

## **The Ubiquity and Fungibility of Property Rights in China\***

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*The right of property is the guardian of every other right, and to deprive the people of this is in fact to deprive them of their liberty.*

– Arthur Lee, Virginia, 1775

*You reproach us with planning to do away with your property. Precisely so; that is just what we intend.*

– Karl Marx and Friedrich Engels<sup>1</sup>

*The fact that a legal or economic model does not exist for an activity or a behavior is no reason to oppose it, because the laws can develop out of experience and practice.*

– Wu Guoping, Yangtze Water Resources Commission<sup>2</sup>

As this volume makes clear, there are many aspects of China’s political economy that defy the current non area-specific state of the field. This is due less to cultural factors than it is to the historical evolution of political and economic institutions in which decisions over institutional design that were made years, even decades ago, continue to shape the behavior of the Chinese state. Nowhere is this truer than in the case of property rights (*chanquan*<sup>3</sup>). Property rights, or the rules that govern ownership, define the state of China’s (or any state’s) political economy, and, as this paper will point out, delineates the contours of the political process itself.

This paper is organized as follows. The first section places the Chinese case within the larger context of property rights literature. The second section reviews the existing scholarship on property rights in China and identifies existing lacunae. The next section provides the broad contours of the contemporary Chinese intellectual and political discourse over property rights in China. The fourth section is comprised of several cases of property rights, that illustrate the variation in the *scope* of the concept of property rights in China and suggests some – but by no means all – of the possible avenues for future research.

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<sup>1</sup> Karl Marx and Friedrich Engels, *The Communist Manifesto*, New York: Signet Classics, 1998, p. 69.

<sup>2</sup> As paraphrased by Beth E. Kinne in Kinne, *Developing Property Rights in Water in Modern China*, LLM Thesis, University of Washington, December 2005.

<sup>3</sup> I discuss the various Chinese configurations of specific types of property rights in subsequent sections. According to Beth Kinney, “[f]rom a legal standpoint, *chanquan* is the same as *caichanquan* [a property right in assets or in the value of something], and even when it is used in laws and regulations instead of *caichanquan*, it has the same meaning...However, *chanquan* is technically a term from the field of economics, and as such it represents the right to the economic value of an asset, with respect to social valuation and compensation. It is usually translated into English as “property right.” Kinne, p. 11.

Thus, this paper is largely a brief outline of the state of the field and is therefore largely descriptive. I am not attempting to advance any specific new theoretical concepts, but rather argue for a broader research agenda that builds on existing research as well as introducing some new, hitherto unexplored areas that make up some of the boundaries of the study of property rights in China.

### **Property Rights Theory**

What is “property”? Janos Kornai disaggregates the concept as including an object (i.e., a factory or home), a resource (i.e., land), knowledge and information (i.e., intellectual property), or someone’s personal faculty (i.e., the gamut from independent contracting to slavery). It is also important to specify who actually owns the property in question (i.e., a person, a school, a government, etc.). A third dimension has to do with “what the owner is entitled to do.” This includes rights to residual income, such as renting or licensing out such rights; rights of alienation or the ability to transfer such rights through sale or inheritance; and the rights to control and manage such property. A final dimension has to do with “what constrains the owner in exercising property rights,” whether through laws, norms, or raw power.<sup>4</sup>

Thus, scholars like Itai Sened are correct when they assert that “the regulation of property rights in society is a fundamental function of any form of government.”<sup>5</sup> Such a view has a long history and a distinguished pedigree, although there is much unresolved debate over the origin of such rights. John Locke argued that property rights – natural rights dictated by reason, but biased in the presence of scarcity – are not created by the government but that the government’s role is to enforce them. However, given the degree of power necessary to enforce them, it appears that they are anything but “natural,”<sup>6</sup> a concession that Locke himself makes: [laws] need a perpetual execution,...therefore it is necessary that there should be a power always in being, which should see to the execution of the laws that are made.<sup>7</sup>

In Hobbes “nasty, brutish, and short” worldview, the human condition exists within a state of anarchy, a state that is recognized by humans who, in seeking a better alternative, are willing to exchange responsibility their individual rights to a sovereign entity. There are two

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<sup>4</sup> Janos Kornai, *The Socialist System: The Political Economy of Communism*, Princeton: Princeton University Press, 1992, pp. 62-66.

<sup>5</sup> Itai Sened, *The Political Institution of Private Property*, New York: Cambridge University Press, 1997, p. 11.

<sup>6</sup> *Ibid.*, p. 13.

<sup>7</sup> Locke as quoted in *ibid.*

flaws with this approach. First, this assumes that there exists a sovereign that is benevolent (at least relative to individuals within a state of nature).<sup>8</sup> Second,

[I]t is not enough to show that individual agents recognize the advantage of having a government that enforces basic rights. One must explain why and how, if at all, strategic rational agents would erect, maintain, and obey such a government.<sup>9</sup>

Douglass North provides a partial answer to this problem. In *Structure and Change in Economic History*, he asserts that this is largely a principal-agent issue, that is, enforcement of property rights is never complete because the agents charged with enforcing them never have the same preferences as those who represent sovereign property rights laws. But policing the police quickly becomes prohibitive, that is, enforcement costs soon overwhelm the benefits, specifically the decrease in transaction costs that are the chief mechanical benefit of property rights.<sup>10</sup> Moreover, this free-rider problem exists even in states that are economically efficient.

More fundamentally, North argues that there is a fundamental contradiction in neoclassical theory: “it assumes both wealth maximization and the Hobbesian model of the state...If individuals are acting rationally with respect to the first assumption, they are acting irrationally with respect to the second.”<sup>11</sup> In other words, when the prospect of individual gain arises, irrespective of the social costs it will impose, the rational economic individual will be likely to undertake such activity.

North suggests the concept of “ideology” be at the center of any such explanation, that “[s]trong moral and ethical codes of a society is the cement of social stability which makes an economic system viable.”<sup>12</sup> North defines “ideology” in the following way:

1. Ideology is an economizing device by which individuals come to terms with their environment and are provided with a “world view” so that the decision-making process is simplified.
2. Ideology is inextricably interwoven with moral and ethical judgments about the fairness of the world the individual perceives. This situation clearly implies a notion of possible alternatives – competing rationalizations or ideologies. A normative judgment of the “proper” distribution of income is an important part of an ideology.
3. Individuals alter their ideological perspectives when their experiences are inconsistent with their ideology. In effect, they attempt to develop a new set of rationalizations that

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<sup>8</sup> Sened, p. 15.

<sup>9</sup> Ibid., p. 16.

<sup>10</sup> Douglass C. North and Robert Paul Thomas, *The Rise of the Western World: A New Economic History*, New York: Cambridge University Press, 1976.

<sup>11</sup> Douglass C. North, *Structure and Change in Economic History*, New York: Norton, 1981, p. 45.

<sup>12</sup> North, *Structure and Change in Economic History*, p. 47.

are a better “fit” with their experiences...[but] inconsistencies between experience and ideologies must accumulate before individuals alter their ideology.<sup>13</sup>

The problem is that China does not yet possess such an ideology, or, rather that such an ideology – as seen as an set of informal institutions – is often in conflict (or at least in competition) with formal and informal institutional norms. Even if we ignore this for a moment, such an ideology arguably might have existed during the first decade of the Mao era, but was devastated by the cynicism that arose in the wake of the Cultural Revolution, and from which some like Tianjin Shi believe China has yet to emerge. As a result, North’s analysis remains a long-term *prescription* but not a contemporary description or conceptual analysis of property rights in China today. Indeed, a shortcoming of North’s body of work is that he provides an excellent reason for why countries are successful in efficient economic organization, but cannot as-of-yet explain those countries that fail at such a task.

China’s situation is perhaps better explained by recent work by Barzel. Like North, he also places property rights as the foundation of state development. However, Barzel is as interested in why states fail in this endeavor as he is in how and why they succeed. He argues that the “distinction between agreements enforced by the state and those enforced by third parties, such as firms or religious institutions, determines the scope of the state” and that the “nature of enforcement varies sharply between rule-of-law states and dictatorships.” Starting from a Hobbesian perspective, Barzel argues that rulers are not benign, that they are as predatory as anyone else in society. Therefore, individuals will protect a ruler

only after they have created a collective action mechanism...This mechanism will reduce the chance that the ruler will use his protection organization to confiscate their property...If individuals fail to create such a mechanism before they allow protection to become a speciality, a protection specialist may quickly become a dictator.<sup>14</sup>

Thus, dictatorial powers are faced with a dilemma. On the one hand, the dictator, while not constrained by “the incentive problems of the employed protector” nevertheless fears rebellion. And thus does what it can to minimize the possibilities for such an occurrence, mostly by dismantling the third-party enforcement mechanisms that are a feature of rule-of-law societies. On the other hand, “as a dictatorial regime gains stability, the dictator can enrich himself by curbing his own confiscatory ability.” If we view China as a unitary state, this aptly sums up the leadership dilemma.

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<sup>13</sup> Ibid., p. 49.

<sup>14</sup> Yoram Barzel, *A Theory of the State: Economic Rights, Legal Rights, and the Scope of the State*, New York: Cambridge University Press, 2002, p. 2.

However, China is not a unitary state. There is a voluminous literature on Center-local relations and words such as “local protectionism” (*difang baohu zhuyi*)<sup>15</sup> and “local corruption” (*difang fubai*) pepper the lexicon of contemporary Chinese rule. Thus, in addition to Barzel’s formulation, there is another dimension to the property rights issue in China: the complex network of actors, authority relations, and incentives that exist throughout the system. These are discussed in the next section.

## Property Rights in Traditional Socialist Regimes vs. Contemporary China

### The Urban Areas

Before the reform era began, there were several forms of ownership that have bled into the reform-era evolution of China’s political economy. The first of these is the state-owned enterprise (SOE). Residual income from the use of the property

is of an economic magnitude set arbitrarily by the bureaucracy. But once it has been set (in the technical terms set by fiscal management) it flows into the central budget of the state, and in that sense the owner is the “state coffers.” So one must rephrase the question to ask: Who has control over the state budget? And who sets all the economic parameters (prices, wages, taxes, etc.) that have just been established to be the factors determining the size of residual income? The answer to both questions is the same: this right of disposal belongs to the bureaucracy.<sup>16</sup>

Thus, the control rights over the SOE are held by the bureaucracy. The question, not surprisingly, is *which* bureaucracy? In the Soviet Union, which was more vertical than horizontal, the answer was more often than not within the vertical, functional bureaucracies. But since the early days of reform – indeed, even during the Mao era – this was not necessarily the case.<sup>17</sup> Kornai argues that “the activities are controlled by a hierarchical bureaucracy *within* the state-owned firm.”<sup>18</sup> But as Edward Steinfield has persuasively argued about the steel sector in China, during

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<sup>15</sup> Andrew H. Wedeman, *From Mao to Market : Rent Seeking, Local Protectionism, and Marketization in China*, New York: Cambridge University Press, 2003.

<sup>16</sup> Kornai, p. 73.

<sup>17</sup> Yasheng Huang, “Information, Bureaucracy, and Economic Reforms in China and the Soviet Union,” *World Politics* 47 (1) 1994: 102-134.

<sup>18</sup> Kornai, p. 74.

the reform era these activities were, in fact, contested over by any number of predatory bureaucratic agencies external to the SOE in question.<sup>19</sup>

Under a strictly socialist system, SOEs cannot be bought or sold, or even leased out. But this is changing in contemporary China, in which under the banner of the “Three Represents” (*sange daibiao*), capitalists have been invited to join the Chinese Communist Party.<sup>20</sup> Eleven before this, leasing arrangements have naturally arisen from various local economic relationships.<sup>21</sup> And this forces us to confront an entirely new form of property rights relationship that may, in fact, be uniquely Chinese in form.

Another institution that Kornai identifies is what he calls the “budgetary institution,” that is “not obliged to even nominally make its income cover its expenditure. This includes such entities as institutions of higher learning, hospitals, etc. In reform-era China, however, these are precisely the types of institutions that are referred to as *shiye danwei*, “undertaking units” that provide their host unit (i.e., a given government agency) with extrabudgetary income. Moreover, knowing this, the number of *shiye danwei* under an ever-growing number of government agencies has mushroomed dramatically to include enforcement teams (*zhifa du*), cadre training centers (*ganbu peixun zhongxin*), and even the State Patent Bureau (*guojia zhuanli ju*)!

## The Rural Areas

Agriculture has its own property rights arrangements under socialism. Although land reform in China redistributed land among the peasantry in China, by 1956, this same land was being rapidly collectivized in order to raise production output (which rose and then topped out after land reform) by introducing economies of scale to agriculture, culminating the people’s communes of the late 1950s (which, in reduced form, endured into the early 1980s). Kornai’s description of cooperatives underscores the lack of personal, let alone individual property rights:

[Peasants] cannot choose freely whether (1) to leave the cooperative (or, if they have never been a member, to refrain from joining) and work in a family undertaking based on private property instead; (2) to employ permanent outside labor in their own agricultural undertaking if they can afford it; or (3) to join the cooperative on a voluntary basis (or, if

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<sup>19</sup> Edward S. Steinfeld, *Forging Reform in China: The Fate of State-Owned Industry*, New York: Cambridge University Press, 1998.

<sup>20</sup> Jiang Zemin, Speech at the Rally in Celebration of the 80<sup>th</sup> Anniversary of the Founding of the Communist Party of China, July 1, 2001.

<sup>21</sup> See Gregory A. Ruff, “Collective Enterprise and Property Rights in a Sichuan Village: The Rise and Decline of Managerial Corporatism,” in Jean C. Oi and Andrew G. Walder, eds., *Property Rights and Economic Reform in China*, Palo Alto: Stanford University Press, 1999, pp. 27-48.

they are already members, to remain voluntary members). Anyone wanting to work on the land must be a cooperative member (or at least an employee of a state farm).<sup>22</sup>

In China, where labor mobility was always far more strictly regulated than in the Soviet Union, the notion of anyone wanting to work on the land was largely irrelevant. The *hukou* system ensured that those without urban residencies (or who were not in the army), by default, were to work on the land.

In the Mao era, private plots, when allowed at all, made up only a very small part of one's overall rural labor. Yet the power of such *de facto* property rights was dramatically illustrated after the United States began sharing satellite photos with Beijing and the Chinese leadership realized that peasants were underreporting one-fifth of their agricultural output.<sup>23</sup> This ratio flipped in the reform era, as the household contracting system described above became the clarion call of reform. However, as the case studies below point out, the current land leasing system is not at all secured by anything that can be regarded as clear and (socially) efficient property rights.

Under reform, there is an impermanent but often stable distribution of property rights between the state and the peasantry. The peasant has the right of residual income as specified in the contracting arrangements of the land, which includes stipulations for the fulfillment of public duties (sales to the state at state prices). The state, by contrast, has the sole right to transfer the land, although subleasing is possible under some conditions. The right of control is where much of the current controversies have erupted: formal constraints (or administrative interference) under which the village collective and farming households share property rights generate ambiguities with respect to control...[and] give local governments considerable leeway to manipulate and impose conditions on the land contracts."<sup>24</sup>

It should be noted that China does not easily fit into the urban/rural divide when it comes to industrial output. In fact, some of the more innovative forms of property rights in China described briefly below have arisen from the industrialization of the Chinese countryside under reform.

### **The “Private” Sector under Socialism**

Although this varies by time period and by country, there has been a narrow stretch of “private” or “quasi-private” ownership, even within traditional socialist regimes. In East Ger-

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<sup>22</sup> Kornai, p. 79.

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<sup>24</sup> Xiaolin Guo, “The Role of Local Government in Creating Property Rights: A Comparison of Two Townships in Northwest Yunnan,” in Oi and Walder, eds., p. 75.

many, Hungary, and Poland, small-scale private industry and commerce was allowed to function. In China, during the consolidation period just after 1949 and again in the early 1960s following the calamitous Great Leap Forward (1958-1961), there were efforts to nourish a limited private sector. These were almost completely swallowed up by the imperatives of extensive development during the First Five Year Plan (1953-1957) and by the radical politics of the Cultural Revolution (1966-1977). Such private industry has made a comeback in the reform era. Although state banks only provide one percent of their loans to private entrepreneurs, according to some pundits there is a staggering 85 million private businesses in China today.<sup>25</sup> In addition, the plan in 1999 has been for the aforementioned *shiye danwei* to become financially independent from their host unit in three years (*sannian yihou duanna*). Although that proved to be too ambitious a target, nevertheless, the trend is in that direction.

Finally, wherever market inefficiencies exist, informal economies inevitably appear. Such shadow economies can sometimes be quite open, such as the market for goods in latter-day socialist Hungary that could only be bought with Deutschmarks as well as the booming black and/or gray markets for goods in other socialist regimes.

### **Property Rights in China: The State of the Field**

Steinfeld makes a strong argument that blindly seeking to privatize property relations are actually counter productive in the absence of a clear separation of managers from government officials, both of whom have separate incentives that can easily collapse into a moral hazard problem when the banks are charged by administrative fiat to bail out hemorrhaging SOEs rather than risk social unrest. Moreover, as SOEs become increasingly vulnerable to bureaucratic predation, other bureaucracies enter the fray, rapidly stripping the SOE of its assets. Steinfeld's cases suggest that rather than specify private property rights as a panacea, the successful SOE may be so precisely because it signals its proximity to a powerful patron which can deter subordinate bureaucracies from field stripping the SOE in question. Such *de facto* property rights may actually induce behavior consistent with *de jure* property rights and hard budget constraints.<sup>26</sup>

Walder and Oi present the most extensive study yet on property rights as they relate to China's political economy. Walder asks the question: "[t]o the extent that governments must exercise property rights over public firms, can incentives be created to make government officials

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<sup>25</sup> <http://transcripts.cnn.com/TRANSCRIPTS/0502/16/lt.01.html>.

<sup>26</sup> Steinfeld.

different than in years past?...Reform this involves the design of incentives, not only for firms, but for governments as well.”<sup>27</sup> In their volume, *Property Rights and Economic Reform in China*, Walder and Oi and the individual contributors trace patterns of change (contracting of public firms, the outright sale of government assets, private gains for officials controlling public firms, *shiye danwei*, and private start-ups); regional variation (the “corporatism” of township and village enterprises and “littoral” patterns of economic growth in rural industry as a function of factor endowments); and a “hollowing out of public ownership” in which officials either “transform [a property] imperceptibly into an asset that takes on the features of family property” or by spinning off “private” enterprises from state ones.

Their conclusions are perhaps inevitably phrased in terms of dynamic evolutionary change, given the experimental nature of reforms combined with the heterogeneity of resource endowments, political preferences, and market access. Their theoretical conclusion is worth spelling out because it may provide an important clue as to why neoclassical economic theories, including those of property rights, are of limited use to China: the relative effectiveness of efficiency. Walder concludes that in China there are the “utility of solutions that are suboptimal in theory,” that is, that even those solutions that deviate substantially from neoclassical economic theory have demonstrably positive, and robust empirical effects. Although one can say that this may provide a conceptual fork in the road whereby China can either move towards the neoclassical ideal or, alternatively, devolve into a quagmire of corruption, the volume makes a strong case that the outcome need not be – indeed, is unlikely to be – so starkly binomial. In fact, although likely to meet with skepticism by non area specialists, Walder and Oi have opened up a far-reaching research agenda, some of the frontiers of which I describe in later sections of this paper.

On the other hand, there have been some theoretical applications of property rights theory to China which suffer from “conceptual stretching,” yet remain dominant in the literature. The (curiously) seminal article by Montinola et al. on market-preserving federalism<sup>28</sup> (MPF) in China places property rights at the center – albeit implicitly – in its case for China being a quasi-federalist system. According to Montinola et al., market-preserving federalism rests on the notion that decentralization arrangements at the local level are accompanied by political “durability” that is difficult for the central government to undo. Montinola et al. argue that market-preserving federalism has five key characteristics:

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<sup>27</sup> Andrew G. Walder and Jean C. Oi., “Property Rights in the Chinese Economy: Contours of the Process of Change,” in Oi and Walder, eds., p. 3

<sup>28</sup> Gabriella Montinola, Yingqi Qian, and Barry Weingast, “Federalism, Chinese Style: The Political Basis for Economic Success in China,” *World Politics* 48 (1) 1995:50-81.

- A *hierarchy* of governments with a *delineated scope of authority*...exists so that each government is autonomous within its own sphere of authority
- The subnational governments have primary *authority over the economy* within their jurisdictions
- The national government has the authority to police the *common market* and to ensure the mobility of goods and factors across subgovernmental jurisdictions.
- Revenue sharing among governments is limited and borrowing by governments is constrained so that all governments face *hard budget constraints*.
- The allocation of authority and responsibility has an *institutionalized degree of durability* so that it cannot be altered by the national government either unilaterally or under the pressures from subnational governments.<sup>29</sup>

The first, third (to some degree) and fifth conditions are undermined by recent efforts to centralize a number of Chinese bureaucracies that I discuss below. The third requirement appears to be contradicted by Walder and Oi's empirical evidence that barriers to entry in certain markets form a cornerstone in the variation of different types of property rights. Finally, insofar as "hard budget constraints" can be loosely understood as a proxy for property rights, both the foregoing and the case studies below auger ill for credible assertions of hard budget constraints as far as property rights in China are concerned.

But before laying out these case studies, it is helpful to place them into the context of recent legislation and academic debate over the promulgation of a property rights law in China that continues to unfold today.

## **Recent Legislation of Property Rights in China**

### **The Civil Law Code**

As of yet, no complete civil code (*minfadian*) exists in China. Although the General Rules of the Civil Law (*minfa tongze*) of 1986 established the overall principle and the form of civil law, the actual body of what is commonly placed under the general heading of "civil law" is simply the collection of separate laws. Indirectly, the evolution of the civil law as it now exists in China provides some clues as to the challenges facing property rights regulation in China today.

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<sup>29</sup> Ibid., p. 55 (italics in original).

There were at least two attempts during the Mao era to establish a civil law, in 1954 and in 1962. However, in both cases, they were put on the backburner as a result of the political upheavals taking place at that time. In 1956, after two years of work, a version of the civil law that contained 500 codes was cobbled together. Almost immediately, however, it was shelved because of the political imperatives of socialist transformation (*shehui zhuyi gaizao*) that were taking place at the same time.<sup>30</sup>

Following the economic and political liberalization that followed in the wake of the Great Leap Forward (1958-1961) disaster, there was another attempt to write a civil law, starting in 1962. In 1964, the writing committee charged with the task released the provisional draft civil law. Like the attempt a decade earlier, this process was overtaken by political events, first by the Socialist Education Movement/Four Clean-Ups campaign and then, starting in 1966, by the Cultural Revolution.

At the beginning of the reform era, following the Third Plenum of the 11<sup>th</sup> Central Committee in December of 1978, the Legislative Affairs Commission of the Standing Committee of National People's Congress formed two drafting teams and the writing of civil law commenced for the third time. For that time until May 1982, no fewer than four drafts had been completed.

However, in 1982, the government changed course again and instead of pursuing an overarching civil law code, it decided that it would be better to issue separate laws instead. This was due in no small part to the rapidly changing economic and political circumstances at the time and reflected the experimental nature of reform at that time. The goal was to establish the policy of establishing separate civil laws (*minshi dan xingfa*) until the circumstances were auspicious to compile a complete civil code. Under this legislative rubric, China passed a succession of laws, including the inheritance law, patent law, and trademark law, among many others. At the same time, Beijing started to work on The General Principles of Civil Law (*minfa zongze*), eventually changing it to the General Rules of the Civil Law (*minfa tongze*) and passed at the Fourth Plenum of the Tenth National People's Congress on April 12, 1986. According to the principles of the General Rules, a barrage of laws was passed in the years to follow. These included the maritime law, the auction law, securities law, and the contract law.

To sum up, there are several problems that remain which are a result of the lack of a civil code and which presumably would be resolved by the promulgation of one. First of all, the prin-

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<sup>30</sup> In fact, the rate of socialist transformation, especially in the countryside was almost single-handedly pushed forward by Mao himself. He was no doubt pleasantly surprised that it moved forward even faster than he claimed it could (and much faster than his colleagues believed it could), and this transformed the entire political landscape of China. Thus, it is not inconsistent to believe that efforts at establishing a civil law were more than simply window dressing, but that they had been completely overwhelmed by concurrent political developments.

principles of the General Rules of the Civil Law are simplistic and often vague. They are, in short, insufficient to settle real-world disputes or clarify the ownership relationships. Second, the discrete laws are inconsistent and they lack coordination among and between one another. Many of the laws and regulations are created by individual administrative institutions, and more often than not, these separate laws contradict the basic law as well as each other. Third, due to the limitations of theoretic level of jurisprudence in China, many of the regulations related to property rights are incompatible with the modern theories of jurisprudence. Fourth, there is a considerable inclination for interference by administrative units as many of the laws are issued in the form of administrative regulations (i.e., the land management and the real estate management laws).

Finally, there are too many technical and otherwise difficult terminologies in the existent laws, which undermine their applicability. Nowhere is this more the case than with property rights. Beth Kinney provides a very useful typology of the pantheon of property rights types that underscores this last point. *Caichanquan* (??? ) is perhaps the broadest types of property rights, including several more specific categories, such as *wu quan*, *suoyou quan*, *jicheng quan* (???, rights of inheritance), and *zhishi quan* (???, knowledge rights) or *zhishi chanquan* (????, intellectual property rights). *Caichanquan* simply refers to rights over assets or over the value of something. *Wuquan* (??), which refers to a concrete property right, is also “a right to a direct allocation of concrete assets, and a priority right in a thing.”<sup>31</sup> *Youngyi wuquan* (????) is a right of usufruct that is generally related to land. It includes *diyiquan* (???), “which are similar to the pawning of land in payment or security debt”<sup>32</sup> (*dian* [?] rights) as well as management authority (*jingying quan*, ???) and land use rights (*tudi shiyongquan*, ?????). *Juedui wuquan* (????) “is an absolute right in chattel.” *Suoyouquan* (???), or a proprietary right – which includes the right of alienation (*waifen quan*, ???) – is the most encompassing form of *wuquan*. There are several specific typologies under the heading of *suoyouquan*, including security rights (*danbaoquan*, ???)

### **Drafting and Debating the Property Rights Law**

The primary dimensions of the draft property rights law are to protect state-owned capital, to guarantee the fundamental interests of peasants, to completely and correctly represent the principle of equal protection of state-owned (*guojia suoyou*), collectively-owned (*jituan suoyou*), and private property.

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<sup>31</sup> Kinney, p. 10.

<sup>32</sup> Ibid.

The conventional wisdom in China begins with the notion that a planned economy does not need a property rights law, but that under the reform era, China's economy has reached a new phase of development which requires a better specification of property rights than currently exists. Although there are specific references to – and regulations on – property rights in existing laws, including the General Rules of the Civil Law, the Land Management Law (*tudi guanli fa*), the Urban Real Estate Law (*chengshi fangdichan guanli fa*), Assurance Law (*danbao fa*), and the Rural Land Contracting Law (*nongcun tudi chengbao fa*), they are currently insufficient to regulate ownership relations of properties. Because of a lack of systematic property rights law, which would be possible under a civil law code, legal argue that administrative agencies are able to exploit the gaps between various property rights regulations as they appear in discrete existing laws and interfere in areas that should be the domain of commercial and civil law.

Moreover, in addition to the protection of private property rights, which are actively pursued and protected by “natural persons” (*ziran ren*), that is, those who are the owners of such rights; there are other types of property rights (i.e., state-owned or collectively-owned property) that where ownership is not so clearly self-evident and which are thus far more vulnerable to such violations as embezzlement and corruption. Thus, scholars also advocate that the property rights law should provide substantial protection of these types of property rights.<sup>33</sup>

There are no fewer than three discrete groups of experts that have been working on a property rights law since 1998. The first of these, the Chinese Academy of Social Sciences Drafting Small Group of the Property Rights Law (*Zhongguo shekeyuan yanjiusuo wuquan fa qicao xiaozu*) was led by Liang Huixing, and put together a set of draft suggestions (*Zhongguo wuquan fa cao'an jianyi gao*) in October of 1999. Another group, the China People's University Civil Commercial and Law Sciences Research Center (*Zhongguo renmin daxue minshangshi falu kexue yanjiu zhongxin*) led by Wang Liming, provided its draft suggestions a year later.

The NPC Legislative Affairs Commission drew upon both of these drafts to write up an “inside” draft of the property rights law and, by the end of 2001, it had finished a Draft Property Rights Law for comment (*wuquan fa cao'an [zhengqiu yijian gao]*), which it sent down to local courts for their feedback. It was taken up for review by the NPC in December 2002, but a revised draft was not issues until almost two years later, on August 3, 2004. On October 15, lawmakers came up with a draft property rights law that had been reviewed by committee members (*weiyuan zhanghui shenyi gao “Zhonghua renmin gongheguo wuquan fa [cao'an]”*). Although the prop-

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not meant to be exhaustive. Rather, they are meant to suggest some of the breadth of the variation of interests, applications, and scope of property rights in China today.

### **Poorly-Specified Land Rights : Resettlement at Pubugou<sup>42</sup>**

One of the most contentious issues in China today has to do with forcible resettlement of entire villages and towns in order to make way for large-scale real estate, energy, and other infrastructure projects, particularly in rural areas. Property rights are at the root of the controversy: poorly-specified property rights can lead to corruption and/or social protest, both of which quickly transform academic debates over property rights into flesh and blood issues of political control.

The recent bloodshed in Dongzhou village in Guangdong province was directly related to poorly-specified property rights and local governments' attempts to wrest control over these resources for financial gain. The result was widespread protest and the actual shooting of dozens of the people who took to the streets to protest what they saw as the illegal appropriation of their property rights. Such claims were motor that sent up to 100,000 peasants to the streets in Hanyuan county in late 2004 to protest their inadequate compensation for the transfer of their property rights in order to build the Pubugou dam and hydropower station in rural Sichuan province.

The main problem had to do with actually establishing a standard for adequate compensation. But it was administratively and politically – not to mention economically (from the standpoint of the hydropower companies and the government recipients of the profits) – quite difficult to establish a standard that would satisfy all the parties involved. On the one hand, because of the richness of the land and good weather, peasants in Hanyuan county well and enjoyed relatively high living standards: “farmland here is so fertile that in one year we can grow enough to last us three years,” according to a villager.<sup>43</sup> However, for the Sichuan government to justify the project on economic development (i.e., policy) grounds, it had to demonstrate that the peasants were actually quite poor.<sup>44</sup> Thus, there were powerful incentives to push compensation levels downward. It is estimated that the difference between the compensation package (based on fourteen-year-old standards<sup>45</sup>) offered and contemporary national standards for compensation is in the

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<sup>42</sup> This section draws from a yet-unpublished book manuscript, tentatively titled *Water Wars in China: Globalization and the Politics of Unintended Consequences*.

<sup>43</sup> Shi Jiangtao, “Peasants in Upstream Fight to Halt Dam,” *South China Morning Post*, January 5, 2005.

<sup>44</sup> Interview 05CD02, July 8, 2005.

<sup>45</sup> “Massive Protest by Sichuan Farmers Squashed by Police,” *The Epoch Times*, November 10, 2004.

neighborhood of 1.2 billion RMB (US \$143 million).<sup>46</sup> As this would entail a substantial reduction in operating costs, the hydropower company Guodian was happy to oblige, labeling the Huanyuan reservoir area as “deep valleys and high [barren] mountains” – and not the more accurate standard of high yield farmland – during the approval process for Pubugou power station.<sup>47</sup>

A full three years after the resettlements began<sup>48</sup> that on May 19, 2004, the Sichuan Provincial Government Large Hydropower Station Relocation Office issued a notice regarding the compensation standard for Pubugou. This information was disseminated to Hanyuan village cadres in June. Houses with a frame structure had a compensation level of 473 RMB per square meter, brick and concrete houses received 300 RMB per square meter, and brick and wood houses received compensation levels of 180 RMB per square meter. Not only were these standards lower than market prices had been in the past, they were far lower than the prices being charged to subcontractors that were building homes for the construction camp at Pubugou, which ranged from 520 to 680 RMB per square meter.<sup>49</sup>

In order to justify such low compensation rates, supplementary materials, such as the “Relocation Questions and Answers” stipulated that the relocation should follow the “Large and Medium Size Hydropower Station Projects Condemnation and Relocation Regulations” issued on May 1, 1991. But the resettlers (*yimin*) objected to the fourteen-year-old standard for compensation. According to villager Song Yuanqing, the political negotiation representative for Hanyuan County, in 1991 a Hanyuan Village cadre’s income subsidy was 7 RMB, while in 2003 it was 50 RMB. In 1991, the bus ticket from Fulin to Wusi was 1.2 RMB, in 2004 it was 9 RMB. In 1991 Hanyuan had tax revenue of 3 million RMB from local businesses, while in 2003 the figure had risen to 40 million RMB.<sup>50</sup> These issues were left hanging, as peasants were being readied for resettlement.

The final compensation package, arrived at in May 2005, was little better. It was announced that in addition to a one-time moving expenses (*banjia fei*) of 1,000 RMB per household for relocation within the county and 2,000 RMB for outside the county (none were moved out of

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<sup>46</sup> “Outrage Emerges over Pubugou Hydropower Project in Sichuan: Residents Forced to Move to Make Way for a Dam on the Dadu River are Angry about the Meagre Compensation Offered,” *Interfax*, October 28, 2004.

<sup>47</sup> *Daduhe shuidian yimin* (..). Christopher Bodeen, “One Killed in Mass Protest over Dam in Western China,” *Associated Press*, November 1, 2004. This far from an uncommon practice, Shi Jiangtao, “Peasants in Upstream Fight to Halt Dam,” *South China Morning Post*, January 5, 2005.

<sup>48</sup> Although possibly illegal, this is not uncommon. This also occurred at the Xiluodu hydropower station along the Jinsha River (????????????????????).

<sup>49</sup> ?????? “?????”

<sup>50</sup> *Daduhe shuidian yimin* (..)

Sichuan province), compensation per *mu*<sup>51</sup> was established (arbitrarily) by the Sichuan provincial government at 1,659 RMB. There was no discussion with the *yimin*; this was decided upon unilaterally by the Sichuan authorities. This 1,659 RMB was multiplied by sixteen in a one-time payout, bringing the total payout per *mu* of 26,544 RMB.

But there were several problems with this. First, the base estimate of 1,659 RMB was considered to be too low. Second, the multiple of 16 was far below the minimum standard of 30 as per the December 3, 2004 Opinion Regarding the Completion of Rural Compensation Allocation System Directive (*guanyu wanshan zhengdi buchang anzhi zhidu de zhidao yijian*). The Sichuan government was unmoved and said that the absolute highest compensation that it could afford was with the multiple of 16. Third, out of this 26,544 RMB, the people only received 8,000 RMB. The remainder (some 18,000 RMB per *mu*) was kept by the local authorities to use to purchase land and to build housing.

Kornai's discussion of the lack of enforceable property rights in a slightly different context (cooperative vs. contracting) is worth quoting at length because it captures much of what occurred at Pubugou:

[T]olerance of household farming is as compromise between the real, ultimate intention and momentary social realities...The real and feigned concessions markedly reduce resistance and make it somewhat easier for the mass of the peasantry to accept the loss of the chance to farm for themselves...The extent to which this is merely a compromise is confirmed by the official declarations that cooperative property is a lower form of social ownership than state property. So it can only be transitional, although the transition may take a long time.<sup>52</sup>

Indeed, although China's economic system has largely become one based on market forces, state corporations like Guodian are largely indistinguishable from formal state organs and the goals of profits for these corporations have supplanted socialist goals of abundance for all. In political terms, in the absence of an independent enforcement mechanism, it is easy for power considerations to overwhelm the delicate ambiguities that define much of property rights-related law in China.

### **The Problem of Enforcement: *Intellectual Property Rights***

However, even if property rights are clearly specified, it does not necessarily follow that the enforcement infrastructure exists in China. Interestingly, although property rights have not

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<sup>51</sup> One *mu* is roughly equal to .16 acres.

<sup>52</sup> Kornai, p. 82.

been defined on their own terms, a politically-charged subfield of property rights – intellectual property rights – have been. However, rather than provide a guide for how property rights more generally are likely to be protected in the future, China’s experience with intellectual property rights underscores the problems of enforcing rights that are clearly specified within China’s extensive legal and regulatory regime.

The Provincial Copyright Department (*banquan chu*), for example, is nestled within, and subordinate to, the Provincial Press and Publications Administration (*xinwen chuban ju*). The Press and Publications Administration makes all the decisions regarding personnel, budgetary, and any additional *ad hoc* resources that are to be allocated to the Copyright Department (direct communication between the Copyright Department and the provincial government would be a significant breach of organizational reporting relationships). This embeddedness forces the copyright enforcement agencies’ to be dependent on their host units, creating problems when the other units’ priorities diverge from copyright enforcement.

Below the provincial level, the logic of organizational consolidation is even more pronounced. Corresponding units of the Press and Publications Administration and the Copyright Department are merged within, and subsumed under, the bureaucracy headed at the national level by the Ministry of Culture. These sub-provincial units combine press, publications, and copyright responsibilities with the local organizational goals of the Ministry of Culture bureaucratic system. The division of these three sets of responsibilities is often skewed to favor the priorities of the Culture bureaucracy, particularly the local Cultural Market Management (*wenhua shichang guanli*) units. These units are charged with supervising the cultural market, which encompasses movies, live performances, books and periodicals, audio-visual products, arts & crafts and fine arts, gaming establishments, restaurants and karaoke parlors, and recreation centers in China. The specific targets of Cultural Market Management enforcement are anti-Communist Party, anti-government, or overtly pornographic products within the cultural market. Only a very small percentage of copyright-violating merchandise falls into these categories; pirated works deemed “nonpolitical,” such as most motion pictures (even those with gratuitous violence and racy sexual situations), computer software, and video games are given a low priority as far as enforcement is concerned.

For all these reasons – and despite the provision of generally well-accepted copyright laws and regulations that have existed on the books in China for almost two decades – enforcement, in the absence of an autonomous and sufficiently powerful enforcement institutional infrastructure, remains woefully inadequate. The same, for some of the same reasons, is also true for the enforcement of another dimension of intellectual property, patents. However, the news is a

bit more positive for the third leg of the IPR tripod, trademarks. But, as I have argued elsewhere, this has less to do with systematic strengthening of the laws and regulations and far more to do with bureaucratic idiosyncrasies peculiar to the trademark enforcement environment. Indeed, the more sorrowful state of copyright enforcement is unfortunately more representative of administrative enforcement of property rights more generally.<sup>53</sup>

### **“Political” Property Rights: *Bianzhi* and *Rencaiwu***

Although they are not often regarded as such, property rights are also a central dimension to the authority relations that define political power in China. Chinese administrative units make a distinction between two types of political relationships: the distinction between a relationship governed by binding orders, and one based on non-binding instructions. Any given political unit in China has the second type of relationship with numerous other units. But it has the first type of relationship with only one, its immediate “superior.” A relationship based upon such binding orders is referred to as “leadership relations” or *lingdao guanxi* (the other type is based on non-binding “professional relations” or *yewu guanxi*). In China’s largely decentralized political system, such leadership relations are often not with administrative superiors (described by the Chinese as “leadership along a ‘line,’” or *tiaoshang lingdao*), but *with local governments at the same administrative level* (or “leadership across a ‘piece,’” *kuaishang lingdao*).

The direction of leadership relations is operationalized by a tripartite set of issues, the shorthand for which is *rencaiwu*. “*Ren*” refers to personnel, “*cai*” refers to finances, and “*wu*” refers to property rights arrangements, including office space, vehicles, computers, and the like, which are assigned along these lines of authority relations. The authority over the quantity<sup>54</sup> of these outlays at the national level is formally within the domain of the Composition of Government Organizations (CCGO, *jigou bianzhi weiyuanhui*, or, *bianwei*). The national CCGO gives each of the provincial-level CCGOs its *rencaiwu* allocation as an aggregate figure. The provincial-level CCGO has the power to distribute this aggregate figure as it wishes among the various government offices within the provincial level. For decentralized bureaucracies, this procedure is

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<sup>53</sup> See Andrew C. Mertha, *The Politics of Piracy: Intellectual Property in Contemporary China*, Ithaca: Cornell University Press, 2005.

<sup>54</sup> The CCGO determines the number of people to be allocated to the next vertically subordinate level of the administrative system; however, the responsibility for choosing the actual individuals for top government and Party positions falls under the jurisdiction of the CCP Organization Department. In the words of one interviewee, “the CCGO chooses the ‘chairs,’ and the Organization Department selects the ‘hats’” (Interview 99CD06, July 1, 1999).

repeated, with some variation, all the way down to the county (there is no CCGO below the county level).<sup>55</sup>

Since 1999, there has been a trend within the past five years to recentralize a set of bureaucracies *up to the provincial level*. This moves the locus of control into the provincial-level governments. For *rencaiwu*, this means that the provincial *bianwei* gives the provincial-level office of the administrative agency in question its allocation for the whole bureaucracy, down to at least the county level (in some cases, down to the township level). The provincial-level unit consults with units at all levels of the system regarding the *rencaiwu* allocations and then makes its decisions about resource allocations *to all units within its xitong throughout the entire province*.<sup>56</sup> In short, *rencaiwu* becomes the responsibility of the newly-centralized bureaucracy – and *not* the local government – from the provincial level on down.

This creates a host of problems akin to under-specification of property rights. Cadres in some units whose vertical management only extends to the provincial level are not considered to be provincial government personnel. Yet, they are also not considered to be vertically-managed because between the provincial and the national level, these same bureaucracies have *decentralized* leadership relations (i.e., their marching orders come from the provincial government and not from their counterpart ministries and bureaus in Beijing). The directors of these units thus find themselves in something of a bureaucratic no man's land. Often, according to one source, “[their] functions...do not correspond to their duties.” This is a result of variation in these local-level cadres' authority relations with their superiors: some bureaus are managed by government committees, some are vertically managed, and some are directly controlled by local governments under a decentralized system.<sup>57</sup>

More ominously, as I have written elsewhere, such developments bode ill for the smooth development of a legislative and judicial infrastructure at the local level which presumably is charged with clarifying and enforcing decisions arising from this under-specification of political property rights:

Under centralized management, units are not created and managed by, or responsible to, the corresponding local people's congresses. This raises a number of issues...it creates a procedural glitch in that it is unclear whether or not the work of these centrally managed units is approved or even reported on by the local people's congress in the latter's work

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<sup>55</sup> At the township and village levels, personnel allocations are determined by the township and village governments. This number is generally very small, and there are no specialized village- or township-level CCGO (Ibid.).

<sup>56</sup> Interview 02CD03, July 12, 2002.

<sup>57</sup> Wang Gang, “*Guanyu difang zhengfu zucheng renyuan fanwei jieding de wenti*” *Renda yanjiu* Vol. 124 (No. 4, 2002).

reports. More to the point, national and local laws stipulate that local people's congresses have supervision power over the administrative departments within the locality. At the very least, centrally managed units are "blind spots" for the local people's congresses; at most they question the very durability of recent improvements in the people's congress system.<sup>58</sup>

Thus, the allocation patterns of administrative property rights are important to determine one of the singularly most important – if *not* the most important – dimensions of the Chinese political system: the direction of authority relations throughout the Chinese government.

### Conclusion

As the foregoing makes clear, the China scholarly community has barely scratched the surface in mining the topic area of property rights in China. This presents both challenges and opportunities. The challenges arise from several areas. First, very often it is difficult to derive an accurate understanding of property rights because of the disconnect between formal laws and regulations and the actual processes unfolding on the ground. Second, these processes are often crouched in layers of ambiguity and inconsistency that results in a phenomenon that is at best opaque. Third, even if we are able to discern a pattern, it is more likely than not that such a pattern is relatively unsystematic and subject to all sorts of sectoral, regional, and other variation. Finally, China itself is changing so rapidly that in the time it takes the researcher to arrive at a credible finding, the ground has already shifted under his or her feet and the fruit of his or her labor is already somewhat out-of-date.

Nevertheless, China scholars should not be deterred because the subject is of such importance that it seeks – indeed, *requires* – our sustained attention. As others have argued, and as I have attempted to demonstrate in this article, property rights are the linchpin in our understanding of the political economy of any state. Moreover, as I and others have suggested, it is also a key dimension in our definition of the interaction of social sphere with its political and economic counterparts. We do ourselves no favors by limiting our approach to one that is based on a narrow legal definition of the concept or to an impressionistic understanding of one or more components in isolation from the overall structure, process, and meaning of property rights as they continue to evolve in China today. Wu Guoping's quote at the beginning of this paper should thus be interpreted as a challenge: "The fact that a legal or economic model does not exist for an activity

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<sup>58</sup> Mertha, "China's 'Soft' Centralization: Shifting *Tiao/Kuai* Authority Relations," *The China Quarterly* 184 (December 2005): 805. 805.

or a behavior is no reason to oppose it, because the laws can develop out of experience and practice.”