

DOES THE RIGHT TO PROPERTY CREATE A CONSTITUTIONAL TENSION IN SOCIALIST CONSTITUTIONS: AN ANALYSIS WITH REFERENCE TO INDIA AND CHINA

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While both China and India began their independent history rooted in a socialist ideology, albeit with some local customisation, they are today in some measure leaning towards free market capitalism. The development of the right to property in the two countries, however, has been diametrically opposite. While on the one hand India had, in pursuance of its ideological goals, relegated the right to property, China on the other hand, has progressively accorded it a stronger status. However, it has not witnessed the kind of constitutional tensions - be it at the ideological level, as a result of apparently conflicting goals of the State, at the institutional level, as between the judiciary and executive branches of the State, or even at the interface with civil society, which India had to brave. This paper explores the reasons for such divergence of experience. However, as Chinese society and legal institutions witness a change, it is foreseeable that China may experience similar tension as India had once witnessed. In this backdrop, this paper suggests means by which China could learn lessons from the constitutional experience in India, keeping in mind systemic differences in the traditions of the twin nations.

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I. INTRODUCTION

This paper seeks to investigate the constitutional tension that the right to property could create in socialist constitutions. The tension may arise, for example, in restricting the government's authority to achieve an equitable distribution of wealth and resources by nationalisation or compulsory acquisition of private property for public purposes. This constitutional tension acquires an additional dimension when socialist constitutions are injected with the free market ideology. Whereas socialist policies or objectives might be hindered by the right to private property, a constitutional recognition of the right to property (including intellectual property) is regarded essential for the success of a free market economy, especially in states with socialist constitutions. More importantly, once a socialist constitution embraces free market ideology, it is very unlikely that the right to property could be kept merely as a symbolic right.

An investigation into this constitutional tension is carried out with reference to India and China, the two states which have embraced a free market economy, but without expressly or totally discarding the socialist orientation of their respective constitutions. An attempt will be made to compare the model of constitutional socialism adopted by India and China and how that model has been modified in view of the policies of economic liberalisation. Against this background, the approaches taken by India and China vis-à-vis the constitutional protection of the right to property will be contrasted. For instance, when the Indian government found the right to property to be hindering the successful implementation of its policies of establishing an egalitarian society, in 1978 it degraded the status of the right to property from a fundamental to a constitutional right.¹ On the other hand, in recent years China has incrementally strengthened the constitutional protection of private property.² This paper will examine whether the constitutional protection of the right to property could pose similar problems to the realisation of socialist policies of the Chinese government and if so, what lessons China could learn from the Indian experience in this regard.

I begin in Part II of this paper by describing the Indian and Chinese versions of socialism as reflected in their constitutions. I shall then explore how both these countries have tried to marry socialism with a free market ideology: two seemingly contradictory notions. Part III reviews the constitutional recognition of the right to property evolved in India and China. Part IV examines the constitutional tension that India experienced in protecting the fundamental right to property and at the same time implementing socialist policies of redistribution of economic resources. The tension could be witnessed from the lenses of confrontation between the executive-cum-legislature on the one hand and the judiciary on the other. For

¹ The Constitution (44th Amendment) Act, 1978 deleted Article 31 (*fundamental* right to property) and inserted Article 300A (right to property) in the Constitution.

² See, e.g., the amendments to the PRC Constitution of 1982 made in 1988, 1993, 1999 and 2004. In 2007, the NPC passed the private property law as well.

various reasons, China may not experience the same level or type of constitutional tension, yet one might notice a few signs of emerging contradictions.³ Finally, an attempt is made in the Part V to analyse what lessons, if any, China could learn from the Indian constitutional experience of the right to property.

II. CUSTOM-MADE SOCIALISMS IN AN ERA OF FREE MARKET

Defining any term is a tough task, especially if lawyers or legal scholars are involved in this task. This applies to defining ‘socialism’ as well⁴ — socialism could mean different things to different people. Both India and China claim to have adopted their own versions of socialism in their constitutions. This Part explains how the constitutional understanding of socialism differs in these two countries and how both India and China have tried to strike a balance between their versions of socialism and the free market ideology.

A. INDIAN SOCIALISM VERSUS CHINESE SOCIALISM

Considering that many members of the Indian Constituent Assembly had ‘the intellectual or emotional commitment ... to socialism’,⁵ it was not surprising that in the Constitution, ‘We, the people of India’, adopted on 26th November 1949 had socialist roots. Although the terms ‘socialist’ was inserted in the Preamble to the Constitution by the 42nd amendment in 1976,⁶ there were no doubts that the Constitution was socialist from the very inception. It seems that the word socialist was not inserted because there was no consensus on what socialism meant or what kind of socialism was suitable for India. Granville Austin, a leading authority on the Indian Constitution, explains:

“What was of greatest importance to most Assembly members ... was not that socialism be embodied in the Constitution, but

³ It seems though that the Communist Party of China (CPC) sees no contradictions between socialism and a free market economy. Wang Yu notes, “CPC has also come to realise there is no fundamental contradiction between socialism and a market economy. A market economy is indispensable to the allocation of resources in socialised production. ... Combining socialism with the market economy is a creation and breakthrough in the Marxist theory on socialist economies.” See Wang Yu, *Our Way: Building Socialism with Chinese Characteristics*, available at <http://www.politicalaffairs.net/article/view/36/1/1/> (Last visited on November 20, 2008). But see Martin Hart-Landsberg & Paul Burkett, *China and Socialism: Market Reforms and Class Struggle*, MONTHLY REVIEW, July-August 2004, Vol. 56 No. 3.

⁴ The *Oxford English Dictionary* defines ‘socialism’ as follows: “A theory or policy of social organisation which aims at or advocates the ownership and control of the means of production, capital, land, property, etc., by the community as a whole, and their administration or distribution in the interests of all.”

⁵ GRANVILLE AUSTIN, *THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION* 41 (1966).

⁶ Constitution (42nd Amendment) Act, 1976.

that a democratic constitution with a socialist bias be framed so as to allow the nation in future to become as socialist as its citizens desired or as its needs demanded.”⁷

Such ‘socialist bias’ was clearly manifested even in the original text of the Preamble, which has been held to be an integral part of the Constitution.⁸ The Preamble provided that the Constitution aims to secure to all its citizens, among others, justice (social, economic and political) and equality (of status and of opportunity).⁹ These aims were not merely aspirational because the founding fathers wanted to achieve a social revolution through the Constitution.¹⁰ The main tool employed to achieve such social change was the provisions on Fundamental Rights (*hereinafter* FRs) and Directive Principles of State Policy (*hereinafter* DPs), which Austin described as ‘conscience of the Constitution.’¹¹

Part III of the Constitution lays down various FRs and also specifies grounds for limiting these rights. ‘As a right without a remedy does not have much substance’,¹² the remedy to approach the Supreme Court directly for the enforcement of any of the Part III rights has also been made a FR.¹³ The holder of the FRs cannot waive them.¹⁴ Nor can the FRs be curtailed by an amendment of the Constitution if such curtailment is against the basic structure of the Constitution.¹⁵ Some of the FRs are available only to citizens,¹⁶ while others are available to citizens as well as

⁷ AUSTIN, *supra* note 5, 43.

⁸ Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461.

⁹ Constitution of India, Preamble.

¹⁰ AUSTIN, *supra* note 5, 27. “The social revolution meant ‘to get (India) out of the medievalism based on birth, religion, custom, and community and reconstruct her social structure on modern foundations of law, individual merit, and social education’”. *Id.*, 26 (quoting K. Santhanam, a member of the Constituent Assembly).

¹¹ AUSTIN, *supra* note 5, 50.

¹² M. P. Jain, *The Supreme Court and Fundamental Rights in FIFTY YEARS OF THE SUPREME COURT OF INDIA – ITS GRASP AND REACH* 1, 76 (S. K. Verma & Kusum eds., 2000).

¹³ Constitution of India 1950, Article 32.

¹⁴ Basheshar Nath v. CIT, AIR 1959 SC 149; Nar Singh Pal v. Union of India, AIR 2000 SC 1401.

¹⁵ The judiciary is the ‘sole’ and ‘final’ judge of what constitutes basic structure of the Constitution. Over a period of time, various provisions have been given the higher pedestal of basic structure or basic features of the Constitution, for example, independence of judiciary, judicial review, rule of law, secularism, democracy, free and fair elections, harmony between FRs and DPs, right to equality, and right to life and personal liberty. See MAHENDRA P. SINGH, SHUKLA’S CONSTITUTION OF INDIA 1002-14 (2001); Jain, *supra* note 12, 8-13.

¹⁶ See, e.g., Article 15(2) (right of non-discrimination on grounds only of religion, race, caste, sex, place of birth or any one of them to access and use of public places, etc.); Article 15(4) (special provision for advancement of socially and educationally backward classes of citizens or the Scheduled Castes and the Scheduled Tribes); Article 16 (equality of opportunity in matters of public employment); Article 19 (rights regarding six freedoms); Article 29 (protection of interests of minorities).

non-citizens,¹⁷ including juristic persons. Notably, some of the FRs are expressly conferred on groups of people or community.¹⁸ Not all FRs are guaranteed specifically against the state and some of them are expressly guaranteed against non-state bodies.¹⁹

Some FRs were specifically aimed at establishing an egalitarian society. One could, for example, refer to the provisions for the prohibition of discrimination on the basis of caste among others,²⁰ equality of opportunity in matters of public employment,²¹ affirmative action for backward class of citizens,²² abolition of untouchability,²³ the right to form associations or unions,²⁴ the prohibition of traffic in human being and forced labour,²⁵ and the prohibition on employing children below the age of fourteen years in hazardous industries.²⁶

In order to ensure that the FRs did not remain empty declarations, the founding fathers made various provisions in the Constitution to establish an independent judiciary,²⁷ which they envisaged 'as a bastion of rights and justice'.²⁸ The power to enforce the FRs was conferred on both the Supreme Court and the High Courts.²⁹ The judiciary can test not only the validity of laws and executive

¹⁷ See, e.g., Article 14 (right to equality); Article 15(1) (right of non-discrimination on grounds only of religion, race, caste, sex, place of birth or any one of them); Article 20 (protection in respect of conviction of offences); Article 21 (protection of life and personal liberty); Article 22 (protection against arrest and detention); Article 25 (freedom of conscience and right to profess, practice and propagate religion).

¹⁸ See, e.g., Articles 26, 29 and 30.

¹⁹ Austin cites three provisions, i.e., Articles 15(2), 17 and 23 which have been 'designed to protect the individual against the action of other private citizen'. AUSTIN, *supra* note 5, 51. However, it is reasonable to suggest that the protection of even Articles 24 and 29(1) could be invoked against private individuals. See also Vijayashri Sripati, *Toward Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back to See Ahead (1950-2000)*, 14 AM. U. INT'L L. REV. 413, 447-48 (1998).

²⁰ Constitution of India 1950, Article 15(1). Article 15(3) further provides that the state could make special provisions for women and children.

²¹ *Id.*, Article 16(1).

²² *Id.*, Articles 15(4) and 16(4). See also clauses (4A) and (4B) of Article 16, which were inserted in 1995 and 2000, respectively. On the efficacy of reservation, see Marianne Bertrand, Rema Hanna & Sendhil Mullainathan, *Affirmative Action in Education: Evidence from Engineering College Admissions in India* (NBER Working Paper No. 13926), available at <http://www.nber.org/papers/w13926> (Last visited on November 20, 2008).

²³ Constitution of India 1950, Article 17.

²⁴ *Id.*, Article 19(1)(c).

²⁵ *Id.*, Article 23.

²⁶ *Id.*, Article 24.

²⁷ *Id.*, Articles 50, 124, 125, 141, 142, 217, and 220-222. See Mahendra P. Singh, *Securing the Independence of the Judiciary: The Indian Experience*, 10 INDIAN JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 245 (2000).

²⁸ AUSTIN, *supra* note 5, 175.

²⁹ Constitution of India, Articles 32 and 226.

actions but also of constitutional amendments. It has the final say on the interpretation of the Constitution and its orders, supported with the power to punish for contempt, extend to everyone throughout the territory of the country. Since its inception, the Supreme Court has delivered judgments of far-reaching importance involving not only adjudication of disputes but also determination of public policies and establishment of rule of law and constitutionalism.³⁰

It is, however, the DPs – Articles 37 to 51 in Part IV – which give most clear indication of the socialist nature of the Indian Constitution. Article 38, for example, provides that the state ‘shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.’ One could also find provisions regarding securing the right to work (Article 41), just and humane conditions of work and maternity relief (Article 42), living wages for workers (Article 43) and participation of workers in management of industries (Article 43-A). Another important DP reads:

“The State shall, in particular, direct its policy towards securing –
 (a) that the citizens have the right to an *adequate means of livelihood*;
 (b) that the *ownership and control of the material resources* of the community are so distributed as best to *subserve the common good*;
 (c) that the operation of the *economic system does not result in the concentration of wealth and means of production* to the common detriment;”³¹

Critics might argue that the socialism enshrined in these provisions does not mean much because the DPs are not justiciable.³² But it should not be forgotten that the Constitution declares that DPs are “nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.”³³ Moreover, one should note that the leaders of the independent movement drew no distinction between the positive and negative obligations of the state and it was only the Constituent Assembly which made such a distinction.³⁴ In fact, even the Supreme Court, after initial deviation,³⁵ has accepted

³⁰ See Gobind Das, *The Supreme Court: An Overview* in SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA 16-47 (B. N. Kirpal et al eds., 2000) for an analysis of some of the landmark judgments delivered by the Apex Court during these years.

³¹ Constitution of India, Article 39 (emphasis added).

³² *Id.*, Article 37: “The provisions contained in this Part [Part IV] shall not be enforceable by any court.”

³³ *Id.*

³⁴ AUSTIN, *supra* note 5, 52. See Mahendra P. Singh, *The Statics and the Dynamics of the Fundamental Rights and the Directive Principles: A Human Rights Perspective*, 5 SUPREME COURT CASES (JOUR) 1 (2003) for the relevance of this difference.

³⁵ State of Madras v. Champakam Dorairajan, AIR 1951 SC 226.

that FRs are not superior to DPs on account of the latter being non-justiciable: rather FRs and DPs are complementary and the former are a means to achieve the goals indicated in the latter.³⁶ The issue was put beyond any controversy in *Minerva Mills Ltd. v. Union of India*,³⁷ where the Court held that the:

“[H]armony and balance between fundamental rights and directive principles is an essential feature of the basic structure of the Constitution’. Since then the judiciary has employed DPs to derive the contents of various FRs,³⁸ thus further diluting the significance of the justiciability distinction between the FRs and DPs. It may be useful to mention here that in some cases the Indian Supreme Court has interpreted the notion of socialism to mean ‘democratic socialism’, the aim of which is to end poverty, ignorance, disease and inequality of opportunity.³⁹ In another case, the Supreme Court reminded that ‘socialism ... ought to be practised in every sphere of life and be treated by the law courts as a constitutional mandate since the law courts exists for the society.’⁴⁰

In comparison to India, the model of socialism adopted by China in its 1982 Constitution is closer to Marxism-Leninism both in terms of terminology (e.g., revolution, alliance between workers and peasants, exploitation) and the core concepts (e.g., people’s democratic dictatorship, democratic centralism, socialist public ownership) employed therein. The constitutional socialism is not merely outcome-oriented but also full of ideological rhetoric. A long Preamble to the Constitution provides various instances of such rhetoric. For the present purpose, one example should suffice:

“The exploiting classes as such have been abolished in our country. However, class struggle will continue to exist within certain bounds for a long time to come. The Chinese people must fight against those forces and elements, both at home and abroad, that are hostile to China’s socialist system and try to undermine it.”

³⁶ C. B. Boarding & Lodging v. State of Mysore, AIR 1970 SC 2042; Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461; *Minerva Mills Ltd. v. Union of India*, AIR 1980 SC 1789; Unni Krishnan v. State of Andhra Pradesh, (1993) 1 SCC 645. See also Rajiv Dhavan, *Republic of India: The Constitution as the Situs of Struggle: India’s Constitution Forty Years On* in CONSTITUTIONAL SYSTEMS IN LATE TWENTIETH CENTURY ASIA 373, 382-83, 405 and 413-16 (Lawrence W Beer ed., 1992).

³⁷ AIR 1980 SC 1789, 1806.

³⁸ See Jain, *supra* note 12, 65-76.

³⁹ See, e.g., D. S. Nakara v. Union of India, AIR 1983 SC 130.

⁴⁰ Secretary, HSEB v. Suresh, judgment dated April 4, 1999 (Rao and Banerjee, JJ.), available at <http://judis.nic.in/supremecourt/chejudis.asp> (Last visited on November 20, 2008).

Two more distinctive aspects of Chinese socialism should be noted here. First, an attempt is made by China to localise the ideology of Marx and Lenin. This is reflected in using phrases such as ‘socialism with Chinese characteristics’ or the ‘Chinese-style socialism’. Despite attempts to explain what the phrase ‘socialism with Chinese characteristics’ might mean,⁴¹ Gabriel argues that it “actually seems to mean ‘capitalism with Chinese characteristics’.”⁴² It also seems that these phrases work as a façade for Chinese leadership to justify deviations from the strict Marxist-Leninist or socialist ideology.⁴³ How could one otherwise justify recognition-cum-protection of both private sector and private property in a socialist constitution rooted in the Marxist-Leninist traditions?⁴⁴ Similarly, how could the Communist Party of China be allowed to abdicate the ultimate goal of abolishing capitalism,⁴⁵ but for the indigenization of Marxism and Leninism to suit the demands of the free market ideology? Professor Han Deqiang sums up the position well:

“The so-called ‘reform and opening-up policy’ was actually a policy of restoring capitalism in China. So public ownership was gradually eroded and finally disintegrated. During this process, because of the existence of an economic foundation of public ownership, this counter-revolution had to be carried out under the name of the people, and the slogan of ‘sticking to four basic principles’ had to be shouted time and again.”⁴⁶

⁴¹ *Socialism with Chinese Characteristics*, September 30, 2007, available at <http://english.peopledaily.com.cn/90002/92169/92211/6275043.html> (Last visited on November 20, 2008). Wang Yu also highlights seven features of ‘socialism with Chinese characteristics’. See Wang Yu, *supra* note 3. See also Liu Jianwu, *What is Socialism with Chinese Characteristics?*, available at http://netx.u-paris10.fr/actuelmarx/cm5/com/M15_Contr_liujianwu.rtf (Last visited on November 20, 2008).

⁴² Satya J. Gabriel, *Technological Determinism & Socialism with Chinese Characteristics: Pulling the Cart without Watching the Road?*, CHINA ESSAY SERIES (October 1998), available at <http://www.mtholyoke.edu/courses/sgabriel/economics/china-essays/8.html> (Last visited on November 20, 2008). See also Hart-Landsberg & Burkett, *supra* note 3.

⁴³ Ting Shi, *When Socialism Turned Marxism on Its Head*, THE SOUTH CHINA MORNING POST (Hong Kong) December 15, 2008, A8 “The theory of ‘socialism with Chinese characteristics’ is like a basket: you can put all sorts of things into it” (quoting Professor Hu Xingdou).

⁴⁴ Kim Petersen, *Necessary Chinese Illusions: Socialism with Chinese Characteristics*, available at <http://www.dissidentvoice.org/Jan04/Petersen0106.htm> (Last visited on November 20, 2008): “A final nail in the Chinese revolutionary coffin was administered late in 2003 when the Communist Party undertook to amend (or more correctly, undermine) the Constitution to protect private property rights.”

⁴⁵ ALBERT CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE’S REPUBLIC OF CHINA 84 (2004).

⁴⁶ Han Deqiang, *Chinese Cultural Revolution: Failure and Theoretical Originality*, 7, available at http://www.nodo50.org/cubasisgloXXI/congreso/deqiang_25feb03.pdf (Last visited on November 20, 2008).

Second, it also seems that the Chinese socialism is personified in that the constitutional ideology is defined with reference to what Mao Zedong or Deng Xioping propounded.⁴⁷ Similarly, a reference in the Preamble to the term ‘Three Represents’ could be traced back, it is suggested by commentators, to the speech of Jiang Zemin delivered in February 2000.⁴⁸ One could find significant influences of people on the constitutional text in other countries as well,⁴⁹ but the Chinese experience is different in that such personification allows the party leadership to mould the constitution in the name of people.⁵⁰ In the absence of a real democracy, allowing such leverage to a given political leader of an undemocratic party runs foul of constitutionalism.

B. MARRYING SOCIALISM WITH FREE MARKET IDEOLOGY

Both India and China have tried to marry their respective versions of constitutional socialism with the free market ideology at different points of time and in different ways. India began this marrying process in 1991 when the government adopted the new economic policy (NEP) of privatisation, liberalisation, disinvestment and deregulation.⁵¹ This distinct policy shift away from socialism resulted in scholars discussing if the NEP was constitutional,⁵² because the government did not amend any provision of the Constitution. It seems that the issue got settled with the Supreme Court upholding the constitutional validity of privatisation and disinvestment in specific instances.⁵³ Doubts though remain if the government could really comply with the constitutional mandate enshrined in DPs.⁵⁴ Such doubts are fuelled by recent judicial disinclination to interfere in the development policies even if they clearly work against the interests of certain disadvantaged

⁴⁷ The Preamble to the 1982 Constitution, for instance, provides: “Under the leadership of the Communist Party of China and the guidance of Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory and the important thought of Three Represents, the Chinese people of all nationalities will continue to adhere to the people’s democratic dictatorship and the socialist road.”

⁴⁸ Wen-Chieh Wang & Min-Chiuan Wang, *The 2004 Amendment to China’s Constitutional Law*, 6:2 PERSPECTIVES 37, 37-38 (2005).

⁴⁹ For example, the influence that Nehru and Madison exerted on constitutional-making in India and the US, respectively.

⁵⁰ “The ‘three represents’ seems to overemphasize an individual’s political power at the expense of constitutional authority.” Wang & Wang, *supra* note 48, 38.

⁵¹ Krishna K. Tummalala, *Administrative Reforms in India* in ADMINISTRATIVE REFORMS IN DEVELOPING NATIONS 29, 42-43 (Ali Farazmand ed., 2001).

⁵² See, e.g., S. S. Singh & S. Mishra, *Public Law Issues in Privatisation Process*, 40 INDIAN JOURNAL OF PUBLIC ADMINISTRATION 396 (1994); Mahendra P. Singh, *Constitutionality of Market Economy*, 18 DELHI LAW REVIEW 272 (1996); LEGAL DIMENSIONS OF MARKET ECONOMY (Parmanand Singh et al eds., 1997).

⁵³ Delhi Science Forum v. Union of India, AIR 1996 SC 1356; Balco Employees Union v. Union of India, AIR 2001 SC 350.

⁵⁴ Surya Deva, *Human Rights Realisation in an Era of Globalisation: The Indian Experience*, 12 BUFFALO HUMAN RIGHTS LAW REVIEW 93, 124-25 (2006).

sections of society.⁵⁵ In one case, the Indian Supreme Court has gone to the extent of observing the following:

“Socialism might have been a catchword from our history. It may be present in the Preamble of our Constitution. However, *due to the liberalisation policy* adopted by the Central Government from the early nineties, *this view that the Indian society is essentially wedded to socialism is definitely withering away.*”⁵⁶

A more explicit sign of this perceived tension between the socialist mandate of the Constitution and the free market policies is provided by a recent case. The Good Governance India Foundation, an NGO, filed a petition in the Supreme Court to remove the word ‘socialist’ from the Preamble to the Constitution as it infringed the original intent as well as today’s economic reality.⁵⁷ Although the Court rejected the petition on the ground that socialism could mean many things (e.g., welfare measures for citizens), the case illustrates that a tension might arise in some instances. Signs of this constitutional tension in the world’s largest democracy are also seen beyond courts in that some leftist political parties, civil society and trade unions have consistently opposed economic reforms. Various scholarly studies also point out that the benefits of economic reforms have not reached the poor populace thus resulting in a further gulf between the rich and poor.⁵⁸ Because of these public oppositions, the Indian government had to move on at a slow pace in deregulating the economy further.

⁵⁵ For example, the Supreme Court declined to interfere in the height of the Narmada dam which displaced several thousand tribal people. See *Narmada Bachao Andolan v. Union of India* (2000) 10 SCC 664; Ramaswamy R. Iyer, *Abandoning the Displaced*, THE HINDU, May 10, 2006. See also Usha Ramanathan, *Illegality and Exclusion: Law in the Lives of Slum Dwellers* (IELRC Working Paper, 2004) available at <http://www.ielrc.org/content/w0402.pdf> (Last visited on November 20, 2008).

⁵⁶ *State of Punjab v. Devans Modern Breweries Ltd.*, (2004) 11 SCC 26, 148 (emphasis added). (In this case, the Court also pushed for an economic interpretation of the Constitution; an interpretation which is suitable in the changed economic environment both at the national as well as international levels).

⁵⁷ See Shruti Rajagopalan, *India’s Socialist Constitution*, THE WALL STREET JOURNAL, January 22, 2008, available at <http://online.wsj.com/article/SB120096313713705107.html> (Last visited on November 20, 2008).

⁵⁸ “The image of an ‘India Shining’ post-1991 is hardly a representative or fully accurate portrayal of a country where over 100,000 villages have never heard a telephone ring. While the economic reforms of the 1990s did much to liberalise and stimulate growth, the direct beneficiaries were more affluent urban dwellers. About a quarter of India’s one billion-plus population, who constitute a third of the world’s poor, continue to live in poverty.” See Sandeep Ahuja *et al*, *Economic Reform in India: Task Force Report*, 17, January 2006 available at <http://harrisschool.uchicago.edu/News/press-releases/IPP%20Economic%20Reform%20in%20India.pdf> (Last visited on November 20, 2008). See also, Surya Deva, *The Sangam of Foreign Investment, Multinational Corporations and Human Rights: An Indian Perspective for a Developing Asia*, SINGAPORE JOURNAL OF LEGAL STUDIES 305, 309-317 (2004).

Nevertheless, it will be fair to say that the Indian government is aware of this growing economic disparity and has not totally forgotten its social welfare commitments under the Constitution. The government, for instance, enacted the National Rural Employment Guarantee Act in 2005,⁵⁹ which seeks to “provide to every household whose adult members volunteer to do unskilled manual work not less than one hundred days of such work in a financial year in accordance with the Scheme made under this Act.”⁶⁰ The aim of the above analysis rather was to show that the marriage between a socialist constitution and the free market ideology is full of tensions, which are played out both inside and outside state institutions.

In the case of China, the government introduced economic reforms in 1978.⁶¹ Consequently, one could note – at least in subtle ways – the process to marry socialism with free market ideology in the PRC Constitution of 1982. The Preamble to the Constitution declared in unqualified terms: “The socialist transformation of the private ownership of the means of production has been completed, the system of exploitation of man by man abolished and the socialist system established.” The 1982 Constitution further provided that the ‘socialist system is the basic system’ of China and that a disruption of this ‘system by any organisation or individual is prohibited’,⁶² that land in the cities is ‘owned by the State’,⁶³ that the state ‘practices planned economy on the basis of socialist public ownership’,⁶⁴ and that socialist public property is inviolable.⁶⁵

At the same time, the Constitution seemed to recognise a role both for the private sector⁶⁶ and private property.⁶⁷ The PRC Constitution of 1982 also gave an indication of what lied ahead because the Preamble mentioned that the “basic task of the nation in the years to come is to concentrate its efforts on socialist modernisation.” The notion of *socialist modernisation* was further clarified by the 1993 amendment in that it provided that such modernisation has to be achieved “in line with the theory of building socialism with Chinese characteristics.”⁶⁸ The 2004

⁵⁹ The National Rural Employment Guarantee Act, 2005.

⁶⁰ *Id.*, § 3(1). The Act also makes provision for ‘unemployment allowance’ in case of failure to provide employment. *Id.*, § 7(1).

⁶¹ CHEN, *supra* note 45, 36, 240-41.

⁶² PRC Constitution 1982, Article 1.

⁶³ *Id.*, Article 10.

⁶⁴ *Id.*, Article 15.

⁶⁵ *Id.*, Article 12.

⁶⁶ *Id.*, Article 18: China ‘permits foreign enterprises, other foreign economic organisations and individual foreigners to invest in China.’

⁶⁷ *Id.*, Article 13: State ‘protects the right of citizens to own lawfully earned income, savings, houses and other lawful property’, including ‘the right of citizens to inherit private property.’ See also Article 11: “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’.”

⁶⁸ Amendment to the PRC Constitution Adopted at the First Session of the Eighth National People’s Congress and promulgated for implementation by the Announcement of the National People’s Congress on March 29, 1993, Article 3.

amendment has replaced the phrase ‘socialism with Chinese characteristics’ with ‘Chinese-style socialism’.⁶⁹ The differences between the two phrases are not apparent though. More importantly, the CPC leaders and Chinese scholars continue to use the old term ‘socialism with Chinese characteristics’ in their public speeches or writings.⁷⁰ While speaking at the 30th anniversary of the launch of the economic reforms, President Hu Jintao, for example, noted the progress that China has made in ‘building socialism with Chinese characteristics’.⁷¹

As we will see in the next Part, the four amendments of the Constitution and the 2007 private property law injected more elements of a free market economy in what was/is essentially a socialist constitution. It is arguable that these constitutional amendments have tried to make the PRC Constitution of 1982 consistent with the economic reality. However, in this process, they have also triggered a tension that arises in view of socialism and the free market ideology having different theoretical underpinnings. Similar to the Indian experience, the Chinese government is also conscious of the increasing economic disparity that the economic reforms of the last three decades have brought. That is why the government is aiming to establish a ‘harmonious’ society⁷² and is already taking various measures to achieve this objective. For examples, the government has proposed to provide medical insurance to 80 per cent of the population in the near future. In early 2008, the government also introduced the labour contract law to protect the interests of workers, despite a heavy corporate lobbying against it.

Logically seen, the constitutional tension arising from a marriage between socialism and the free market ideology should have been more visible in the case of China, because as compared to India, the PRC Constitution is explicitly tied more to a hard-core socialist ideology. But, as we will see in Part IV, this has not happened.⁷³ The tension was rather more visible in India for several reasons. One important reason is that unlike China, India’s independent judiciary – armed with the power of judicial review provides a venue to raise and resolve such constitutional tensions. Another reason is

⁶⁹ Amendment to the PRC Constitution Adopted at the Second Session of the Tenth National People’s Congress and promulgated for implementation by the Announcement of the National People’s Congress on March 14, 2004, Article 18.

⁷⁰ *Supra* notes 41 and 44.

⁷¹ Shi Jiangtao & Josephine Ma, *30 Years of Reform*, THE SOUTH CHINA MORNING POST (Hong Kong) December 19, 2008, A6.

⁷² Ting Shi, *When Socialism Turned Marxism on Its Head ...*, THE SOUTH CHINA MORNING POST (Hong Kong) December 15, 2008, A8: “The phrase ‘harmonious society’ emerged in 2004 as the new ideological catchphrase of the Hu Jintao era.” *See also* Shi Jiangtao, *Hu Hails Reforms, Says Much More Still to Do*, THE SOUTH CHINA MORNING POST (Hong Kong) December 19, 2008, A1: Recently, President Hu Jintao reiterated the promise of establishing a ‘prosperous and harmonious society’.

⁷³ Woods Lee, *... and the Party Embraced Businessmen*, THE SOUTH CHINA MORNING POST (Hong Kong) December 15, 2008, A8: “Communism and capitalism have learned to co-exist in the past 30 years of opening up and reform in China. As capitalism has thrived, the Communist Party has expanded its membership into non-state sector such as private companies, foreign-funded enterprises and self-employed individuals.”

that both political parties and civil society in a democratic country like India are able to deliberate upon this tension in the Parliament or other public forums. But this opportunity is again limited within the current political landscape of China.

III. RIGHT TO PROPERTY: A SURVEY OF CONSTITUTIONAL EVOLUTION

This Part will compare and contrast how the constitutions of India and China have taken quite opposite routes vis-à-vis the protection of the right to property. The Indian Constitution began with recognising a FR to property but later on downgraded the status of this FR to a mere constitutional right. On the other hand, the Chinese Constitution has tried to offer incremental protection to the right to property.

A. FROM A FUNDAMENTAL RIGHT TO A CONSTITUTIONAL RIGHT

During the drafting process of the Indian Constitution, members of the Constituent Assembly discussed and disagreed for several months on the exact contours of the fundamental right to property. The key issue was if any adjective such as ‘just’, ‘fair’, ‘adequate’, or ‘equitable’ be added before compensation that must be given by the state if it acquires personal property for public purposes.⁷⁴ The founding fathers were clearly wary of giving the courts a power to adjudicate on the sufficiency of compensation. At the same time, some members of Assembly did not want to confer on the government an absolute right to acquire private property. Finally, a compromise was reached, as reflected in Article 31 of the Constitution as a fundamental right. Article 31 provided that “no person shall be deprived of his property save by authority of law” and that no property shall be acquired for public purposes under any law “unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined and given.” In addition, Article 19(1)(f) provided that all citizens shall have the right ‘to acquire, hold and dispose of property’.

In order to build an egalitarian society, the founding fathers had envisaged that agrarian reforms would have to be carried out and *zamindari* system would have to be abolished. They had also thought that the judiciary will not invoke the right to property to frustrate such policies. Pandit Nehru, the first Prime Minister of India, had observed during the Constituent Assembly debate that “no Supreme Court and no judiciary can stand in judgment over the sovereign will of Parliament representing the will of the entire community.”⁷⁵

⁷⁴ AUSTIN, *supra* note 5, 87-99.

⁷⁵ As quoted in *id.*, 99.

As we will see in the next Part, the Indian judiciary did not meet this expectation, which resulted in the right to property being amended several times by the Parliament.⁷⁶ Ultimately, in 1978, the Indian Parliament had to delete both Articles 19(1)(f) and 31 from the list of fundamental rights. The same constitutional amendment also inserted a new provision, Article 300A, in the Constitution. This provision reads: “No person shall be deprived of his property save by authority of law.” One main reason for lowering the status of the right to property from a fundamental to constitutional right was to limit the judicial interference in property acquisition cases. In other words, the protection of the right will continue to be available against executive action but not if the private property is taken away by a law enacted by the legislature.⁷⁷

B. INCREMENTAL CONSTITUTIONAL PROTECTION IN CHINA

In China, the evolution of the right to property has been opposite to what India has witnessed. Whereas the constitutional status of the right to property in India has been degraded from a fundamental right to a constitutional right, the right to property has received a higher recognition gradually through the four constitutional amendments of 1988, 1993, 1999 and 2004. The 1988 amendment, for example, provided that the “State permits the private sector of the economy to exist and develop within the limits prescribed by law” and that the “private sector of the economy is a complement to the socialist public economy.”⁷⁸ It was also acknowledged that, “[The] State protects the lawful rights and interests of the private sector of the economy.”

The 1993 amendment replaced ‘planned economy on the basis of socialist public ownership’ with ‘socialist *market* economy’.⁷⁹ The 1999 amendment further clarified the role of private ownership and private sector. The amendment inserted a new paragraph in Article 5 of the 1982 PRC Constitution, which reads, “The People’s Republic of China governs the country according to law and makes it a socialist country under rule of law.”⁸⁰ Equally important was the acknowledgment that although the “basis of the socialist economic system of the People’s Republic of China is socialist public ownership of the means of production,” the “non-public sectors of the economy such as the individual and

⁷⁶ SINGH, *supra* note 15, 275; AUSTIN, *supra* note 5, 99-101.

⁷⁷ SINGH, *id.*, 845.

⁷⁸ Amendment to the PRC Constitution Adopted at the First Session of the Seventh National People’s Congress and promulgated for implementation by the Announcement of the National People’s Congress on April 12, 1988, Article 1.

⁷⁹ Amendment to the PRC Constitution Adopted at the First Session of the Eighth National People’s Congress and promulgated for implementation by the Announcement of the National People’s Congress on March 20, 1993, Article 7 (emphasis added).

⁸⁰ Amendment to the PRC Constitution Adopted at the Second Session of the Ninth National People’s Congress and promulgated for implementation by the Announcement of the National People’s Congress on March 15, 1999, Article 13.

private sectors of the economy, operating within the limits prescribed by law, constitute an important component of the socialist market economy.”⁸¹

However, the clearest recognition of the right to property was provided by the 2004 amendment of the Constitution. The revised Article 13 of the 1982 Constitution now reads as follows:

“Citizens’ lawful private property is inviolable. The State, in accordance with law, protects the rights of citizens to private property and to its inheritance. The State may, in the public interest and in accordance with law, expropriate or requisition private property for its use and make compensation for the private property expropriated or requisitioned.”⁸²

The 2004 amendment also inserted in Article 33 of the PRC Constitution the following, “The State respects and preserves human rights.”⁸³ This provision should further strengthen the protection of the right to property. In order to operationalise the right to private property, the NPC enacted the Property Rights Law in March 2007.⁸⁴ The fact that this law was enacted after several drafts and years of debate is again reflective of the tension that may arise in introducing the right to private property in a socialist constitution.⁸⁵

In comparing the right to property provisions specifically (or fundamental rights provisions generally) in India and China, at least three observations may be made. First, it is very important that in addition to enumerating rights in a Constitution, a suitable legal framework is provided for the realisation of such rights. The Indian Constitution does provide for such framework, e.g., democratic governance, rule of law, independent judiciary, and judicial review. It seems, however, that the PRC Constitution currently lacks adequate framework for the realisation of rights. The constitutional rights are supported neither by an independent judiciary⁸⁶ nor by laws enacted to implement them.⁸⁷ Perhaps Professor

⁸¹ *Id.*, Articles 14 and 16.

⁸² *Supra* note 69, Article 22.

⁸³ *Id.*, Article 24.

⁸⁴ See generally Matthew S. Erie, *China’s (Post-) Socialist Property Rights Regime: Assessing the Impact of the Property Law on Illegal Land Takings*, 37 HONG KONG LAW JOURNAL 919 (2007).

⁸⁵ One aspect of debate was if the Property Rights Law was consistent with the PRC Constitution, because Article 5 provides that, “No laws or administrative or local regulations may contravene the Constitution.” See Erie, *supra* note 84, 936-37; Songyan Sui, *New Property Law Shakes Up China*, BBC NEWS, March 8, 2007, available at <http://news.bbc.co.uk/2/hi/asia-pacific/6429977.stm> (Last visited on November 20, 2008).

⁸⁶ Although Article 126 of the PRC Constitution declares that the people’s courts shall “exercise judicial power independently”, the courts in China are not independent. Zhiwei Tong, *An Outlook for Development of Chinese Constitutionalism in Mid-and-Short Run*, 17-18 (Conference on Constitutionalism in China in the Past 100 Years and Its Future, School of Law, City University of Hong Kong, October 2008) (on file with the author).

⁸⁷ Zhiwei Tong, *supra* note 86, 13-15.

Henry Shue had states like China in mind when he wrote that people should not merely 'have' rights but should also be able to 'enjoy' or 'exercise' them.⁸⁸

Second aspect is that under the Indian constitutional scheme, the availability of fundamental rights is not linked to the performance of one's constitutional duties, though the Constitution has enumerated certain duties.⁸⁹ On the other hand, it seems that the enjoyment of citizens' rights is linked with and on a way, dependent on the performance of duties under the Chinese Constitution. The PRC Constitution of 1982 states that "Every citizen is entitled to the rights *and at the same time must perform the duties* prescribed by the Constitution and other laws."⁹⁰ This relationship between rights and duties is elaborated further in some provisions. Article 42, for instance, provides that citizens "have the right as well as the duty to work."⁹¹ It is, thus, clear that "the Constitution stresses the relationship and interdependence between rights and duties" and that this "linkage of individual rights to the performance of social duties is again consistent with the Marxist tradition."⁹² In view of this, one wonders if the Chinese courts would decline to enforce a fundamental right on the ground that the bearer of such right has not fulfilled certain constitutional duties.

Third, although the right to private property is now protected under the PRC Constitution, it should be noted that Article 13 is part of Chapter I on General Principles rather than Chapter II on The Fundamental Rights and Duties of Citizens. The implications of this for the status, or the extent of protection, of the right to property are not clear under the Chinese constitutional scheme.⁹³ One could say though that had this been the case in India, the right to property would not have enjoyed the status of FRs.⁹⁴

⁸⁸ Henry Shue, *BASIC RIGHTS: SUBSISTENCE, AFFLUENCE AND US FOREIGN POLICY* 16, 68-69 (1996).

⁸⁹ Constitution of India, Article 51A, inserted by the Constitution (42nd Amendment) Act 1976.

⁹⁰ PRC Constitution 1982, Article 33. Professor Chen observes that "the Constitution stresses the relationship and interdependence between rights and duties" and that this "linkage of individual rights to the performance of social duties is again consistent with the Marxist tradition."

⁹¹ A similar spirit is reflected in Article 46, which reads: "Citizens of the People's Republic of China have the duty as well as the right to receive education." See *supra* note 69, Article 46.

⁹² CHEN, *supra* note 45, 56. The 1977 Constitution of the USSR had also emphasised this relationship between rights and duties. Article 59 read: "'Citizens' exercise of their rights and freedoms is inseparable from the performance of their duties and obligations."

⁹³ Zhiwei Tong argues that, "[S]ome kinds of fundamental rights are listed in the first chapter of General Principles." Zhiwei Tong, *supra* note 86, 7. However, it seems that with the possible exception of Articles 4, 13 and 32, the other provisions of Chapter I are hardly in the nature of 'fundamental' rights.

⁹⁴ It is suggested, for example, that "the guarantee of property ownership is ... treated as part of the economic policy rather than a fundamental rights." Wang & Wang, *supra* note 48, 40.

IV. CONSTITUTIONAL TENSION OVER THE RIGHT TO PROPERTY

The Part examines the constitutional tension that the right to property created in the wake of Indian government's pursuit for socialist policies. It also asks a hypothetical question if China could experience a similar constitutional tension due to a constitutional recognition of the right to property.

A. INDIAN JUDICIARY'S BATTLE WITH THE PARLIAMENT OVER THE RIGHT TO PROPERTY

After reviewing various cases in which the right to property was invoked, Upadhyaya concludes that the Supreme Court has 'done its best' to protect agrarian reforms over the years.⁹⁵ This conclusion, however, does not sit well with the constitutional reality which induced the Indian Parliament to take the extreme measure of deleting the right to property from Part III of the Constitution. As Austin examines in detail, there was a battle for supremacy between the judiciary and the Parliament since the middle of 1960s.⁹⁶ In fact, it was this battle for supremacy which was fought around the conflicting views of judiciary and executive/legislature on the issue of socialist policies and the right of property that had contributed to the controversy about supersession of judges of the higher judiciary, the debate about the 'committed judiciary', and the imposition of emergency in 1975.

The FR to property conferred by Article 31 of the Constitution has been amended by the Indian Parliament on six occasions.⁹⁷ Although it would not possible to offer a detailed explanation for these amendments,⁹⁸ an attempt would be made to provide a brief summary. For our purposes however, it is relevant to note at the outset that all the six constitutional amendments were triggered by some decisions of the judiciary which the government considered to be restricting the goals of establishing an egalitarian society.

The tussle between the judiciary and executive-legislature over the right to property started just after the promulgation of the Constitution when the Patna High Court declared unconstitutional a land reform law on the ground of violating the

⁹⁵ M. L. Upadhyaya, *Agrarian Reforms* in FIFTY YEARS OF THE SUPREME COURT OF INDIA: ITS GRASP AND REACH 569, 589 (S. K. Verma & Kusum eds., 2000).

⁹⁶ GRANVILLE AUSTIN, *WORKING A DEMOCRATIC CONSTITUTION: THE INDIAN EXPERIENCE* 69-122, 171-292 (1999). See also Tom Allen, *Property as a Fundamental Right in India, Europe and South Africa*, 15 *ASIA PACIFIC LAW REVIEW* 193 (2007).

⁹⁷ Constitution (First Amendment) Act, 1951; Constitution (Fourth Amendment) Act, 1956; Constitution (Seventeenth Amendment) Act, 1964; Constitution (Twenty Fifth Amendment) Act, 1971; Constitution (Forty Second Amendment) Act, 1976; and Constitution (Forty Fourth Amendment) Act, 1978.

⁹⁸ See for details, SINGH, *supra* note 15, 275-318.

right to equality under Article 14.⁹⁹ The Parliament responded by inserting Articles 31A and 31B in the Constitution, which, in short, sought to save land reforms laws from any future constitutional challenge on being violative of FRs. Of particular significance was the umbrella protection created by Article 31B. This article provided that any law included in the Ninth Schedule to the Constitution shall not be deemed to be void on the ground of being inconsistent with any of the Part III rights.

Very soon, the battle shifted to the quantum of compensation to be paid for acquiring private property for public purposes. In *State of West Bengal v. Bela Banerjee*,¹⁰⁰ the Supreme Court held that a provision which fixed the compensation without reference to the value of the land was arbitrary and breached Article 31(2). In other words, the compensation should be a 'just equivalent' of what the owner has been deprived of. In some other cases dealing with regulation of industry, the Court held that the payment of compensation may be necessary even for restricting the exercise of property rights.¹⁰¹ These judicial decisions provided impetus for the Parliament to amend the Constitution again in 1955. This amendment made the adequacy of compensation non-justiciable and also laid down that no acquisition or requisition of property takes place unless there is a transfer of ownership or the right to possession. So, compensation would not be required if the property rights are limited by ways other than acquisition or requisition.

Despite these amendments, the Supreme Court continued with its 'private-property-protecting' interpretations and decisions. For example, it held that although the compensation is not required by law to be adequate, it must yet not be 'illusory'.¹⁰² The Court also struck down the bank nationalisation law for not providing compensation as per the relevant principles.¹⁰³ The judgment in *Golak Nath v. State of Punjab*¹⁰⁴ made the matter worse as the Supreme Court held that the Parliament cannot amend FRs even while exercising its constituent power to amend the Constitution. But the Indian Parliament was not willing to accept this judicial position easily: it restored the power to amend FRs by the 24th Amendment and inserted Article 31C by the 25th Amendment. Article 31C was of far-reaching importance as it provided that no law giving effect to DPs shall be declared void by the courts on the ground of being inconsistent with FRs under Articles 14 or 19 and that courts cannot review if the law seeks to further DPs or not.¹⁰⁵

The constitutional validity of Article 31C was challenged in *Kesavananda Bharati v. State of Kerala*.¹⁰⁶ The majority held that the Parliament has the power to

⁹⁹ *Kameshwar Singh v. State*, AIR 1951 Pat 91 (Patna HC).

¹⁰⁰ AIR 1954 SC 170.

¹⁰¹ Allen, *supra* note 96, 198.

¹⁰² *Vajravelu v. Special Deputy Collector*, AIR 1965 SC 1017. *See also* *Union of India v Metal Corporation*, AIR 1967 SC 637.

¹⁰³ *R. C. Cooper v Union of India*, AIR 1970 SC 564.

¹⁰⁴ AIR 1967 SC 1643.

¹⁰⁵ The original text of Article 31C was amended further by the 42nd and 44th Amendments to the Constitution of India.

¹⁰⁶ AIR 1973 SC 1461.

amend FRs as long as they are not part of the ‘basic structure’ of the Constitution, which cannot be amended. The Court, thus, overruled *Golak Nath* on this point, but at the same time put an implied and open-ended limitation on the power of Parliament to amend the Constitution. The Supreme Court also declared invalid the second part of Article 31C which sought to exclude judicial review. The battle of supremacy between the Supreme Court and the Parliament by and large came to an end with the deletion of the right to property (Article 31) as a FR by the 44th Amendment and the Court in *Minerva Mills* declaring the balance between FRs and DPs to be a basic feature of the Constitution.¹⁰⁷

B. IMPLICATION OF RECOGNISING THE RIGHT TO PROPERTY IN CHINA

Could the constitutional protection of the right to property lead to a constitutional tension in China similar to what India had experienced? It seems unlikely that a similar tussle between the judiciary and executive leading to such tension might unfold in China. The reasons are not too difficult to find. First of all, unlike the Indian legal system which is based on common law, the Chinese legal system is rooted in civil law traditions under which courts may have a very limited role in interpreting constitutions. But more fundamentally, China lacks an independent judiciary in practice though its constitutional text suggests otherwise.¹⁰⁸

Second, since China is not a democracy yet, it does not offer even non-judicial forums in which constitutional tension could play out. For example, forums such as parliamentary debates, multi-party elections and public discussions to deliberate upon constitutional tension that the right to property may create in socialist constitutions are not present in China. In other words, unlike China, it is more difficult to manage or control constitutional tension in democracies like India. Does it mean then that the right to property may create no constitutional tension at all in the socialist framework of the Chinese Constitution? In my view, if China gives any real meaning to the right to private property and does not abandon socialist ideology,¹⁰⁹ some kind of constitutional tension would be unavoidable. For instance, the tension may arise in people employing the right to property to fight against land grab by private builders, or business people resisting government’s acquisition of private property for public purposes.

¹⁰⁷ *Minerva Mills Ltd. v. Union of India*, AIR 1980 SC 1789.

¹⁰⁸ PRC Constitution 1982, Article 126: “The people’s courts shall, in accordance with the law, exercise judicial power independently and are not subject to interference by administrative organs, public organisations or individuals.”

¹⁰⁹ There are no signs yet that China is going to abandon either socialism or free market economy. While speaking at the 30th anniversary of the launch of the economic reforms, President Hu Jintao observed, “Reform and opening was a key choice for the fate of China. ... The road has been correctly chosen. There is no way we will turn back.” Shi Jiangtao, *Hu Hails Reforms, Says Much More Still to Do*, THE SOUTH CHINA MORNING POST (Hong Kong) December 19, 2008, A1. He also expressed the hope that China would become a ‘prosperous, democratised, civilised and harmonious modern socialist country’ in 2049. *Id.*

One should also not ignore that there are already signs of some [legal] reforms in China.¹¹⁰ The Supreme People's Court, for instance, has issued an interpretation for suspending or overturning death penalties,¹¹¹ an issue that has attracted lots of criticism. Commentators also see the rise of civil society in China in the recent times.¹¹² Furthermore, the Chinese government is considering allowing farmers to extend the land lease to farmers beyond thirty years and step up the registration of farmland contracts to minimise land seizure by local officials.¹¹³ Although not much should be read into this at this stage, President Hu Jintao gave a veiled indication of what lies ahead in terms of the future role of CPC in governance: "The Communist Party's status as the ruling party is not immutable. What it possessed in the past does not equal what it possesses at present; what it possesses now does not equal what it will possess in the future."¹¹⁴ These reforms would provide further opportunities to play out the constitutional tension that the right to property may create in a socialist constitution.

Before moving further, one paradox in the position of India and China with reference to propriety rights over land must be noted. In India, the government sought to acquire private land with an objective of redistribution to commons in order to pursue socialist policies of establishing an egalitarian society. On the other hand, considering that all the land in China is owned by the state or peasants collectively, the Chinese government might have to achieve a transition from collective ownership to private ownership in due course of time. In fact, the first step in this direction has already been initiated by allowing farmers to transfer their land-use rights on a voluntary basis.¹¹⁵

V. CONCLUSION: LESSONS FOR CHINA?

What lessons could China learn from the Indian experience of the right to property? One immediate response could be that China could/should learn no lesson from the Indian experience for the simple reason that there are several fundamental differences between the constitutional schemes and ethos of these two countries.

¹¹⁰ It is suggested that legal reforms may promote stability and harmony. Jerome A Cohen, *Legal Reform can Promote Harmony*, THE SOUTH CHINA MORNING POST (Hong Kong) December 25, 2008, A13.

¹¹¹ Woods Lee, *Judicial Revision Shows More Caution over Use of Death Penalty*, THE SOUTH CHINA MORNING POST (Hong Kong) December 27, 2008, A4.

¹¹² "[W]hile the definition of 'the people' is blurring in an increasingly polarised society, the country's masses are starting to wield greater clout, and their voices are being heard." See Raymond Li, *Civil Society Rapidly Rising as 'the People' Wield Greater Clout*, THE SOUTH CHINA MORNING POST (Hong Kong) December 29, 2008, A4.

¹¹³ Josephine Ma, *Farmers to Get Land Leases Past 30 Years*, THE SOUTH CHINA MORNING POST, Hong Kong, October 23, 2008, A4.

¹¹⁴ Jiangtao & Josephine Ma, *30 Years of Reform*, THE SOUTH CHINA MORNING POST (Hong Kong) December 19, 2008, A6.

¹¹⁵ Ma, *supra* note 113. See also Al Guo, *Zhejiang Farmers Given Approval to Lease Out Agricultural Land*, THE SOUTH CHINA MORNING POST (Hong Kong) March 18, 2009, A7.

First, as compared to the Indian Constitution, the PRC Constitution of 1982 is more deeply wedded to the socialist/Marxist ideology. Second, unlike China, India was a mixed economy from the very beginning in that the role of private sector was recognised even in the 1950s. Three, whereas the Indian legal system is based on common law, the Chinese legal system is rooted in civil law traditions. Four, as opposed to China, the Indian judiciary – which is quite independent – has the power of judicial review.¹¹⁶ Five, the Indian Constitution enshrines the rule of law and a broad separation of powers, or at least checks and balances, but the Chinese position is far from perfect on these counts. Six, since India is a democratic country, non-constitutional means, such as the civil society are available to keep the government under control – a luxury which China does not yet have, at least to the same extent.

However, despite these differences, China could gain a few useful insights from the challenges that the Indian government faced in redressing vast economic disparities, which are not unknown to China, because of the fundamental right to property. For example, if China decides to afford real protection to the right of property and at the same time try to bridge economic inequalities, it is likely that private actors whose property rights are curtailed will challenge the relevant government policies or actions. Similarly, the quantum of compensation and whether the acquisition of private property was in ‘public interest’ could also invite litigation.¹¹⁷ On these points also, the Indian experience could throw useful light.

Learning lessons from the constitutional experiences of other jurisdictions would though require us to develop more extensive and democratic trans-border *dialogues* among constitutional traditions of states. India and China could be important constituents of this dialogue, which should take place both within and outside judicial corridors. The term ‘dialogue’ is used here consciously in order to differentiate it from one-way hegemonic influences that we already see.¹¹⁸ In other words, the reciprocal influences should take place not merely at a vertical level but also at horizontal levels and the governments/courts of developing states should not always look for solutions of their local problems in the Western constitutional traditions.

¹¹⁶ The judiciary has extended and safeguarded this power vigorously. For instance, the Supreme Court has declared that judicial review is a basic structure of the Constitution and the Parliament cannot take away this power even by a constitutional amendment. *Waman Rao v. Union of India*, AIR 1981 SC 271; *S. P. Sampath Kumar v. Union of India*, AIR 1987 SC 386; *L. Chandra Kumar v. Union of India*, AIR 1997 SC 1125.

¹¹⁷ It seems that the Chinese Property Law has intentionally left the meaning of ‘public interest’ vague. Erie, *supra* note 84, 943.

¹¹⁸ One scholar, for example, has found that about 25 per cent of all Indian Supreme Court judgments have relied on the foreign law. Adam M Smith, *Making Itself at Home: Understanding Foreign Law in Domestic Jurisprudence: The Indian Case*, 24 BERKELEY JOURNAL OF INTERNATIONAL LAW 218, 240 (2006).

