The Effects of Legal Systems on Eminent Domain Practices in China and the US

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ABSTRACT
Eminent domain is the act of a government to expropriate private property. Almost by definition, expropriation involves a conflict between the government and individual interests. Therefore, the laws pertaining to it have historically been the subject of controversy. China and the US have perhaps the two most ideologically diverse governments in the world, and it seems only natural that eminent domain laws are observed very differently in those two places. While it is tempting to dismiss the difference as arising solely out of government ideologies, Hayek's comparative analysis of legal systems and the common law system in particular in his book Law, Legislation and Liberty points to another potential cause for this difference in legal practice. This research explores this alternative explanation, using Hayek's theories in that book and in Individualism and Economic Order to argue that the common law system is integral to protecting individual rights in situations like eminent domain.

Keywords: *Eminent Domain, Hayek, Common Law, Civil Legal System, Law, Legislation and Liberty.*

1. INTRODUCTION

Chinese and US laws on eminent domain, although similar in formal content, are observed very differently by governments and courts, with Chinese ones prioritizing expediency from a broader perspective, and US ones focusing on the rights of the individual. In the past, US judiciaries have been cautious towards expanding the scope of eminent domain from strictly public uses of land, and such expansions, if any, were greeted with public disapproval and even outrage, as seen in the case Kelo v. City of New London. On the other hand, comparative law scholar Shitong Qiao noted that both local and national governments in China freely used eminent domain to implement its central objectives, such as urbanization and industrialization. Under such a broad framework, the Chinese government enjoys a much greater discretion of how and when to exercise its powers, rarely discriminating clearly between public and private commercial interests. So far, the common explanation for this disparity, as researcher Degang Miu delineated, was to attribute it to the difference in political ideologies—democratic liberalism emphasizes individual rights, while the collective outranks the individual in Marxist socialism. This paper, while acknowledging the former explanation, presents different legal systems as another prominent reason for the varying degrees of private property protection in Chinese and American eminent domain practices. To analyze and compare the Chinese civil legal system and American common law, this paper draws on Hayek's two books Law, Legislation and Liberty and Individualism and Economic Order. Proof of an ideology-independent interpretation sheds light on another potential way to enhance property rights protection in countries where such changes are believed to be necessary.

2. EMINENT DOMAIN PRACTICES IN CHINA AND THE US

On paper, the parts of the Chinese and US constitution that pertain to eminent domain are quite similar. The fifth amendment to the US constitution contains the famous "takings clause", which states that "nor shall private property be taken for public use, without just compensation." The 1982 Chinese constitution also states that "the state may in the public interest take over land for its use in accordance with the law", with the 20th and 22nd amendments in 2002 later adding the provision of compensation into the clause[1]. Apart from the typical negative expression used in the US constitution, the two draws on several common concepts like public benefit and compensation.

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Curiously, these similarities in principle are by no means translated into practice, as the degree of protection of private property from government takings is vastly different. Chinese legal scholar Jie Cheng states that in China, despite the supposed limitations of public interest and fair compensation, the security of property rights is questioned as both individuals and collective organizations find themselves vulnerable when government agencies take their property[1]. Comparing how the common criterion of public benefit, or the public interest, is used and evaluated in the two countries can be a further illustration of this disparity. Qiao finds that in China, "although state requisition … is legally limited to the public interest and constrained by procedural requirements … rapid and massive urbanization has meant that, in reality, these legal rules are either ignored or relaxed. For example, the requirement of public interest rarely precludes local governments in China from requisitioning rural land for industrial or commercial development"[2]. The Chinese government rather undisputedly puts industrial and commercial development within the standard of public interest to exercise its eminent domain power. In comparison, in the US, using eminent domain power to obtain land for industrial or commercial objectives has been extremely controversial. The most notable case in this regard is Kelo v. City of New London in 2005. The case arose because the government of New London used its eminent domain power to give private land to Pfizer for industrial development. The Supreme Court ruled in favor of this practice, using reasoning that's similar to that of the Chinese government, saying that it qualifies as a public use because expected economic development benefits the public. The difference is that while mass uses of eminent domain power for non-direct uses in China go largely undisputed, the Supreme Court immediately came under tremendous criticism after its decision in Kelo. Two national polls conducted in the fall of 2005 showed that 81% and 95% of respondents were opposed to Kelo[3]. As a result, "public outrage has filtered up through state legislatures, and politicians have responded. Since Kelo, more than 40 states have enacted stricter laws governing eminent domain, thereby challenging the Court's decision" although not through strictly judicial means[4].The precedential effects of Kelo were thereby limited and an expansion of what constitutes public interests did not take place like it did in China.

In interpreting the cause for the different reactions, Chinese and American political systems and ideologies regarding private property is undoubtedly a prominent reason. Despite having their differences, the drafters of the US constitution all gave great importance to property rights, resulting in their being protected by multiple provisions under the constitution[5]. A House of Representatives report on the Private Property Rights Protection Act of 2017, which aimed to overturn Kelo, said that "the protection of ownership of private property lies at the foundation of American government… according to John Locke, … '[t]he great and chief end… of men uniting into Commonwealths, and putting themselves under Government, is the Preserving of their Property'"[3]. While the protection of private property stands a pivotal role in the US government, Marxism, the Chinese state ideology, is explicitly opposed to it. Marx believed that "the reason that landowners were able to extract rent was mere because they occupied a piece of natural resource; the owner neither made significant contributions to improve his property, nor took any risk in generating profits from his land. Private land ownership, therefore, served as the basis for pure exploitation"[6]. Initially, China attempted to differentiate between land and home ownership, but the distinction was completely broken in the radical phase of the Cultural Revolution, where private property rights were destroyed completely[6]. Although extreme, the political attitude towards private property during the Cultural Revolution was not merely an aberration. Miu writes that even after Reform and Opening Up, adherence to Marxist political economy and Chinese characteristics still prevails over the recently introduced New Institutional Economics theories when it comes to land ownership issues[7]. As the recent government under Xi starts to reemphasize China's Marxist ideological roots and the socialist nature of the political system, it seems that ideology will remain a long-standing barrier to Chinese land rights protection.

The aforementioned difference in ideology has always been a popular explanation for why eminent domain laws are used so differently in the two countries. However, through a review of Hayek's theories on the common law system and the laws of nature that it is based on, this paper proposes that the difference between common law and the civil legal system, independent of political ideologies, also contributes to the different exercises of eminent domain laws in China and the US. Section 3 will explain Hayek's definition of the laws of nature, and their effects on English and American law. Section 4 will focus on the American common law system and explain its mechanisms in accordance with Hayek's theories. Section 5 will explain why a common law system results in better protection of individual (property) rights. Section 6 will return to the prevalent interpretation offered in the introduction and explain the connections between political ideologies and legal systems.

3. HAYEK'S LAWS OF NATURE AND THEIR EFFECTS

3.1 Defining Laws of Nature

Hayek believed that every ruler has two sets of rules he could enforce: "Rules of conduct which he regards as established, though he may have little idea why they're

important or what depends on their observance, [or] commands for actions which seem to him necessary for the achievement of particular purposes"[8]. The former is described in a quite nebulous way. It is abstract beyond the scope of language, yet it translates automatically inside the minds of each individual and shapes their choices in a way that sets the foundation on which entire societies are built. In the early stages of human civilization, these established norms and practices that shape everything from individual choices to government policies are collected by the likes of Ur-Nammu, Hammurabi and Solon into the first "laws of nature". Hayek never used the term laws of nature in this context himself; instead, he used this term to describe a Spanish school of thought that aimed to protect the purity of laws from legislation and keep them in their natural state. However, since Hayek never comprehensively summarized his notion into one term, the term "laws of nature" could be used as a summary of the aforementioned ideas. The term stresses the fact that those laws arose naturally without conscious intervention from anyone, particularly the ruler, while at the same time distinguishing itself from natural law, which, according to Hayek, had come to mean "law under the design of 'natural reason'" from Cartesian rationalists, which incorporates a conscious, logical rational design that is at odds with the spontaneous nature of the laws. Natural laws are always old laws: they've always been conceived as "unalterably given" and passed down through generations. They can never be new, because "when a case arises for which no valid law can be adduced, then the lawful men will make new law in the belief that what they are making is good old law not expressed [but] tacitly existent"[8]. In other words, some implicit principles from already established practices can be extracted and applied to this new area, so that no principles need to be construed from thin air. To sum it up, Hayek's definition of laws of nature includes several aspects: they are an abstract, spontaneous, self-evolving set of rules that emerged from established practices of the times. Independent from the will of the rulers, they can only be found, not created or designed.

3.2 The Effects of Laws of Nature

Hayek further explains that Roman law, which many regards to be the basis of the civil legal system, is actually more accurately described as common law, at least from its origins. "As all other early law it was … considered to have always existed and nobody asked for their origin…Classical Roman civil law … is almost entirely the product of law-finding by jurists and only to a very small extent the product of legislation"[8]. There was no need to make a distinction between common and civil law back then, as common law, the legal system where the only rules are the laws of nature, was the only law. People were alien to the thought that laws could be made entirely by men. According to Hayek, the creation of civil law was a misunderstanding. Later, when the Byzantium emperor Justinian codified the Roman law code, it became mistakenly viewed as made by him and expressing his will, starting the belief that human-made laws could be legitimate laws.

Since England was relatively free from Byzantium influence, the common law tradition remained there and did not dissolve into civil law like in the rest of continental Europe. By the sixteenth and the early seventeenth century, as its continental counterparts became absolute monarchies, England was saved from such a fate due to its deeply entrenched common law tradition "that was not conceived as the product of anyone's will but as a barrier to all power, including that of the king"[8]. Hayek wasn't alone in his belief that the laws of nature were the heart and soul of the English legal tradition. The Victorian British legal scholar Dicey observed several decades earlier than Hayek that "informal and unwritten 'understandings, habits, or practices' were crucial features of British constitutionalism and an essential means by which political power was kept in check"[9]. As a result of such a tradition, England was "the only country that succeeded in preserving the tradition of the Middle Ages and built on the medieval 'liberties' the modern conception of liberty under the law"[8]. A detailed discussion of the relationship between the common law and individual rights and liberties will be made in section 5, as now we will move on to talk about the effects English common law made when it was carried to the US.

It is well-accepted that the US legal system, amongst that of other commonwealth countries, has taken up the common law legal tradition of English law[10]. US courts inherited the principle of stare decisis, Latin for "to stand by things decided". This legal doctrine obligates courts to follow precedents when making a ruling on a similar case. The implications of the precedential power wielded by the US Supreme Court are explored in detail in the following section.

4. THE US LEGAL SYSTEM FROM A HAYEKIAN PERSPECTIVE: THE JUDICIARY AND LEGISLATIVE BRANCHES

4.1 The Judiciary Branch

This section resumes last section's discussion of stare decisis, the legal doctrine that the US legal system inherited from English common law. As previously stated, one of the characteristics of natural laws is that they must be abstract in order to maximize adaptability and ensure applicability in the broadest spectrum of affairs over the longest period of time.While each individual has their own interpretations of those laws based on their expectations, sometimes these

interpretations conflict with each other. In circumstances of dispute, an articulation by the authority is needed, not to create a law, but to explain what it should be and clear up the doubts. A Supreme Court ruling is such an articulation. An articulation couldn't be perfect: "fumbling attempts to express in words what most obeyed in practice would usually not succeed in expressing only, or exhausting all of, what the individuals did take into account in the determinations of their actions"[8]. Precedents are always a bit off from the actual unarticulated laws of nature. As a result, the inconclusiveness of precedents ends up changing expectations, altering established practices, and consequently affecting the laws of nature in unintended ways. Hayek carefully reemphasizes that while such minor changes in the process of articulation are inevitable, as long as the belief is solid and the distinction is clear that these are merely human errors, not conscious redesigns, they "have little effect", and are still regarded as discovering, not creating, law[8]. In the circumstance that the Supreme Court may be compelled to make a so-called "new law" as society progresses and legal voids start to exhibit themselves, as alluded to in section I, Hayek remains cautious, warning against the trap of a rationalist design theory of law, that the new laws are not new because they are "logically derivable", but if old laws "are to achieve their aim, an additional rule is required." Again, the Supreme Court does not assign itself the task of deciding how to design new laws with logic and rationality, instead it is only in charge of ensuring the fairness and adequacy of old laws of nature.

4.2. The Legislative Branch

In accordion with his beliefs on the Supreme Court, the Legislative branch, despite its suggestive name, is not approved by Hayek with the power to make new laws either. Granted, the legislative branch does enjoy some power to determine the rules, but they were the "rules of government" not the "universal rules of just conduct". The power is of a "purely administrative character", aimed to facilitate the government's organization of daily affairs through regulating their officers or subordinates. It is by no means towards "the task of enforcing justice" and has nothing to do with the established norms and practices that have preceded and will almost certainly outlast the administration[8]. In other words, the rules of government construed by the legislation are no different from the codes of conduct set by a company's board or the student handbook of a school. They all serve purely administrative purposes, and, using Hayek's words, carry no dignity that the laws of nature do.

Despite his staunch belief in the independent evolution of laws of nature, Hayek is not an absolutist. He concedes that, like all spontaneously developed systems, the laws of nature, can eventually stray into an undesirable position through common law's precedent system. There are several possible scenarios under which this could happen: A positive feedback loop of minute distortions from the articulations can change the laws of nature gradually but so considerably in one direction that it has become a "one way street" incapable of retracing its own steps; The law could be evolving in the right direction, only the speed could not satisfy the "desirable rapid adaptation" when "wholly new circumstances" arise. This scenario applies to the Supreme Court during the New Deal, which failed to see that its previous articulations of private property rights and due process are not applicable to the sudden calamity that is the Great Depression, and initially did not respond rapidly enough to it. The last and the most frequent one is that "law has lain in the hands of members of a particular class whose traditional views made them regard as just what could not meet the more general requirements of justice."[8] In other words, the ones in charge of articulation have an unjust perception of the laws of nature themselves, and consequently, articulate the laws in an unjust fashion. When any of the three scenarios occur, Hayek believes that it is not only admissible but also necessary that the legislation intervenes with the articulation of the law so that its negative outcomes are reduced. What state legislatures did in the wake of Kelo as described in the introduction is one such example of "correction by legislation"[8]. For whatever reason, the decision of the court violated the established practices and expectations of the general society, and the legislature acted quickly to quell public concerns.

At this point, it is necessary to clarify that the section above describes only Hayek's idealized perception of how the US legal system should work. It is not a perfect depiction of reality. Although US and English legal systems are based on the idea of government-independent laws of nature, expanding governmental powers across the world in the modern age means that the US government and its legislature do wield significant power over how the laws, both administrative and universal, are made. In US, this process of increased government interference in law happened after the Great Depression, when the government increased its presence in all aspects of social affairs. The court opinion in the immediately post-Depression case Erie R. Co. v. Tompkins makes clear that "although there is 'a transcendental body of law outside of any particular State'…law in the sense in which courts speak of it today does not exist without some definite authority behind it", which is the government. "The common law so far as it is enforced in a State…is not the common law generally but the law of that State existing by the authority of that State"[11]. This is not to say that Hayek's view is completely irrelevant: the forces of government control and spontaneous evolution contribute to US laws in various degrees throughout history. Despite some governmental influence, the US legal system still falls

distinctively under the common law category, which contrasts with the civil legal system used in China.

5. ADOPTION OF THE COMMON LAW SYSTEM AND PROTECTION OF INDIVIDUAL RIGHTS AND LIBERTIES

Hayek did not undergo this arduous investigation into the origins of law just for its historical value. As the title of his book suggests, liberty, more specifically that of the individual, is also one of the three core concepts he explores. Being one of the most prominent thinkers in neoliberal political science and the Austrian school of economics, he interprets laws and legal systems through a unique lens of a liberal political economist. i This section will explore how the common law system prioritizes individual rights over the government, and the next section will return to the popular interpretation of political ideologies being the cause of different eminent domain practices mentioned in the introduction and connect my interpretation to it.

The research starts with the idea of sovereignty. It is accepted that the power to exercise eminent domain originates from the sovereignty of a government[12]. Legal positivists define sovereignty, or the notion of a sovereign, as the ultimate source of law, which, in its entirety, is but "a subset of the sovereign's commands"[13]. However, Hayek interprets sovereignty in much more limited light. In continuation with his belief in the laws of nature, he takes it as a "prevailing opinion" that the legislator is "authorized only to prescribe what is right." This opinion always and only upholds the laws of nature, it is "concerned not with the particular contents… but only with the general attributes… which alone the people are willing to give support." The legislator must abide by this opinion and is only "sovereign" insofar as the particular contents and specificities are concerned. Contrary to the positivists who define the sovereign to be the ultimate power, Hayek believes that in the free society, the ultimate power is the power of opinion about the laws of nature, which "determines nothing directly yet controls all positive power by tolerating only certain kinds of exercise"[8].

In a common law system, the scenario in which a legal dispute arises can be described as such: both parties had expectations "based on what they regarded as established practices", but one of them is bound to be disappointed, as the judge will tell them, through his articulation, what their perceptions of the established practices, or the common law, ought to have been. Because of the nature of the common law's supreme power, as explained in the sovereignty issue addressed above, the judge must ignore what is "expedient from a higher point of view" or what might "serve a particular result desired by authority". The common law judge "pays no attention…to any wishes of a ruler or any 'reason of state'"[8]. Upholding recognized rules that individuals can reasonably count on is the only and biggest public good that the judge should be concerned with.

6. THE CONNECTIONS BETWEEN POLITICAL IDEOLOGIES AND LEGAL SYSTEMS

The introduction stated that most believe that the different ideologies of Lockean individualism and Marxism are the reasons why the US and China took actions of eminent domain in the ways they did. This section attempts to tie this view of political ideologies together with the alternative view of legal systems offered so far in this research, and attempt to argue that the inherent qualities of the legal systems correlate with the prevalence of these political ideologies in said countries.

Hayek's earlier book Individualism and Economic Order introduces an analysis of individualism as an ideology and envisions multiple aspects of the individualist society. The part particularly relevant to this paper is his advocation of a long-term, abstract common law system. According to him, only under such system can a society promote individual freedom as well as economic productivity.

Hayek affirms the importance of using common laws as the fundamental rules of an individualist society, which is composed of universally understood "common conventions and traditions among a group of people that will enable them to work together smoothly and efficiently with much less formal organization and compulsion[14]. This reduces transactional costs and limits governmental power, because the universal observance of common laws makes behaviors of other people predictable, upon which an individual can make his own plans and determine his own sphere of responsibility, instead of letting the government assign them to him.

Common laws are abstract and valid for long periods. Their long-term applicability helps them serve as signposts for individuals to make their own decisions. On the other hand, laws under the civil legal system that focus on specific, short-term effects "leads inevitably to the reliance on [government] orders adjusted to the particular circumstances of the moment" and disrupts individual planning[14]. Abstractness in laws is necessary because men are not omniscient. Without full knowledge and evaluation of all the consequences, we cannot operate on specific rules without conceding our freedom to the government.

Instead of abstract rules under the common law system, rulers in societies with centralized governmental powers are more inclined to take up specific laws in the civil legal system. Hayek observes that "it is highly unlikely that any ruler aiming at organizing the activities

of his subjects for the achievement of definite foreseeable results could ever have achieved his purpose by laying down universal rules"[8]. Indeed, those rules would undermine the absolute authority of the government because they apply to everybody, including the ruler himself. What the ruler would want is specific, short-term laws that he had complete control over and could reflect the needs of the moment, so that he could direct the society to achieve the specific ends he desired. The Chinese and US eminent domain laws serve as a good example for this comparison. The takings clause in the US constitution is short, abstract and has been in effect for centuries, which are all characteristics of common laws. While the Chinese constitution is similarly written, since China has a civil legal system, the government also gets to make many specific laws and opinions on the matter, which are organized into the Expropriation and Compensation Law. This law is made entirely from the will of the legislator and independent from the constitution or any other general principles. Looking at representative past rulings of Chinese courts on eminent domain cases, it is evident that specific parts of this law are referred to when Chinese eminent domain cases are decided, while the constitution serves little practical use[15]. The law also changes frequently to represent the short-term needs and plans of the government. For example, in the 2000s and early 2010s, the government had urgent needs to reorganize urban land for infrastructure, and as a result, it offered generous compensations for urban dwellers to incentivize them to give their land to the government. However, this indirectly drove up housing prices, as houses that might be expropriated are viewed as more valuable, and compensation sometimes involved giving more houses to the proprietor, which increased housing demand. As the short-term plans for urban infrastructure become less prioritized in some cities and housing affordability is put higher on the agenda, the Chinese central and regional governments immediately changed their laws in specific ways so that less compensation is given to homeowners, to make homeowning less potentially profitable.

One might say that the comparison made above is unfair or inconducive, because law was being compared as in the sense of a legal principle (the takings clause) to law as in the sense of a government policy (the Expropriation and Compensation Law). However, that is exactly the point. As explained in section I, law was always meant to be about principles and only that. Government policies are something entirely different and ought to be distinguished from laws. Granted, the government has the authority to make and enforce the rules of conduct to their officers and subordinates to defend itself from enemy invasion or organize other social affairs, but these rules are purely administrative and do not carry the same weight as the laws of nature do. The abuse of legislative power happened gradually when rulers started to "find it to his advantage to claim for the organizational rules the same dignity as was generally conceded to the universal rules of just conduct", to abuse the word law and the sense of awe and respect it commands, to use it as a misnomer for his own plans and interests[8].

At this point, it might be necessary to clarify that the argument is not made that a civil law system inevitably leads to a government ideology where centralized planning prevails, and individual liberty is restricted, or that such an ideology would result in the civil law system being adopted. this research simply points out a correlation between the two. A good counterexample to an attempted claim at causation would be Germany, which employs perhaps the most archetypal civil law system, yet continues to be beacon for individual liberty and democracy for the most part of the past few centuries. The case of Germany doesn't totally disprove my point either, as many still hold the opinion that the German approach to real property law "grants lesser protection of property rights in case of regulatory takings than U.S. law"[16].

This research will not attempt to delve deep to clearly delineate whether legal systems determine political ideologies, or the other way around. This would fall prey to a rationalistic view where all social phenomena must be interpreted with logical connections. It would be a reduction of the complex process of spontaneous co-evolution between legal systems and political ideologies. The two are, from the very beginning, intertwined, because "an inherent part of… ideology is a judgement about the fairness or justice of 'the system'", which is delivered through the legal system[17].

7. CONCLUSION

In the course of this paper, we have covered several topics. First, we gave an introduction on the status quo of eminent domain laws in China and the US. After stating their similarities and differences, we proposed that legal systems are an overlooked reason to this disparity in practice. Secondly, we drew upon Hayek's Law, Legislation and Liberty to provide further justification. Before we could do that, we gave a summary of his central notion of "laws of nature". We used the US judicial and legislative branches to illustrate the attributes that he believes a common law system should possess. Finally, we returned to the question in the introduction, and argued that common law's innate capability to protect individual rights and liberties is why government eminent domain power is more restricted in the US. At the same time, we clarified against any absolutist views about definite causation between legal systems and political ideologies. To this extent, we have offered a comprehensive yet cautious analysis to support our proposal.

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