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# The Legitimacy of Extralegal Property: Global Perspectives and China's Experience

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## Abstract

Binary thinking has been entrenched in property law, posing challenges to the protection of land tenure and land users who have no title to the land they cultivate. This paper critiques the state law centred approach to evaluating the legitimacy of property and defends extralegal property, as legitimate claims to land and related natural resources that are not against the law, but that are not recognised by the law as formal property rights. It begins with an overview of how the legitimacy of property is conceived of at the global level, drawing upon several conceptual frameworks of property developed via global initiatives and soft law instruments. That being done, it moves to examine the legitimacy of extralegal property from the local perspective, looking at a case study of 'minor rights property' in China. It is argued that long-term usage of land supported by the prevalence of this practice and social consensus should be regarded as one of the major sources of the legitimacy of property. The paper concludes that the state law centred approach to evaluating the legitimacy of property overlooks a range of legitimate property claims and the plurality of norms governing property relations. In order to recognise the full spectrum of property, we should link global perspectives with local experiences.

## Introduction

Extralegality has an uneasy relationship with property. In his very influential and often-cited book *The Mystery of Capital*, de Soto argues that it is the lack of legal property and the predominance of extralegal property that traps people in poverty; extralegal property needs to

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be converted into legal property via titling, for legality is coupled with title (property representation) and it is title that enables people to obtain liquid capital.<sup>2</sup> He also argues that ‘it is legality that is marginal; extralegality has become the norm’.<sup>3</sup> In his case study of Peru, it is estimated that ‘53 per cent of city dwellers and 81 per cent of people in the countryside live in extralegal dwellings’.<sup>4</sup> It may be true that extralegality prevails over legality in terms of scale, but it is frequently stigmatised as ‘illegal’, ‘underground’ and ‘unregulated’, or is often associated with ‘black-market’ economy.<sup>5</sup>

De Soto’s analysis of extralegal property and the international drive to individualise land rights that his work has propelled do not capture the nature of property and oversimplify the source of the legitimacy of property. The concept of property is fluid. For de Soto, property is essentially a conversion mechanism whereby assets can be transformed into capital. In such an analysis, the scope of property is reduced to things—whether it be ‘assets’ or capital; people and social relations are excluded from consideration. Moreover, de Soto overemphasises individual absolute dominion manifest in Blackstonian private ownership.<sup>6</sup> As a result, a new category of ‘property outsiders’ or ‘legally propertyless masses’, in particular those who hold nothing other than occupation or use rights, have been generated, and have been denied their entitlements to property holding in law.

This paper re-evaluates the relationship between extralegality and property and critiques the state law centred approach to evaluating the legitimacy of property. By property we mean property in land and related natural resources, and as explained in Section Two, we use property and land tenure interchangeably, as both emphasise the relationship between people and land as well as the relationship between people with respect to land. We focus on how legitimacy derives from long-term relationships in dealing with land. In developing this argument, we draw several crucial distinctions. The first distinction is between ownership and property. We will discuss in detail in the following sections that ownership is static, formulated by political discourses and ideologies with entrenched boundaries of exclusion;

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<sup>2</sup> H de Soto, *The Mystery Of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (Black Swan, 2001).

<sup>3</sup> Ibid 30.

<sup>4</sup> Ibid.

<sup>5</sup> B J Miller, ‘Living Outside the Law’ (2007) 5 *Journal of International Human Rights* 127, 127.

<sup>6</sup> William Blackstone defined property as ‘the 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’. W Blackstone, *Commentaries on the Laws of England, vol I: Of the Rights of Persons* (Clarendon Press 1766) 2. See also R W Gordon, ‘Paradoxical Property’ in J Brewer and S Staves (eds), *Early Modern Conceptions of Property* (Routledge, 1996) 95-110, 95.

whereas property is dynamic, based on long-term social interactions where a plethora of property claims have emerged, many of which are extralegal. We define extralegal property as legitimate claims to land and related natural resources that are not against the law, but that are not recognised by the law as formal property rights; the origin of extralegal property is outside the scope of law.<sup>7</sup> This leads to the second distinction between property claims and property rights. While both are part and parcel of diverse property relations, property claims are often based on de facto use, long-term social interactions and custom. Indeed the source of the legitimacy of property is closely linked to time. By contrast, property rights are recognised and enforced by the state.<sup>8</sup> The fact that some property claims have not been recognised by law does not mean that they are illegitimate.<sup>9</sup> This point of view has been supported by UN-HABITAT (the United Nations Human Settlements Programme), which has stated that ‘a number of parties can hold different tenure claims and rights in the same piece of land. These can be either, formal/legal, or informal/extra-legal’.<sup>10</sup>

Property is mostly governed by domestic law. Yet, acknowledging the legitimacy of extralegal property is challenging if we only focus on property law in the domestic context. For example, for scholars in jurisdictions where the rule of law has been well developed, it would be difficult for them to comprehend why an ‘illegal’ practice could be legitimate. Further, binary thinking is entrenched in the general conceptual framework of property in many legal systems. For instance, we are familiar with the idea that ownership can be divided into state ownership, commons and private ownership, which leaves limited scope for according recognition to other forms of property and property hybrids. Although recent studies of the spectrum of state, private, communal, public property and property hybrids have begun to break down boundaries within property law and to capture the diversity of

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<sup>7</sup> According to the *Oxford English Dictionary*, the term ‘extralegal’ is defined as ‘(of an action or situation) beyond the province of the law’. Customary tenure may not be recognised by the state, as is the case with many African countries, and therefore customary tenure can be broadly conceived as extralegal property. See e.g., K Deininger, ‘Land Policies for Growth and Poverty Reduction’ (World Bank, 2003), xviii.

<sup>8</sup> O M Razzaz, ‘Examining Property Rights and Investment in Informal Settlements: The Case of Jordan’ (1993) 69 *Land Economics* 341, 341-42.

<sup>9</sup> See e.g., A Smart and F M Zerilli, ‘Extralegality’, in D M Nonini (ed) *A Companion to Urban Anthropology* (Wiley-Blackwell, 2014) 222–38, 231 (discussing the ways in which ‘something [that] a government considers illegal is thought by participants to be legitimate’); U Mattei and L Nader, *Plunder: When the Rule of Law Is Illegal* (Blackwell, 2008); B Santos, ‘Beyond Abyssal Thinking: From Global Lines to Ecologies of Knowledges’ (2007) 30 *Review: A Journal of the Fernand Braudel Center* 45 (challenging the dichotomy between legal and illegal); F M Zerilli, ‘The Rule of Soft Law: An Introduction’ (2010) 56 *Focaal—Journal of Global and Historical Anthropology* 3, 3-4 (arguing ‘conceptions, ideas, and practices’ concerning property emanate from ‘a variety of normative sites and institutions located beyond the margins of the state’).

<sup>10</sup> UN-Habitat, 2008, ‘Securing Land rights for All’, at <<http://mirror.unhabitat.org/pmss/listItemDetails.aspx?publicationID=2488>>.

property, they have not yet covered a wide range of diverse contexts that include Asian, South American and African experiences.<sup>11</sup>

We need to look at the conceptual framework of property at the global level. Since the second half of the twentieth century, the scope of property has dramatically expanded from the local to the global.<sup>12</sup> As a result, a plethora of treaties, customary norms, and soft law instruments have emerged to constitute a new body of law — ‘international property law’, as Sprankling calls it.<sup>13</sup> In Section Two, we look at the changes to the traditional conceptual framework of property made by some global initiatives, soft law instruments and policy recommendations, including the proposals of UN-HABITAT and ‘the Voluntary Guidelines on the Responsible Governance of Tenure’ prepared by the Food and Agricultural Organisation (FAO) of the United Nations in 2012 (hereinafter, the Voluntary Guidelines 2012).<sup>14</sup>

After sketching out the conceptual framework of property from the global perspective, our research extends to the local experience. We use ‘minor rights property’ in China, the subject of competing and even conflicting property claims, as a case study. In many areas in China a de facto property market is emerging that consists of affordable properties called ‘minor rights properties’; however, this does not constitute a formal legal concept. These sorts of properties are built by farmers on collectively owned rural land that is reserved for agricultural purposes or for farmers’ residential use according to the classification of land use control. Buyers of such properties can obtain an ownership certificate issued by the township government. However, the ‘legality’ of such ownership certificates is highly questionable, as according to the law, only governments at the county level or above have the authority to issue these ownership certificates and register these properties.<sup>15</sup> When purchasing these properties, buyers cannot use mortgages or apply for bank loans to support their purchase.

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<sup>11</sup> See e.g., A Lehari, *The Construction of Property: Norms, Institutions, Challenges* (Cambridge University Press, 2013) (discussing the US, British and Israeli experiences and the transformation of the nature of property in globalisation).

<sup>12</sup> T Xu and J Allain, ‘Introduction: Property and Human Rights in a Global Context’, in T Xu and J Allain (eds), *Property and Human Rights in a Global Context* (Hart Publishing, 2015), 9.

<sup>13</sup> J G Sprankling, *The International Law of Property* (Oxford University Press, 2014).

<sup>14</sup> ‘The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security’ adopted in Rome in 2012. The Guidelines promote secure tenure rights and equitable access to land, fisheries and forests as a means of eradicating hunger and poverty, at <[www.fao.org/nr/tenure/voluntary-guidelines/en/](http://www.fao.org/nr/tenure/voluntary-guidelines/en/)>. See also R Hall and I Scoones, ‘Next Steps to Strengthen Global Land Governance’, *The Conversation*, 11 May 2016, at <<http://theconversation.com/next-steps-to-strengthen-global-land-governance-58940>>. It is argued that ‘the voluntary guidelines represent a unique example of collaborative “soft law”’, as the UN Committee on World Food Security opened up the opportunity for the direct involvement of a wide range of shareholders in preparing and drafting the Guidelines.

<sup>15</sup> Article 10 of the Property Law (2007), promulgated by the National People’s Congress; Article 4 of the Methods on the Housing Registration (2008), issued by the Ministry of Construction on 22 January 2008. The township level is lower than the county level in the Chinese governance system.

The ‘minor’ nature of such properties is manifested in: the inferior status of the land use rights (hereinafter LURs) to the collectively-owned rural land compared to those of urban land in terms of transferability on the property market; and by these properties’ ‘illegal’ and non-registrable status. Despite this inferior status, a minor rights property market is flourishing, due in large part, it seems, to the fact that prices are low and more affordable compared to those available on the urban property market. There were already 6 billion square meters minor rights properties nationwide by June of 2010.<sup>16</sup> In Shenzhen, for example, approximately 49.27% of properties were characterised as minor property rights as of the end of 2011.<sup>17</sup> In Section Four, we distinguish different types of minor rights property and defend one type which is built on farmers’ residential plots rather than on arable land. This sort of property is usually a big house which contains several flats. Farmers retain one or two flats for the use of their own family; other flats are available for sale. This particular type of minor rights property constitutes a form of extralegal property.

Our study of minor rights property speaks to analyses of property ‘from the margins’.<sup>18</sup> It begins by introducing property law in China, which embodies binary thinking of ownership and closely links with the urban-rural divide (Section Three). This section also examines the emergence of ‘primary rights property’ in order to compare it with minor rights property. It then moves on to analyse controversies surrounding minor rights property in China (Section Four). That being done, it identifies the origin of extralegality, locating this issue within the context of profound socio-economic transformations, in particular urbanisation, which is breaking down the urban-rural divide (Section Five). It then criticises the state law centred approach to evaluating the legitimacy of property (Section Six). It is concluded that the legitimacy of extralegal property does not depend on the sanction of the law. Extralegal property mirrors the heterogeneity of property relations, and antedates the formation of formal, legal property. The conclusions also point out that there are limits to using national

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<sup>16</sup> See ‘There Are 6 Billion Square Meters Minor Rights Properties in China’ (Zhongguo xiao chanquanfang huo da yi pingfang mi), at <[http://house.ifeng.com/special/xiaochanquanfang/focus/detail\\_2010\\_06/03/1580970\\_0.shtml](http://house.ifeng.com/special/xiaochanquanfang/focus/detail_2010_06/03/1580970_0.shtml)>.

<sup>17</sup> W C Zhu, ‘The Dilemmas of Minor Rights Property’ (‘Ganga de xiao chanquan fang’), *Southern Metropolis Daily* (*Nanfang dushi bao*), 24 August 2012.

<sup>18</sup> See e.g., A J van der Walt, *Property in the Margins* (Hart Publishing, 2009); G Standing, *The Precariat: The New Dangerous Class* (Bloomsbury Academic, 2011). See also L Fox O’Mahony, ‘Property Outsiders and the Hidden Politics of Doctrinalism’ (2014) 62 *Current Legal Problems* 409, 426 (arguing that ‘analyses from the perspective of the less-propertied person allow us to see more clearly the political choices we have made through our value commitment and to reflect on whether the distributional consequences are normatively desirable’).

law to protect extralegal property, highlighting instead the possibility of using soft law such as global guidelines, which may employ moral force in order to influence states.

Our method is primarily historical, probing the origin of minor rights property. We review the property system and analyse its margins. We have done a substantial survey of Chinese laws and regulations pertaining to property from 1949, the founding date of the People's Republic of China (PRC), and have found that no laws or regulations prohibit the sale of minor rights property. We also contrast the primary property market with the minor property market, and compare the central government's approach to minor rights property with the local government's approach and with the social conception of minor rights property. We focus on systemic issues, and for this purpose our research is not an empirical study, which would usually require the gathering of evidence from localities, although we are aware of local particularities and variations given the size and diversity of China. Indeed, to study China, the choice is usually between a macro-study of the system or the structure of the whole country and a micro-study of a locality (for example, a province, a city or a village, usually through fieldwork). The problem with the study of a specific locality is that a conclusion to a study that is relevant or useful for one locality (for example, Henan province) is not necessarily relevant or useful for another locality (for example, Hunan province). That said, although we choose to focus on the 'big picture' in this paper, this does not mean we shall overlook the importance of field research; we intend this to be the next step in our research, and the subject of further papers.

### **The Legitimacy of Property: Global Perspectives**

Against the international drive to individualise land rights propelled by de Soto, diverse forms of tenure have been recognised by global initiatives, soft law instruments and policy recommendations.<sup>19</sup> In 'Securing Land Rights for All', published by UN-HABITAT in 2008, different terms have been used, including:

**Land rights:** Socially or legally recognized entitlements to access, use and control areas of land and related natural resources.

**Property rights:** Recognised interests in land or property vested in an individual or group and can apply separately to land or development on it. Rights may apply separately to land and to property on it (e.g., houses, apartments or offices). A recognised interest may include

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<sup>19</sup> E.g., FAO Land Tenure Studies 10, Compulsory Acquisition of Land and Compensation, FAO, Rome 2008, Forward: 'Effective land tenure institutions are needed to administer who has rights to which natural resources for which purposes, for how long, and under what conditions', at <<http://www.fao.org/docrep/011/i0506e/i0506e00.htm>>; Voluntary Guidelines 2012, 2.4 emphasises 'the governance of all forms of tenure, including public, private, communal, collective, indigenous and customary'; FAO Land Tenure Studies 10, 4.33 covers statutory tenure (defined in written law) and customary tenure.

customary, statutory or informal social practices which enjoy legitimacy at a given time and place.

**Land tenure:** the way land is held or owned by individuals and groups, or the set of relationships legally or customarily defined amongst people with respect to land. In other words, tenure reflects relationships between people and land directly, and between individuals and groups of people in their dealings in land.<sup>20</sup>

These concepts all speak to the three important aspects of property in land and related natural resources: these dimensions concern not only relations between people and land but also relations between the individual and groups of people with respect of the land; it includes entitlements to access, use and control land and related natural resources; its legitimacy may come from social recognition and practices and depends on different contexts. It seems that the concept of tenure or property in land and related natural resources encompasses these important aspects. Therefore, in our following discussion, we use these two concepts interchangeably.

The ‘continuum of land rights’ approach (Figure 1) was adopted at the 2011 UN-Habitat Governing Council resolution by Member States.<sup>21</sup> This approach is seen as:

the more sustainable way of providing security of tenure for all, at scale. The approach, described as a system where different sources of land access and use patterns co-exist, allows a diversity of tenure situations ranging from the most informal types of possession and use, to full ownership.<sup>22</sup>

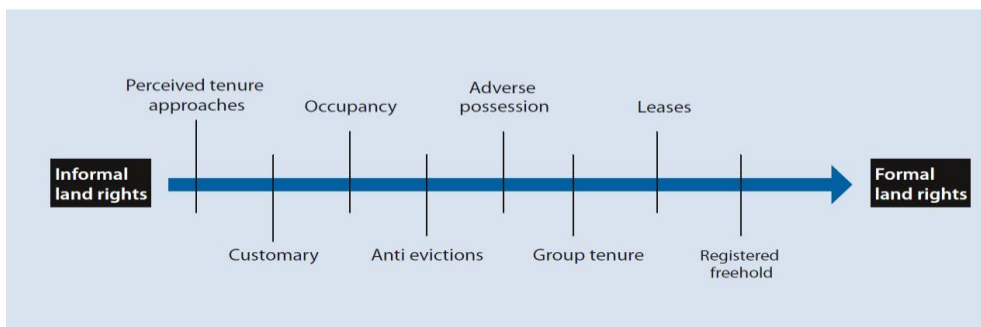


Figure 1: The ‘continuum of land rights’ approach<sup>23</sup>

Yet, ‘contrary to the name of the model, discrete tenure types are depicted in harmony with a staged understanding of tenure and incremental movement through the land rights and land

<sup>20</sup> UN-Habitat (n10) 5.

<sup>21</sup> GLTN (Global Land Tool Network), ‘Celebrating the Continuum of Land Rights’, at <<http://www.glt.net/index.php/media-centre/glt-news/177-celebrating-the-continuum-of-land-rights>>.

<sup>22</sup> Ibid.

<sup>23</sup> Source: UN-HABITAT (n10) Table 1.5.



tenure types'.<sup>24</sup> Indeed, this model has several limits. It uses statutory concepts such as registered freehold and adverse possession that may sound familiar to English or American property lawyers, but may sound foreign to people from other jurisdictions. It is still confined by binary thinking due to its adherence to the distinction between informal and formal land rights. It is based on a linear, teleological model that presupposes that informal land rights ought to be transformed into formal land rights, as indicated by the arrow which only moves in a single direction. Further, it overlooks the context.

LEAP (the Legal Entity Assessment Project) has proposed another continuum of land rights model.<sup>25</sup> It has revised the linear evolution of different types of tenure, as indicated in Figure 2, so that the arrows move in both directions. However, it still highlights boundaries such as formal vs. informal; there is no specific emphasis on communal property; and it uses registration and written rental agreement as the measure of land tenure security.

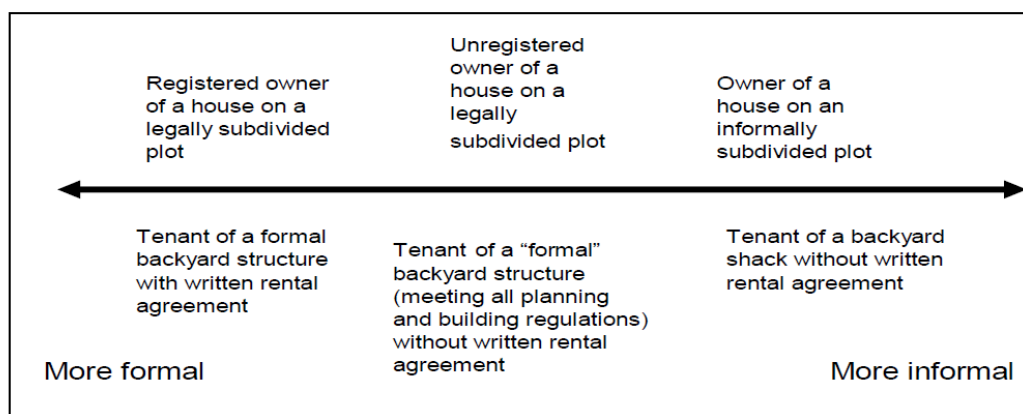


Figure 2: LEAP's continuum of land rights<sup>26</sup>

The Voluntary Guidelines 2012 and relevant FAO studies have improved the models proposed by UN-HABITAT and LEAP, emphasising the importance of context in perceiving the idea of land tenure. The Voluntary Guidelines seek to promote 'secure tenure rights and

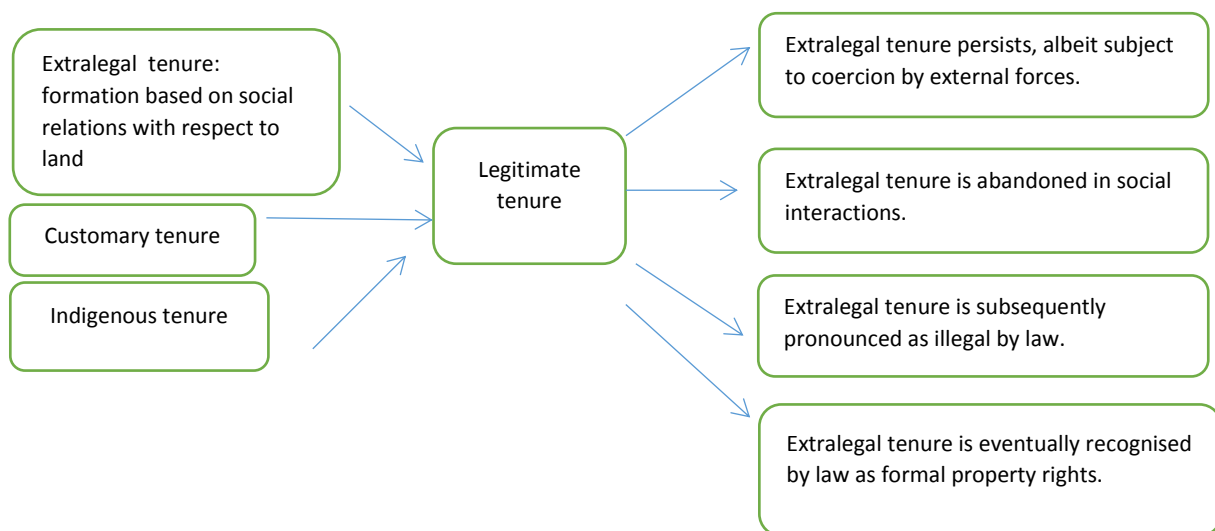
<sup>24</sup> J Whittal, 'A New Conceptual Model for the Continuum of Land Rights' (2014) 3 *South African Journal of Geomatics* 13, 14.

<sup>25</sup> 'LEAP came into existence in 1988 when a group of KwaZulu-Natal land practitioners from NGOs, government and the private sector began to focus on why the communal property institutions (CPIs) set up under land reform appeared to be failing', at: <<http://www.mdukatshani.com/leap-home.php>>

<sup>26</sup> Source: L Royston and C Kihato, 'One Step at a Time: Linking the Tenure Security Continuum Concept to the Findings of Urban LandMark's Operation of the Market Study in Maputo', *Urban LandMark*, 12 April 2012, at <[http://www.urbanlandmark.org.za/conference/2012\\_presentations/lauren.pdf](http://www.urbanlandmark.org.za/conference/2012_presentations/lauren.pdf)>.

equitable access to land, fisheries and forests’ by setting out best practice.<sup>27</sup> In preparing the draft of the Voluntary Guidelines 2012, many non-state actors were involved in the process of negotiation, including NGOs, farmer associations, development agencies, and the private sector.<sup>28</sup> One outcome of the negotiation is that the ‘cultural, religious or emotional aspects of the land’ have been recognised.<sup>29</sup> ‘States should recognize that policies and laws on tenure rights operate in the broader political, legal, social, cultural, religious, economic and environmental contexts’.<sup>30</sup> More importantly, extralegal property including customary tenure has been recognised in FAO land tenure studies.<sup>31</sup> Lands under customary tenure cannot be simply treated as ‘public or government land, vested in the nation or in the name of the president in trust for the citizens’.<sup>32</sup>

While the protection of indigenous and customary tenure has gained momentum due partly to the development of international human rights law and soft law, protection afforded to extralegal property remains an understudied area. Our research shifts the Voluntary Guidelines’ focus on customary and indigenous tenure to extralegal tenure based on social relations between individuals and groups of people with respect to the land. This point will be elaborated in Figure 3 and the case study of minor rights property in China.



<sup>27</sup> The Voluntary Guidelines 2012, iv.

<sup>28</sup> A Arial *et al*, ‘Governance of Tenure: Making it Happen’ (2012) 1 *Land Tenure Journal* 63, 66, <[www.fao.org/nr/tenure/land-tenure-journal/index.php/LTJ/article/viewFile/51/91](http://www.fao.org/nr/tenure/land-tenure-journal/index.php/LTJ/article/viewFile/51/91)>.

<sup>29</sup> FAO Land Tenure Studies 10 (n19) 7.

<sup>30</sup> The Voluntary Guidelines 2012, 5.9.

<sup>31</sup> FAO Land Tenure Studies 10 (n19) 34.

<sup>32</sup> *Ibid*.

### Figure 3: Legitimacy of property and different ‘stories’ of the transformation of extralegal tenure

Extralegal tenure may be interpreted very broadly and encompass customary and indigenous tenure, however the three types of tenure identified in Figure 3 are formed on a different basis. As discussed above, customary tenure may not be recognised by the state and is often regarded as extralegal; some groups such as fisherfolk, herders and pastoralists may not be characterised as ‘indigenous’, but may hold customary tenure. The legitimacy of customary tenure derives from custom. Indigenous peoples’ resource use is integral to their cultural identity. Although indigenous peoples may not have sufficient recourse to national law to protect indigenous tenure, protection of indigenous tenure has been gradually incorporated into an international human rights framework.<sup>33</sup> Human rights have also become the major source of legitimacy of indigenous tenure.

Our primary concern in this paper is extralegal tenure, whose legitimacy derives more from a de facto situation, based on social relations between individuals and groups of people with respect to the land. These social relations are shaped and reshaped by a variety of bonds such as shared economic interests and values, which encompass both spatial and temporal dimensions. For example, people share a sense of belonging by reference to locality, and they follow the same rules of the use of resources which may be intergenerational but not yet amount to customary. Compared to customary and indigenous tenure, this type of extralegal tenure receives the least protection from national law.

The role of social relations in the formation of extralegal tenure indicates that social sanctions should be regarded as one source of the legitimacy of tenure: when people defend their land tenure, they are supported by the wider consensus of the community. Here we could draw links to relevant discussions on ‘the moral economy’ where some ‘legitimising notion of right’ is not to be found in either state law or ‘the free market’.<sup>34</sup> Of course, we should recognise that property claims may have different degrees of legitimacy due largely to the different length of land use and degree of social consensus. These property claims may also be subject to various degrees of protection, as these claims ‘can be stronger or weaker according to social conventions, the law, enforcement conditions, and length of possession, political

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<sup>33</sup> A Clarke, ‘Property, Human Rights and Communities’ in Xu and Allain (n12) 19-40.

<sup>34</sup> See e.g., E P Thompson, *Customs in Common*, (the Merlin Press, reprinted in paperback 2010), Chapter IV ‘The Moral Economy of the English Crowd in the Eighteenth Century’ 185-259.

support, etc.’<sup>35</sup> As a result, there may be different stories (we use the word ‘stories’ to avoid indicating the linear evolution of property rights) of the transformation of extralegal tenure as elucidated in Figure 3. That said, the possible transformations of extralegal tenure should not be used to reject its nature as legitimate tenure.

### **Property Law in China and ‘Primary Rights Property’**

Before looking at the nature of minor rights property, it may be helpful to start with some background introduction to Chinese property law. In the Mao era (1949-1978), the conception of ownership in China was overwhelmingly influenced by former Soviet jurisprudence. Ownership was regarded as indivisible and absolute. Public ownership (including state and collective ownership)<sup>36</sup> was superior to individual interests; private ownership was virtually abandoned;<sup>37</sup> acquisition and management of property was under an overarching administrative fiat.<sup>38</sup>

Although civil law-making in the post-1978 era returned to the German Civil Law framework,<sup>39</sup> a clear boundary between public ownership and private ownership still exists in the law, and a tri-ownership system including state ownership, collective ownership and private ownership has evolved and persisted. The right to property is defined broadly but also vaguely, in the General Principles of the Civil Law (GPCL, 1986), as ‘ownership and property rights relevant to ownership’.<sup>40</sup> The concept is specified in the Property Law (2007) as *wuquan*, literally property rights over things (*wu* means things, particularly tangible things; *quan* means rights). The scope of property rights is limited by the *Numerus Clausus* principle:

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<sup>35</sup> UN-Habitat (n10) 5.

<sup>36</sup> Article 10 of the Constitution (1982, amended 1988, 1993, 1999, and 2004): ‘Land in the rural and suburban areas is owned by collectives except for those portions which belong to the state in accordance with the law; residential plots and private plots of cropland and hilly land are also owned by collectives’. Article 9 of the Land Administration Law (1986, amended 1988, 1998, 2004) defines collective ownership in the same way as Article 10 of the Constitution.

<sup>37</sup> Private ownership was not formally abolished in 1949, and a mixed economy was adopted between 1949 and 1956 as a prelude to nationalisation of private capital. Whether or not a complete system of public ownership was established is unclear. E.g., Article 11 of the 1954 Constitution recognised private property: ‘the State protects the right of citizens to own lawfully-earned incomes, savings, houses and other means of life’. Article 12 of the 1954 Constitution provides: ‘the State protects the right of citizens to inherit private property according to law’. See the English version of the 1954 Constitution, in A P Blaustein (ed), *Fundamental Legal Documents of Communist China* (Fred B. Rothman & Co, 1962). The content of Article 11 of the 1954 Constitution was restated in Article 9 of the 1975 Constitution, but ‘the right to inherit private property’ was abandoned in the 1975 Constitution.

<sup>38</sup> See P Potter, ‘Globalization and Economic Regulation in China: Selective Adaptation of Globalized Norms and Practices’ (2003) 2 *Washington University Global Studies Law Review* 119, 126-127.

<sup>39</sup> Legal reforms that occurred in the late Qing (1840-1911) and Republican (1911-1949) periods introduced many aspects of the Civil Law system to China from Germany, via Japan. See T Xu, *The Revival of Private Property and its Limits in Post-Mao China* (Wildy, Simmonds & Hill Publishing, 2014) chapter 2.

<sup>40</sup> The GPCL (1986), Chapter 5, Section 1.

*wuquan* includes ownership, usufructuary rights, and security rights.<sup>41</sup> While public ownership of land is still perceived to be ideologically important in China, the right to use the land by individuals and households has become one of the most fundamental, and, at the same time, controversial issues in Chinese property law.

According to Article 4 of the Land Administration Law (1986, amended 1988, 1998, 2004), the state controls the purposes of the use of land. The state formulates overall plans for land utilisation, and classifies the purposes of land use into agriculture, construction use and unused. Article 4 (1) of the Land Administration Law provides:

“Land for agricultural use” refers to land directly used for agricultural production, including cultivated land, woodland, grassland, land for farmland water conservancy and water surfaces for breeding; “land for construction use” refers to land on which buildings and structures are put up, including land for urban and rural housing and public facilities, land for industrial and mining use, land for building communications and water conservancy facilities, land for tourism and land for building military installations.

Article 12 of the Interim Regulations Concerning the Assignment and Transfer of the Right to the Use of the State-owned Land in the Urban Areas (1990, hereinafter ‘the Interim Regulations’) provides:

The maximum term with respect to the assigned right to the use of the land shall be determined respectively in the light of the purposes listed below:

- (1) 70 years for residential purposes;
- (2) 50 years for industrial purposes;
- (3) 50 years for the purposes of education, science, culture, public health and physical education;
- (4) 40 years for commercial, tourist and recreational purposes; and
- (5) 50 years for multiple uses or other purposes.<sup>42</sup>

Since 1978 collective ownership of rural land has been fragmented into various forms of use rights according to the control of the purposes of the use of land, including the rights to farm land for agricultural use, that is, ‘contractual management rights’<sup>43</sup> and use rights to land for construction purposes. Unlike use rights to urban land, there is no maximum term specified in law for using rural land for construction purposes. Land for construction use includes farmers’ residential plots reserved for farmers to build their houses, which constitute 70% of rural land for construction use.<sup>44</sup> However, the extent to which the use rights to rural land may be

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<sup>41</sup> The Property Law (2007), Article 2.

<sup>42</sup> Article 149 of Property Law (2007) provides: ‘When the period of time for the right to the use of land for construction of residences expires, it shall automatically be renewed’.

<sup>43</sup> The term increased from 15 years in 1984 to 30 years under Article 14 of the Land Administration Law (1998).

<sup>44</sup> H Yu and F Zhang, ‘New Land Reforms Plans Cannot Rescue “Minor Rights Property”’ (‘Xin tugai fang’an nan jiu “xiao chanquan fang”’), *The Economic Observer (Jingji guancha bao)*, 29 November 2014.

transferred and disposed of has raised a lot of debate. For example, Chapter 13 of the Property Law (2007) deals with LURs to rural residential plots, but fails to clarify the issue of the transfer and sale of these use rights (in instances where the plot has not been reclaimed by the state first). As a result, many informal norms concerning the transfer and sale of LURs have emerged at the grassroots level, giving rise to various sorts of property claims which are not necessarily recognised by law as property rights.

The difference between the primary and minor rights property markets is closely linked with the rural-urban divide, which has become entrenched in the Chinese governance system in the post-1949 era. The Maoist regime, although it claimed to be pro-village and anti-city, ‘was fundamentally urban after all’.<sup>45</sup> Industrialisation was the priority in the making of the modern state, and the transfer of agricultural resources to subsidise the industrial sector enlarged the gap between the rural and urban areas. The mobility of rural people to cities was controlled by the state through the household registration system (*hujia zhidu*)<sup>46</sup> in which rural households were treated as ‘second-class citizens’ in terms of their entitlements to social security, education and health care provision. Further, the rural-urban divide has been closely linked to two different land systems—the rural land system and the urban land system: urban land is owned by the state and rural land is owned by the collectives; ownership of the land itself cannot be transferred.

In the post-Mao era, and especially in the post-Deng period (1992-), large-scale rural-urban migration and rapid urban expansion have led to the relaxation of legal and administrative distinctions between urban and rural. For example, 17 provinces, autonomous regions, and municipalities have abolished the category of rural household (*nongye hukou*).<sup>47</sup> Yet the land system still remains as an obstacle to bridging the gap between the rural and urban areas.

Before 1978, urban land was not a commodity, and was allocated by administrative methods. The state granted LURs to its agencies, for example, governments, state-owned enterprises, hospitals, and universities.<sup>48</sup> These state agencies were not just land users, but also held

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<sup>45</sup> D Strand, ‘New Chinese Cities’, in J W Esherick (ed) *Remaking the Chinese City: Modernity and National Identity, 1900-1950* (University of Hawaii Press, 2000) 223.

<sup>46</sup> See e.g., X Cheng, ‘Problems of Urbanization under China’s Traditional Economic System’, in R Y Kwok et al (eds) *Chinese Urban Reform: What Model Now?* (M. E. Sharpe, 1990) 67-68.

<sup>47</sup> T N Li and Y Lin, ‘17 Provinces Issued Local Plans to Reform the Household Registration System’ (‘17 Shengfen chutai difang ban hugai fang’an’), *Economic Information Daily* (Jingji cankao bao), 9 June 2015.

<sup>48</sup> See e.g., Y Hsing, ‘Land and Territorial Politics in Urban China’ (2006) 187 *The China Quarterly* 575, 579.

management rights and functioned as the *de facto* owners.<sup>49</sup> Urbanisation has speeded up since the late 1980s, which fuelled the commercial value of urban land and increased the demand for urban land in the 1990s. This change called for a new mechanism to improve the marketability of the urban land system while maintaining the doctrine of state landownership. It was in response of this challenge that the LURs system emerged. The establishment of the LURs system also served as an engine to boost economic growth.<sup>50</sup> The LURs system, along with the change in housing provision through which urban households were given the opportunity to purchase their flats or houses for the first time, has led to the formation of the urban property market in China.

The lease of state-owned lands has been legalised via the promulgation of the Land Administration Law (1986). In April 1988 the Constitution was also amended to provide that ‘the right of land use can be transferred in accordance with the law’ (Clause 4 of Article 10).<sup>51</sup> However, rather than establishing a LURs system based on market principles, a ‘dual-track’ LURs allocation system was introduced to assign LURs in urban areas. A dual-track allocation system means that LURs are assigned in two ways: allocation (*huabo*) and assignment (*churang*). Allocation is the transfer of LURs to state owned users without either time limits or land leasing fees; assignment is the transfer of LURs to non-state users via tender, auction or negotiation for a fixed period and for payment of land leasing fees.<sup>52</sup> Together allocations and assignments of LURs constitute the primary property market. The transfer of LURs via sale has, in effect, created a secondary property market.

The Urban Real Estate Administration Law of the PRC was promulgated in 1994 (amended in 2007), for the purpose of administering urban land and real estate in China. It confirms the functioning of the dual track LURs allocation system and the existence of the dual property market. Article 3 of the Real Estate Administration Law stipulates that the state shall adopt a paid transfer of LURs system for the use of state-owned land for a limited period, except in instances where LURs are obtained through the state land allocation system in accordance with this law. Article 12 provides that the assignments of LURs could adopt tender, auction,

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<sup>49</sup> Ibid, 580.

<sup>50</sup> See F L Wu and L J C Ma, ‘The Chinese City in Transition: Towards Theorizing China’s Urban Restructuring’, in L J C Ma and F L Wu (eds) *Restructuring the Chinese City: Changing Society, Economy and Space* (Routledge, 2005) 267.

<sup>51</sup> The first auction of land use rights was held in Shenzhen on 1 December 1987. Article 10 of the 1982 Constitution states: ‘No organization or individual may appropriate, buy, sell or lease land or otherwise engage in the transfer of land by unlawful means’.

<sup>52</sup> Article 12 of the ‘Interim Regulations’. See also S P S Ho and G C S Lin, ‘Emerging Land Markets in Rural and Urban China: Policies and Practices’ (2003) 175 *The China Quarterly* 681, 687.

and negotiation. However, in reality, assignment often lacks a transparent procedure.<sup>53</sup> Under the dual allocation system, the property market is largely controlled by administrative power.

### **‘Minor Rights Property’ and Legitimate Property Claims**

It may be helpful to clarify the scope of the minor rights property we are looking at in order to define and defend legitimate property claims. There are two categories of minor rights properties — those built on rural land where construction has been authorised by the state and those built on agricultural land. According to the state control of land use discussed above, the state restricts conversion of land for agricultural purposes to land for construction in order to keep the total area of the land for construction under control and to provide special protection for agricultural land. For example, Article 63 of the Land Administration Law (2004) stipulates that no right to the use of land owned by rural collectives may be assigned, transferred or leased for non-agricultural construction. This is in line with China’s land policy and the pressing need to feed 1.3 billion people.<sup>54</sup> Building minor rights properties on agricultural land changes the use of the land and is against the law.<sup>55</sup>

In terms of minor rights properties built on rural land for construction purposes, there are also two kinds of properties. One is built by the village committees on the village communal land; the other is built by farmers on the residential plots.<sup>56</sup> The former are mostly for commercial purposes rather than for farmers’ residential use. As discussed above, they contravene the law of land use control. Our focus is thus on those minor rights properties built by farmers on the residential plots — their purpose is not for large scale commercial sale; there are no issues with any violation against the control of the use of the rural land.

Despite the popularity of the minor rights properties, the vagaries of such a *de facto* property market are due largely to the government’s critical scrutiny. For example, during the 17<sup>th</sup> National Land Day campaign on 25 June 2007, jointly sponsored by the Ministry of Land and Resources and the Beijing municipal government, one of the issues that apparently seized the

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<sup>53</sup> See e.g., C R Ding and G Knaap, ‘Urban Land Policy Reform in China’s Transitional Economy’, in C R Ding and Y Song (eds), *Emerging Land and Housing Markets in China* (Lincoln Institute of Land Policy, 2005) 22; L H Li, *Urban Land Reform in China* (Macmillan, 1999) 26.

<sup>54</sup> Preserving 1.8 billion *mu* (1 hectare = 15 *mu*) of arable land in order to ensure the country’s food supply is a national policy, but arable land only constituted 12.7% of the total land in 1996, and this figure decreased to 11.3% (around 1.6 billion *mu*) in 2013. The World Bank, at <<http://data.worldbank.org/indicator/AG.LND.ARBL.ZS/countries>>.

<sup>55</sup> X W Chen, ‘Minor Rights Properties Are Illegal and Cannot be Transferred’ (‘Xiao chanquan fang bu hefa bu neng jiaoyi’), *Economic Information Daily (Jingji cankao bao)*, 31 October 2014.

<sup>56</sup> S J Huang, ‘Minor Rights Properties: Reasons and Solutions’ (‘Xiao chanquan fang: Chengyin yu chulu’) in J H Pan et al (eds), *A Report on the Development of Chinese Cities, No. 4* (Zhongguo chengshi fazhan baogao, No.4) (Shehui kexue wenxian chubanshe, 2011) 273-296.



attention of buyers or potential buyers of minor rights properties was concern about the ‘security’ of ownership rights: these properties cannot be registered, and buyers cannot use mortgages or bank loans to support their purchase. On 11 December 2007, the State Council declared that ‘city and township residents should not purchase “minor rights properties” in rural areas’.<sup>57</sup> Following this declaration, a large number of minor rights properties in several areas were forcibly demolished.<sup>58</sup> By contrast, township governments clearly acquiesced in the development of these properties, a fact which not only reflects an increasingly complex relationship between central and local government, but also strengthens the legitimacy of minor rights property if we follow an estoppel type argument. Township governments do not have the authority to assign LURs, and therefore they cannot profit from collecting the land leasing fees. As a result, township governments have managed to find an alternative source of income by encouraging the development of minor rights properties, thereby competing for income from land with the superior levels of government.<sup>59</sup> Moreover, there exist provincial variations in dealing with minor rights property. For example, in Beijing a lot of minor rights properties have been demolished on the orders of Beijing municipal government, whereas in Shanghai the Higher People’s Court has recognised the purchasers’ right to continue possessing and using minor rights properties.<sup>60</sup>

Despite the central government suppression, the minor rights property market has become a vibrant realm where transactions frequently take place. The central government has tried, at least intermittently, to prevent the property market’s drift towards extralegality—but with little success: the minor rights property market continues to exist, and minor rights properties constitute a significant number of the residential properties (Figure 4).

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<sup>57</sup> See J D Wu, ‘A Ban on the “Minor Rights Properties” Cannot Solve the Problem’ (‘Xiaochanquan fang bude mai bu yiweizhe jieju wenti’), *South China Weekend (Nanfang Zhoumo)*, 20 December 2007.

<sup>58</sup> See R Ding, ‘The Ministry of Land Resources: Minor Property Rights Apartments that Contravene the Regulations Will be Demolished’ (‘Guotu bu: yanzhong weigui de xiaochanquan fang jiangbei chaichu’), *Beijing Business Today (Beijing Shangbao)*, 13 December 2007.

<sup>59</sup> For the role of township governments in relation to property rights, see e.g., Y Hsing, ‘Broking Power and Property in China’s Townships’ (2006) 19 *The Pacific Review* 103.

<sup>60</sup> REICO report, ‘Research into Minor Rights Property: Situations and Solutions’ (‘Woguo xiao chanquan fang yanjiu: Xianzhuang yu chulu’), 30 March 2012, at <<http://www.chinavalue.net/Finance/Article/2012-3-30/199011.html>>.

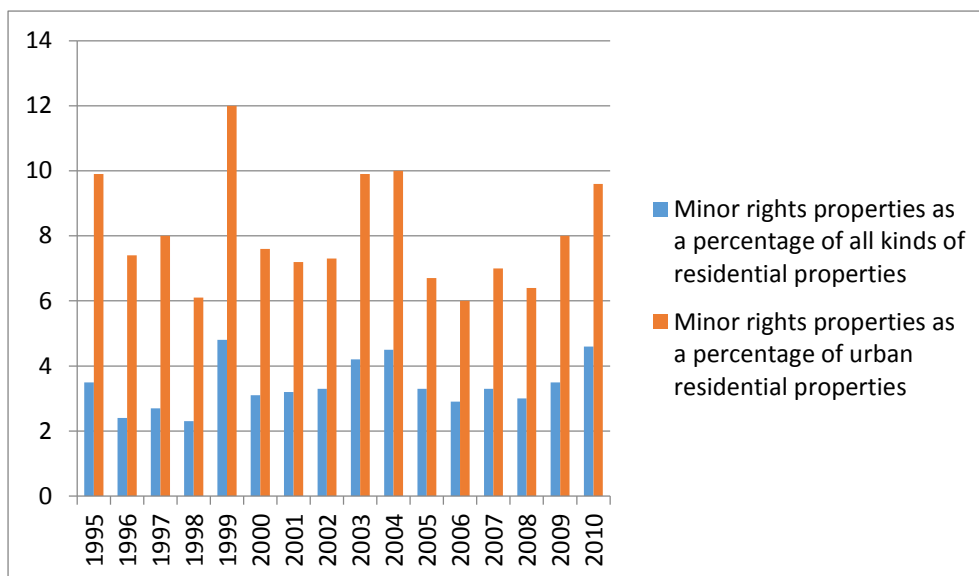


Figure 4: The vibrancy of the minor rights property market<sup>61</sup>

### The Origin of Extralegality and Diversity of Property Relations

An examination of the nature of the minor rights property market warrants a brief review of its origins and historical development. Since land reform (1950-1953), residential plots had been recognised as farmers' private property, and this was confirmed in the 1954 Constitution, but was subsequently abolished by Article 10 of the 1982 Constitution. Because of change, farmers only have use rights to the residential plots. The subsequent collectivisation (1966-1976) introduced some fundamental changes to rural land ownership, primarily via the issue of a series of the Communist Party leaders' speeches and policy documents rather than law. Indeed, there were actually no clear policies regarding how to acquire, utilise, transfer and dispose of property rights until the publication of the Revised Draft Principles on the Work of the People's Communes ('60 Principles on the People's Communes') in 1962. The Draft Principles are self-contradictory in that: they prohibit the lease and sale of the rural residential plots in Article 21; whereas in Article 45 they recognise that farmers have full ownership over the houses built on the residential plots and that they have the right to lease or sell these properties.<sup>62</sup> These provisions have caused serious problems in terms of transferring farmers' houses: when farmers have sold their houses, have the residential plots also been transferred? Farmers have recourse to consensus reached among themselves. In fact since 1962, the transfer of farmers' houses between friends and relatives has become a common

<sup>61</sup> Source: 'Saving Minor Rights Properties' ('Zhengjiu xiao chanquan fang'), at <<http://bj.house.163.com/special/lianghuixiaochanquanfang/>>

<sup>62</sup> Q R Zhou, 'Minor Property Rights, Big Opportunities' ('xiao chanquan, da jihui'), *The Economic Observer* (*jingji guancha bao*), 27 August 2007.

phenomenon.<sup>63</sup> Farmers have tried to avoid talking about the transfer of land or land rights; rather, they have achieved a consensus that land rights have in fact been transferred as well. However, the nature of such sales remains vague: could the seller of the house ask for the residential plot back by arguing that the sale of residential plots is illegal and therefore the sale contract is void? This has actually become a major source of disputes in rural China, especially when the land value increases but the sale price is only based on the value of the house rather than the value of the land. Despite the existence of disputes, the minor rights property market continues to grow and the demand for minor rights properties is no longer limited to close friends and relatives within the rural area in the way that it used to be.

The huge demand for rural houses since the economic reform commencing in 1978, the undercurrents of rapid urbanisation, as well as farmers' strong motivation to benefit from such urbanisation have led to the extensive construction of minor rights properties, which began in the early 1990s. A particularly interesting phenomenon concerns the relationship between the construction of these sorts of properties and the formation of 'villages within the city', which are more than semi-undifferentiated urban/rural spaces. During the process of urbanisation, a large number of villages have been gradually enclosed in newly constructed urban areas. These have become the 'joints' between the urban and rural areas, and eventually 'villages within the city' have formed in the expanding urban areas: residents of these villages live in the city — even the city centre — and enjoy city life as urban residents. However, the land of these 'villages' is still collectively owned by the villages themselves, the community is still governed by the village committees, and the residents are still members of the village. In other words, they still hold agricultural household registration, and in theory they are still the owners of the land where the village is located.<sup>64</sup> Farmers began to lease their houses to migrants who work in the city but choose to reside in these urban villages because of the affordable housing prices. As time goes along, the distinction between lease and purchase has become blurred, and many leases have transformed into de facto sales.

Ironically, the early stage of the formation of minor rights properties was an active response to a series of governmental reforms, and it also gained the government's support from the 1980s to the 1990s. As discussed above, in the late 1980s, on the basis of the introduction of the LURs system, urban households in China were given the opportunity to purchase their

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<sup>63</sup> Ibid.

<sup>64</sup> See J Y Xu, 'The Villages with the City, Migrant Workers, Minor Rights Properties, and the Urban-Rural Divide' ('Chengzhong cun, nongmin gong, xiao chanquan fang yu chengxiang eryuan tizhi gaige') (2010) 2 *Huxiang Forum* 100.

own flats or houses for the first time. The private housing market has since flourished. In order to obtain more land for construction, collaboration was formed between property developers and the rural collectives — property developers provided funding, and the rural collectives provided land. In some developed areas such as the Jiangsu and Zhejiang provinces, many rural households extended their houses; some urban residents also went to rural areas and built houses. Most of these houses were owner-occupied, but some were available for rental or for sale.<sup>65</sup> The booming of minor rights properties has also been driven by the industrialisation that has taken place in the Pearl River Delta region since the early 1980s. Foreign investment was introduced in this region, and a large number of enterprises and migrant workers moved in, creating a huge demand for space for factories and housing. As a result, many village committees built factories or residential houses on rural land for rental or for sale. In the meantime, many farmers individually or jointly built new houses on the residential plots or built extensions to their houses for the same purposes.

Buyers of minor rights properties are attracted to their relatively low price, which only constitutes approximately 1/3 of that of commercial housing.<sup>66</sup> According to a survey, 60.3% of people are willing to purchase minor rights property; 86% support the view that minor rights property should be legalised; 76.3% think that the legalisation of minor rights property will make the overall housing price cheaper.<sup>67</sup>

Most purchasers envision property as their ‘home’ rather than ‘capital’. Although some of the purchasers of minor rights properties are investors who want to buy these properties for rental purposes, they are not the super-rich in the sense that they could not afford to invest in the formal property market. Most purchasers are pensioners, young professionals who have just started their careers, and rural migrants in the city who cannot afford the high price of commercial housing, and in the meantime want to own their houses.<sup>68</sup> As a result, purchasing minor rights properties becomes a reasonable and legitimate choice. According to a survey conducted by Jin Zhifeng and others in Nanjing, 98% of households who have bought minor rights properties simply want an adequate standard of housing for living.<sup>69</sup> Moreover, the source of their funds comes from savings, and they are therefore able to avoid the risk of

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<sup>65</sup> Huang (n56).

<sup>66</sup> See ‘What is Minor Rights Property?’ (*Shenme shi xiao chanquan fang*), *Renminwang Theory Channel*, 22 February 2012, at <<http://theory.people.com.cn/GB/49154/49155/17190374.html>>.

<sup>67</sup> REICO report (n60).

<sup>68</sup> Zhou (n62).

<sup>69</sup> Z F Jin et al, ‘Research on the Activities of Minor Rights Properties’ Buyers: A Survey Based on Nanjing’ (*Xiao chanquan fang yezhu goufang xingwei yanjiu: jiyu Nanjingshi de wenjuan diaocha*) (2015) 36 *Shanghai Land & Resources (Shanghai guotu ziyuan)* 40.

being too reliant on bank loans, or of being in debt to loan sharks. Their property being extralegal actually gives them a strong degree of security. This echoes the argument made in relevant literature that ‘security of tenure does not require the issue of full legal title’.<sup>70</sup>

The price of normal commercial housing is high, and this is in part due to the fact that when using state-owned urban land to construct housing, property developers need to pay land leasing fees to the government;<sup>71</sup> and it is further due to the fact that commercial housing developers also want to make high profits. The fees and profits all increase the price of legal urban housing. Further, the building of commercial housing usually requires the acquisition of the collectively-owned land from the rural collectives, but farmers gain very little from land acquisition for property development. After acquiring the land from the collectives, the government leases the land to commercial developers in return for their payment of high land leasing fees; farmers just receive compensation for the required LURs and cannot benefit from the value added to the land via development.<sup>72</sup> As a result, farmers are keen to build housing independently for the purposes of sale. The development of minor rights property has a huge impact on the profits accrued by the property developers on the commercial property market, and it also indirectly affects the government’s income drawn from land leasing. As a result, the central government has tilted toward the curtailment of minor rights properties.

### **Extralegality, Law’s Limits, and Plural Rules**

The process of property lawmaking in China is one in which social reality pushes the law to reform, and this process struggles to strike a balance between party policy and law as well as between central and local law-making. Law-making in China is guided by a principle that asserts that broad legislation is always better than detailed legislation. Under this guideline, national law only provides general principles and needs to be complemented by various kinds of regulations for implementation. As a result, there exists a complex hierarchy of law-making power and legislative organs (Figure 5). Specifically according to the Legislation

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<sup>70</sup> A Gilbert, ‘On the Mystery of Capital and the Myths of Hernando de Soto — What Difference Does Legal Title Make?’ (2002) 24 *International Development Planning Review* 1, 5. See also Razzaz (n8); O M Razzaz, ‘Legality and Stability in Land and Housing Markets’ (1997) 9 *Land Lines*, at <[http://www.lincolnst.edu/pubs/487\\_Legality-and-Stability-in-Land-and-Housing-Markets-](http://www.lincolnst.edu/pubs/487_Legality-and-Stability-in-Land-and-Housing-Markets-)>; Deininger (n7)39; D W Bromley, ‘Formalising Property Relations in the Developing World: The Wrong Prescription for the Wrong Malady’ (2009) 26 *Land Use Policy* 20.

<sup>71</sup> See Article 8 of the ‘Interim Regulations’ and Article 8 of the Urban Real Estate Administration Law (1995, revised 2007).

<sup>72</sup> For land development rights in China, see T Xu and W Gong, ‘Taking as Giving, Appropriation as Access: Transfers of Land Development Rights and China’s Recent Experiments’ (2013) 64 *Northern Ireland Legal Quarterly* 411.

Law of the PRC (2000), the National People’s Congress and its Standing Committee exercise state legislative power (Article 7); and only national laws may be enacted in respect of matters relating to ‘acquisition of non-state assets’ (Article 8 (6)). The State Council enacts administrative regulations in accordance with the Constitution and national law in order to implement the law (Article 56). Various ministries and commissions under the State Council also exercise regulatory power and make administrative rules in accordance with national law, administrative regulations, and decisions and orders of the State Council in order to implement administrative regulations (Article 71). The Local People’s Congress and Standing Committee make local decrees and local governments make local rules within their authorities (Articles 68, 71). In theory, the Constitution has the highest authority, followed by national laws and administrative regulations, which have higher authority than local decrees and administrative or local rules (Article 79).<sup>73</sup> Local authorities tend to make law that suits local interests but not the national interest. Moreover, both the central government and local authorities tend to issue policies rather than laws and regulations in order to deal with matters relating to farmers’ property. As a result, competing and even conflicting rules have been generated, giving rise to an extralegal, grey area. However, these conflicting rules, a product of the wrestling for power between the central and local government, should not be used to refute the legitimacy of extralegal property.



Figure 5: The hierarchy of law-making in China

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<sup>73</sup> Ibid, 418.

The central government has in fact issued various policies concerning how best to deal with minor rights properties, which does indeed suggest some uncertainty within the higher-level authorities about the status of these properties. There are actually no laws prohibiting farmers from selling these properties. Article 62 of the Land Administration Law (2004) merely stipulates that individual rural households can only have one residential plot; if they have sold or leased their houses, their application for another residential plot should not be approved. Further, farmers' sale of their houses is not against the Property Law (2007).<sup>74</sup> The subsequent ban on farmers' sale of their own residential properties was issued in the form of a series of policy documents formulated by the central government.<sup>75</sup>

Turning to the issue of whether urban residents can buy minor rights properties, no laws prohibit urban residents from doing so. Before 1998, it was legal for urban residents to build houses on the collectively-owned rural land as long as they obtained approval from the county government and fulfilled several requirements (Article 41 of the Land Administration Law (1986)).<sup>76</sup> However, when the Land Administration Law was revised in 1998, this Article was deleted, and the city residents' right to build houses in rural areas was thus abolished. That said, the law does not explicitly forbid urban residents from buying properties located in the rural area. Again, prohibition was issued via the publication of a series of policy documents.<sup>77</sup>

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<sup>74</sup> E.g., Article 39 of the Property Law (2007) provides that owners of immovables or movables shall be entitled to possess, use, benefit from and dispose of the immovables or movables according to law. Article 153 of the Property Law also stipulates that laws such as the Land Administration Law and the relevant State regulations shall be applicable to the obtaining, exercising and transferring of the right to the use of the residential plots.

<sup>75</sup> E.g., Article 2 of the Circular on 'Strengthening the Administration of the Transfer of Land Use Rights and Prohibiting Speculative Land Dealings', issued by the General Office of the State Council in May 1999, provides that: farmers cannot sell their houses to urban residents, and applications from urban residents to use farmers' collectively owned land to build houses shall not be approved. Similar prohibitions issued by the General Office of the State Council include the following: Article 2 of the Circular on 'the Stringent Implementation of the Laws and Policies Concerning the Use of Rural Collective Construction Land' (No.71, 2007) and Article 3(6) of the Circular on 'the Active and Steady Promotion of the Reform on the Household Administration System' (No. 9, 2011). The same ban can also be found in Article 13 of the Opinions on 'Enforcing the Management of Rural Residential Plots' (No.234) issued by the Ministry of Land and Resources on 2 November 2004.

<sup>76</sup> Those requirements include that the area to be used shall not exceed the standards set out by the provinces, autonomous regions, and municipalities; that users should pay compensation and resettlement fees just like those provided for farmers when their land is acquired by the state for the purpose of national construction.

<sup>77</sup> The State Council issued 'the Decision on Deepening the Reform and Strengthening the Management of Land' (No. 28) on 21 October 2004. Article 10 of this Decision prohibits urban residents from buying residential plots in rural areas. The Ministry of Land and Resources Management also issued many rules banning the issuing of ownership certificates to the owners of minor rights properties, including the Circular on 'Strengthening the Management of Construction Land' issued on 11 August 2009.

From the above analysis, we can see that only documents issued by the State Council prohibit these sales of the minor rights properties, but these policy documents do not constitute administrative regulations.<sup>78</sup> Therefore, the announcement made by the State Council and relevant administrative departments declaring that minor rights properties are illegal does not have a solid legal foundation. It is better to characterise minor rights property as ‘extralegal’ rather than illegal.

The evolution of property finds great proximity to extralegality in profound socio-economic transformations such as the economic reform commenced in 1978 in China, which is often characterised as ‘groping for stones to cross the river’,<sup>79</sup> as well as the rapid urbanisation thereafter. This metaphor indicates both that economic reform is directed by the ongoing facts without clear guidelines or legal rules, and that the making of guidelines and legal rules often lags behind the pace of economic reform. Indeed China’s economic reform is not just a ‘planned and top-down’ project directed by the central government. Beijing did not and is not able to conceive a unified and comprehensive plan that oversees every process and aspect of economic reform. The reality has been far more complex and intricate.<sup>80</sup> In fact, many initiatives that have propelled the reforms have emanated from the grassroots; some grassroots initiatives have eventually forced the law to bend to social pressures, in its creation and enforcement. Yet, in many cases, grassroots initiatives tend to run into obstacles when they seek legal recognition; these initiatives are bitterly suppressed, if they contravene the vested political and economic interest.

### **Concluding Remarks**

The case study of China’s experience helps contextualise global concerns regarding the definition of property and the extent to which the measure of the legitimacy of property has been recast. It also enables us to define extralegal property and to highlight the importance of recognising legitimate property claims. In China, farmers’ use rights to residential plots are

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<sup>78</sup> According to the Chinese Legislation Law (2000), the State Council can make regulations. Article 56 of the Chinese Legislation Law reads: ‘The State Council enacts administrative regulations in accordance with the Constitution and national law.’ Administrative regulations may provide for the following:

(i) matters for which enactment of administrative regulations is required in order to implement a national law;  
(ii) matters subject to the administrative regulation of the State Council under Article 89 of the Constitution.

<sup>79</sup> Development is closely associated with social, cultural, institutional and political transformations, see D Kennedy, ‘Some Caution about Property Rights as a Recipe for Economic Development’ (2011) 1 *Accounting, Economics, and Law* 1, 29.

<sup>80</sup> See also J Kynge, *China Shakes the World: A Titan’s Rise and Troubled Future — and the Challenge for America* (Houghton Mifflin, 2006) 12-14.



characterised as one form of usufructuary rights, that is, the right to use another person's property. The law fails to clarify the extent to which these use rights may be transferred and disposed of, leading to controversies surrounding the sale of minor rights property. As one form of extralegal property, minor rights property has been formed on the basis of long-term use of the land and via social interactions among farmers themselves, between farmers and urban residents and between farmers and local government. It has been supported by social consensus, and can promote a considerable degree of security of tenure. However, the enforcement of these legitimate property claims may be eroded or shattered by 'bad law' or political condemnation, and security of tenure may also be weakened. For example, threats to security of tenure come from demolitions and evictions ordered by the central government. And it is not because of extralegality that the central government condemns minor rights property. Rather, it is due to the fact that such property threatens potential vested interests, be they of a political or economic nature. The law cannot capture the diversity of property relations due to its inherent limits (for example, its incoherence and its inability to reflect complex and changing society); minor rights property has been pronounced illegal by government policies and documents, creating 'legally propertyless masses'.

The burgeoning of minor rights property in China clearly challenges the status quo system of law and exhibits a potential to change the law. If we recognise the legitimacy of minor rights property built on farmers' residential plots, it means that use rights to farmers' residential plots could be transferred and enjoy the equal status as use rights to urban land for construction purposes. It also means that farmers and urban residents will enjoy equal access to land. As these use rights are separated from collective ownership of rural land, the transfer of these rights will not affect the integrity of collective ownership of rural land; instead, it promotes more efficient use of the land. For example, we could follow the practice of transferring use rights to urban land and set up a fixed term for the use of the residential plots. The collectives, the owner of rural land, could charge the purchasers a land leasing fee. As such, the rural collectives, farmers, and rural residents with low income could all benefit from the development of rural land, while the collective ownership of rural land, in particular arable land, is still being protected.

Minor rights property works in favour of legally propertyless masses, and there is a strong case for its retention. However, national law is unlikely to afford sufficient protection, as in national law the source of the legitimacy of property is strongly linked with the state. We need to turn our attention to the global level such as the Voluntary Guidelines 2012 where a

spectrum of property/tenure has been recognised (as further developed in Figure 3), including the access to, use of, and control over land and other natural resources by people who may hold nothing rather than user rights to land and natural resources.<sup>81</sup> Of course, while soft law protection of property is often alleged to have limited legal effect due to its ‘non-binding’ nature and a lack of formal enforcement mechanisms, soft law may nevertheless provide a timely response to global concerns, fill in gaps where hard law protection is ineffective, recast the measure of the legitimacy of property, and become the starting point for negotiating international binding commitments.<sup>82</sup> More work needs to be done to link the global with the local: facilitating the development of global guidelines via the study of local experience; and experimenting with mechanisms to internalise global guidelines in local contexts.

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<sup>81</sup> T Xu and W Gong, ‘Communal Property Rights in International Human Rights Instruments: Implications for De Facto Expropriation’ in Xu and Allain (n12) 225.

<sup>82</sup> T Xu, ‘Hidden Expropriation in Globalisation and Soft Law Protection of Communal Property Rights’ in B Hoops *et al* (eds) *Rethinking Expropriation Law II: Context, Criteria and Consequences of Expropriation Law* (Eleven International Publishing, 2016) 89-109, 107.