Even now these terms do not seem to be entirely clear to participants in the reform, let alone foreign observers.

Another front of economic reforms was in the property ownership field. While the command economy was being implemented, the country had only public ownership of land and property, whereby the state and the collective enjoyed the exclusive right to use and dispose of land and property. However, it was never made clear how the state was to exercise its ownership of land and property, so this was later found to be a hurdle to development and consequently was one of the areas singled out for reform in the 1970s.

China's reform and opening-up, which began in 1978, loosened the strict social and economic controls exercised by the state and produced millions of private entrepreneurs. However, for a rather long period of time, they could only be called "Minying" (citizen-operated enterprises) — not "private enterprises." The practice of encouraging the private sector of the economy but avoiding reference to its existence in ideology and in the law was a concern to many private entrepreneurs, who felt that their assets might be subject to state takeover or control if they were not awarded legal status in the Constitution. Moreover, most of the private assets in China were not owned by private entrepreneurs but by common citizens. Common citizens' assets needed even more protection in the Constitution because their right to hold their own assets was more likely to be infringed upon by the public power and by the rich.

In response to the rise of the private sector in China's economy and its demand for legal recognition, the PRC government has amended its Constitution four times since 1982. The amendments to the Constitution declare that the state has permitted the private economy to exist and grow within the limits prescribed by law, the private economy being considered a complement to the

socialist public economy. The newest amendments, consisting of a preamble and twelve articles, were adopted in March 2004. They include stipulations regarding the protection of human rights and private property rights and the establishment of national social security institutions.

Article 11 of the Constitution serves as a good example of how the word “private” has gradually returned to Chinese political and legal phraseology. The original provision of Article 11 in the 1982 constitution stated: “The individual economy of urban and rural working people, operating within the limits prescribed by law, is a complement to the socialist public economy. The state protects the lawful rights and interests of the individual economy. The state guides, assists and supervises the individual economy by administrative control.” The 1999 amendment stated: “The State protects the lawful rights and interests of the individual and private sectors of the economy, and exercises guidance, supervision and control over individual and the private sectors of the economy.” The 2004 amendment stated:

The State protects the lawful rights and interests of the non-public sectors of the economy such as the individual and private sectors of the economy. The State encourages, supports and guides the development of the non-public sectors of the economy and, in accordance with law, exercises supervision and control over the non-public sectors of the economy.<sup>29</sup>

## **B. Resistance to Forced Eviction**

One other factor contributing to the rehabilitation of the “private” is the resistance of many homeowners to forced eviction by the local governments and developers since 2000. With modernization and urbanization having accelerated since the late 1990s and the beginning of this century, the problem associated with the demolition of buildings in urban areas and appropriation of land in rural areas by the state has become increasingly acute. Despite China’s efforts in the last two decades to enact more laws to facilitate economic development, there are no national rules and procedures regulating such activities. The decision-making power has been relegated to the local governments, leading to significant consequences and to the rise of the “tenants’ rights movement.”<sup>30</sup>

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29 See Chen Jianfu, *The Revision of the Constitution in the PRC*, 53 CHINA PERSP. 1, 2-20 (2004) (comparing all four amendments to the PRC Constitution).

30 Human Rights Watch, *Demolished: Forced Evictions and the Tenants’ Rights Movement in China*, UNHCR (Mar. 25, 2004), <http://www.unhcr.org/refworld/docid/412dec764.html>.



Many local governments have enacted rules or regulations that are to the government's advantage while ignoring the property rights of the owners of the buildings or land.<sup>31</sup> The regulations and rules regarding demolition and eviction promulgated by the local governments generally adopt a condescending attitude, focusing on implementation of the government's economic and development policies without taking into consideration the rights of private property owners. Furthermore, the standards for compensation are set only by reference to the face value of the houses demolished. Factors like the value of the land use rights attached to the property and expenses incurred in demolishing the houses and relocation are not considered. The value of land use rights varies considerably with the location of the property, and the price for the same size piece of land may be very different. The regulations and rules currently in force have not made any distinction in these matters. This allows the government or developers to obtain the land use rights of a certain property that may have enormous economic potential at a very cheap price, thereby causing the property owners serious injustice.

One sunny day in May 2004, two Beijing residents, Mr. Huang Zhenyun and his wife, performed a traditional storytelling ritual in their Beijing dialect with drum accompaniment, telling people their grievances. They had been residents of the Xicheng District in Beijing for many years, and the Beijing municipal government had recently decided to take over their property without adequate compensation. The Huangs were furious. They learned that under the newly amended PRC Constitution, private property was protected and the requisition of private property by the government must be compensated. When government officials came to evict them from their property, they successfully resisted them by presenting the PRC Constitution and saying they placed their confidence in it.<sup>32</sup>

The Huangs were not the only people who defended their property rights by referring to the constitution. Earlier in Guangzhou city, residents in the Village of Artists displayed a huge poster of the PRC Constitution to defy the government's order for forced evictions.<sup>33</sup> Similarly, in Kaifeng city of

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31 In Chinese context local governments refer to provincial, prefectural and county level governments.

32 Li Jing, *Constitution Helps Man Fight for Home*, CHINA DAILY, Apr. 6, 2004, [http://www.chinadaily.com.cn/english/doc/2004-04/06/content\\_320827.htm](http://www.chinadaily.com.cn/english/doc/2004-04/06/content_320827.htm).

33 *Artists Fight for Land Use Rights*, CHINA DAILY, June 12, 2004, [http://www.chinadaily.com.cn/english/doc/2004-06/12/content\\_338768.htm](http://www.chinadaily.com.cn/english/doc/2004-06/12/content_338768.htm).

Henan province, thirty-eight households that faced forced eviction used the constitution to resist the government's imminent demolition decision.<sup>34</sup>

These forced eviction cases epitomize something deeply embedded in the Chinese psyche, namely a clear but asymmetrical distinction between the public and the private, between the government and the people. The tradition has been such that in any conflict between the former and the latter, it is always the people and the private that suffer and yield. The Property Rights Law<sup>35</sup> and the constitutional provision regarding private ownership will continue to face a very tough test as long as the political culture remains largely the same without significant change.

The new March 2004 amendments to the 1982 Constitution ultimately but only partially responded to the dilemma of forced evictions. Article 13 of the newly amended Constitution states that “[t]he lawful private property of citizens is inviolable. The state protects according to law the right of citizens to own and inherit private property. The state may, in the public interest, appropriate or requisition private property of citizens for its use in accordance with the law, while making compensations.”<sup>36</sup>

This provision will undoubtedly have very positive effects on the protection of private property, although when read together with other provisions of the Constitution, which protect public and collective properties, the force of the article is diminished. For instance, Article 12 of the same Constitution states that socialist public property is inviolable. The state protects socialist public property. Appropriation of or damage to state or collective property by any organization or individual by whatever means is prohibited. The image of the private in the PRC Constitution is still very weak and vague. Even in that form, however, it has already been vitally useful to some victims of forced demolition, as demonstrated by the cases mentioned above.

### **C. Property Rights Law**

The government started to draft the Property Rights Law as early as 1998 but was unable to complete it until 2005. The National People's Congress (NPC) of the PRC issued a draft of the Property Rights Law in July 2005 for

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34 *Residents of 38 Households in Kaifeng City Went to Street to Publicize the Constitution in Order to Defend Their Property*, XINHUA NET (Apr. 29, 2004), [http://news.xinhuanet.com/legal/2004-04/29/content\\_1446003.htm](http://news.xinhuanet.com/legal/2004-04/29/content_1446003.htm).

35 PROPERTY LAW OF THE PRC (2007), available at [http://www.china.org.cn/china/LegislationsForm2001-2010/2011-02/11/content\\_21897791.htm](http://www.china.org.cn/china/LegislationsForm2001-2010/2011-02/11/content_21897791.htm) (China).

36 See PRC CONSTITUTION art. 13 (2004), available at [http://english.gov.cn/2005-08/05/content\\_20813.htm](http://english.gov.cn/2005-08/05/content_20813.htm) (China).

public consultation, and the law was expected to be enacted in March 2006. In August 2005, however, Gong Xiantian, a Peking University law professor and Communist Party member, petitioned the NPC Standing Committee, arguing that the draft law on property rights “violate[d] the principles of socialism and thus is reactionary.” Gong, a Marxist law theorist, said the essence of the draft law was to protect the property rights of the extremely rich minority, though in form it sounded as if everybody’s rights would be protected. He said sarcastically that the property law “equally protects a rich guy’s limousine and a beggar’s rod.”<sup>37</sup> Gong’s petition delayed the passing of the property law, but did not completely derail its enactment.

The promulgation of the Property Rights Law of the PRC on March 16, 2007 is undoubtedly a positive step towards reshaping China’s social framework, which is currently still based on dogmatic principles that have been abandoned by the daily routines dictated by the survival instinct of the Chinese people. One particular feature of this law is what is believed to be the equal protection of property rights of the state, of the collective and of the individual — a Chinese-style equal protection. Article 4 of the Property Rights Law explicitly mentions the types of property owners: “The property right of the State, the collectives, the individual persons and other obligees is protected by law, and no units or individuals shall encroach on it.” The fact that the article considers private property as only one type of ownership that theoretically enjoys the same protection as public property is very problematic in China’s political and legal context, because in the face of the public and the collective, individual property rights do not easily survive nor are they easy to defend. It has been the practice that whenever there is a conflict between the public and the private interest, or between the collective and the private, the public or the collective always wins. In addition, what is considered public or collective has never been clearly defined by the law. If the government wants to, it can always argue from the perspective of the “public” and defeat individual claims to property rights.<sup>38</sup>

Moreover, in the legal system’s conceptualization of property rights, the right to use is separated from the right to possess and dispose. Presumably, all land is owned by the state, but individuals can use it, build homes on it, or buy houses built on certain land. One can own the house but cannot own

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37 See Gong Xiantian, *A Property Law (Draft) That Violates the Constitution and Basic Principles of Socialism*, LINKS (Aug. 12, 2005), <http://links.org.au/node/221>.

38 PRC PROPERTY RIGHTS LAW (2007), available at <http://www.lehmanlaw.com/resource-centre/laws-and-regulations/general/property-rights-law-of-the-peoples-republic-of-china.html> (China).

the land on which the house is built. This has been a problem hindering the development of the Property Rights Law, and it has been heatedly debated in recent years.<sup>39</sup> A market economy cannot develop well without clarifying who owns what and without clear rules to ensure the security of normal transactions. However, the PRC's entire society and economy are still in a transitional stage and the question "who owns what?" is often a matter of controversy.

The PRC Constitution and the Property Rights Law provide that coercive demolition can be justified by concern for the public interest. Take the "nail household" phenomenon<sup>40</sup> as an example: despite media coverage, and recourse to the constitution and the legal process, private property rights still have to give way to the powerful but unjust government, which aligns itself with the developers. One person in Chongqing was ordered to demolish his house on the grounds that it looked ugly and adversely affected the city's image. In this case, the image of the city is the "public interest," to which private interest must concede. If one type of property right can easily take precedence over other types of property rights by putting on a public face, then the "equal protection" provision will remain empty talk.

## V. THE PUBLIC, THE PRIVATE AND THE SOCIAL

With the rehabilitation of the private, as evidenced by the constitutional amendments and the promulgation of the Property Rights Law, and with the development of the private sector in the Chinese economic system, the public/private divide in law has become meaningful. The mainstream view now seems to support the distinction between the two. Arguments presented by Chinese scholars often can be traced back to classical views offered by Roman jurists, especially in the Institutes of Justinian.<sup>41</sup>

G.W.F. Hegel's distinction between civil society and the political state has also been employed to argue for the distinction between the public and the

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39 See, e.g., Anna Nadgrodkiewicz, *China's Property Rights — and Wrongs*, CIPE DEV. BLOG (June 19, 2013), <http://www.cipe.org/blog/2013/06/19/chinas-property-rights-and-wrongs/#.UfGiyb7D8lQ>.

40 A nail house is a Chinese term for homes belonging to people who refuse to make room for development. The term refers to nails that are stuck in wood and cannot be pounded down with a hammer. See Jo Blason, *Chinese Citizens Refuse Demolition of Their Homes — in Pictures*, GUARDIAN, Nov. 22, 2012, <http://www.guardian.co.uk/world/gallery/2012/nov/22/chinese-citizens-refuse-demolition-homes-in-pictures>.

41 Li, *supra* note 26.

private. For Hegel, civil society is a completely free and autonomous private sphere, which sharply contrasts with the public sphere of the political state. Therefore, a person enjoys dual status as a “civilian” in civil society, and as a “citizen” in political society.<sup>42</sup> A civilian is the subject of private life, while a citizen is a participant in public life. The best example of this is in Article 1 of the French Napoleonic Code promulgated in 1804, which states that “[t]he exercise of civil rights is independent of the quality of citizen, which is only acquired and preserved conformably to the constitutional law.”<sup>43</sup> It is obvious from this provision that a person may lack the status of a citizen, but it does not affect that person’s life in the private sphere. He can participate in civil matters and be protected by the civil code.<sup>44</sup>

One view holds that the significance of making the private sphere available can be understood in two ways. On the one hand, private rights have been clearly delineated so that individuals can interact with each other in the private sphere without encroaching upon their respective rights. On the other hand, private rights act as a defense for individuals to prevent the political state from invading the private sphere, thereby protecting individuals from the state’s unlawful interference. Individuals can employ their legitimate rights to fend off illegal deprivation of and encroachment upon their private rights by state organs.

In a nutshell, private law addresses issues relating to a free and autonomous civil society. Within this sphere, all legal rules revolve around private rights, whereas public law contains rules regulating the behavior of the political state. Within the public sphere, legal rules tackle issues relating to public affairs and social welfare. Taken together, public law and private law perform their respective roles in a society and facilitate its progress in a harmonious way. Many scholars hold that the distinction between the public and the private law has played a significant and undeniable role in the development of the world’s legal systems.

Since the beginning of the twentieth century, however, with social, political and economic development, the distinction between the public and the private has been subject to question. First, since the twentieth century state intervention

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42 G.W.F. HEGEL, *PHILOSOPHY OF RIGHT* 183 (T.M. Knox trans., Oxford University Press 1942) (1820); see also LIANG HUIXING, MINFA ZONGLUN [A COMPREHENSIVE STUDY OF CIVIL LAW] 30-32 (2001) (China).

43 See *The Code Napoleon (1804)*, THE HISTORY GUIDE: LECTURES ON MODERN EUROPEAN INTELLECTUAL HISTORY, [http://www.historyguide.org/intellect/code\\_nap.html](http://www.historyguide.org/intellect/code_nap.html) (last visited Sept. 10, 2013).

44 Zhu Xiao, *xifang gongfa sifa eryuan falu chuantong* (西方公法、私法二元法律传统) [*The Western Public and Private Dualist Legal Tradition*], CHINACOURT (May 19, 2003), <http://old.chinacourt.org/html/article/200305/19/57078.shtml>.

in economic development has become increasingly popular in countries where the state directly or indirectly participates in activities traditionally held as belonging to the private sphere.<sup>45</sup> To some extent this change is a kind of integration of the public and the private spheres after longtime conflict between the two. Second, developments in some branches of law have made the distinction meaningless. Constitutionalism since the twentieth century has in many respects replaced civil law in protecting individual rights, diluting the distinction between the two. In civil law, traditional principles such as absoluteness of private ownership, freedom of contract and strict liability are now challenged by serious considerations of the principles of public interest, good faith and prohibition of abuse of rights. The rise of other branches of law, such as administrative law, labor law, land law and commercial law, has also blurred the distinction between the public and the private. Third, the concepts of public and private law are associated with particular historical stages and cultures only with reference to which a good understanding of their finer aspects is possible.<sup>46</sup>

There is an obvious trend that has been described by some as the “publicization of private law.” In the Chinese context, state legalism still plays the controlling role in the country’s legal development. In many laws enacted in recent years, the imprint of the state is remarkably obvious. For instance, contracts, trade, loans and advertisements — in all of these private activities the government is involved to varying degree. Economic contracts are monitored, consumer rights are protected, advertisements are licensed, and deposit interests are fixed by the government.<sup>47</sup>

Also obvious is the other direction, the “privatization of public law,” where the government acts as a shareholder in a company, a party to a land use contract, or a guarantor of a bank loan, in which the roles of the state respectively as a property owner and the holder of the public power are separate.<sup>48</sup> The privatization of public law is especially useful in the Chinese context where the public used to dominate in all branches of law. It means

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45 For instance, government intervention in the economy has been obvious in the United States. See the U.S. Department of State discussion of the issue, *Growth of Government Intervention in the Economy*, ABOUT, <http://economics.about.com/od/governmenttheconomy/a/intervention.htm> (last visited Nov. 30, 2013).

46 *Id.*

47 See Dong Qin, *shāng fǎ de; dì; dí sī fǎ xìng zhì yǔ sī fǎ gōng fǎ huà; huā* (商法的私法性质与私法公法化) [*The Private Law Nature of Commercial Law and the Publicization of the Private Law*], CHINA PRIVATE LAW NETWORK (Feb. 1, 2007), <http://www.civillaw.com.cn/Article/default.asp?id=30769>.

48 See Cao Jie, *A Preliminary Study of the Publicization of Private Law and the Privatization of Public Law*, 1 *STUD. COM. & CIV. L.* 56 (2008) (China).

returning to the private law realm what was taken away by the public law. For instance, the economic relations among citizens, which used to be dealt with by administrative regulation, are now handled by contract law. Similarly, consumer protection, which was seen as the responsibility of the government, is now regulated by law on the basis of individual rights.

Debaters are also aware of the existence of laws that have both a public and private nature, such as economic law, including planning law, budget law, auditing law, environmental law and labor law. So they tend to follow the view popularly held by German scholars that there is another type of law bordering between the public and the private, which may be termed social law.<sup>49</sup> Social laws have both a public and private nature and have been developing in light of new social and economic changes in contemporary legal systems.<sup>50</sup> It has been argued that the concept of social law actually fits in comfortably with the Chinese socialist legal system because such laws regulate the social behavior of the citizens, which is necessary for constructing a harmonious society.<sup>51</sup> Under the rubric of social law, its advocates have listed the PRC Labor Law (1994), PRC Disability Law (1990), PRC Production Safety Law (2002), PRC Labor Dispute Resolution Law (2007) and a dozen similar laws which have both public and private characters.<sup>52</sup>

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49 See, e.g., H.F. ZACHER, SOCIAL POLICY IN THE FEDERAL REPUBLIC OF GERMANY 78-82 (2012).

50 See Li, *supra* note 26.

51 Liu Junhai, *goujian hexie shehui he fa linian de gengxin* [Construction of Harmonious Society and Rejuvenation of the Idea of Law], 5 XUEXI YU TANSUO [STUD. & EXPLORE] 88 (2006) (China).

52 See ZHONGHUA RENMIN GONGHEGUO LAODONG FA (中华人民共和国劳动法) [LABOR LAW OF THE PEOPLE'S REPUBLIC OF CHINA] (1994), available at [http://www.china.org.cn/living\\_in\\_china/abc/2009-07/15/content\\_18140508.htm](http://www.china.org.cn/living_in_china/abc/2009-07/15/content_18140508.htm); ZHONGHUA RENMIN GONGHEGUO CANJIREN BAOZHANG FA (中华人民共和国残疾人保障法) [LAW OF THE PEOPLE'S REPUBLIC OF CHINA ON THE PROTECTION OF DISABLED PERSONS] (Revised 2008), available at <http://www.lawinfochina.com/display.aspx?lib=law&id=869&CGid=>; ZHONGHUA RENMIN GONGHEGUO ANQUAN SHENGCHAN FA (中华人民共和国安全生产法) [LAW OF THE PEOPLE'S REPUBLIC ON WORK SAFETY] (2002), available at <http://wenku.baidu.com/view/ca008b630b1c59eef8c7b42b.html>; ZHONGHUA RENMIN GONGHEGUO LAODONG ZHENGYI TIAOJIE ZHONGCAI FA (中华人民共和国劳动争议调解仲裁法) [LAW OF THE PEOPLE'S REPUBLIC OF CHINA ON MEDIATION AND ARBITRATION OF LABOR DISPUTES] (2007), available at <http://www.laodonghetong.org/1018a.html>.

## CONCLUSION

Despite disagreement over whether the distinction between public law and private law makes sense in an increasingly mixed world of law, the Chinese experience suggests that such a distinction does play a significant role in a country's legal and economic development. In the first thirty years of the PRC, state legalism, which essentializes law and advocates the unitary use of law as a tool for the state to banish the concept of the private out of the political, economic and legal spheres, had left Chinese political and social life in a dogmatized and barren state. The denial of the private, however, could not survive the economic and legal reforms after 1978. To a great extent the economic and legal reforms since 1978 have been geared towards a reevaluation of the private, including private property, private business and private law, versus the failure of the planned economy and public ownership. The contribution that the private sector of the economy has made to China's overall economic success in the last three decades persuasively convinced the Chinese authorities to acknowledge the positive role such a sector plays in the economic construction of the country. Theoretical justification for acknowledging the private sector, then, rests on the distinction between the public and the private. To legitimize the private sector's position and to further solidify it, the concept of private law has been reinstated.

It is obvious that political, economic and other factors played significant roles in shaping the Chinese attitude toward the public and private divide in law and in other fields. It could be argued that such a divide is not a natural distinction, but rather an artificial divide susceptible to change. It might be the case that in some other legal system, the distinction between the public and the private may not be significant at all. The Chinese example, however, shows clearly that such a divide has in fact contributed to the development of the Chinese legal system since the reform. In the early years of the PRC when the distinction was not made, the legal system functioned only as a political tool for the government, but not as a guarantor of individual rights. The legal system then left much to be desired. After the reform and the acknowledgment of the distinction, and hence the private side of the law, the Chinese legal system has, at least theoretically, taken as its task not only to serve the government but also to protect individual rights.

With the introduction of the concept of social law and the mutual reception of some elements of both fields, it has become even harder to defend the public and private divide. Such a distinction, however, will find sufficient support among Chinese scholars because the fight for the private property and private economy is likely to continue for a long time. Presumably China is still a country whose economy is dominated by public ownership and state-owned



enterprises and the private sector is still being absorbed into the system and has not yet gained equal status to the public sector. The distinction between the public and the private has not exhausted its utility yet. The Chinese case may eventually reveal much regarding this widely discussed dichotomy.

