



The New Chinese Property Code: A Giant Step Forward?

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1. Introduction

The long-awaited Property Code of the People's Republic of China (PRC) has finally arrived. It was passed during the fifth plenary session of the 10th National People's Congress (NPC) of the PRC on 16 March 2007 and will come into effect on 1 October 2007. For many law students in China, the laws relating to property are sterile and devoid of interest. However, in the last decade, few statutes have conjured up greater visions of legislative innovation and importance than the enactment of a property code. This is important for China has been working on a property code since the 1990s.² The code was intended to complete the Chinese legal system with laws relating to property that would secure the protection of property rights by clearly defining the various types of property as well as safeguard trade security and market order. The enactment of a property code has been heralded by many in China as landmark legislation to achieve clarity and certainty of property rights so necessary for concomitant and sustainable economic development. This statutory demarcation of property rights can scarcely be overestimated for not only it is of great interest to the legal community but also it affects almost every aspect of people's daily lives. To use the words of the drafters, it is "perhaps the single most significant development in Chinese civil law since the founding of the PRC."³

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² As early as 1994, the Chinese legislature devised a legislative plan to enact a Chinese property code. In 1998, the legislature invited a drafting panel of nine Chinese civil law scholars to initiate the drafting.

³ Wang Liming, "The Property Code is the cornerstone of Rule of Law in China", see <http://www.civillaw.com.cn/> (accessed 21 March 2007).

In October 1999, the drafting group under the auspices of the Institute of Law in the Chinese Academy of Social Sciences (CASS) first completed a model draft that consisted of twelve chapters containing 435 articles.⁴ In 2000, a drafting group headed by the Research Institute of Civil and Commercial Law in the School of Law at the People's University also completed a model property law draft. It is divided into five chapters with 575 articles.⁵ Later, the legislative body used these two model drafts to put together one of its own. The Standing Committee of the NPC deliberated and pruned its legislative draft seven times.⁶

This paper evaluates recent Chinese property code developments from a comparative perspective. The code contains five sections covering nineteen chapters, namely, Section One: General Principles; Section Two: Ownership; Section Three: Right of Use and Enjoyment; Section Four: Right of Security; and Section Five: Possession. The code is concluded by two supplementary articles. These property institutions are selectively examined in this paper. It is important to note at the outset that an examination of all aspects of the property code is beyond the scope of a single paper. Hence, the aim of this paper is rather to provide Western legal scholars with an overview by comparing some identifying institutions with counterparts in Western civil law jurisdictions. Consequently, many questions arise. China, ruled by a Communist Party, has changed from largely eliminating private property to increasingly embracing it. What kind of property code is China working on? In other words, is it based on a European civil law model, a common law model or a mixed one? How can it reconcile socialist ideology primarily based on public/state ownership with a property code enshrining the protection of private property interests? Why does it take such a long time to finalize the legislative process?

These questions are the primary concerns of this paper. On the one hand, China lacks important formalised property institutions and this has hampered economic development.⁷ On the other hand, a plethora of divergent provisions pertaining to property,⁸ various administrative regulations,⁹ overloaded judicial pronouncements,¹⁰ and inconsistent local

⁴ Liang Huixing, *Commentary on Chinese Property Law Draft*, (Social Science Literature Press 1999)1-88 (Chinese version).

⁵ Wang Li Ming, *Comments On Draft of China's Jus Rerum and Explanations*, (Legal Press, 2000) 1-67 (Chinese version).

⁶ The eight parliamentary deliberations were held in: 1) December 2002 at the 31st Meeting of the Standing Committee of the 9th NPC; 2) October 2004 at the 12th Meeting of the Standing Committee of the 10th NPC; 3) June 2005 at the 16th Meeting of the Standing Committee of the 10th NPC; 4) October 2005 at the 18th Meeting of the Standing Committee of the 10th NPC; 5) August 2006 at the 23rd Meeting of the Standing Committee of the 10th NPC; 6) October 2006 at the 24th Meeting of the Standing Committee of the 10th NPC; 7) December 2006 at the 25th Meeting of the Standing Committee of the 10th NPC; and 8) 16 March 2007 at the fifth plenary session of the 10th NPC (final assent).

⁷ There is no uniform statute on condominium/apartment ownership in China.

⁸ Examples include the Law on Security of 30 June 1995 and the Law on Land Administration of 25 June 1986 of the PRC.

⁹ Examples include the Provisions Concerning the Administration of Private Houses Owned by Foreigners of 25 August 1984 and the Interim Regulations on Assignment and Transfer of Rights to Use State-Owned Land in Urban Areas of 19 May 1990.

¹⁰ For instance, the Judicial Pronouncement Regarding the Application of Some Provisions of the Law of Security by the Supreme People's Court of the PRC.

norms¹¹ disguise the structural weakness in the legal system's capacity to foster sustainable development. It is necessary that the enactment of a property code offers a systematic set of laws that recognises and defines private property rights along with enforcement mechanisms and the organisations to formalize them.¹² To deal with these issues the social and legislative background of recent developments in Chinese property law is examined. This helps to establish a frame of reference in order to show why property law legislation is so necessary and urgent in the country. Part 2 presents a brief survey of the Chinese property system and its legislative history. It traces the most recent commitments of the state to elevating private property interests, such as the latest constitutional amendment to equate private ownership with public ownership.

Part 3 focuses on the technical points of property law by illustrating selected primary principles and main elements of property law such as ownership, rights of use and enjoyment and rights of security. However, this paper does not deal with every aspect of the property regime. In evaluating property institutions, the comparative approach utilising systems of property rights in other jurisdictions is employed to better understand the Chinese system. Part 4 examines the enactment of a property code that is forward thinking in the sense that it is top-down legal modernisation. Nevertheless, analysis and debate have not ceased even after its enactment. The relevance of law and development theory within the context of formalising Chinese property law is addressed in order to understand the necessity of institutionalising property rights in an environment of bullish economic growth.

2. The Historical and Social Background of Contemporary Property Law Development

2.1 China's Civil Law Tradition and the Legislative History of Property Law

The approach in this paper to critically evaluating the new property code is necessarily historical. It should not be overlooked that China has a strong civil law tradition despite claiming to endorse a socialist legal system that was taken from the former Soviet Union after the establishment of the PRC. Since the former Soviet Union's legal tradition was strongly influenced by Roman law, previous features of property law development have to be understood in order to fully grasp the shift of Communist China's attitude to private property protection.¹³

¹¹ Examples include Guiding Rules on the Management Corporation and Its Executive Council, Shen Fu (2005) 11 by the municipal government of Shenzhen City on 17 January 2005 and Rules on Condominium Property Management of Guangdong Province of 1998 issued by the Guangdong Provincial People's Congress.

¹² Frank Cross, "Law and Economic Growth", (2002) 80 *Texas Law Review* 1737-1739.

¹³ Wang Zhenmin, "The Roman Law Tradition and Its Future Development In China", *Frontier of Law in China*, 2006 1:72-78.

From 1929 to 1931 the Kuomintang (Nationalist Party) government published the Civil Code of the Republic of China that encompassed the Property Code.¹⁴ After the Chinese Communist party came to power in 1949, it repealed the legal system of the Republican era and transplanted a portion of the 1950s Soviet legal system into it.¹⁵ According to classical proletarian theory, laws became an instrument for political class struggle rather than restrict government power and protect individual rights. Hence, private property rights were severely reduced during the planned economy period. Under the socialist-planned economy, there was no need to introduce specialised property laws.

Significant improvements in people's daily lives did not occur until the government opened up the country to foreign investment in the late 1970s. Deng Xiaoping said: "Let some people get rich first." China's central government made efforts to transfer its planned economy to a market economy and by 2005, China's per-capita Purchasing Power Parity (PPP) General Domestic Product (GDP) reached USD 7,198. This is internationally accepted as the mark of a medium-developed country.¹⁶ With more money in hand, an increasing number of people have purchased or are planning to purchase houses and cars, both regarded as necessities of modern life. Concurrent with the economic boom is a change in people's thinking, from "it's a shame to be rich" to "one should be proud to get rich through hard work in a lawful way."¹⁷ For this reason, legal reform has proven to be an effective way of expediting China's development. In the view of Wang Liming, an expert in Chinese civil law and one of drafters of the property code, the formulation of a new property law is essential to economic development and social progress under market economy conditions.¹⁸ The government needs to assure the protection of property rights, particularly those of the new entrepreneurial classes, in order to "energize them and bring the builders of socialism fully into play."¹⁹

2.2 Constitutional Entrenchment of Private Property Rights

Initially, there was no provision for private property in the 1982 PRC Constitution. With the dramatic changes in economic and social conditions, the PRC Constitution was amended quite frequently to constitutionally entrench private property within the Chinese legal system. The 1999 constitutional amendment states that "individual private and other non-public economies that exist within the limits prescribed by law are major components of the socialist market

¹⁴ The Civil Code of the Republic of China is still in force in Taiwan despite numerous amendments and adjustments. See Zhang Jinfan et al. (ed.) *Chinese Legal History (Zhongguo Fazhi Tongshi)*, vol. 9, (China Law Press (Falü Chubanshe) 1999) 611-615.

¹⁵ Eight months before the PRC was founded, the Central Committee of the Communist Party issued an order to abolish the laws of the Republic of China. This order was incorporated into the Common Program that served as the interim constitution for the PRC from 1949 through 1954. For more details, see Luo Wei, *Chinese Law and Legal Research*, (W.S. Hein, 2005) 53-54.

¹⁶ International Monetary Fund, *World Economic Outlook Database*, September 2006, for the year 2005.

¹⁷ "Constitution Amendments To Protect Private Property", Xinhua News Agency, 8 March 2004 (Chinese Version).

¹⁸ Wang Liming, *Remarks On the Chinese Property Code Draft* (China Fazhi Press, 2001) 1-5 (Chinese version).

¹⁹ Jacques de Lisle, "Property Rights Reform In China", Presentation to a conference sponsored by the Carnegie Endowment for International Peace on "The Future of Political Reform in China". 29 January 2004.

economy.”²⁰ In contrast, the 2004 constitutional amendment guarantees the right to hold private property.²¹ This most recent amendment is expected to lead to legal changes improving the country's legal framework for trading in real estate, stocks and bonds and other kinds of property.²²

The three Chinese constitutional amendments of March 2004 elevate private property rights to a level that warrants better protection. Firstly, individual private property rights are entrenched by a provision that citizens' legally obtained private property not be violated.²³ Secondly, non-public economic sectors, such as small-scale private enterprises and joint ventures, not only receive more rigorous constitutional protection, but the amendments also support the development of these sectors.²⁴ This places the protection of private property on an equal legal footing with that of state-owned property.²⁵ Thirdly, the amendments make clear that when private property is expropriated, the government must provide compensation.²⁶ Although private property is protected in various ways under Chinese law, the Constitutional amendments are directional in that they acknowledge the status of the right to private property as a fundamental freedom. This is a symbolic milestone that also serves as a constitutional signpost for the enactment of further laws relating to property.²⁷ The code on tangible property rights enhances investment by giving equal protection to privately owned, state-owned and collectively owned property.

2.3 Reasons for Enacting the Property Code

With the middle class increasing in China and becoming more affluent, the government now acknowledges their desire for the legal protection of private property. Relatively vague and weak property rights impair economic prosperity and political stability. The argument advanced here is that the formalisation of property institutions can promote sustainable economic development for a thriving economy.²⁸ Additionally, the legal protection of

²⁰ Art. 11 of China's Constitution (amended on 15 March 1999 at the 2nd session of the 9th NPC).

²¹ Art. 13 of China's Constitution (amended on 14 March 2004 at the 2nd session of the 10th NPC).

²² Wang Liming, *The Constitution and the Protection of Private Property*, 25 *Law Science Magazine* (Xian Dai Fa Xue) 9-12 (2003) (Chinese version).

²³ Art.13 (1) of the PRC Constitution (1982, amended 2004).

²⁴ Art.11 of the PRC Constitution (1982, amended 2004).

²⁵ Wang Liming, "Analysis On the Principle Of Equal Protection of Jus Rerem", (2006) 27 *Law Science Magazine* (Fa Xue Za Zhi) 2; YIN Tian, "Owners of Real Rights", (2006) 28 *Modern Law Science* (Xian Dai Fa Xue) 4-6 (Chinese version).

²⁶ Art.13 (3) of the PRC Constitution (1982, amended 2004).

²⁷ Miao Lianying, "Safeguarding Constitutionalism in a Harmonious Society", 24 *Wuhan University Law Review* (Fa Xue Ping Lun) 10 (2006). (Chinese version) In this paper Miao continued stating that "only the declarative property clause on the Constitution cannot resolve the problem of private property's violation ... the point is, to establish a fair and just mechanism of interest balance between private property and public power."

²⁸ Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs In The West And Fails Everywhere Else* (Bantam Press, 2000); Johan Torstensson, "Property Rights and Economic Growth: An Empirical Study", (1994) 47 *Kyklos* 231-247; David Kennedy, "Laws and Developments", in J. Hatchard and A. Perry-Kessaris (eds.) *Law and Development: Facing Complexity In the 21st Century* (Oxford Cavendish Publishing, 2003).

property rights provides incentives for efficient exploitation of resources.²⁹ In brief, economic growth requires the enactment of a property law. Second, globalisation means that the international arena highly values the protection of property rights. Moreover, with China's entry into the World Trade Organization, the pressure of providing protection for foreign investments and enterprises has also played an important role. Third, the country has developed a more sophisticated economy. It has gone rapidly from agriculture to industry, to real estate development, to mortgage-backed securities, to intellectual-property-intensive service industries. And it has gone into other sectors where the "rights equation" may be much more complicated and the arguments for clearer and stronger legal property rights are more compelling.³⁰ Fourth, the crucial civil law codification factor was that a property law was urgently needed. Consequently, the codification of civil law and the promulgation of property law have recently been highlighted. Finally, Chinese legal scholars have become more sensitive to and active in drafting property law. On the one hand, many Chinese legal scholars had gone to university and had gained legal experience in such developed countries' as Germany, the Netherlands and France, which enabled them to draft a proper property code. On the other hand, the more legal knowledge they obtained from the outside, the more worried they became about the prevailing Chinese civil law system. Some insisted on the codification of civil law and took an active part in the drafting in order to create a more suitable Chinese legal system.³¹ In what follows, their efforts are shown to reflect the key features of the property code.

3. Identifying Specific Issues on the Current Property Code

The first section of the code consists of general principles including three chapters, namely, Chapter One: General Statements; Chapter Two: Creation, Alteration, Transfer and Extinction of Real Rights; and Chapter Three: Protection of Real Rights. The function of this section is to put forth the principles of the property code by employing modern civil law examples. As to this section, the immovable property registration system is used as an example to show the influence of very traditional Roman law on modern day Chinese property law.

3.1 The Immovable Property Registration System

During drafting, no reference was made to the land recording system in America or the Torrens system in Australia. The civilian immovable property registration system is respected, but it is not easy to fully understand the dynamic features between cognate systems. Public notification of landownership and other immovable interests were not features of Roman

²⁹ See Harold Demsetz, "Toward a Theory of Property Rights", 57 *Am. Econ. Rev.* 347 (1967); and Richard Posner, *Economic Analysis of Law*, 6th edition, (Aspen Publishers, 2002).

³⁰ Jacques de Lisle, *supra* note 18.

³¹ Liang Huixing, *Struggle for A Chinese Civil Code* (Falü Chubanshe (China Law Press), 2002) 1-14 (Chinese version).

law.³² However, in modern Western civil law systems there is a basic difference between German-influenced jurisdictions³³ in which registration is a requirement to establish a right to land or buildings, and French-inspired jurisdictions³⁴ in which registration merely declares the existence of rights that have already been created. The French model, also called the voluntary or declarative system, is characterised by the fact that the consent of parties itself gives effect to the sales contract in transferring land. A contract is valid from the moment when parties consent to its terms and conditions. The registration only makes the transaction effective against third parties but it does not give the creditor greater rights against third parties than against the person whose property is encumbered.³⁵ By contrast, the positive nature of the German model, also called the constitutive registration system, is far more powerful than the French model for without registration there is no property right.³⁶ A civil-law notary is also required³⁷ for a property right simply cannot exist without it being both notarised and registered.³⁸

In contrast, the current operation in China of the immovable property registration system is chaotic and confusing. This is because the perception of land ownership and the actual practice of a privatised real estate market are still in the maturation stage. First, there is no uniform legal framework dealing with immovable property registration. A plethora of fragmented departmental rules and judicial pronouncements about immovable property registration often makes the rules incompatible for departments with different interests.³⁹ Consequently, the legal effects of immovable property registration are uncertain and unpredictable. For example, the Law of Security of the PRC stipulates that “the immovable mortgage contract is not effective until registration has taken place.”⁴⁰ By contrast, the judicial pronouncement issued by the PRC’s Supreme People’s Court states that “where there is no registered document in place, the immovable mortgage is deemed effective if the registered document is provided or supplemented before the first instance trial ends.”⁴¹ In the former provision, the German constitutive registration system seems to have been adopted since registration is compulsory and indispensable for the deed to be valid. However, the latter provision follows the French model since the mortgage is deemed to be effective once the contract has been concluded, and registration is required only for effect against third parties. Second, national level registrar offices are not uniform in China. Conflicting and inconsistent

³² Alejandro Garro, “Recordation of Interests in Land”, Ch.8 Vol. VI Property and Trust, *International Encyclopedia of Comparative Law*, 2004, 11.

³³ See the German Bürgerliches Gesetzbuch, (Civil Code, BGB) Art. 873; the Swiss CC. Art.656 (1); and the Austrian CC. Arts. 432, 451.

³⁴ See the French CC. Art.158; the Italian CC Arts.922, 2643 (1), 2644; and the Portuguese CC Arts. 1316,1317.

³⁵ See Alejandro Garro, *supra* note 31 at 53. See also the Japanese CC. Art.176.

³⁶ BGB Art.873 requires both deed/contract of sale and registration for validity.

³⁷ See Murray Raff, *Private Property and Environmental Responsibility: A Comparative Study of German Real Property Law* (2003) 250-260.

³⁸ Elizabeth Cooke, *The New Land of Land Registration* (Oxford Hart Publishing, 2003) 176.

³⁹ Hu Zhigang, *New Research On Real Estate Law* (Xuelin Chubanshe (Xuelin Press), 2006) at 99-101 (Chinese version).

⁴⁰ See Art. 41 of Law of Security of the PRC.

⁴¹ Art. 49 of the Judicial Pronouncement Regarding the Application of Some Provisions of Law of Security by the Supreme People’s Court of the PRC.

departmental interests and local governments' parochial interests hinder the systemisation of registrars. At present, there are six main registration authorities in different departments, namely, the state land administration, the housing authority, the mining authority, the water administration, the fishery authority, and the forest administration. Moreover, in the case of urban housing registration, the owner has to register with two different authorities in order to obtain two different entitlement certificates, namely, a certificate of housing ownership with a housing authority and a certificate for a land use right with the state land administration authority.⁴² Therefore, it is sometimes argued that the authority to register immovable property should be conferred on a judicial body, as is the case in Germany.⁴³ Others disagree, arguing that when a title dispute arises it is difficult to ensure that judges will rule fairly and reasonably to correct their own wrongdoings since many judges are neither fully qualified nor politically independent.⁴⁴ Third, the scope of registrable properties has been unduly curtailed. Many new property rights pertaining to underground garages, underground shopping centres, subways, and condominium roof gardens cannot be titled separately through registration. Fourth, public access to registration documents has not yet been institutionalised.⁴⁵ Fifth, the registrar offices lack an indemnity fund to remedy their mistakes. Additionally, disciplinary rules for malpractice by registrar staff are needed in order to improve the quality of land registration.

The development of the Chinese market economy demands the reform of the registration system in China. The property code tackles the deficiencies in the immovable property registration system in a coordinated and structured manner by stating that uniform registrar offices at the national level are necessary. Unfortunately, it leaves many concrete details unresolved, such as the crucial question of which property rights are registrable, and the procedures for registration. Even the question which offices should be vested with uniform authority to register has not been resolved.⁴⁶ All of these issues will need to be resolved in special statutes. In addition, the code has adopted the principle that registrars should allow persons involved to access and duplicate relevant registration documents.⁴⁷ But access procedures have not been regulated. Furthermore, the right to receive compensation for loss suffered on account of errors made by the registrar has been regulated in the property code⁴⁸ but provisions concerning the funding of such compensation - whether by means of an indemnity fund or indemnity insurance - are lacking.

⁴² Patrick Randolph and Lou Jianbo, *Chinese Real Estate Law*, (Kluwer Law International, 2000) 167-171.

⁴³ Liang Huixing, *supra* note 3 at 142; Sun Xianzhong, *On Law of Things*, China law press, 456 (Chinese version).

⁴⁴ Wang Liming, *Study on Law of Things* (Zhongguo Renmin Daxue Chubanshe (Chinese People's University Press), 2002) 222 (Chinese version).

⁴⁵ Wang Liming, *ibid.* at 202-203; Hu Zhigang, *supra* note 38 at 109-110.

⁴⁶ Art. 10.

⁴⁷ Art.18.

⁴⁸ Art.21. This paper also argues that applicants should be liable for losses and should compensate parties who are adversely affected if applicants provide false documents for registration.

On the positive side, the property code contains two new mechanisms to protect private property tenure expectations more efficiently. These mechanisms have been borrowed from the German land registration system, namely registrable cautions and objections. A caution (*Vormerkung*), also called a priority notice, is an entry in the register regulating the circumstances under which the disposition of a registered property is subject to the consent of the person who lodges a caution.⁴⁹ The registrar is requested to enter a caution in the register to prevent registered property from being disposed of wrongfully. The Chinese caution, although based on German law, differs from German rules in the following respects. First, unlike German law, the Chinese code does not provide that a caution cannot be registered without the authorisation of the person whose right it affects or a court order upon summary application.⁵⁰ Second, the Chinese caution is restricted to contracts of sale or other contracts concerning real estate while the German caution is not subject to these restrictions and is therefore more flexible.⁵¹ If the person who is entitled to having a caution entered into the register cannot be authenticated, the caution may be cancelled after three months.⁵² The registration of an objection, equivalent to *Widerspruch* in German law, is an entry in the register that an outside interest affects a registered property. A person who claims to be entitled to an interest in a registered property may apply to the registrar to enter an objection in the register to correct the interest.⁵³ In German law there is an unlimited right to rectify the register in the event that it does not reflect the legal position correctly.⁵⁴ These borrowed protections are welcome.

As the number of law reforms over the last ten years demonstrates, the concept of immovable property ownership is still developing in China.⁵⁵ There is a strong call for legal reform of immovable property registration rules and practices. It is unimportant which model of land registration is adopted, the French model,⁵⁶ the German model⁵⁷, or even the Torrens system.⁵⁸ Based on Raz's theory of an instrumental rule of law,⁵⁹ the central issue is whether or not the property code and future special legislation will resolve the major problems and keep the land registration system functioning. The property code is merely the first part of a consolidation and modernisation process that could ultimately witness the development of a real property market in China. As Örüçü notes, the majority of legal systems around the world

⁴⁹ BGB Arts. 883-888.

⁵⁰ Ernest Schuster, *The Principles of German Civil Law* (Oxford Clarendon Press, 1907) 381.

⁵¹ Christian Hertel and Hartmut Wicke, *Real Property Law and Procedure In the European Union*, National Report: Germany, European University Institute-European Private Law Forum, 8/47, 2005.

⁵² Art.20.

⁵³ Art.19; see also BGB Art. 899.

⁵⁴ BGB Art. 894. Rectification of Land Register is *Berichtigung des Grundbuchs*.

⁵⁵ See Alejandro Garro, *supra* note 31 at 90.

⁵⁶ Guo Mingrui, "Several Reasons for adopting the French Declarative Registration System", (2005) *Legal Science Magazine* (Chinese version) no. 4.

⁵⁷ Sun Xianzhong, "On Immovable Property Registration", 1996 *China Legal Science* 5 (Chinese version).

⁵⁸ Hu Zhigang, *supra* note 38 at 96. The pitfalls of the German approach are as obvious as its strengths, for example, its time-consuming need for maps and surveys and its piecemeal approach to the involvement of civil-law notaries. The Torrens system is being accepted by more and more jurisdictions for its lacking of appreciation of high precisions and long-term requirements. The approach to be adopted in the Chinese registration system remains debatable.

⁵⁹ See Joseph Raz, *The Rule of Law and Its Virtue*, in *The Authority of Law* (1979) 210.

are a mix of different legal traditions.⁶⁰ It is almost certain that Chinese legal scholars will draft legislation with this in mind.

3.2 Ownership

3.2.1. Conceptions of Ownership

The second section of the property code, the institution of ownership, is seen as the core and spirit of property law. The Romans defined ownership (*dominium*) as *jus utendi et abutendi re sua, quatenus juris ratio patitur* ([ownership is] the right to use and to dispose of one's object to the extent allowed by law and reason). The French Civil Code has adopted this classical maxim in Article 544.⁶¹ However, ownership is neither exclusive nor free from limitations. The German Civil Code (*Bürgerliches Gesetzbuch*) defines ownership as extensive control over an object "as long as it is not limited by law and rights of private persons".⁶² The Swiss Civil Code also considers ownership as the right of free disposition of an object within the limits of the law.⁶³ Based on a survey of civil law jurisdictions, the Chinese property code contains a provision that the owner of an object has a right, within the limits of the law, to possess it, to use it, to receive its benefits, and to dispose of it.⁶⁴ Thus ownership here is a person's complete subjugation of an object within the limits set by the law. Technically, however, this does not seem to pertain to limitations imposed by other legally binding documents such as regulations and ordinances. Can regulations and ordinances also limit and restrict full and absolute ownership? The simple answer is yes. This is illustrated by the condominium regulations which limit the powers of apartment owners to reasonable use so as not to interfere with a neighbour's interests. The "law" in this provision is broadly interpreted, including regulations, ordinances and even local customs.

In China's socialist system, property is categorised into three types, namely private property, state property and collective property. Under the communist regime a primary concern has been what place private property should occupy in the property code. State-owned property primarily but not exclusively includes (1) property for public service, such as government offices and state-owned enterprises, as well as property used in national defence; (2) property for public use, such as public infrastructures including public roads, power plants, radio spectrum resources, telecommunication and oil and gas facilities; (3) state immovable property such as land in urban areas, naval ways, seas and their shores, state-owned antiquities and mineral resources; (4) natural resources owned by the state such as forests, mountains, grasslands, unoccupied lands, state-owned wild animals and plants not owned by

⁶⁰ Esin Öricü, *Studies in Legal Systems: Mixed and Mixing* (Kluwer Press, 1996) Chapter 20.

⁶¹ Article 544 of the French CC: "Ownership is the right to enjoy and to dispose of things (*biens*) in the most absolute manner, provided no use is made of them contrary to legislation or regulations."

⁶² Arts. 755 and 903 of the BGB.

⁶³ Art. 903 of the Swiss CC.

⁶⁴ Art. 39.

collectives.⁶⁵

Along with state ownership Chinese law recognises collective ownership. The principal task of collectives is to cultivate land in rural areas and therefore collective property primarily refers to agricultural land, forests, mountains, grasslands, unoccupied lands, and homesteads as well as public facilities for communal use in rural areas.⁶⁶ Property owned by collectives has been a vexing source of disputes for some time since a collective's interests are very nebulous and uncertain. Consequently, there is a need for clear-cut legislation on collective property.⁶⁷ The new code provides little detail about the demarcation and commercialisation of a collective's interests.⁶⁸ For example, only land use rights to state-owned land can be transferred to private persons or institutions, while collective land is not transferable. Land belonging to collectives has to be nationalised before it can be transferred.⁶⁹ Many scholars believe that the new property code should contain the fundamental principle that any legally acquired property, whether public or private, or whether owned by the state or by collectives, should be given fair and equal protection.⁷⁰ Unfortunately, state and collective ownership issues are not only legal issues; they are also closely connected with China's political ideology.⁷¹ These issues are beyond the influence of legal scholars and cannot be resolved in one step.

3.2.2. Expropriation⁷²

The status of private property has been a constant source of conflict between states and individuals since the inception of sovereignty and private ownership of property. Expropriation is a term used in civil law countries corresponding to the notion of eminent domain in the United States, compulsory purchase in England and New Zealand, and resumption in Australia.⁷³ Expropriation is the mechanism whereby state authorities take objects or rights that belong to private individuals for a public purpose or in the public interest. The property code of China contains the following provisions on expropriation (Article 42):

⁶⁵ Arts. 46, 47, 48, 49, 50, 51, and 52.

⁶⁶ See Art. 58.

⁶⁷ Meng Qinguo, "How to Protect Collective Property By a Property Code", *Legal Science Monthly*, 2006 1, 72; Chen Su, "The Establishment of Property Right Protection of the Household Responsibility System for Agricultural Land", 1996 *China Law Magazine* 3 (Chinese version).

⁶⁸ *Ibid.* 76; Yin Tian, "On the Subject of Property Rights", vol. 28 *Modern Legal Science* 2, 7 (Chinese Version).

⁶⁹ Art. 40 of the Land Administration Law of the PRC and Art. 25 of the Implementing Rules on Land Administration Law of the PRC.

⁷⁰ See Liang Huixing, *supra* note 3; Wang Liming, *supra* note 17; Hu Zhigang, *supra* note 38.

⁷¹ Gong Xiantian, a professor in law of Peking University submitted, an open letter to the NPC and its leaders asking to nullify the draft of the property code on the grounds that the draft code is unconstitutional since it contradicts the public ownership concept enshrined in the Chinese Constitution. Thus, its enactment was delayed a year ago amid vocal opposition from resurgent socialist intellectuals and old-line, left-leaning members of the ruling Communist Party.

⁷² This paper only discusses the expropriation of immovable/real properties with compensation. Confiscation and requisition are not discussed in this paper. Confiscation means taking of property into the Treasure without compensation. Requisition means the expropriation of movables.

⁷³ Wikipedia (online encyclopedia) see http://en.wikipedia.org/wiki/Eminent_domain.

Subject to the provisions of the laws concerning the authority and procedures of expropriation, land owned by a collective, properties of juristic persons and individual housing and other immovable property can be expropriated for public purposes or in the public interest;

The expropriated land owned by collectives should be compensated to the full extent of the loss suffered subject to law. The compensation includes, among others, compensation for taking the land, a resettlement subsidy and compensation for the fixtures, crops and plants on the expropriated land. The premiums for social security and farmers living on expropriated land should be compensated and the lawful interests of expropriated farmers should be safeguarded;

When the residential houses and immovable property owned by individuals and institutions are expropriated, the cost of demolition and removal should be compensated subject to law in order to maintain the legal interest of the expropriated institution or individual. When private housing is expropriated, the accommodation of the expropriated persons should be guaranteed during the removal period.

No institution or individual shall withhold, misappropriate, embezzle, or privately divide the compensation for expropriation.

The first question to arise is whether the concept of a valid public purpose is a sufficiently wide notion to include the expropriation of private property. In other words, how freely, if at all, can a public purpose be interpreted? The term public purpose is not clearly defined and is thus subject to various interpretations.⁷⁴ The ambiguity which surrounds the term is prone to abuse by local governments that are intent on encroaching on private interests. Some Chinese scholars claim that it is beyond the property code to demarcate the meaning of public purpose. They argue that this task should rather be left to the Constitution to regulate the undefined nature of public purpose.⁷⁵ The second question is whether the compensation in the provision means fair and reasonable compensation? In short, how reasonable is reasonable? The code contains no yardstick that measures or determines the reasonableness of compensation. For example, the current use of the property, the history of its acquisition and use, its market value, and the purpose of the expropriation are not factors that are studied, calculated or even thought about when an expropriation is being considered. The puzzling third question is why the expropriation clause in the new property code does not mention and specify the expropriating authority. It is not clear who has the authority to expropriate property from collectives and individuals for a public purpose or in the public interest. Can this be the central government, governmental ministers, local governments or even other entities involved? The amorphousness of this situation leads to potential abuse of the power to expropriate. Accordingly, it can be concluded that purposively or technically, the code's

⁷⁴ Andre Van der Walt, *Constitutional Property Law* (Juta Press, 2005) 241-243; Andra Eisenberg, "Public Purpose And Expropriation: Some Comparative Insights And the South African Bill of Rights", (1995) 11 *South African Journal on Human Rights* 207-221.

⁷⁵ Wang Liming, *The Property Code Cannot Bear the Burden on the Demarcation of a Public Purpose*, *Legal Daily* (Fazhi Ribao), 21 October 2006 (Chinese version).

expropriation provision is at best skeletal and obscure. It is for this reason that a special detailed statute on expropriation should be enacted in the near future in order to institutionalize the phenomenon of expropriation.

3.2.3 Condominiums or Apartment Ownership

Condominium ownership is the individual ownership of an apartment coupled with a percentage of an undivided interest in the common elements.⁷⁶ The apartment owner has exclusive ownership of the apartment, but the land and other common elements are owned jointly by all the unit owners. Examples of common elements include lobbies, hallways, roofs, and pathways. While the regulation of rights in apartments has a long history in China, there is not a national uniform statute on apartment ownership because of its fairly recent acceptance in Chinese property law. During the drafting of the property code attention was given to the abuses and malfunctions of local governments in dealing with multi-unit buildings. For this reason the code has a separate chapter entitled “the apartment ownership in multi-ownership buildings”,⁷⁷ which endorses the concept of apartment ownership.⁷⁸ The chapter specifies that apartment owners “enjoy individual ownership of the parts of the building designed for exclusive ownership and joint ownership of the common parts of the property, and are obliged to jointly manage and maintain the buildings and accessory facilities.”⁷⁹ In addition, the property code clarifies that apartment owners, as joint owners, must bear the cost of maintenance and repairs of the common areas. Since the ownership of individual apartments is inextricably linked to the undivided share in the common property, any transaction with regard to an apartment also comprises the undivided interest in the common property.⁸⁰ Furthermore, the code specifies that an owners’ association composed of all the individual owners rather than the developer is responsible for the management and administration of the buildings and accessory facilities.⁸¹ All the owners automatically become members of the association as soon as they acquire ownership of an apartment. They all participate in the decisions or resolutions reached by the owners’ association and these resolutions are binding on all the apartment owners.⁸² Finally, the code determines and prescribes the majorities of vote that are required for resolutions that substantially impact on the property rights of individual apartment owners.⁸³ The new property code goes a long way towards meeting apartment purchasers’ expectations.

⁷⁶ C.G. van der Merwe, “Apartment Ownership”, *International Encyclopedia of Comparative Law* Vol. VI Ch. 5 (J.C.B Mohr Publisher, 1994) 3.

⁷⁷ The title is used so Chinese nationals can easily understand this institution. The title is borrowed from a term used in the Japanese Civil Code (1898).

⁷⁸ Lei Chen and Hanri Mostert, “The Unavoidable Necessity of Formalizing Condominium Ownership in China: A Pilot Study,” *Asian Journal of Comparative Law*, (2007) Vol. 2: Issue 1, Article 3.

⁷⁹ Art. 70.

⁸⁰ Art. 72.

⁸¹ Arts. 75 and 76.

⁸² Art. 78.

⁸³ Art. 76.

The new property code endorses the threefold-unity theory that the ownership of a unit is inextricably linked to an undivided share in the common areas and facilities as well as membership in an owners' association that manages and administers maintenance.⁸⁴ It is not possible to resolve all problems connected with condominiums through the enactment of a general property code. Many Western countries have separate statutes on apartment ownership in order to better regulate such rights.⁸⁵ However, for the moment it is worthwhile to note that apartment ownership provisions are included as a new chapter in the property code. These provisions may well form the basis for a detailed special statute on apartment ownership in the future.

3.2.4 The Right of Neighbourhood

The right of neighbourhood is a limitation on the interests of individual owners. When a party needs to cross over or through neighbouring property for water, drainage, ventilation, utility services, electricity cable, sunlight, or access to their own property, Chinese law recognises and protects the right to use neighbouring land in this manner as a "neighbourhood right".⁸⁶ This right which approximates the German *Notweg* and the South African way of necessity⁸⁷ is included in the property code in order to promote "proper neighbourly relations in the spirit of helping production, making things convenient for people's lives, enhancing unity and mutual assistance, and being fair and reasonable."⁸⁸ To safeguard the interests of purchasers of land use rights, the new property code grants them the right to claim compensation for any damage caused by persons exercising neighbourhood rights for access, water use, drainage, or laying pipes and wires.⁸⁹ Neighbourhood rights should not be confused with servitudes or easements even though they too constitute a legal limitation on the right of ownership. Neighbourhood rights can be extensions of or limitations on ownership in order to limit the rights of the owner in the use of the property, while servitude is a limited real right. The purpose of neighbourhood rights is to harmonize neighbouring owners' interests. Moreover, servitudes or easements are created by agreement and the servitude agreement is registrable

⁸⁴ The threefold-unity theory enjoys a great deal of support in many Anglo-American jurisdictions, notably in the New South Wales Strata Title Act of Australia and the Uniform Condominium Act of 1977 in the United States. Many European civil law countries also adopted this threefold structure approach, notably Austria in its *Wohnungseigentumsgesetz* (Federal Law on Ownership of Condominiums and other Premises) of 1 July 1975 and Spain in its *Ley no.49 Sobre Propiedad Horizontal* (Law no.49 on Horizontal Property) of 21 July 1960.

⁸⁵ For Germany, see *Gesetz über das Wohnungseigentum und das Dauerwohnrecht* of 1951; for South Africa, see Sectional Titles Act of 1986; for England, see Commonhold and Leasehold Reform Act 2002; for Singapore, see Land Titles (Strata) Act 41 of 1967 (as amended by the Land Titles (Strata) (Amendment) Act 1999) and the Building Maintenance and Strata Management Act 45 of 2004.

⁸⁶ Arts. 84-92.

⁸⁷ See C.G. Van der Merwe and M. von Hinden "Wegenot, Eigentumsgarantie und öffentliches Interesse – Der Notweg in Deutschland und Südafrika" in J. Basedow, U. Drobnig et al. (ed.) *Aufbruch nach Europa: 75 Jahre Max-Planck-Institut für Privatrecht* (Mohr Siebeck Tübingen 2001) 955-973; C. G. Van der Merwe "The Louisiana Right to Forced Passage Compared to the South African Way of Necessity", 1999 *Tulane Law Review* 1363-1413.

⁸⁸ Art. 84.

⁸⁹ Art. 92.

whereas neighbourhood rights do not need agreement between neighbouring owners to be effective.

3.2.5 Co-ownership

In co-ownership two or more people enjoy concurrent interests in the same property. The code distinguishes two kinds of co-ownership, namely, joint ownership and ownership in common.⁹⁰ Ownership in common is also called undivided co-ownership. It refers to a situation where several individuals own property in common, and each of them, in proportion to their share, owns a fraction of the property. Each co-owner may dispose of their share but may not change the state of the co-owned property without the consent of the other owners and the other owners have a priority right to acquire the alienated share.⁹¹ The administration of the property is determined by a two-thirds majority vote of the co-owners whose voting rights are proportionate to their share value.⁹² The share of each co-owner is determined by an act creating the common property. When the ratio of the ownership of a share is not specified, all shares are presumed to be equal in value.⁹³

Joint ownership in China pertains primarily to matrimonial property, joint-partnership enterprises, and property jointly owned by more than one heir by will or on intestacy. The new code stipulates that any attempt to turn a joint owner's holding into an undivided share and any attempt to dispose of part of a joint-owned property without the permission of all joint-owners is invalid.⁹⁴ It recognises that there may be ways of allocating unequal shares in the property, such as by agreement, by unequal contribution to the purchase price to obtain the property, and by an unequal allocation of management functions. It is particularly striking that the new code has not adopted a right of survivorship, a striking feature of joint ownership in English law. This means that upon death, a joint owner's interest falls to the remaining joint owners.⁹⁵ This right of survivorship was meant to apply to members of sport clubs and other social associations. The property code, however, does not deal with the right of survivorship since it does not contain provisions for when one of the joint owners dies. The co-ownership provisions in the property code have primarily been borrowed from the Japanese Civil Code, which illustrates China's long time commitment to a civil law tradition.⁹⁶

3.2.6 Acquisition in Good Faith

The property code includes the principle of *bona fide* acquisition (acquisition in good faith). *Bona fide* acquisition occurs when a purchaser acquires the ownership of the property without leaving any room for the original owner to make a claim for its return. In the code, three

⁹⁰ Art. 93.

⁹¹ Art. 101.

⁹² Art. 97.

⁹³ Art. 104.

⁹⁴ Art. 99. This provision is analogous to Art. 251 of the Japanese CC.

⁹⁵ Bernard Rudden, *The Law of Property*, 3rd edition (Oxford University Press, 2002) 93.

⁹⁶ For example, Art. 94 of the Chinese property code has been borrowed from the Art. 249 of the Japanese CC. Art. 97 of the Chinese property code has been borrowed from Art. 252 of the Japanese CC.

conditions must be met for acquisition in good faith: (1) the *bona fide* purchaser must not be aware that the transferor does not have legal entitlement to transfer the property; (2) the purchase price must be reasonable; and (3) the transfer of the property must be registered if so required, failing which requirement, possession of the property must be transferred.⁹⁷

Moreover, to gain the public's confidence in open market sales, the original owner must reimburse the assignee the amount paid if the *bona fide* transferee purchased the property at an open market or through an auction.⁹⁸ The general principle of good faith is best illustrated with the German and French Civil Codes.⁹⁹ In fact, the Chinese property code intends to incorporate Art.932 (2) and Art. 936 (2) of the German Civil Code that prevent the *bona fide* acquisition of property when there is gross negligence (*lata culpa*).¹⁰⁰

3.3 Rights of Use and Enjoyment

3.3.1 Terms Used in the Property Code

Chinese law scholars have long debated the kinds of rights of use and enjoyment that should be provided for in a Chinese property code. The main issue is whether traditional institutions such as superficies and servitude should be retained or whether a new set of concepts - such as land use rights for urban buildings, land use rights for rural homesteads, and the right for farmland use - should be adopted in right based land management contracts. It has already been shown that the new property code has adopted the latter concepts in order to address the special characteristics of Chinese land law. It is noteworthy that land use rights for rural homesteads are not freely alienable in commerce, which gives rural land use rights a lower status than urban land use rights.

3.3.2 Farmland Use Right Based on Agricultural Household Responsibility Contract System¹⁰¹

Another long-time controversy is whether a farmland use right based on an agricultural household responsibility contract system should be defined as a real right.¹⁰² Scholars who oppose this argue that a farmland use right which is based on a contractual right, namely an

⁹⁷ Art. 106.

⁹⁸ Art. 107.

⁹⁹ Ewan Mckendrick, "Good Faith: A Matter of Principle?" in A.D.M. Forte (ed.) *Good Faith in Contract and Property Law* (Oxford: Hart Publishing, 1999), 40.

¹⁰⁰ Art. 108.

¹⁰¹ The agricultural household responsibility contract system (Nongye Jiating Lianchan Chengbao Zerenzhi) was initiated by a group of farmers in a small village in Anhui Province in central China in the early 1980s. The system has two main features. First, since farmland is still owned by the collectives, agricultural collective landownership remains unchanged. Second, production and management are entrusted to individual farming households through long-term contracts. During the contract period the farmers pay taxes to the state and pay collective reserves to local governments while keeping the crop for themselves.

¹⁰² Chen Huabin, *The Principles of Jus Rerum*, (National Administrative Institute Press, 1998) 374 (Chinese version).

agricultural household contract, is a kind of *jus in personam* and should be regulated by the law of contract.¹⁰³ This issue was debated when the Chinese Uniform Contract Law was drafted. Those in favour of incorporating a contractual farmland use right into the category of real rights believe that a contractual household responsibility system is not absolute landownership and therefore is subject to limitations by state and local authorities.¹⁰⁴ Some contend that treating a contractual land management right in rural areas as a real right would stabilize the relationship of rights and obligations over land in rural areas, protect the interests of farmers, mitigate the decrease in the number of farms and prevent local governments from arbitrarily expropriating land.¹⁰⁵ In contrast, due to the relative nature of a personal right, it would be disadvantageous to the person entering into a contract to obtain the right to manage land if such a right was regarded as a personal right (*jus in personam*). It is argued that the farmland use right based on a land management contract should be defined in the new property code as a limited real right (*ius in re alina*).¹⁰⁶ Moreover, the content of the real right enjoyed by the contractor of the land should be specifically listed.¹⁰⁷ It is noteworthy that the property code emphasises that the land use rights based on agricultural household contracts cannot be changed arbitrarily for non-agricultural purposes.¹⁰⁸ In addition, the property code adopts the French voluntary system for registration of this kind of land use right. In other words, the agricultural household contract validates such a kind of land use right when parties have agreed to the terms and conditions of the contract. However, in the same clause, the property code provides that the local government, including and above county level, should grant a real right for land use rights based on an agricultural household contract.¹⁰⁹

3.3.3 Land Use Rights for Urban Buildings and Rural Homesteads

European civil law considers a building to be an integral part of the land. This is in line with the Roman maxim *superficies solo credit*.¹¹⁰ Chinese law differs in this respect. It considers a building to be immovable property that is independent of land largely because of public landownership.¹¹¹ The code deals with a situation where a person or a legal entity is allowed to use state-owned land for a period of time, usually on payment of rent or hire charges. The Constitution allows land use rights to be separated from land ownership in order to commercialize such rights.¹¹² Once the transfer of land use rights was recognised, China

¹⁰³ Qu Maohui, "Comments on Obligation Nature of the Agricultural Household Contracting System", 1998 *Law and Economics* 1 (Chinese version).

¹⁰⁴ Patrick Randolph and Lou Jianbo, *supra* note 41 at 81; Yang Lixin, "The Pitfalls of the Chinese Household Responsibility System and Its Resolution", 2000 *Hebei Law Journal*, 1 (Chinese version).

¹⁰⁵ Liang Huixing, *supra* note 3 at 510-514.

¹⁰⁶ In other words, this is a property right belonging to another person.

¹⁰⁷ Arts. 124-134.

¹⁰⁸ Art. 128.

¹⁰⁹ Art. 127.

¹¹⁰ Also referred to as *omne quod inaedificatur solo cedit*, which means that an owner exercises his land entitlements below and above the land's surface.

¹¹¹ It is worth noting that Chinese property law has a tradition of separating landownership and buildings. See V.A. Riasanovsky, *The Modern Civil Law of China*, (Harbin Daily News Press, 1928).

¹¹² Article 10 of the PRC Constitution, amended in 2004, provides that a land use right may be transferred in

developed rules on leasing, mortgaging, selling, and inheriting land.¹¹³ According to current land administrative law, a “granted land use right” is given for a period of 40 to 70 years depending upon the grant’s purpose.¹¹⁴ The property code provides that the urban building land use right can be obtained by government allocation and in the market.¹¹⁵ The land use right is somewhat similar to the long-term ground lease that is common in America to develop commercial sites and the leasehold estate system in England.¹¹⁶ The difference is that the Chinese right is obtained from the government rather than from a private owner. In light of China’s civil law tradition a granted land use right in urban areas originates from, and is similar to, the institution of *superficies* or the right of a building grant (Di-Shang-Quan). The land use right for rural residential purposes stems from the institution of perpetual quitrent or *emphyteusis*, a real right on real estate that can be assigned coupled with taking care of the property and paying rent on it. (Yong-Dian-Quan).

Early in the legislature’s draft deliberations, it was widely acknowledged that there was uncertainty about the ability of the holder of a land use right to renew the land use right when it expires. No one knew how much protection this right of renewal gives to holders of land use rights, because none of the rights granted after the 1988 Constitutional Amendment fall within the renewal period. Additionally, existing law does not state whether the holder of land use rights must pay increased charges based on the value of the land at the time of renewal, or whether the renewed term will be at least as long as the original term. To reduce uncertainty and risk, the NPC ensures that the state confirms holders’ right of automatic renewal without charge for private ownership on residential buildings¹¹⁷ except when it is in the public interest to reclaim the land.¹¹⁸ This is an improvement to further protect private property interests.

3.3.4 Retention of the Dian Quan System

Another issue centres on whether or not to abolish the Dian Quan system, which corresponds with the Roman term of *antichresis*. This occurs when a borrower hands over an immovable property to a creditor as security for a loan. In terms of Dian Quan, the creditor is entitled to use the security in lieu of receiving interest on the borrowed money. Historically, Dian Quan is a special Chinese system of use and enjoyment.¹¹⁹ In essence, it means the transfer of

accordance with the law.

¹¹³ Patrick Randolph, “Joint Congressional Executive Committee on the China Property Rights Roundtable”, see <http://www.cecc.gov/pages/roundtables/020303/randolph.php> (accessed 15 January 2007).

¹¹⁴ According to Article 12 of the Law on Urban Land Administration, the 50 year land use right is for industry, the 40 years right for commercial and service use, and the 70 years right for residential housing.

¹¹⁵ Art. 137. In Chinese real estate development practice, the third way is by assigning rural land for the construction of residential buildings. This encroaches most on farmers’ land interests.

¹¹⁶ See Patrick Randolph, *supra* note 112.

¹¹⁷ Art. 149.

¹¹⁸ Art. 148.

¹¹⁹ This is despite the fact that the Korean Civil Code (1958 as amended in 2005) was historically influenced by Chinese law to adopt the institution of Dian Quan as a separate chapter. (Arts. 303-319) The Korean term is “Chonsegwon”. Moreover, the Chinese CC of Taiwan (1929) also has this system. See Chinese CC of Taiwan,

secured immovable property to a creditor giving the creditor the right to use the secured property. The debate on whether *Dian Quan* should be retained in the new property code continues. The reasons for retaining the *Dian Quan* system are as follows. Firstly, *Dian Quan* is a security right to immovable property that is uniquely Chinese. It reflects the Chinese attitude of “helping the poor and supporting the weak”.¹²⁰ In one sense, retaining the *Dian Quan* system encourages the preservation of national culture and self-respect.¹²¹ Secondly, *Dian Quan* meets the requirements of a right of use and enjoyment of property as payment. The creditor profits from the use of the immovable property and his security is guaranteed by the value of the property. The fact that the creditor is allowed to benefit from the use and enjoyment of the property distinguishes it from a mortgage and means that replacement of *Dian Quan* by a mortgage system would cause a lacuna in the law.¹²² Thirdly, a policy of promoting the commercialisation of stated-owned residential properties increases the number of privately owned residential properties. *Dian Quan* offers the perfect solution for owners who neither want to use nor sell their property. They can use this institution instead of letting the property or entrusting it to the care of a manager. Hence, *Dian Quan* should be retained in the new Chinese property code.¹²³

The reasons for abolishing *Dian Quan* are as follows. Firstly, the origin of *Dian Quan* is rooted in the traditional Chinese notion that it is shameful to sell properties inherited from ancestors. With the rapid development of the modern market economy, people’s attitudes have changed. It is now regarded as normal business practice either to sell immovable property or to mortgage it when cash is needed. Secondly, with the development of international trade the Chinese domestic market is progressively merging with international markets, which in turn has led to a trend of internationalisation of the property system. The peculiar Chinese institution of *Dian Quan* should thus be abolished in order to adapt the country’s property system to an international setting. Thirdly, until now land has been predominantly owned by the state and the collectives that made the application of *Dian Quan* inappropriate for state-owned land. Even *Dian Quan* in relation to residential property is questionable. Although no statistical data is available, the cases brought to the courts for adjudication show that the practice is not popular. Hence, there is no value in retaining *Dian Quan*.¹²⁴

In conclusion, it should be noted that academic groups were in favour of maintaining *Dian Quan* in both drafts of the property code.¹²⁵ Consequently the view that the *Dian Quan* institution should be retained in the new property code is supported because of the

Arts.911-927.

¹²⁰ Article 83, the General Principles on Civil Law of the People’s Republic of China, regulates this moral principle.

¹²¹ Su Yongqin, *The Study of Divergence on Property Law*, (Taiwan Wunan Publishing House, 1999) 258-259.

¹²² Mi Jian, “Comparative Study on the *Dian Quan* System” (2001) *Tribune of Political Science and Law* 4 (Chinese version).

¹²³ Li Wanli, “An Approach to the System of *Dian Quan* in China” in Liang Huixing (ed.), *Essays on Civil Law and Commercial Law*, (Legal Press, 2001) 199 (Chinese version).

¹²⁴ Zhang Xinbao, “The Abolishment of the *Dian Quan* System”, (2005) *Legal Science Magazine* 5 (Chinese version).

¹²⁵ See Chapter 6 (Arts. 288-303) in the academic draft by Liang Huixing’s group, and Arts. 339-360 of the academic draft by Wang Liming’s group.

irreplaceable practical function.¹²⁶ Unfortunately, in the final text of the property code this unique and worthwhile Chinese institution has been abandoned.

3.3.4 Servitudes

In line with Roman tradition, the Chinese property code recognises the civil law division on servitudes into praedial servitude and personal servitude.¹²⁷ The praedial servitudes, also known as real or landed servitudes, are limited rights of enjoyment of a dominant tenement prevailing over a servient tenement.¹²⁸ Praedial servitudes allow the owner of the dominant tenement certain activities on servient tenement such as a right of way or the support of structures. It also prohibits certain material acts on servient land such as raising the height of buildings on servient land. However, the chapter on servitude in the property code does not differentiate types of servitude, such as right of way and lateral support of a building. Servitudes can be created by agreement, by testament, and by law. According to customary Chinese law, a small piece of land is always in need of servitudes. But unfortunately the institution of servitudes has not been regulated satisfactorily either in legislation or judicially. Consequently, the property code makes it clear that the servitude can only be created by agreement and that servitude agreements are registrable.¹²⁹

Classically, there are three types of personal servitudes: the right of usufruct- using and enjoying the profits of another's property - the right of use, and the right of habitation/residence. However, the Chinese property code does not contain any provisions on personal servitudes. The right of habitation was in the draft until the fifth reading in the NPC. As in the Swiss and the Italian Civil Codes, a right of residence is an inalienable and non-heritable real right of a person to reside in the dwelling of another.¹³⁰ The right cannot be encumbered, sold, transferred, donated or inherited.¹³¹ Habitation is a personal servitude, namely, a charge on a property in favour of a person, similar to, but more limited than a usufruct.¹³² The main function of a right of habitation is to provide a guaranteed place to stay for the lifetime of a parent or family members. The personal servitude of a habitation is essential in China in the light of the lack of housing and the government's policy of making the provision of adequate housing a priority. This is why discarding provisions on the right of habitation seems to be almost irresponsible.

¹²⁶ Hu Zhigang, *supra* note 38 at 263-271.

¹²⁷ The BGB divides servitudes into praedial servitudes (Arts.1018-1029), usufruct (Arts.1030-1089), and limited personal servitudes (Arts. 1090-1093); the Greek CC includes praedial servitudes in Chapter 7 of Book Three and personal servitudes in Chapter 8.

¹²⁸ A.N. Yiannopoulos comments that the German BGB contains a precise but cumbersome definition of praedial servitudes – *Grunddienstbarkeiten* – since it also refers to the purpose of praedial servitudes. See A.N. Yiannopoulos., “Praedial Servitudes; General Principles: Louisiana and Comparative Law”, 29 Louisiana Law Review 1.

¹²⁹ Art. 158. The registration of a servitude agreement is voluntary with the parties giving their consent. This is the case for the registration of agricultural land use rights that are based on household responsibility contract.

¹³⁰ See the Swiss CC, Art.776 (2) and the Italian CC, Art. 1024.

¹³¹ Art. 183. In addition, the provision states that unless the will or the agreement creating the right of habitation specifies otherwise, the person who holds the right cannot lease the dwelling.

¹³² Louisiana CC., Arts. 630-638.

3.4 Security

A security right burdens the debtor's property in favour of a creditor to ensure the satisfaction of a creditor's claim when the debtor defaults on loan payments or becomes insolvent. The Chinese property code makes provisions for security rights to ensure that an obligation is met, typically the payment of a debt. Historically, Roman law recognised three forms of real security: *fiducia cum creditore* (conditional transfer of ownership), *pignus* (pledge), and *hypotheca* (mortgage). In modern times, there is a transition from the disposition of property as security to the realisation that the burdening of an equity asset inherent in the value of property affords sufficient security. Most jurisdictions draw a distinction between personal security and real security. Any discussion of personal security is outside the scope of the property code. Basically, the property code contains four elaborate chapters on security interests, namely, general provisions, mortgages, pledges and liens. In more recent civil codes, traditional value-preserving mechanisms such as the mortgage, the pledge, and the lien, have been supplemented by the maximum amount mortgage as security for bank overdrafts, mortgages on identifiable movable property, mortgage on consortium assets, floating charges, and pledges of incorporeal movables such as future debts.¹³³ Since the pledge and the lien are substantially similar to most European civilian systems, especially to the German pandectist system, only mortgage rights and atypical securities merit further discussion.

3.4.1 Mortgage

The Chinese property code follows the modern European civil codes in describing a mortgage as (1) a limited real right (2) an accessory right contingent on the existence of the secured obligation¹³⁴ and (3) a preferential right. The mortgage chapter in the Chinese property code contains two separate sections, one on regular mortgages that secure a fixed claim, and one on maximum amount mortgages that secure a future or conditional claim.¹³⁵ Remarkably, the code prevents certain specified tangible and intangibles from being mortgaged, including state-owned lands, use rights in collective farmland in rural areas, unclaimed or defective titled property, sequestered property, public facilities such as public schools and hospitals as well as other things prescribed by law.¹³⁶ The code also specifies that a mortgaged-backed security should be created by a written contract and that a mortgage of immovable property should be registered in the land registrar office in order to render it effective.¹³⁷

The property code contains certain prescribed procedures with regard to mortgages. In case of default, the registered mortgage creditors have priority over unregistered creditors.¹³⁸ When a property is encumbered with more than one registered mortgage, creditors' claims are ranked

¹³³ See the draft by Wang Liming's group, Arts. 430-450.

¹³⁴ The atypical security is illustrative of the existence of theoretical deviations from the accessory nature.

¹³⁵ Dutch CC Art. 3 (231) (1); BGB Art. 1190; Swiss CC Art. 794 (2).

¹³⁶ Art. 184.

¹³⁷ Arts. 185 and 187.

¹³⁸ Art. 199 (2).

chronologically according to the *prior in tempore* principle.¹³⁹ When a mortgaged property is sold in execution, the mortgage creditors are paid out fully and the surplus to the mortgage debtor. If the debt has not been satisfied fully by the execution of the mortgaged property, the debtor is still responsible for the amount left to satisfy the debt.¹⁴⁰ As is the position in Western Europe, mortgage creditors in China cannot make an agreement with mortgage debtors to transfer the title of a mortgaged property before the debt becomes due.¹⁴¹

An examination of Civil law jurisdictions indicates that the maximum amount of a mortgage securing future debts must be shown on the mortgage certificate and that the amount must correspond to the amount shown on the deed.¹⁴² If the maximum amount recorded is less than the full value of the mortgaged property, subsequent mortgages can be established for the outstanding amount. Perhaps because of a special statute recognising maximum amount mortgages,¹⁴³ the property code contains only very skeletal provisions on maximum amount mortgages. There is, for example, no mention of a provision that the owner and the mortgage holder may at any time agree to convert the maximum amount mortgage to a regular mortgage for a fixed amount.¹⁴⁴

3.4.2 Atypical Real Security Rights

More recently, atypical forms of securities have become popular. They are used to avoid troublesome and expensive public procedures as well as to secure a debt while retaining ownership rights.¹⁴⁵ These forms include 1) the retention of ownership as security in a conditional contract of sale and 2) sale and leaseback arrangements coupled with life insurance. Indeed, it has become an international trend in security rights legislation to replace traditional forms of security with atypical forms.¹⁴⁶ China has attempted to transplant the English system of mortgages¹⁴⁷ into its law because of the vital role mortgages play in the booming housing market. With the collapse of welfare-housing policy,¹⁴⁸ the market for privately owned apartments flourished, because of the possibility for private citizens to finance their purchase of residential property with twenty to thirty-year home mortgage loans.

¹³⁹ Art. 199 (1).

¹⁴⁰ Art. 198.

¹⁴¹ Art. 186.

¹⁴² Japanese CC. Art. 398 (2) (1); Spain, Law on Mortgages of 1946 Art. 153 (5); French CC. Arts. 2129, 2132 and 2146 (2); Swiss CC. Art. 797.

¹⁴³ The PRC Law of Security of 1995 includes provisions on maximum amount mortgages in Arts. 59-62. However, these provisions are widely held to be no more than a definition of maximum amount mortgage and without significant value in practice.

¹⁴⁴ For Belgian examples, see E. Dirix and R. De Corte, *Zekerheidsrechten*, 481-482, and C.G. van der Merwe and E. Dirix, "A Comparative Law Review of Covering Bonds and Mortgages Securing Fluctuating Debts", 1997 *Stellenbosch Law Review* 17-30.

¹⁴⁵ Shi Shangkuan, *On Law of Things*, (China University of Politics and Law Press, 2000) 425.

¹⁴⁶ Liang Huixing, *supra* note 3 at 776-781.

¹⁴⁷ The English mortgage is the counterpart of the atypical security right commonly used in European civil law scholars. See Liang Huixing, *supra* note 3 at 777.

¹⁴⁸ Welfare-housing policy refers to the Chinese policy of distributing housing to working people without charge. These people were not allowed to obtain ownership of their residences.

The purpose is to make funds available for the purchase of houses or apartments. On the one hand, this system allows buyers to live in houses of their choice without having to pay the full purchase price at the outset. On the other hand, Chinese banks flourish by virtue of numerous loans extended to purchasers of residential property. The banks are as protected as their Western counterparts, for if a borrower defaults, the creditor – the bank – can take possession of the property and sell it at a judicial sale.¹⁴⁹ Since this system is already in place in the country's housing market, one of the drafts of the property code included this system as a separate chapter.¹⁵⁰ Unfortunately, the final text of the code has not integrated it in its provisions.¹⁵¹

4. Conclusion

A comparative overview of the main characteristics of the Chinese Property Code including its overall structure reveals that while it is flavoured with Chinese traditional values and political influence, it forms part of a worldwide civil law system. Generally, Chinese property law has been strongly influenced by the European civil law tradition while borrowing from the English common law mortgage mechanisms. Chinese legal scholars who discussed and drafted the model property code focused on the property provisions of the German and Swiss Civil Codes with reference to the Japanese and Taiwanese Civil Codes as being analogous in the spheres of legal culture, values, language and history.

Chinese legal scholars and foreign property law experts praise the new property code.¹⁵² From the perspective of language, organisation, and legislative technique, the new property code is a big leap forward from the antiquated and obscure provisions of the 1986 General Principles of Civil Law. It offers much needed certainty and clarity in promoting title security, particularly in the sphere of private property. There are conspicuous merits in the code that deserve to be mentioned. These include the automatic renewal of urban land use for residential purposes upon expiration, allowing apartment owners to employ or appoint a managing agent of their choice, requiring a uniform registration system for immovable property, and adequately compensating farmers whose land use rights in collective farms have been expropriated. In summary, the code is an unprecedented achievement in Chinese legislative history. It acknowledges the new and progressive Chinese national characteristics and consolidates a new approach to property law in tandem with the new Chinese political

¹⁴⁹ M. Thompson, *Modern Land Law* (Oxford University Press, 2001) 322; Chen Benhan, *General Study On Law of Security*, (Wuhan University Press, 1998) 333 (Chinese version).

¹⁵⁰ See the draft provided by the academic group led by Liang Huixin.

¹⁵¹ Those opposing inclusion of an atypical security system maintain that Chinese security law primarily borrowed from civilian systems. The concept of atypical security, including purchase money mortgage/instalment sales, does not fit in the whole civilian system. This argument is weak since it ignores the very popular practice of instalment sales in China and is therefore still doctrinal and rigid. See Wang Guowei and Wang Kun, "The Position of Atypical Security in Chinese Law of Things", (2004) *Modern Legal Science* 5 (Chinese version).

¹⁵² Jacques de Lisle, *supra* note 18. He calls the current legislative effort to enact a property code the most ambitious legislative endeavour in contemporary Chinese legal history. He goes on to say that it will have a far-reaching impact on every type of economic transaction in China.

ideology. It has already attracted the attention of civil law scholars anxious to see how it is to be implemented.

The new property code is not perfect. The foregoing analysis shows that the new code is no more than a consolidation of the general principles of property law to meet current social and economic conditions. The code's final text that has 247 articles is a contracted version of the original academic drafts which contained 435 and 575 articles respectively. Certain provisions in the drafts have been pruned for the sake of political ideology. For example, collectively owned agricultural land and housing still cannot be mortgaged and the right of habitation has been abandoned from the final text of the property code. Moreover, technical problems impeded the drafting of the final text of the code. Very knowledgeable lawyers, land registration staff, civil-law notaries and land-surveyors, all with first-hand experience and expertise, for one reason or another were purposively not invited to present their ideas and materials during the drafting process. Furthermore, the code introduces new concepts into Chinese law that were previously rejected. Examples are the introduction of the maximum amount mortgage to secure future overdrafts with a bank and the institution of apartment ownership. These new concepts present new challenges for both legal scholars and practitioners who have to adapt to a changing legal environment. Finally state ownership still plays a predominant role in the Chinese system of property rights. Controversy over the different treatment of State-owned, collectively owned and private property has long plagued the Chinese legal system. A unique feature of the new property code is that legislators now accept that state and privately owned property should enjoy equal protection. This policy may not be easy to implement given the issues concerning state ownership in the Chinese political system. One suggestion is that the legislative technique of stipulating general provisions be adopted. The new property code should contain general provisions while specific and detailed property rights should be provided for in later legislation. Indeed, special statutes pertaining to specific institutions are not simply necessary, they are indispensable. However, the long-awaited property code should be functional rather than only a compilation of general principles making no sense in practice. Hopefully, special statutes will be enacted later to rectify the problems the code does not meet. Ultimately, the life of the law lies in its application. So the impact of the new code will be measured by the state's approach to enforcement. And finally, a process needs to be designed to transform state ownership to private ownership in tandem with and sensitive to the new market economy.

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