THE BACKGROUND, PRINCIPLES AND CORE CONTENTS OF THE REAL RIGHT LAW OF THE PEOPLE’S REPUBLIC OF CHINA

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INTRODUCTION

As early as during the period of Roman law, jurists set about the task of systematizing the civil law, differentiating *jus in personam* from *jus in res*. Accordingly, Gaius created a dual classification of personal law and real law in his *Institutes of Gaius*. The division of personal law and real law turns out to be the most important division in the internal civil legal system of the continental legal system. In fact, this dichotomy reflects the logic of the existence of law itself. It is the relation between the human being, as subject, and the scarce objective outside world, which is the core issue regulated by the civil law.

The classification of human law and real law in the *Institutes of Justinian* subsequently guided movements of civil law codification in modern Europe. The most typical were the *French Code Civil* of 1804 and the Austrian Civil Code, the *Austrian AGBG* of 1811. The concept of rights *in res* can be attributed to the Pandecten school in Germany. The Pandecten dedicated themselves to the internal systematization of the civil law and tried to discover logical connections between law and real life. In the early 18th century, Professor Arnold Heisse at the University of Heidelberg in Germany systematically proposed the first system of civil law in an outline prepared for civil law courses. The system consisted of General Principles, the Law of Real Rights, the Law of Obligation, the Law of Family, and the Law of Succession. It tremendously changed the tripartite civil law system of Gaius. Specifically, the law of succession was no longer considered to be simply a law of property circulation, but an independent branch of civil law. Under the civil law system, property law consisted of obligation law and real rights law, and the objects of adjustment by real rights law were things corporeal in the narrow sense. The quinquepartite method was first adopted by the

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Saxon Mirror, the Sachsenspiegel of 1863, was developed and perfected by the Civil Code of Germany, the German BGB in 1896, and was then accepted in greater part by the Swiss Civil Code, the Switzerland ZGB in 1911. Subsequently, it was adopted worldwide, and has formed the systematic and theoretical basis for the creation of Chinese civil codes since the late Qing Dynasty.2

The advent of the concept of real rights and the gradual establishment of the real rights system greatly enhanced the entire system of civil law and shored up the system of civil property rights. Consequently, real rights became the core of property law along with obligatory rights. However, the concept of real rights was not adopted by the common law system. Instead, the concept of property rights was embraced.

Due to pressure from both domestic and foreign political forces, an important transition was launched in the legal history of China and a number of new legal concepts and theories from developed countries on the European continent were introduced in the late Qing Dynasty. Due to the geographic proximity of China and Japan, among other reasons, the Japanese civil law was transplanted to China. Prior to this, Japanese civil law had been deeply influenced by German civil law, especially by the first draft of the BGB (Motive).3 Thus, German civil law had a profound impact on Chinese civil law.4 When China began amending its laws in the late Qing Dynasty (1640-1911), Chinese civil law embraced European continental civil law, particularly German civil law. It thus adopted the concept of real rights from German civil law in the civil law system. With the founding of the People's Republic of China

2. For a discussion of how Chinese civil law embraced continental civil law beginning in the late Qing Dynasty, see FOO Ping-Sheng, Introduction to Books I, II and III, S. XIX, in: The Civil Code of the Republic of China, 1931. Many explanations and arguments have been given as to why China has transplanted the European civil law system instead of common law. Convincing opinions, at least according to modern research, point out that the political system, geographic neighborhood and legal communication between China and Japan most likely played a dominant role in China's decision to copy the German legal system.

3. The Japanese civil law went into effect in 1898. A legislative history of this law is given by Kitagawa, Rezeption und Fortbildung des europäischen Zivilrechts in Japan, 1970. (This book by Kitagawa, published in German in the 1970s, is an excellent monograph of comparative civil law that elaborates on the effects of continental law on Japanese civil law.)

(PRC) in 1949, the civil code was drafted three times, and the concept of real rights was once again adopted. However, the strict concept of real rights was not used in civil legislation and civil law theory for a long time, having been restrained by historical conditions. The concept of property rights and some correlative concepts were adopted in the *General Principles of the Civil Law (GPCL)* in 1986. With the rapid development of the national economy and the intensive study of civil law, the concept of real rights has emerged once again in theory and in practice.

The drafting of the Real Right Law (RRL) was the most time-consuming and most difficult legislative process in the history of the PRC. It involved various conflicts of interest, such as harmonizing the conflict between public power and private interest, and the relation between State property and private property. It also involved deep-seated problems of Chinese society and the orientation of Chinese economic development, such as the status of State property and private property in the Chinese economy and the orientation of Chinese rural reform. The RRL meanders among equity, efficiency and the value of macro-development, trying to summarize the past in the form of statutory law and promote further opening to the outside. In terms of results, this first objective has been achieved, but the latter objective has been left for further legislation.

This article first discusses the legislative background of the RRL, pointing out that the aim of the RRL is to fill in the gaps in the property law of the Chinese civil legal system (see the discussion of part I). It also plays a crucial role in the development of the modern Chinese socialist market economy (see the discussion of part II). Additionally, this article analyzes the basic principles of the RRL (see the discussion of part III and beyond) and successively examines the core systems of the RRL (see part IV and beyond) in an attempt to reveal the basic features of the RRL.

### I. LEGISLATIVE BACKGROUND OF THE REAL RIGHT LAW

#### 1. The protection of property rights before the RRL

Following the founding of the PRC in 1949, the civil code was drafted and suspended three times. Civil legislation mainly focused
on laws and regulations concerning land and marriage. Following adoption of the policy of reform and opening up in 1978, China has promulgated a series of important civil laws and regulations. In terms of the current Constitution, civil laws and regulations, the legal system relevant to real rights can be divided into three levels.

1.1 Provisions dealing with real rights in the Constitution

The Constitution prescribes that the fundamental economic system of China is one of maintaining a mainstay of public ownership while allowing diverse forms of ownership to develop side by side. This not only emphasizes the core status of public ownership, but also accords an important position to the non-public sector in the Chinese socialist economic system. Amendments to the Constitution in 2004 added the protection of lawful private property. Therefore, the Constitution establishes the fundamental economic system of China as the coexistence of state ownership (ownership by the people), collective ownership and private ownership, each with different functions in the macro-economy. This provides a basic framework for establishment of the Chinese RRL.

1.2 The General Principles of the Civil Law (GPCL) as the basic civil law

The GPCL of 1986 is the most important civil law in the current civil legal system of China. In Chapter 5 of the GPCL, there is an enumeration of civil rights. Section 1 provides for “ownership of property and correlative property rights.” Due to the dramatic change in Chinese society in the past two decades, the provision for property rights in the GPCL no longer meets the needs of practical life, not just conceptually, but also in terms of the system of real rights.

1.3 Single civil laws in form of statute (fälüe)

With the establishment of the market economy, laws about guaranty and financing were urgently needed. Thus, the Guaranty Law (GL), which entered into force on October 1, 1995, became an important single civil property law. The GL, which covers personal

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6. Article 13 of the Chinese Constitution: “The lawful property of citizens is inviolable.”; “The state protects by law the private property rights of citizens and the right to inherit property.”; “The state may in the public interest take over the private assets of citizens for their use in accordance with the law, and shall provide appropriate compensation.”
guaranty and property security, has systematic provisions regarding the security interest system. It plays an important role in guaranteeing credit and financing, and in maintaining economic order.

The Rural Household Land Contract Law (RHLCL) enacted in 2002 gives long-term land use rights to farmers. This has further stabilized and consummated a double-tier management system that combines unified and separate operations on the basis of a household-based output-related contractual responsibility system for the first time. The law stipulates clearly that land contractual rights are a variety of real right. It also prescribes for the reasonable circulation, such as by transferring and purchasing shares in, succession, adjustment and revocation of land contractual rights. Furthermore, it successfully handles the relationship between rural collective ownership and contractual land rights, laying a strong foundation for further improvement of the rural productivity of China by upgrading the current fundamental economic system to the level of law.

Additionally, there are provisions involving real rights in certain special civil laws. For example, the Maritime Law of 1992 has provisions regarding ship ownership, ship hypothecation rights, and the priority of rights in ships. The Civil Aviation Law of 1995 stipulates civil aviation ownership, hypothecation rights and the priority of rights.

1.4 Economic administrative laws and departmental rules and regulations

Since the 1990s, a series of laws and regulations has been enacted regarding natural resources, including the Mineral Resources Law, Fisheries Law, Grassland Law, Forest Law, and Water Resources Law. Moreover, certain economic administrative laws, such as the Ocean Space Use and Management Law, Land Management Law, Urban Real Estate Administration Law, Soil Conservation Law, City Planning Law, Construction Law, Law on the Protection of Cultural Relics and the like have been enacted. Many provisions of these statutes concern real rights.

1.5 Interpretation by the Supreme People's Court (sifa jieshi)

To better deal with cases involving property right disputes, the Supreme People's Court has provided a great amount of important judicial interpretation of the RRL. This mainly includes: opinions on the implementation of the General Principles of the Civil Law of 1988 and judicial interpretation of the Guaranty Law of 2000. In
2005, the Supreme People's Court also provided related judicial interpretation of the Rural Household Land Contract Law of 2002 to further clearly define concrete problems in land use contracts. Additionally, the Supreme People's Court has provided judicial interpretation of issues relating to commercial housing market transactions on two specific occasions. In 2005, it also provided judicial interpretation of specific legal issues in the transfer of state-owned land and regarding disputes involving contracts transferring construction use of state-owned land.

2. Shortcomings of laws concerning real rights enacted before the RRL

Since the start of the period of reform and opening up, the Chinese civil law system has been gradually enhanced. The legislative mode of "division into stages" based on practical need has proved capable of timely meeting the needs of real economic life for civil law. But many problems remain, such as the lack of a systematic civil legislation process and conflict between various laws and regulations within the system of civil law.

First, there has been rapid progress in civil legislation in China since the 1990s. The Company Law of 1993, which was completely amended in 2005, regulates the subject of market transactions—the system of corporations. The Contract Law of 1999 resolves the problem of a lack of unified market transaction rules. The Guaranty Law of 1995 fleshes out the guaranty of credit and financing. However, from the perspective of civil law, the legal system of a market economy should include at minimum a subject system, a transaction system, and a property right system that can serve as the premise and consequence of a transaction. However, a real right law serving as the premise and consequence of a transaction has always been lacking. With the great wealth accumulated in the process of reform and opening up, the protection of state-owned property, collective-owned property and lawful private property has become the most demanding and urgent task in the enactment of civil legislation and in the study of civil law. Previous related laws and regulations are not up to the task.

Second, most laws and regulations have been drafted by the State Council and various ministries and commissions under it, which the exception of the GPCL and the GL, which were drafted by the standing committee of the National People's Congress (NPC). The ministries and commissions that draft laws and regulations often have difficulty in considering the overall picture, tending
to consider the interests of their own departments and systems. Thus, the problems of inconsistent, overlapping and mutually conflicting laws and rules are difficult to avoid.

Third, although a real right system exists under the civil law, it is deficient in both concept and structure. For example, the concept of a “real right” does not appear in any civil law or regulation. Nor does the principle of *numerus clausus* appear; the types of usufructuary rights are not explicit. And some rules of guaranty in the GPCL and the GL and its judicial interpretations are in conflict with each other. This cannot satisfy the further development of the socialist market economy, nor does it reflect the true level of the study of civil law in China.

II. THE SIGNIFICANCE OF THE RRL

1. The social and economic significance of the RRL

As the principal civil property law, the Real Right Law is a basic civil law that sustains the fundamental social economic system and socialist market economic order. The Real Right Law starts by determining the attribution of real rights and protecting all types of real rights, and encourages the creation of wealth by confirming and protecting property rights. Furthermore, the Real Light Law is a basic law of the market economy. Through a series of rules, such as the principle of public summons and public trust of rights in rem, rules of real right alteration and alienation, and *bona fide* acquisition, the Real Right Law directly serves property transactions.

1.1 Sustaining the basic economic system

Passage of the RRL has made it possible to conduct judicial proceedings based on the rules of the basic Chinese economic system and property protection that are prescribed in the Constitution. The RRL operates to maintain the basic economic system and the socialist market economy. According to the Chinese Constitution, public ownership is the mainstay. It coexists with various other forms of ownership to constitute the basic economic system of China. This means that the RRL must distinguish three forms of ownership: national ownership, collective ownership, and private ownership. Additionally, the RRL must adhere to the principle of equality of civil law. Therefore, after establishing these three forms

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of ownership, the Real Right Law proclaims their equal status, properly handling the relation between the Constitution and the RRL. Because it occupies a core position in the entirety of civil property law and administrative regulations, the RRL becomes a hub connecting the Constitution, other civil property laws, and administrative regulations.

1.2 Consolidation of the successful results of the policy of reform and opening up since 1978

The RRL is a law that confirms and consolidates the successful results of reform and opening up. The basic economic system, including public ownership as the dominant form of ownership coexisting with multiple economic forms, has been explored through the implementation of socialism since 1978. In particular, the status of the non-public ownership economy has been greatly improved. Some of the important achievements of economic reform attained over the past several decades have been intensively reflected in the RRL. One example is the transition from the no-cost use of land without time limit to the institution of a usufructuary right that is limited in time and involves a cost. Another is strengthening the right to contractual land management in the countryside.

1.3 Solving disputes and making the best use of objects

Clarity of property rights is a premise and foundation of the socialist market economy. As a result of the policy of reform and opening up, great social wealth has been accumulated over the past 30 years. However, serious disputes often occur concerning the allocation of this wealth. From the viewpoint of sustainable social development, it is necessary to clarify the attribution of all kinds of property in basic laws. The Real Right Law promotes the clarity of property rights, since it prescribes that real estate must be registered and movable property is subject to the rule of possession.

The RRL is a law that determines the attribution and best use of objects. It does not by itself directly regulate to create wealth, but it can establish a solid foundation for encouraging the creation of wealth by confirming and protecting all types of legal property. Historical lessons from the establishment of the People’s Republic of China inform us that if we do not formulate a legal system that protects all kinds of lawful property, wealth cannot be accumulated. National power will deteriorate, and people will lack a sense of security with regard to legally acquired property. The RRL sets up a
complete legal protection system for all types of legal property and encourages the positive creation of wealth.

The basic economic model of modern society is based on the exchange of products, which is in turn based on the social division of labor. Resources can be optimally allocated through transactions. Hence, the RRL provides for more than a possessor’s use of his own property, which can be essentially derived from the characteristic of a real right being a “dominant right.” More importantly, the best use of an object means that a possessor can allow others to use his property rather than using it himself. This means that property can be transferred for use by those who are more competent, while allowing possessors to satisfy their revenue requirements or achieve financing functions by establishing security.

2. One stable step towards a future Chinese civil code

Passage of the RRL is of great significance for perfecting the Chinese civil law system.

First, since the draft of a civil code was first reviewed by the National People’s Congress (NPC) in December, 2002, an important legislative task of the NPC has been to draft a complete civil code with Chinese characteristics within the next ten years. The RRL is an important component of the civil law, having assumed the status of an independent section. Passage of the RRL marks a new stage of achievement in the drafting of a Chinese civil code.

Second, the RRL was actually founded on the basis of multiple special laws. For example, some security interests were drafted on the basis of the GL in 1995 and on the basis of judicial interpretation by the Supreme People’s Court in 2000. Contractual land rights are founded on the basis of the Land Contract Management Right Law of 2002 and on judicial interpretation by the Supreme People’s Court in 2005. Therefore, the RRL is characterized by summarization of the existing real right system. This has resulted in the problem of how to coordinate the RRL and other related special laws and regulations once the RRL has been implemented. This will inevitably become the task of legislators and the legal profession.

Third, certainly, the RRL will require the support of multiple regulations in areas in which the RRL is incomplete, such as a Registration of Real Estate Law, an Expropriation and Requisition Law, and a Law of State-Owned Property Protection.
III. BASIC PRINCIPLES

Because China has adopted a legislative model of codification, principles become the basis for abstract codes. In the theory of Chinese civil law, principles are the norms of legislation, jurisdiction, and the people's enjoyment of rights. The RRL clearly provides three basic principles, among which is the principle of equal protection of real rights with Chinese characteristics. Additionally, the principle of *numerus clausus* and the public disclosure and public trust principle are principles that are recognized in all countries from a comparative perspective.

1. The principle of equal protection (*Pingdeng baohu yuanze*)

The principle of equal protection means that owners of different forms of property enjoy equal status under the law. All types of ownership are to be protected equally by the RRL in the market. When various rights conflict with each other, the dispute should be resolved according to rules that apply equally to each owner. The principle of equal protection of the RRL is a reification of the equality principle under the civil law. \(^8\) Constitutional jurists have voiced opinions on the issues of state ownership and the protection of state-owned property, considering that the provisions in the draft of the RRL concerning state ownership were in violation of the Constitution. \(^9\) But civil law scholars universally believe that in drafting the RRL, it was necessary to abide by the equality principle of civil law. \(^10\) It was logical to protect state ownership, collective ownership and personal ownership equally once these different forms of ownership had been defined. Only in this way was it possible to satisfy the requirements of the market economy and remain consistent with the true meaning of the Constitution.

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8. Article 3 Paragraph 3: “The State shall practice a socialist market economy, the equal legal status and the right to development of all the subjects of the market shall be safeguarded.” Article 4 provides: The property rights of the State, collectives and individuals and the property rights of other obligees shall be under legal protection, no entity or individual may infringe on them.”


It should be noted that claiming the equality of legal status of real rights does not preclude adopting different policies towards enterprises of different forms of ownership regarding industrial policy, market access, tax incentives, the issuing of loans, and so on. In particular, it does not affect the leading role of public ownership in the market; there is no contradiction with the principle of equal protection. The leading role of public ownership is embodied in the rules of the Constitution and economic administrative regulations. The RRL also adheres to a basic economic system dominated by public ownership, but as a basic civil property law, the RRL must also retain the most fundamental principle—the principle of equality.

The principle of equal protection is conducive to the equal protection of different forms of property, and promotes the growth of social wealth. The philosopher Mencius (B.C. 372-289) in China's Spring and Autumn Period said: “He who has persistent production has persistent heart [You hengchanzhe you hengxin].” The realization of property rights and the enjoyment of their benefits become uncertain absent the equal and sufficient protection of private property. As a consequence, “persistent production” cannot be achieved, the public will tend to lack the confidence to invest, the desire to consume, and the driving force of entrepreneurship. Public property rights and private property rights differ in terms of subject and object. For example, land can only be owned by the State or a collective; it cannot be owned by private individuals. However, this cannot be permitted to constitute a reason for treating public property rights and private property rights differently in terms of their legal status or the methods used to protect them.

2. The principle of numerus clausus (Wuquan fading yuanze)

The principle of numerus clausus, or of establishing the varieties and contents of real rights, played important historical roles in establishing a land system under capitalism, preventing feudal restoration, and the like. In the market economy, it has developed many important functions, such as establishing property patterns and reducing transaction costs. The basic premise of the market economy is clarity of property rights. This, in turn, allows resources to be allocated and used with maximum efficiency. Application of the principle of numerus clausus makes the property right requirements of the market economy the basic principle of the RRL, reducing transaction costs in the market to as close to zero as possible. A model of freely created real rights would give rise to high verification costs. For instance, legally requiring the registra-
tion of real estate reduces the costs of conducting searches, prediction, and preservation of original private funding, and can be absorbed as an administrative cost. By way of example, in China, the transferal of property rights in land is limited to the construction land use rights of city land and on the basis of different applications aiming at regulating distinctive right contents and terms.

According to this principle, the variety and content of real rights must be stipulated directly by law. According to the requirements of the Constitution and laws, real rights can only be legislated by the NPC and its Standing Committee. Thus, administrative regulations issued by the State Council cannot establish any type of real right. One important purpose in drafting the RRL was to maintain a uniform domestic Chinese market. Thus, customary law cannot establish categories of real rights. When parties attempt to create a real right that is outside the scope of real rights that have been legally established in terms of type or content, their agreement has no effect at the level of real rights.

3. The principle of public disclosure and public trust (*Gongshi gongxin yuanze*)

As absolute rights, real rights greatly affect transactions. In order to reduce the cost of transactions and clarify the attribution and boundaries of rights, the law requires that non-right holders have access to an external, legally established system of public disclosure, allowing them to thoroughly determine the attribution of real rights in the market at a low investigation cost. If outside parties are unable to determine the status of change in real rights, third parties to transactions tend to suffer losses.

Not only is it necessary for stakeholders to know the status of ownership in static situations, but they also need to confirm changes in real rights in transactions. Hence, changes in real rights in transactions must be made known to potential transacting parties in society by means of external public disclosure. Otherwise, multiple ownership rights or usufructuary rights would necessarily come to exist in a single object, resulting in numerous disputes about ownership and compromising the security of transactions. Thus, for real estate and chattels, the RRL provides separate methods of public disclosure in the form of registration and possession. Registration means that the real right status of real estate is registered in a document by an administrative department. The method of disclosure of a real right in a chattel by possession means actual control over an object by the possessor.
Based on the theory of public trust, when what has been publicly disclosed differs from the actual status of a real right, the law will preferentially protect a transaction made based on the status of the real right as indicated in a trustworthy public disclosure. Specifically, public trust of possession is embodied in a presumption, meaning that without contrary evidence, the possessor of a chattel will be presumed to be its owner. Those who rely on such an "appearance of right" in entering into a transaction may acquire ownership or other real rights; this is dealt with in combined fashion under good faith acquisition\(^1\). Public trust of real estate registration indicates that the obligee recorded in the document of registration is the person who owns the property protected by law, even when there is a conflict between a real right and a legal right. It should be noted that possession as a means of public disclosure of chattels still has a major disadvantage: it carries less weight in terms of public trust than the registration of real estate.

**IV. THE REALTY REGISTRATION SYSTEM**

Chinese laws concerning real estate, such as the Land Management Law and the Urban Realty Management Law, had established a registration system prior to implementation of the RRL. However, there were many shortcomings to the Chinese realty registration system. These included the existence of many registration departments, the requirement that houses and land be registered separately, and a cost of registration that was too high to meet transaction needs. The RRL prescribes a more detailed registration system, requiring that the alteration of real estate rights be registered, and that the right owner recorded on the register be the real right owner. However, the unification of registration bodies and the establishment of a detailed registration system have been left to a future realty registration law.

The RRL provides relatively detailed provisions on a real estate registration system, resolving the issue of a lack of a basic registration system in Chinese civil law. Under the RRL, the alteration of real estate rights by contract and by other legal acts must be registered. Registration of the alteration of real estate rights by judgment, expropriation, inheritance, and other practical acts is not required, but the alteration of real rights based on further transactions cannot come into force without registration.

\(^1\)Article 106 of the RRL.
1. **The significance of registration**

The real estate registration systems of the various countries of the world include legislative forms based on consensus, registration documents, and adversarial systems. In reality, Chinese law has adopted a mode akin to that of Swiss law, where agreement by the involved parties alone about changes in real rights does not have legal effect. To the contrary, only registration can effect a change in a real right. The time of registration is the time recorded on the real estate registry.

2. **Classifications of registration**

The RRL provides for the following important registration classifications: primary registration, correction registration, opposition registration, and advance notice registration.

2.1 **Primary registration (Chushi dengji)**

When making a primary registration (including ownership rights and other real rights), both of the parties need to submit documents of title and other necessary documents. Registration departments are primarily responsible for procedural examinations and secondarily responsible for substantive examinations. Since China's real estate registration departments are actually administrative departments, a registration error creates State liability to provide compensation for damages, and not common civil liability. However, if an error in registration can be attributed to some cause relating to the parties involved, such as the intentional registration of home ownership under the name of another, the registration department is not liable.

2.2 **Correction registration (Biangeng dengji)(Art.)**

If a right holder or interested party holds that there is something wrong with an item recorded in a realty register, with the written consent of the right holder as recorded on the real estate registry, or based upon evidence demonstrating that the registration is indeed incorrect, he may request that the contents recorded in the real estate registry be corrected. In practice, when a third party calls into question the contents recorded on the registry, the holder of the right recorded in the realty register will normally not provide

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12. Article 19 Paragraph 1 of the RRL.
written consent. There is then an issue of how to protect a potential real right holder.

2.3 Objection registration (Yiyi dengji)\(^{13}\)

In order to balance the interests of the right holder recorded in the realty register with those of a person who has an objection, the RRL prescribes a system whereby the real estate registration is temporarily “frozen.” That is, an objection can be filed that preliminarily calls into question the accuracy of the realty registry. The person making the objection must provide evidence to prove that there are mistakes in the realty register. How to weigh such preliminary evidence is a difficult issue for legislation. In the end, the RRL avoids this issue. However, an earlier draft stipulated that the People’s Court should determine how to handle objection registration. A petitioner should file an action within 15 days of registering an objection or the objection registration will become void. In the event of an improper objection registration, the petitioner is liable for damages.

2.4 Advance notice registration (Yugao dengji)

Advance notice registration refers to a system for ensuring the creditor rights of a party who enters into a purchase agreement based on the promise of a real right or some other form of real estate. It allows the party to apply for advance notice registration with the registration body so as to ensure the realization of the real right in the future. Following advance notice registration, disposal of the realty without the consent of the holder in the advance registration will not have the effect of altering the real right.

3. The distinction between the effects of a real right and a creditor’s right

The distinction between the validity of a real right and the validity of a creditor’s right has its roots in German law. On the basis of differentiating real right acts from obligation acts, German law has created the abstract theory of dinglicher Rechtsgeschäfte, reality juristic acts. Although the RRL of China does not adopt the abstract theory on real right acts of German law, it does distinguish between the validity of a real right and the validity of a creditor’s right.

\(^{13}\) Article 19 Paragraph 2 of the RRL.
A creditor's right act is a fundamental act altering a real right, such as a contract of sale. The alternation of the real right must meet the requirements of registration. According to Article 9 of the RRL, the alternation of a real right in real estate must be registered. If it is not, there are legal effects. According to Article 15 of the RRL, even if the real right is not registered, the validity of the contract remains unaffected. This stipulation of the RRL corrects the incorrect contents of the GL, which prescribed that a mortgage contract did not take effect without its registration. For example, A and B conclude a real estate mortgage contract, but they do not register it. The mortgage contract itself is effective, but the real estate mortgage right does not exist. As another example, assume that A and B have concluded a contract of sale on a house. The contract is effective, but the price of the house rises, A then sells the house to C, and registers it. C gets ownership of the house because he acted in good faith. Although B is not permitted to request that C's ownership of the house be revoked, A is liable to B for breaching the original contract of sale.

V. OWNERSHIP (SUOYOUQUAN)

In contrast to the ownership laws of Western countries, the RRL establishes state ownership, collective ownership and private ownership. These reflect the requirements of China's basic economic system as established by the Constitution.

1. Three categories of ownership

1.1 State ownership.

State ownership is very important in the RRL. It is special because the entity that exercises this form of ownership is the State Council. However, state organs and other institutions may enjoy the right to use state-owned property according to relevant laws and regulations. In addition, the State Council and the local People's Government are investors in the state-owned property in state-owned enterprises. The object of state ownership is extensive and specific, which is different from private ownership. For example, mineral resources, water resources, and areas of the sea belong to the State. City lands also belong to the State. The RRL places great emphasis on avoiding the draining of state-owned assets.

14. Article 47 of the RRL.
15. Articles 56 and 57 of the RRL.
1.2 Collective ownership

Collective ownership means that working people collectively enjoy the rights of possessing, utilizing, profiting from, and disposing of their assets. Based on who the owners are, collective ownership can be divided into rural collective ownership and urban collective ownership. The economic system has undergone great change during recent years, rendering the entities exercising collective ownership quite complex. Villages, groups of villagers, and towns can all exercise collective ownership. The entities engaging in the collective economic sector are fewer in towns. As collective ownership is an important component of China’s public ownership, the scope of the object of collective ownership — collective property — is quite broad. In particular, there is exclusive collective ownership of real estate such as land. In terms of its internal structure, the collective is not simply the sum of its members, nor is it an independent organization apart from its members. Thus, it is unique in how it enjoys ownership. The RRL emphasizes the rights of the members of a collective in collective ownership (Article 59). That is, the members of a collective economic organization enjoy the rights of management, distribution of earnings, and making decisions regarding collective properties. The emphasis on the rights of members of the collective is not aimed at partitioning collective common property, but at better reflecting the uniqueness and purpose of this type of ownership.

1.3 Private ownership

China amended its Constitution in 2004, adding a provision protecting legal private property. The RRL further emphasizes the protection of legal private income, homes, savings and other investments. In fact, this is not limited to the protection of things corporeal, but extends to property in the broad sense. Thus, the RRL plays a better role in implementing the policy of protecting private property. Additionally, laws such as the Company Law and the Securities Law are even more practical in affording protection to private investors.

2. Condominiums

Before the 1990s, there was no true real estate market in Chinese cities. The land was still the means of production and was used by the government free of compensation, with paid use of the land being forbidden. Additionally, most houses occupied by
China’s urban inhabitants were obtained from enterprises as a form of welfare, and were not truly privately owned homes. The amendment of the Constitution in 1988 served as a prelude to paid use of city land. China’s urbanization process developed rapidly, which led to an increasingly acute contradiction between land and population. In the city, condominiums were formed on the basis of State land ownership.

A condominium is a special form of ownership in which an owner enjoys ownership of an exclusive element of a building such as residential house or a house used for business purposes, while sharing with other owners ownership and common management rights in common elements other than the exclusive elements. A condominium thus involves compound rights.

During the process of drafting the RRL, there was a dispute about which parts were to be owned in common by all owners. Under the RRL, ownership of the roads, common facilities and houses used for realty services within a building zone are to be shared in common by all owners. Through clear agreement, it is possible for the owners to enjoy use rights to green areas. The RRL adopts the legislative policy of contract first for the ownership of parking spaces and garages, not stipulating that parking spaces and garages be owned in common by all owners. In addition, the RRL forbids casual alteration of residential homes. That is, no owner may alter a residential home into a locale for business purposes in violation of any law, regulation or management. This means that establishing a place of business in a residential area is forbidden.

3. Expropriation and requisitioning (Zhengshou yu zhengyong)

In the 2004 amendment to the Constitution, Article 10, Paragraph 2 stipulates that the State may in the public interest expropriate land for its use or requisition land in accordance with the law, and shall provide appropriate compensation. But there is no clear distinction between expropriation and requisitioning. The RRL provides separate provisions on expropriation and requisitioning in Article 42 and Article 44. These reflect the development trend in ownership theory from unrestrained absolute ownership to the socialization of ownership, especially the increasing burden on real estate with regard to social public interest.

The RRL’s provisions on expropriation make it clear that the power to expropriate resides in the State, not in estate developers. Therefore, when there is a dispute about expropriation involving
expulsion, an estate developer cannot become a party, and the government cannot delegate the right to expropriate, which is a public power, to an estate developer, who is an actor in the market. In addition, compensation is a core issue in expropriation involving expulsion in China.

The RRL stipulates that expropriation “in the public interest” can be executed in accordance with lawful jurisdiction and procedure, but precisely what lies within the public interest remains a puzzle in legislative, judicial, and jurisprudential study. During the drafting process, there was heated debate among scholars about whether to adopt definite examples or abstract generalized modes. One view held that the RRL could not make general stipulations about the public interest, but another view held that the Property Law could adopt procedural provisions allowing the People’s Congress at various levels to determine whether specific administrative actions were in line with the public interest.\(^\text{16}\)

In the end, Article 42 of the RRL adopted the abstract generalized method of example, not giving an explicit answer to the expropriation and expulsion problems that are prevalent in China today. According to the legislation rules of the NPC, this task will be completed in a Realty Expropriation and Requisition Law in the future. However, since passage of the RRL, China has begun amending the Planning Law, Regulations on the Removal of Houses, and other laws and regulations relevant to land expropriation and removal. According to the common views of Chinese scholars, the public interest must be the interest enjoyed by the most people, and it is necessary to ensure that the action of removal be consistent with the “public interest” through “procedural justice”.

VI. THE SYSTEM OF USUFRUCTUARY RIGHTS

Usufructuary rights have roots in Roman law grounded in the differentiation of values between the two legal natures of a *res*, which are “possession” and “utilization”\(^\text{17}\). Utilization of a *res* can be divided into self-utilization by an owner and utilization of the *res* of another by a non-owner. Based on the differentiation between the use value and exchange value, “utilization” can be divided into


utilization of use value and utilization of exchange value. In the utilization of use value, the owner may utilize a res by himself, but resources are scarce, and a res will have different use values for different entities. Market entities seek maximum benefit at minimum cost. Different entities have different demands which can be satisfied at the same time by means of utilization of a res at different levels. Moreover, it has been proved in practice that not all owners are always able to make the best and most efficient use of their res, and that an owner may be unwilling to take risks in the process of using and obtaining profit from a res.

1. The significance of the system of usufructuary rights in China

In China, land is owned by the State or by collectives. Thus, based on the premise of maintaining the existing system of land ownership, it is necessary to create different forms of realty rights to satisfy market demand for land as an important production requisite or means of sustenance. Usufructuary rights are a form of realty right that can truly be circulated in Chinese society. If we divide the legal system of land into the system of land ownership, the system of land use, and the system of land circulation, the system of usufructuary rights in China performs the functions of the latter two. Several important laws from the Constitution and from civil law have prescribed land ownership. Moreover, practical use and circulation are centered on usufructuary rights. Thus, the system of usufructuary rights is the most important system relating to land in the Chinese market economy. From the perspective of forms of property rights that can be traded, the idea of real rights centered on ownership of a res has been replaced by the idea of utilization of the res. So far, in the real right law of China, usufructuary rights have become the core of the system of real rights.

The usufructuary rights established in the RRL have great significance in China today.

First of all, a balance is maintained between the fact that land is an irreplaceable, scarce resource and the need to maximize use efficiency, especially given the intense relation between population and land. In China, land is owned by the State or by collectives. Therefore, disputes concerning ownership are rare. However, maximum benefit cannot be derived from land resources through clarity of ownership alone; highly efficient use and circulation systems are also required. Accordingly, since the foundation of the PRC, legal system reform concerning land has focused on using the land to the greatest advantage by means of a proper land circulation system.
with fixed ownership of land. The usufructuary right system can satisfy such a demand: on the one hand, it can help land owners avoid extra management costs in possessing and using the land, and on the other, it can increase use efficiency and land value as well as the financial revenues of the State by means of the paid use of the land.

Second, they play a key role in consolidating production relations on the land, especially in rural areas of China. In urban areas, land is used mainly for industrial production, living, etc. From the experience of various nations, the system of land circulation in urban areas may bring huge financial revenues for one country or region, but when land prices appreciate too fast, a bubble can be created in the real estate industry. Accordingly, the system of usufructuary rights in urban areas has been kept under the strict control of the market economy. Conversely, the system of usufructuary rights in rural areas has become the key legal system in consolidating the main achievements of the past thirty years since the start of implementation of the policy of reform and opening up. A dual system characterized by “the combination of centralized operation with decentralized operation” as the basic economic system in rural areas is manifested in the form of the usufructuary right to contract the management of land. From the General Principles of the Civil Law, through the common efforts of scholars in civil law and other laws, the right to contractual management of land has been transformed from a short-term creditor’s right with deficient protection to a long-term real right capable of resisting even the party issuing the contract.

Third, they are narrowly defined in specific usufructuary rights. They bring to civil law the mandatory provisions of land administration law with respect to land use. For example, the right to contract the management of land is only applied to cultivated land, forests, grasslands, and the like, while the right to a house site is only applied to residential use by farmers. This reflects the increasing load arising from the public law in the field of realty law. Usufructuary rights still retain those problems that historically remain during social transitional periods. The characteristics of the dual structure between urban and rural areas are still manifested in the system of usufructuary rights. On the one hand, there is the right to use construction land on land owned by the State in urban areas, and there is the right to use collectively owned construction land on land owned by rural collectives. However, in the RRL, there is only one article relating to the right to use collectively owned construction land, which invokes provisions of other laws and regulations. On
the other hand, in strict accordance with the purpose of the land, there exist the right to contract the management of land and the right to use house sites on land owned by rural collectives.

2. Categories of usufructuary rights

The RRL of China prescribes the right to land contractual management in rural areas, the right to use construction land, the right to use a house site in rural areas, and easements. Easements are recognized for the first time and limited in principle to promissory types. They have only been recognized for a short time, so it is impossible to judge their actual effects. Thus, they will not be further addressed herein. In the following part, the author shall give a brief introduction to three other important usufructuary rights, particularly as relates to certain disputed issues.

2.1 The right to land contractual management in rural areas (Tudi chengbao jingyingquan)

2.1.1. Establishment of the mode of land contractual management

Beginning in 1958, “rural people’s communes” were gradually formed by combining various agricultural production cooperatives. They were generally divided into the three levels of: communes, production brigades, and production teams. The ownership of land at three levels with ownership by production teams as the mainstay was the basic system of land property rights at the time. The land ownership system of rural areas “at three levels and based on production teams” was established and has had an enduring effect that remains even today.

The collective ownership of rural land has created the following legal problems. First, the owners are in fact empty. The collective is only a concept based on its members, it can not exercise the rights of an owner. Thus, it has to take the form of representatives or agents, making it quite difficult to solve the problem of how to ensure consistency between the interests of the collective and those of its members. Second, the collective ownership of rural land has caused farmers to lose the right to directly use, take proceeds from, and, especially, dispose of the land. Farmers are excluded from being direct holders of rights. However, farmers are responsible for production and management of the land. Therefore, the attribution of rights is separate from direct management activities. Lastly, al-
though the collective is the legal owner, in rural areas, it is not merely a legal owner, but also a base unit that assumes a series of social functions. Accordingly, activities of collective economic organization, such as management and decision-making, are certain to be affected by various forces from outside, which increases tension between the collective and its members. Under the mechanism of the people’s communes, member rights were replaced by compulsory non-member resolutions, which led to a severe decline in productivity. In the end, people’s communes became a mode of economic organization that blocked the development of rural productivity.

Although the system of collective ownership and unified management of land dominated rural areas of China after the 1960s, the ideology of household management has existed all along. Under the system of people’s communes, “fixing farm output quotas for each household” appeared in a scattered form. The operation mode experimented on and promoted in the spring and summer of 1956 in Yongjia County in the Wenzhou region of Zhejiang Province is considered to have resulted in the first experimental work unit of contractual management of land in China’s rural areas. However, due to the political ideology and management mode of the planned economy, rights relating to the land were not truly developed into the form of real rights in rural land in China under “contractual management” or “fixing farm output quotas for each household”.

The right to contractual management of land owned by rural collectives in China has been established on the basis of voluntary exploration and acknowledgment of State policies by farmers. They have experienced various forms of this right, such as “fixing farm output quotas for each household” and “work contracted to households”.

Along with the basic policy of reform and opening up, the central government adopted new measures concerning the management of rural areas. From 1982 to 1986, five “No. 1 documents” of the Central Committee of the Communist Party of China related to rural reform and development all recognized the household contract responsibility system developed with remuneration linked to output, the main form of which was “work contracted to households”. Furthermore, in 1984 the central government specifically re-
quired that the contract duration should be more than 15 years, during which time the government intended to stabilize the new mode of management of collectively owned land. In November of 1991, the Eighth Plenary Session of the Thirteenth Central Committee of the Communist Party of China (CPC) adopted the Decision on Further Reinforcing the Undertakings of Agriculture and Rural Areas. This established the household contract responsibility system developed with remuneration linked to output and the dual operation system characterized by “the combination of centralized operation with decentralized operation” as the fundamental economic system of rural areas. In 1993, the Central Committee of the CPC and the State Council promulgated Some Policies and Measures Concerning the Development of Agriculture and the Rural Economy to extend the contract term to 30 years, and much longer for barren lands. In 2002, the Rural Land Contract Law was promulgated to formally establish a duration of 30 years for land contracts in legal form.

In the RRL, Articles 124 to 134 confirm the right to land contractual management as a usufructuary right. Although regulated by only 11 articles of the Real Right Law, the right to land contractual management has been promoted to the level of a basic civil right in terms of its legal basis. This will have a profound influence in stabilizing the basic economic system of China’s rural areas in the long term.

2.1.2. Circulation of the right to land contractual management

According to Article 128 of the RRL, the holder of a right to land contractual management shall be entitled to circulate the right to land contractual management by means of subcontract, exchange, assignment, etc. The main reasons for allowing the circulation of the right to land contractual management are that the nonagricultural portion of rural household income is growing and the flow of people between rural and urban areas is speeding up. In particular, the rural population is pouring into urban areas. Additionally, to the extent permitted by agricultural production, it is necessary to develop large-scale agriculture. It is also necessary to increase the labor force, which is premised on the removal of the strict limits on household registration. Further, allowing the circulation of the right to land contractual management is an important measure in eliminating the dual social structure between rural and urban areas. In the Third Plenary Session of the Seventeenth Cen-
 Central Committee of the CPC in 2008, a more specific resolution relating to the issue of the circulation of the right to land contractual management was adopted in order to increase the income of the farmers and to bolster the agricultural capacity of China.

However, the RRL still forbids rural households from obtaining financing directly by means of security such as mortgaging the right to land contractual management. With respect to the issues of rural areas, agriculture and farmers, the Chinese government has always adopted policies of stable construction. It is still uncertain to what extent the right to land contractual management in rural areas can be circulated as a tradable commodity.

2.2 The right to use construction land (Jianshe yongdi shiyongquan)

The RRL uses the concept of "the right to use construction land" to replace the former "right to use state-owned land", emphasizing the utilization purpose of land. It is indicated that in the future the rights to use construction land owned by the State and collectives will be unified. At present, experimental reform in some localities is moving in this direction.

In the section on the right to use construction land, there are several significant legal issues:

2.2.1. Categories of the right to use construction land

Article 136 of the RRL states that the right to use construction land may be created separately on, above, or under the land surface. A newly-established right may not prejudice a usufructuary right that has already been established. In other words, the object of the right to use construction land involves the land surface and the areas above and below the land. The areas above and below the land are equivalent to above ground space and underground space.

The content of Article 136 of the RRL goes far beyond the former scope of rights to use Stated-owned land. It practical terms, it recognizes that separate rights to use construction land can be legally created above and below the land. Article 136 of the RRL actually adopts a balanced approach, bringing a separate spatial right system to the current system of the right to use construction land. This system not only preserves the existing system of usufructuary rights, but also meets the increasing social demand for spatial utilization accompanying the development of science and technology.
2.2.2. Automatic extension of the right to use construction land for residential purposes

In the real estate market of Chinese cities, the limit of the right to use construction land for dwelling purposes is 70 years. Thus, buyers of commodity apartments are extremely concerned about extension of the right to use construction land once the 70-year limit is up, given the separate mode of property rights in houses and land.

Article 149 of the RRL explicitly states that the right to use construction land for residential houses shall be automatically renewed, but it is unclear whether this is to be gratuitous. At one point in the legislative process, one draft of the RRL stated that an application would be necessary in order to extend the term of residential construction land. However, scholars generally recommended that the degree of protection of private property should be enhanced. Some experts even suggested that the right to use construction land for residential houses should be extended free of charge. In other words, when the term was extended, the handing over of allotment fees would not be required.

During the legislative process, however, the NPC considered that there might be tremendous future transformation in the real estate market, so they avoided the issue. The legislators realized that whether or not the payment of a land use fee would be required following the extension of the land use right was related to the vital interests of the common people. The right of use term for the vast majority of residential construction is 70 years. At present, there is not an adequate basis for scientifically specifying the obligation to be borne by the holder of a right to use construction land at the appointed time. Decades from now, when the country is wealthy, the proposition of whether to charge land use fees must be carefully studied. This shows that it may as well not be regulated by the Real Right Law. Moreover, the absence of such a provision in the Real Right Law does not preclude the State Council from acting according to actual circumstances and establishing related provisions. Therefore, a determination of whether to require the payment of a land use fee after the right expires was left out this time around. Extension of the use term, payment standards, and payment methods for allotment fees are to be stipulated by the State Council.20

20. See the Law Council of NPC ed., Articles of Real Right Law and Its Legislative Reasons, Beijing University Press, 2007, and Article 149 of the RRL.
2.2.3. Means of obtaining the right to use construction land

There are two ways to acquire the right to use construction land: non-compensated appropriation and compensated acquisition. The former is mainly suited to national capital construction, large-scale projects, and so forth. In order to realize the function of benefiting from State assets in the form of land, the Real Right Law clearly stipulates that land for construction is to be transferred through adoption of methods of compensated competitive bidding, including auctions, licensing, invitations to tender, and the like. It strictly limits transfer by agreement.

2.2.4. The right to use collective construction land (Jiti jianshe yongdi shiyongquan)

In contrast to the right to use construction land in the form of state-owned land, the right to use collective construction land has been established such that collectively owned land can only be used for village enterprises, village public utilities, village public services, and the construction of residences for farmers. Specifically, the right to use collective construction land cannot be traded on the market, which is stipulated by the Land Administration Law. Nor can the right to use collective construction land be transferred, traded, or leased for non-agricultural construction. Therefore, farmer collectives are unable to directly transfer their own right to use collective construction land. Only following expropriation by the State does the land become available for construction.

In accordance with Article 151 of the RRL, the use of collectively owned land as construction land is to be handled in accordance with the Land Administration Law and other related laws. Thus, the Real Right Law does not provide any new regulation of this type of new usufructuary right. The reasoning was as follows. Reform of the national land system is proceeding. Given the considerable differences that exist between regions and the fact that the Land Administrative Department is conducting land system experiments at selected points and carrying out research, there is a need to wait for summarization of the experience. This summarization can then be used as a basis for regulating and improving the system. Moreover, reform of the collective construction land system will require revision of the Land Administration Law and other laws to fundamentally solve this problem. Hence, the Real Right Law has only provided the principle that the use of collectively
owned land as construction land is to be handled in accordance with the Land Administration Law and other related laws.\(^{21}\)

In recent years, reform of the national land system has intensified. The State Council has successively promulgated a series of regulations relating to the construction of rural collective land. The recommendation that economic system reform be intensified that was issued by the State Council in 2005 clearly points out that further study of the issue of entry of the right to use rural collective land for construction onto the market is required. The Ministry of Land and Resources has always made speeding up the reform of collective construction land use a priority. While strictly managing collective construction land, it has permitted some areas to develop experimental sites for the circulation of collective construction land. The current Real Right Law does not provide general principles on the right to use collective construction land. It leaves room for future work promoting the circulation of collective construction land.\(^{22}\)

2.2.5. Houses of incomplete ownership

So-called "houses of incomplete ownership" usually refer to commodity apartments that are purchased by non-members of a rural collective economic organization and are located on collective farmland, but have not been approved under existing Chinese laws and regulations. The main characteristics of such "houses of incomplete ownership" are: a rural collective economic organization develops commodity apartments without paying allotment fees and other expenses, and the certificate of the right is not issued by the registration organ, but by a township or village government. Thus, such houses are called "township ownership right housing", or "houses of incomplete ownership right".

According to Article 151 of the RRL, the use of collectively-owned land as construction land is to be handled in accordance with

\(^{21}\) Article 151 of the RRL.\(^{22}\) In 2005, it was announced in "Methods of Policing Trading of the Right to Use Collective Construction Land in Guangdong Province" that from October 1, 2005, rural collective land for construction in Guangdong could enter into the market and be traded, but collective construction land could not be used for constructing commodity apartments. After villagers sold or rented out the housing, they could not apply for a new house site. This "method" has established a system whereby rural collective land shares a common principal. This principal consists of the same place charging the same price and taking the same rights with respect to state-owned land, attempting to establish a unified land market in which collective construction land may also be sold, leased, transferred, subleased and mortgaged.
the Land Administration Law and other related laws. In the Land Administration Law, only when collectively owned land is expropriated can it enter the level-one land circulation market through a transfer. Therefore, “houses of incomplete ownership” are in violation of the law as it stands today. In particular, when the collective construction land on which such “houses of incomplete ownership” are built is expropriated, the owners of the houses are unable to obtain corresponding reasonable compensation.

However, in the process of drafting the RRL, a certain effort was made to break with the existing regulations in the Land Administration Law and seek a mechanism that would allow for the circulation of the right to use collective land for construction. As a result of the complexity of the issue of circulation of the right to use collective land for construction, Article 151 of the RRL ended up adhering to the content of the Land administration Law. At a minimum, this indicates that, in the future, the right to use rural collective land for construction may be gradually incorporated into the unified system of the right to use construction land, which is a right that can be traded. This will probably by done by revising the provisions of the Land Administration Law.

2.3. The right to use a house site in rural areas (Zhaijidi shiyongquan)

The right to use a house site arises on the basis of land owned by a collective in the country. It is used to construct and occupy a building and its ancillary facilities for the purpose of habitation by farmers alone. Article 152 of the RRL provides that the holder of a right to use a house site shall enjoy the right to occupy land owned by a collective, and to utilize it by constructing a residential house and ancillary facilities thereon. The right to use a house site is a right whereby every farming household that is a member of the rural collective economic sector shall have the right to occupy and use the land owned by a collective.

2.3.1. The characteristics of the right to use a house site

As a special form of usufructuary right, the right to use a house site has one particularity in the form of no time limit. This means that the farmer's family members shall have the right to use the house site for generations, passing it on from generation to generation even when the successor is no longer a member of the rural collective economic sector. The farmer obtains this right free of charge. Thus, the right to use a house site has a special social wel-
fare function, meaning that the right to use a house site is a social welfare attempt to guarantee almost one billion farmers places to live. Since the current Chinese social security system is unable to cover the vast rural areas, since no real estate market has been formed for houses in rural areas, and since there is a natural connection between farmers and the land, adaptation of the right to use a house site for the benefit of major farmers could fundamentally solve the problem of land for the basic habitation needs of farmers.

2.3.2. Alteration of the right to use a house site

There is no doubt that alteration of the right to use a house site was a controversial issue during drafting of the RRL. This issue reflected from another angle the fact that Chinese land policy is currently in the process of reformation. The RRL has adopted a policy of strict prohibition.

The main reasons for opposing alteration of the right to a house site are as follows. First, a house site is the site of basic daily life for a farmer, ensuring that “residents have places to reside”. Currently, the Chinese rural social security system has not yet been fully set up. Each farming household has only one house site, in contrast to the inhabitants of towns. Farmers are deprived of their basic living conditions when they lose their lodging and house sites. This could affect social stability. Second, given the disparity between the country and the city, farmers who seek to enter the city always have the option of returning to rural areas, preventing an “uprooted population.” Third, the right to use a house site is based on collective ownership of the land in the country. An individual does not have the right to transfer the right to use a house site out of the collective. Finally, house sites in the country would generally not be purchased by urban residents to meet their basic living requirements, so such purchases would be a waste of land in the country. Moreover, this would undoubtedly tie up rural land. From the perspective of strictly protecting the land, the draft prohibiting the purchase of house sites in the country by urban residents is appropriate. Furthermore, an invasion of rural areas by urban residents could cause the disintegration of folk society, knocking the foundation of Chinese society out of balance.

However, there are also scholars who approve of the transfer of the right to use house sites, ensuring that the rights enjoyed by farmers could be converted into assets. This would increase the income of farmers and help eliminate the disparity between urban and rural society.
VII. REAL RIGHTS FOR SECURITY
(DANBAO WUQUAN)

Since the initial establishment of the socialist market economy in 1992, China has been faced with the task of ensuring credit and expanding corporate financing. In 1995, China enacted the Guaranty Law in the form of a single law. In 1999, the Chinese Supreme People's Court provided a detailed judicial interpretation of this law, making certain amendments and filling certain gaps in the law.

The RRL develops the above-mentioned contents of the Guaranty Law to a broader degree, while making certain adjustments. There are even some provisions that are more conservative than before. Article 178 of the RRL states that, "If there is any discrepancy between the Guaranty Law and the provisions of this Law, this Law shall govern".

1. Overall Trends in Real Rights for Security

1.1 General Categories of Real Rights for Security

The RRL maintains the categories of real rights for security stipulated in the Guaranty Law. It also adopts the guarantee system in Article 9 of the U.S. Uniform Commercial Code (UCC) for reference. This reflects the current development of the function of the real rights for security from guaranteeing creditor's rights to financing. The types of real rights for security include: mortgage rights and pledge rights. The former can be divided into general mortgage rights, which include chattel mortgages, especially floating charges, and mortgage rights at maximum amount, while the latter includes chattel pledges and right pledges, with the latter being the current focus of pledge rights. In addition, pledge rights also include a system of pledge rights at maximum amount.

Further, in accordance with the fundamental principle of *numerus clausus*, only the law can establish the forms of real rights. Therefore, the traditional real right for security that has been retained in Chinese economic life - the "pawn" - is not a legal real right for security. In practice, realty mortgages and chattel pledges are usually adopted to implement this popular form of guaranteeing financing.

1.2 Expansion of the scope of items that can serve as security

Setting forth the principle that "What the law does not stipulate is prohibited", the Guaranty Law of 1995 enumerates the scope
of property that can serve as security. This legislative style was a serious hindrance to the growth of the guaranty market and blocked new financing channels in the market. So Article 180 (7) of the RRL adopts an open legislative stance by stipulating that "other properties the mortgaging of which is not prohibited in the laws or administrative regulations" can be used to provide security. This expands the scope of property that can serve as security.

1.3 Procedure for an obligee to collect on security

In practice, an obligee may demand that the obligor provide both personal security and a security interest in property to secure credit. Under these circumstances, what is the procedure for the obligee to collect on the security when the obligor fails to pay his debt as it comes due? Once the obligee has satisfied his claim against an obligor, does the obligor then have an internal claim against other obligors to recover his payment?

On these issues, the Guaranty Law is contradictory. The Real Right Law provides more explicit provisions.

First, in the case of an unclear agreement or no agreement, where the obligor provides his own property as security, the obligee shall first exercise his security interest in the form of the security interest in the obligor's property. The purpose of this provision is to ensure that the obligor will bear primary responsibility. It is also an effective mechanism for preventing fees and other risks resulting from a surety having to attempt to internally recover payment from the obligor.

Second, in the case of an unclear agreement or no agreement, the obligee enjoys the right to choose. He can require the surety to assume the liability in the form of personal security or a third party to assume the liability in the form of property security. A third party who assumes more liability than his due responsibility has the right, after satisfying the security liability, to recover payment from others. In a case where each of them provides security of equal amount, they should assume the same amount of final security liability.

23. Article 28 of the GL: "Where there are both suretyship and property security for the same claim, the surety shall be liable for the creditor's claim unsecured by the property security". This provision established the principle of "an absolute priority of the security on property." Judicial interpretation of the Guaranty Law Article 38: "Where there are both suretyship and property security from the third party for the same claim, the obligee may demand that the surety or the third party who provides property security assume the security responsibility."
2. **New developments in mortgages**

2.1 *Collecting on a mortgage*

Collection on a security liability should involve balancing the interests of the obligee and the obligor. On the one hand, it is very important to provide the obligee with an effective and low-cost way to collect on his debt, ensuring that compensation is obtained for debts. On the other hand, preventing the obligee from taking advantage of his dominant position to gain unjust advantage from the security is also a crucial issue. Therefore, the Guaranty Law clearly stipulates that without a just and open procedure in the form of an auction, sell-off or liquidation of the property, direct gain from ownership of the property is prohibited.²⁴

Under the current guaranty system of China, the real estate mortgage is still "king". However, numerous problems exist in collecting on real estate mortgages. Specifically, the high expense, complicated procedures, and low efficiency involved seriously affect functioning of the mortgage system. Before entry into force of the RRL, collecting on a mortgage in China depended on State power. This meant that a mortgage might finally be collected on through compulsory court execution following litigation or arbitration. This system was disadvantageous to the mortgagee. It prevented the mortgagee from obtaining a timely settlement, and left the mortgagor a chance to transfer the property.

The RRL constitutes major improvement in this area. Under Article 195 of the RRL, "Where a debtor defaults in the repayment of his debts at maturity or the situation of realization of the mortgage as stipulated by the parties concerned occurs, the mortgagee may stipulate with the mortgagor to convert the mortgaged property into money or make use of the money obtained from the mortgaged property by means of auction or sale thereof for receiving compensation in priority." This simplifies collecting on a mortgage. In practice, the mortgagee may notarize the guaranty contract and then apply directly to the court for compulsory execution. Therefore, it will be necessary to correspondingly amend the Civil Procedure Law in the future to meet the need for a self-help remedy with respect to the mortgage right.

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²⁴ Article 186 of the RRL.
2.2 The duration of the mortgage right

There is an issue as to whether the mortgage right should disappear with the principal creditor’s rights once the limitation of action runs on the principal creditor’s rights if the mortgagor does not timely exercise his mortgage right. According to Article 12 of the Guaranty Law, the right of mortgage co-exists with the creditor’s right that is secured. If the creditor’s right lapses, the right of mortgage will lapse after 2 years due to adoption by Chinese civil law of the doctrine of “repudiation creates a right of defense.” Thus, upon lapsing of the limitation of action, the creditor’s right becomes an incomplete right, rather than extinguishing. However, the RRL modifies the content of the Guaranty Law. As stipulated in Article 202 of the RRL, “A mortgagor shall exercise his mortgage rights subject to the limitation of actions governing the principal creditor’s rights; the People’s Court shall not give protection to him if his mortgage rights are not exercised.” This is because, with the rapid turnover in the market economy, if mortgage rights were allowed to exist indefinitely, the mortgagor might delay in exercising his rights, precluding the mortgaged property from achieving its economic utility and negatively affecting economic development. Thus, the duration of a mortgage right should be in accordance with that of the principal creditor’s rights, thereby encouraging the mortgagor to actively exercise his rights and promoting economic development.

2.3 Floating mortgages on chattels

2.3.1 Features of floating mortgage on chattels

In contrast to a fixed mortgage, a floating mortgage on chattels, the subject matter of which consists of present chattels and chattels to be acquired in the near future that are of undetermined status when the contract is signed, is a special mortgage established for financing or guaranteeing the realization of a credit. On one hand, the floating mortgage on chattels allows the mortgagor to enjoy the right of relative freedom of disposition of the mortgaged chattels. This can ensure normal operation by the mortgagor, while allowing him to gain financial support from the mortgagee. It also improves the mortgagor’s ability to pay his debts. Moreover, it provides an additional financing channel to small and middle-sized

25. Article 12 of the GL.
26. Supra note 20, pp. 439-440
firms. On the other hand, however, it presents the mortgagee with new high risks, especially in how to maintain the economic value of the mortgaged chattels during the existence of the mortgage.

In contrast to a fixed mortgage, the mortgager must be the obligor of the principal credit. Third parties are unable to provide floating chattel mortgages on behalf of an obligor. According to Article 189 of the RRL, the mortgagors of floating mortgage are limited in scope to the following types: enterprises, individually owned stores and agricultural production operators. This means that natural persons are not permitted to take out floating mortgages. The objects of floating chattel mortgages are also limited to certain fixed chattels. For example, the subject matter of a floating chattel mortgage can only be manufacturing equipment, raw materials, semi-manufactured goods or finished products. Property other than what is enumerated can not be mortgaged. Real estate can not be the subject matter of a floating chattel mortgage.

2.3.2 The special effects of chattel mortgages

In addition to the general effects of mortgage rights, such as the right to priority repayment, floating mortgage rights have certain special effects that differ from those of fixed chattel mortgages.

First, there is the effect of decreased value maintenance of the mortgaged property. During the existence of the floating mortgage, the mortgagee does not have the right to interfere with the mortgager in exercising disposition rights to the mortgaged properties within the normal scope of business. The floating mortgage ensures that the mortgager will be allowed to exercise his right to dispose of the mortgaged property within normal scope of business. This can increase the debt paying ability of the mortgager through operation of the business. The legal exercising of disposition rights to the mortgaged properties may increase the value of the property and guarantee realization of the credit. The normal operating activities include business projects started before creation of the floating mortgage and projects that are necessary to increase the profit of the firm. To prevent the mortgager from conducting the business in a manner improperly affecting the interests of the mortgagee, the mortgagee is given the right to supervise the normal operating activities of the mortgager.

Second, there is a limited priority right to repayment. This means that the floating mortgage can not be claimed against buyers who purchase the mortgaged property for a reasonable price in the normal course of business. Given that a floating mortgage is a
mortgage on the present and future; that the mortgager is allowed to exercise the right to dispose of the mortgaged property within the normal scope of business; and that the subject matter of a floating mortgage is chattels such as raw materials, semi-manufactured goods, and finished product inventories; the effect of the public disclosure of this security right is quite weak. From the perspective of protecting the safety of transactions, the rights of a third party who buys the mortgaged property and pays a reasonable price in return in the normal course of business with the mortgager should be protected with priority. Otherwise, the reliance interests of a third party acting in good faith, as well as operation of the market as a whole, would be affected.

2.3.3 Enforcing security rights on floating mortgages on chattels

The property that is mortgaged in a floating mortgage has a floating status. If the obligor succeeds in paying his debts timely and in full as they come due, there is no need to enforce the mortgage right. But if the obligor fails to pay his debts as they come due, or any circumstance considered negative to realization of the right to enforce the mortgage arises, the redemption of the credit should be ensured through enforcement of the mortgage right. Therefore, the enforcement of a floating mortgage right against chattels consists of three phases: determining the condition that triggers enforcement, fixing the mortgaged property, and enforcing the mortgage.

The enforcement of rights against a floating mortgage on chattels must meet the following conditions. First, the debt must be due. If the breach of a duty by the obligor leads to failure to repay the credit, the obligee has the right to demand that the mortgager assume mortgage responsibility. From the day the credit comes due, the mortgager is no longer allowed to dispose of the mortgaged property. Second, if the mortgager is declared bankrupt or his license is revoked, the mortgagee of the floating mortgage possesses the legal right to priority repayment from the fixed mortgaged property once the mortgager enters the bankruptcy liquidation process and the floating mortgage chattels are subsequently fixed. It does not matter whether the debt is then due, because the mortgager has lost the ability to conduct further business operations. Third, there can be circumstances stipulated by the parties concerned that trigger enforcement of the mortgage right. As the civil law complies with the rule of intent, the law allows the parties to
freely stipulate circumstances that will trigger enforcement of mortgage rights so as to ensure that both parties are able to maximally pursue their own profits. In practice, the mortgagee may demand a contract that covers circumstances where the mortgager maliciously disposes of the mortgaged property or transfers the assets. Additionally, they may stipulate that dropping of the inventory of the mortgaged product below a certain ratio of the total inventory is a condition for the mortgagee to exercise his mortgage right in advance. Fourth, there are other circumstances that would affect the credit. In addition to the three circumstances set forth above, if the mortgager violates the good faith doctrine by failing to timely collect on a debt that is due, assigns its property without compensation, or sells its property at an unreasonably low price, thereby clearly reducing its property and affecting enforcement of the debt, the obligee may file a claim to enforce the mortgage. In that case, the obligee could enforce the debt externally as a right of subrogation or revocation to replevy the relevant mortgaged property and maximally protect its credit.

When the above situations occur under a floating chattel mortgage, the mortgagee has the right to stop all business operations of the mortgager, clearly examine the present scope of the mortgager’s property, and determine the mortgage property according to the mortgage contract. If the mortgager has mortgaged all of his chattels, then the mortgagee has the right to check all the chattels of the mortgager. If the mortgager has only mortgaged part of his chattels, then the mortgagee may determine the final property according to this scope.

3. **Pledges (Zhiquan) and liens (Liuzhi)**

Since the scope of the use of chattel pledges is shrinking fast in modern society, the pledging of rights has become the core of the pledge system. With the growth of the capital market of China, the pledging of various securities was a key issue in the RRL. Therefore, the RRL has added the pledging of fund units to the pledging of notes, bills of lading, and stocks already stipulated under the Guaranty Law. In addition, the pledging of receivables is clearly permitted. Such a pledge right is established after the related credit reference agency has processed registration of the pledge (Article 228). However, it is not clear if these agencies are to be limited to banks. There is thus a need for further legal prescription.

In the system of the lien, which is the only statutory real right of guaranty, the RRL sets forth what is known as a commercial lien.
This type of lien does not have a strictly limited scope of application, which means that it applies to all the debt and credit relations of an enterprise. The ordinary lien is limited to a scope where the chattels subject to the lien on behalf of the obligee and the obligee's rights must fall into a single legal relationship\textsuperscript{27}.

**CONCLUSION**

The Real Right Law tends to summarize the past. Its main significance is that it establishes the basic forms of property, especially forms of real estate, in the market economy of China as real rights on the level of the basic civil law. It also emphasizes the equality of all forms of ownership in terms of legislative policy. However, this does not mean that all legislative work has been completed in the area of property law in China. On the contrary, the National People's Congress should accelerate passage of an Expropriation and Requisition Law, a Real Estate Registration Law, etc. The State-Owned Assets Law approved in October of 2008 can be considered an extension of the Real Right Law. In this regard, there is still a long way to go in the demanding process of establishing property laws.

\textsuperscript{27} Article 231 of the RRL.