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Community-based individual property rights: developing the ‘bundle of rights’ perspective in the Chinese context

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Abstract

This article invokes a concept of ‘community-based individual property rights’ as individual property rights recognised in a communal property system by virtue of community membership. It employs mixed methods, including a comparative analysis that reviews and develops the ‘bundle of rights’ perspective in the Chinese context and an analysis of a large dataset of judgments recently made publicly accessible. It sets out an analytical framework which appears more advantageous in helping researchers arrive at a better explanation of the current rights structure in rural China. The article concludes that the concept of ‘community-based individual property rights’ has greater analytical and explanatory force than existing concepts based on continental civil law. The conclusion also challenges the common assumption that common law property theories never work in non-common law jurisdictions and that the Chinese property system is irrelevant to developing common law property theories.

Keywords: community; community membership; community-based individual property rights; bundle of rights; property in China

I. Introduction

In this article we posit a concept of ‘community-based individual property rights’ and examine the coexistence of communal and individual property rights within a communal property system. Community-based individual property rights are property rights held by individuals by virtue of community membership. We choose the term community-based ‘individual’ property rights rather than community-based ‘private’ property rights mainly for two reasons. One is that it is difficult to define the concept of private property;¹ the other is that simply knowing the owner’s identity does not give us sufficient information on the nature of ownership.² Private ownership is quite broad: individual and corporate ownership are ‘private’, while ‘government ownership of resources such as office buildings [is also] essentially private’.³ Individual property rights, on the other hand, are property rights held by a human person, as opposed to an artificial legal entity.

Individual property rights are being exercised in communal property systems in various jurisdictions. For example, in South Africa traditional communities, both households and individuals uphold land rights and actively participate in law-making

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¹ Jeremy Waldron, ‘What Is Private Property?’ (1985) 5 Oxford Journal of Legal Studies 313.

² Margaret Davis, *Property: Meanings, Histories, Theories* (Cavendish Publishing, 2007) 63–64.

³ *Ibid.*

in relation to communal land.⁴ In Israel, following the development of a market economy and a series of financial crises, most *kibbutzim* have abandoned the strict ban on private property and have gradually moved towards a system recognizing individual property rights.⁵ In China, economic reforms have witnessed the selective integration of individual property rights within a communal property system.⁶

One of the difficulties in clarifying the relationship between individual and communal property rights within a communal property system lies in the fact that the study of communal property is an area notorious for confusions in terminology.⁷ Here, we use ‘communal property’ to refer to resources owned, used, or governed by a group of people defined by reference to some common characteristics. This conception of communal property refers to both a resource over which a community and its members together have overall control, and the way a resource is managed and regulated by a community for its communal purposes.

Invoking the concept of communal property does not entail the sacrifice of individual property rights in pursuit of communitarianism. In a communal property regime, each member has property rights by virtue of community membership, which consists of not only present but also future members. Some practical studies focus on ‘community-based property rights’,⁸ which ‘emanate from and are enforced by communities’.⁹ These studies recognise the importance of subjecting resource management to community control. Little discussion, however, has been given to individual property rights legally recognised and exercised within a communal property system. Helpful insights can be found in theoretical and methodological development in addressing this gap.¹⁰ The aim and methodology of our article, however, differ from

⁴ Juanita Pienaar, ‘Customary Law and Communal Property in South Africa: Challenges and Opportunities’ in Ting Xu and Alison Clarke (eds), *Legal Strategies for the Development and Protection of Communal Property* (Proceedings of the British Academy, Vol. 216) (Oxford University Press, 2018) 127.

⁵ Amnon Lehari, *The Construction of Property: Norms, Institutions, Challenges* (Cambridge University Press, 2013) 113; Abraham Bell, Gideon Parchomovsky, and Benjamin Weitz, ‘Property in the Kibbutz: Old and New’ in Xu and Clarke (eds), *ibid.*, 58.

⁶ Alison Clarke, ‘Integrating Private and Collective Land Rights: Lessons from China’ (2013) 7 *Journal of Comparative Law* 177; Ting Xu, *The Revival of Private Property and Its Limits in Post-Mao China* (Wildy, Simmonds and Hill Publishing, 2014).

⁷ See Xu and Clarke (eds) (n 4).

⁸ See e.g., Fernanda Almeida, ‘Legal Options to Secure Community-Based Property Rights’ (World Bank Conference on Land and Poverty, The World Bank, Washington DC, 2015) <<https://www.iccaconsortium.org/index.php/2015/03/27/legal-options-to-secure-community-based-property-rights/>>; Fernanda Almeida, ‘Legislative Pathways for Securing Community-Based Property Rights’ *Rights and Resources Initiative* (February 2017) <<https://rightsandresources.org/en/publication/legislative-pathways-securing-community-based-property-rights/#.XniXz4j7Q2x>>.

⁹ Centre for International Environmental Law (CIEL), ‘Community-based Property Rights: A Concept Note’ (26 August–4 September 2002) Issue Brief for the World Summit on Sustainable Development <<http://www.ciel.org/Publications/cbpr.pdf>>.

¹⁰ See e.g., Paolo Grossi, *An Alternative to Private Property; Collective Property in the Juridical Consciousness of the Nineteenth Century* (University of Chicago Press, 1981); Waldron (n 1); Margaret A. McKean, ‘Success on the Commons — A Comparative Examination of Institutions for Common Property Resource Management’ (1992) *Journal of Theoretical Politics* 247; Jim Harris, *Property and Justice* (Clarendon Press, 1996); Michael Robertson, ‘Reconceiving Private Property’ (1997) 24 *Journal of Law and Society* 465; Carol M. Rose, ‘The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems’ (1998) 83 *Minnesota Law Review* 129; Shitong Qiao and Frank Upham, ‘The Evolution of Relational Property Rights: A Case of Chinese Rural Land Reform’ (2015) *Iowa Law Review* 2479; Paddy Ireland and Gaofeng Meng, ‘Post-Capitalist Property’ (2017) 46 *Economy and Society* 369.

the existing literature. Our main aim is not to defend community-based individual property rights as a novel form of property rights, but to explore what community-based individual property rights (with a focus on property rights in land) are, how they are exercised, and the principles and mechanisms that can help reconcile potential conflicts between individual and communal property rights.

The methodology of the article is both descriptive and analytical. To anchor its analytical concerns in the broader theoretical, social and political significance of the co-existence of individual and communal property rights in a communal property system, this article draws on both theoretical and empirical evidence. Section II of this article articulates a descriptive and analytical methodology through reviewing and developing the ‘bundle of rights’ perspective, in particular that advanced by Honoré,¹¹ in a new context, that is, the context of communal property regimes. This framework, however, has limits. It does not establish the extent to which both the community and its members hold property rights. Nor does it clarify the principles and mechanisms that mitigate conflicts between communal and individual property rights.

Section III details the case study of China’s experience, showing why it has been chosen as salient for addressing the limits of the analytical framework and providing the context of disputes discussed in Section IV. According to a report by the World Resources Institute, ‘two-thirds of the global land owned or controlled by communities is in five countries: China, Canada, Brazil, Australia and Mexico’.¹² A case study of community-based individual property rights in China helps address the gap in the current literature on community-based property rights, which is heavily focused on the use and management of communal lands by Indigenous Peoples and local communities. Further, the current literature on group rights suggests that collective rights are ‘often invoked with the express political function of mitigating the individualism that many think is latent in rights’.¹³ In China, it is the opposite: individual rights are invoked to mitigate the collectivism entrenched in rights-holding. China’s experience thus yields new insights into the understanding of the nature and significance of community-based individual property rights.

Section IV analyses case study findings and maps these findings onto the analytical framework, and the idea of community-based individual property rights is shown deductively. Finally, the conclusion highlights the conceptual, theoretical and empirical contributions of this study.

II. ‘The bundle of rights’ perspective in the context of communal property regimes

A. Developing the ‘bundle of rights’ perspective in the context of communal property

Citing the majority judgments in *Victoria Park Racing*,¹⁴ Gray argued that a resource cannot be ‘propertised’ if it is not excludable.¹⁵ A focus on excludability sets the core

¹¹ Anthony Honoré, ‘Ownership’ in Anthony G. Guest (ed), *Oxford Essays in Jurisprudence (First Series)* (Clarendon Press, 1961) 107.

¹² Peter Veit and Katie Reytar, ‘By the Numbers: Indigenous and Community Land Rights’ *World Resources Institute* (20 March 2017) <<https://www.wri.org/blog/2017/03/numbers-indigenous-and-community-land-rights>>.

¹³ Leslie Green, ‘Two Views on Collective Rights’ (1991) 4 *Canadian Journal of Law and Jurisprudence* 315, 315.

¹⁴ *Victoria Park Racing and Recreation Grounds v Taylor* (1937) 58 CLR 479.

¹⁵ Kevin Gray, ‘Property in the Thin Air’ (1991) 50 *Cambridge Law Journal* 252, 268. See also James E. Penner, *The Idea of Property in Law* (Clarendon Press, 1997) 71 (arguing exclusion is ‘the formal essence of right’).

criterion for property.¹⁶ This criterion tells us that, if a resource is excludable, but with some restrictions on alienability of certain rights over it, the resource can still count as property. However, simply focussing on the criterion of excludability does not say much about an owner's capability to exclude others from his/her property. In a communal property system, different parts of the resources may be subject to varied degrees of control by different rights-holders; and each part is excludable. The criterion of excludability functions with different degrees and at various levels of the community.

Let us first consider the 'bundle of rights' perspective on (legal) ownership developed by Honoré, which specifies 'incidents' of ownership, including claim-rights to possess, use, manage, and receive income and powers to transfer, waive, exclude, and abandon.¹⁷ Honoré's purpose and methodology was an exercise of descriptive exposition based on the proposition that we can understand ownership better through describing the phenomena associated with a standard case, that is, the fullest ownership by one individual of a thing. Specifying these incidents is useful in elaborating 'the scope of action that ownership provides'.¹⁸ Moreover, unlike Hohfeld's characterisation of property as an aggregate of legal entitlements and relations,¹⁹ Honoré's discussion of ownership 'never abandons its reliance on the notion of a "thing"'.²⁰

Although the subject of Honoré's analysis is still within the ambit of 'the "liberal" concept of "full" individual ownership',²¹ as Honoré himself admitted, his thesis '[must not] be confused with the claim that all systems attach an equal importance to ownership in the full, liberal sense or regard the same things as capable of being owned'.²² Therefore, his work potentially allows various persons and entities — whether individuals or groups — who are not necessarily *the* owner, to claim proprietary rights or interests over a thing or a resource. But, then, what differentiates the ownership rights held by the community as a whole and other property rights held by smaller groups within the community and by individual members? If the power of control over a resource is relative, it may be helpful to consider 'gradations of "property" in a resource'.²³ 'The amount of "property" which a specified person may claim in any resource is capable of calibration — from a maximum value to a minimum value.'²⁴ Such calibration of property speaks to 'the ownership spectrum' — ranging from 'mere property' to 'full-blooded ownership' — discussed by Harris.²⁵ By referring to 'mere property', Harris meant a right to use a thing, but not to transfer it.²⁶ Any relationship along the spectrum can be called an ownership interest/right, comprising 'some use-privileges and some control-powers'.²⁷ Harris used the term 'ownership interests'. But we use 'property interests/rights' in the following discussion to distinguish ownership

¹⁶ Gray, *ibid*, 294.

¹⁷ Honoré (n 11) 107.

¹⁸ James E. Penner, 'The Bundle of Rights Picture of Property' (1995-96) 43 *UCLA Law Review* 711, 741.

¹⁹ Wesley Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 *Yale Law Journal* 16.

²⁰ Honoré (n 11) 108; Penner (n 18) 732.

²¹ Honoré, *ibid*, 107.

²² *Ibid*.

²³ Kevin Gray and Susan F. Gray, 'The Idea of Property in Land' in Susan Bright and John Dewar (eds), *Land Law: Themes and Perspectives* (Oxford University Press, 1998) 16.

²⁴ *Ibid*, 16.

²⁵ Harris (n 10).

²⁶ Allain Pottage, 'Instituting Property' (1998) 18 *Oxford Journal of Legal Studies* 331, 332.

²⁷ Harris (n 10) 5.

interests/rights from other property interests/rights.²⁸ Powers of transmission only become more visible when one property interest moves up above the upper half of the spectrum.²⁹

Reviewing the criterion of excludability in light of the property spectrum helps clarify the nature of the right to exclude, differentiate ownership rights from other property rights. As Rose argued, ‘a right to exclude would not necessarily mean that property owners *do* exclude others; it would mean only they can decide *whether* to exclude or not’.³⁰ Rose’s view echoes Gray’s argument that ‘property is the gateway to access’.³¹ Penner argued that exclusivity of property permits the ‘selective exclusion of others’, or the selective sharing of property with others, but not with everyone.³² In turn, Katz emphasised the owner’s position as ‘the exclusive agenda setter’.³³ Their views pave the way for justifying the co-existence between communal and individual property rights. It means that the community as the owner and agenda-setter can retain ownership rights, while smaller groups within the community and individual members can hold other property rights, such as use and management rights.

Further, coupled with Harris’s analysis of the ‘ownership spectrum’, Honoré’s ‘bundle of rights’ perspective on ownership can help us set up a useful descriptive and analytical methodology and explore the original material from China through this frame. In this frame, ownership rights in land may be vested in the community as a whole. Other lesser property interests or rights in land that is subject to the overall control of the community may be vested in individual members or smaller groups within the community, affording rights of use, management and receiving income (see Table 1). Different combinations of property rights may be configured, each of them attracting greater or lesser degrees of control according to whether they contain the right to transfer. There is, however, a danger of over-simplification. This analytical framework needs to be developed to specify two important issues: first, the extent to which communal land is under the control of a community as a whole and its individual members and sub-groups; and, second, the legal principles and mechanisms that mitigate potential conflicts between different property rights. To further examine these issues, we turn to the literature on group rights discussed in social and political theory. This literature yields important insights into ascertaining the relationship between both a group and its members as rights-holders, but has been neglected in the current research on the co-existence of individual and communal property rights.³⁴

Table 1: A Descriptive and Analytical Framework for Understanding Communal Ownership of Land

Community	Individual members and
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²⁸ See also Anthony Honoré, ‘Property and Ownership: Marginal Comments’ in Timothy Endicott, Joshua Getzler and Edwin Peel (eds), *Properties of Law: Essays in Honour of Jim Harris* (Oxford University Press, 2006) 131 (‘It would have been better to talk not of an “ownership spectrum” but of a “property spectrum”’).

²⁹ Harris (n 10) 5.

³⁰ Carol Rose, ‘Canons of Property Talk, or Blackstone’s Anxiety’ (1998) 108 *Yale Law Journal* 601, 604; italics original.

³¹ Gray (n 15) 304.

³² Penner (n 18) 743-744.

³³ Larissa Katz, ‘Exclusion and Exclusivity in Property Law’ (2008) 58 *University of Toronto Law Journal* 275.

³⁴ Most literature does not draw a distinction between group rights and community groups, so we use these two terms interchangeably in the following discussion.

	(holding ownership rights)	sub-groups (holding other property rights)
The right to possess (exclusive physical control)	Yes	There may be a degree of exclusion here: individuals and groups within the community may exclude the rest of the community from 'their resources'; needs test
The right to security (an immunity from expropriation)	Yes	Yes (must be associated with community membership)
The right of absence of term ³⁵	Yes	Needs test
The right to the capital ³⁶	No. Communal ownership is a special form of 'ownership' that could not be sold or leased.	Needs test
The right of transmissibility ³⁷	No	Yes (may be limited; needs test)
The right to manage ³⁸	Yes	Needs test
The right to the income of the thing	Yes	Yes
The right to use	Yes	Yes ³⁹

Note: The term 'needs test' in Table 1 means that we do not know if the answer is 'Yes' or 'No', and further examination of this issue with empirical evidence is needed.

B. Integrating a consideration of group rights

A group has a self-standing identity.⁴⁰ For example, a club is an entity in its own right, and its identity persists despite changes in its membership. This kind of group differs from 'an *ad hoc* group of individuals who constitute an informal collectivity which is pushing a car up a hill'.⁴¹ Group rights cannot be reducible to the rights of group members.⁴² However, it is unhelpful to contrast a group with its members, as a group is held together by a variety of bonds (for example, a convergence of economic interests,⁴³ shared customs, and common values).⁴⁴ Based on these bonds, individuals form a group

³⁵ Honoré's framework focuses on ownership rights that are forever. See Honoré (n 11) 121–122.

³⁶ The right to the capital 'consists in the power to alienate the thing and the liberty to consume, waste or destroy the whole or part of it: clearly it has an important economic aspect'. See Honoré, *ibid*, 107.

³⁷ The power to devise or bequeath the thing. See Honoré, *ibid*, 120–121. Here we take a broad view of 'the right of transmissibility' that includes all types of transfers of property rights.

³⁸ 'The right to decide how and by whom the thing owned shall be used'. See Honoré, *ibid*, 116. The right to manage and the right to use may overlap.

³⁹ From the analytical framework, we conclude that both the community and its members have rights to income and use. But there must be a special arrangement for the enjoyment of these property rights for different parts of the land and at different times. We will further examine this point in Sections III and IV below.

⁴⁰ Keith Graham, 'The Moral Significance of Collective Entities' (2001) 44 *Inquiry* 21, 23.

⁴¹ *Ibid*, 23.

⁴² Peter Jones (ed), *Group Rights* (Ashgate, 2009) xiv.

⁴³ See Stephen R. Munzer, 'Commons, Anticommons, and Community in Biotechnological Assets' (2009) 10 *Theoretical Inquiries in Law* 271, 273–274 (defining a community as 'a group of people who have shared interests and who work toward shared goals').

⁴⁴ Roger Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Ashgate, 2006) 74 (seeing 'community' as networks of social relations). Accordingly, group rights may have different

‘in and through social relations’:⁴⁵ groups can therefore be regarded as ‘individuals-in-relations’.⁴⁶

Some approaches adopted in the literature on group rights help clarify the nature of the property rights exercised by a community and its members. For example, Miller argued that we could understand a group right as a right to ‘a collective good’ that individuals jointly hold with each other by virtue of membership of that group.⁴⁷ Such a good/resource, as in Green’s example of friendship, must be ‘jointly produced; individuated supply is not merely inefficient, it is impossible’.⁴⁸ Each individual therefore holds property rights in the shared good/resource. But these individual property rights are community-based, as they are property rights in ‘a shared good which can be enjoyed only in the form of association which itself partly constitutes the good shared’.⁴⁹

Further, it is ‘the set of linked collective interests’ that grounds the holding of property rights by the community.⁵⁰ The exercise of individual property rights within a communal property regime is subject to the fulfilment of communal interests. This observation leaves open one important question: does the community have the capacity to implement community control of the exercise of individual property rights, or must the community exercise its control through the constitution of a collective agent which can make decisions on how the resource is governed and judge disputes?

There are two major ways of characterising a group and a group right — the ‘corporate’ and the ‘collective’.⁵¹ A ‘corporate’ conception regards a group as a corporate entity in its own right.⁵² A group right is therefore the right exercised by an entity that exists over and above its individual members. By contrast, a ‘collective’ conception sees a group right as ‘a right held jointly by a “collection” of individuals’.⁵³ When applied to an analysis of property rights in a communal property system, both conceptions have difficulty in explaining who ‘owns’ what in this property system and why the group/community has the capacity to hold property rights. One way of explaining that a community has the requisite capacity for holding and exercising rights is to see these rights as being held and exercised by ‘a collective agent’,⁵⁴ something akin to the corporate entity discussed by Jones.⁵⁵ This collective agent has a status that distinguishes it from the members of the community.⁵⁶ It can make decisions that bind each community member to ensure the pursuit of the community’s collective interests or the collective aspect of the individual member’s interests.⁵⁷

grounds — be they legal, moral, customary and so on. See Jones (n 42) xiii. Group rights are therefore much broader than the right that a society accords to an ethnic or cultural minority, which Kymlicka described as ‘group-differentiated’ or ‘group-specific’ rights. See William Kymlicka, *Multicultural Citizenship* (Oxford University Press, 1995).

⁴⁵ Carol C. Gould, *Rethinking Democracy: Freedom and Social Co-operation in Politics, Economy, and Society* (Cambridge University Press, 1990) 105.

⁴⁶ *Ibid.*

⁴⁷ Seumas Miller, ‘Collective Rights’ (1999) 13 *Public Affairs Quarterly* 331, 331.

⁴⁸ Green (n 13) 321.

⁴⁹ *Ibid.*; Leslie Green, *The Authority of the State* (Clarendon Press, 1988) 208.

⁵⁰ Green (n 13) 323.

⁵¹ Peter Jones, ‘Group Rights and Group Oppression’ (1999) 7 *Journal of Political Philosophy* 353.

⁵² *Ibid.*, 361–367.

⁵³ *Ibid.*, 356–367; see also Jones (n 42) xvi.

⁵⁴ Green (n 13).

⁵⁵ Jones (n 51).

⁵⁶ *Ibid.*, 373.

⁵⁷ Leonard W. Sumner, *The Moral Foundation of Rights* (Clarendon Press, 1987) 209; Green (n 13) 318; Jones (n 51) 373.

The fact that a collective agent can exercise its property rights over and above the property rights held by the community's members may give rise to conflicts between communal and individual property rights. Neither can the 'collective' conception mitigate such conflicts. If a community is seen as an aggregation of its individual members, it is easy to assume that individual members possess group rights separately and that communal property rights could be severed by an individual member without the community's consent.⁵⁸ In Sections III and IV, we further examine this question with empirical evidence.

III. Case study

A. Ownership in Chinese law and the difficulties in characterising 'lesser' property rights

Property law-making in post-1978 China is based on the German civil law framework, which was transplanted into China during the legal reforms in the late Qing dynasty (1840–1911) and Republican China (1911–1949). Unlike the property law system of England and Wales where ownership 'is not a legal problem',⁵⁹ 'ownership' is clearly defined in Article 71 of the General Principles of the Civil Law (GPCL) (1986, revised 2009), referring to the rights to possess, use, benefit from, and dispose of one's own property. Unlike many other civil law systems, however, in China such an absolute notion of ownership is closely associated with socialist ideology: under the socialist ownership structure, urban land is owned by the state, while rural land is owned by the collective/community.

For property rights defined in the Property Law (2007), the law adopts a very specific concept of '*wuquan*' (物權) (literally, property rights over things; '*wu*' meaning things, in particular tangible things, and '*quan*' meaning rights). As *wuquan* refers to the exclusive rights that directly control specific things, a basic principle of property law has been established — '*yiwu yiquan*' (一物一權): that is, one right over one thing, or that one thing may establish only one right. This principle, however, cannot effectively deal with issues emerging from the fragmentation of property rights in China, for example, the relationship between ownership and lesser rights.

In order to resolve this problem, while labelling ownership '*ziwu quan*' (自物權) (*jus in re propria*, rights over one's own property), Chinese legislators have introduced '*jura in re aliena*' (rights over the property of someone else, *tawu quan* (他物權)) from continental civil law, in particular the notion of '*usufruct*' (the right to use and to take the fruits of the property of another), to make sense of what is happening in Chinese property law. '*Jura in re aliena*' has become an important mechanism that enables lawmakers to 'propertise' the fragmented property rights that emerged in market reform.

In terms of collectively owned rural land, since 1978, the 'right to land contractual management' (*tudi chengbao jingying quan*, 土地承包經營權) has been granted to rural households to enable farmers to possess and use rural land for farming purposes through

⁵⁸ Jones, *ibid.*, 354.

⁵⁹ Anthony D. Hargreaves, 'Modern Real Property' (1956) 19 *Modern Law Review* 14, 17 ('The problem of ownership [...] is the concern of the politician, the economist, the sociologist, the moralist, the psychologist...'). This understanding of ownership seems to contrast the understanding of ownership in continental civil law that draws a clear distinction between ownership as 'unlimited in content' and other limited, lesser property rights. See Eveline Ramaekers, 'What Is Property Law?' (2017) 37 *Oxford Journal of Legal Studies* 588, 598.

the dismantling of rural communes and the introduction of the household responsibility system. The collective issues contract to the household, which has responsibility for the management of farming an area of land called ‘responsibility land’ (*chengbao di*, 承包地).⁶⁰ Since the abolition of agricultural tax in 2006, farmers can retain all the grain produced from the land they farm. The collective also directly manages a tiny amount of rural land for farming purposes called ‘reserved land’ (*jidong di*, 機動地) for the benefit of present and future members. The ‘reserved land’ can be used to adjust the land rights allocated to a household when it has new members.

Chinese law makers rely on the vocabulary of continental civil law, such as *usufruct*, in their attempts to clarify the nature of the right to land contractual management.⁶¹ Under The German Civil Code (BGB), ‘in exercising the right of use, [the *usufructuary*] must retain the previous economic purpose of the thing and must proceed in compliance with the rules of proper management’.⁶² On the face of it, *usufruct* seems to offer a balanced mechanism that releases the economic potential of the property by allowing another to possess, use, and enjoy it, without transferring full powers of alienation to the *usufructuary*. The foundation of *usufruct* in continental Europe, however, is individual private ownership. An individual owner grants others a real right to use, enjoy, and benefit from the property. Referring to the Chinese communal property system, individuals within the community do not possess, use, and benefit from the property owned by another individual, as each member is entitled to communal land that is enjoyed only in the form of a community.⁶³ We therefore suggest that *usufruct* is not an appropriate concept with which to characterise the nature of either the right to land contractual management or individual property rights in ‘responsibility land’. In the following sections, we further test if the concept of community-based individual property rights has greater analytical force.

B. Empirical evidence

We employ mixed methods to examine the two issues which have not been specified in the analytical framework.⁶⁴ To examine the first issue on the extent to which both the community and its members hold property rights, we carried out large-scale data collection of disputes over the right to land contractual management, which provides a useful prism through which to ascertain how individual property rights are exercised in a communal property system in contemporary China (see Section IV(A) of this article). In 2013 the Supreme People’s Court of China requested courts nationwide to put judgments online and then collected these judgments in its publicly accessible online database. This database allows Chinese-speaking researchers to review a large volume of judgments (they are not available in any other language) spanning wide geographical

⁶⁰ The duration of the contracts increased from 15 years granted in the initial allocation of rural land rights to 30 years under Article 14 of the Land Administration Law (1986, revised 1998). Now, under the Property Law (2007), when the contracts expire, they may be renewed. Property Law (2007), art 126.

⁶¹ E.g., Property Law (2007), art 17: ‘A usufructuary shall, according to law, have the right to possess, use and benefit from the immovables or movables owned by another.’ See also, Lidong Cai and Nan Jiang, ‘The Legal Construction of the Separation between Contractual Management Rights and Management Rights’ (承包權與經營權分置的法構造) (2015) 3 Chinese Journal of Law (法學研究) 31; Lidong Cai and Nan Jiang, ‘The Legal Mechanism of Separating Three Property Rights in Rural Land in China’ (農地三權分置的法實現) (2017) 5 Social Sciences in China (中國社會科學) 102.

⁶² BGB, §1036(2).

⁶³ See Section IV of this article for more details.

⁶⁴ See Section II of this article.

areas.⁶⁵ It has now become an invaluable source for empirical research on various types of disputes in China, including disputes over rural land rights.⁶⁶

Our sample comprises disputes over the right to land contractual management in Changchun, the capital of Jilin Province located in northeast China. Changchun has a population of 7,538,000 as of 2015 and consists of eight districts, one county and two county-level cities. Changchun has a large amount of farmland and is one of the most important producers and processors of food products in China. It has been chosen by policy-makers as a pilot area to experiment with rural land reforms.⁶⁷

Our sample includes 637 cases tried in the period between 2012 and 2017. We searched cases using the keywords ‘civil cases’, ‘right to land contractual management’, ‘cases under the jurisdiction of Changchun intermediate level court’, ‘courts at the local level’, ‘cases tried at first instance’, and ‘judgments’. We found 637 relevant cases. To our knowledge, ours is the first to study the way community-based individual rights are exercised within a communal property system through analysis of this dataset.

Statistically inclined readers may query the representativeness of our dataset. They may point out that regions in China differ in terms of economic growth, traditional cultures, modes of production and the roles communities play in local governance. Observations we gather from Changchun may not apply to other areas. While these points are pertinent, the focus of our study is on the recognition and exercise of community-based individual property rights in Chinese laws and regulations. The Chinese legal system is not based on precedent; judges decide cases on the basis of legislation, although they may consider local conditions and community norms. Judgments given by the Chinese courts are also relatively short, ranging from two to ten pages, and do not contain much reasoning and analysis. These judgments do not necessarily evidence how rules of law are applied in practice. Most court decisions, however, evidence the kind of legal disputes that arise between the community and its members and the application of rules of law in these disputes. Court decisions also establish principles and mechanisms that have not been specified in the legislation through the judicial interpretation of legislation. Moreover, this is a qualitative study rather than a quantitative study. As long as we gather a good number of cases which uphold the principles and mechanisms we identify, our data are large enough to yield important insights into the ways in which the law concerning community-based individual property rights has been applied by judges.

To examine the second issue on the principles and mechanisms that mitigate conflicts between communal and individual property rights, we first compared common law and civil law approaches to ownership and time-limited property rights, and then reviewed the recent land reform (top-down experimentation led by central and provincial governments) in China in light of the findings from the comparative study

⁶⁵ For discussion on the significance of this method, see e.g., Benjamin L. Liebman, ‘Leniency in Chinese Criminal Law? Everyday Justice in Henan’ (2015) 33 *Berkeley Journal of International Law* 153 (with a focus on criminal cases); Benjamin L. Liebman, Margaret Roberts, Rachel E. Stern, and Alice Wang, ‘Mass Digitization of Chinese Court Decisions: How to Use Text as Data in the Field of Chinese Law’ (13 June 2017) 21st Century China Center Research Paper No. 2017-01; Columbia Public Law Research Paper No. 14-551 <<https://ssrn.com/abstract=2985861>> (discussing ‘how mass digitization of court decisions opens a new window into the practice of everyday law in China’, with a focus on administrative judgments).

⁶⁶ We first examined this database in our article published in Ting Xu and Wei Gong, ‘Understanding Collective Property in the Chinese Context through the Lens of Community’, in Xu and Clarke (eds) (n 4) 152–176. However, in that article we analysed a different sample of cases in Henan Province with a different focus on the relationship between community and community membership.

⁶⁷ < <http://www.changchun.gov.cn/zjzc/ljzc/zrgk/>>.

(See Section IV(B) of this article). One of the key experiments is to separate the ‘right to land management’ (*tudi jingying quan*, 土地經營權) from the ‘right to land contractual management’. So now there is ‘separation of (at least) three rights’⁶⁸ in rural land — the collective’s ownership rights, the household’s land contractual management right, and the right to land management which can be held by entities other than the household, such as agro-enterprises. These terms, however, are extremely confusing. We examined if the analytical framework set up in Section II of this article appears more advantageous in helping us arrive at a better explanation of the current rights structure in rural China.

IV. Mapping case study findings onto the analytical framework

A. Establishing the extent to which the community and its members hold property rights

Before moving to establish the extent to which property rights can be exercised by both the community and the individual within a communal property system, it is useful to summarise the current status of the ‘community’/‘collective’ pertaining communal ownership. Our survey of laws, regulations and policy documents shows that the ‘corporate’ conception regarding a group as a corporate entity in its own right discussed in Section II(B) of this article primarily applies to the ways a community has been conceived in post-1949 China. The collective economic organisation is regarded as the ‘owner’ of rural land, with exceptions such as Article 10 of the Land Administration Law (1986, amended 2004) and Article 60 of the Property Law (2007), which have accorded the ‘manager’ status to the collective economic organisation. The General Principles of the Civil Law of PRC (2017) has granted the collective economic organisation a legal personality,⁶⁹ indicating that it is now regarded as an entity existing beyond and above its members. This entity represents community members’ collective interests, exercises the power to allocate contractual management rights to households, makes decisions for managing rural affairs, and judges disputes. Collective economic organisations, however, often lack procedural rules and a clear governance structure, which will prevent them from fulfilling these tasks.⁷⁰

As discussed in Section III of this article, communal ownership itself cannot be transferred or severed, giving rise to the important question of how to materialise each member’s property rights in communal land. The introduction of the household responsibility system is an institutional innovation that enables individuals within a household to possess, use and benefit from farming a plot of rural land. First, it grants the household rights to manage the farming of rural land. It then ensures that the exercise of each member’s property rights is subject to the household’s property interest and the overall community’s property interest in rural land. The household’s property rights are confirmed in the form of the right to land contractual management granted by contracts issued by the collective.⁷¹ A more controversial issue relates to the alienability of the right to land contractual management, as this kind of right is closely

⁶⁸ See Cai and Jiang, 2015 and 2017 (n 61).

⁶⁹ General Principles of the Civil Law of PRC (2017), art 99: ‘The rural collective economic organizations shall obtain the legal personality according to law.’

⁷⁰ A detailed analysis of this issue will be the subject of another article.

⁷¹ Property Law (2007), art 127: ‘The right to land contractual management shall be established as of the date the contract for the right to land management becomes valid.’

associated with community membership. This issue is the key to understanding the substance of disputes discussed below.

Referring to empirical evidence in China, it evidences the kind of legal disputes that arise between the community and its members. Out of the 637 relevant cases there are 42 cases concerning the alienation of the right to land contractual management through transfers; 70 cases concerning the alienation of the right to land contractual management through subcontracting, leasing, and exchange; 74 cases concerning whether this right can be inherited; eight cases concerning whether this right can be mortgaged; and 44 cases concerning community membership. There are 248 cases confirming that individuals and households can exclude the rest of the community from ‘their’ responsibility land.⁷²

Our case analysis confirms that ‘responsibility land’ is subject to the farmer’s individual property rights and various layers of communal property rights, including the household’s management rights and the collective’s ownership rights. Farmers’ individual property rights are closely linked to their membership of the collective. This is confirmed by the 44 cases concerning community membership. For example, in *Liang Hongjie v Liang Guojun*,⁷³ although the defendant and the plaintiff had divorced at the time of land acquisition, the plaintiff was still a member of the collective and had the right to receive compensation after the land was acquired. It is held that the defendant as the head of the household should evenly distribute the compensation and pay the plaintiff in full. The alienation of these rights is subject to the collective’s supervision and restriction, as unregulated transfers are likely to render communal property unsustainable. There are a number of mechanisms in place to enable members of the collective to realise the economic value of their individual property rights without threatening the cohesion of the community and the sustainability of communal property.

First, the increase or decrease in the number of people in the household will not affect the amount of ‘responsibility land’ that the household is entitled to farm within the contractual period.⁷⁴ If one ceases to be a member or no longer relies on farming to make a living, one’s individual property rights automatically cease and revert to the relevant household. The interests of the dead or drop-outs accrue to the other members in the household.⁷⁵ Out of the 74 cases concerning whether the right to land contractual management can be inherited, there are 66 cases confirming this practice. For example, in *Tian Guizhen v Yu Cai*, it is held that after the death of the plaintiff’s husband, the household’s contracted land should be contracted by the plaintiff. The plaintiff’s request to recover the land contracted by her and her husband should be supported. If the household ceases to exist, the property rights in the ‘responsibility land’ held by the household members revert to the collective; the ‘responsibility land’ may then be reallocated to the other households in the collective to farm.⁷⁶ Out of the 74 cases

⁷² See e.g., *Chang Zhiqian v Chang Zhifu*, People’s Court at Nong’an County, Changchun City, 27 December 2016; *Yan Hongchang v Zhang Junjiu*, People’s Court at Changyang District, Changchun City, 19 February 2016.

⁷³ *Liang Hongjie v Liang Guojun*, People’s Court at the District of High-tech Industrial Development, Changchun City, 3 December 2012. See also *Niu Yuling v Chen Linqun*, People’s Court at Jiutai City (county-level city), Changchun City, 4 May 2015.

⁷⁴ See the Notice Concerning ‘The Opinion on Stabilizing and Improving the Land Contract Relationship Issued by the Ministry of Agriculture and Approved and Distributed by the State Council’ (《國務院批轉農業部〈關於穩定和完善土地承包關係的意見〉的通知》國發〔1995〕7號) (28 March 1995).

⁷⁵ *Tian Guizhen v Yu Cai*, People’s Court at Erdao District, Changchun City, 1 April 2014. See also *Liu Guizhi v Liu Jinqian*, People’s Court at Jiutai City (county-level city), Changchun City, 9 July 2014.

⁷⁶ *Yao Wandou v Liu Zhidan and Liu Zhiyu*, People’s Court at Dehui City (county-level), Changchun City, 18 December 2015. See also *Zhang Haoqing v Zhang Shuyuan*, People’s Court at Dehui City

concerning whether the right to land contractual management can be inherited, there are eight cases confirming this practice. For example, in *Yao Wandou v Liu Zhidan and Liu Zhiyu*, it is held that after the death of Yao Wande, his household ceased to exist, and his contracted land should be recovered by the collective. Yao Wandou therefore has no right to the contracted land. Members can make a choice of moving out of the collective, and, if evidence shows that they no longer rely on farming to make a living, their membership as well as their property rights will be revoked by the collective. Although not specified in the law, court decisions have made it clear that, while members retain the right to exit,⁷⁷ membership of the collective itself is closely linked to the enjoyment of associated property rights. Out of the 44 cases concerning community membership, three cases have confirmed this practice. For example, in *Zheng Xueming v the Villagers' Committee of Fuxing Village*, the plaintiff's household moved out of the collective in 1998 and therefore no longer held membership of the collective. It is held that their contracted land should be recovered by the defendant.

Second, members' property rights in the 'responsibility land' cannot be inherited,⁷⁸ and they are not included in the list of categories of inheritable property under Article 3 of the Law of Succession of the PRC (1985).⁷⁹ All the 74 cases concerning whether the right to land contractual management can be inherited have also confirmed this. Members' property rights in the 'responsibility land' cannot be mortgaged either.⁸⁰ All the eight cases concerning whether the right to land contractual management can be mortgaged have confirmed this.⁸¹

Finally, referring to the right to land contractual management enjoyed by the household, this right can be alienated to another household belonging to a different collective within a given contractual period.⁸² The law, however, sets different

(county-level), Changchun City, 12 January 2016; *Zhang Jin v Banshi Village Committee*, People's Court at Shuangyan District, Changchun City, 18 March 2016.

⁷⁷ See also e.g., Leslie Green, 'Rights of Exit' (1998) 4 Legal Theory 165; Hanoch Dagan and Michael Heller, 'The Liberal Commons' (2001) 110 Yale Law Journal 549 (arguing that successful commons can exist in a liberal society if participants have appropriate exit rights). *Zheng Xueming v the Villagers' Committee of Fuxing Village*, People's Court at Yushu City (county-level), 19 May 2016.

⁷⁸ See e.g., *Liu Xiaowen v Liu Xiaofa*, People's Court at Nong'an County, Changchun City, 8 October 2014; *Jiang Yajun and Jiang Yachen v Jiang Caixia*, People's Court at Shuangyang District, Changchun City, 22 December 2014.

⁷⁹ Article 3 of the Law of Succession of the PRC (1985) provides that:

Estate denotes the lawful property owned by a citizen personally at the time of his death, which consists of:

- (1) his income;
- (2) his houses, savings and articles of everyday use;
- (3) his forest trees, livestock and poultry;
- (4) his cultural objects, books and reference materials;
- (5) means of production lawfully owned by him;
- (6) his property rights pertaining to copyright and patent rights; and
- (7) his other lawful property.

⁸⁰ Article 184 of the Property Law (2007) provides that:

The following property cannot be mortgaged:

- (1) land ownership;
- (2) the right to the use of the land owned by the collective, such as cultivated land, house sites, private plots and private hills, except where otherwise provided for by law...

⁸¹ See e.g., *Quanyan Branch of Changchun Rural Commercial Bank Co., Ltd. v Wu Peipei, Duan Lihua, and Feng Min*, People's Court at Erdao District, Changchun City, 29 October 2015; *Wang Yong v Han Laiyong and Cui Hongmei*, People's Court at Shuangyang District, Changchun City, 24 August 2016.

⁸² E.g., Article 32 of the Law of the PRC on Land Contract in Rural Areas (2002) provides: 'The right to land contractual management obtained through household contract may, according to law, be circulated

conditions for alienation through subcontracting, leasing, and exchange, and alienation through transfers. For alienation through subcontracting, leasing, and exchange, the contractor (the household) temporarily circulates the right to land contractual management within the contractual period, or exchanges such a right with another household to farm a different parcel of land. For alienation through transfers, the contractor (the household) relinquishes the right to land contractual management, and members of the household also give up their individual property rights in the land. Thus, the household and its members together exercise the right to exit from communal life. So, transfers shall be subject to consent by the collective. Out of the 42 cases concerning the alienation of the right to land contractual management through transfers, nine cases have confirmed that the contract for the transfer of the right to land contractual management without the consent of the collective shall be deemed void.⁸³ Subcontracting, leasing, and exchange, however, just need to be reported to the collective for the record.⁸⁴ If the collective issues contracts to households that are not members of the collective, the matter shall be subject to the consent of a majority of its members.⁸⁵ All kinds of alienation are also subject to certain conditions, including that members of the collective to which the transferor belongs have the right of first refusal.⁸⁶ The nature of members' individual property rights and the household's right to land contractual management is quite similar to what Radin described as 'market-inalienable', meaning that they 'may be given away but not sold'.⁸⁷

by subcontracting, leasing, exchanging, transferring or other means.' Article 128 of the Property Law (2007) provides:

Contractors for the right to land management shall, in accordance with the provisions of the Law on Land Contract in Rural Areas, have the right to circulate the right to land contractual management by subcontracting, exchanging or transferring the right or by other means. The term of circulation may not exceed the remaining period of the term of a contract. Without approval as granted according to law, no contracted land may be used for non-agricultural development.

⁸³ See e.g., *Gao Yang v Li Hongye*, People's Court at the District of High-tech Industrial Development, Changchun City, 6 May 2014.

⁸⁴ Law of the PRC on Land Contract in Rural Areas (2002), art 37. All the 70 cases concerning the alienation of the right to land contractual management through subcontracting, leasing, and exchange have confirmed this practice. See e.g., *Zhang Jinyou v Zhao Wenyan*, People's Court at Nong'an County, Changchun City, 26 April 2014.

⁸⁵ Article 48 of the Law of the PRC on Land Contract in Rural Areas (2002) provides that:

Where the party giving out contracts gives out the contracts for rural land to units or individuals other than the ones of the collective economic organization concerned, the matter shall first subject to consent by not less than two-thirds of the members of the villagers assembly, or of the villagers' representatives, of the collective economic organization concerned and it shall be submitted to the township (town) people's government for approval.

⁸⁶ Article 33 of the Law of the PRC on Land Contract in Rural Areas (2002) provides that:

The right to land contractual management shall be circulated in adherence to the following principles:

- (1) that consultation on an equal footing, voluntariness and compensation, and no organizations or individuals may compel the contractor to circulate his right to land contractual management or prevent him from doing so;
- (2) that no change shall be made in the nature of the land ownership or the purpose of use of the land designed for agriculture;
- (3) that the term of the circulation may not exceed the remaining period of the term of contract;
- (4) that the transferee shall have the capability for agricultural operation; and
- (5) that under equal conditions, members of the collective economic organization concerned shall enjoy priority.

⁸⁷ Margaret J. Radin, 'Market-Inalienability' (1987) 100 Harvard Law Review 1849, 1849. Article 4 of the Law of the PRC on Land Contract in Rural Areas (2002) provides that:

Through an analysis of disputes over the right to land contractual management, we have probed the internal complexity of the communal property system and established the extent to which the community and its members hold and exercise property rights. Our study reveals the possibility of explaining the way community-based individual property rights work in China through the analytical framework set up in Section II of this article. With the aid of this frame, we can arrive at a better explanation of the current rights structure in rural China (see Table 2 below). The fragmentation of property rights means that the collective retains ownership rights; the household has the right to manage farming; and farmers (members of the collective) retain individual property rights to use and benefit from rural land. All three rights are proprietary rights.

Table 2: Exploring Co-existence of Communal and Individual Property Rights through the Analytical Framework

	Community (ownership rights)	Households (property rights in 'responsibility land', that is, the right to 'land contractual management')	Individual members (individual property rights in 'responsibility land')
Ownership rights in Communal Land	Yes	No	No
The right to possess (exclusive physical control)	Yes	Yes (within the contract period)	Yes, individuals within a household can exclude the rest of the community from 'their responsibility land' within the contract period
The right to security (an immunity from expropriation)	Yes	Yes (must be associated with community membership)	Yes (must be associated with community membership)
The right of absence of term	Yes	No	No
The right to the capital	No	No	No
The right of transmissibility	No	Yes (limited)	Yes (limited)
The right to manage	Yes (including issuing contracts, judging disputes, managing 'reserved land', etc.)	Yes (deciding on how to farm 'responsibility land' and organising farming within the contract period)	No

The State protects, in accordance with law, the long-term stability of the relationship of land contract in rural areas. After the land in rural areas is contracted, the nature of ownership of the land shall remain unchanged. The contracted land may not be purchased or sold.

The right to the income of the thing	Yes (excluding the income from the land allocated to households)	Yes (within the contract period)	Yes (within the contract period; income is distributed by the household)
The right to use	Yes (excluding the land allocated to households)	Yes (within the contract period)	Yes (within the contract period)

Our study also highlights the importance of examining the right to exit for analysing community-based individual property rights. Exit is traditionally regarded as a crucial value, meaning ‘voluntarily leaving the effective jurisdiction of the group’.⁸⁸ Surprisingly and interestingly, the right to exit can be found in a communal property system. It means that a communal property system, which is primarily for promoting cooperation, does not necessarily ‘sacrifice individual autonomy for collective goods’.⁸⁹

However, as exit is likely to lead to not only the withdrawal of membership of a community, but also the transfer of rights to the use of communal resources to outsiders, free exit may potentially destroy communities.⁹⁰ In order to sustain communities and communal property rights, some restrictions on the right to exit are necessary, as evident in China’s experience, including community consent and community members’ right of first refusal. These rules are described by Dagan and Heller as ‘cooperation-enhancing exit’.⁹¹ Further, as the right to exit and the right to alienate are closely related, justifications for restrictions on the right to exit entail restrictions on the right to alienate. The fact that some community members — such as those in Chinese collectives, accustomed to being tight-knit for ideological reasons — are increasingly driven by economic pursuits poses a challenge to the legitimacy of a prohibition on alienation. This challenge invites a further examination of the reconciliation of conflicts between communal and individual property rights.

B. Reconciling conflicts between individual and communal property rights

As discussed in the previous section, the emergence of the household responsibility system was an innovative initiative that not only mitigated tensions between communal and individual property rights, but also promoted economic development. However, techno-economic development in agricultural production requires property institutions that can support cooperation and consolidated farming. The household responsibility system, which relies on management of farming tiny land plots by small households, now struggles to promote such development. Early evidence for this was found in the late 1980s when, in spite of the fact that the household responsibility system was widespread, rural economic growth in rural China nonetheless stagnated.⁹² Moreover, if land-use rights constituted farmers’ most important assets, they would be keen to

⁸⁸ Green (n 77) 171; see also Albert O. Hirschman, *Exit, Voice, and Loyalty: Responses to Declines in Firms, Organizations, and States* (Harvard University Press, 1970).

⁸⁹ Dagan and Heller (n 77) 552.

⁹⁰ Of course, these rights can be transferred to insiders and absorbed into the community. But such internal transfers are unlikely to destroy the community.

⁹¹ Dagan and Heller (n 77) 602.

⁹² Justin Y. Lin, ‘Rural Reforms and Agricultural Growth in China’ (1992) 82 *American Economic Review* 34, 39.

materialise the economic value of their individual property rights in rural land through acquiring more power to transfer and mortgage these rights.

Further, with regard to the rationale for restrictions on free alienation, such measures are necessary because unregulated transfers are likely to lead to massive privatisation of farmland, posing a threat to tenure security and food security in China. These restrictions are in line with China's land policy on conservation of farmland and the pressing need to feed 1.4 billion people.⁹³ Moreover, there are a large number of migrant workers who cannot enjoy the same level of social security provided for those people formally registered as urban residents; farmers' property rights in rural land still perform social security functions. The tensions between property's economic and social functions seem unavoidable.

One possible way to mitigate the conflict between communal and individual property rights is to allow the division of the power of control over a resource for different lengths of time and to align the fragmentation of property rights with multiple property functions. English property law, for example, permits the fragmentation of property rights, due largely to the concepts of estate and tenure and the influence of equity — in particular, through the institution of the trust. The concept of estate determines for how long one person can hold the land and, therefore, English property law encompasses a very important time element.⁹⁴ Indeed, it is possible for more than one person to be entitled to the same estate in land at the same time. The concept of tenure involves the notion of one person holding land from another, rather than owning the land. The trust permits the split of legal and beneficial ownership.

In contrast to the common law system, the continental notion of ownership is often characterised as one in which 'title and enjoyment are welded together' and as being distant from the economic reality.⁹⁵ This conventional view, however, places too much emphasis on the differences between common law and civil law approaches to property. It overlooks the fact that some property institutions may be framed differently, but perform a similar function (for example, the function of realising the economic value of property).

Both the common law and civil law systems recognise 'time-limited interests in land', which have never been 'the subject of thorough research':

Time-limited interests in land straddle both the law of property and the law of contract ... The main thrust is, however, not the contractual aspect of the law of lease, but those aspects of the lease of land which [endow] the tenant with certain proprietary entitlement even in those civil law jurisdictions which do not recognise a lease as a limited or subordinate real right.⁹⁶

In the civil law system, one of the prominent examples of time-limited interests in land is the *usufruct*. As discussed in Section III(A), a *usufruct* strikes the balance between conservation of the property and the *usufructuary's* power to consume and dispose of the *usufructuary* assets. In most civilian jurisdictions, a *usufruct* itself cannot

⁹³ The World Bank <<http://data.worldbank.org/indicator/AG.LND.ARBL.ZS/countries>>.

⁹⁴ Peter Birks, 'Before We Begin: Five Keys to Land Law' in Bright and Dewar (eds) (n 23) 457–486, 460.

⁹⁵ Karl Renner, *The Institutions of Private Law and Their Social Functions* (Transaction Publishers, 2010) 21–22 (Otto Kahn-Freund's Introduction).

⁹⁶ Cornelius Van Der Merwe, 'General Introduction', in Cornelius Van Der Merwe and Alain-Laurent Verbeke (eds), *Time Limited Interests in Land* (Cambridge University Press, 2012) 12–18, 12.

be transferred, but the rights under a *usufruct* can be.⁹⁷ However, the transferred right cannot go beyond the term of the initial *usufruct*.⁹⁸ In China the right to land contractual management is exercised within this legal framework.

Despite some similarities in recognising time-limited interests in land, the civil law system recognises ‘absolute ownership as something radically and qualitatively different from time-limited interests’; the latter are considered as *jura in re aliena*.⁹⁹ This distinction, however, is problematic when used to explain the nature of individual property rights being exercised in China’s communal property system. In contrast, the common law framework appears more advantageous, in particular, because its temporal dimension puts ‘perpetual and time-limited rights in the same class’,¹⁰⁰ although these property rights confer varied degrees of power of control over the land.

The economic reforms in China in the past decades have witnessed various social, legal, and governmental endeavours, all trying to tackle the disaggregated property rights being exercised by the state, the collective, and the individuals in response to social, economic, and technological transformation.¹⁰¹ Whether these projects have been successful or not, they all reflect the reformists’ endeavours to unleash the economic potential of the land while preserving the current ownership structure that is so closely linked to socialist ideology.

As Maurice argued, ‘[t]he post-Mao regime has been successful in avoiding the politically explosive question of formal ownership without undermining the functionally capitalist character of the reformed economic system’.¹⁰² These efforts, which were intended to maintain ‘the functional transformation of the untransformed norm’,¹⁰³ have nevertheless created ‘the discrepancy between the normative content of the law (which is static) and its economic and social function (which is dynamic)’.¹⁰⁴ To do with this discrepancy, China’s central government is promoting a new round of rural land reform. For example, to enable consolidated farming, the household can now choose to transfer (through subcontracting) the right to manage farming to a cooperative, an agro-enterprise, or another household within the contractual period. This means that the right to manage farming can now be disassociated from community membership. The household is also allowed to mortgage the right to manage within the contractual period, opening the door to bringing capital into large-scale agriculture. These transfers and mortgages do not affect farmers’ individual property rights. For example, in cases of defaults, the bank can only reclaim the right to manage and recover losses of income from farming. Such a right to manage farming, exercised within the contractual period, has the least power of control over the land for a limited time; it must be for agricultural purposes only (see Table 3).

Table 3: Aligning the Fragmentation of Property Rights with Multiple Property Functions

⁹⁷ There are exceptions, for example, under the new Dutch Civil Code of 1992, ‘control and income may be fully vested in the hands of the usufructuary’. Alain-Laurent Verbeke, Bart Verdickt and Dirk-Jan Maasland, ‘The Many Faces of Usufruct’, in Van Der Merwe and Verbeke (eds), *ibid*, 33–56, 36 and 39.

⁹⁸ This position is similar under German law (BGB, § 1059) [FCC, art 617].

⁹⁹ Van Der Merwe and Verbeke (eds) (n 96) 4.

¹⁰⁰ *Ibid*.

¹⁰¹ Ronald C. Keith and Zhiqiu Lin, *Law and Justice in China’s New Marketplace* (Palgrave, 2001) 142.

¹⁰² Maurice Meisner, *The Deng Xiaoping Era: An Inquiry into the Fate of Chinese Socialism, 1978-1994* (Hill and Wang, 1996) 513.

¹⁰³ Renner (n 95) 6 (Otto Kahn-Freund’s Introduction)

¹⁰⁴ *Ibid*.

	Community (ownership rights)	Households (property rights in 'responsibility land', that is, the right to 'land contractual management')	Cooperatives, Agro-enterprises, banks, etc. (property rights in 'responsibility land')	Individual members (individual property rights in 'responsibility land')
Ownership rights in Communal Land	Yes	No	No	No
The right to possess (exclusive physical control)	Yes	Yes (within the contract period)	Yes (within the subcontract period)	Yes, individuals within a household can exclude the rest of the community from 'their responsibility land' within the contract period
The right to security (an immunity from expropriation)	Yes	Yes (must be associated with community membership)	Yes (within the subcontract period)	Yes (must be associated with community membership)
The right of absence of term	Yes	No	No	No
The right to the capital	No	No	No	No
The right of transmissibility (the capital component of property's economic function)	No	Yes (limited)	No	Yes (limited)
The right to manage (the capital component of property's economic function)	Yes (including issuing contracts, judging disputes, managing 'reserved land' etc.)	Yes (deciding how to farm 'responsibility land' and organising farming within the contract period)	Yes (deciding how to farm 'responsibility land' and organising farming within the contract period)	No
The right to the income of the thing (the capital component of property's economic function)	Yes (excluding the income from the land allocated to households)	Yes (within the contract period)	Yes (within the subcontract period)	Yes (within the contract period; income is distributed by the household)
The right to use	Yes (excluding	Yes (within the contract period)	Yes (within the	Yes (within the contract period)

	the land allocated to households)	subcontract period)
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The current land reform measures seek to align the fragmentation of property rights in rural land with property’s multiple functions. Collective ownership of rural land in China is not vestigial. It carries a broad range of social functions: in addition to its close link with the socialist ideology, it also serves an ecological function for conserving a sufficient amount of rural land alongside providing the basis for farmers’ social security. While the social functions of collective ownership have been retained, the economic function of rural land, in particular, its capital component, is becoming attached to fragmented property rights, such as the right to manage farming. The ‘mobility’ of the capital function of property transcends ideological boundaries, as well as the divide between civil and common law approaches to property, as it ‘enables itself to a multitude of different norms whose legal structures have little or nothing in common’.¹⁰⁵ Property’s multiple functions are enabled by the fragmentation of property rights, and this fragmentation also helps maintain property’s various functions. In this regard, we could argue that the recognition of a spectrum of property rights, and its alignment with different functions of property, will facilitate the unification of ownership, rather than splitting it up.¹⁰⁶

V. Conclusion

The article contributes to our understanding of the nature of the current Chinese property rights system, and to the theorisation of individual property rights in communal property systems using China as a case study. It explores in Section II the pros and cons of the existing theories and concepts that may or may not fit in the context of China, and then proposes a new concept, that is, community-based individual property right, as a way to understand better the complicated Chinese communal property system. In the following sections, the employment of mixed research methods (including an analysis of a large dataset of judgments recently made publicly accessible and a comparative study of common law and civil law approaches to property) enables us to explain the way individual property rights are recognised and exercised in a communal property system.

Our theoretical analysis lays out a plausible analytical framework for describing and explaining community-based individual property rights. We develop the ‘bundle of rights’ perspective in the context of communal property with an integration of a consideration of group rights. Our study shows that individual and communal property rights can co-exist within a communal property system. The actual powers of each rights-holder are determined and limited; they are also interlinked, performing different functions. Well-defined property rights may lack or restrict the right to alienate.

Our case study of China’s experience is particularly important. It provides empirical evidence to test and develop the analytical framework. Through mapping our findings from the case study onto the analytical framework, we are able to establish the extent to which both the community and its members hold property rights, and examine

¹⁰⁵ Ibid, 36.

¹⁰⁶ See also Michele Graziadei, ‘The Structure of Property Ownership and the Common Law/Civil Law Divide’ in Michele Graziadei and Lionel Smith (eds), *Comparative Property Law: Global Perspectives* (Edward Elgar, 2017) 71, 88.

the principles and mechanisms that mitigate conflicts between communal and individual property rights within a communal property system. Our study shows that common law property theories can be applied to the Chinese context and that learning from China's experience can enrich and advance the development of empirically grounded common law property theories. It will be interesting to see if future developments in the Chinese legal system will gradually move towards adopting common law principles and mechanisms.¹⁰⁷

Practically, our research has important implications for policy-making regarding communal property systems. It examines the rationale for preserving communal property systems while discussing the way in which we could adopt a more equitable distribution of resources. In China, for example, collective ownership of rural land prevents the potential for privatisation of this land and serves as the basis for farmers' social security. Preserving the social functions of collective ownership, however, does not exclude the economic function of property, in particular, its capital component. The fragmentation of property rights in rural land, as well as the collateralisation of the right to manage farming, have strengthened the individual member's and the household's power to control rural land. Households have the option to mortgage the right to manage farming to financial institutions in return for loans; or to transform the right to manage farming into shared joint ventures or cooperatives; or even to transfer the right to manage farming to trust institutions in return for income. After the agreed period, these rights would revert to the household. Such mechanisms release the economic potential of the land while simultaneously preventing the dissolution of communities and communal property. Our findings have implications for tackling the challenges of managing communally held land faced by many countries, including Australia, Brazil, Canada, Israel, Mexico, South Africa, and so on.

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¹⁰⁷ It is interesting to note that many Chinese top law schools, including Renmin University Law School, Peking University School of Transnational Law and Tsinghua University Law School, have set up centres for common law studies.

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