

The Origin of Ownership and the Legitimacy of the Existence and Continuation of the System: A Civil Law Person's Interpretation of the Private Property Protection System in the Basic Law of the Macao SAR

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I. Introduction

Article 5 of the Basic Law of the Macao Special Administrative Region of the People's Republic of China (hereinafter as "the Basic Law") specifies that "the socialist system and policies shall not be practiced in the Macao Special Administrative Region, and the previous capitalist system and way of life shall remain unchanged for 50 years." "The core of the capitalist system is the economic system of capitalism... its manifestation in the ownership system lies in the private economy."¹ The private economy is the premise of all the property rights theories in the contemporary law developed in the West.

The protection of private property is the premise of property rights theories. The author hopes to deeply dig out the theoretical basis hailed as proven and hypothetical by the general law people while seeking the joint point of the civil law and public law.

II. Overview of private property rights based on the "Second System" in the "One Country, Two Systems" policy

2.1 Private ownership and ownership rights

All law topics on property or property rights originated from the dominium in the Roman Law. So for a long period of time, private ownership has basically been a synonym for dominium; proprietary. Capitalism and socialism as opposing propositions have specific historical and political meaning. According to traditional description, a capitalist polity refers to a polity in which means of production belongs to private ownership while socialism refers to the public ownership of the means of production. Thus, private ownership or public ownership of the production data is the standard of distinction between the capitalist system and the socialist system. In capitalist economy, the owner is subject to various restrictions in his right to use or transfer his property. Therefore, there exists no absolute capitalism (private ownership) or absolute socialism (public ownership), in many cases, the difference between the two is not about the type, but just about the degree. In extreme cases, "the socialist system uses direct distribution policy to dominate the construction of ownership rights, but in capitalism, ownership rights are not designed in a systematic way for the purpose of a certain form of distribution. Therefore, capitalist property rights are those that allow

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the natural distribution of resources, information, technology, talent, and individual inclinations are not allowed to decide goods (market) transactions in the achievement of distribution.”²

2.2 The private property rights protection system based on the Basic Law

The principal aspect of the capitalist system is the private ownership of property. Under Article 6 of the Basic Law, “The Macao Special Administrative Region shall protect the right of private ownership of property in accordance with law.” Article 103 specifies the rights to protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property.³ Article 128 also specially declares religious organizations previous property rights and interests shall be protected by law.

According to the public law theory, the property rights protection should embody “institutional guarantee” and “individual guarantee” in the constitution. The so-called “institutional guarantee” refers to the institutional recognition and establishment of property rights, making it become a link in the national legal system; and the so-called “individual guarantee” refers to the recognition of property rights as basic rights. “Individual guarantee” can be embodied as “existence guarantee” and “value guarantee”. The former means ensuring the “existence” of property, so that the people can live freely according to their property; the latter refers to giving appropriate compensation⁴ in terms of property value when property rights are violated.

With a comprehensive survey of the property rights disposal in the Basic Law, it can be found that the Law embodies “institutional guarantee” and “individual guarantee” at the same time.

With the constitutional nature, the Basic Law is the basis of common legislation, its protection of value or rights is usually implemented as a rule of the organizational system by common legislation, so is the protection of property rights. The Basic Law provides guarantee and sets the framework for the Macao Civil Code, the Macao Business Law and the Intellectual Property Law and other common legislation arranged in a crisscross pattern to constitute a specific property right system.

Professor Lok Wai Kin made a clear and concise exposition on the property rights concerning the Basic Law and the civil law from the perspective of their different meanings and standardized methods, he said: “The meaning of the constitutional property rights lies in the declaration of property rights as a basic human right. Deprivation is illegal unless otherwise specified by law. But the law must be in accordance with the Constitution for the purpose of the protection of property rights, and the civil law is to provide specific protection. The protection of property rights has become a basic principle of law. The Basic Law specifies provisions on property rights, a) To confirm the property rights of the citizens as a basic and inalienable right. b) To establish property rights protection, the Basic Law has supreme legal effect, provides basic protection of property rights. At the same time, it lays down a basis for the Special Administrative Region legislation to guarantee property rights.” “The Basic Law only provides the basic contents of property rights. Under the Basic Law: a) Property rights are basic human rights, inviolable. b) Property rights are restricted for the sake of public interests, such as the need for the government to expropriate land for the public interests according to law. This is consistent with the legal systems of all countries. For the needs of economic development and the state intervention in the economy, the original sacrosanct property rights have been changed a little for the public interests. Property rights are no longer absolute rights, they are subject to certain restrictions for the public interests. So in the

mid-20th century, many countries made such provisions in the constitution.”⁵

It is worth noting that in accordance with the above discussion, in constitutional law (including the Basic Law), property has a broader concept which is different from the concept of property and rights in some civil law doctrines. These doctrines strictly distinguish property from rights, then, further classify property rights in a narrow sense. To further perfect the interpretation system of law, it is necessary to give a detailed discussion on the flux of the property rights concepts in the Basic Law and the civil law.

III. Origin and development of the concept of private property rights

3.1 Origin of the concept of Roman ownership system as private property rights

As an example of modern law, *Corpus Iuris Civilis* described in abundance the ownership rights to sufficiently show their feature as a technical concept. However, in Roman law, the ownership rights did not come into existence like this at the start. Like other ancient societies, social organization modes and power structures were still relatively primitive in the early Roman society, and the power organization mode shifted from tribes to clanship to the family in blood bonds.

During the farming age, the father exercised the full powers over the family, which was the true origin of the Roman system of ownership rights. Later, the powers of the chaotic and father (paterfamilias) were broken down into several concepts because the powers were pointed to different objects: the power over his wife was called manus; the power over his son was called patria potestas; the power over the slaves was called dominica potestas; The power over goods was called dominium. Since then, dominium had become a technical term, and proprietas was its synonym.⁶ With territorial expansion, population growth and changing political environment, ownership rights, evolved from the powers of the father and initially confined to the Roman people only, gradually expanded to all the Romans (in fact, the result of the expansion of Roman citizenship). From the classical period on, jurists made no distinction between manipium, dominium, proprietas and meum esse ex iure Quiritium to denote such rights.⁷ This is what we today call the origin of ownership rights.

To strictly divide the property system into public ownership and private ownership or set both as an either-or type is just a theoretical assumption. In historical organizational systems, public ownership and private ownership were only different in degree, so was the ownership system in the Roman law. Since ancient times, Rome had had some land called “public land (ager publicus)” which was regarded to be in the possession of the city-states (nominally belonged to Populus Romanus), most of the land was freely occupied by citizens.⁸ The “public” land was sometimes allocated to civilian families, which then became private property of the families. Yet some believed that early Roman private ownership of land involved only houses and courtyards to satisfy family needs, the rest of the land belonged to the collective.⁹

The system of ownership which was evolved from the father’s powers was not only regarded as the origin of a legal technical concept of “ownership”¹⁰, but as the origin of private property ownership. From the beginning, Roman ownership rights took on a private nature because the powers similar to sovereignty which the father exercised from the start was centered around the family as an organizational unit, the opposite sides of interests included other families as well as

larger organizations above (clans and tribes, and even city-states or “states” which developed afterwards).

In fact, dominium in the Roman law was not only the origin of private ownership and property rights, but might be the origin of the concept of rights. Some scholars pointed out that some jurists still regarded dominium and ius as synonyms until the late Middle Ages.¹¹

The ownership rights derived from the powers of the father in Roman law was described as absolute power, that is, the initial shape was not decided by external influences, and the power was not restrained.¹² However, with regard to what was meant by absolute power, it was until the late 19th and early 20th centuries that some scholars of the civil law system began to make a more systematic exposition. Ernesto Roguin¹³ was the most influential. It was by him that the distinction between absolute power and relative power was able to spread and consolidate in Latin legal systems. Later, a Frenchman named Duguit summarized the absoluteness of ownership in three points: (1) the absoluteness of public power, that is, public power shall not confiscate personal belongings before making appropriate compensation; (2) the absoluteness for individuals to exercise rights, that is, the rights owner can legally conduct all acts concerning his belongings, and takes no responsibility for the infringement upon others in using his belongings; (3) the absoluteness of the effective duration, that is, the rights owner has the right to dominate his belongings in his lifetime and to dispose of them according to his will after death.¹⁴ In a more recent book, economist John Christman gave a rather explanatory and purposive definition of the assumption of absoluteness of ownership rights: “Private ownership rights are equal to exercising personal rights to freely use, possess, destroy articles and obtain revenue from the articles. (Even if any of these rights is deprived, it is not for the purpose of generally adjusting the distribution of social wealth).” Thus, “to control and restrict any of the rights listed above for the purpose of rectifying the distribution mode is opposed to the free ownership rights (author’s note: the absolute ownership rights.)”¹⁵

In conclusion, the absoluteness of property rights comes from that of the ownership rights, and the exposition on the absoluteness of ownership rights comes from the Roman concept of ownership rights. The assumption of the absoluteness of property rights is a target of criticism of property rights in modern dogmatics. But since the birth of the concept of ownership rights, the ownership rights without any restriction have never appeared in human society. Even in Roman law, unrestricted ownership rights were only an assumption, that is, the ownership rights were imagined as unrestricted rights in a primitive state. In fact, according to Max Kaser, even the ownership rights in the Roman law were restricted because of the will of the interested parties, the neighboring relationship and the morality of law.¹⁶

3.2 Expansion of the concept of property rights

As a basic system in the Roman law, the concept of property rights (ownership rights) has been constantly inherited, accepted and developed because of the succession of Roman law in the broad environment. In Codex Justinianus, there was a more complete system of ownership rights and its related complements. Up to the codification period, property rights system based on “ownership rights” in Roman law was also codified with a different look. However, for a long period of time, in the dogmatics of law, the so-called “property rights” equaled almost the “ownership rights” which at most only included the so-called “real rights”. But by the early 20th century, the concept of property rights changed in different areas of law.

In the constitutional field, the constitutional concept of property rights began to show a tendency to expand from the exposition of Martin Wolff of Germany. Article 153 of *Weimar Constitution* used the term "ownership rights" in the protection of property rights, but a number of academic writings and judicial views extended the concept to property rights to protect not only ownership rights or real rights, but also all the private ownerships that had property value, including creditor's rights, intellectual property, stock rights, and even the legal status that possessed property features.¹⁷ The expansion of the constitutional concept of property rights also led to the expansion of the concept of collection.

In the field of civil law, some French scholars in the late 19th and early 20th centuries found that real rights and creditor's rights actually had much in common, so they proposed the so-called "general property rights" in an attempt to include real rights and creditor's rights. "Property was regarded as 'a collection of law', meaning the total of a person's property and debt, a whole in law."¹⁸ So in most cases, French property law textbooks would first discuss the concept of "property", and it was Aubry and Rau who created the classic French "property theory". Aubry and Rau said: "General property is personalistic, reflecting the link between the personality and the external things." Based on this value, Aubry and Rau established the four principles¹⁹ of the well-known classical property theory: (1) only humans can possess general property; (2) all humans must have one property; (3) all humans have only one property; (4) property and humans can not be separated.

According to the analysis of scholars, there were two main reasons for the expansion trends of the constitutional property rights: One reason was the structure of the property transferred gradually from the real rights to the creditor's rights²⁰ during the 19th and 20th centuries; The other was the European legal ideology shifted slowly from the concept of rule of liberal law to the concept of rule of social law.²¹ In civil law, the expansion occurred mainly because the property rights structure was distinguished dualistically, and it was too rigid, but the expansion trends in civil law were not out of control unlike those in the Constitution, for they met with constant resistance. Even today in the 21st century, civil law has not found a way out of this vicious cycle. The true reason might be that the civil codification had too heavy a burden to bear.

IV. Argumentation about the legitimacy of private property rights system in history

4.1 Origin and development of the topics

Before the advent of the era of rational natural law, the legitimacy of ownership rights or private property rights was rarely challenged by jurists or philosophers, or even simply not a topic of attention.

The legitimacy of private property rights system was seen as a topic when a turning point occurred in the following background: (1) the fall of Hispano-Portuguese maritime hegemony; (2) the transition of Spanish natural law school to rational natural law school.

At the turn of the 16th century and 17th century, Hugo Grotius's emergence marked a turning point in the whole history of law development. We may say that he was the first man to vigorously question the tradition of ownership rights stemmed from the Roman law (especially preemptive maritime rights). Grotius' first book to reveal his idea of ownership rights was *De Iure Praedae*,

written in his adolescence (at the age of 24). In this book, Grotius linked freedom to ownership, and pointed out: “As man was created ‘free and independent by God’, so every man’s actions and employment of things he enjoyed were not dependent on the will of others, but only on his own will.” “Freedom of action is equivalent to ownership of real things.”²²

This idea was further developed. In his famous book *Mare Liberum*, Grotius used the discussions about the legitimacy of ownership rights to oppose the assertion that the colonial powers adopted to preoccupy and dominate the oceans. He first pointed out that some things were common property God bestowed on mankind, which must not be monopolized by a small number of people.²³ As common property, the oceans were like everything else before the advent of private property law. All things were common property. No country shall claim the oceans as private property, and exclude others from using.²⁴

It should be pointed out here that the purpose of “the legitimacy of ownership rights” Grotius discussed was tinged by politics, but on this issue, from the technical angle of law, Grotius’ purpose and means of discussion can be temporarily separated. Technically, his theory was a landmark in political science, economics as well as law. It was because of Grotius’ discussion that the legitimacy of ownership rights became a long lasting subject in the fields mentioned above.

Back in *De Iure Praedae*, Grotius cited Cicero’s example of taking a public theater on the first-come, first-served basis to illustrate why individuals could make use of the common property²⁵ that God bestowed. Here, it seems that “preemption” as a basis to obtain ownership of the legitimacy of the theory is confirmed. In his later masterpiece *De Iure Belli ac Pacis*, Grotius repeated this theory.²⁶

Ostensibly, Grotius was in line with the Spanish natural law school in explaining the basis of the legitimacy of ownership rights, but by further analysis, the subject on the legitimacy of preemption ownership rights as the starting point was led to a completely opposite conclusion. He pointed out that in the primitive form of society, when people could find natural consumables (such as fruits or animals) or caves for continuous living or wasteland²⁷, preemption ownership rights were legitimate. Therefore, preemption rules did not apply to the products of labor and products stored for future use. Once the product in the state of common property (or state of nature) was preempted, and the ownership remained, then others shall not preempt it again. Finally, he concluded that: only the actual grab of the product could obtain ownership rights by preemption; and only preempt the product that would be depleted by use. According to this conclusion, he further deducted that: the ocean could not be neither actually grabbed nor depleted by use, so it should not become a country’s private property due to preemption.²⁸

But in any case, people can only obtain things from nature for consumption, beyond this scope, the exclusive ownership rights may not be determined by the individual will alone. Because people do not know how many others are interested in the same things, so to exclude others from using it needs to obtain their consent. The problem is that when mankind enters a more complex society, things that can be preempted have become fewer and fewer, most of the necessities of subsistence can not be obtained from direct natural output, acquisition of private ownership rights will often need “a protocol, whether explicit (for example, cession) or implicit (for example, preemption)”.²⁹

Grotius’s theory of ownership rights was largely inherited by his follower Pufendorf, but Pufendorf demanded thorough requirements of an agreement or protocol. He said: “after God bestowed, and nothing can prevent man from getting things for himself, but when a thing is to be obtained or grabbed, the rights of others for the thing will be denied. If we can understand this, then

existence of some kind of agreement will be necessary".³⁰

Grotius' influence was already at the time "worldwide". In the United Kingdom, Grotius' contemporary John Selden also made a lot of discussion about the similar topic. Although his standpoint was not the same as Grotius' (Selden advocated maintaining the monopoly of maritime rights), but his standpoint was almost similar to Grotius' in that the legitimacy of ownership rights acquisition should be based on a contract, but Selden attached more importance to the role of agreements or contracts;³¹ And in his mind, the image of a contract was more than just a myth or legend, but a real contract. It was his influence in the academic circles in the UK that created fertile ground for Thomas Hobbes and John Locke's classic political / legal theories.

After Grotius, the most important exposition on the legitimacy of ownership rights might be John Locke's ideas expressed in the *Second Treatise of Civil Government*. At the beginning of this topic, Locke's presentation was roughly the same as Grotius'. He said: "God has given the earth to mankind in common", man can "gradually have (in things) property rights." In principle, man may have some personal and exclusive property rights in things. However, after a couple of paragraphs, Locke was soon into his famous treatise: a) "Everyone has ownership rights of himself" (paragraph 26), thus b) "he has 'ownership rights' of his body's labor and his hands' work", and therefore, c) if he mixes his labor with some thing to break the thing away from the natural state, and d) there are enough things, and just as good for others, and e) some thing or no more than the thing that a man can use before "the qualitative change ·····" (paragraph 31), then, f) the thing have "something attached to it that repels the sharing of rights" (paragraph 27). That is to say, the man has "established property rights of them (the things)" (paragraph 28).³²

The characteristic of Locke's statement of the legitimacy of ownership rights lies in that he based ownership acquisition on labor. By a man's work, the thing has undergone a qualitative change; through vivid analogy, Locke described something had been "attached" to the "thing" after it was reformed by labor. It was "this something" (actually the labor itself) that repelled the sharing of the rights.

This statement was different from the previous simple preemption or preemption with agreement in natural law. Labor is not simply the meaning or the expression of the meaning. It is not simply the casual improvement of the thing;³³ labor is intentional. In addition, it always produces a greater moral impact for a man to establish ownership rights by labor than just to "get something or label 'This is mine' on it."³⁴

We can say that the property rights theory in the United Kingdom, the United States, and France is based on Locke's theory. However, the property rights theory based on natural law (including Locke's labor theory) is far from final conclusion.

4.2 Negative views on the legitimacy of the private property rights system

About 200 years ago, shortly after the mighty French Revolution, P. J. Proudhon shouted out revolutionary slogans at once, "Property is theft!"³⁵ At the turn of the 19th century and 20th century, Leo Tolstoy still lamented that "property is the root of all evil."³⁶

Proudhon and Tolstoy made such a lament because the society they were living in was full of inequalities. Not only the extreme disparity between the rich and the poor in economy, but the most important thing was the inequality of conditions. The gap caused by status at the starting point resulted in the feeling that it was hard for the majority of civilians to stand up.

In fact, except for the provocative, crying language, in *What is Property*, Proudhon gave

systematic and complete criticism of the legitimacy of the property. The starting point for his criticism was the theory that the legitimacy of property was based on natural rights mentioned above. After explaining the purpose and method of his writing, Proudhon immediately refuted the mainstream theory of property--that is, the theory on the legitimacy of property based on preemption and agreement in natural law and on human labor--from point to point. He first rejected equating ownership with liberty, equality, and security in *Declaration of Human Rights*, believing that the right of property could not be justified by neither law nor morality nor common practice.³⁷ Then, he argued against the preemption theory of Grotius and other natural jurists, he asked: "If the first occupants preempt everything, then what is left for late comers?"³⁸ For the labor theory of property Locke proposed and later developed, Proudhon, likewise, put forward another question to begin his challenge. He asked the advocates of labor property: "Who gave you the instructions? We do not force you to work, what rights do you have to ask us for your labor reward?"³⁹ He bluntly denied the legitimacy of property based on agreements or contracts. He vividly expressed that even if there existed such a contract drafted "by Grotius, Montesquieu, Rousseau and signed by all human beings, the contract would be invalid before the law, and any action aimed at executing it is illegal." Because the recognition of private property means giving up labor.⁴⁰ After having reviewed and refuted the theory of property in natural law, Proudhon drew the conclusion: "Property is impossible!" He gave as many as ten reasons for his conclusion, but I particularly prefer the eighth reason: "the property right can not be limitless because of its cumulative force, but the object on which it executes the right is limited!"⁴¹

V. Topic of the legitimacy of the private property system, a new way out in the 20th century: economic analysis

The topic of the legitimacy of the private property system which had been questioned since the 19th century could only find a new way out in the 20th century (especially in the late 20th century, when the socialist economy stumbled, and even collapsed): economic analysis.

In fact, as early as the late 19th century, Pope Leo XIII mentioned in his famous speech *Rerum Novarum* that the relationship between the private ownership system and labor or freedom had had the flavor of economic analysis, but its thread of thoughts had not been systematically integrated into the context of economic analysis or economic analysis of law. The following are two representative views which will be introduced briefly:

5.1 Private property rights and freedom

In an article James Buchanan described the relationship between private property rights and freedom.⁴² He believed that in a market of adequate size, the legal protection of private property guaranteed the freedom for everyone to enter and exit the market, to trade, and in competitive conditions, individuals would not be exploited in adverse trade terms. Besides, because of the possibility of trading, people could focus on a single product or service to exchange surplus products with others. This means that people were free to choose their own profession in their ability or of interest, and to trade a wide range of consumer goods in the market.

Freedom dominates the actions of its own will without restraint, and the will driven by the desire is endless, so absolute freedom is impossible at all. For freedom, there must be an opposite

reference object, and all freedom is a compromise under certain constraints. Buchanan chose the experience of the socialist countries in Eastern Europe as the reference object. For the most part of the 20th century, the rulers of these countries had the means of production in their hands so that all the citizens were assigned to play specific roles in specific workplaces.⁴³

Private property or ownership is important for freedom only when the property belongs to a particular person, and the state of belonging gets adequate protection, then, the transaction can take place (of course, the further requirement is the existence of a competitive market). After the deal becomes likely, people will be free to choose their own professional activities, free to choose consumer goods to enter into a certain lifestyle (influenced by goods). Legal protection of private property is the first premise for a transaction to take place.

5.2 Incentive system of private property rights

The classic assertion on the relationship between private property rights and the incentive system is: the legal protection of property rights leads to efficient use of resources. In his famous book *Economic Analysis of Law*, R. Posner briefly described the mode of action of this relationship: "Although the value of crops measured by the consumer's willingness to pay may be much higher than the costs of labor, raw materials and giving up other uses of land, there is no incentive to pay the costs if there are no property rights, because bearing the burden of the costs is unlikely to get a reasonable reward. Only through dividing exclusive rights for the use of particular resources among the members of the community will result in appropriate incentives." The example is as follows: Imagine a whole society in which all ownership rights are annulled, the farmer plants grains, fertilizes his land, sets up scarecrows to scare birds, but when grains mature his neighbor reaps and keeps them to himself. Since the farmer owns neither the land he cultivates nor the crops, then he is not entitled to ask a legal remedy for his neighbor's behavior. After experiencing several such incidents, farmers will give up farming the land.⁴⁴

In addition, "the creation of the exclusive rights is a necessary condition for efficient use of resources, but not a sufficient condition; the rights ought to be transferable." When the rights owners are not good at using their own resources, the efficiency mechanism shows: it can induce the rights owner to transfer property to a person who can make more efficient use of the property. But it should be noted that the efficiency mechanism based on the transferability of property can be partly or entirely suppressed because of the high transaction costs.⁴⁵

However, some scholars object to the traditional discourse on the relationship between the incentive system and private property rights. John Christman believed that the traditional discourse about the property rights incentive system should be focused on "income rights". However, the proportional relationship between the maximization of income and the maximization of efficiency has not been verified. For example: most workers have quite fixed salaries, their performance was controlled by on-the-spot management staff or supervisors, and there were no commitments to salary increase. Therefore, efficiency was not directly linked to income. In addition, he also believed that the efficiency and income formula could not explain neither the differences in salary for equal work in different regions, nor the labor without income (such as looking after children, doing housework) and so on.⁴⁶

The economic analysis of the property incentive system depends mainly on the psychological analysis of the social participants; the setting of conditions is difficult for the sampling statistics. I believe that rational people get a return on their investment, which is only one of the possible

approaches of the incentive effects caused by the legal protection of private property, and the fundamental incentive mechanism should be based on the following two effects of ownership rights: (1) the accumulation of wealth becomes possible; (2) the transaction becomes possible.

When property is protected, the accumulation of wealth will be likely, and the wealth accumulation increases purchasing power, thus increasing the sense of security, and also the opportunity for people to fulfill their wishes. Wealth is accumulated through work, so people will have the initiative to work. When the deal becomes possible, the emergence of the mass market drives individuals to focus on a professional production department in order to promote their production efficiency. And production efficiency means more surpluses which can be converted into greater purchasing power.

IV. Conclusion

After carefully comparing the demonstration methods of the economic law scholars in the 20th century with those of the jurists and law philosophers in the 16th and 17th centuries, we can find that their purposes and starting points are actually different.

It must be recognized that why it is undoubtedly necessary for the system to continue to exist when the topic of the legitimacy of private property or ownership rights is led on the path of economic analysis, or some functions and advantages of the private property system are pointed out. Therefore, this argument can be seen as functional analysis. However, either the economic analysis or functional analysis in the 20th century, in fact, did not respond to the criticisms Proudhon and other opponents made of ownership rights and private property. Private property was still what Proudhon referred to the private property that led to endless accumulation and the apriori gap between the rich and the poor.

On the contrary, Grotius and subsequent natural law jurists attempted to seek the legitimacy of the ownership rights system from the perspective of the nature or natural laws of social phenomena (or other explanations of natural law), this effort was another direction. The legitimacy they pursued was a statement of moral appropriateness, and for this reason, they almost found themselves in a dead end because this was an arduous task, which, even as Proudhon said, was impossible.

Grotius chose “preemption” and “agreement”, Selden and later, Rosseau assumed such a contract, Locke chose labor. These choices had one thing in common: They all reflected the “good” side of the system’s basis, that is, the belief that all human beings would show the value of “good” that those thinkers pursued in the whole process of social development, especially in the process of establishing the system of ownership rights. However, in this way, they drew an early conclusion of the topic: only “good” was human nature.

However, as a matter of fact, these thinkers themselves should be clear that the process of establishing the property system they set as a question of fantasy did not need to look like a question of fantasy, because it could be set as a historical question! The history of human society institution (including the property system) is traceable. Even in the age of Grotius or Locke, at least the history of the institutions of Greece, Rome and the Middle Ages was not vague to them. They might well take from the history to verify their theoretical model. But the harsh reality was that behind the great Rome at the national level, the whole history was filled with wars, looting, and

annexation, not the history of each takes what he needs from the infinity, first come, first served, or more pay for more work.

About the collapse of the foundation of the natural law theory at this level, John Christman's following remarks were thought-provoking: "many of the U.S. land tenure demands were made after the violent massacre (certainly can not be proven just!) of the indigenous people who occupied the land first. Furthermore, it was only because the central government announced the freedom to colonialize any regions, and this colonization was the (U.S. citizens) can make the original claim and the requirements can be respected colonial. This presupposes that the government itself after it is through the law to all (white and male) citizens of the transfer of rights holders."⁴⁷

Therefore, in order to demonstrate the legitimacy of the original system of private ownership or property rights, the concept of "legitimacy" must be expanded to the negative aspect. In other words, in addition to assuming "good" of human nature, it must be admitted that "evil" is also human nature. The topic of the "legitimacy" of private ownership must begin with the recognition of human badness-desire. Otherwise, everything will be unable to add up. The formation of the "evil" of humanity may be related to the accumulated experience and habits formed in order to survive in the difficulty natural environment. In the wild times, man had to battle against nature and compete with other creatures in order to obtain the basic material resources necessary for survival. When man basically conquered other natural competitors, the object of competition turned to his fellows. External stimulation led to the development of internal character, the instinct of survival pursuit gradually evolved into the thrill of winning and transcending in the competition, finally competition gradually shifted from a device to a goal. Desire was developed step by step from the pursuit of survival → the pursuit of security → the pursuit of pleasure. During the competition process, many of the losers' interests were sacrificed, which had always been the by-product developed from the nature of pursuing survival, so it was taken for granted.

The system of private ownership was the result of human experience and rational summarization and induction in the natural environment of competition, its "legitimacy" can only be built on the frankly accepted human nature of "desire" and "selfishness".

In the entire history of human development, the establishment of private property was a critical moment. The first major significance of the establishment of private property was that it relieved mankind of endless struggles for materials in group life, and gave a sense of security. For this situation, the most classic exposition in history was the "state of nature" Thomas Hobbes depicted in *Leviathan*. Hobbes imagined a state in which there was no idea of "mine and yours", no habits, no law and no state, people would compete for power to control resources, a "war of all against all" would never stop, and any person living in this state would be "solitary, poor, nasty, brutish and short." However, all men would not like to live forever in such fear. In order to avoid the incessant threat of death, people would be willing to cede some rights to an authority for the sake of protection.

The establishment of this powerful force was linked directly to private property or ownership rights because ownership rights were the basis for other social institutions (especially or at least other legal institutions). Early in the 19th century, Hennequin pointed out that: "Ownership is the basic principle of the creation and maintenance of civil society. The issue of ownership was regarded as one of the topics that would not see a new interpretation in a short time... Whether ownership was the source or the result of social order, it was the basis for all morality and all

human institutions.”⁴⁸

It is conceivable that unless the private property rights (ownership rights) are established, it is impossible to transfer goods, nor is it necessary, thus basically there is no need for a contractual relationship; without exchange and flow of goods, future development of complex economic activities and social relations would not have taken place later; Without private property or protection of private property, there would be no violations of property rights in civil and criminal law; In addition, most criminal activities involving persons are a result of property. So, if private property is not recognized, no one will ask an authority for protection of property, then, there will be no reason to cede rights to the authority, in this way, most of the social and legal institutions will lose their basis for their existence.

Since the 20th century, the theories which explained the ownership rights by means of economic analysis or other were completely different propositions. They no longer showed our “good” nature as their duty, or asked whether the initial private property system or the abstract logic of the system was “good” and “legitimate”, and this analysis had gone past now! We need to face the present and future! Hence, we need to answer this question: will the establishment of private property be continued or not? If not, what are other options? What if mode one, mode two or other is chosen?

This is of course a positive direction of thinking, and we can also go on further. For example: after we choose to continue the system of private property, we can take into account all the aspects that influence personal life, the pattern of interpersonal relationships, social state and sustainable social development, etc.

The trouble is that in spite of the economic analysis which attempts to make the analysis of the problem seem logical and rational, many conditions can not be quantified in this area, and its basis is an issue of value judgment. The establishment of private property is linked to humanity, but to continue or not, or to choose what mode to continue is linked to whether we are satisfied with the status quo, and what lifestyle we wish to have.

Awareness of our own nature is undoubtedly a signal of human society going into maturity, but in ancient times, the pursuit of “good” in a more direct and simple way had its positive meaning, too.

The Basic Law guarantees our current lifestyles to remain unchanged for 50 years, but the formation of value and the development of the establishment will not occur suddenly at a certain moment. Maybe life is quietly changing at this moment.

Notes:

¹ Wang Shuwen (Ed.) (2001). *Introduction to the Basic Law of the Macao Special Administrative Region*. Beijing: Party School of the Central Committee of CPC Press. 285.

² Christman, J. (2004). *The Myth of Property: Toward the Egalitarian Theory of Ownership*. (Chinese version translated by Zhang Shaozong). Guilin: Guangxi Normal University Press. 66-71.

³ The concepts of expropriation and requisition and its related systems in Macao. See Tong, Io Cheng (2009). The Concept of Expropriation and Requisition in Macao Law. *Macao New Vision*. Vol. 4. 16ff; Tong, Io Cheng (2009). On the Right of Claiming for Restitution in Law of Macao Region. *Journal of Fujian Institute of Political Science*

- and Law. Vol. 1. 35ff; also see Lok Wai Kin (2006). On Property Protection and Commonweal Requisition in the Basic Law of the Macao. *Journal of Juridical Science*. Vol. 3. 127ff; Mai Man Ieng (2006). Macao Requisition System's Characteristics and Basic Principles. *Journal of Juridical Science*. Vol. 3. 147ss.
- ⁴ Chen Min (2001). *Administrative Jurisprudence*. Published by the author. 1041.
- ⁵ Lok Wai Kin (2000). *Introducao a lei Basica da RAEM (Introduction of the Basic Law of the Macao Special Administrative Region)*. Macao: Macao Foundation. 109-110.
- ⁶ Kaser, M. 1984. *Roman Private Law* (4th Edition). Translated by R. Dannenbring. Pretoria: University of South Africa. 117.
- ⁷ de A. Santos Justo (1997). *Direito Privado Romano III (Direitos Reais)*. Coimbra: Coimbra Editorial. 22.
- ⁸ On Public Land and Public Property System Developed from Modern Law. See Ana Raquel Gonçalves Moniz (2005) *O Domínio Público: O Critério e o Regime Jurídico da Dominialidade*. Coimbra: Almedina. 19ff.
- ⁹ Grosso, G. (1998). *Roman History of Law*. (Chinese version translated by Huang Feng). Beijing: China University of Political Science and Law Press. 112-113.
- ¹⁰ For the formation of ownership in a technical sense, the classification of objects in the Roman Law and the transfer methods of ownership should be considered. See A. Santos Justo (1997).
- ¹¹ Tuck, R. (1979). *Natural Rights Theories: Their Origin and Development*. Cambridge: Cambridge University Press. 5.
- ¹² Kaser, M. (1984). *Roman Private Law* (4th Edition). Translated by R. Dannenbring. Pretoria: University of South Africa. 115; Pietro Bonfante (1992). *Instituzioni di diritto Romano*. (Chinese version translated by Huang Feng). Beijing: China University of Political Science and Law Press. 195.
- ¹³ His discussion about the classification system of rights and legal relations has several Latin language translation versions, he has a decisive influence on building the legal relationships. For absolute rights concept, see Ernesto Roguin (1990). *Las Reglas Jurídicas: Estudio de Ciencia Jurídica Pura*. Madrid: Traducción por José Maria Navarro de Palencia. 240ff.
- ¹⁴ Duguit, L. (2003). *Les Transformations Generales du Droit Prive Depuis le Code Napoleon*. (Chinese version translated by Xu Diping). Beijing: China University of Political Science and Law Press. 144-145.
- ¹⁵ Christman, J. (2004). *The Myth of Property: Toward the Egalitarian Theory of Ownership*. (Chinese version translated by Zhang Shaozong). Guilin: Guangxi Normal University Press. 6.
- ¹⁶ Kaser, M. (1984). *Roman Private Law* (4th Edition). Translated by R. Dannenbring. Pretoria: University of South Africa. 117.
- ¹⁷ Fernando Alves Correia (1982). As Garantias do Particular na Expropriação por Utilidade Pública, In *Boletim da Faculdade de Direito, Suplemento XXIII*. Coimbra: Universidade de Coimbra. 225, 232.
- ¹⁸ Carbonnier, J. (1992). *Droit Civil, Tome 3, Les Biens*, France: Presses Universitaires de France. 13.
- ¹⁹ See Aubry et Rau. *Droit Civil Français, IX.*. § 574-583, 333-335; The four principles are cited from Planiol, M. and G. Ripert (1995). *Traité Pratique de Droit Civil Français, Tomé 3*. Réimpression. Schmidt Periodicals GMBH. 20-21. The formulation is slightly different Mr. Yin Tian, but basically the same meaning. See Yin Tian (1999). *Droit Réel Français*. Taipei: Wunan Book Publishing Company. 5. But Jean Carbonnier merely summed up three points, and the last one is: "The relationship between people and their property does not mean a right to their property. It can be said that man is 'titulaire' of the property, but not 'proptétaire' because the property is in a sense himself." Quoted from Jean Carbonnier (1992). *Droit Civil, Tome 3, Les Biens*. Presses Universitaires de France. 18.
- ²⁰ About the changes of creditor's rights, see Wagatsuma Sakae (1999). *Supremacy of Claims Act in Modern Law*. Beijing: China Encyclopedia Publishing House. 6ff.
- ²¹ Fernando Alves Correia (1982). As Garantias do Particular na Expropriação por Utilidade Pública. In *Boletim da*

- Faculdade de Direito, Suplemento XXI*. Coimbra: Universidade de Coimbra. 226.
- ²² Tuck, R. (1979). *Natural Rights Theories: Their Origin and Development*. Cambridge: Cambridge University Press. 60; Grotius, H. (1950). *De Iure Praedae Commentarius*. Oxford: Clarendon Press. 18.
- ²³ Grotius, H. (1916). *Mare Liberum*. Oxford: Oxford University Press. 24.
- ²⁴ Salter, J. (2001). Hugo Grotius: Property and Consent. *Political Theory*. 29 (4). 539.
- ²⁵ Tuck, R. (1979). *Natural Rights Theories: Their Origin and Development*. Cambridge: Cambridge University Press. 61.
- ²⁶ He pointed out that “Although the theater is a public place, he takes a seat, the seat belongs to him, this is correct.” Grotius, *De Iure Belli*, II.II.II.1.; cited from J. Salter. 2001. Hugo Grotius: Property and Consent. *Political Theory*, 29 (4). 553. In his view, positive law is used as a way to preempt to build the establishment of ownership is the result of “imitation of nature”, that is, the establishment of ownership imitates the link between man and goods. Man grabs materials to meet his own needs and has contact with objects. See Grotius, H. (1950). *De Iure Praedae Commentarius*. Oxford: Clarendon Press. 216; see R. Tuck. (1979). *Natural Rights Theories: Their Origin and Development*. Cambridge: Cambridge University Press. 61.
- ²⁷ Grotius, *De Iure Belli*, II.II.II.4.; cited from J. Salter. (2001). Hugo Grotius: Property and Consent. *Political Theory*, 29 (4). 542.
- ²⁸ Salter, J. (2001). Hugo Grotius: Property and Consent. *Political Theory*. 29 (4). 545; However, Grotius did not extend this conclusion to real property (mainly land), Grotius thought that although the land will not be used up, but the land can be used for farming or grazing, but the earth did not have enough land for unlimited use, so land use should preempted for exclusive rights.
- ²⁹ Grotius, *De Iure Belli*, II.II.II.5.
- ³⁰ Pufendorf, S. (1934). *De Jure Naturae et Gentium Libri Octo* (Vol. 2). Translated by C. H. Oldfather and W. A. Oldfather. Oxford: Clarendon Press. IV.IV.5.
- ³¹ Selden’s following discussion shows some of his ideas: “the consent of all human beings (the contract can restrain late comers) to intervene terminates the common interests or the original rights so that only the owner of the property assigned to an individual’s right to…… [In territoriis ita distribuendis, consensus veluti humani generis corporis seu universitatis (interposita fide, quae etiam posteros obligaret) intervenit, ut a communiione seu pristino jure eorum, quae ita distributim singulis dominis cederunt, palne discederetur.]” Cited from Tuck, R. (1979). *Natural Rights Theories: Their Origin and Development*. Cambridge: Cambridge University Press. 88.
- ³² Christman, J. (2004). *The Myth of Property:Toward the Egalitarian Theory of Ownership*. (Chinese version translated by Zhang Shaozong). Guilin: Guangxi Normal University Press. 82-83.
- ³³ Becker, L. (1976). The Labor Theory of Property Acquisition. *The Journal of Philosophy*. 73 (18). 654.
- ³⁴ Christman, J. (2004). *The Myth of Property:Toward the Egalitarian Theory of Ownership*. (Chinese version translated by Zhang Shaozong). Guilin: Guangxi Normal University Press. 84.
- ³⁵ Proudhon, P. J. (2003). *What is Property: An Inquiry into the Principle of Right and of Government*. Edited and Translated by Donald R. Kelly and Bonnie G. Smith. Cambridge: Cambridge University Press. 15-16.
- ³⁶ Tolstoy, L. (1899). *What is to be Done?* New York: Thomas Y. Crowell and Company; cited from L. S. Underkuffler. (2003). *The Idea of Property: Its Meaning and Power*. Oxford: Oxford University Press. 1.
- ³⁷ Proudhon, P. J. (2003). *What is Property: An Inquiry into the Principle of Right and of Government*. Edited and Translated by Donald. R. Kelly and Bonnie G. Smith. Cambridge: Cambridge University Press. 37-38.
- ³⁸ *Ibid.* 53.
- ³⁹ *Ibid.* 67.
- ⁴⁰ *Ibid.* 74.
- ⁴¹ *Ibid.* 163-164; this article thinks the content and exposition of this reason can be adjusted and re-emerges as a new

topic to discuss the shortage of resources in modern society.

⁴² Buchanan, J. M. (1993). Property as a Guarantor of Liberty. In C. K. Rowley (Ed.). *Property Rights and the Limits of Democracy*. The Locke Institute. 28 ss.

⁴³ *Ibid.* 46.

⁴⁴ Posner, R. A. (1997): *Economic Analysis of Law (Book I)*. (Chinese version translated by Jiang Zhaokang). Beijing: China Encyclopedia Publishing House. 40.

⁴⁵ *Ibid.* 42-43.

⁴⁶ Christman, J. (2004). *The Myth of Property: Toward the Egalitarian Theory of Ownership*. (Chinese version translated by Zhang Shaozong). Guilin: Guangxi Normal University Press. 202ff.

⁴⁷ *Ibid.* 108.

⁴⁸ Hennequin, A. L. M. 1838. *Traité de Législation et de Jurisprudence*. Paris., I, xi; cited from P. J. Proudhon. 2003. *What is Property: An Inquiry into the Principle of Right and of Government*. Edited and Translated by Donald. R. Kelly and Bonnie G. Smith. Cambridge: Cambridge University Press. 34.