THE PATH TO CLARITY: DEVELOPMENT OF PROPERTY RIGHTS IN CHINA

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The clear demarcation of property rights is no longer purely an issue of academic interest in China. To a large extent, it has already become a vital policy and legislative concern. In President Jiang Zemin's 1997 report to the 15th CCP National Congress, "readjusting and perfecting" China's ownership structure was made a fundamental strategy to build an efficient socialist market economy and to maintain sustained economic growth.[1] Shortly after this policy breakthrough, the drafting of a comprehensive *Law on Real Property Rights* (*wuquan fa*) was put on the working agenda of the Legislative Affairs Committee of the National People's Congress (LAC) in 1998.[2] Two teams of civil law scholars were entrusted with working on drafting the law. One team was led by Professor Huixing Liang of Chinese Academy of Social Science and the other by Professor Liming Wang of Chinese People's University. The two teams each submitted a proposed draft to the Legislative Affairs Committee. In 2001, the two proposed drafts were combined into one and the resulting LAC draft (*zhengqiu yijian gao*) is currently being circulated for comments.[3] Of the many legislative objectives the new law is designed to achieve, clarifying

[1] See Jiang Zemin, Political Report to the 15th CCP National Congress , BEIJING REVIEW, October 6, 1997.

[2] See WANG LIMING, ED., ZHONGGUO WUQUANFA CAO'AN JIANYIGAO JI SHUOMING [PROPOSED DRAFT OF CHINESE PROPERTY LAW AND EXPLANATIONS] 3-4 (Beijing: China Legal Publishing House 1997).

[3] According to Professor Huixing Liang, one of the lead drafters of law on real property rights, the original LAC plan on civil lawmaking made in 1998 was to enact a unified contract law in 1999, a law on real rights within four or five years, and a comprehensive civil code before 2010, the year in which China plans to complete the construction of a "socialist legal system with Chinese characteristics." However, the legislative authority has recently decided to accelerate the compilation of a civil code. Professor Liang predicts that the law on real property rights will be eventually enacted as a section (*bian*) of the comprehensive civil code instead of an independent act. *See* Liang Huixing, Zhongguo Wuquanfa De Qicao [The Drafting of Chinese Property Law], paper presented at the Conference on the Making of Chinese Civil Code and Property Law, held at Waseda University in Japan, January 15, 2002, *at* http://www.civillaw.com.cn/weizhang/default.asp?id=10761.

property relationships among various economic actors is the overarching goal of the proposed law.

The need to improve China's property rights regime was reiterated at the 16th CCP National Congress recently adjourned on November 14, 2002.[4] At this time, the call for normative and institutional perfection was accompanied by some more refined policies on critical issues such as 1) the relationship between public and private ownership, 2) the roles of central and local governments with respect to state ownership, and 3) the essential layout of the state's commitments to pluralize the ownership structure of public assets and to protect individual private property (*siren caichan*)."[5] Though mostly incremental, these latest policy developments provide specific guidelines to untangle some perennial sources of ambiguity that have been baffling Chinese property lawmakers.

Some of these policy developments are solidified in China's latest constitutional amendments. On March 14, 2004, the second plenary session of the tenth National People's Congress adopted thirteen constitutional amendments. Among them, three amendments directly relate to the perfection of property rights.[6] First of all, individual private property rights are sanctified. All legal private properties of citizens (*gongmin de hefa de siyou caichan*), regardless of forms, are explicitly made inviolable.[7] Secondly, the status of non-public economic sectors have been further elevated.[8] Non-public sectors are not only protected but also specifically encouraged (*guli*) and supported (*zhichi*). Thirdly, government expropriation of lands and private properties is now provided for in closer detail. Expropriation is sub-divided into taking with ownership change (*zhengshou*) and use without ownership change (*zhengyong*).[9] In either case, compensation must be made.[10] The significance of these constitutional amendments is not merely symbolic; they serve as a constitutional base for future property law-making.

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[4] *See* Jiang Zemin, Report to the 16th National Congress of the Chinese Communist Party titled "Build a Well-off Society in an All-round Way and Create a New Situations in Building Socialism with Chinese Characteristics," (Nov 8, 2002). Official English Translation *at* http://english.people.com.cn/200211/18/eng20021118_106983.shtml.

[5] *Id.* § 4(4). For discussions of these policies, please see sections II.1 (1), II.2 (1) and II.2 (2) (a) of this paper.

[6] *See* Xianfa Xiuzhengan [Constitutional Amendments] arts. 10, 11 and 13 (2004.)

[7] *Id.* art. 13.

[8] *Id.* art. 11.

[9] *Id.* arts. 10, 13.

[10] *Id.*

To a certain extent, China's recent legislative efforts to clarify property rights tend to rekindle interests ignited by her fast economic growth over the past two decades in the absence of a clearly defined formal property regime. While China's past economic success seems to challenge the neo-classical hypothesis that a formal property institution with clearly defined property rights is essential to the functioning of a market economy and sustained economic growth, the recent clarification movement suggests a causal link between the clarity of property rights and market efficiency. This paper attempts to investigate the relationship between property institutions and economic development through a survey of the institutional changes of property rights in post-Mao China.

I. THE MOOT PUZZLE

For many economists, the transformation of the Chinese economy from a central-planning system to a market-based economy is fundamentally distinctive from the path taken in most other transitional economies. The economic reform in China is said to have followed a unique "gradualist" approach. [11] Instead of clear-cut overnight privatization (so-called "shock therapy"), China's successful market transformation is perceived to be unfolding on the basis of gradual "decentralization of public ownership" into "a hybrid of property forms."[12] More strikingly, the decentralized property forms are often considered to be only vaguely defined in law.[13] How China achieved its economic success with a system so contrary to that prescribed by the neo-classical economic theories has generated tremendous interest among economists as well as jurists.

Based on some neo-classical and institutional economic theories, a clearly defined system of private property rights is essential to the efficient functioning of a market economy for at least four

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[11] *See generally* Andrew Walder and Jean Oi, *Property Rights in the Chinese Economy: Contours of the Process of Change, in* PROPERTY RIGHTS AND ECONOMIC REFORM IN CHINA (Jean Oi and Andrew Walder eds., Stanford: Stanford Univ. Press 1999). Also, XIAOBO HU, PROBLEMS IN CHINA'S TRANSITIONAL ECONOMY: PROPERTY RIGHTS AND TRANSITIONAL MODELS (Singapore: Singapore Univ. Press 1998). And Yusheng Peng, *Chinese Villages and Townships as Industrial Corporations: Ownership, Governance, and Market Discipline*, 106 AM. J. SOC. 1338 (2001).

[12] *See* Walder and Oi, *supra* note 11. Also Peng, *supra* note 11, at 1340.

[13] *See* HU, *supra* note 11, at 7. Also, Victor Nee and Sijin Su, *Institutions, Social Ties, and Commitment in China's Corporatist Transformation, in* REFORMING ASIAN SOCIALISM: THE GROWTH OF MARKET INSTITUTIONS (John McMillian and Barry Naughton eds., Ann Arbor: Univ. of Michigan Press 1996).

reasons: firstly, it internalizes externalities, thus avoiding the "tragedy of the commons;"[14] secondly, it lowers transaction costs by reducing costly disputes;[15] thirdly, it prevents shirking and injects necessary incentives for efficient exploitation of resources;[16] and finally, it insulates excessive bureaucratic intervention and hardens budgetary constraints.[17] From the perspective of economists, China's phenomenal market growth despite the lack of a sufficiently defined private property regime during the past two decades is, in a sense, an intriguing anomaly.[18]

A. Theoretical Responses

Various economic theories have been developed over the years to explain the "China phenomenon." Generally speaking, these theories can be divided into two distinct groups. The first group of theories attempts to solve the puzzle within the neo-classical framework. The "decentralization of public ownership" in China is interpreted as informal or "hidden" privatization. Economists in this group argue that although public ownership is formally preserved in law, the devolving of management autonomy and rent extraction power (residual income power) to lower-level governments, individuals and legal persons has in effect created *de facto* private property rights. While the enforceability of these *de facto* property rights are not always clearly guaranteed by law, they are supported by unique local bureaucratic structures, kinship connections, personal ties (*guanxi*) and other informal social networks.[19] The vagueness of legally defined "property rights" is thus illuminated in their specific social-political context. According to some of these economists, such informal property institutions are most efficient in imperfect transitional markets where civil and commercial legal regimes have not been fully established. In such imperfect markets, the costs of impersonal market transactions are actually higher than transactions

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[14] *See generally* Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967).

[15] *See generally* Ronald Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937). Also, Douglass North and James Alt, *Series Editor's Preface, in* DOUGLASS NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC REFORM (1990)

[16] See *generally* YORAM BARZEL, ECONOMIC ANALYSIS OF PROPERTY RIGHTS (Cambridge: Cambridge Univ. Press 1989).

[17] See *generally* JANOS KORNAI, THE SOCIALIST SYSTEM (Princeton: Princeton Univ. Press 1992).

[18] *See* Walder and Oi, *supra* note 11, at 1.

[19] *Id.* Also, Nee and Su, *supra* note 13. And HU, *supra* note 11.

conducted through informal social networks. However, as the market grows and the transaction costs of market exchanges are lowered, the informal property regime will give way to a more efficient formal legal system of clearly delineated property rights that offers more security.[20]

In contrast, the second group of theories questions the necessary causal link between the clarity of property rights and economic development. For economists in this group, a clearly defined system of private property rights is neither a necessary nor a sufficient factor for economic growth. Based mostly on empirical studies in China's fast-growing township and village enterprises (TVEs), some scholars suggest that economic growth in rural China is based on its cooperative culture in which the clarity of property regime is not absolutely indispensable.[21] Other scholars argue that the ambiguity of property rights is actually the "lubricant" of economic transformation. Based on a study of China's land tenure system, Peter Ho argues that the "ambiguity of legal rules allows the land tenure system to function at the current stage of economic reforms. Moreover, this institutional indeterminacy is partly the result of efforts by the central leadership to create leeway for reacting to societal developments."[22] From such a perspective, a formal system of well-defined property rights, if one ever came into being, is a contingent result rather than a pre-condition of socio-economic development.[23]

Generally speaking, economic development in post-Mao China is affected by a complexity of formal and informal institutional factors that interact with each other. In a sense, each of these theoretical responses reflects a certain façade of China's recent economic experience. However, like the neo-classical theory they intend to modify, these theories cannot be generalized beyond their temporal, sectorial and geographical constraints. Moreover, China's recent legislative endeavor to clarify property rights tends to render the puzzle a moot issue.

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[20] *See* Victor Nee, *Organization Dynamics of Market Transitions: Hybrid Forms, Property Rights, and Mixed Economy in China*, 37 ADMIN SCI. Q. 1 (1992).

[21] *See* Martin Weitzman, *Economic Transition: Can Theory Help?*, 37 EUR. ECON. REV. 549 (1993). Also, Martin Weitzman and Chengguang Xu, *Chinese Township-Village Enterprises and Vaguely Defined Cooperatives*, 18 J. COMP. ECON. 121 (1994).

[22] *See* Peter Ho, *Who Owns China's Land? Policies, Property Rights and Deliberate Institutional Ambiguity?*, 166 CHINA Q. 394, 400 (June 2001).

[23] *See* Peter Murrell, *Can Neoclassical Economics Underpin the Reform of Centrally Planned Economies?*, 5 J. ECON. PERSP. 59 (1991).

B. *Spontaneous Property Institutions*

First of all, the importance of spontaneous property institutions to China's economic development is unquestionable. As revealed by many empirical studies, spontaneous property institutions supported by local political power structures and cultural networks often provide the necessary incentive, relative security and hard budget constraints needed for economic growth. [24] However, spontaneous property institutions are neither new nor unique to China. Ugo Mattei straightforwardly defined property as "a historically contingent aggregate of formal and informal constraints."[25] To a certain extent, the China phenomenon also attests to the power of formal discourse in shaping spontaneous property institutions and in stimulating economic development.

C. *Formal Property Discourse*

In response to Martin Wietzman's "cooperative culture theory" which attributes China's post-Mao economic development to cooperative Chinese culture, Hu Xiaobo asked a question that was also raised by some other economists: "why did not the Chinese 'cooperative culture' produce growth in the past."[26] One possible answer to this question is that the culture-based informal institutions in the post-Mao era are modified, if not reshaped, by the formal economic reform discourse. These moderated institutions may be fundamentally distinctive from those of the past.

Admittedly, the many forms of *de facto* properties uncovered by empirical studies are essentially "generated" by formal institutional changes that decentralize incidents of public ownership to various economic actors, even if the emergence of some were not intended.[27] In China's transitional context, particularly during the early reform years, formal property discourse should be construed to be much broader than legal discourse. In fact, when economic reform was initiated, the governance of economic affairs in China was mostly based on direct administrative control, and the major forces of formal property discourse were government policy and official discretion. In a sense,

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[24] *Supra* note 11.
[25] *See* UGO MATTEI, BASIC PRINCIPLES OF PROPERTY LAW 3 (Westport: Greenwood Press 2000).
[26] *See* HU, *supra* note 11, at 7.
[27] *See supra* note 12.

the transition of the Chinese economy is the transformation of its economic governance structure from traditional direct administrative control to indirect macro market regulations.[28] As such, many legally defined "property" rights have their origins in policy.[29] In other words, these initial "property" rights are legal confirmation of policy-created proprietary interests.[30]

D. "Trial and Error Approach"

To a certain extent, the transformation of the Chinese economy in the post-Mao era has been conducted through a series of "trial and error" reforms. The gradual experimenting approach necessitates that any decentralized "right" be of broad and temporary nature. At the early transitional stage, the guiding principle of legislative works were "the broader the better (*lifa yicu bu yixi*)" and "maturing one enacting one (*chengshu yige zhiding yige*)."[31] As a result, it is often unclear whether the formalized "proprietary" interests are contractual rights or property rights, or even who the right holder is. However, these vaguely formalized "property" rights served as the foundation of many spontaneous property institutions and provided relative stability for the Chinese economy.[32]

While it is unclear whether the resulting ambiguity is intentional or due to lack of experience, the merits of such a legislative approach is certainly recognized by some institutional economic theorists. "As a result of the imperfections (of information) found in the real world, formal institutional arrangements such as constitutions, laws, contracts, and charters are inevitably incomplete. This inherent limitation should be recognized and dealt with as far as possible. Important instruments of the type noted should be written in such a way as to leave room for their rapid adaptation to unforeseen circumstances through the spontaneous development of informal rules."[33]

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[28] Developing a socialist market economy and governing the market through the macro-management of law have been written into the Chinese Constitution. *See* Constitution art. 15 (1982, amended 1999).

[29] *See* the case study in Section III below.

[30] *Id.*

[31] *See* Liang, *supra* note 3.

[32] *Id.*

[33] *See* EIRIK FURUBOTN AND RUDOLF RICHTER, INSTITUTIONS AND ECONOMIC THEORY 15 (Ann Arbor: The Univ. of Michigan Press 2000).

E. *Striving for Clarity: Systemization of Formal and Informal Property Institutions*

Despite its merits, the negative impacts of an overly broad and indeterminate property rights system have been gradually felt as marketization goes further. From the perspective of many Chinese economists and jurists, vagueness and uncertainty of property rights have significantly suppressed China's economic development.[34] As described by Wang Liming, one of the lead drafters of the *Law on Real Property Rights*, the deficiency of property law has caused some serious problems, including stripping of state-owned and collectively owned assets, disorderly market exchanges, short-term behavior,[35] high transaction costs and inefficient allocation of resources.[36] At least in the minds of China's policy makers and legislators, the clarity of property rights, as predicted by some neo-classical economists, has become an imperative for China's sustained economic growth. As demonstrated in the overview of recent developments in China's property lawmaking in Section II and the case study of China's rural land reforms in Section III, the clarification effort is largely the systemization of efficient formal and spontaneous property institutions formulated along the course of market reform. The development of property rights in China is a complicated process of policy experiment, broad legal confirmation, *de facto* operation and legal clarification, reflecting a dynamic interaction of formal and informal institutions.

II. RECENT DEVELOPMENTS OF PROPERTY LAW: EQUAL PROTECTION AND CLARITY

Since the early 1980s, China has embarked on a two-decade long journey of phenomenal lawmaking and institution building. However, despite widely recognized achievements,[37] the construction of a "socialist legal system with Chinese characteristics" is still an ongoing process.[38] As well appreciated by Chinese legislators, the

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[34] See Jianping Wang, Delay and Transformation in the Legislation of Real Rights, paper prepared for the Legal Reform and Economic Development in Mainland China and Taiwan Conference, hosted by the Institute of Asian Research, University of British Columbia, 24 June 2001.

[35] Short-term behavior refers to business practices that pursue short-term interests at the expense of long-term interests.

[36] *See* WANG, *supra* note 2.

[37] Pursuant to Article 5 of PRC Constitution as amended in 1999, China shall be governed in accordance with law and shall be constructed into a socialist "rule by law" nation.

[38] *See* Li Peng, Report to the 4th Session of the 9th National People's Congress, March 9, 2001.

property law regime is especially underdeveloped.[39] While contract law has been largely streamlined,[40] property law at the current stage is believed to be an insufficiently coordinated body of law and regulations.[41] More problematically, the definitions of property rights in these laws are often criticized for their ambiguity and for their failure to carry through the now crystallized state policy of equal protection of public and private properties.[42]

Despite their merits, these criticisms should not be blown out of proportion. While inequality and ambiguity do exist in the current system, they are limited to specific sectors of the Chinese economy. Additionally, some of the ambiguities articulated are essentially the "prejudice" of certain civil law jurists. From the perspectives of common law lawyers, the present system may not be considered overly indeterminate.

Initially, China's property reform is best described as a dual track "pluralization" process. On the one hand, while public ownership forms are preserved, incidents of public ownership, specifically power to possess, power to use, power of partial income and sometimes power to alienate, have been gradually decentralized from the central government to local governments, from government to business or non-business entities, and from entities to individuals. On the other hand, a nascent private sector has been created through the introduction of foreign investment[43] and the recognition of "individual

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[39] *Id.*

[40] A unified contract law was enacted in 1999. *See generally* Hetong Fa (Contract Law) (1999).

[41] At the center of it is the Minfa Tongze [General Prinicples of Civil Law] chp. 5 (1986) (GPCL), which provided some broad and in many civil law scholars' opinions, outdated guidelines of ownership and related property rights. The next level consists provisions related to property rights scattered around some independent civil, commercial and property administration laws, such as the Danbao Fa [Gurantee Law] chps. 3, 4, 5, 7 (1995), the Haishang Fa [Maritime Law] chp. 2 (1992), the Tudi Guanli Fa [Land Administration Law] chp. 2 (1986, revised 1988 and 1998), and the Chengshi Fangdichan Guanli Fa [Urban Real Estate Administration Law] chps. 2, 4, 5 (1994), the Gongsi Fa [(Company Law] art. 4 (1993), the Hehuo Qiye Fa [Partnership Enterprise Law] chp. 3 (1997), the Duzi Qiye Fa [Sole Proprietorship Enterprise Law] chp. 3 (1999), the Hunyin Fa [Marriage Law] art. 17-19 (1980, revised 2001). The last level includes provisions in a large collection of administrative regulations such as the Chengzhen Siyou Fangwu Guanli Tiaoli [Urban Private Housing Administration Act] chp. 2 (1983) and the Chengzhen Guoyou Tudi Shiyongquan Churang he Zhuanrang Zanxing Tiaoli [Tentative Act on the Assignment and Transfer of Urban State-owned Land Use Rights] chp. 2 (1990).

[42] *See* Liang, *supra* note 3. Also, WANG, *supra* note 2. And Yang Lixin, *Tawuquan de Lishi Yanjin he Woguo Tawuquan Zhidu de Chongxin Gouzhao [The History of Iura in Re Aliena and the Restructuring Ownership Structure in China], at* http://www.civillaw.com.cn/weizhang/default.asp?id=10735.

[43] Since 1979, China has enacted a complete system of laws governing foreign invested enterprises, which mainly include the Zhongwai Hezi Jingying Qiye Fa [Sino-foreign Joint Venture Law] (1979, revised 1990 and 2001), the Waizi Qiye Fa [Wholly Foreign-owned Enterprise Law] (1986, revised

industrial and commercial households" (*geti gongshang hu*),[44] individual partnerships (*geren hehuo*)[45] and private enterprises (*siying qiye*).[46] The overwhelming majority of ambiguities of property rights exist within the decentralized sectors. Ownership structures of the foreign investment and private business sectors suffer relatively few ambiguities, with the exception of the so-called "red capping" problem that is associated with public ownership.[47]

Additionally, the decentralization process was a series of "trial and error" reforms aimed at improving the efficiency of various public assets that mainly include state-owned enterprises, collective enterprises, state-owned urban lands and natural resources as well as collectively owned rural lands. As such, the initial "transfer" of public ownership incidents was generally in broad terms and of temporary and contractual nature. While in the eyes of civil law jurists, the property nature of these decentralized lesser interests is unclear, for common law lawyers, they may be just broadly drafted leasehold estates.

That being said, the points made in these criticisms are not to be denied. In fact, the problems raised are exactly what the Chinese policymakers and legislators are trying to resolve through the enactment of the *Law on Real Property Rights*. While the achievements of Chinese civil lawmaking over the years can never be totally obscured by its problems, nor can the hurdles on the path to a clearly defined efficient property regime be ignored.

A. Equal Protection of Plural Forms of Properties: Policy Clarity and Technical Difficulty

1. Constitutional and Policy Clarity

During the past two decades, the status of private ownership has been formally elevated in China through a series of constitutional amendments. Until the mid 1980s, public ownership of the means of production was pre-dominantly believed to be the immutable

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2000), and the Zhongwai Hezuo Jingying Qiye Fa [Sino-foreign Cooperative Enterprise Law] (1988, revised 2000).

[44] *See* GPCL, *supra* note 41, arts. 26-29.

[45] *See id.* arts. 30-25. Also, Partnership Enterprise Law, *supra* note 41.

[46] *See* Siying Qiye Zanxing Tiaoli [Private Enterprise Administration Act] (1988) and Sole Proprietorship Enterprise Law, *supra* note 41.

[47] The "red capping" problem is discussed in section II 2 (2) c of this paper.

foundation of socialism. [48] As such, the 1982 Constitutional Amendments did not specify the status of the private economy in China. Following the pragmatic reinterpretation of socialism based on Chinese circumstances in the late 1980s,[49] the 1988 Constitutional Amendments formally recognized the private sector as a "complement" to the "socialist public economy."[50] In the late 1990s, the "primary stage of socialism" theory was further liberalized. Based on President Jiang Zemin's report to the 15th CCP National Congress ("the 1997 report"), any form of ownership that meets the criterion of improving social productivity, national power and the standard of living of the people should be used to serve socialism.[51] In 1999, the status of the private sector was raised further. Pursuant to the 1999 Constitutional Amendments, "individual, private and other non-public economies that exist within the limits prescribed by law are *major components* of the socialist market economy" [Emphasis Added].[52] The standing of the private sectors has been lifted again in the 2004 Constitutional Amendments. Their importance goes beyond recognition. Private sectors are now particularly "encouraged and supported."[53]

While in accordance with state policy and the Constitution public ownership is unequivocally acknowledged as the mainstay of the socialist market economy, the development of the non-public sectors is equally encouraged.[54] As articulated by President Jiang Zemin in 1997, "it is China's basic economic system for the primary stage of socialism to keep public ownership in a dominant position and to have diverse forms of ownership developed side by side."[55] In addition, the 1999 Constitutional Amendments specifically provide that the state shall protect the legitimate rights and interests of individual and private economic actors and in the mean time, guide, supervise and regulate the development of non-public economies.[56]

At the 16th CCP National Congress held in November 2002, the seemingly conflicting policy goals of retaining public sectors as the

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[48] *See* ROBERT HSU, ECONOMIC THEORIES IN CHINA, 1979-1988 53-57 (Cambridge Univ. Press 1991).
[49] *See id.*
[50] *See* Constitution art. 11 (1982, amended 1988).
[51] Jiang, *supra* note 1.
[52] Constitution art. 11 (1982, amended 1999).
[53] *See* Constitutional Amendments, *supra* note 6, art. 11.
[54] *See* Constitution art. 6 (1982, amended 1999).
[55] Jiang, *supra* note 1.
[56] *See* Constitution art. 11 (1982, amended 1999).

mainstay and promoting non-public sectors alongside were further explained. According to President Jiang Zemin's report to the plenary session ("the 2002 report"), the two policies should not be "set against each other;" on the contrary, they should be "unified" in the process of "socialist modernization."[57] The 2002 report further points out that economies in all ownership forms may very well fulfill their respective comparative advantages in market competition, "stimulating one another for common development."[58] In the same report, perfecting the legal system to protect "individual private properties" (*siren caichan*) and creating an equal competition environment for individual and private economic sectors are cemented as state policies at the highest level.[59] In the 2004 Constitutional Amendments, individual private property is sanctified to the same inviolable level as public property.[60] Non-discriminatory treatment of private ownership is thus a crystallized national policy. Therefore, at least *qualitatively*, public and private sectors shall be equal counterparts.

Moreover, the 2002 report calls for further cross-board "pluralization" of the ownership (capital) structure of public assets, particularly state-owned assets. With the exception of the precious few that must be solely owned by the state, ownership of the vast majority of state-owned enterprises are to be "pluralized" (*duoyuanhua*) through the "share-holding system" (*gufenzhi*).[61] Additionally, only important ones among the pluralized state-owned enterprises are to be controlled by the state through majority shareholding.[62] Within such a policy framework, the line between state ownership and non-state ownership is drawn at the shareholder level. As a result, "state-owned enterprises" (*guoyou qiye*), which were transformed from "state-managed enterprises" (*guoying qiye*) as a result of past "decentralization" reforms, have become "state-invested enterprises (*guojia touzi qiye*) after they are converted into modern corporations with a pluralized capital structure. Public and private ownership is not only equally protected, but also "united" (*ronghe*) in such a system. Thus, at a minimum, equal protection of public and private ownership is clearly the predominant paradigm at both the policy and constitutional levels.

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[57] *See* Jiang, *supra* note 5 § 4(4) para. 1.
[58] *See id.*
[59] *See id.* para. 4.
[60] *See* Constitutional Amendments, *supra* note 6, art. 13.
[61] *Id.* para. 3.
[62] *Id.*

2. Technical Debate

However, it is inherently difficult to translate policy clarity into legal certainty. As demonstrated by the serious debate arising out of the drafting process of the *Law on Real Property Rights*, equal protection of public and private ownership remains an unsettled issue at the technical level. While there has been a general consensus that equal protection of public and private properties shall be a fundamental principle of China's *Law on Real Property Rights*,[63] Chinese civil law scholars and legislators are widely divided on how to equally protect public and private ownership, and on whether public ownership, particularly state ownership, should be treated in any special way.

One group of scholars, represented by Professor Liang Huixing of CASS, believes that the "sanctity of public ownership" principle[64] as adopted in the existing civil law regime is a relic from the command economy past and a product of outdated civil law jurisprudence heavily influenced by the former Soviet civil law schools.[65] The sanctity principle unilaterally stresses the protection of public properties while neglecting the protection of legitimate proprietary interests of individual natural persons and legal persons.[66] As such, it is not conducive to the new pluralistic socialist ownership structure, and therefore should be replaced by the principle of "unified protection of all lawful properties" (*hefa caichan yiti baohu yuanze*).[67]

Liang further differentiates ownership as a social institution (*suoyouzhi*) and ownership as specific civil property rights (*suoyouquan*). As implied by Liang, ownership as property rights are inherently equal and thus there is no need to categorize them based on the status of their holders. In his proposed *Law on Real Property Rights* draft submitted to LAC, Liang and his team of drafters discarded the traditional General Principles of Civil Law (GPCL)[68]

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[63] See Yang Lixin, 2001 Nian Zhongguo Wuquan Fa Guoji Yantoahui Taolun Jiyao [Minutes of the 2001 International Conference on Chinese Property Law], at http://www.hubce.edu.cn/cbb/qwjs/lib/34538.html. Also, WANG, supra note 2, at 3.

[64] *See* GPCL, *supra* note 41, art. 73.

[65] *See* Liang, *supra* note 3.

[66] *Id.*

[67] *Id.* Also, Yang, *supra* note 63.

[68] The GPCL was enacted in 1986 and is currently the fundamental piece of legislation of China's civil law system. Some Chinese scholars consider it the equivalent of the general section of a civil code.

taxonomy of state ownership, collective ownership and individual ownership. [69] Instead, the proposed draft treated ownership as a universal construct and provided "state ownership" in its treatment on land ownership, mineral ownership and public property.[70]

Liang's theory is vehemently opposed by Professor Wang Liming of People's University, the leader of the second *Law on Real Property Rights* drafting team. Wang believes that a country's property law regime should reflect the nature of its underlying ownership institution (*suoyouzhi*), which is a pluralized system with public ownership as its mainstay in China. [71] While emphasizing the importance of equal protection of all forms of ownership, Wang argues that equal protection is not in conflict with separate provisions for state ownership and collective ownership, the characteristics of which are distinctive from private ownership.[72] Additionally, separate provision is essential to preserve the dominance of the public economy and prevent the stripping of state assets.[73] In the proposed draft completed under his supervision, state ownership, collective ownership, individual ownership and ownership of social and religious organizations are separately provided. [74] More importantly, Wang insists that state ownership should enjoy special protection under limited circumstances. Pursuant to Wang's proposed draft, the state shall assume ownership in the case where the owner(s) of a particular piece of property cannot be ascertained. [75] Actions against misappropriation of state-owned assets that have not been authorized for management or administration by natural persons, legal persons or other organizations shall not be subject to any statute of limitations.[76] To a certain extent, the special protection of state ownership in Wang's proposal is no more than the notion of "escheat" or the rules against adverse possession of public lands in many common law jurisdictions.

The LAC draft currently being circulated for vetting balanced the views reflected in both proposed drafts. While keeping the traditional civil law taxonomy of state ownership, collective ownership

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[69] *See* LIANG HUIXING, ED., ZHONGGUO WUQUANFA CAOAN JIYIGAO [PROPOSED DRAFT OF CHINA'S LAW ON REAL PROPERTY RIGHTS] (Beijing: China Social Science Documents Press 2000).
[70] *Id.*
[71] *See* WANG, *supra* note 2, at 255-257.
[72] *Id.*
[73] *Id.*
[74] *Id*, at 16-42.
[75] *Id*, at 28.
[76] *Id.* at 30.

and private ownership, the LAC draft does not provide any special protection for state ownership.[77] Various opinions on the LAC draft have been voiced since its circulation. In the lengthy critique proffered as a collective work by the Faculty and Students of the Chinese University of Law and Politics,[78] LAC's taxonomy of "the trio ownership forms" is seriously challenged. Among the tough questions asked, the most intricate one may be how a corporation whose shares are held jointly by the state and individuals should be labeled.[79] The technical debate on how to provide equal protection of public and private property is far from over. However, its resolution is not beyond contemplation.

B. Clarity and Certainty: Impact of Civil Law Jurisprudence

1. Totality Conception of Ownership

Ownership, in Honere's words, is simply "the greatest possible interest in a thing which a mature system of law recognizes."[80] To illustrate what he means by "the greatest possible interest in a thing," Honere articulates 11 leading standard incidents of ownership in liberal societies.[81] For Honere, ownership is the aggregation of all these incidents. However, these incidents need not be always held in one person; all that is required is the legal viability that they may be unified in a single person. In common law, ownership is frequently described as a "bundle of sticks." Incidents of ownership or individual "sticks" can be theoretically arranged into an unlimited amount of successive lesser interests and held by an unlimited amount of people in the name of "estates," subject to certain restrictions such as the "rule against perpetuity." And in civil law, under the influence of the *numerus clausus* theory, incidents of ownership (particularly with

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[77] See Liang, *supra* note 3.

[78] *See* Chinese University of Law and Politics, *Guanyu Zhonghua Renmin Gongheguo Wuquan Fa de Xiugai Yijian [Modification Proposal on the Draft PRC Law on Real Property Rights]*, June 11, 2002, *at* http://www.law-thinker.com/detail.asp?id=1108.

[79] *Id.*

[80] A. M. Honere, *Ownership, in* OXFORD ESSAYS IN JURISPRUDENCE 108 (A. G. Guest ed., 1961)..

[81] *See id.* at 112-134. Which include the right to possess, the right to use, the right to manage, the right to the income, the right to the capital, the right to security, the incident of transmissibility, the incident of absence of term, the prohibition of harmful use, liability to execution, and the incidence of residuality.

regard to real property) are grouped into code-defined *jura in re aliena* (other real property rights)[82], which have a life of their own.

To a certain extent, a substantial source of ambiguity in the property rights regime in China today originated from the totality conception of ownership in orthodox Chinese civil law jurisprudence.[83] In contrast to the liberal concept of ownership depicted by Honere, the conception of ownership in China in the past had been overwhelmingly influenced by former Soviet civil law jurisprudence. Ownership was understood as an indivisible and absolute whole and *jura in re aliena* was not provided for.[84] In the old centrally-planned economy, this conception posed few problems because all means of production were publicly owned and centrally managed. The existence of legally defined lesser interests was not necessary.

However, when the Chinese leadership embarked on the pragmatic market reforms and started to "transfer" incidents of ownership to various "economic agents," interpretation of these newly created individual interests based on the old narrow conception of ownership caused tremendous confusion and uncertainty.[85] Within the old ownership discourse, the status of these newly created lesser interests was ambiguous and generally not interpreted as formal property rights, even though in the eyes of common law lawyers, some of these lesser interests are nothing different from vaguely drafted leaseholds.

In recent years, Chinese civil law scholars have made tremendous progress in developing ownership theories. While the common law concept of "property" and the doctrine of estate have been introduced,[86] the mainstream of scholarship in the field inclines toward using the civil law jurisprudential framework. From the perspective of most of these scholars, the Pandectist system of "real property rights" (*wuquan*) is more appealing because of its legal specificity, uniformity and publicity.[87] Most civil law scholars have since suggested setting up a system of "other real property rights" (*ta*

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[82] *Jura in re aliena* refers rights to another's property.

[83] *See* Yang, *supra* note 42. Also, JIANFU CHEN, FROM ADMINISTRATIVE AUTHORIZATION TO CIVIL LAW: A COMPARATIVE PERSPECTIVE OF THE DEVELOPING CIVIL LAW IN THE PEOPLE'S REPUBLIC OF CHINA (Boston: Martinus Nijhoff 1995).

[84] *See* Yang, *supra* note 42.

[85] *Id.* Also, RONALD KEITH AND ZHIQIU LIN, LAW AND JUSTICE IN CHINA'S NEW MARKETPLACE 144 (New York: Palgrave 2001). Also, *see generally*, CHEN, *supra* note 83.

[86] *See id.* at 145-146.

[87] *See* LIANG HUIXING, RESEARCH ON REAL RIGHTS IN CHINA 1-4 (Beijing: Law Press 1998).

wuquan), particularly using "usufruct" (*yongyi wuquan*)[88] to formalize and streamline the decentralized lesser interests.[89]

In practice, one of the main themes in the two proposed drafts for the *Law on Real Property Rights* and the resulting LAC draft is to formally recognize "lesser interests" created in the decentralization process as usufructs.[90] These decentralized interests generally include the "land use right" of state-owned lands (mostly urban lands),[91] the "contractual management right" of collectively owned rural lands,[92] the "enterprise management right" [93] of state-owned enterprises, and "profits a prendre"[94] of state-owned natural resources.[95]

However, the proposed drafts vary considerably in the scope and taxonomy of the "usufruct" system. The most significant difference lies in the necessity for the *Law on Real Property Rights* to regulate the property relationship between the State and state-owned enterprises. While Professor Liang Huixing's drafting team believes that the relationship is essentially the subject matter of Company Law, which has already designated it as the relationship between shareholder and corporation, [96] Professor Wang Liming sees the necessity to upgrade the "enterprise management right" and provide an overarching "state-owned enterprise property right" (*guoyou qiye caichan quan*) to clarify the rights and obligations between the state and state-owned enterprises, particularly for unincorporated enterprises.[97] The most recent policy development with regard to state-owned enterprise reform seems to coincide with Professor Liang's opinion. The 16th CCP National Congress calls for continued conversion of state-owned enterprises into modern companies with "perfected legal person governance structures."[98] In any case, the debate is mostly at a technical level, while the general tone to formally "propertizing" these decentralized lesser interests has already been set.

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[88] "Usufruct" refers to the right to use another's property.
[89] *See* generally CHEN HUABIN, WUQUAN FA YUANLI [PROPERTY LAW THEORY] (Beijing: College of Public Administration Press) (1997). Also Yang, *supra* note 42.
[90] *See* Liang, *supra* note 3.
[91] Constitution art. 10 (1982, amended 1988).
[92] GPCL, *supra* note 41, art. 80.
[93] *Id.* art. 82.
[94] *Profit a prendre* refers to the right of entering the land of another to extract profit.
[95] GPCL, *supra* note 41, art. 81.
[96] *See* Company Law, *supra* note 41, arts. 4, 64 -72.
[97] *See* WANG, *supra* note 2 at 30. In Wang's opinion, "state-owned enterprise property rights" is a special type of "other real right" that is distinctive from tradition usufructs.
[98] *See* Jiang, *supra* note 4 § 4(4) para. 3.

2. Public Ownership: Identity of Holders

The deficiency of the old orthodox Chinese civil law jurisprudence is not limited to its inability to accommodate the complexity brought by the separation of ownership and management, a necessary consequence of China's economic reform and modernization. To a certain extent, its definition of public ownership itself is challenged by changing realities. As a result of the profound reform of China's economic governance structure, the once unquestionable identities of public ownership holders has become debatable in the new context.

a. State Ownership v. "Local State Ownership"

According to the Constitution, public ownership in China includes state ownership and collective ownership.[99] In theory, state-owned assets belong to all the people in China.[100] In practice, state ownership is exercised by the state government as the representative of all the people. During the old central planning era, the state's property interest was an absolutely cohesive one. However, as a result of fiscal reforms in the 1980s, a system similar to multi-level tax farming took shape.[101] Under this system, the central government contracted with the next level local governments, who were allowed to keep any revenue surplus after turning in the stipulated lump sum.[102] The contracting system was repeated at each level of local government. Consequently, local governments ceased to be the pure collection agents of the central government and obtained their own separate fiscal identities. The fiscal contracting system was replaced by a tax sharing system in 1994. However, the separate local fiscal interests remain intact.[103]

In the meantime, management and control of state-owned enterprises were being decentralized from central ministries to local governments. In addition to investing in these localized state-owned enterprises, local governments also fund new enterprises from their own budgets. The ownership of these locally invested state owned

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[99] *See* Constitution art. 6 (1982, amended 1999).
[100] *See* GPCL, supra note 41, art. 73.
[101] *See* Peng, *supra* note 11 at 1343-1344.
[102] *Id.*
[103] *Id.*

enterprises thus becomes an issue of serious debate.[104] Some scholars suggest that "local state ownership" should be created to reflect separate local interests.[105] Others propose that state ownership should remain unchanged while local governments be granted with "usufruct" (*shouyi quan*) on locally invested enterprises.[106]

The recently concluded 16th CCP National Congress provides some detailed policy guidance in this area. Based on President Jiang Zemin's report, while the separation of central and local state ownership is dismissed, the power to represent the state as "investor" (*chuzi ren*) is to be compartmentalized between the central government and various local governments through legislation.[107] On the one hand, state ownership of large state-owned enterprises, facilities and natural resources that are detrimental to the national economy and national security are to be represented by the central government.[108] On the other hand, ownerships of all other state assets are to be represented respectively by either provincial or municipal (prefectural) governments.[109] The government with the "power of representation" (*daibiao quan*) enjoys ownership rights and interests of assets represented.[110]

To a certain extent, the envisioned compartment of "power of representation" is somewhere between outright division of state ownership and mere grant of "usufruct." Within such a framework, the government that represents the ownership of a particular piece of state assets is to be conferred with power to manage, *as investor*, the assets (*zi*), the personnel (*ren*) and the affairs (*shi*)."[111] And the government that enjoys the rights (*quan*) and benefits (*yi*) originating from any state ownership representation must also bear all corresponding duties (*yiwu*) and liabilities (*zeren*).[112] As a result, while state ownership remains an undivided whole, the proprietary interests of the central government and various local governments are to be clearly demarcated. However, whether and to what extent the central government will retain control over assets "represented" by local governments is yet to be seen in further effectuating legislation.

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[104] *See* WANG, *supra* note 2, at 270-273.
[105] *See* Wang, *supra* note 34.
[106] *See* WANG, *supra* note 2, at 270-273.
[107] *See* Jiang, *supra* note 5 § 4(4) para. 2.
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.*

b. Collective Ownership

Compared to state ownership, articulating collective ownership is a much more daunting task. While the Constitution explicitly refers to collective ownership on numerous occasions,[113] it does not provide any specific definition other than that collective organizations enjoy autonomies to engage in economic activities and shall be governed democratically.[114] The 1986 GPCL also supplies few details. Pursuant to Article 74 of the 1986 GPCL, "assets owned by collective organizations belong to the working masses (members) collectively." Even among Chinese jurists, what constitutes "the working masses" is subject to very different interpretations. The owner of a collective has been proposed to be "its founding members or investors," "the collective itself," or "all members of the collective jointly."[115] The ambiguity of the identity of owners has caused a lack of ownership supervision of the management and disposition of collective assets.[116] Identification of owners of collective organizations is thus an urgent matter.

While some drafters of the *Law on Real Property Rights*, represented by Professor Liang Huixing of CASS, favor leaving the clarification work to business organization laws, others propose to provide some general guidance in the *Law on Real Property Rights*. Unsurprisingly, the most systematic proposal to clarify collective ownership comes from Professor Wang Liming's drafting team, which insists on the separate provision of state and collective ownerships. Wang envisions collective ownership as the joint ownership of all members of a collective.[117] Members would enjoy equal voting rights on collective affairs.[118] And collective ownership would be exercised by democratically elected management organs pursuant to collective charters.[119] Fundamental business affairs would be approved by three-fourths of votes of a quorum of two-thirds of members.[120] Other than the non-transferable voting rights, members also would enjoy

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[113] *See* Constitution arts. 6, 8, 10, 17 (1982, amended 1999).
[114] *See id.* art. 17.
[115] *See* 5 WANG LIMING, RESEARCH ON CIVIL AND COMMERCIAL LAW 184 (Beijing: Law Press 2001).
[116] *Id.*
[117] *See* WANG, *supra* note 2, art. 126.
[118] *Id.* art. 129.
[119] *Id.* art. 130.
[120] *Id.* art. 134.

inheritable right to distribution and priority right to lease or purchase collectively owned assets.[121] Members' rights would come into effect upon joining the collective organization and cease one year after leaving the organization.[122]

To a certain extent, Professor Wang's approach to clarify collective ownership is that of a halfway incorporation. While the system provides necessary supervision on management of collective affairs without straightforward redistribution of social wealth, the limitation on liquidity of individual member interests begs for further clarification. Additionally, the system entangles with the modernization of China's business organization forms. From such a perspective, Professor Liang Huixing's proposal to leave the problem to business organization laws, particularly Company Law, is not without merits. Whichever way it goes, the general trend is to offer more protection to individual members and more supervision to the management organs of collective assets.

c. Red-Capping

The originally perplexing definitional problem is aggravated by the so-called "red capping" phenomenon. In the early years of reform, private ownership of the means of production was not fully recognized and was thus discriminated against to a certain degree. To gain preferential treatments that were only available to public enterprises at that time, some privately invested businesses masqueraded as state-owned or collectively owned entities. Such "red-capping" registration practices were not uncommon in certain geographic areas.[123] Ownership status of these "red capped" entities has long been a controversial issue. While some propose that ownership of these entities should be "reverted" to private investors, others prefer to keep the status quo.[124] In Wang's draft of the *Law on Real Property Rights*, a general principle of "whoever invests benefits" (*shui touzi, shui shouyi*) is proposed. However, in the case where alleged investors do not have sufficient evidence of investment, assets shall be assumed to belong to the collective.[125] In any event, the general consensus seems to

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[121] *Id.* art. 130.
[122] *Id.* art. 131.
[123] *See* 5 WANG, *supra* note 115, at 198-199. Also, Peng, *supra* note 11, at 1347.
[124] See 5 WANG, *supra* note 115, at 198-199.
[125] *See* WANG, *supra* note 2, at 296-297.

be the recognition of legitimate private interests in these red-capped enterprises.

C. Conclusions

This summarized review of recent developments of property lawmaking is illustrative rather than comprehensive. Many important issues such as the unified registration system, conveyance, title, servitude, security, tenancy in common, and prescription are not discussed due to limited space. To a large extent, these issues are subject to the same intense debate in the academic community and among legislators. However, the general line of China's recent legislative endeavors on property rights is discernable. To a large extent, it has been a process of formalizing broad and occasionally indeterminable *de jure* "property" rights through the selective recognition of efficient *de facto* property rules generated during the decades-long economic reform.

III. CASE STUDY: RURAL LAND REFORMS

To a certain extent, rural land reform is essentially the decentralization of collective ownership. As such, it touches on both the ambiguity of collective ownership and the uncertainty of decentralized lesser interests. Additionally, among all the decentralization reforms, the reform of rural lands through the so-called "household responsibility system" is the first one and most successful. In a sense, the evolving process of rural land reform is an epitome of institutional change in China's property regime, reflecting the achievements it has accomplished and the problems it faces.

A. Collective Ownership

In the late 1970s, after decades of socialist transformation, private ownership of rural lands was virtually extinct in China.[126] Most

[126] After the founding of the People's Republic of China in 1949, private land ownership was not immediately transformed into public ownership. Based on the Tudi Gaige Fa [Land Reform Act] (1950), rural lands taken from landlords were redistributed evenly to deprived peasants. Starting from the mid-1950s, through a series of land reform movements, particularly the "people's commune" movement, ownership of rural lands were concentrated in the collectives. *See* 4 WANG, *supra* note 115. Also, CHEN, *supra* note 89. And WANG WEIGUO, ZHONGGUO TUDI QUANLI

lands in the countryside were collectively owned and managed based on the vague principle of "three-level ownership with the production team as basis" (*sanji suoyou, dui wei jichu*).[127] Only a small portion of lands was allocated to individual households for use either as homestead (*zhaijidi*) or "self-reserved lands" (*ziliudi*), which are small lots assigned to grow produce for self-consumption. Theoretically, even these privately possessed lands were owned by the collectives. The collective ownership of rural lands was formalized by the 1982 Constitutions. Pursuant to Article 10, rural and suburban lands, including homestead and "self-reserved lands," belong to the collectives. However, the Constitution does not specify which collective among the three-level rural collective organizations shall be the rightful owner.

Though falling short of completely clearing up the confusion, subsequent legislation, in particular the 1986 General Principles of Civil Law (GPCL) and the 1986 Land Administration Law (LAL), provided some necessary details. Based on the aforementioned two pieces of legislation, rural lands are collectively owned by members of a village and managed by the village committee (*cunmin weiyuanhui*).[128] However, lands "already owned" by townships, a higher-level rural collective organization, shall be managed by the townships.[129] Additionally, lands "already owned" separately by more than two sub-groups of villagers in a village (*cunmin xiaozu*) shall be managed respectively by the sub-groups.[130] To a certain degree, these laws attempt to recognize ownership contingently shaped along historical lines. Unfortunately, they provide scant guidance as to what constitutes "already owned." In practice, the lack of fine details in the law is believed to be the cause of considerable confusion and land disputes in rural communities.[131]

Moreover, collective ownership of rural lands is seriously limited under the current law. Although "ownership" is defined in the 1986 GPCL as an owner's right to possess, use, extract income from

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YANJIU [STUDIES ON RIGHTS ON CHINA'S LANDS] 95-96 (Beijing: China Law & Politics Univ. Press 1997).

[127] *See* 4 WANG, *supra* note 110. The other two levels are "people's commune" (the equivalent of today's township) and "brigade" (the equivalent of today's village). Among the three, "production team" (equivalent of today's villager's group) is the lowest level collective organization.

[128] *See* GPCL, *supra* note 41, art.74. Also, *see* Land Administration Law, *supra* note 41, art. 10.

[129] *Id.*

[130] *See id.* art. 10.

[131] *See* 4 WANG, *supra* note 115, at 345.

and dispose of a particular property,[132] collective ownership of rural lands is not transferable unless taken by the state.[133] In the case of taking, fair compensation is required by law.[134] To a large extent, this "restrictive covenant" on alienation is designed to prevent land polarization and to protect the powerless rural collectives or individual members from unscrupulous transactions and distribution. Under these circumstances, the voice of direct privatization of rural lands or indirect liquidation through a shareholding system is not strong at all.[135]

Whereas all three drafts of the *Law on Real Property Rights* address property rights related to rural lands extensively, none proposes any change to its collective ownership or the inalienability of collective ownership. However, the drafts did intend to solve some of the problems with respect to the ownership system. In Professor Liang Huixing's proposed draft, state taking of rural lands must be for genuine public interest purposes and "just" compensation must be paid.[136] And according to Professor Wang Liming's draft, in the event ownership of rural lands cannot be ascertained, a sub-group of villagers (*cunmin xiaozu*) shall be presumed to be the owner.[137]

B. Rural Land Contractual Management Rights

1. Policy Experiment

On balance, the collectivization of rural lands from the mid 1950s to the late 1970s failed to raise productivity due to a lack of incentives. Around 1979, following the 3rd Session of the 11th CCP National Congress, which resolved to shift the focus of the Party and State to economic construction, reformers in Anhui and some other provinces started to experiment with the creative "household contract responsibility system" (*baochan daohu*) to inject necessary incentives while preserving socialist collective ownership.[138] Based on the number of laborers in particular households, collectively-owned and -managed agricultural lands along with adjacent forests, orchards,

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[132] *See* GPCL, *supra* note 41, art. 71.
[133] *See* Land Administration Law, *supra* note 41, arts. 45-50. Also, Urban Real Estate Administration Law, *supra* note 41, art. 8 (1994).
[134] *Id.*
[135] *See* WANG, *supra* note 2, at 288.
[136] *See* Liang, *supra* note 3.
[137] *See* WANG, *supra* note 2, art. 135.
[138] *See* LIANG XIAO, ZHONGGUO SUOYOUZHI JIEGOU YANJIU [RESEARCH ON CHINA'S OWNERSHIP STRUCTURE] 121 (Taiyuan: Shanxi People's Publishing House 1988).

ranches and water spaces were partitioned and allocated to each household for a fixed term.[139] The households were responsible for managing their allocated lands and were allowed to keep any surplus produces after meeting quotas. The system essentially created *de facto* leaseholds of rural lands in individual households. Only at the initial stage, the de facto leasehold rights of the households were supported by local administrative powers, rather than prescribed by law.

The "household responsibility system" was an immediate success, improving productivity significantly. The system was soon sanctioned by the central leadership and spread nationwide.[140] By 1983, 99.5% of the rural collectives adopted the system.[141] Initially, the term of the "leases" was 5 years. In 1984, the term was extended to 15 years. And in 1993, the "leases" were renewed for a term of 30 years.[142]

2. Broad Legal Confirmation and Gradual Legal and De facto Specifications

Approximately two years after the "household contract responsibility system" spread around the country, the policy creating "leasehold" rights of individual rural households was formally recognized by the 1986 GPCL as the "rural land contractual management right" (*nongcun tudi chengbao jingying quan*).[143] Pursuant to Article 80 of GPCL, such "contractual management rights" are protected by law; and the rights and obligations of the parties shall be in accordance with the "rural land management contract" signed between the collective and individual households.

The sketchy provision of 1986 GPCL was later repeated by the 1986 LAL,[144] and was reinforced to some degree by the 1988 LAL revision and by a rich body of central and local administrative regulations and policies. The essence of these subsequent formal developments is summarized by the 1998 LAL revision. Pursuant to Article 14 of the 1998 LAL, collectively owned rural lands shall be contracted out ("leased") to individual members for management for the fixed term of thirty years. The rights and obligations of the

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[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] *See* Ho, *supra* note 22, at 394-395.
[143] *See* GPCL, *supra* note 41, art. 80.
[144] *See* Land Administration Law, *supra* note 41, art. 12.

collective "lessor" (*fabaofang*) and the member "lessee" (*chengbaofang*) shall be specified in the management contract. While the member "lessee" enjoys her legally protected contractual management rights, she shall bear the obligation to preserve the contracted lands and use the lands only for purposes stated in the contracts.

Additionally, the contractual management rights of the lessee is subject to unilateral "adjustment" by the lessor. However, in the case where the lessor collective needs to adjust contracted lands among member villagers, such adjustment must be approved by a two-thirds vote of the village assembly or villager representatives and sanctioned by relevant township or county land administration authorities.[145] The revised LAL also provided some limited channels for the collective to lease its lands to non-members of the collective to engage in agriculture, forestry, husbandry and fishery.[146] However, any lease to non-member lessee must be approved by a two-thirds vote of the village assembly or villager representatives, and sanctioned by the township government.[147]

While the 1986 LAL and its subsequent revisions did not provide for the alienability and inheritability of contractual management rights, the 1993 Agriculture Law filled this gap. In accordance with Article 13 of the Agriculture Law, with the consent of the lessor, lessees may sublease the contracted lands or assign their contractual management rights to a third person. In the event a lessee passes away before the expiration date of the management contract, the heirs of the lessee may inherit the contractual management rights. In practice, sublease, assignment and gift of contractual management rights are not uncommon. Various spontaneous property devices such as shareholding cooperatives (*gufenzhi hezuo*) are created to aid the transfer of contractual management rights in the absence of the lessor's consent. In certain areas, some members of a collective even pay off others to assume their contractual management rights in order to avoid accompanying obligations.[148]

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[145] *See* Land Administration Law, supra note 41, art. 80.
[146] *See id.* art. 15.
[147] *Id.*
[148] *Id.*

3. Clarification: Propertizing "Contractual Management Right"

Despite the stringent legal restraints on unilateral adjustment of land management contracts, redistribution of contracted lands by the collectives is quite frequent, mostly due to demographic changes in the households. Based on a 1997 study, 80% of the leases have been "adjusted," among which 66% have been adjusted more than once.[149] Additionally, the transfer of contractual management rights is often burdensome for want of the lessor collective's consent. The relative deficiency in stability and transferability has prompted some serious debate among Chinese jurists as to the nature of rural land contractual management rights.

While by the letters of law and in judicial practices rural land contractual management rights are a species of contract rights (*hetong zhi zhai*), some scholars argue that in essence, contractual management rights are de facto usufruct on lands, a genre of "real rights."[150] Whatever its nature may be, most civil law scholars agree that rural land contractual rights should be clarified as a usufruct to better protect the interests of individual lessee villagers, stabilize the economic relationship between the collective owners and individual users, and enhance the transferability of the right.[151] Ultimately, such clarification is expected to minimize short-term abusive use and promote efficient allocation of dwindling farmland resources.[152] Differences in formalizing contractual management rights among the various *Law on Real Property Rights* drafts is essentially nominal. Whereas Professor Liang Huixing's drafting team used the term "rural land use rights" (*nongdi shiyong quan*) to designate the "propertized" right, Professor Wang Liming inclines to keep the original "contractual management rights" to ensure continuity.[153] The underlying attempts to formalize contractual management rights as usufruct are largely in common.

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[149] *See* Ho, *supra* note 22, at 397.
[150] *See* CHEN, *supra* note 89, at 505.
[151] *See* WANG, *supra* note 2, at 368-372. Also, WANG, *supra* note 126, at 97.
[152] *Id.*
[153] *Id.*

4. The Tenacity of the "Gradualist" Approach

On August 29 2002, a comprehensive Rural Land Contractual Management Law (*nong cun tu di cheng bao fa*, hereinafter "the 2002 CML") was enacted and will come into force on March 1, 2003. To a certain extent, the 2002 CML is a summarization of nationwide experiences on the household responsibility system over the past two decades. Among the many improvements, the security and alienability of contractual management rights have been specifically enhanced.[154] However, the law does not explicitly clarify the nature of the fortified contractual management rights. While the lessor village committee's right of entry has been restricted to two legally specified circumstances, [155] the law leaves it with a well-intentioned yet potentially cumbersome control over the alienation of the contractual management rights.[156] In the eyes of some Chinese civil law jurists, the contractual management rights as redefined in the 2002 CML may still be a short step away from the ideal "freehold" usufruct.[157]

To begin with, one of the key purposes of the 2002 CML is to "grant farmers with long-term secured land use right."[158] To this end, the lessor village committees are expressly prohibited from unilaterally modifying or terminating any rural land management contracts, subject to two narrowly tailored exceptions. [159] Firstly, the lessor village committees are allowed to "reenter" contracted lands before the expiration of relevant contracts when all the members of a lessee household relocate to cities (*shi*) and their residential registrations (*hukou*) have been reclassified as non-agricultural residents (*fei nongye hukou*).[160] This exception is extremely thin in the Chinese context. For all members of a lessee household may relocate to other villages, townships or small cities, so long as their new residential registrations are still classified as agricultural residents (*nongye hukuo*), their contractual management rights remain beyond any pre-matured reversion.[161]

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[154] *See* Nongcun Tudi Chengbao Fa [Rural Land Contractual Management Law] arts.4, 10 (2002).
[155] *Id.* arts. 26 and 27, discussed below.
[156] *Id.* art. 37, discussed below.
[157] Based on Professor Wang Liming's draft of the Law on Real Rights, "contractual management rights" shall be assignable without any consent of the "lessor" village committee. *See* WANG, *supra* note 2, at 71-72.
[158] *See* Rural Land Contractual Management Law, *supra* note 154, art. 1.
[159] *Id.* arts. 14 (1) and (2), 26 and 35.
[160] *Id.* Art. 26.
[161] *Id.*

Secondly, the lessee village committee may still adjust "contracted lands" among lessee villagers with two-thirds approval of the village assembly or representative meeting.[162] However, this exception is limited by the 2002 CML to special circumstances such as severe natural disasters.[163] And the scope of re-adjustment is restricted to the households affected.[164] Additionally, any adjustment must also be approved by relevant township and county authorities. More importantly, this exception may be opted out in contractual management contracts. If the contracts expressly provide that the contracted lands shall not be subject to any re-adjustment, such contracts shall prevail.[165] Other than the two legally specified exceptions, the lessee village committees are strictly barred from "re-entering" contracted lands. In fact, any contract clauses that provide otherwise are void *ab initio*.[166] As such, the underlying intent of the 2002 CML to formalize contractual management rights as legally specified usufruct is discernable.

In comparison, the 2002 CML's enhancement on the alienability of contractual management rights is more hesitant. Although the 2002 CML explicitly protects any lawful (*hefa de*) and voluntary (*ziyuan de*) transfer (*liuzhuan*) of contractual management rights "for value" (*youchang de*),[167] it does not completely free all kinds of transfers from the interference of the lessor village committees. Pursuant to the 2002 CML, contractual management rights may be transferred through sublease (*zhuanbao*), rental (*chuzu*), swapping (*huhuan*), assignment (*zhuanrang*) or any other means.[168] And in general, as long as the transferee has the capability to engage in agricultural production and the "rights of first refusal" of other village members are respected, no organization or individual shall interfere with the transfer of contractual management rights.[169] However, while the sublease, rental or swapping of contracted lands requires a mere report (*bei'an*) to the lessor village committees, the assignment of contractual management rights needs their consents.[170]

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[162] *Id.* art. 27.
[163] *Id.*
[164] *Id.*
[165] *Id.*
[166] *Id.* art. 55.
[167] *Id.* art. 10.
[168] *Id.* art. 32.
[169] *Id.* art. 33.
[170] *Id.* art. 37.

The underlying legislative intent of such specific restrictions on assignment is to protect the lessee households from completely giving away their contractual management rights without other stable sources of income.[171] Unlike sublease and rental, assignment severs any legal relationship between the lessee household and the contracted lands. And compared to swapping, the lessee household does not obtain any contractual management rights on different lots. Based on the wording of Article 41 of the 2002 CML, the consent process may help ensure that the lessee households have other stable sources of income before they relinquish all their rights on contracted lands, the most important source of livelihood in rural China.

However, such restrictions on alienation, though well-meant and narrow in contrast to the freedom allowed, entails a legislative scheme that holds the original lessee households liable for any violation of relevant land management contracts by subsequent transferees, unless the contractual management rights are assigned with the consent of the lessor village committee, who, as a result, retains substantial control over alienation.[172] Arguably, the consent requirement may be a substantial burden on the transfer of contractual management rights.

The significant but nonetheless incomplete formalization of contractual management rights by the 2002 CML reflects the resilience and vitality of the "gradualist" approach. For Chinese pragmatists, clarification of property rights is a progressive enterprise that involves incremental adjustment of competing interests. To a certain extent, the development of property rights in China is and will continue to be a compromise between formalism and pragmatism.

C. *Formalization of Homestead Land Use Rights (*zhaijidi shiyong quan*)*

Generally speaking, rural lands in China can be divided into two types based on the purpose of use: 1) productive lands (*nongdi*) and 2) homesteads (*zhai ji di*). Due to their distinctive nature, they are subject to very different laws and regulations. On the one hand, productive lands, including farmlands, wooded lands, water space, etc. are exploited through the system of contractual management rights. On the other hand, lands for homesteads are allocated to collective

[171] *Id.* art. 41.
[172] *Id.* art. 41.

members for free use. Pursuant to 1998 LAL, each household in a collective is entitled to one lot as a homestead.[173] The size of the lot shall be in conformity with the standards set by provincial and county governments. [174] In the event that a villager needs lands for homesteading, she shall apply to the township government for verification and the county government for approval. [175] However, applications of villagers who sold or leased their residences shall be rejected. [176] Should productive lands need to be converted into homesteads, such conversion must be approved by the provincial government.[177]

Although there is no disagreement to formalize villagers' rights on homesteads as usufruct, drafters of the *Law on Real Property Rights* disagree on whether the resulting usufruct shall be an independent category. Professor Liang Huixing's drafting team treats all lands used for construction purposes alike and does not differentiate urban lands owned by the state and rural homestead lands owned by the collectives. As such, in Liang's draft, the resulting usufruct on rural homesteads is part of general "foundation land use rights" (*jidi shiyong quan*) that also covers state owned urban lands.[178] In contrast, Professor Wang Liming believes that the means to obtain rural homestead usufruct is fundamentally different from state-owned urban land use rights, which may be obtained through negotiation, bidding or auction.[179] Thus, in Wang's draft, rural homestead usufruct is treated separately as "homestead land use rights.[180] Once again, the difference primarily concerns taxonomy. The general trend to "propertize" decentralized lesser interests produced at the transition stage is undisputed.

IV. CONCLUSIONS

From a certain perspective, the development of property rights in China is an evolving formalization process that may be visualized as a path to increasing clarity. During this process, ideological,

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[173] *See* Land Administration Law, *supra* note 41, art. 62.
[174] *Id.*
[175] *Id.*
[176] *Id.*
[177] *Id.*, arts. 44 and 66.
[178] *See* Liang, *supra* note 3.
[179] *See* Tentative Act on the Assignment and Secondary Transfer of Land Use Rights on Urban State-owned Lands, *supra* note 41, ch. 2 (1990).
[180] *See* WANG, *supra* note 2, arts. 298-309.

jurisprudential and technical constraints have been gradually unraveled, and individual proprietary interests have been steadily crystallized and secured. Additionally, this process is a dynamic interaction of policies, laws and spontaneous institutions. On the one hand, it reflects clashes of conflicting values and techniques, between transplanted laws and indigenous constructs, between civil law and common law models, and between social engineering and spontaneous institutions. On the other hand, it is a gradual fusion of efficient *de jure* and *de facto* property institutions shaped along the course of market reform. At a more profound level, this process is about the realignment of social wealth to achieve economic efficiency without disrupting basic social justice and fundamental values of society, or more generally, within the context of "path dependence."

The intricacy of this process pre-determines that it is beyond the explanatory power of any one theory. If this paper has achieved anything, it is to proffer some evidence as to the complexity of the relationship between property institutions and economic development. However, the immediate purpose of this paper is much more simple. It is to draw attention to China's recent movement to formalize its property regime, a movement that challenges the somewhat established view that the clarity of a formal property regime is more or less irrelevant to the economic growth in China. As demonstrated by the trajectory of the evolution of property rights in the post-Mao era, while a formal system of sufficiently defined property rights, a luxury in the early transitional period, may not be a necessary condition for economic growth, it may very well be a premium factor. Without a doubt, the neo-classical theory needs to be qualified. Nonetheless, the power of formal property discourse should never be discounted.