

The Evolution of Chinese Property Law:

Stick by Stick?

Shitong Qiao¹

1. Introduction

Chinese land reform has managed to maintain and disintegrate state and collective land ownership simultaneously by discarding the unitary conception of ownership. It is consistent with the idea that “property comprises a complex aggregate of social and legal relationships” (Heller 1999:1191) rather than being “the simple and nonsocial relation between a person and a thing” (Alexander 1997:321). Scholars disagree about whether property rights are *in personam* rights or *in rem* rights. Traditionally, the *in rem* nature of property was widely recognized. Most famously, Sir William Blackstone (1803:1) defined property as “that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.” According to Blackstone, property is “a right of a person with respect to something that avails against a large and indefinite number of other persons” (cited in Merrill and Smith 2001a:361). Later, however, legal realists succeeded in promoting a rival conception—that of property as a bundle of rights. Ronald Coase (1960) went one step further, conceiving of property as a list of particularized use rights that individuals have when it comes to resources, i.e., *in personam* rights. In recent decades, the “bundle of rights” view come under considerable criticism (e.g., Penner 1995; Merrill and Smith 2001a). Henry Smith (2011, 2015) further criticizes the *in personam* concept of property

¹ J.S.D., Yale Law School; Assistant Professor, the University of Hong Kong Faculty of Law. The author thanks Yun-chien Chang for comments and Yicheng Su for research assistance. All errors are my own.

rights, explicitly proposing property as a law of things to theorize the *in rem* nature of property rights. Although this *in rem* versus *in personam* debate is well known, its relevance to property reform in developing countries has not been explored fully (for an exception, *see* Qiao and Upham 2015).

Taking up the case of China, this chapter argues that the path of Chinese land reform better fits a “bundle of sticks” than “law of things” view of property rights. Regardless of Chinese legal scholars’ enthusiasm for or leftists’ hatred of the idea of individuals having sole and despotic dominion over private property, the law and policy makers of Chinese land reform have often taken a more pragmatic approach, reconfiguring land rights in China “stick by stick.” The two main achievements of Chinese land reform, i.e., the establishment of land use rights (LURs) in the urban area and the establishment of land management and contract rights (LMCRs) in the rural area, are examples of the stick by stick approach. The ideological debates over privatization, in contrast, has more often intensified conflicts within the country’s political system. When such ideological enthusiasm dominates the law-making process, it hampers land reform, as exemplified in the making of the 2007 Property Law. It is therefore misleading to ask who owns and who prevails in the context of Chinese land reform. The better question is how the bundle of sticks is arranged among government, communities, and individuals. This bundle of rights metaphor, or conception of legal relations, as Heller (1999:1191-1194) calls it, is useful because society is generating more forms of property than the simple thing-ownership metaphor captures. This chapter also examines the recent policy developments following the third plenum of the 18th Congress of the Chinese Communist Party (CCP) and finds that policy makers have stuck to the stick by stick approach. The

chapter develops its arguments by reviewing the main property laws and policies over the past three decades to outline the basic contours of the Chinese property system.

The remainder of the chapter is organized as follows. Section 2 examines the concept of *in rem* property rights. Sections 3 and 4 investigate the competing concepts of property rights in the fable and reality of Chinese property law respectively. Section 4 also explores the status and meaning of public land ownership in the current system, as well as how individual sticks of property rights have evolved and become separated from public land ownership. Section 5 concludes.

2. *In Rem* Property

Who is eligible to serve as the owner of property? Individual persons, close-knit communities, and governments “all can and do own property” (Merrill and Smith 2010). But what is meant by “property rights”? Some scholars believe that property is a bundle of rights that indicates which designated individuals are entitled to engage in which uses of particular resources (e.g., Ellickson 2011; Epstein 2011; Baron 2013). This *in personam* approach defines property as social relations between persons with respect to resources, and is analogous to a bundle of rights. Another school of thought holds that “property is a distinctive type of right to a thing, good against the world” (Merrill and Smith 2001). This *in rem* concept of property consists of three parts. The first part is emphasis on “property as the law of things” (Smith 2011). As Smith (2014) argues, “the definition of a thing and its role in mediating private interactions lie at the heart of property.” The “thing” plays a role in depersonalizing and formalizing property relations. In general, this *in rem* concept views property as the relationship between human beings

and resources instead of a web of social relations among human beings.² “First, it identifies particular resources (‘things’), and specifies which person (the ‘owner’) is to act as the gatekeeper or regulator of the thing” (Merrill and Smith 2001). Things are “modules” through which law can organize the complex relationships into “lumpy packages” of legal relations (Smith 2012).

The second part of the *in rem* theory of property is the emphasis on the right to exclude; that is, the right to exclude others from some definite thing is central to what the owner owns (Merrill and Smith 2001). To describe someone as an owner of some thing is to say that someone has the right to exclude others’ use of that thing. Merrill (1998) holds that the right to exclude is more than just one stick in the bundle of property rights: “Give someone the right to exclude others from a valued resource . . . and you give them property. Deny someone the exclusion right and they do not have property.” However, Smith (2014) recently argued that “the right to exclude . . . is not quite a *sine qua non*” of property.” In the same essay, he addresses other property rights, such as the right to transfer and the right to use. Even more recently, Chang (2015) claimed that “ownership” is just one type of property right, labeling the right to transfer and the right to use, among others, as “subsidiary rights.” Despite these recent elaborations, however, the *in rem* concept retains its long-time emphasis on the right to exclude as the natural consequence of defining property rights as a law of things. Under this view, then, the first question to ask remains who owns the thing, which generally means who is the gatekeeper who has exclusive control over it.

² Note that Chang and Smith (2012) argue that “property is a *structured* bundle of relationships,” which makes the distinction between the *in rem* and *in personam* concepts more nuanced.

Merrill and Smith (2001) argue that legal realists and legal economists have successfully replaced the traditional *in rem* concept of property rights with the bundle of rights picture. In their view, someone who believes that property constitutes a right to a thing might be mocked for being lack of sophistication. Nonetheless, the Blackstonian concept of absolute dominion still dominates our imagination of property rights. The standard trilogy of private, communal, and state property rights presumes the *in rem* concept of property rights and is evidence of the Blackstonian concept. “Theorists push reforms towards one type or the other, but none” has substantially challenged the trilogy itself (Heller 2001).

Private property, despite the inherent ambiguity of its boundaries, is the benchmark and starting point of this trilogy. Blackstone’s sole and despotic dominion over the external things of the world is an *in rem* portrayal of property rights. Further, as Dagan and Heller (2001) argue, “comm[unal] property designates resources that are owned or controlled by a *finite* number of people who manage the resource together and exclude outsiders.” Essentially, it is “a regime that holds some resources as a commons among a group of ‘insiders,’ but as an exclusive right against ‘outsiders’” (Rose 1998). It is “commons on the inside, [private] property on the outside” (Rose 1998). State property, or centralized property, refers to property over which the state holds all rights of exclusion and is the sole locus of decision-making regarding the use of resources (Heller 2001). Like the definition of private property, the definitions of both communal and state property present a relationship between a thing and an owner, in which exclusion is the core.

The third component of the *in rem* view is the *numerous clausus* principle. Merrill and Smith (2000) develop the optimal standardization thesis and further discuss the *numerous clausus* principle based on the *in rem* concept of property rights, which, on the whole, overemphasizes the role of law and downplays the role of social norms in the evolution of property rights. In the world of *numerous clausus*, law is the main source of property rights. Merrill and Smith (2001) argue that the government, particularly the legislature, should play a role in standardizing rights, an argument that is closely aligned with Bentham's (1975) supposition that without law there would be no rights. Smith's (2003) well-known analogy between language and property is apt here. He pointed out that the grammar of a language is standardized spontaneously, whereas the source of the standardization of property rights is different.

In rem property rights theory also dominates the evolution of property rights literature, the majority of which, following the path-breaking work of Harold Demsetz, focuses on the paradigmatic situation in which the evolutionary process begins with open-access or communal property and ends with private individualized property. Demsetz (1967) centers his discussion on the emergence of private property among Indians of the Labrador Peninsula. Robert Ellickson (1993) explores the switch from group ownership to individual ownership over time using various empirical materials. Finally, Michael Heller (1998) investigates the post-communist transitions of property regimes in Russia, whose aim was a shift from government ownership to private ownership.

In summary, the Blackstonian idea of property rights defined as the exclusive relationship between a thing and its owner might be more powerful and persistent in legal

research than scholars thought (Merill and Smith 2001a). Its prevalence is likely owing to its clear-cut, intuitive nature (Ackerman 1978), which reduces information costs (Merill and Smith 2000). The the real world is more complicated (Qiao 2016), however. Hence, I examine the competing concepts of property rights in Chinese land reform in the two following sections.

3. The Fable of Chinese Property Law

At first glance, both Chinese property law and the public discourse on Chinese land reform adopt the *in rem* view outlined above and follow the *numerus clausus* principle closely. The 2004 Constitutional Amendment stipulates that “citizens’ legal property shall not be violated,” which was widely cheered by commentators both inside and outside China as a landmark success in China’s long march toward a market economy and constitutionalism based on private property (e.g., Buckley 2004). Article 5 of the 2007 PRC Property Law states that “the varieties and contents of real rights shall be stipulated by law,” which is essentially the Chinese version of *numerus clausus* (*wuquan fadong*).³ The legislative interpretation is that the establishment of new kinds of property rights and the content of those rights can be stipulated only by law, i.e., cannot be left to agreement between parties. The underlying rationale, according to this legislative interpretation, is that property rights differ from contract rights in the sense that there are thousands of obligators, as a result of which the former cannot be decided by the parties concerned, only by law (Standing Committee of NPC 2007). This is a perfect match with Merrill and Smith’s (2000) information cost theory. The legislators also considered that new property rights might emerge, and thus that property law should

³ For an introduction to how Chinese property scholars interpreted the *numerus clausus* principle, see Chang and Smith (2015:2301-03).

allow room for their development. However, again consistent with Merrill and Smith (2000), the Chinese legislators concerned concluded that new property rights can be sanctioned only by law (Standing Committee of NPC 2007).

The *in rem* picture of property rights in China is vividly exemplified in the mass media by the phenomenon of the nailhouse (dingzihu). A Chinese neologism that first appeared in the media in 2007, the term “nailhouse,” refers to a hold-out house standing in the way of urban redevelopment like a stubborn nail. The first nailhouse was located in the city center of Chongqing in a case dating back to 2004, when the Chongqing government decided to redevelop the area in which it was located. Of the 281 households affected by the redevelopment plan, only one remained in September 2006, a so-called nailhouse owned by a couple who were demanding more compensation. The land developers began to reconstruct the demolished area surrounding the nailhouse and cut off the supply of water and electricity to it. On March 16, 2007, the National People’s Congress of China passed the Chinese Property Law, the main purpose of which, according to the Chinese mainstream media, was to strengthen protection for private property (Xu 2007). On March 21, Yang Wu, the husband concerned, climbed onto the roof of his house, hoisted the national flag, and unfurled a banner reading “citizens’ legal right to private property cannot be violated”(Xu 2007). Wu Ping, his wife, stood in front of their home with a copy of the Chinese Constitution in her hands, Article 13 of which stipulates the exact words written on the banner. Within 24 hours, this poignant scene had attracted national and even international attention. On March 22, reporters from around

the world rushed to Chongqing to see “the coolest nail household in history.”⁴ The case was settled by offering more compensation to the owners, the amount of which remains a secret. This case was widely applauded as a great success in protecting private property against public power. In the words of the New York Times, “a simple homeowner stared down the forces of large-scale redevelopment that are sweeping this country, blocking the preparation of a gigantic construction site by an act of sheer will” (French 2007).

Mainstream opinion attributed the couple’s success to the power of law (Hong 2007), with many believing that the new Chinese Property Law and 2004 Amendment to the Chinese Constitution had enabled an ordinary couple to resist and prevent an abuse of public power “by an act of sheer will” (French 2007).

The public discourse on rural land reform also presents an *in rem* picture, focusing on whether rural land should be privatized, re-collectivized or even nationalized (Qin 2008). The privatization proposal emphasizes individual autonomy, liberty, and the necessity of securing private property for long-term economic development (Chen 2014), whereas the re-collectivization proposal considers the decline of the irrigation system in the rural area and the overall insufficient supply of public goods to be the failure of the country’s Household Responsibility System (HRS), and claims that re-collectivized rural land would also have an advantage in terms of economies of scale (Bai 2015). The nationalization proposal is more complicated: some proponents propose state land ownership for the purpose of preventing village collectives from violating individual households’ land rights (Chen 2014) whereas others propose it as a strategy to modernize the agricultural sector through the creation of large-scale farm operations (Chen 2014).

⁴ Sixty-one reporters representing more than 40 media organizations participated in a press conference held by the local court on March 23, 2007. Numerous magazines and newspapers, including the New York Times and BBC News reported the incident. See Southern Weekly 2007.

Although such proposals contest who should own rural land, they are consistent in their *in rem* view of land.

Who owns China's land? This question can be misleading because it is premised on an exclusive relationship between land and the state, the village community, or individuals/private entities. The conventional view further holds private "sole and despotic dominion" over real estate as the benchmark for comparison. As a result, several phrases have been invented to depict developments in the Chinese property regime, such as "quasi-private property rights" (Kung 2002) and "incomplete property rights" (Bennett et al. 2011) However, Chinese land reform is not a simple privatization, i.e., the transfer of exclusive control from the state or collectives to individuals. Accordingly, the *in rem* view of property rights is inconsistent with Chinese reality. What is needed instead is examination of how the bundle of rights to Chinese land has been rearranged over the past three decades.

4. The Reality of Chinese Land Rights: The Sticks of Public-Owned Land

Chinese land reform is not done by changing land ownerships. More than three decades since the market transition, China's economy is still built on public land ownership: roughly speaking, urban land is state-owned and rural land is collective-owned. Despite the general belief that private property is the key to economic growth (e.g., North and Thomas 1973; Cooter and Schaefer 2009), China's economy has become the second largest in the world in the absence of private land ownership. The seeming contradiction of the so-called "China problem" has compelled scholars to reflect on the role of property rights in economic development (e.g., Clarke 2003; Palomar 2004; Trebilcock and Veel 2008; Upham 2009).

In reality, the separation of LURs from land ownership is a central feature of the evolution of the Chinese land regime. This separation has resulted in the emergence of urban LURs (“ULURs”) and the rural LCMRs (“RLCMRs”). In the 1980s, the Chinese government, which had set development as its supreme goal, consciously and pragmatically gave up the unitary conception of public land ownership and focused on restructuring the complex social and legal relationships surrounding property. Both ULURs and RLCMRs emerged, and were gradually adopted into law as sticks detachable from the bundle of sticks of state-owned land and collective-owned land, respectively. This process has involved the gradual adjustment of the rights and obligations between land owners (the state and collectives) and land users. Although the rights of both are listed as usufructuary rights (*yongyi wuquan*) in the 2007 Property Law, they are created by contracts between land owners and corresponding land users, and are still far from fee simple: the exercise, mortgage, and transfer of ULURs are subject to detailed restrictions on the assignment contract between the state and the initial user, regardless of whether the ULURs have been further transferred, whereas the transfer and mortgage of RLCMRs are still strictly controlled and subject to the approval of the collective land owners in many situations.

In the following, I examine the continual confirmation of public land ownership in Chinese law, the emergence and legalization of ULURs and RLCMRs, and the nature and contents of both rights.

4.1 Public Ownership Stays

Public land ownership, including the state ownership of urban land and collective ownership of rural land, still defines and shapes the Chinese land regime. Public land

ownership in Article 10 of the 1982 Chinese Constitution remains and has been consistently confirmed in the following property laws. Articles 73 and 74 of the 1986 General Principles of Civil Law (GPCL) stipulate state property ownership and collective property ownership separately, both of which were arranged before individual property ownership (Article 75) and before LURs and LCMRs in Article 80. Both public ownership and its priorities were kept untouched in the 2009 revision of the GPCL. Article 1 of the 1986 Land Administration Law (LAL) states that the law is intended to “strengthen land administration, maintain socialist public ownership of land, protect and develop land resources.” Articles 6 and 8 of the 1986 LAL reiterate the state ownership of urban land and collective ownership of rural land separately. Subsequent revisions to the LAL in 1988, 1998, and 2004 have kept the law’s purpose to maintain public land ownership intact. Both the 1990 Interim Regulations Concerning the Assignment and Transfer of the Right to the Use of the State-owned Land in the Urban Areas (“the 1990 Interim Regulations” hereafter) and the 1994 Urban Real Estate Administration Law were made to implement state land ownership. Finally, the 2002 Rural Land Contract Law (RLCL) also confirms the collective ownership of rural land.

Readers may question the meaning of such articles, just as they may question the validity of the communist ideology in the Chinese constitution. Does their meaning matter? Yes, the ongoing confirmation of public land ownership matters in two ways. The first way is via the expressive power of law (McAdams 2015), which includes the expression of a particular ideology, but goes beyond expressing an ideological preference. The aforementioned articles confirm the status of the state and collectives as land owners. Despite the decreasing sphere of both owners’ rights to the land, all individual rights are

from and subsidiary to public land ownership: except for those granted to individual entities, all rights remain in the hands of the state or collectives. The second way in which their meaning matters is more substantive and has posted an ongoing threat to individuals' land rights. What does land ownership mean? If it is superior to ULURs and RLCMRs, then the government can destroy individual land rights by exercising its land ownership. This is what happened in the land nationalization conducted by the Shenzhen city government in 2004 (Economic Information Daily 2013), in the sales of collective land by village heads in the name of the collective in Wukan, Guangdong in 2001, and in other places on many occasions (Ramzy 2011).

The significant meaning of land ownership also made it a focus of constitutional debate in the making of the 2007 Property Law. Professor Gong Xiantian of Peking University Law School sent a public letter to the Standing Committee of the National People's Congress (NPC), claiming that the entire Property Law draft under the NPC Standing Committee's review was unconstitutional because it lacked an article on the protection of public property. This letter extended the Law's review process and led to substantial revisions to the draft, including the addition of Articles 3 and 4 to emphasize the protection of public property. The state ownership of urban land and collective ownership of rural land are reiterated in Chapter 5, "State Ownership and Collective Ownership, Private Ownership" of the Property Law.

4.2. ULURs

The government of Shenzhen, China's first special economic zone (SEZ), created ULURs under the influence of the crown land sale model of Hong Kong. Although the practice was unconstitutional, it soon spread to other cities, and later triggered the 1988 constitutional amendment that sanctioned ULURs. On the one hand, ULURs can be transferred, leased, and mortgaged. On the other, their contents are specified in the ULUR assignment contract and run with the land. The 2007 Property Law includes the *numerus clausus* principle and lists the ULUR as usufructuary right. However, ULUR assignment contracts leave sufficient room for both parties, the government in particular, to create well-tailored terms to control the use and development of the land without worrying about future ULURs holders changing those terms.

4.2.1. The Creation of ULURs

Before 1979, land was controlled by the state and used by various government units for free in accordance with Marxist principles stating that the price mechanism was inappropriate after the abolition of private property. However, with the implementation of China's reform and opening-up policies, state ownership of urban land required a more nuanced understanding than that provided by Marxist orthodoxy. The cities at the frontier of the reform and opening-up policies blazed the trail for land use reform. On December 31, 1979, for example, the director of the Shenzhen City Construction Commission signed a contract with a Hong Kong investor according to which the Shenzhen city government contributed land, and the Hong Kong investor financed land development and shared in a fixed percentage of the profits (Feng 2006). On December 5, 1980, the Shenzhen City Construction Commission signed the first "land use fee" contract with a Hong Kong investor, which included the essential ingredients of today's standard

contracts governing the assignment of state-owned LURs between local governments and real estate developers, including the term (30 years in this contract) and price of land use (HK\$ 5000 per square meters) (Feng 2006).

The practice of land use fees discussed above can be considered a prologue to land use reform because of their limited scale, but it ultimately served as the beginning of a norm cascade (Ellickson 2001; Sunstein 1996). The Shenzhen SEZ went one step further. In November 1981, Shenzhen created its own land use regulation that required domestic investors within Shenzhen, as well as foreign investors, to pay one-time land use fees.⁵ However, in the absence of a land market, the standard land use fee was fixed by law and applied to all construction projects. Users who valued the land most had no opportunity to reveal their willingness to pay higher prices. Shenzhen, as the first city to charge land use fees, was the first to feel their constraints. After carefully studying the crown land sales in Hong Kong (Nissim 2008), the Shenzhen government realized the revenue-generating power of land markets. It wanted to sell land, and it created a slogan in response to the CCP's call to build a "commercial economy with planning." Its slogan was: "No land market, no complete commercial economy." Shenzhen's desired reform faced an ideological challenge from Marxism: how could a socialist country that had abolished private property sell land? In response to this challenge, the reformers separated LURs from land ownership. A local reformer searched the classics of Marx and Engels page by page and found support from the latter. Engels wrote: "[A]bolishing private ownership of land does not require abolishing land rents; rather it requires

⁵ See Article 19 of Interim Regulations on Land Administration in Shenzhen Special Economic Zone (promulgated by The People's Congress of Guangdong Province, Dec. 24, 1981).

submitting land rents to the society” (cited in Feng 2006). Thus selling LURs would not challenge state land ownership in China, but would allow the state to utilize land rents.

Shenzhen eventually held the first public auction of transferrable LURs in the history of the PRC on December 1, 1987, in direct conflict with the then effective LAL and Constitutional Law (Feng 2006). This public defiance led to legal authorization of the transfer of LURs by the People’s Congress of Guangdong Province (the province in which Shenzhen is located) on January 3, 1988, and, more importantly, by a Chinese Constitutional Amendment on April 12, 1988 and a similar amendment to the LAL on December 29, 1988.

The 1988 amendments to the Constitution and LAL removed the legal barriers to the sale of LURs by local governments. On May 19, 1990, the State Council promulgated the 1990 Interim Regulations detailing the rules governing the assignment (*churang*) of LURs from the government and their transfer (*zhuanrang*) among land users, which remains in effect today. The 1990 Interim Regulations confirm that the assignment of LURs is the responsibility of city and county governments.

4.2.2. The Content of ULURs

ULURs are a mixture of contract and property rights. On the one hand, ULUR holders are entitled to transfer (Article 19 of the 1990 Interim Regulations), lease (Article 28 of the 1990 Interim Regulations), and mortgage (Article 32 of the 1990 Interim Regulations) their rights, just like standard property owners. The maximum terms of ULURs range from 40 to 70 years, depending on the land use (Article 12 of the 1990 Interim Regulations). ULURs are automatically renewed in the case of residential land, and the government should approve ULURs holders’ renewal applications in other cases

except when there is a need to take back land for public use. On the other hand, what rights holders have are subject to the ULURs assignment contract, which follows a standard format but leaves considerable blank for negotiation with the state owner. First, regarding the use and development of the assigned land, the ULURs holder has little choice but to utilize the land according to the contract. If a ULURs holder does not follow the terms and conditions of the contract in land use and development, the land administration agency can issue a warning or fines or even withdraw the ULURs (Article 17 of the 1990 Interim Regulations). In situations in which changing the agreed land use is justified, the ULURs holder needs to renegotiate a ULURs contract, including an adjustment to the ULURs assignment fees and registration of the new ULURs (Article 18 of the 1990 Interim Regulations).

Second, the initial holders of ULURs contracts (i.e., the assignees of ULURs contracts) cannot transfer their ULURs before satisfying the conditions specified in those contracts. A standard ULURs contract requires either finishing 25% of the investment or the fulfillment of other specified conditions (Article 20 of the 1990 Interim Regulations). It is interesting to note what is actually being transferred. As specified by law, what are transferred are the rights and obligations of the ULURs contract (Article 21 of the 1990 Interim Regulations). Therefore it is not the *in rem* rights that are transferred, but the *in personam* contract rights. It is the same situation in the lease of ULURs, which cannot be leased without satisfying the conditions of investment and utilization specified in the contract (Article 28 of the 1990 Interim Regulations). Furthermore, when ULURs are transferred, any buildings on the land, built in accordance with the ULURs assignment contract must also be transferred (Article 23 of the 1990 Interim Regulations). When the

price of a transfer is significantly lower than the market prices, the government has the right of first purchase (Article 26 of the 1990 Interim Regulations).

We can see the contractual nature of ULURs more clearly by comparing it with the leading English case affirming what Merrill and Smith (2000) call the *numerus clausus* principle, namely, *Keppell v. Bailey*. In this case, the purchasers “covenanted on behalf of themselves and their successors and assigned to acquire all limestone required by the works from a particular quarry and to ship the limestone to the works on a particular railroad” (Merrill and Smith 2000). The Court of Chancery held that this type of agreement did not fall within the recognized types of servitudes enforceable against subsequent purchasers as a property right running with the land (Merrill and Smith 2000). According to Merrill and Smith (2000), inventing new modes of real property rights such as the covenants in *Keppell* and allowing them to be established as property rights would create unacceptable information costs to third parties. In the case of ULURs, the entire ULURs assignment contract “runs with the land,” i.e., runs automatically with the land even when it passes into remote hands (Chang and Smith 2012:35): the transfer of ULURs means the transfer not only of the rights and obligations specified in the registration documents, but also of those specified in the assignment contract.⁶ A standard ULURs assignment contract allows specially-tailored terms on the use of the land, which can be as specific as “commercial office (value-added telecommunication business) use”⁷ and “the nature of the main constructions, the nature of affiliated buildings, floor area

⁶ See Article 22 of an English translation of the Contract on the Assignment of the Use Right of State-Owned Land, available at <http://www.sec.gov/Archives/edgar/containers/fix150/1269238/000119312508094260/dex421.htm>.

⁷ See Article 4, *Id.*

ratio, building density as well as height limits.”⁸ Such detailed agreements are as peculiar and idiosyncratic as the covenants in *Keppell*. Other than the specified land use written into the contract, the land cannot be used for any other purposes without rewriting the contract.

The importance of ULURs assignment contracts is also verified by the registration process. These contracts are required for the transfer and lease of ULURs. Article 21 of the 1990 Interim Regulations emphasizes that “rights and obligations in ULURs assignment contract and registration document are transferred when ULURs are transferred.” Therefore, a ULURs assignment contract is not only the basis for ULURs certificates, but also an equally important document for verifying the rights and obligations running with the land. This requirement has been confirmed in various legislations since 1990.

This contractual nature of ULURs is determined by the strong will of the state to control the use and development of land, which arises from a combination of the legacy of the planned economy and also the current developmental state’s strong hand in the market. The subsidiary role of ULURs is also reflected in the expropriation of urban housing. There is no compensation for ULURs. The State Council passed the Regulations on the Expropriation and Compensation of Housing on State-Owned Land in 2011 (“2011 Regulations” hereafter). The title reveals that these regulations concern housing alone, and there are no separate regulations concerning the expropriation of and compensation for ULURs. Article 13 of the 2011 Regulations states that ULURs are withdrawn when housing is expropriated in accordance with the law. Article 17 stipulates

⁸ See Article 11, *Id.*

that compensation is restricted to the value of the expropriated house, moving and temporary accommodation costs caused by the expropriation, and expropriation-induced business losses (Article 17 of the 2011 Regulations). No compensation is to be provided for the loss of the involved ULURs. One could reasonably argue that location is considered in calculating the value of an expropriated house, and therefore that ULURs are at least indirectly considered. However, that is still different from recognizing the independent value of ULURs. The words of the 2011 Regulations suggest that the underlying logic is that ULURs return to the state land owner when the related housing is gone, which is consistent with the resilience theory of ownership in civil law (Chen 2004).

4.3. RLCMRs

It was Chinese farmers, not the government, that created RLCMRs, the first key institutional innovation in China's market transition. The Chinese government did the right thing by tolerating the emergence and development of such an institution, and has been cautiously building legal institutions to secure people's expectations, to reduce the risk, and also to resolve disputes. It is a long and yet-to-be-done process. Nevertheless, it is noteworthy that RLCMRs were not created by law, and its contents are still evolving beyond the strict boundaries of law.

4.3.1 The Creation of RLCMRs

The underlying system of RLCMRs is the HRS, the essence of which is to liberate Chinese farmers so that they can produce for themselves on individually allocated plots of land. The system was initiated by the actual practices of farmers, particularly those of farmers in Xiaogang Village in An'Hui Province in the early 1980s, but was not written into law until a 1993 constitutional amendment, by which time the system had been fully

operational across the country for several years. The 1993 constitutional amendment legitimizes the HRS by defining it as a form of socialist collective economy. RLCMRs first appeared in law in the 1986 GPCL, Article 80 of which, under Section I, “Property Ownership and Property-Ownership-Related Property Rights,” of Chapter Five, “Civil Rights,” states that citizens’ contract and management rights to collective-owned land are protected by law. The same article also states that land cannot be sold, leased, mortgaged, or transacted illegally in other ways. This article does not specify the content of RLCMRs, leaving room for future development. In 1980s and early 1990s contract adjustments between individual households and village collectives occurred quite often. Village collectives from time to time gave instructions and guidance to farmers on what and how to plant, and also reallocated the contracted land periodically in the name of equality (Zhu 2005). Further elaboration of RLCMRs had to wait until the 1998 LAL, which has a longer article dedicated to RLCMRs. Article 14, in addition to emphasizing that RLCMRs are protected by law, specifies that the term of RLCMRs is 30 years and that contract adjustments within that term need to be agreed by a two-thirds majority in villagers’ meetings or by villagers’ representatives. It was not until 2002 that the RLCL was made to fully specify the details of RLCMRs, including the rights and obligations of village collectives as contractors and individual households as contractees, the principles and procedures of contracting, the terms and contents of contracts, and the protection and transfer of RLCMRs. The 2007 Property Law further includes RLCMRs in Part III as one kind of usufructuary rights, together with construction ULURs, residential LURs, and easement.

4.3.2. The Content of RLCMRs

Like ULURs, RLCMRs, although recognized by the 2007 Property Law as property rights, are actually a mixture of property and contract rights. As the name implies, RLCMRs are created by land management contracts between village collectives and their members and concern the division of rights and obligations between contractor and contractee. Such rights are *in personam* in nature, context-specific, and inconsistent with the depersonalized “thing-ownership” concept (Heller 1999: 1189). First, RLCMRs are affiliated with holders’ identity as members of a village collective and are unavailable to outsiders (Article 15 of the RLCL). When RLCMRs holders lose their collective membership by changing their *hukou* (household registration) from rural to urban, they need to return their land to the village collectives, resulting in the demise of their RLCMRs (Article 26 of the RLCL). In addition, when a woman marries a man from outside her village, she may also lose her RLCMRs after being granted RLCMRs in her husband’s village (Article 30 of the RLCL). Second, assignment contracts between village collectives and individual households are subject to the approval of two-thirds of the village members or their representatives (Article 18 of the RLCL). The same two-thirds majority can also decide to adjust the land allocated to members in the event of natural disasters or some other special circumstances (Article 27 of the RLCL). Third, the contracted land can be used only for agriculture, which is a contractual obligation per se and requires no reference to the zoning of local jurisdictions (Article 16 of the RLCL). Finally, RLCMRs are created at the moment the corresponding contract is signed (Article 22 of the RLCL). Although this is, of course, not decisive evidence of the contractual nature of RLCMRs, registration is viewed as more of an *in rem* effect (Smith 2015). RLCMRs were initially treated as contract rights, but have gradually been sanctioned as

property rights in the past three decades together with extending their terms and imposing restrictions on interference by village collectives (Chen 1996).

In the following, I examine the alienability and expropriation of RLCMRs in detail to elucidate both their contractual nature and the government's gradual adjustment of their content. I also examine the right to develop contracted land as a possible extension of RLCMRs in Chinese policy discussions.

(1) Alienability of RLCMRs

There are four main forms of RLMCRs transactions: subcontracting (*zhuanbao*), lease (*chuzu*), exchange (*huhuan*), and transfer (*zhuanrang*). Exchange refers to the exchange of RLMCRs between members of the same village collective. Transfer means the transfer of RLMCRs from one holder to another, and requires the approval of the contractor, i.e., the village collective. The transferee also needs to sign a new contract with the village contractor (Article 37 of the RLCL). In this case, the transferor loses its RLMCRs. Subcontracting means that RLMCRs holders subcontract the land to other members of the village, and lease refers to those holders leasing their RLMCRs to someone outside the village collective. In both subcontracting and lease arrangements, RLMCRs holders do not lose their RLMCRs, and only need to register their transactions with the village collectives (NPC 2003). All of the foregoing RLMCR transactions take a contractual approach and reflect the *in personam* nature of the RLMCRs. Procedures differ between transactions within and outside the community. What is transferred are contract rights to the village collectives, rather than *in rem* rights to the land. Whether a new contract is to be signed also serves as a key difference between different forms of transactions. Moreover, village collective members have the right to first purchase

(Article 33 of the RLCL), which is *in personam* in nature because it is based on membership and is not connected to any specific plot of land of any particular villager.

The restrictions on the alienability of RLMCRs have historical and political roots. In the early stages of reform, the government was leery of what might be seen as the logical next step: free alienability of LMCRs. The CCP's No. 1 Document of 1982, for example, not only strictly prohibited alienation but also empowered the collective owner, i.e., the village, to cancel the contract if alienation was attempted (CCP No. 1 Document 1982). As early as 1984, however, the picture began to change, with the CCP Central Committee promulgating a notice allowing members of village collectives to subcontract their land with the collective's approval (CCP Central Committee 1984). The decades since have witnessed considerable toing and froing over an issue that is eloquent testimony to the central government's ambivalence about the full blossoming of the free exchange of farmland, of which the HRS may have been the first step. In 1988, a constitutional amendment and amendment to the LAL legalized the transfer of LURs, although it remained unclear whether alienability included rights to the collectively owned land contracted to individual households. Then, in 1995 the State Council explicitly recognized that the transfer of RLMCRs was an "extension and development" of the HRS, declaring: "Provided that collective ownership is retained and there is no change in the agricultural use of the land and with the approval of the contractor, a contractee may subcontract, transfer, exchange, or convert their land into shares of stock (*rugu*)".

In the years since, however, the pace of liberalization has slowed. Although it has become conventional wisdom that the Chinese agricultural sector needs modernization,

which would require some degree of land concentration, the central government remains suspicious of the long-term leasing and management of rural land by industrial or commercial enterprises (CCP Central Committee 2001). Instead, the transfer of agricultural land is supposed to take place among rural households to facilitate land concentration in the hands of the more productive farmers without diverting land from agricultural use (CCP Central Committee Document No.1, 1984; CCP Central Committee, 2001). The 2002 RLCL, confirmed by the 2007 Property Law, was the most recent statute to address the transfer of land contract rights. It maintained the requirement of village approval for transfer but converted the approval requirement for subcontracting, exchanges, and leases to simple registration.

In the wake of rapid urbanization and the flow of millions of farmers into cities, the need for agricultural land transfers has intensified in recent years. Since 2008, a number of central government documents have reiterated the goal of establishing “a market for RLMCRs.” Nevertheless, substantial progress has yet to be made. The most recent reform plan delineated three redlines for any reform: land ownership must remain public, the amount of arable land should remain above the minimum necessary for national food self-sufficiency, and farmers’ interests should be protected (Hong 2014). The ambivalence is understandable. Collective land ownership is ideologically central to a nation that still calls itself communist. Public ownership, furthermore, needs not hinder gradual reform, as we have seen from the rise of the HRS, the development of an urban land market, and the reform of state-owned enterprises. The other two conditions are of more pragmatic importance. The protection of arable land is based on a strategic concern for food self-sufficiency that may not only be unattainable but, paradoxically, may even

lead to gross inefficiencies. Self-sufficiency may also be contrary to the third condition. It is conventional wisdom that landless farmers in Chinese cities pose a serious threat to social order in times of economic downturn. Therefore, the retention of small household plots, no matter how inefficient in terms of economies of scale, is seen as serving as an essential social safety net for migrant workers, at least until the government builds a social welfare system in the countryside.

Farmers themselves seem to understand this. According to statistics from the Ministry of Agriculture, about one quarter of agricultural land has been subjected to some form of transaction (Lin 2014). However, most of those transactions took the form of subcontracting and were agreed between villagers who knew each other. Few migrant workers are willing to sever their connections to their home villages by selling their land. That is why the central government has emphasized that local governments should not promote the transfer of agricultural land against farmers' will (Li 2013).

(2) RLMCRs in Land Expropriation

As with the state ownership of urban land, the collective ownership of rural land also figures in cases of expropriation. Article 10 of the Constitution states that the state can expropriate land to serve the public interest as long as compensation is provided. Article 42 of the Property Law specifies the types of compensations required, including compensation for land, relocation cost, and structures and crops. The land compensation fee, according to the LAL, should be six to ten times the land's average output in the three previous years. Relocation costs are calculated according to the number of rural household members. The total amount of the two types of compensation should not exceed thirty times the average annual output of the expropriated land in the past three

years (Article 47 of the 2004 LAL). What is the standard and purpose of compensation? The purpose is to maintain the livelihood of farmers whose land has been expropriated and to protect their legal interests (Article 42 of the 2007 Property Law). That is why relocation assistance is provided, calculated according to the number of rural household members and subject to the future career arrangements of the farmers who are losing their land (Interpretation of the 2004 LAL, Article 47). Rural land ownership and RLMCRs do not include the right to develop rural land. Therefore the legislative interpretation of the LAL explicitly rejects the idea of compensating farmers according to the price the government assigns ULURs. The same legislative interpretation also emphasizes that “land expropriation is a state act and not a land transaction..... [Hence, compensation] is not subject to the negotiation between government and farmers or the ‘market value.’” (Interpretation of the 2004 LAL, Article 47)

Who is entitled to the land compensation fee? According to the legislative interpretation of the LAL, both land owners and land users are so entitled. Accordingly, Article 48 of the LAL states that local governments should listen to the opinions of village collectives and farmers whose land has been expropriated. Article 49 further states that village collectives whose land has been expropriated should make public the income from and expenses involved in the land compensation fee and accept monitoring from their members. There are no clear legal standards on how to divide the land compensation fee between village collective and their members. In reality, it seems that village collectives receive the fee and decide how to spend it. How much is land ownership worth? How much are RLMCRs worth? The absence of clear answers has led to the arbitrary allocation of land compensation fees between village collectives and their

members, mostly to the advantage of the former and often serving the personal interests of village collective leaders.

Reforming the system of rural land expropriation has been under discussion for a long time. In 2012, then-premier Wen Jiabao promised to issue a State Council Regulation on Expropriation of Rural Land and Housing, but he did not succeed in doing so (Wen 2012). Discussions of rural land expropriation have tended to follow the conventional wisdom on eminent domain and to focus on public interest and just compensation. However, such expropriation in China differs from eminent domain in countries in which *in rem* private land ownership is well established. I argue that the existing approach cannot work because it overlooks the bundle of rights structure of rural land for the following reasons.

First, “public interest” was designed to restrain the government’s expropriation power but, in China, expropriation is the only way to convert rural land to urban land—only the latter can be sold and put to various uses. Article 43 of the LAL requires that “any unit or individual that needs to use land for construction must apply for the use of state-owned land in accordance with the law,” which means that city and county governments must expropriate rural land to satisfy the land needs of rapid industrialization and urbanization process. It is thus no wonder that “public interest” has been extremely widely interpreted. Therefore, defining “public interest” more strictly without changing the current land structure is a non-starter. If urban users cannot buy land from farmers for non-agricultural use, there is no other way for them to buy land but to buy it from the government that they can receive land, and government land is simply rural land that has been expropriated.

Second, as previously noted, “market value” is clearly rejected by the legislative interpretation of the LAL. How then is compensation for farmers calculated? We need to investigate what rights they have, and whether they are entitled to the non-agricultural development value of rural land. Chinese farmers are acutely aware of the vast wealth produced by urbanization based on formerly agricultural land. Ignoring farmers’ expectations carries a political cost. From the opposite perspective, however, granting farmers the full post-conversion market price would deny growing municipalities a substantial source of revenue (Qiao 2016). With no obvious immediate replacement, cities would be faced with falling even further behind in providing the public goods needed to accommodate a growing population of former farmers seeking a better life than is possible back on the farm. In any case, basing compensation on the post-converted market value of rural land would not constitute compensation for RLMCRs, but the granting of new rights or expansion of the content of RLMCRs, depending on how those rights are formulated.

(3) The Right to Non-Agricultural Use

As noted, RLCMRs holders are not entitled to use the contracted land for non-agricultural purposes. Granting them the right to non-agricultural use can be understood either as expanding the content of RLCMRs or moving one stick of the rural property rights from the state to farmers. Conflicts caused by rural land expropriation and the prevalence of illegal rural land development (Qiao 2015) have triggered policy discussions and experiments in this direction. The review of policy developments below provides another vivid example of the bottom-up, decentralized, stick-by-stick approach of Chinese land reform.

In early October 2008, the Third Plenary Session of the 17th Central Committee of the CCP for the first time in history proposed to “gradually unify the construction land use markets in urban areas and rural areas” and that “legally-acquired rural collectively-owned construction land should have rights equal to those of state-owned land” (CCP Central Committee 2008). It also emphasized that rural LURs must be transferred through a unified and *visible* market in a *public* way, a clear indication of the central government’s concern with the *invisible* or *hidden* small-property market (CCP Central Committee 2008). Just one month later, the Ministry of Land and Resources issued a notice to its local branches on implementing the decision. The notice stated that the transfer of rural construction land has particularly important meaning to the protection of farmers’ land rights, and also called for the establishment of institutions for the assignment and transfer of rural collective construction land that are compatible with the existing urban land use market (Ministry of Land and Resources 2008).

This foregoing proposal was reiterated five years later at the Third Plenary Session of the 18th Congress of the CCP and promulgated as two points on November 12, 2013: (1) establishing a unified construction land market, thus allowing rural collective construction land to be transferred in the same manner as state-owned land, and (2) granting more property rights to farmers by selecting several experimental sites and cautiously promoting the lien, mortgage, and transfer of farmers’ property rights to their residential houses (CCP Central Committee 2013).

The 2014 No. 1 Document of the CCP Central Committee also has a paragraph on incorporating rural construction land into the market. It states that under the precondition of consistency with land use control and planning, rural construction land should be

permitted to be transferred, leased, and converted to shares in the same way as state-owned land for the same rights and the same price (Xinhua News 2014b). Then, on December 2, 2014, the Leading Small Team for Deepening Reform of the CCP Central Committee promulgated an opinion on experiments in reforming rural land expropriation, incorporating rural construction land into the market, and rural residential land reform (Xinhua News 2014a). Although the content of this opinion is not available, according to news reports the experiments should be finished by 2017, before which no transfer of rural construction land is allowed without authorization (Wang 2015).

Rural land reform is challenging, and the final institutions will be built on an evaluation of different experimental plans. As happened with the HRS, the property laws that will confirm the completion of such evaluation will come once effective practices have been recognized.

In summary, RLMCRs are subject to and subsidiary to both collective land ownership and the state's police power (i.e., a "state act," as stated in the legislative interpretation) in land conversion and expropriation. RLMCRs are still not strong *in rem* rights per se. Rather, as one stick in the bundle of collective property rights, they are entangled in the relationship among rights holders, collective land owners, and the state.

5. Conclusion

Understanding property as a bundle of sticks provides a logical basis for separating ULURs and RLCMRs from public land ownership, and also for rearranging the sticks to adapt to social and economic developments, which are often well ahead of

the legislature. Despite the enthusiasm for private land ownership among scholars and the mass media alike, Chinese policy makers have taken the more pragmatic approach of adjusting the bundle of property rights cautiously and carefully while keeping land ownership public. This is not to say that they understand or even know about such scholarly jargon, but rather that when they try to accommodate new changes in reality in their daily work through gradual policy and legal reforms, they do not take property as an undivided concept but adjust the rights and obligations of the related parties with great care. This is now the bundle of rights idea has become rooted in the evolution of Chinese land laws. A recent policy development serves as another example of the stick-by-stick approach to land reform in China. To resolve the conundrum between protecting farmers' property rights and promoting farmland transactions, the current government proposed the separation of three rights: land ownership rights, land contract rights, and land management rights (Zhang 2014). The idea is that rural households will keep their land contract rights, which cannot currently be freely transferred, but will be able to transfer land management rights to agricultural companies, banks, and other entities outside village collectives to realize the market value of the land (Wu 2015). The proposal's details are still to be figured out, and the consequence of separating land management rights from land contract rights fully examined (Liu 2015). The stick-by-stick approach has its own problems, including the costs and uncertainty incurred by fragmented and unstandardized property rights (Ellickson 2012), the political maneuvering in the reform process (Qiao 2016), and the weakness of individual rights. Nevertheless, we can expect it to continue to dominate China's land reform, driven by pragmatism and incrementalism, for the foreseeable future.

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