Chapter Ten

Civil Law: Property

1. Introduction

Property law is one of the most significant components of any legal system. From a current law and development perspective, the protection of private property constitutes one of the most essential components of the rule of law. And from the perspective of foreign investors in China, it is of great importance in that it defines property rights, including ownership, rights to operate property (state-owned or private), land use rights as well as mortgage rights. All are major legal considerations in investment decision-making and in ensuring smooth investment and trade operations and their legal protection. From a socio-legal perspective, property law penetrates into every corner of society, affecting the basic rights and the capacity of every single citizen and resident. In terms of comparative law, the codification of property rights in a socialist country demands significant innovation and its result could easily challenge some of the conventional views on the classification of legal systems/families.

Ideologically, the politico-economic notion of property rights introduced from the former Soviet Union has proven to be the most stubborn impediment to the establishment of a legal regime on property rights in China. The Soviet notion emphasised public ownership and its priority over other forms of property rights, and treated the sacred nature of public ownership as the essential feature of a socialist property rights regime.1 It is not surprising, therefore, that private property in the PRC was only declared inviolable by the most recent constitutional revision in 2004.2 Under socialist ideology, which is still rhetorically upheld in the state Constitution,3 the reform of the state-owned enterprises and the rural land system,

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1 See Jianfu Chen, From Administrative Authorisation to Private Law: A Comparative Perspective of the Developing Civil Law in the PRC (Boston/London/Dordrecht: Martinus Nijhoff Publishers, 1995), at 144-149.
2 On the evolution of the constitutional protection of private property, see Chapter 3.
3 The present Constitution, as amended in 2004, still upholds public ownership as being sacred while private property is only declared inviolable. See discussions in Chapter 3.
and the protection of private property have all been severely frustrated, and so was the drafting of a law on property rights, for more than half a century.\textsuperscript{4}

Politico-economically, the most fundamental challenge in establishing a socialist market economy is two-fold: political reforms and the restructuring of the property rights system. Political reforms in China have been slow and have always lagged behind economic reforms, although such reforms are being pushed ahead indirectly by administrative law reforms, sometimes referred to by Chinese scholars as ‘effective constitutional reforms’. While economic reform has been carried out rapidly, it has nevertheless been an incremental, trial and error process, a process which continues today. This process, from a legal viewpoint, is in fact pre-determined by the slow and difficult reform of the property rights regime in China.\textsuperscript{5} In one sense, economic reforms since 1978 have essentially been the process of a reform of the property rights system. And, as will be seen, the final enactment of the Law on Rights \textit{in rem} in March 2007 represents a climax in politico-economic reform.

This chapter first reviews the historical development of a modern property law in China. The concepts and conceptions of property law under the General Principles of Civil Law (GPCL) and the Chinese Constitution are then examined. This is followed by an analysis of the conceptual framework of property rights as evidenced in the 2007 Law on Rights \textit{in rem} as well as other laws relating to property rights. In particular, an examination of the very torturous process of enacting the Law on Rights \textit{in rem}, and of the political and academic controversies that erupted during the drafting process will shed light on the contemporary legal framework of property rights in China.

\section{2. Property Rights in Traditional China and Modern Property Law under the KMT}

There was no systematic codification of property rights in traditional China until the introduction of Western law at the turn of the 20th century. Although some scholars are able to identify many provisions of law governing property rights, or even a system of rights \textit{in rem} in traditional China,\textsuperscript{6} the concept of property rights

\textsuperscript{4} For a detailed study of these issues, see Jianfu Chen, \textit{supra} notes 1; and Jianfu Chen, ‘Civil Codification, Foreign Influence and ‘Local Conditions’ in China’, 2005 (2:1) \textit{Chinese Cross Currents} 82.

\textsuperscript{5} For detailed discussions on the relationship between politico-economic reform and the development of property rights in China, see Jianfu Chen, \textit{supra} notes 1, at 144-149.