

## Same Base, Different Taste: The Cultural Ingredient in Property Law

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Taisu Zhang, *Cultural Paradigms in Property Institutions*, 41 **Yale J. Int'l L.** 347 (2016), available at [SSRN](#).

Can we bring preferred legal norms to culture, asking culture to adapt, or do we bring culture to the formation of legal norms, asking law to adapt? This is not just a normative question causing consideration of moral or consequentialist choices. It is also an empirical one. Regardless of what we think we ought to do or might want to do, the real world may very well be constructed to preordain the sequence. Indeed, the embeddedness of culture in societal architecture may limit the bandwidth of available opportunities for law to act as an influence exogenous to culture.

To understand the interplay between culture and the law, it is useful to evaluate historical developments of legal doctrines from a comparative perspective. That is the eminently valuable project undertaken by Professor Taisu Zhang in his article, *Cultural Paradigms in Property Institutions*.

Zhang exposes the sometimes “muted” perspective regarding the strong cultural influence and sociological concerns in property law’s development and its theoretical understanding. By comparing and contrasting his project against many of the other influential comparative property theory endeavors, Zhang identifies both the alignments his study has with previous literature but also where his richer understanding of culture’s role fills gaps or omissions in the existing body of analysis.

There is little doubt that property theory has been dominated by economic analysis, especially in recent years, with our definition of utility most often correlated with wealth enhancement. Zhang does a great service by forcing property scholars to question whether that focus has too greatly marginalized the study of culture as a factor in property law’s development. According to Zhang, we may very well need to “re-culturalize” property theory.

The article makes a convincing point that social culture is a critical ingredient in the creation and evolution of property law institutions. Even where the same base of interactive arrangements and concerns necessitates the development of legal institutions, the content of laws and norms nonetheless takes on different tastes depending on the cultural ingredients added to the base.

To test his hypothesis, Zhang conducts rigorous country studies—comparatively studying the evolution of land mortgage law and related legal institutions in China, England, and Japan during the two centuries before large-scale industrialization. His descriptive account is vital to making an informed normative and comparative assessment of the relative advantages and disadvantages of divergent property norms within and between different societies.

Zhang’s study reveals that, “[a]lthough the negotiation of mortgage norms tended to be a rich-versus-poor process almost everywhere, the actual laws and customs that emerged from this process were profoundly different from country to country.” (P. 351.) For example, England developed a pro-creditor and pro-rich set of land mortgage norms, while China developed a pro-debtor and pro-smallholder set of land mortgage norms (with Japan similar to England but with some variations). He traces this

divergence to cultural difference, including, for example, that England placed a premium on land wealth while Chinese culture was more concerned with age and generational seniority as drivers of status privileges.

Zhang explains that social status in some societies is chosen, or “distributed,” based on cultural factors, such that those with the highest status might not favor predominately wealth-enhancing or principally materialist-based norms. Furthermore, there is often a link between social status and political status within a culture.

Property “winners” are often chosen by the political process, so that status-based power (which is often defined by culture) can drive political choices designed to preserve status for the winners. If they are winners in the political process based on some non-material calculus, then we should expect that the political choices of property norms might also be based on some non-material calculus.

Consequently, those with status-based power, no matter how attained, may choose property norms that reinforce or enhance a status norm that may in fact be non-material. In fact, some status norms can become culturally sustaining “despite having *strongly* negative material consequences.” (P. 349.)

But how is what Zhang describes more than just elites protecting their economic self-interest? He argues that position is not necessarily distributed culturally based on economic considerations, so the maintenance of status similarly will not necessarily involve perpetuating one’s own economic self-interest. In fact, pursuing economic ends might not be the controlling value in a particular culture, and such pursuit might even threaten one’s ability to maintain his or her cultural social status.

Zhang ultimately concludes that his cultural theory “is particularly powerful—perhaps indispensable—in explaining large-scale institutional differences between societies” (P. 348) regarding how they regulate the use and transfer of property. The article is rich with revelations about various country-level differences in property institutions that “deserve country-level explanations.” (P. 352.)

Zhang’s work helps us understand why shared social cultural values, particularly regarding sociopolitical status distribution, help explain the divergent legal and institutional property-based choices made between these societies. Indeed, he concludes that culture is better than utilitarian bargaining, self-interest, wealth maximization, or other functionalist theories of norm formation at explaining why different societies might choose to structure their law to favor different status distribution norms.

Given culture’s empirically proven influence on the historical development of property institutions, we should continue to expect that local cultural factors might very well be influencing property use and regulation today. By recognizing that influence, property theorists can better contextualize and compare property norms across jurisdictions. Zhang’s work helps us understand why culture is an explanation of the property norms we have, how culture is a driver of the property norms that develop in a given society, why culture can present opportunities for law’s development, how culture can be a barrier or limitation on the alteration of property norms, and how navigating culture becomes necessary whenever one is operating within a legal system of property institutions.

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