

The Sticks in the Chinese Property Rights Bundle

Author : Gregory M. Stein

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There is ongoing disagreement among Western scholars as to whether property rights are *in personam* or *in rem* rights, and scholars' views have evolved over time. Blackstone emphasized dominion and exclusion. Scholars in the twentieth century shifted the focus to the "bundle of rights." More recently, some property law scholars have emphasized the view that property is a "law of things."

As Shitong Qiao, a law professor at the University of Hong Kong, observes in a recent book chapter, most of these scholars adopt a Western perspective. Consequently, these scholars have overlooked the relevance of this discussion to the evolution of property law in developing countries, including China.

Professor Qiao contends that the "sticks in the bundle" approach is best suited to an examination of Chinese property law given how that law has evolved in the past quarter-century. For practical reasons and for internal political reasons, China has had to deal with property rights on a piecemeal basis – what he refers to as a "stick by stick" approach – rather than all at once. As China and its people have experimented, different forms of property have developed in which different groups of sticks are arranged in different ways.

At first glance, China might seem to have adopted an *in rem* approach. Most notably, the Chinese Constitution and the Property Rights Law of 2007 both appear to treat law as primary, with property rights differing from contract rights. But this *in rem* view is not entirely accurate. China's recent land reform is not simply a series of privatization transfers by the state and by agricultural collectives to individual ownership.

To begin with, no land in China has actually been privatized. The right to use land and the legal title to that land have been separated in both the urban and rural settings, though in somewhat different ways. The Chinese state continues to own all urban land while agricultural collectives still own all rural land. This public and collective ownership is an ongoing manifestation of Communist ideology and is seen as necessary for the government to maintain a certain level of credibility.

Meanwhile, the state has sold off the right to use urban land that it continues to own. This system of land use rights arose as property norms began to evolve in the 1980s and 1990s, informally ratifying the separation of ownership and use. These dynamically evolving norms led to changes in law that formally authorized these ongoing transfers of the right to use land.

Chinese land use rights today are a hybrid of contract rights and property rights. Technically, those who acquire land use rights in China obtain only personal contract rights, which are not analogous to the rights in land that are found in common law jurisdictions. In this way, the state has managed to retain considerable control over land while expanding private use of land.

Similar events occurred in rural areas, where farmers created rights in property that changed over time

and were later ratified by the government. These rights, too, are personal in nature, and the alienability of rural land is restricted considerably. Meanwhile, as China has urbanized, the government has converted much rural land to urban uses, to the detriment of the former occupants of that agricultural land. The government has statutorily capped the compensation to which the rural land's former occupants are entitled.

As a result, farmers enjoy little of the massive profit that typically results from the development of their land for urban purposes, with most of that profit going to government bodies and to real estate development entities. In property terminology, the government has retained the "stick" of non-agricultural use, a reality that has led to considerable illegal urban use of land that is still technically designated for agricultural purposes only. This means that rural rights are not rights *in rem*.

Professor Qiao concludes by noting that "Chinese policymakers have taken the ... pragmatic approach of adjusting the bundle of property rights cautiously and carefully while keeping land ownership public." (P. 32.) Although there is considerable enthusiasm in China for private ownership of land, there are practical constraints to complete privatization. The government has opted instead to allow private experimentation, which it then ratifies if the experiments are successful. During the past three decades, this has meant that ownership and use have been severed and that sticks in the property bundle have been rearranged in different manners to reflect gradual changes in attitude toward private property rights.

Professor Qiao's chapter contributes to property scholarship in several important and meaningful ways. He reminds his readers that scholarship focusing on Western attitudes toward property can easily overlook non-Western cultures and legal systems. He emphasizes how cultural context influences social and legal attitudes toward property rights. He reminds the reader that China is still in an experimental phase in which private parties test out new approaches and the government endorses the ones that seem to work best.

Thus, when Chinese policymakers "try to accommodate new changes in reality in their daily work through gradual policy and legal reforms, they do not take property as an undivided concept but adjust the rights and obligations of the related parties with great care." (*Id.*) In sum, Chinese property law is not evolving in a unitary fashion but rather is changing "stick by stick."

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