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THE NEW CHINESE PROPERTY RIGHTS LAW: AN EVALUATION FROM A CONTINENTAL PERSPECTIVE

GEBHARD M. REHM & HINRICH JULIUS*

* Gebhard M. Rehm is Acting Professor of Civil Law, Comparative Law, and Private International Law at the University of Munich. Hinrich Julius is Professor at the University of Applied Sciences Hamburg (HAW) and heads the legal cooperation office of the Deutsche Gesellschaft für technische Zusammenarbeit (German Development Cooperation) (GTZ) GmbH in Beijing, working on behalf of the German Ministry of Economic Cooperation and Development. Both authors have acted as consultants during the legislative process leading to the Chinese Property Rights Law since 2000 and present their personal views – not views of the institutions they work for. Preparatory materials from the consultation process are collected in *Chinesisches Sachenrecht im Werden – Materialien der Gesetzgebungsberatung zum chinesischen Sachenrechtsgesetz 2000-2006* (Hinrich Julius & Gao Zhixin eds., 2009).

I. INTRODUCTION

On October 1, 2007 – the 48th anniversary of the founding of the People's Republic of China (PRC) – the Property Rights Law of the PRC (hereinafter "PRL" or "Property Rights Law") entered into force. The symbolic date clearly expresses the importance of this law, which was fourteen years in the making and of much interest both within China and internationally. The central thrust of the law is the protection of private property through the "socialist market economy" of the People's Republic of China, which has been widely commented upon and is the law's major political essence. Due to the law's orientation towards German Law – in its basic structure and many individual provisions – this article uses Continental and especially German law to explain its major features and peculiarities. Registration requirements for real property rights and real rights for security will in the future be unified – the registration system, at least in the cities, leans on a German system, but does not copy it. The Regulations on residential property developed elements of different legal systems as the basis of a future Chinese solution. A reform of land use rights includes gestures towards the creation of private property in land (at least from an economic viewpoint) – altogether a major step forward not only towards the enactment of a comprehensive Chinese Civil Code but also on the long road of shaping a Chinese rule of law.

A. Significance of the Enactment of the Property Rights Law

After more than fourteen years of consultation, the PRL was passed on March 16, 2007 to come into effect on October 1, 2007.[1] "China's Next Revolution" was The Economist's headline, with a picture of a cultural revolutionary farmer sitting proudly on his tractor, gesturing to the future with a red "property deed."[2] During the entire transformation process of the People's Republic of China since the mid-1980s, no other single piece of legislation has received comparable international media attention,[3] while in China the passage of the PRL

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[1] 物权法 [Property Rights Law] (promulgated by the Nat'l People's Cong., Mar. 16, 2007, effective Oct. 1, 2007) [hereinafter *Property Rights Law* or *PRL*].

[2] *China's Next Revolution: Property Rights in China*, The Economist, March 10, 2007.

[3] The enactment of the Property Rights Law has been covered by numerous international newspapers. *See*, e.g., Joseph Kahn, *China Backs Property Law, Buoying Middle Class*, N.Y. TIMES, Mar. 16, 2007, *available at* http://www.nytimes.com/2007/03/16/world/asia/16china.html (last visited Mar. 13, 2009); Philip, *Pékin décide de garantir la propriété privée et de taxer davantage les sociétés*

dominated the media for months. Television and the daily press featured discussions of both real and fictional cases. The television coverage of many aspects of the PRL especially will have raised awareness of legal protection in many newly regulated areas as well as areas in which regulations already existed.[4] Since the enactment of the law, all jurists of repute at Beijing universities (and probably not only them) have been instructing judges, administrative lawyers as well as military and party officials. The international press has also turned its attention to the domestic Chinese debate. The story of the "Nail House" – the struggle of a married couple against the demolition of their old house in Chongqing – circulated widely, through the arresting image of an isolated house standing atop a mound of earth in the middle of a vast excavated building site.[5]

The PRL has also set a record in the People's Republic of China (PRC) in terms of length of consultation period. After discussion on the civil law skeleton draft in the 1980s, which culminated in the passage of the General Principles of Civil Law (GPCL),[6] the official legislative work

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étrangères, LE MONDE, Mar. 17, 2007; *China reconoce por primera vez la propiedad privada con una ley*, EL PAÍS, Mar. 16, 2007; *China's Clause Four: The Recognition of Property Rights is an Ideological Landmark*, TIMES, Mar. 17, 2007; Hein, *Chinas Volkskongress billigt Eigentumsgesetz*, FRANKFURTER ALLGEMEINE ZEITUNG, Mar. 16, 2007, at 16; Bork, *Bruch mit Maos Erbe*, SÜDDEUTSCHE ZEITUNG, Mar. 17, 2007, at 25; Julius, *In der Tradition des deutschen Rechts*, DIE WELT, Mar. 13, 2007, at 9.

[4] This aspect of legislation as a means of implementing regulation cannot be underestimated. Many aspects of rural land use rights were for example already regulated in the 2002 Rural Land Contracting Law. 农村土地承包法 [Rural Land Contracting Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 29, 2002, effective Mar. 1, 2003). However, information about restrictions on the readjustment of land use rights was not widely circulated among farmers. Roy L. Prosterman considers a lack of knowledge among farmers a central problem of implementation. According to a survey conducted in 2004, only one out of six farmers had heard of the regulations of the Rural Land Contracting Law. With the increased publicity of the PRL, this will definitely change. *See* Roy L. Prosterman, *Rural Property Rights in China*, *in* REALIZING PROPERTY RIGHTS 107-117 (Hernando De Soto & Francis Cheneval eds., 2006).

[5] Howard W. French, *Homeowner Stares Down Wreckers, at Least for a While*, NEW YORK TIMES March 27, 2007, *available at* http://www.nytimes.com/2007/03/27/world/asia/27china.html (last visited Mar. 13, 2009); Jane Macartney, *They came at night and hammered down the Nail House*, THE TIMES, April 4, 2007, *available at* http://www.timesonline.co.uk/tol/news/world/asia/article1610142.ece (last visited May 22, 2009); Wenk, *Ein Paar kämpft um sein Haus – und wird berühmt*, WELT ONLINE 25.03.07 (last visited May 4, 2009).

[6] 民法通则 [General Principles of Civil Law] (promulgated by the Nat'l People's Cong., Apr. 12, 1986, effective Jan. 1, 1987); *see also* Münzel, *Huaninanzi und das Halbblutrecht – Zum Entwurf eines Sachenrechtsgesetzes der VR China*, Zeitschrift für Chinesisches Recht 2006, at

began in 1993, when the Legislative Affairs Commission of the Standing Committee to the National People's Congress (LAC) set up a working group for the preparatory work. In March 1998, the commission presented a timetable for the creation of a comprehensive civil code.[7] Following the 1999 passage of the unified contract law,[8] further "chapters" should now be passed in the period leading up to 2010.[9]

B. Legislative History

On the basis of two competing academic drafts,[10] at the end of 2001, the LAC produced an initial draft bill and made it available to select circles of Chinese experts for comment. In the meantime, work progressed on the draft of an entire civil code:

> The first reading by the Standing Committee of the National People's Congress (the "Standing Committee") of the so-called first official draft of an entire civil code on December 23, 2002 together with the "Property Rights Law" part; in particular, work on the Property Rights Law was given a strong push by being addressed for the first time at the official level by the People's

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1; Julius, *China auf dem Weg zu einem Zivilgesetzbuch: Zur Nichtverabschiedung des Sachenrechtsgesetzes*, Zeitschrift für Chinesisches Recht 2006, at 270.

[7] 梁慧星, 制定中国物权法的若干问题 [Liang Huixing, *Several Issues on Enacting China's Property Rights law*], 法学研究 [CHINESE J.L.] No. 4, 2000, at 6.

[8] 合同法 [Contract Law] (promulgated by the Nat'l People's Cong., Mar. 15, 1999, effective Oct. 1, 1999).

[9] Even if this timetable currently seems unrealistic, the legislature tries to adhere to it as far as possible. Work is already underway at the political level with respect to tort law and private international law; filling the gaps in civil and commercial law is considered to be an important step in, as well as a symbol of, the Chinese economic transformation. *See* Liang, *supra* note 7.

[10] The October 1999 Draft of a working group of the Chinese Academy for Social Sciences (CASS), chaired by Liang Huixing; the December 2000 draft in reply of the People's University (Renmin DaXue) Beijing, chaired by Wang Liming, both published in book form with detailed commentary.

See generally 梁慧星, 中国物权法草案建议稿：条文、说明、理由与参考立法例 [Liang Huixing, *Proposed Draft of Property Rights Law: Text, Explanations, Rationale and Cited Foreign Legislation*] (2000) (discussing the reasons for each draft provision and making reference to similar rules in foreign laws); 王利明, 中国物权法草案建议稿及说明 [Wang Liming, *Proposed Draft of Property Rights Law with Explanations*] (2001) (discussing the reasons for each draft provision). Münzel offers a preliminary view of the contents. *See* Münzel, *supra* note 6, at 1 (15 et seq.). For consideration and the first public discussion of these drafts at the National People's Congress, *see* Xiaoyan Baumann, *Das neue chinesische Sachenrecht: Seine Entwicklung unter Einfluss deutschen Rechts* [*The new Chinese Property Rights Law: Its development under the influence of German Law*] (2006).

Congress.[11] The other chapters, however, also presented and discussed, were considered not ready for enactment. Already, in 2002, strong political interest existed to enact a "complete" Civil Code, following the legislative traditions of Continental Europe and demonstrating the progress of the Chinese economical transformation even while pushing it further;

- The second reading before the Standing Committee on October 23, 2004 of a "second draft for scrutiny and consultation" of the Property Rights Law;[12]
- The third reading before the Standing Committee on January 26, 2005. Virgin legislative territory was entered with the "third draft for scrutiny and consultation" on July 10, 2005.[13] With its publication (in print and on the Internet),[14] the public was invited to respond by August 20, 2005.[15] After a televised public hearing on the income-tax law, this was the second instance of inviting the broader public to participate in the Chinese legislative process. Previously, while individual views of interested persons or bodies were sought (e.g., for the reformulation of the corporate law), there had up to then been no comprehensive public participation in the legislative process. The response was enormous, with 11,543 responses submitted on almost all articles of the draft bill.[16]

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[11] 周婷玉、邹声文, 中国制定民法典迈出"第二大步" [Zhou Yuting & Zhou Shengwen, *China Made a Second Great Leap towards the Enactment of Civil Code*], 新华网 [XINHUA NEWS NET], Dec. 23, 2008, *available at* http://news.xinhuanet.com/newscenter/2008-12/23/content_10549481.htm (last visited Mar. 13, 2009).

[12] 裴智勇, 吴邦国主持人大常委会第十二次会议, 物权法草案再次提请审议 [Pei Zhiyong, *Wu Bangguo Presides the 12th Meeting of the Standing Committee of the National People's Congress, Draft of Property Rights Law Submitted for Review Again*], 人民网 [PEOPLE'S NET], Oct, 22, 2004, *available at* http://www.people.com.cn/GB/shizheng/1024/2938544.html (last visited Mar. 13, 2009).

[13] 中华人民共和国物权法 (草案) [Property Rights Law (Draft)], 人民网 [PEOPLE'S NET], Jul. 10, 2005, *available at* http://npc.people.com.cn/GB/14957/3530629.html (last visited Mar. 13, 2009).

[14] 中华人民共和国物权法 (草案) [Property Rights Law (Draft)] (P.R.C.), 法制日报 [LEGAL DAILY], Jul. 11, 2005, at 3.

[15] 全国人大关于公布物权法(草案)征求意见的通知 [Notice of National People's Congress on Soliciting Public Opinions on the Draft Property Rights Law], 新华网 [XINHUA NEWS NET], Jul. 10, 2005, *available at* http://news.xinhuanet.com/legal/2005-07/10/content_3200359.htm (last visited Mar. 13, 2009).

[16] 吴坤, 物权法草案反响强烈, 法工委共收到意见 11543 件 [Wu Kun, *Draft Property Rights Law Draws Extensive Attention, The Legislative Affairs Commission Has Collected*

> The fourth reading, on October 24, 2005, of the draft in the Standing Committee reflected the critical views voiced during the public hearing.[17] It was envisaged to present and pass the third draft before the Fourth Plenary Session of the 10th National People's Congress, which met from March 8th to 14th, 2006.[18]

However, in mid-December 2005 the Property Rights Law was removed from the agenda of the National People's Congress (NPC), planned for spring 2006. The reason for this in effect one-year postponement was a political debate triggered by a public letter addressed to Wu Bangguo, Chairman of the NPC, by Professor Gong Xiantian of Beijing University on August 12, 2005.[19] In the letter, Gong Xiantian argued that the fundamental principles of the draft diverged from the fundamental viewpoints and principles of Marxism and from the fundamental viewpoints and principles relating to socialism of the Chinese Communist Party.[20]

This article triggered a lively public debate, which also took place on the Internet. The National People's Congress organized a series of symposiums to investigate the potential unconstitutionality of the draft PRL bill.[21]

Even if this discussion was pursued by elements of the "New Left" as a final, or possibly further, attempt to criticize the introduction of market economy structures in China, it takes on immense significance for other reasons. Generally speaking, a relevant proportion of the Chinese citizens are unhappy with the consequences for the national economy of the successful transformation of the economy as a whole. As a result, according to the policy of the "New Socialist Village" adopted at the Fourth Plenary Session of the 10th National People's Congress on March

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11,543 Pieces of Public Opinions], 法制日报 [LEGAL DAILY], Sep. 7, 2005, at 3. For criticism of the content, *see* Julius, *supra* note 6, at 270, 272.

[17] *See* Wu, *Id.*

[18] 关注《物权法》之六: 物权法的昨天、今天、明天 [*Part VI of Focus on Property Rights Law: The Past, Present and Future of Property Rights Law*], 地雅集团 [DIYA INVESTMENT & MANAGEMENT], *available at* http://www.diyagroup.com.cn/view.asp?id=54 (last visited Mar. 13, 2009) [hereinafter *Focus on Property Rights Law*].

[19] 蒋安杰, 物权法学界首度回应违宪质疑 [Jiang Anjie, *For the First Time Property Rights Scholars Responded to Constitutionality Challenge of the Draft Property Rights Law*], 法制日报 [LEGAL DAILY], Feb. 28, 2006, at 3.

[20] For a detailed account and criticism, *see* Julius, *supra* note 6, at 274 et seq. For detailed description of the Chinese discussion, *see* Mo Zhang, *From Public to Private: The Newly Enacted Chinese Property Law and the Protection of Property Rights in China*, 5 BERKELEY BUS. L.J. 317, 325-238 (2008).

[21] Focus on Property Rights Law, *supra* note 18.

8-14, 2006, the position in particular of the most prominent losers in the economic reforms was to be improved.[22] Many also criticized the fact that the proceeds of privatizing enterprises and land benefit only a few and that, here too, neither the State nor employees in state industries nor farmers previously working on plots of land have sufficiently benefited from such proceeds.[23] Accordingly, the political leadership recognized the danger of the PRL not affording sufficient and adequate protection to state and collective property. This criticism in particular led to the subsequent introduction of a series of largely symbolic preventative measures in favor of state and collective property.

It is remarkable that debate over the PRL was conducted in public. There was an exchange of informed arguments, particularly in internet forums, but also in a wide range of publications. Political circles also participated in the debate, with Wu Bangguo giving his own substantive standpoint[24] to all comments on the draft PRL, and the Standing Committee pursuing the debate in further readings.

On the occasion of the 5th reading before the Standing Committee in August 2006, debate on the conformity of the PRL with the principles of the Chinese policy of openness came to a conclusion.[25] Further issues were resolved in the 6th reading on October 22, 2006.[26] After the 7th reading before the Standing Committee on December 30, 2006, this body decided to present the law to the full assembly of the NPC in March 2007.[27] More notable than the low number of votes against the passage of the draft bill on March 16, 2007[28] is the fact that the draft underwent

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[22] For a critical view of the seriousness of the claims to have improved the situation of the rural population, *see* Holbig, *Ideologische Gratwanderung – Die Jahrestagung des Nationalen Volkskongresses*, China aktuell 2/2006, at 51 et seq.

[23] *Id.*

[24] 郭亮, 吴邦国听取物权法修改意见, 强调维护群众利益 [Guo Liang, *Wu Bangguo Heard Proposed Changes on the Draft Property Rights Law and Emphasized the Protection of Popular Interests*], 新浪网 [SINA NEWS], Aug. 28, 2006, *available at* http://news.sina.com.cn/c/2005-09-26/14297039241s.shtml (last visited Mar. 13, 2009).

[25] China Daily, *Specific Issues Focus of Property Law Debate*, Aug. 24, 2006, *available at* http://www.chinadaily.com.cn/china/2006-08/24/content_673637.htm (last visited Mar. 13, 2009).

[26] 毛磊、刘晓鹏, 进入四年来的第六次审议, 物权法草案日趋成熟 [Mao Lei & Liu Xiaopeng, *The Sixth Review within Four Years, Draft Property Rights Law Ready for Vote*], 人民网 [PEOPLE'S NET], Oct. 30, 2006, *available at* http://politics.people.com.cn/BIG5/1026/4971603.html (last visited Mar. 13, 2009).

[27] *Id.*

[28] A total of 2.826 representatives voted for the bill, with 37 voting against and 22 abstentions. China Daily, *Landmark Property Law Adopted*, Mar. 16, 2007, *available at*

substantive changes in the final weeks of the debate, such as the automatic prolongation of land-use rights to land used for residential purposes in urban areas.[29]

C. *Consultation by GTZ*

The German Development Cooperation (Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH) has supported the legislative process in an advisory capacity since 2000. Before the first official drafts it called for the involvement of academics. In the following years, GTZ worked closely together with LAC. Seven symposi or workshops were organized. Several visits by delegations to various European jurisdictions offered the opportunity to examine practical questions more deeply. The advice was backed up with written opinions.[30] It is difficult to identify particular focal points of the consultation activity as over time it touched almost all statutory issues, but fundamental issues regarding the protection of private, state and collective property, the types of security rights and the actual structuring of good faith acquisition were discussed repeatedly.

Even if the political debate on the protection of private property occupied the forefront, the law is still comprehensive and regulates the elements of the law of things in a classic Continental European manner: ownership, possession, and limited real rights (rights of use and credit guarantees/collateral). The circumstance that its title is rendered as "Property Law" in the daily press and English-speaking world owes less to the Anglo-American legal concepts of property law than to the desire by the press to use simplified concepts and mark the alleged digression from orthodox Marxist concepts of property. Thus, in legal translations into English a more appropriate title would be "Property Rights Law."

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http://www.chinadaily.com.cn/china/2007-03/16/content_829330.htm (last visited Mar. 13, 2009).

[29] Property Rights Law, *supra* note 1, art. 149.

[30] *See* Julius and Zhixin, *Chinesisches Sachenrecht im Werden – Materialien der Gesetzgebungsberatung zum chinesischen Sachenrechtsgesetz 2000-2006* (Hinrich Julius & Gao Zhixin eds., 2009); summary of activities in Julius, *supra* note 6, at 270 et seq.; reports on individual events in Julius, *Symposium zum Sachenrecht*, Zeitschrift für Chinesisches Recht 2004, at 302-305; Julius, *Symposien zum Sachenrecht*, Zeitschrift für Chinesisches Recht 2005, at 169-172; Julius/ Petersen, *Die Kodifikation des chinesischen Sachenrechts - zu zwei Symposien zum chinesischen Sachenrecht am 13./14.09.2005 in Chengdu und am 31.10./01.11.2005 in Beijing (Reporting on two symposia on the Chinese property rights law on the respective data)*, Zeitschrift für Chinesisches Recht 2006, at 151-153.

II. LEGAL FRAMEWORK OF THE PROPERTY RIGHTS LAW

A. Constitutional Basis

The enactment of the PRL represents a milestone in the creation of a "socialist state under the rule of law" – the constitutional law objective of the PRC enshrined in article 5.[31] The socialist rule of law principle as well as the "socialist market economy" are at once constitutional law objectives and fundamental tenets underlying the very self-perception of the PRC.[32] On the one hand, they express continuity of development since the founding of the socialist state in 1949. On the other hand, they symbolize the largely completed transformation into a market economy. The term "socialist market economy" is intended to describe the objective of developing the economy from a planned economy led by a politically strong administration to a system subject to market forces. In contrast, the "socialist state under the rule of law" principle refers to a system of controlled state power without the Western separation of powers and democratic principles.

Article 10 of the December 4, 1982 Constitution is the basis of the modern Chinese understanding of property and the starting point for the development of law during the process of economic transformation. This provision stipulates that ownership of land in the towns is the preserve of the state, while land in the countryside is owned by the "collectives."[33] The Constitution allows expropriation in the public interest and recognizes transferable land-use rights. Even though the press celebrated the PRL as the first legislative measure to secure private property, the underlying protection of private property had already been constitutionally enshrined in 2004.[34] The PRL implements this protection in practical and detailed terms.

B. Existing Property Rights Laws

The PRL also consolidates and develops over 20 years' of measures addressing individual property law issues. This technique is a

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[31] 宪法 [Constitution] (promulgated by the Nat'l People's Cong., Dec. 4, 1982, as amended) [hereinafter *Constitution*].

[32] *See id.* art. 5, §1, art. 15, §1.

[33] *See* Constitution, *supra* note 31, art. 10, §1-2.

[34] In 2004, Article 13 of the Constitution was amended, proving that a "citizen's legal private property is inviolate" and that the "state protects citizen's right to personal property and to inherit private property in accordance with law." *See id.* art. 13, §1-2.

particular characteristic of Chinese legislative methods. Fundamental questions of economic transformation, as well as their legal basis, are not answered on the legislative drawing board, but rather are developed in practice through administrative decisions, internal directives (especially in earlier times), regulations, and local as well as later central laws. National legislation here has a unifying function, although the ultimate national legislation of many individual issues also introduces innovative solutions.[35]

Before the enactment of the PRL, the civil law foundations of the regulation of property relations were, as they continue to be, the General Principles of Civil Law (GPCL) in force since 1987.[36] Their regulations on property assume a tripartite distinction between "state property, collective property and individual property." The provisions are formulated tersely and document their origin in a time of different economic aims – for example through the enumeration in article 75 GPCL of movables capable of constituting personal property.[37]

Ownership and land-use rights are regulated in the 1986 Land Administration Law.[38] The 1994 Urban Real Estate Law regulates legal trading in immovables as well accompanying rights of use.[39] Credit guarantees, required for further economic restructuring, were regulated in a separate Guarantee Law in 1995.[40] The relevant GPCL provisions were seen as too limited. The (registrable) mortgage of real immovables and movables, the (possession) pledge right as well as the right of retention have since then been the central security rights in commercial practice.

The PRL creates the framework to combine these specialized laws and enacts a series of particular provisions, notably credit guarantees. Unfortunately, apart from a general statement according to which provisions of the PRL take priority over the Guarantee Law,[41] the PRL does not repeal specific old rules. The reluctance to repeal obsolete provisions is a general problem of Chinese legislative methodology. Simply requiring jurists to "know" which provisions should prevail over

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[35] On the role of legislation in China, *see* Julius, *Institutionalisierte rechtliche Zusammenarbeit – die Erfahrungen der GTZ in China* [*Institutionalized Legal Cooperation – Experiences of GTZ in China*], 71 Rabels Zeitschrift 53 (2008).

[36] General Principles of Civil Law *supra* note 6, arts. 71-83, 89.

[37] *See id.* art. 75.

[38] 土地管理法 [Land Administration Law] (promulgated by the Standing Comm. Nat'l People's Cong., Jun. 25, 1986, effective Jan. 1, 1987).

[39] 城市房地产管理法 [Urban Real Estate Law] (promulgated by the Standing Comm. Nat'l People's Cong., Jul. 5, 1994, effective Jan. 1, 1995).

[40] 担保法[Guarantee Law] (promulgated by the Standing Comm. Nat'l People's Cong., Jun. 30, 1995, effective Oct. 1, 1995).

[41] Property Rights Law, *supra* note 1, art. 178.

others (as this technique is generally justified in China) disregards the need for clarity of the laws in force and thus a simpler application of the law.

The enactment of the PRL means that, alongside the Contract Law, the second book of the codification of a future civil code comes into force. Further books on tort law, private international law, rights of the person as well as a general part and possibly family law and law of succession shall follow.

III. PUBLICITY AND REGISTRATION

The PRL puts great emphasis on publicity. Article 6 provides for a general registration requirement in the cases of creation, modification, transfer, and elimination of rights to immovables.[42] Without such registration, and barring the applicability of an exception, such transactions on immovables are invalid.[43] As in many continental European countries, public registration is deemed to provide the strongest guarantee of legal certainty in the immovables business. Being the basis for long-term investment for investment and housing purposes, these transactions are in many ways the backbone of modern societies, whose stability needs to be ensured through means as reliable as possible.

As a matter of principle, movables have to be delivered in order for rights in them to exist or to be transferred.[44] This general regulation and the respective particular rules not only correspond to the general public publicity principle of the PRL, but also express the legislative intention to allow as few as possible hidden transactions and circumventions.

Diverging from the terms of the original academic draft of CASS,[45] however, there will in China be no unified nationwide official competence for the rules on the registration of land-use rights and ownership of immovables. Resistance to the necessary relinquishing of financially profitable competences was, at least in some provinces, too strong. Article 10(1) accordingly refers to respective local rules of registration.[46] The assignment of this competence to several local public

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[42] *See id.* art. 6.
[43] *Id.*
[44] *See id.* art. 23.
[45] Liang, *supra* note 7.
[46] Property Rights Law, *supra* note 1, art. 10, §1.

authorities was nevertheless acknowledged to be inefficient. Thus, certain provinces, such as Shanghai, simplified the relevant rules.[47]

More as a political objective than, at least in the medium-term, a realistic objective for legal practice, article 10(2)(1) PRL requires a unified registration system for all real property rights. Hitherto, the registration provisions for the granting of rights varied markedly between provinces.[48] The introduction of a unified system would have to be welcomed unreservedly, as it would create a consistent basis for investment and thereby enhance legal certainty as well as possibly restrict the scope of corruption. However, as yet there is a lack of precise implementation provisions as they are, e.g., familiar from the German Land Registration Act.[49] On the other hand even such implementation provisions will be seen as a mere first step towards uniform national registration. Far-reaching institutional adaptation and modification will inevitably have to follow.[50] The convergence at least – if not unification – of registration systems will be a major task of Chinese political practice. In the cities, this goal might be partially achievable. In the countryside, the question of registration goes in hand with the question of further strengthening and more clearly defining the property rights of farmers.

Detailed provisions on future cost regulations in article 22 reflect above all the current (creative) methods of levying fees. According to this article, fees should be levied in the future on a case-by-case basis rather than according to the value of the registrable right.[51] In addition, the registration authority may no longer (arbitrarily) require expert evaluations or repeated registration during annual on-site inspections.[52] Thus, while many details of the registration law are subject to future execution provisions, the PRL already contains some detailed – at least from a civil law standpoint – procedural provisions. For example, article 18 determines the circle of those entitled to inspect the land register.[53]

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[47] In Shanghai, the registration authority is required to establish a unified registration system. 上海市房地产登记条例 [Regulation on Real Estate Registration] (promulgated by the Standing Comm. People's Cong. Shanghai Mun., Oct. 31, 2002, effective 1995), arts. 4-5.

[48] For detailed description of the existing registration system, *see* PATRICK A. RANDOLPH & LOU JIANBO, CHINESE REAL ESTATE LAW 167 (2000).

[49] "Grundbuchordnung" of March 24, 1897; current version *available at* http://www.gesetze-im-internet.de/bundesrecht/gbo/gesamt.pdf (last visited Mar. 13 2009).

[50] Lei Chen sees the property code as a first step in a consolidation and modernization process irrespective of its following a German, French or Australian Torrens model of registration. Lei Chen, *The New Chinese Property Code: A Giant Step Forward?*, 11 ELEC. J. COMP. L. 1, 9 (2007), *available at* http://www.ejcl.org,/112/article 112-2.pdf (last visited Mar. 13, 2009).

[51] Property Rights Law, *supra* note 1, art. 22.

[52] *Id.*

[53] Property Rights Law, *supra* note 1, art. 18.

According to this provision, every rights holder as well as any interested party is entitled to inspection. This regulation, which seeks to balance the privacy interests of the real property rights holder with that of publicity, clearly derives from consultation on the comparable regulation of article 12 of the German Land Registration Act.[54] The Chinese legislature sees it as necessary and sensible to restrict rights of inspection lest the land register develop into a general register of certain property rights.

As regards the effect of registration, Chinese law follows the German model in that registration – as for example under French law[55] – not only destroys good faith (thus only preventing acquisition from a person not entitled to transfer the right), but is a precondition for every acquisition, including from the owner (art. 9), and establishes a presumption of legal ownership in favor of the registered party.[56] Even so, the law makes occasional exceptions. Thus, pursuant to article 158, the parties can grant an easement without registration by private agreement.[57] However, the right is only effective against a third party dealing in good faith if it is registered.[58] By contrast, article 24 renders the disposition of ships, aircraft, and motor vehicles, which otherwise would become effective on delivery, effective against third parties dealing in good faith only on registration.[59]

A basic system of advance notice and objection, modeled on German law, serves the protection of the transferee as well as third parties.[60] Advance notices forewarn potential buyers that the owner has already sold a right in an immovable even before this actual transfer was registered. They cannot acquire the right validly as against the person protected by the advance notice. With respect to them, the acquirer thus economically obtains the owner's position before being formally entitled. This instrument allows, among others, the safe payment of the purchase price even before registration of the transfer and thus mitigates the registration system's disadvantage consisting in the delay necessary for registration. Otherwise, the acquirer might run the risk that the seller, after making the purchase contract but before registration, will validly sell

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[54] *See* Rehm, *in* Julius & Gao, *supra* note 30, at IX.2.7.

[55] *See* Code Civil [C. Civ.] art. 1138 (Fr.); Larroumet, Les Biens – Droits Réels Principaux, Vol. II 374 et seq. (5th ed. 2006); Zenati, Les biens 131 (1988).

[56] Property Rights Law, *supra* note 1, art. 9.

[57] *See id.* arts. 156-158.

[58] *Id.* art. 158.

[59] *See id.* art. 24 and 188. With respect to these exceptions Mo Zhang calls the Chinese registration system a combined civil law practice mixing elements of the German and French registration principles. *See* Zhang, *supra* note 20, at 30.

[60] *See* Property Rights Law, *supra* note 1, art. 19.

the right a second time to a second buyer unaware of the first sales contract. If the second buyer for some reason is registered first, the first buyer may have paid the purchase price (and eventually lose it in case of the seller's insolvency) without ever obtaining the right.

An objection deprives an entry on which a good faith acquisition could possibly be based, but which is challenged by a third party, of its legitimating effect in favor of the nominal rights holder. However, an objection blocks only good faith acquisitions. While the dispute on the correctness of the entry is being resolved, the true owner is not prevented from transferring his rights even though a potential buyer would be reluctant to try to acquire a right on this insecure basis. Both instruments are meant to provide a compromise between the interests of somebody who claims a right to the immovable and wants to block any good faith transaction to his disadvantage and the interests of the true rights holder, who could not dispose of his rights if the register were to be blocked completely pending resolution of the dispute.[61]

The entry of an advance notice must be applied for with the consent of the transferor on the basis of a contractual agreement.[62] After entry of the advance notice, any further legal dispositions on the immovable in question are without legal effect insofar as they disadvantage the person in whose favor the advance notice is entered.[63] However, the advance notice is only valid for three months and entry of the legal transfer must be applied for during this period.[64] Subject to a still-to-be promulgated unified national regulation of registration rights which secure the processing of applications after their receipt, the instrument of advance notice should achieve effective protection of the transferee.

A primary correction of the entry may be applied for in the event of an erroneous entry.[65] This correction will be carried out if the rights holder agrees in writing or where it can be summarily established that the entry is inaccurate.[66] This latter alternative will above all be relevant in cases of obvious mistakes in the entry, for example mistakes in names.[67] Otherwise, where the rights holder withholds consent, a claim must be

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[61] *See* Bürgerliches Gesetzbuch [BGB] [German Civil Code] Aug. 18, 1896, as amended, §§ 883, 899.
[62] Property Rights Law, *supra* note 1, art. 20.
[63] *Id.*
[64] *Id.*
[65] *Id.* art. 19.
[66] *Id.*
[67] *Id.*

filed within 15 days of entry of the objection, or its legal effect lapses (art. 19(2)).[68]

As China has no system of notaries public who, by setting up and certifying the sales contract and deed of transfer, play an important role in securing valid and legally certain transactions on land in many civil law countries, such as France, Italy, Germany or Spain, control exclusively by means of registration law takes on greater importance. Article 12 in deviation from these systems therefore imposes extensive monitoring obligations on the registering body, the qualification of which has yet to be provided.[69] Because of the lack of a notary's supervision, it is to be expected and desired that the substantive monitoring of registration requirements also takes place in cases other than transfer of ownership. The provision in any case extends far-reaching competencies to the responsible authority to investigate the substantive matter. However, contrary to some current Chinese practice, the authorities are to confine themselves to judicial review. On the one hand, therefore, the registration authority is equipped with extensive powers to more closely monitor legal relations regarding registrable real property rights so that the parties can more securely structure such transactions. This is aimed above all at addressing the significant insecurities of Chinese practice where multiple transfers of ownership and other real rights without registration are widespread. On the other hand, however, some forms of conduct by the registration authorities should be prevented to encourage increased local levies (multiple registrations, demands for expert valuations). In view of the significant differences in the quality of work of regional authorities, however, it is doubtful whether the courts will immediately implement this stringent duty after the law comes into effect.[70] The strict liability imposed on the registration authority for losses caused by mistakes pursuant to article 21, which in light of these extensive obligations is a considerable risk, should provide an incentive to implement these ambitious aims on the institutional level.[71]

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[68] *Id.*

[69] *See id.* art. 12.

[70] There is already a lively debate in China over which jurisdiction is competent for claims against the registration authority. While the claim of an injured party against an applicant using falsified material pursuant to art. 21 of the Property Rights law is clearly a civil law matter, there is doubt regarding claims against the registration authority and claims of the authority against the false applicant. In any case, all three claims must fall under the same jurisdiction so as to avoid contradictory claims and results.

[71] *See* Property Rights Law, *supra* note 1, art. 21.

IV. OWNERSHIP

A. *Forms of Ownership*

1. According to Political Criteria

The PRL preserves the distinction between state, collective, and private ownership already known in the GPCL. The individual forms of ownership are each governed by independent rules – albeit largely redundant in many respects from a foreign perspective. But, this distinction may have a politico-ideological value rather than one necessary in legal reality based on identifiable theoretical distinctions.

The category of state ownership is of particular significance in that sense, as all urban land belongs to the state. The state is additionally the owner of natural resources while state enterprises remain an important element of the Chinese economy.[72] Even if the majority of state enterprises have in the meantime been transformed into private-law legal personalities (with the state as majority shareholder) and in towns land-use rights limited in time are the basis for economic activity, state property nevertheless receives special protection in response to the already mentioned criticism of former drafts. Article 45(1) makes clear that the State Council, and thereby individual ministries (on all levels of state administration), constitute the representative body of the state in the exercise of powers regarding state property.[73]

Collective ownership, in comparison, is the basis for non-urban production. The collective, composed of all village inhabitants, is the owner of all agrarian land and collective production facilities. Arable land is exploited on the basis of takeover agreements in which plots of land are transferred to individual families for some period of time. Collective property is also afforded its own particular protection against the looming danger of the massive transformation of collective property into state property, including the possibility thereby established of creating rights of use with commercial potential. The further treatment of collective ownership is one of the most difficult issues of the further legal restructuring of the PRC. While collective ownership as a concept also serves as social security for the rural population, in practice it has already ceased to perform this function. Several tens of millions of former farmers have been deprived of land either legally (through transformation into state ownership with an appropriate compensation) or in effect. The

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[72] *Id.* arts. 47 and 48.

[73] *See id.* art. 45.

Chinese debate on social insurance law focuses upon the category of landless farmers, who require particular protection, as they neither fall under the primary urban insurance systems, nor can they rely on remaining farming subsistence. Investors leasing production facilities are and must always be aware of the uncertainty if these facilities are situated on land which legally remains collective property. It was recently reported from South China that investors, principally from Hong Kong, are purchasing considerable areas of arable land to exploit it for industrial scale agriculture – presumably under a "creative" interpretation of the existing law in (silent or express) agreement with the local authorities. In view of all these problems, the legislature has foregone a radical redefinition of collective ownership in the PRL. The political criticism preceding passage of the statute led to a symbolic strengthening of legal protection. Only court practice, however, will show whether such heightened protection will actually materialize.

With the guarantee of private ownership, the legislature protects not only the exclusive entitlement to corporeal goods, but pursuant to article 64, also the entitlement of the rights holders to their income, savings, and investments alongside the right of succession and other legal interests.[74]

2. Common Ownership

In line with the distinction found, e.g., in German law between several ownership[75] and joint ownership,[76] the law distinguishes between several forms of common ownership of rights in article 93 et seq.[77] The distinction does not lie in the theoretical concept of ownership or divergent entitlements associated with it, but in the basis of their community. While joint owners are typically bound by some reason beyond the incidence of common ownership (partnership contracts, family relationships, etc.), the co-owners are a rather accidental community. Joint owners typically hold the right for some joint purpose, whereas this is not necessarily the case with respect to common owners. This is reflected in the exact object of entitlement and thus the possibility of being able to transfer one's entitlement without the other owners'

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[74] *See id.* art. 64.

[75] So called *Bruchteilsgemeinschaften*. *See* BGB §§ 741, 1008.

[76] So called *Gesamthandsgemeinschaften*, such as civil and commercial law partnerships (*see* BGB §705; Handelsgesetzbuch [Commercial Code] §105), marital community of property (*see* BGB §1415), community of heirs (*see* BGB §2032).

[77] *See* Property Rights Law, *supra* note 1, arts. 93-105.

consent, although the difference is less clear and consequent than, e.g., in German law. There the parties have relatively little leeway on the property rights level (i.e., effective against third parties) to structure their internal relationship. Under PRL, while the joint owners are jointly entitled to the respective thing, the co-owners hold a direct entitlement to the thing, proportionate to their share.[78] This share is determined according to agreement at the level of the amount of the contribution, or if this cannot be determined, in equal shares. Several owners can dispose of their respective shares, with their fellow owners having a pre-emptive right on an equal footing.[79] Where the several entitled parties fail to determine the type of community, article 103 presumes several ownership, if they are neither in a family relationship nor otherwise closely connected.[80] The common rights holders have extensive powers to structure the internal affairs of the community. They can thus determine administrative rights, but also the power of disposition regarding common real rights (art. 96 et seq.) and liability for community obligations (art. 98).[81] Pursuant to article 99, the right to division of joint ownership can be excluded, except for cases with cause.[82] Otherwise, several ownerships can be dissolved at any time, whereas joint ownerships can only be dissolved if the basis of the community disappears or if there is cause. Losses incurred as a consequence of partition must be compensated. The joint owners are jointly (and severally) liable to third parties pursuant to article 102 unless the third party was aware of the lack of joint liability or joint creditor entitlement in the internal relationship.[83]

B. Proprietary Powers & Restrictions

Following Roman tradition, the owner is entitled, pursuant to article 39, to own movable or immovable property, use and seek profit from, and dispose of it.[84] Pursuant to article 2, he also has the right to exclude others from use of the realty, although this right is already implied in article 39 of PRL.[85] Unlike German law, therefore, the PRL does not use a general clause to describe the owner's powers, but rather

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[78] *Id.* arts. 95, 96.
[79] *Id.* art. 101.
[80] *Id.* art. 103.
[81] *Id.* arts. 96, 98.
[82] *Id.* art. 99.
[83] *Id.* art. 102.
[84] *Id.* art. 39.
[85] *See id.* arts. 2, 39.

enumerates them individually.[86] Some claim that this difference is not only one in formulation, but also in substance, because certain powers (such as the right to change, damage or destroy the thing) naturally covered by the general clause cannot be subsumed under the aspects enumerated in article 39.[87] Apart from the resulting differences being of probable rather than theoretical importance, however, such an intention can neither be inferred from legislative history nor is there any substantive reason why the Chinese legislator should have desired to limit the owner's prerogatives in this way. His resorting to an enumeration is more likely to have had "pedagogical" reasons – avoiding a lack of exactness and the resulting uncertainty necessarily associated with general clauses.

Not only for a socialist market economy, as the PRC defines itself,[88] it is self-evident that powers of ownership are subject to restrictions. Article 7 obligates the owner of a thing to have regard not only to legal provisions and the rights of others but also to social morality and general well-being.[89] The actual content and consequences of these restrictions is difficult to predict. A somewhat clearer definition may result from the to be expected "judicial interpretations" of the Supreme People's Court, even though the Chinese judiciary will undoubtedly try to preserve a certain flexibility and discretion in this respect.[90] In light of the property-friendly tendency of the law, and also the political acceptance achieved in the meantime of private property, it cannot,

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[86] *See* BGB § 903.

[87] Q. Ding & W. Jäckle, *Das neue chinesische Sachenrechtsgesetz*, 53 Recht der Internationalen Wirtschaft (RIW) 807, 809 (2007).

[88] *See* Property Rights Law, *supra* note 1, arts. 1, 3.

[89] *Id.* art. 7.

[90] Art. 33 of Organic Law of the People's Court confers the powers of making binding interpretations of laws to the Supreme People's Court. *See* 中华人民共和国人民法院组织法 [Organic Law of the People's Court] art. 33 (1983) (P.R.C.). These interpretations are a widespread and in practice important means of legal interpretation. In some cases, the "judicial interpretations" are wider in scope than the wording of the law; a further particular feature is the duty of lower courts to submit questions of interpretation in cases of disputed claims. Pursuant to art. 11 of Organic Law of the People's Court, central bodies are established within the courts to improve the quality of judgments – all disputed claims are to be submitted. Additionally, in practice (without explicit legal basis) disputed questions are also to be submitted to higher courts for "adjudication," or rather "referral." This legal practice based on the goal of achieving as homogeneous a case law as possible has however been criticized in recent Chinese jurisprudence, e.g. 高福生, 法院判案何以要"请示"上级？ [Gao Fu Sheng, *Why must the courts seek guidance from higher courts in judgments*] at http://www.jxnews.com.cn/jxcomment/system/2006/05/19/002259495.shtml (last visited May 5, 2009).

however, be expected that the property rights afforded by article 4 will be entirely withdrawn or invalidated on this basis. Even substantial inroads into the proprietorial powers are rather unlikely, at least on a systematic rather than case-by-case basis.

C. *Transfer of Ownership*

1. Publicity Act

As only the state or, alternatively, the agricultural collective can take title to land, in practice the transfer of immovables is effectively confined to apartments and houses, to which the previously mentioned registration requirements of article 9 apply.[91] Pursuant to article 23, the transfer of ownership of movables requires delivery, which may also be effected under informal private agreement (absent other prevailing regulations this applies correspondingly to the granting and transfer of rights to movables).[92] Ownership of certain registrable movables such as ships, aircrafts or motor vehicles can only be objected to by bona fide third parties if actually registered.[93] Pursuant to article 26, a transfer of ownership is also possible by means of assigning a claim to delivery[94] and pursuant to article 27 by creating constructive possession of movables by the acquirer based on agreement.[95]

2. Titles

Despite its orientation towards German law, the Chinese legislature has not adopted the separation and abstraction principles[96] because they are considered to be overly complex and removed from

[91] *See* Property Rights Law, *supra* note 1, art. 9.

[92] *See id.* art. 23; as a model, *see* BGB § 929.

[93] Property Rights Law, *supra* note 1, art. 24.

[94] *Id.* art. 26. This provision follows the principle of BGB § 931.

[95] *See id.* art. 27; *see also* BGB § 930.

[96] Under German law, the agreement to transfer ownership ("real agreement") is a separate contract from the obligatory contract under which one party is obliged to transfer ownership, such as a sales or gift contract. Therefore, the real agreement may be valid, whereas the obligatory contract is not. In such case ownership is validly transferred (which may be important for insolvency law purposes), but the transferor has a claim of restitution. *See* BGB § 812. The principles of separation and abstraction (apart from their theoretical value) are primarily meant to insulate a third party acquiring a thing from its initial buyer against defects in the obligatory contract. Despite the sales contract possibly being void, the third party can validly acquire the right from the buyer if only the real agreement with the seller is valid. In other legal systems, this function is partially achieved by the rules on good faith acquisition, which, however, also exist in German law.

reality.[97] Therefore it is not necessary to distinguish a "real agreement"[98] from an obligatory contract. Nevertheless, the PRL makes no express provision of the necessity of an acquisition of title. It is, however, self-evident that the delivery itself does not create or transfer a property right because delivery of a thing is also made under lease and gratuitous loan contracts where ownership is not transferred. It is somewhat unclear under what conditions delivery would lead to the acquisition of ownership. One will have to demand an instrument aiming at the transfer of ownership such as a sales contract or gift as title of ownership. This also corresponds to Chinese practice, in that the sales contract and gift are defined as contracts in which the seller or donor "transfers" the property (and does not merely undertake to do so).[99] To this extent, the requirements for acquisition of ownership ("title" in the form of a sales contract, the "mode" being delivery) correspond to those in Austria or the Netherlands.[100]

3. Joint Transfer of Ownership in Apartments and Land-use Rights

Ownership of land is the exclusive preserve of the state or the collective. Accordingly, there is no requirement under Chinese law for a link between ownership of land and buildings, and this was never adopted when land ownership existed in China.[101] However, art. 146 of PRL provides that the transfer of the right to exploit construction land automatically triggers transfer of the buildings connected to the relevant piece of land.[102] Correspondingly, if the buildings are transferred, the right to construction land will also be transferred.[103] This regulation is problematic in that the equation between buildings and the right to construction land can at least theoretically lead to contradictions in acts of transfer: in cases of differing official competences of authorities, two purchasers could apply for parallel transfers. Here, clear rules on

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[97] *See*, e.g., Ding & Jäckle, *supra* note 87, at 811.

[98] *See supra* note 96.

[99] *See* Contract Law, *supra* note 8, arts. 130, 185.

[100] *See* Allgemeines Bürgerliches Gesetzbuch [ABGB] [Civil Code] Justizgesetzsammlung [JGS] No. 946/1816, as amended, §424; Burgerlijk Wetboek [Civil Code] art. 3:84, 3: 90.

[101] *See* Thümmel, *Bodenordnung und Immobilienrecht in der VR China (1995)*, at 52; Baumann, *supra* note 10, at 104. In contrast, such a link is usually considered to exist under German law. *See* BGB §§ 94, 946.

[102] Property Rights Law, *supra* note 1, art. 146.

[103] *Id.* art. 14.

registration procedure are needed to eliminate potential conflicts resulting from "parallel entries."[104]

On the other hand, there is no express link in the PRL between agricultural land and the ownership of farmers' residential buildings. This allows only the conclusion that property in a residential building, unlike the right to agricultural land, is transferable. This leads to considerable problems in practice since many town dwellers buy houses in the country to use as weekend houses and villages also offer buildings cheaply in order, for example, to attract better teachers. Ownership of houses can be validly acquired, whereas the right to the agricultural land is not transferable. However, based on the concept of collective property, which includes social provision for the collective members, such a split in ownership should not be possible, at least to any large extent. Continuous ownership rights in such houses are therefore threatened by the invalid transfer of rights in agricultural land.

4. Entitlement of the Transferor and Acquisition in Good Faith

Alongside the owner's power of disposal under article 39,[105] article 106 requires the transferor to have been the right holder for the right transfer to be valid.[106] This rule provides that the owner has a right of recovery against the transferee if a non-entitled party disposes of the thing.[107] Acquisition in good faith is possible if the cumulative requirements of article 106(1-3) are fulfilled.[108] Alongside good faith and the acquisition of the thing at a "reasonable" price, the law requires the acquirer to have fulfilled the respective applicable publicity requirements (delivery or registration).[109] It is easily predictable that this regulation is likely to create a number of difficult issues. Up to now it is only clear that the owner has a compensatory claim against the transferor who lacked the power of transfer.

One problem is that the law fails to define good faith.110 The wording of Article 108, according to which the rights to a movable are

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[104] On the parallel problem of enforcing mortgages on buildings and the rights of use to building land, *see id.* art. 182; *see also* Baumann, *supra* note 10, at 126 et seq.

[105] *See* Property Rights Law, *supra* note 1, art. 39.

[106] *See id.* art. 106.

[107] *Id.*

[108] *See id.*

[109] *See id.*

[110] On the definition of good faith *see generally* Krauß, *Gutgläubiger Erwerb gem. §§ 106 f. SachenRG der Volksrepublik China,* Kanzleiter/Kössinger/Grziwotz (eds.), Festschrift für

extinguished by the movable's acquisition in good faith, provides an indication of how this term is to be construed, though.[111] This legal consequence presupposes that the acquirer neither had, nor could have had, knowledge of the right. To avoid the contradictory result that the right could be acquired in good faith without the rights burdening the ownership being extinguished,[112] this standard must be carried over into article 106(1). Thus "good faith" is to be understood uniformly as the absence of at least negligent lack of knowledge of the right in question.

This understanding, however, raises a series of ensuing problems. The law thereby requires a unified standard of good faith for both movables and immovables. To German, as to most other civil law systems, jurists' distinct standards of good faith with respect to immovables[113] and movables[114] are indispensable in order to reflect the comparatively stronger legal appearance created by registration than by mere possession. Even so, this obstacle to interpretation can be overcome in that the standard of negligence with respect to the acquisition of an immovable requires a higher degree of breach of duty in view of the presumption of the accuracy of the entry pursuant to article 17 than in the case of the acquisition of a movable. An unlimited duty to check the transferor's rights would undermine the purpose of the register to save the acquirer costly and time-consuming investigations.[115] Thus – for negligence with respect to immovables – there would have to be at least highly concrete indications that the actual legal position did not correspond to the entry. To the extent that the legislature has not made itself clear, it nevertheless follows from the entry requirement of an acquisition (which necessitates a corresponding pre-entry of the transferor), that while it is not essential for the acquirer to examine the register, it is at least advisable to do so.

However, this raises a further issue of how the concept of negligence is to be interpreted with regard to movables. Should there

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Wolfsteiner (2008), 85, 91, who assumes that only the buyer's positive knowledge of , but not his negligent failure to realize, the seller's lack of ownership destroys his good faith.

[111] *See* Property Rights Law, *supra* note 1, art. 108. According to the express wording of art. 108, this applies only to the transfer of movables; for the extension to immovables. Krauß, *see supra* note 110, however, sees a contradiction between the general standard of good faith (in his view positive knowledge) and art. 108 (negligence).

[112] In fact, it is even unclear whether art. 108 does not refer to ownership as a right as well. Under this – however because of the systematic position somewhat unlikely – construction of the law, there would be no contradiction at all.

[113] *See* BGB § 892(1) (providing that only actual knowledge creates liability).

[114] *See id.* § 932(2) (providing that gross negligence also constitutes bad faith).

[115] *See* Krauß, *supra* note 110, at 91.

always be an obligation to check the transferor's entitlement? This would also be a significant burden on the legal transaction, even if the problem is mitigated under Chinese law by the fact that the circle of registrable things is drawn significantly wider (including productive plant and machinery, etc.), so that in practice the acquisition of movables in good faith without use of the register will play a more limited role. Nevertheless, in order to avoid inappropriate difficulties also in the acquisition of movables, suspicious facts will be required in order not to unduly strain the acquirer's obligation. Even so, possession creates a certain, albeit relatively weak, appearance of entitlement to the benefit of the possessor, despite the widespread use of leasing and rental agreements in China.

It is also unclear at which point of time good faith must be present. As good faith structurally substitutes for the seller's right of disposal, which generally must exist at the moment of transfer of ownership when all acquisition requirements are fulfilled, it seems to follow that good faith must also exist at this moment. This is unproblematic for movables. However, there is no provision comparable to § 892(2) BGB,[116] so that, strictly speaking, good faith would also have to be present at registration of the immovable, without the acquirer having influence on how long the registration process takes. The delay between the request for registration and the actual registration – which is beyond the applicant's sphere of control – should in no way cause a disadvantage for him. Here it is to be hoped that appropriate regulations will be created in the registration laws or in the judicial interpretation of the Supreme Court.

The question of the good faith requirement leads to a further problem. Article 106(2) requires the payment of a "reasonable" price.[117] At first sight – as discussed during the consultation process – this requirement could to an extent be understood as but one example for defining good faith. The acquirer should be put on notice regarding the entitlement of the seller when the price is unusually low. In view of its systematic position as an independent factual requirement of good faith alongside good faith and registration or delivery, one will not have to understand this as only one, possibly rebuttable, criterion in the context of the negligence test. Rather, an unreasonably low price always excludes acquisition in good faith. The legal-political decision underlying this rule

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[116] *See* BGB § 892(2). According to this provision, it is sufficient for good faith acquisition of rights in immovables that the acquirer was in good faith at the time of making the application of registration instead of the actual registration as the last requirement of acquisition. The rationale of this provision is to protect the acquirer against any disadvantages resulting from the duration of the registration process, which inevitably takes time.

[117] *See* Property Rights Law, *supra* note 1, art. 106(2).

is doubtful, in that a lower selling price is not always a certain indication of a lack of entitlement of the seller. In view of the, in this respect, clear systematic structure of the law, this interpretation is, however, unavoidable. This requirement might also be justified by the legislator's assumption that an acquisition which is at least partially free of charge and thus does not require any or a full-fledged "sacrifice" on the buyer's side should not receive the same protection as a transaction in which he pays full consideration.[118] Since the Chinese legislator does not confer the same level of legal certainty on contracts free of charge,[119] such interpretation of reasonableness does not seem beyond reason.

However, on the basis of these, what could be considered imprecise standards of "reasonableness," it is difficult to predict how the courts will draw, if any, the quantitative thresholds in individual cases. Even if they are guided by market prices, it remains questionable which legal standard applies when there is either no such price, or a price which is difficult to ascertain or subject to significant fluctuations. Incidentally, should the market price also be the standard for impulse buyers who are not familiar with the market? Will account be taken of particular subjective circumstances of the seller either communicated to the buyer or otherwise known of, such as temporary liquidity difficulties putting the buyer into a stronger bargaining position? Also, the degree of divergences could be a matter of controversy. Will fixed percentages for tolerable divergences be indicated? The requirement of reasonableness of price must, despite all the uncertainty associated with it, be accepted as an inevitable concession to those who did not want to allow good faith acquisition in the first place because they consider it to be contrary to Chinese tradition. Arguably it might be best explained with the above-mentioned legislative purpose of weakening legal transactions which might be considered to be (semi-)gifts.[120]

All the same, the legislature has minimized further difficulties

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[118] A similar legislative policy underlies the relevant provisions in BGB, *see* BGB §§ 816(1), (2), 822, and the requirement of consideration in common law contract systems.

[119] Pursuant to Contract Law, art. 186(1), a gift contract is generally revocable before performance and may be revoked afterwards in specific cases or its performance refused in cases of economic duress. *See* Contract Law, *supra* note 8, arts. 186(1), 192. It is therefore much easier to withdraw from a gift contract than, e.g., from a sales contract. The contract free of charge, although generally enforceable, thus has less binding force.

[120] This could mean, for example, that even a nominal price is "reasonable" if the buyer has no reason to believe that the low price might indicate the lack of the seller's right of disposal. For example, a municipality may sell a right in land in order to prompt the buyer to invest in the municipality. Even though the municipality does not receive a market price, the transaction might still be in its interest and the low price is therefore reasonable.

with the elimination of the fourth criterion, provided for in the preparatory drafts, for acquisition in good faith – a valid acquisition agreement. Pursuant to article 51 of Contract Law,[121] the contract concluded by an unentitled person only becomes effective with the confirmation by the rights holder or acquisition of the title by the transferor. Apart from the fact that this provision is already doubtful from a contract law perspective, in that it deprives the buyer of possible compensatory claims for nonperformance,[122] it also entirely excludes potential acquisition in good faith. Any contract which potentially constitutes a "title" would be invalid.[123] At least with the introduction of the regulation of acquisition in good faith in article 106,[124] in order for article 51 of Contract Law to make sense, it would have to be interpreted narrowly. This means that the contract is exceptionally valid if the requirements of acquisition in good faith are fulfilled. Otherwise good faith acquisition would be structurally impossible. That cannot have been the legislature's intention when passing article 106 et seq. Doctrinally, this unavoidable result could be equated with the acquisition of rights of disposal after the actual transaction (which leads to a valid contract according to article 51 of Contract Law), which in its property rights law effect corresponds to acquisition in good faith. However, this judicially formalistic analogy in fact reacts only to the indisputably desirable result to not in principle exclude acquisition in good faith and does not carry much argumentative weight itself, besides allowing a constructive way of overcoming article 51 of Contract Law. Had the legislature on the other hand laid down the requirement of an effective contract in article 106(1) and 106(2), the idea of article 51 Contract Law would have been indirectly confirmed and a corrective interpretation would have been entirely impossible. One must therefore welcome the discarding of this requirement of an effective contract during the drafting process.

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[121] Art. 51 provides that where a piece of property belonging to another person was disposed of by a person without the power to do so, such contract is nevertheless valid once the person with the power over its disposal has ratified the contract, or if the person lacking the power to dispose of it when the contract was concluded has subsequently acquired such power. Under the Contract Law a seller can only convey what he/she owns. *See* Contract Law, *supra* note 8, arts. 51, 132.

[122] *See* also Krauß, *supra* note 110, at 90, where the author rightly argues that the claim for breach of contract under Contract Law, art. 107, because of the invalidity of the contract could never exist if art. 51 were strictly interpreted.

[123] For the "title requirement," *see* the text accompanying notes 96-100.

[124] *See* Property Rights Law, *supra* note 1, art. 106(1).

5. Special Rules for Lost Property

Article 107 of PRL provides a special rule for lost property. Even though the law expressly does not refer to stolen things, it should be interpreted to also include them a fortiori.[125] The protection of the owner against theft for systematic reasons should not be exclusively governed by criminal law.[126] Under this Article, the owner has a claim for surrender of the lost property. To the extent it was transferred legally, the owner can either demand the surrender of proceeds of sale or delivery of the thing within two years from his knowledge or negligent (constructive) knowledge of the identity of the acquirer.[127]

In view of these requirements and Chinese discussion of the still controversial question of the limitation period for the claim to surrender – the two-years from gaining knowledge limitation period of article 135 of GPCL[128] is widely seen as too short – the wording of the law must be understood as a strengthening of this limitation period rather than a form of acquisitive prescription.[129] Similar to § 935(2) BGB, the legal protection of the acquirer is strengthened if he purchased the property at an auction or from a person acting in the course of a legitimate trade. According to article 107 sentence 3, the acquirer is obliged to surrender the property to the owner only for the return of the purchase price he paid. For the owner, he can demand corresponding payment from the seller (art. 107 s. 3). In practice, the result regarding lost property largely corresponds to German law, as the two-year limitation period is comparatively short but only begins with the knowledge of the claimant. However, the difference lies in the fact that according to the PRL it is relevant whether the thing was acquired from an auction sale or from a legitimate trader.

It is noticeable that article 108 provides for unburdened acquisition in good faith only for movables.[130] From a methodological point of view, this explicit ruling is difficult to circumvent by means of an

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[125] *See* Property Rights Law, *supra* note 1, art. 107.

[126] Arguably, the protection of the owner against theft is not covered by art. 106, but by the general provision of art. 34. This would have the consequence of the owner not being required to compensate the good faith acquirer for the purchase price under art. 107.

[127] *See* Property Rights Law, *supra* note 1, art. 107.

[128] General Principles of Civil Law, *see supra* note 6.

[129] Acquisitive prescription is known in a number of legal systems in the Roman law tradition: for French law, *see* arts. 2219, 2265 of French Civil Code (Code Civil Français); for Spanish law *see* art. 1940 of Spanish Civil Code (Código Civil), for Italian law *see* art. 1158 of Italian Civil Code (Codice Civile).

[130] *See* Property Rights Law, *supra* note 1, art. 108.

analogy, even though this seems necessary in an *a fortiori* conclusion. It is hardly justifiable that, although the ownership of the property can be acquired in good faith, it cannot be acquired unburdened in good faith. The courts seem to share these doubts. The Second Beijing People's Court at second instance has already declared, in an April 29, 2007 decision, the legal idea that article 108 is applicable to immovables as well.[131] This is remarkable on two grounds. First, the court applied the new PRL even before it came into force. The court consciously did not rely on the direct application of article 108 of PRL, but rather applied the "legal concept of acquisition in good faith" expressed in the PRL, and made clear that this concept, expressed in article 108, applies equally to the transfer of both movables and immovables.[132] Second, already shortly after the enactment of the PRL, but before its entering into force, technical errors of the legislature were corrected. As this is the first court judgment on the PRL, the interpretation of the provisions in question must have rested on a course of action coordinated between the judiciary and the legislature.

V. RESIDENTIAL PROPERTY

The regulations of the PRL on residential property are quite new for Chinese law. In the past 15 years, Chinese towns have undergone a thorough transformation. Traditional buildings disappeared; modern administrative and office buildings as well as a multitude of residential estates rose up. The building of these estates was largely initiated by investors who acquired rights of land use to a particular area in order to restructure it. From a practical point of view, these development companies take over the demolition and compensation of any previous residents. Public utilities were built (in particular, lines and pipelines, and at times district heating plants); new apartment blocks and also communal institutions were constructed (underground garages, kindergartens, playgrounds, parades of shops). By means of new buildings and also privatization of old buildings above all in the 1990s, it is today estimated

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[131] *See* 陈俊杰，蒋春燕，妻瞒夫私自将房屋出售 丈夫起起诉被驳 [Chen Junjie, Jiang Chunyan, *Wife sold house without notice to husband; husband sued but case dismissed*], 新京报 (NEW BEIJING DAILY), April 29, 2007, *available at* http://bj.house.sina.com.cn/news/2007-04-29/0808188405.html (last visited May 5, 2009).

[132] *See* Property Rights Law, *supra* note 1, art. 108.

that 80% of the urban population of China live in owner-occupier apartments.[133]

Up to now contracts with identical wording entered into between the development company and the respective purchaser provided the legal basis for residential property. These contracts pass on to the development company conditions created by the local administration in the public offers of land-use rights or their transfer. Ownership of the apartment was transferred to the purchaser, along with a partial right of use to the land, as well as a possible joint ownership of communally used facilities.

The corresponding regulations of the PRL were tensely anticipated by the Chinese middle classes, as they regulate a number of contentious issues and also unify the law of residential property.[134] To this extent, from a conceptual point of view, Chinese law tends to follow the Hong Kong or (South) Korea models, which equally recognize individual ownership of the transferred apartments and joint ownership of the communal areas, while admitting majority decisions of the owners to a far broader degree than at least that of applicable German law up to July 1, 2007.[135]

The purchaser of an apartment pursuant to article 70 is the individual owner of the separately acquired parts of the building.[136] Communally used parts remain in joint ownership. Admittedly, the individual ownership is subject to the exclusive rights of disposal of the apartment owner. However, he can only exercise these within the scope of the legal interests of other landlords (art. 71).[137] Article 73 provides an answer to a previously highly contentious question in China: all private paths, green spaces, and other publicly used infrastructure facilities, as well as areas used for the property administration, are now considered to be in the joint ownership of the landlords.[138] Development companies in the past had often claimed that particular green areas were building grounds even without the express planning of the development company.

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[133] *See* East Asia Institute of Ludwigshafen Fachhochschule (Ed.), *China im Schaubild (5)*, Xiu Cai 90, 22.02.07, at 14 or exhibition picture (Schaubild) Nr. 129 with reference to "The Industrial Map of China," Social Sciences Academic Press (China), Beijing 12/06.

[134] Property Rights Law, arts. 70 – 83.

[135] A most important element of the reform of the German Residential Property Law was the suspension of the mandatory unanimity requirement for decisions of the residential owners' commune. *See* Wohnungseigentumsgesetz, *available at* http://bundesrecht.juris.de/bundesrecht/woeigg/gesamt.pdf (last visited May 5, 2009).

[136] *See* Property Rights Law, *supra* note 1, art. 70.

[137] *See id.* art. 71.

[138] *See id.* art. 73.

In the future, such areas are to be clearly labeled as non-public areas for the exclusive use of the development company.

Three different bodies under the law can administer an apartment estate. An apartment administration company might carry out daily administration of the estate pursuant to article 81.[139] That is already the rule at least for urban estates. The law clearly provides that the apartment owners may replace administration companies chosen by the development company and often connected to them (and, in practice, in part charging for their services at levels above market price).[140]

The apartment owners may form an owners' general meeting and a committee. Decisions of the general meeting and of the committee are binding upon all owners. The owners' general meeting is responsible for a number of significant questions (among others, administrative agreements, election of the owners' committee, and appointment of the building administration) and reaches decisions respectively with a majority of residents and, to the extent necessary, with the corresponding two thirds majority (for example for the raising and application of maintenance funds, rebuilding, and new construction). The owners' committee can at the same time be seen as a business management of the apartment estate, which has transferred or entrusted daily tasks to external administration. The general meeting thus takes over the tasks of a classical supervisory body.[141] Although in fact property in a single apartment exists, the Chinese concept of residential property thereby contains certain corporation law elements. Because of the size of Chinese residential estates, the protection of minorities, that is protection of individual interests of the respective owner, are not emphasized strongly. In a residential estate of possibly several thousand owners it is unavoidable that individual owners cannot have a veto right.

Nowhere near all questions of residential property in the Chinese Cities are solved with the PRL. Discussions of the ownership of newly created parking spaces will continue.[142] The functioning of general meetings and committee leads to many detailed questions.[143] However, it is to be hoped that the courts will be able to resolve the most urgent

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[139] *See id.* art. 81.

[140] *See id.* art. 81(2).

[141] *See id.* art. 76.

[142] For instance, art. 74 of PRL states, "The parking lots occupying the co-owned roads of the owners or located at other sites shall be jointly owned by the owners." However, the law fails to define "co-owned roads" or "other sites."

[143] Randolph discusses some of these problems in detail; in trainings of judges many questions come up relating to specific issues of residential property due to cases being tried in urban lower courts. *See* Randolph, *The New Chinese Basic Law of Property: A Real Estate Practitioner's Perspective*, 21 Probate & Property Magazine 14 (2007).

problems and thus provide a basis for a sound practical residential property law.[144]

VI. RIGHTS OF USE

A. Usufruct

The PRL recognizes a usufructuary in movables as the only real right to use. This right can also exist in land. Pursuant to articles 117 and article 120 sentence 2, the possessor has the right to possession, use, and proceeds to the exclusion of the owner. In this way, private persons can acquire such rights (normally in return for consideration, article 119) as prospecting (minerals), drawing water or fishing, as well as in natural resources found in state property or agricultural collective ownership (article 118). In cases of expropriation, the holder of the usufructuary is to be compensated in accordance with general provisions.

The rights of use to land as well as the easements presented in detail in the following must be understood from the theoretical point of view as types of usufruct and are regulated in a separate chapter on rights of use. The legislature deliberately avoided theoretical disputes on the legal nature in particular of land-use rights, which at least in commercial practice do not function as something of less value than ownership, but rather substitute for it.

B. Particular Rights of Use in Land

1. Basic Overview of Previous Legal Practice

Starting from the constitutional principle[145] that the state enjoys

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[144] It needs to be remarked that the new Chinese middle class invested even without detailed regulations. Although apartments now are no longer bought at apartment-fairs with full down payment before construction begins, a general willingness to take risks does exist in China. One has to wonder if, as Randolph argues, only the next housing crisis will prove the effectiveness of the regulations in the Property Rights Law on residential property. *See id.*

[145] Constitution *supra* note 31 art. 10 (2004); interestingly, private property in land was legally abolished only by this 1982 Constitution provision. Prior to such abolishment, it had been considered whether to nationalize land belonging to farmers. This plan failed previously because it could not be conveyed to the farmers "psychologically." The success of the Chinese Communist Party rests on the farmers who were promised the land they till. A general nationalization was, however, deemed necessary as land users made undue demands on the state with respect to land urgently required for building and restructuring, *see* Münzel,

ownership in real estate in towns and the collective does so in rural areas, in the last 25 years of economic liberalization, more or less commercially realizable rights to the use of land were developed and legally regulated. The legal basis for these rights separable from ownership is an amendment to the Constitution in force since 1998[146] as well as detailed regulations in the Law on administration of land dated December 29, 1998.[147] For legal trading in immovables including the corresponding rights of use, detailed regulations were enacted in the Urban Real Estate Law of 1994.[148] On the basis of these regulations, land-use rights of state enterprises on the one hand were transferred to the entities operating them.[149] On the other hand, rights of use for residential purposes were transferred to development companies, which transformed Chinese towns to a significant extent and continue to do so. Further, in the course of extensive privatization in the late 1990s, apartments held as public property were transferred to the residents of these "old properties." These were mostly buildings constructed by state enterprises or communes in the 1980s and 1990s. Apartments in buildings from the 1950s and 1960s were privatized to a limited extent, as communal kitchens and sanitary facilities rendered an attractive splitting into individual properties difficult. Equally, the law recognizes a de facto right of use to old owners in the land belonging to them (this until legal expropriation through the 1982 Constitution) and to privately used land for private houses.[150]

Since the commencement of the economic reform in 1978, a

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supra note 6, at 1 n. 19 citing Xiao Weiyun, *The Birth of the Current Constitution of Our Nation* 43 (1986).

[146] Art. 10(4) of the 1982 Constitution was added thereto on Apr. 12, 1988 ("Land use rights may be transferred pursuant to the legal provisions."), *see* Baumann, *supra* note 10, at 121.

[147] Land Administration Law *supra* note 38; the final sentence of art. 2 establishes the possibility of a system of the remunerated use of state land. Art. 9 establishes the possibility of land use rights to land under collective ownership. For the details of the legal introduction of land use rights as well as their practical implementation, *see* Thümmel, *supra* note 101.

[148] Urban Real Estate Law *supra* note 39.

[149] This is in the form of a so-called unremunerated allocation, *see* arts. 22, 23, 39 Urban Real Estate Law *supra* note 39.

[150] *See* Land Administration Law, *supra* note 38, art. 58(1) no. 2 which states that compensation needs to be paid by adjustments in land use necessitated by the reconstruction of old urban districts; 城市房地产转让管理规定 [Provisions on the Administration of Urban Real Estate Transfer] (Aug. 7, 1995, amended Aug. 15, 2001) art.12 stipulates preconditions for a transfer of allocated land use rights; this effective right of use had been recognized in practice, it was however a more limited protection against compensation. The rationale for the differentiation is that only a right of use achieved through a legal act (by public tender, unremunerated transfer or under privatisations in the late 1990s) should be a protected right of use; *see* remarks in Münzel, *Chinas Recht 16.03.07/1 comment 1, available at* http://lehrstuhl.jura.uni-goettingen.de/chinarecht/020829.htm (last visited May 5, 2009).

system of "the right to take over land" was initially tried out in rural areas and later introduced as a general principle. The land, the property assets of collective economic organizations, as well as all buildings, are the property of the (village) collectives and are operated and administered by them.[151] From this "collective" transfer contracts were concluded for a limited time with individual members of the collective or their families. This system of "private responsibilities" was the driving force of Chinese development in the initial phase of the opening up policy, as the private incentives thereby created (after the surrender of a certain production quota the crops could be sold freely on the market) served to increase production. A number of legal disputes regarding the duration of the takeover contracts, the level of takeover fees, rights of withdrawal including an ensuing redistribution among the members of the collective, led to detailed regulations in the law of the People's Republic of China on the takeover of village land, dated August 29, 2002.[152] Even if this law did not address all the necessary issues, it helped clarify an important area of practice.

Diverging from the regulations on agricultural (production) land, special regulations were enacted for the domestic plots of farmers.[153] In contrast to the rights of takeover to arable land, this right is unlimited in time, although strictly bound to membership in the village collective and permitted housing size.

2. Categorization of Rights of Use in the Property Rights Law

(1) Overview

The Property Rights Law distinguishes between three forms of land use:

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[151] General Principles of Civil Law, *supra* note 6, art. 74.

[152] 農村土地承包法 [Law of the People's Republic of China on the Takeover of Village Land], (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 29, 2002, effective Mar. 1, 2003) (P.R.C.) [hereinafter *Village Land Takeover Law*], *see* remarks in Münzel, *Chinas Recht 29.8.02/1*, *available at* http://lehrstuhl.jura.uni-goettingen.de/chinarecht/020829.htm (last visited May 5, 2009). Münzel explains in detail the problems of farmers in a hitherto existing system of transfer agreements subject only to rudimentary regulations, who in practice often do not have rights against the more powerful governing collective (often the village elder) and thus had to accept provisional changes and withdrawal from transfer agreements.

[153] *See* Land Administration Law, *supra* note 38, art. 62.

- the "right to exploitation of acquired land," art. 124 et seq.;
- the "right to use of building land," art. 135 et seq.;
- the "right to the use of farming domestic plots," art. 152.

Thereby, the law operates within the categories of the previous laws, without distinguishing between the reasons for the transfer of rights of use (such as acquisition through a procurement procedure, unremunerated transfer or sites of buildings in owner occupation). During this entire legislative process, also in view of the clear wording of the constitutional law, regulations on the introduction of private property in land were not seriously pursued in the domestic Chinese debate. However, longer time periods were promoted for the transfer as well as further reaching claims to prolongation without renewed fees.

(2) Land Rights to the exploitation of acquired land

The recognition of the right to exploit acquired land as a type of usufructuary right should have settled the Chinese dispute on the legal nature of this right. This is particularly true given the fact that the time limits for transfer were initially not regulated by law but rather through political directives. The transfer contracts were partly seen as purely *in personam* contracts, which qualification in turn was considered to be a reason for the weak position of the farmers in the assertion of rights arising from takeover contracts.[154] As the right of takeover was again regulated as a usufructuary right, it now has the status of an absolute property right enforceable pursuant to article 2(2).

The commercial organizations of the rural collectives operate their land pursuant to article 124(1) through individual persons/families or collective enterprises. This system habitually characterized as dual or two-tiered is the basis for economic activity in the villages and applies to both the land belonging to the collectives and land in state ownership but operated by collectives (art. 124 (2)). The takeover right entitles one to possession, use, and collection of proceeds (art. 125). In order to increase the commercial viability of the takeover right and to be able to allow larger areas to be exploited agriculturally, article 128 clearly provides that the right of transfer is transferable under the provisions of the law on the contracting of rural land. However, a complete transfer is only possible under the additional requirement of article 41 Law on the Take-over of

[154] Baumann, *supra* note 10, at 130 with reference to Wang Liming, *Study on Realty Law supra* note 10, at 457; Liang Huixing, *Proposed Draft Law for the Chinese Real Property Rights Law*, *supra* note 10, at 510.

Rural Land, namely, the rights holder possessing a sufficient non-agricultural source of income and the collective giving its consent. This serves to legally recognize the function of transferred collective property. As outside the towns up to now only rudimentary systems of social insurance existed, the collective and in practice rights to use of land transferred to the respective family serve as social security. This also applies to farmers who have migrated to the towns as so-called itinerant laborers. They shall only be able to permanently transfer their claims to transferred land after acquiring a sufficient source of income in the towns.

In practice, the strategy of (*in personam*) rental of collective land circumvents this prohibition of a complete transfer of takeover rights. Generally, such rentals are possible through the collective itself and through the individual transferee of the takeover right. They are practiced to a large extent to the benefit of urban dwellers and urban enterprises. While permitted only for agricultural purposes, these rentals are in practice also used to circumvent this substantive limitation. The Chinese central government at least tried to create the impression of energetically resisting such practices.[155]

The right of transfer was consciously made commercially viable only to a limited extent in the Property Rights Law. This (pre-existing) limitation of commercial viability must be seen against the background of the desire to provide social security for farming families by transfers of right in land and the widespread circumvention in practice of these legal limitations.

Article 130 also makes clear that during the contractual period of validity the acquired land can neither be altered nor expropriated. This corresponds to the previous legal position.[156] It is, however, characteristic that renewed clarification was once again seen to be necessary due to (at least in the past) frequently divergent practice.

(3) Right to the Use of Land for Construction

The right to the use of land for construction is the basis for all non-agricultural or forestry economic activity and can only be founded on state property (i.e., not on collective property). Article 43 expressly states that arable land is under particular protection. The provision strictly

[155] The possibility of such contracts derives from art. 32 of Village Land Takeover Law *supra* note 152; *see* Münzel, *supra* note 152, comment 5 on a communication of the Central Committee of the Party in the circulation of the Takeover-Land Use Rights of Farmers (Dec. 30, 2001) as well as a detailed bulletin of the Agricultural Ministry dated May 28, 2002.

[156] Village Land Takeover Law, *supra* note 152, art 26 - 27.

limits the transformation of arable land into land for construction. This particular regulation of collective property is a reaction to the widespread practice of villages transforming agricultural land for purposes of industrialization or in the areas around towns transforming agricultural land for building apartments. This policy rests on the fear of loss of land used for agricultural production.[157] In addition, this regulation provides a social compensation for farmers who have lost their agricultural income, by means of providing alternative employment opportunities or payment of compensation calculated according to the previous proceeds from their land.[158]

The right to construction land for buildings is structured in a fully commercially viable manner. Pursuant to article 143 it can be transferred and used as credit collateral. In the future, these commercial land-use rights should only be transferred through transparent and competitive procedures. Here the law expressly provides for invitations to tender, auction or other forms of public competition as possibilities of commercialization (art. 137 (2)). The former widespread practice of (no cost) allotment of land use rights is to be severely curtailed (art. 137(3)). Allotments were the basis for the work of all state enterprises and public institutions. Investments in many (partly) insolvent enterprises were particularly attractive because of these transferred rights of use in land. In addition, municipalities and towns also consciously used the allotment of rights of land use as a means of attracting (foreign) investors. The Property Rights Law, however, will in the future not prevent making all forms of commercial rights of use available at no cost. It is to be expected that the observance of various forms of use of plots of land will be monitored more closely. The central government wishes to prevent, or at least restrict, the further diminishing of agricultural land through a variety of legislative measures. However, here it struggles (with varied degrees of success) against the interests of local governments which wish to increase their revenues by means of industrialization.

(4) Farmland designated for domestic use

As under previous law, the right to land on which residential buildings are constructed in rural areas (house sites) is designated as not subject to commercialization. Regional regulations delineate the size of

[157] For the requirements and details of the process, *see* Land Administration Law *supra* note 38, art. 44.

[158] For expropriated land six to ten times the average yearly production value in the preceding three years will be paid, *see id.* art. 47.

the plot.[159] As land under collective ownership, such a plot is in principle nontransferable and can only be used to be leased for agricultural buildings.[160] Pursuant to article 184(2), agricultural land designated for domestic use cannot be mortgaged. This also reflects the nature of collectively owned land, which is primarily intended to ensure the social protection of the farmer by restricting the commercialization of existing rights of use in collective property.

3. Registration Duty

PRL article 9 is the basis for the duty to register rights of use, according to which changes in property rights only become effective upon registration, subject to alternative provisions in the law. However, these registration requirements vary according to the relevant right of use in question:

> Rights of property in land (which can only accrue to the state or the collective) are registrable pursuant to article 11 section 1 and 2 of the Law on the Administration of Land.[161]

Under previous law, pursuant to article 5 of the implementation provisions of the Law on the Administration of Land,[162] rights of use to collective and state property require a register to record these rights. The duty to set up land registers acquired for economic exploitation also rests on article 127(2).[163] Transfers of rights to acquired economic exploitation are, however, also effective without registration pursuant to article 129. Registration merely prevents acquisition in good faith by third parties (art. 129 s. 2).

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[159] *See id.* art. 62.

[160] *See id.* art. 63. The widespread practice in the vicinity of large towns of the "sale" of unused and empty farmhouses as weekend houses to town dwellers therefore has no legal basis. This is also indicated in the repeated press reports on repossession claims by farmers who in view of significant market price increases demanded the return of houses (or further payments) from their buyers.

[161] *See id.* art. 11.

[162] 土地管理法实施条例 [Implementation Provisions of the Law on the Administration of Land] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 27, 1998, effective Jan. 1, 1999). For a German translation, *see* Münzel, *supra* note 152.

[163] A duty of the authorities to introduce a registration system for the takeover of village land derives from Village Land Takeover Law, *supra* note 152, art. 23.

Article 155 provides that the transfer of registered house sites must be registered without delay. This is surprising at first sight, as basic rights in house sites are generally not transferable.[164] This provision must therefore be understood as referring to article 63 of the Administration of Land Law, which regulates a transfer in case of bankruptcy or the merger of enterprises in accordance with the overall planning of land use. For these cases, registration is not a requirement for a valid transfer and there is also no express provision for the protection of third parties dealing in good faith.

Registration has constitutive effect only for the transfer of the right to land use for buildings, that is, for the transfer of commercial rights to land use in towns. Pursuant to article 138, such a transfer requires a written contract. Pursuant to article 138. the (initial) grant is to be applied for from the registration body. Pursuant to PRL article 9, the transfer is then effective upon registration.

The distinctive structure of registration requirements of the various rights of use reflects the differentiated treatment of urban (in principle commercially realizable) and rural land (in principle not commercially realizable as collective property and at least in theory serving the social protection of farmers). More limited registration requirements for agricultural rights of use (the farming of acquired land, house sites) may, on the one hand, be seen as a reflex reaction to the circumstances that registration bodies in rural areas are in many respects incapable of operating to the desired extent. On the other hand, despite more limited possibilities for commercial trading, these rights of use shall at least receive a certain form of protection for acquirers (registration prevents acquisition by third parties in good faith at least for land where rights of exploitation are concerned).

4. Duration and Renewal of Rights of Use

Rights of use are in principle of limited duration:

(1) the right to the acquired exploitation of land

- arable land -- 30 years
- pasture 30 -- 50 years
- woodland 30 -- 70 years[165]

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[164] *See* Land Administration Law, *supra* note 38, art. 63.

[165] All regulated in PRL art. 126. With particular types of woodland, the takeover period may be extended.

(2) the right of use of land for construction in towns
- residential use 70 years
- industrial use 50 years
- education, natural sciences, culture, hygiene and sport 50 years
- trade, travel and entertainment 40 years
- other purposes 50 years.[166]

The Property Rights Law does not fundamentally change the applicable law. It is remarkable that the Property Rights Law copied the time periods for rights to acquired exploitation of land expressly, while the time periods for the use of land for construction in towns continues to be regulated by subsidiary legal norms. Whether this expresses a difference in the value of the regulated time periods is hard to ascertain at this point.

The Property Rights Law did, however, clearly change the rules on claims for renewal of such rights. Even during the National People's Congress' debates on the enactment of the statute renewal provisions were still being introduced in article 149 and article 126(2), which provoked widespread discussion in China. To date, the regulations still prompt more questions than they answer.

Article 149(1) PRL provides that the right to use of land for residential buildings is automatically renewable. However, it is not clear whether a new fee is payable for such a renewal. In the Chinese press (because of the broad interest of all purchasers of apartments, initially above all, in the daily press) a comprehensive range of possible opinions on this question was represented – from payment of a fee determined by the market price to the payment of a purely administrative fee to no charge being levied. In view of this political debate the final wording should be understood as a compromise between two viewpoints: the desire among the new middle classes for permanent protection achieved by means of residential property acquired in part through extreme deprivation, but which is opposed to the protection of the constitutional law basic principle that urban land constitutes state property. Thus it is also understandable that there is no provision for an automatic renewal of the right to use of land for non-residential buildings. For the commercially exploited right, article 149(2) refers to the application of

[166] 城镇国有土地使用权出让和转让暂行条例 [Provisional Regulation on Transfer and Surrender of Rights of Use to State Land in Towns and Communes] (promulgated by the Nat'l People's Cong., May 19, 1990), art. 12.

previous rules (which already recognize renewal claims, if only against the levying of renewed fees for use).

The intention of the legislature on the other hand can only be interpreted as tending towards the desire to give privileges to apartment owners, although the scope of these concrete privileges will have to be determined in later interpretations. Thus the problem is, at least for the detailed circumstances, ultimately only postponed. On construing the intentionally ambiguous wording one can only come to the conclusion that the desired privileges of apartment owners must also have some practical effect. Thus the requirement of paying a fee for use determined according to the market price is untenable. The concept of "automatic" renewal suggests preferential treatment, which can only be presumed if renewal is, for example, effected against payment of an appropriate administrative fee far below market value. This interpretation of article 149(1) PRL, at least from an economic viewpoint, provides unfettered ownership of rights to the use of urban land at least for residential purposes: such a right of use comprising an automatic right of renewal, which can only be withdrawn under the general preconditions of expropriation, has no other effect than ownership. Literally at the last minute the Property Rights Law thereby became the arena for a minor revolution: at least functionally, the constitutional law decree that land is without exception state property has been set aside.

Equally, in the final legislative phase, a regulation was inserted in article 126(2) for the continuance of rights to exploit agricultural land, whose wording is even less clear. According to this provision regulating the expiration of the contractual term, the rights holder shall continue the use under the existing contractual terms. The provision does not mention a renewal or possible fees. In its final wording, the rule could even be understood as a "provisional right to further use until agreement is reached on reallocation of the right." However, it must be understood as an (ambiguously worded) compromise between the two viewpoints that the farmer should be granted permanent rights of use and that the previous system of granting limited rights of use should be retained. Finally, the rules do not provide an automatic (let alone free of charge) claim to renewal. The ambiguous wording, however, at least affords discretion for strengthening the rights of farmers in the implementation of directives or judicial rulings.

C. Easements

For the first time, the Property Rights Law regulates the use of a plot of land (subservient tenement) by the owner of another plot

(dominant tenement) (article 156 et seq.) for the purposes of increasing the economic efficiency of his land. But, the law does not provide for such preference of an individual person independent of the situation of his land (personal easement).

1. Grant

The parties create the easement by means of a contract, containing, pursuant to article 157, particulars of the parties, location of the plot, nature of the right, its duration, consideration, and the dispute resolution method. In view of the frequent splitting of ownership and rights of use to land, the question arises whether the owner or the rights holder has to agree to the easement for the subservient tenement. In principle, it goes without saying that the owner is entitled to grant the easement (art. 39), but article 161 indicates that the law regards not the owner but rather the rights holder as affected by the easement. Accordingly, easements may be granted at the most fraught period equivalent to the duration of the existing rights of use. Therefore, article 163 also provides that the owner may only grant an easement with the consent of the usufructuary rights holder.

2. Registration

Divergent from PRL article 9, the easement is created once the contract becomes effective without requiring registration. However, the easement cannot be objected to against third parties dealing in good faith without such registration, so that registration is advisable in order to prevent such unfettered acquisition of rights of use to the land (arts. 106, 108). This relative lack of effectiveness then raises the problem, however, of the legal consequences of a third party acquiring not the rights of use itself, but rather a mortgage. Unlike the right of use to land, a mortgage is not *legally* burdened by the existing easement, but at best *economically*, in terms of a diminished value of the respective right of use. To this extent, it would certainly be exaggeration to deem the easement entirely ineffective against the mortgagee. Also, on a true construction of the law, this is hardly enforceable as in estimating the likely proceeds for mortgage purposes (and possibly under a private agreement) the knowledge of the acquiring party of the easement will reduce its economic value.

3. Demarcation to Contiguous Rights

According to the Property Rights Law, there is no legal claim to the granting of an easement under specific emergency circumstances (lack of provision of essential resources) so that a party cannot claim easements of necessity or drainage, water, telecommunication or electricity rights. If a landowner depends upon another plot for such purposes, he can fulfill his need for these rights through a so-called contiguous relationship, the requirements of which are contained in article 84 et seq. These contiguous rights create a duty to facilitate appropriate use of land by the neighboring owner without consideration. This can involve, for example, water supply and drainage, access for entry, access for repairs, the laying of wires, cables, and pipelines for water, heating, or gas. At the same time, these contiguous rights give rise to compensatory claims in terms of the duty of care during construction (avoidance of hazards such as landslip). Articles 88-91 concretize this duty in terms of administrative law requirements regarding access to light and ventilation, control of noise levels, as well as refuse disposal.

VII. EXPROPRIATION

The Property Rights Law first came to notice in the Chinese and international press as a law that would primarily control the mass "expropriation" of residents in inner-city areas as well as farmers in areas of economic potential. The case of the so-called "nail house" was documented with striking pictures published in the global press.[167] A certain family refused to leave their two-story house and former restaurant, located in the center of the city of Chongqing. The house stood isolated on a remaining mound of earth in the middle of a vast, excavated building site for a shopping center, a visual demonstration of resistance against expropriation under modern development projects.

Such cases of resistance against infrastructure development or industrial projects are factually more frequent in China than suggested by the prominence this single event gained.[168] The simultaneous enactment of the Property Rights Law, however, attracted worldwide attention for this particular case. Although the legislature was aware that the issue of

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[167] *See supra* note 5.

[168] Economist, Oct. 3, 2007, at 25 (reporting on the basis of an assessment by an official representative that there were 23,000 cases of mass social unrest due to property and land disputes in 2006). This statistic is likely to be underestimated in view of a lack of uniform counting methods and political pressure.

the admissibility of expropriation in the public interest constitutes a public law rather than a private law question, for reasons of relevance it created rules on this issue in the Property Rights Law – thus following the French tradition. The precise definition of the requirements for expropriation and various forms of entitlement to compensation were discussed in detail. In the course of the legislative process, numerous commentators suggested that a clearer definition of "general interest" be provided, so as to support the courts in their decision-making. The first draft of 1999[169] defined the general interest in article 48 and expressly disallowed expropriation for commercial purposes.[170] Eventually, the legislature declared as admissible expropriation in the "general interest" in accordance with the legally laid down powers and the required procedure (art. 42(1)). The present difficulty for the courts of defining these uncertain legal concepts could have been reduced by providing a catalogue of case examples. However, the legislature – apart from being unable to agree on such a catalogue – may have also believed that the relevant situations should first be argued in the courts, although the courts in the Chinese legal system generally perform much less of a law making function than common law courts. The possibility of defining the public interest more specifically was discussed in detail during a symposium organized by LAC and GTZ on September 13 and 14, 2005 in Chengdu.[171] The need for a further definition also becomes obvious in discussions with Chinese judges who ask for foreign experience on how the importance of private interests in the definition of the term "public interest" should be assessed.

Alongside concrete definitions of the "general interest," Chinese doctrine discussed a variety of procedural rules with regard to expropriation as a highly relevant problem for the development of China's economic prospects. Some proposed to vest the competence for decisions on expropriation in general in the respective competent provincial People's Congress and thereby avoid administrative and (because of the absence of constitutional courts in China) constitutional review. Others encouraged and practiced, at least as a preliminary measure for administrative decisions on possible expropriations, to subject large restructuring projects to a kind of plebiscite. The courts will now have to develop more precise criteria for the understanding of the

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[169] Draft of the Chinese Academy for Social Sciences, *supra* note 10.

[170] *See* Münzel, *supra* note 152, comment 1 to a German translation of the 2005 published third draft for discussion.

[171] Wolf, Rehm & Krauß, *Conclusions of the Chinese-German Workshop*, *in* Julius & Gao, *supra* note 30, at 34.

general interest through judicial review of actual administrative decisions.[172] This may even lead to a different (at least slightly) accentuation of the balance of power between courts and the administrative authorities, which could have ramifications in other legal areas.

Regarding compensation for expropriation, a distinction is drawn between compensation for collective land (primarily rights of use to arable land, art. 42(4)(2)) and compensation for buildings as well as other immovables (municipal houses and apartments, art. 42(3)). The compensation for expropriation of collective land is largely in terms of "costs of security of livelihood, accommodation costs in a new location, relocation costs, adequate payment of the land, adequate payment for the fruits of the land"). For expropriated buildings compensation includes the cost of demolition and relocation. This certainly excludes any expectation damages which might otherwise be claimed.

With regard to expropriation affecting a right of use, or confiscation of (movable and immovable) property, article 121 provides (with reference to art. 42) for corresponding compensation. Article 132 makes the same reference to article 42 for the expropriation of contracted land, as well as article 148 for the withdrawal of the rights of use of land. This requires a concrete economic assessment of the legal position expropriated.

The actual basis of calculation of the level of compensation rests in part on other legislative models. With respect to the compensation of collective property, article 47 Law on the Administration of Land[173] provides that agrarian land will be compensated at a rate equivalent to between 6 and 10 times the average annual productive value for the preceding three years. For expropriation of other land the People's government regulates the rate of compensation. To fulfill the requirement of article 42(2) PRL on the social provision of dispossessed farmers, the Ministry of Employment and Social Affairs has laid down guidelines to provide security to farmers.[174] However, these guidelines do protect

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[172] It is, however, still argued that a special detailed statute on expropriation should be enacted in the near future, see, e.g., Lei Chen, *supra* note 50, at 13; based on the legislative history and the existence of this argumentation it is most likely not be expected that a more detailed statute on expropriation will be enacted in the near future – the development of more detailed preconditions will be the task of the judiciary.

[173] Land Administration Law, *supra* note 38, art. 47.

[174] 關於做好被徵地農民就業培訓和社會保障工作的指導意見 [Guidelines on creating employment, training and social provision for farmers whose land has been expropriated], (promulgated by MINISTRY OF EMPLOYMENT AND SOCIAL AFFAIRS, Apr. 10, 2006). For German translation, *see* Münzel, *supra* note 152, comment 4 on the draft Property Rights Law.

against expropriation, but only allow calculating the state support for expropriated farmers.

To the extent rights of use of state-owned land (in the following "land use rights") are concerned, article 19 Urban Real Estate Law[175] provides that these may not as a matter of principle be withdrawn before expiration of the agreed period of use. Nevertheless, article 19 provides for an exception where withdrawal is required in the general interest. In such a case compensation must be paid according to the actual duration of the used right and with respect to the actual circumstances of this development by the use of the land rights holder. Article 19 Urban Real Estate Law, however, only protects the new owner, that is, the holder of the transferred land use right. These are those holders of land use rights who acquired their right from the state in accordance with the provisions of the Urban Real Estate Law. Original urban owners, who were owners of the land until 1982 with uninterrupted ownership since then, are only protected on the basis of article 58 Law on the Administration of Land. According to this provision, the right of use may be withdrawn not only in the general interest, but also if it appears necessary to the rebuilding of the urban area. In the event of withdrawal of rights of use, appropriate compensation must be given. Münzel criticizes such compensation as not deserving its name, but as rather an equalization of values which for a long time has only been calculated according to the estimated construction costs of the buildings and thus is far below market value.[176]

Pursuant to article 24 of the regulation on demolition of urban housing,[177] financial compensation will be paid if such houses are torn down. The amount will depend on the building market price according to the location, use, site area, and other circumstances of the building subject to demolition.

On closer analysis of the expropriation rules, it is clear that the Property Rights Law does not strengthen the rights of the owner as against the previous legal position. It neither clarifies the requirements for expropriation, nor does it standardize the levels of compensation. All the same, the national and international impression of the Property Rights Law with respect to matters of expropriation is not inaccurate. The regulation of the expropriation requirements in the Property Rights Law (albeit without closer definition of the public interest) have provided a clearer focus on the previous restrictions on expropriation (considered to

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[175] Urban Real Estate Law, *supra* note 39.

[176] Münzel, *supra* note 6, at 20.

[177] 城市房屋拆迁管理条例 [Regulation on the Demolition of Urban Housing] (promulgated by the Nat'l People's Cong., Jun. 13, 1994, effective Jan. 11, 2001).

be insufficient) in the entire People's Republic of China. The enactment of the Property Rights Law triggered public discussion on the prerequisites for expropriation and the compensation owed to such an extent that at least a certain conformity of the expropriation practice in accordance with the (also previously existing) theory may be hoped for.

VIII. REAL SECURITY RIGHTS / COLLATERAL

A. General

According to the express rules of article 170, real security rights grant their holders priority of claims over other creditors. This applies directly, however, only outside insolvency proceedings, because the Chinese Insolvency Law regulates such priorities in cases of insolvency independently. Collateral based on legal transactions must be agreed upon in a written contract in which the parties determine the secured claims and their due dates, the particulars of the security right (type, scope, conditions of exercise, etc), and the modalities of their grant.[178] The law distinguishes between contractual security rights (pledge, mortgage, which can also be granted in certain movable property) and legal security by means of a right of retention.

Security rights are strictly accessory pursuant to articles 170 and 177. This means that they do not exist independently, but that they require a valid principal claim (debt) and expire if the secured claim is discharged. Pursuant to article 192, mortgages can therefore not be transferred without the claim and follow the claim in its transfer. This serves to protect the debtor and the provider of the security, who may not at all times know of the current level of extinction of the other claim. To the extent that a claim is secured through a security in rem and a guarantee,[179] the obligee pursuant to article 176 must proceed in the security claim according to the contractual stipulations. Absent such stipulations, he must realize his rights primarily out of the right in rem. Where the principal obligor and provider of security are different persons, the creditor may elect to realize his claim out of the real or personal security. A third party providing security has a right of recourse against the principal debtor if the security is realized against it.

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[178] Property Rights Law, *supra* note 1, art. 181 (mortgage); art. 210 (pledge).

[179] Guarantees are continued to be governed by the Guarantee Law, *supra* note 40, which is not affected in this respect by art. 178 of the Property Rights Law, as this statute otherwise contains no conclusive rules for personal securities.

B. Pledge

1. Pledge of Things

As security for movables, the law provides only for a pledge of possessory movables, under article 208. As has previously occurred in Germany, it may be expected that the property pledge right may gain some importance in the private field but not in the commercial field, since, pursuant to article 212, on conclusion of the pledge agreement the pledge right only arises on transfer of the pledged thing to the pledgee. This means that the pledgor cannot use the pledged good in order to earn the necessary means for repayment of the debt. Furthermore, the pledgee must store the property and owes with respect to it a duty of care to the pledgor under article 215. If he fails to fulfill it, this will make him liable to the pledgor. Despite these well-known weaknesses of the rights arising from pledges, which in practice leads to the pledged property being excluded from the ordinary course of business transactions, the legislature seems to have been unable or at least unwilling to forgo this right.

Article 219(1) confirms – rather superfluously in view of the general accessory principle applicable to secured credits under article 177 – that the right of pledge extinguishes on fulfillment of the secured claim. If the security claim arises, the pledgee is entitled to sell the security in a privately agreed sale or auction of the pledged property provided the pledgor agrees. Before the claim arises pursuant to article 219(2), a settlement at the level of the value of the pledged property is inadmissible. This is meant to protect the pledgor, who might agree to lightly to give up his ownership rights in a situation of financial distress. Under article 219(3) for both a private agreement and a settlement the market price is to be taken into account. Any possible surplus accrues to the pledgor. The only special form of pledge provided for by the law is a maximum amount pledge under article 222, which, alongside the pledge law rules, is also subject to the rules on maximum amount mortgages under article 203 et seq.

2. Pledge of Rights

Along with the pledge of movables, article 223 provides for a pledge of rights such as checks, bills of exchange, bonds, stock, intellectual property rights, and claims. In view of its better compatibility with the needs of commerce, the pledge of rights should achieve wider application than the pledge of property. At least this has been the German

experience, where shares in particular serve as pledged property. Pursuant to article 229, this pledge of rights is also subject, alongside the specific regulations, to those on the pledge of movables.

The form of grant is determined by the type of the actual right. If it takes the form of bearer security (check, transferable share, bill of lading, warehouse warranty, etc.), the creation of the pledge requires along with it the necessary pledge agreement for delivery of the instrument. Otherwise the pledge of rights requires registration with the competent authority under article 224. The pledge of shares pursuant to article 226 is to be registered with the Industry and Administration Authority, intellectual property rights with the authority yet to be nominated by the State Council (art. 227), and debts with the competent credit authority (art. 228).[180] If intellectual property rights are pledged, the pledgor may no longer transfer them or allow their use by a third party, for obvious reasons: the pledgor could otherwise evacuate the right of its economic value and thus undermine its value as a security right.

C. *Mortgage*

1. Mortgageable Legal Objects

Pursuant to arts. 179, 180 a mortgage may be granted on certain – registrable – movables as well as immovables (buildings, or rights of use to plots of land). Pursuant to article 182, a mortgage of a building extends automatically to the right to use land and vice versa. The mortgage is thus not confined to immovables as in French or German law,[181] so that the disadvantages of possessory pledges can at least partially be compensated by the grant of a mortgage. Suitable movables are in particular vehicles and ships or aircraft under construction, but also industrial machinery, raw materials, and (semi) finished products. It is significant from a practical perspective that enterprises, traders, and agricultural producers pursuant to article 181 can also grant mortgages on future machinery, raw materials or semi-finished or finished products. This makes possible the grant of a security in a similar manner as for anticipated secured property on revolving stocks of goods. In this way, the consequences of a lack of an ownerless security right can be significantly mitigated. This does not constitute a so-called floating

[180] At present it is the task of the Central Bank and its branches. However, a system of creditworthiness is being developed and competence in this area is still unclear.

[181] *See C. Civil*, *supra* note 55, art. 2393, 2397, 2398 (French law); *BGB*, *see supra* note 61, § 1113 (German law).

charge on the English model.[182] Rather, the Chinese mortgage cannot be granted on the entire property of the respective limited company (with the inclusion of receivables), but only on the property items designated in article 181 – that is, things. Up to now, absent provisions on registration procedures, certain details of how the registration is to be carried out are lacking, in particular how precisely the property items must be described.

By contrast, other legal subject matter such as plots of land (due to the exclusive state or collective entitlement), and in particular rights of use to agricultural land, are not suitable mortgage subjects. The rule is significant, as the land use rights of farmers still are severely weaker than urban land use rights. It comes, however, at the price that in this way farmers are deprived of creditworthiness and have significant difficulties in obtaining loans. This may even be an intentional consequence motivated by the desire to avoid under all circumstances the risk of overindebtedness of farmers – historically, the desperation of over-indebted farmers was an important factor in the rise of the Communist Party.

Also excluded from granting mortgages are facilities serving the public such as schools, kindergartens, and hospitals. Finally, by force of express legal decree, no mortgages can be granted on properties subject to dispute, pledged property or property under administration.

2. Granting of Mortgage

Requirements for creation also vary according to the type of object for which a mortgage is to be granted. In any case, pursuant to article 185, an appropriate mortgage agreement must be concluded. Pursuant to article 187, mortgages on buildings, including those under construction, or rights to use of construction land and rights to exploit acquired land only become effective upon registration. By contrast, pursuant to article 188 et seq., mortgages on other objects are effective upon conclusion of a valid agreement. However, they require registration to be effective against third parties acting in good faith. Here securities must be registered with the authority originally responsible for registration, which can vary according to province. Pursuant to article 181, the mortgage is to be entered with the industry and trade authority at the seat of the grantor of the mortgage. Such a general competence depending on the seat is unavoidable to the extent that, unlike ships or

[182] *See* Davies, Gowers & Davies, *Principles of Modern Company Law*, at 818 (Paul Davies ed., 2003).

vehicles, etc., there is no specific competence for individual objects such as raw materials or goods in stock.

3. Exploitation

Like the pledge, the mortgage may also be realized pursuant to article 195 by applying its market value to the debt, by a private sale agreed upon between mortgagee and mortgagor or by a court-organized sale or auction. Where the property is subject to several mortgages, article 199 provides that registered mortgages have priority over unregistered mortgages. Between several registered mortgages the principle of priority according to their date of issue applies. Where mortgages have the same priority they will be fulfilled on a pro rata basis as generally will unregistered mortgages. There are particular regulations applicable to mortgages at a maximum amount which can be restricted to a certain amount of existing secured claims or claims arising during a particular period, article 203 et seq.

D. Statutory Security Right / Lien

The only statutory right of security provided for in the law is a right of retention pursuant to article 230 et seq., which also allows direct realization. This right of retention arises, to the extent not excluded by agreement of the parties or by law, on the debtor's movable property which is lawfully in the creditor's possession. As a result, pursuant to article 240, it extinguishes when the creditor loses possession. In contrast to other legal relationships such as between private parties, between companies no coherence of the debt and the thing, i.e., their being rooted in the same legal relationship, is necessary. Pursuant to article 239, the right of retention takes priority over mortgages and rights of pledge. It may be realized pursuant to article 236 through set-off, private sale at market value or auction.

E. Security Property

In the legislative process, it was long controversial whether security property[183] should be allowed as a security right. The 2002 draft

[183] Under German law, the concept of security property (*Sicherungseigentum*) – that is, the transfer of ownership for security purposes with the transferor retaining possession – serves as the most important means to provide security on movables. An agreement on the transfer of ownership as well as an indirect possession by the transferee is a precondition while it is agreed that the transferor and thus the economic user of the property retains possession of the

contained a corresponding regulation which, however, was removed from the 2005 draft. In view of this and the views presented during the consultations from the Chinese side, it is likely that the granting of security property would be seen as a circumvention of the publicity regulations on the right of pledge and thereby seen as invalid, similar, for example, to the position in the Netherlands or Austria. Also, article 211 indicates that the unlimited acquisition of property as a consequence of granting security and the non-fulfillment of this hidden liability is not desired.[184] As pursuant to article 179 mortgages can also be granted on movable property (see for example art. 180(4), 6), there is in addition a more limited need for security property without possession than in Germany, where such a registrable movable security is not provided for at law.

At the same time it is anything but clear that the Chinese legislature sees security property as inadmissible. Thus during the consultative phase of legislation, at the urging of experts, in particular from Anglo-American legal circles, a suggested express prohibition of security property was rejected. In addition, article 27 makes possible the transfer of property by granting indirect possession. In Chinese, as well as in German practice, this option probably has its greatest importance in the area of security rights. If in addition one sees indirect possession as insufficient to fulfill the publicity principle, then it is difficult to understand why the publicity principle can be limited in the case of the unsecured transfer of property pursuant to article 27, but not in the case of security property, which in light of article 27 constitutes only a minus.

Finally, it is also permissible under Chinese law to agree on retention of title, which leads to the separation of ownership and direct possession and, in view of the publicity principle, is therefore no less problematic than the security property. Arts. 130, 159 Contract Law, which provide for the duty of the seller to transfer ownership to the buyer, are on a true interpretation of Chinese law dispositive law and alterable by agreement of the parties. Equally, according to article 45 Contract Law, conditions are permissible so that at least on construction of the law there is nothing to prevent the creation of security property. In the first step, the debtor sells a good to the bank and delivers it. The purchase

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movable. No registration is necessary. This system of security property is, despite its low level of publicity, quite effective in Germany and does not involve high costs. In practice, it requires close supervision of the debtor by the bank or other institution granting the credit, which mostly, however, is guaranteed anyway.

[184] However, a similar provision in *BGB*, *supra* note 61, §1229 did not prevent secured property from achieving its prominence in the German collateral market.

price and original debt are set off against each other. In the second step, the bank resells the good to the debtor and delivers it to him. The transfer of ownership, however, is conditioned upon the owner repaying the debt. If these, undoubtedly admissible, steps are combined, the effect is the same as if security property had originally been agreed upon. However, in view of the typically narrow approach of Chinese courts to the wording of the law and absent a pressing need for the recognition of security property, it is rather doubtful whether such arguments and constructions will prove acceptable to the Chinese courts.[185]

F. Open Questions

The problems arising from the principle of accessory status, such as the acquisition in good faith of security guaranteeing a non-existent claim, have not been clarified. This is particularly relevant in the case of mortgages since the settlement of the claim and thereby its corresponding discharge is not recorded in the land registry. According to article 106(3) the acquisition of mortgages in good faith is in principle possible. How this can take place from a legal interpretation perspective, if the mortgage no longer exists because of the extinction of the claim, is not apparent from the law; there is no regulation corresponding to article 1138 BGB.[186] The fundamental decision for a strict control of mortgages by legal registration as well as for the acquisition in good faith of security rights could, however, be interpreted in such a way that at least by way of analogy a solution corresponding to article 1138 BGB would have to be found. The value of a mortgage would otherwise be improperly reduced and would fall to zero in legal trading. A secure control over the extinction of claims is not possible. The legal concept of acquisition in good faith, however, is aimed at limiting the costs of gaining certainty on the status of the right. This would be counteracted if the acquisition in good faith of an unburdened mortgage were to be excluded, while any acquirer would be compelled to undertake complicated research into the status of the claim.

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[185] Interpretation is at least formally the role of the Standing Committee of the National People's Congress according to art. 67(4) of the Constitution, *supra* note 31.

[186] BGB, *see supra* note 61, §1138 roughly provides that mortgages can be acquired in good faith even though the claim does not exist. The principle is that a mortgage always presupposes a valid claim and thus does not apply in this particular case.

IX. CLAIMS OF THE HOLDERS OF PROPERTY RIGHTS

In a clear parallel to the German system, the Property Rights Law conveys on the entitled party a range of express claims against a potential infringer. However, a number of open questions in this area remain.

Pursuant to article 34, the owner or other in rem entitled party has a claim for delivery against an unentitled possessor. With respect to this basis for claims, which makes no distinction between movables and immovables, it is unclear how long the limitation period would be. Whereas the general two-year limitation period under article 135 GPCL is acceptable for movables, this time period seems unduly short for apartments. As, despite advice to the contrary,[187] the legislature here created no specific regulation, this dilemma can possibly only be solved within the longer process of a codification of the Chinese civil code and the necessary re-ordering of its individual chapters.

Article 35 gives the rights holder the right to require the cessation of infringements by a third party. It cannot be ascertained at present to what extent this provision also confirms a right to take action against the entry of imponderables or other restrictions (noise, deprivation of light and ventilation). In this respect, however, the already mentioned contiguous relationship rights of article 84 et seq., in particular arts. 89, 90, are decisive in the assessment of such claims. They incorporate to this extent the respective applicable administrative law standards for construction and health.

Finally, arts. 36, 37 confer a compensatory claim on the rights holder in the event of harm to his property. In comparison with the otherwise applicable standard of simple negligence in Chinese tort law the regulation provides for no concrete fault requirement.[188] However even with the, in the meantime, well-meaning political approach towards property, it would be difficult to understand a conflict of values if personal injury or death were to give rise to compensatory claims only in the event of negligent conduct whereas material damage by contrast gave rise to strict liability.

Article 38 expressly permits these grounds for claim to be combined so that, for example, alongside the delivery of the stolen car

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[187] *See* Rehm *in* Julius & Gao, *supra* note 30, at IX.2.5; *see also* Krauß, Rehm & Wolf *in* Julius & Gao, *supra* note 30, at IX.1.

[188] A tort law is currently being prepared and its enactment is expected in 2010. Hitherto this was governed by the incomplete regulations of art. 106 of General Principles of Civil Law, which requires negligence for liability for property infringements.

that was damaged in the escape, compensation for the damage caused can also be required.

It is somewhat unclear what influence the various in rem entitlements have with regard to the content of claims. Thus, for example, article 34 confers on a rights holder a right to delivery of the thing. However, this can arise only if the actual right in rem includes the right of possession, which is true for a pledge, but not necessarily for a mortgage on movables. Otherwise, only delivery to the respective holder of the right of possession can be demanded.

It would also be unjustified if, for example, the holder of a pledge pursuant to article 37 should be able to liquidate the entire material damage to the property instead of only the supposedly lower value of his pledge right. Possibly the rules of construction of the Supreme Court will achieve more clarity in this regard.

X. POSSESSION

The final part of the law provides in part cursory regulations on certain issues relating to the law of possession. It remains to be seen whether they will take on more than theoretical significance.[189] These regulations resembling the German regulations on the owner-possessor relationship are, pursuant to article 241, subsidiary to the contractual provisions for termination and liability. In particular, they provide for a malicious possessor's liability (art. 242), a claim for compensation of a good faith possessor who has improved the good (art. 243), a claim for delivery to the previous possessor against an unentitled possessor, and a claim for cessation of disturbance (art. 245).

XI. EVALUATION

The foregoing remarks make clear that the law owes much in its style and rationale to continental European, and in particular German, concepts of law. In light of the long standing civil law tradition of China, this is hardly surprising. Anglo-American legal concepts such as the discussed *floating charge* derived from English law have found fewer places in the law. However, the question remains open of how in practice mortgages of chattels/movables will be registered. Here it is entirely conceivable that a registration system will be established according to US Uniform Commercial Code regulations.

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[189] For a skeptical view, *see* Münzel, *supra* note 152, comment 2.

The extent to which Chinese courts will refer to the civil law experience in order to fill gaps in the law is also questionable. Most courts – assuming they are even aware of this closeness to civil law – would lack access to the relevant jurisprudence and legal literature. Even in the Supreme Court, the personnel and facilities only begin to approach the level required for such an orientation. Due to the fact that most interpretations of civil law traditions will not be available in Chinese or English, the access for qualified Chinese judges even having access to decisions will be limited. This means that in particular US law may gain a stronger influence on this law which one could expect in light of the statute's theoretical roots.

It is regrettable that the relationship to existing laws was not more clearly regulated. Thus, article 178 in particular, with its reference to the priority of the Property Rights Law over the credit security law, is at present incapable of creating adequate legal certainty. A number of provisions of the credit security law are rendered obsolete by the Property Rights Law. Unfortunately, Chinese legislative practice does not normally allow for this to be clarified in an accompanying introductory law. It would have been perfectly possible to do this for a range of the regulations on movable securities. Now judicial practice must establish which regulations of the credit security law have no further practical significance, which continue to be valid and which have to be construed anew.

In the final analysis, the requirements for the acquisition of property are not clearly enough regulated. Thus articles 23 et seq. speak only of the requirement of transfer of a movable or registration in the case of immovables. Despite considerable advice to the contrary, it was decided not to expressly provide that a corresponding title (sales agreement, gift agreement) is necessary. According to the view of LAC expressed during consultations, this requirement would derive from the Contract Law (where, however, it would be incorrectly placed) or implicitly from the Property Rights Law (which contradicts the principle of detailed regulation).

There is also no clear regulation of the relationship between the Property Rights Law and tort law regulations. Thus, on its wording, article 36 appears to contradict the previous principle of fault liability of the party which infringes the property rights of another. That such a strict measure is intended can derive neither from the consultations nor from the rationale and purpose of the law. Here the general tort requirement of fault will have to be applied by analogy. This is even truer in the case of acquisition in good faith. Thus, according to the evaluation of article 106,

a party who negligently contributes (authorized business operator) to a third party acquiring property in good faith should not be liable if he could himself have acquired property. An opportunity to regulate the relationship to other laws more closely will, however, arise at the latest on the codification of the civil code. It is to be hoped that the Chinese legislature will not here restrict itself to putting together the existing individual laws unaltered but rather will consistently and systematically coordinate the regulations with each other.

The remaining gaps could however also be due to the circumstance that the legislature itself relies on the Supreme Court answering the corresponding questions in its anticipated judicial interpretation. Numerous practitioners also anticipate detailed implementation provisions even where no corresponding regulatory discretion is expressly provided for in the law.[190]

XII. SUMMARY & PROSPECTS

The Property Rights Law can thus be seen as a revolution, to the extent that after fourteen years of controversial debate it was enacted at all. Through its rules it particularly protects private property – even if such protection was already afforded by constitutional law and to a large extent the new law merely consolidates and makes concrete existing regulations. After almost 30 years of economic transformation, the Property Rights Law establishes and makes politically binding an extremely significant basis for the regulation of the private economy.

At present, the still abstract regulations on the registration of property rights in immovables will involve significant changes in registration authorities all over China. The structuring of registration as a constitutive requirement for legal change, at least in rights of use in towns, will in the future mean that transactions enjoy more legal certainty.

In particular, the regulations on residential property are extremely significant for the practice in towns, as hitherto there was a lack of national unified rules in this area. For the new middle class, but also for purchasers of apartments previously under state ownership, the regulation

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[190] This impression was gained in numerous information events for German, European, and American business partners, in which the question of actual implementation provisions was constantly asked. Chinese administrative practice here corresponds to the wish of enterprises, namely, being able to rely on as precise as possible administrative instructions. Frequently, however, it has to be recognized that broad regulatory areas of the Real Property Rights Law concerns not questions of administrative implementation, but how conferred freedoms of jurisprudence are to be exercised – the effectiveness of certain concluded agreements are monitored ex post by the courts.

of the respective rights and obligations could be made more concrete. Discussions with the judiciary show that more precision can be expected to be achieved by the courts and is possible within the framework of the enacted regulations.

In particular, the provision in article 149 PRL on the automatic prolongation of rights of use of land designated for residential purposes can be interpreted as a breakthrough for private ownership of land. This provision, inserted into the law "at the last minute," certainly has revolutionary potential – even if in the immediate future no detailed interpretation of this provision can be expected.

As is to be expected in Chinese legislation, there is a residual lack of clarity in terms of coordination with other laws. There is no unified law on land registry procedures pursuant to article 10 PRL. A number of these unclear areas will hopefully be removed with the combining of all the civil law chapters into one civil code. Clarification of a number of outstanding issues may already be expected from traditional interpretations (such as reasonableness within the meaning of art. 106 or the standard of good faith).

From a comparative law perspective, it can be said that the Chinese Property Rights Law is broadly oriented towards continental European legal conceptions.[191] German law in particular seems to have played a significant role as an important legal model in discussions – even if, and particularly when certain German regulations, such as the separation and abstraction principles, were not adopted.

[191] *See* Lei Chen, *supra* note 50, at 23 (specifically mentioning German and Swiss Civil Codes as major influences).