

Land Registration System in China: Past, Problems and Prospects

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Sumario: 1. Historical development of chinese land registration System; 2. A hybrid registration system under the 2007 property code; 2.1 Dual track registration of land use right and housing on the same apartment; 2.2 Co-existence of constitutive and declarative models; 3. A Belated property transfer theory; 4. Powers of review and public access to information; 5. Preliminary notice and caution against dealings; 5.1 preliminary notice system; 5.2 cautions against dealings; 6. Liability for mistakes and fraud; 7. Problems and prospects

1. HISTORICAL DEVELOPMENT OF CHINESE LAND REGISTRATION SYSTEM

When the People's Republic of China (PRC) was founded in 1949, the law enacted in the Republican era in general, and property law in particular, have been repealed without being replaced. All land is either owned by the state in urban areas or collectively in rural areas¹. Until 1988, the fundamental rule pertaining to all land in China was that there were no individual rights in land and no private ownership of land². Since there was only public landownership at that time, there was little need to introduce a full-fledged land registration system. In 1988, China embarked on a new economic policy realising housing marketization³. With this policy, China amended its Constitution allowing transferability of privatised land use rights⁴. The recognition of this land-use right generated a building

¹ RANDOLPH & LOU 2000, pág. 3-10.

² HO & LIN 2003, pág. 681-682; Wang & Murie 1996, pág. 971-989.

³ In 1988 the State Council embarked on a staged housing reform by adopting a Scheme of National Housing Reform in Urban Areas. This stimulated the government's initial efforts and provided a ten-year blueprint to expedite commercialize apartment property and reduce state subsidies of housing. See more detail at Lee 2000, pág. 66.

⁴ The amended Constitution of 1988 states: "the right to use land may be transferred according to law".

Soon thereafter, it revised Article 2 of the Land Administration Law stipulating that "the right to use State owned or collectively owned land may be assigned

construction boom and an unprecedented level of commercial dealings in real estate and housing industry⁵. The privatisation and commercialisation of the housing market have helped to relieve the government from responsibilities on maintaining and managing buildings that were originally built to accommodate state employees as one of their major social benefits⁶. However, housing privatisation also posed a challenge to other related institutional framework, in particular to the land registration system.

To be specific, the first statutory provision by the State Council regarding private household registration was promulgated in 1983, namely, "The Rules concerning Administration of the Private Households in the Urban Area". Article 6 of this Rule provided that owners of the private households in the urban area should apply for registration of household ownership, and then by completing the investigation and confirmation process, should obtain the certificate of household ownership (the Certificate of Title) in the local household administrative organ. In addition, when there was a transfer of ownership or a change in the status of the household, the related parties should apply to register the transfer of ownership or the change of current status of the household in the local household administrative organ. After the Rules came into effect, all the owners of private households were required to submit registration so as to affirm the ownership, regardless whether the household has previously been registered. In addition, since the ownership can only be represented by the Certificate, any transfer or assignment of ownership shall be effective only after registration. Changes in the physical formation, for example the size, of the household also needed to be registered. With the implementation of these rules, the household registration system was thus standardized. The next worth-mentioning statute on real estate administration was the Urban Real Estate Administration Law, enacted by the National People's Congress ("the NPC") in 1994. Under this law, effect of registration is further clarified: only by completion of registration will the owners legally obtain ownership of the real estate, and that the ownership can only be represented by Certificate of Title. In addition, the various laws and regulations have

pursuant to the law". The commercialization of landuse rights was first tried in Shenzhen on 9 September 1987 and was formally adopted when Article 10 of the Constitution was amended on 12 April 1988 to permit the assignment of the right to use land. See more detail at Ho & Lin 2003, pág. 686.

⁵ Selden & Lu 193, pág. 187-205.

⁶ The Decision on Furthering Housing Reform in Urban Areas of 1994, issued by the State Council.

been promulgated subsequently in order to fine-tune the details as to the mechanics of registration.

Despite the passage of a plethora of fragmented departmental rules and judicial pronouncements by the Supreme People's Court on immovable property registration, the current operation in China of the immovable property registration system is confusing. The perception of land ownership and the actual practice of a privatised real estate market are still in the maturation stage. First, there is no uniform law dealing with immovable property registration. For example, the legal effects of registration of certain types of property rights are uncertain and unpredictable. To illustrate, the Law of Security of the PRC stipulates that "the immovable mortgage contract is not effective until registration has taken place"⁷. In contrast, the judicial pronouncement issued by the PRC's Supreme People's Court states that "where there is no registered document in place, the immovable mortgage is deemed effective if the registered document is provided or supplemented before the first instance trial ends"⁸. In the former provision, it appears that registration is compulsory and indispensable for the deed to be valid. However, the latter provision seems that the mortgage is deemed to be effective once the contract has been concluded, and registration is required only for effect against third parties. This discrepancy obviously caused confusion. Second, registration offices are not uniform in China. At present, there are six main registration authorities in different departments, namely, the land administration, the housing authority, the mining authority, the water administration, the fishery authority, and the forest administration. Conflicting and inconsistent departmental interests and local governments' parochial interests hinder the systemisation of registration.

The development of the Chinese market economy demands the reform of the registration system in China. With the middle class growing in China and becoming more affluent, the government now acknowledges their desire for legal protection of private property since vague and weak property rights impair economic prosperity. Additionally, legal protection of property rights provides incentives for efficient exploitation of resources⁹.

⁷ Art. 41 of Law of Security of the PRC.

⁸ Art. 49 of the Judicial Pronouncement Regarding the Application of Some Provisions of Law of Security by the Supreme People's Court of the PRC.

⁹ HAROLD DEMSETZ, "Toward a Theory of Property Rights", 57 *Am. Econ. Rev.* 347 (1967); and Richard Posner, *Economic Analysis of Law*, 6th edition, (Aspen Publishers, 2002).

Moreover, with China's entry into the World Trade Organization, the pressure of providing protection for foreign investments and enterprises is also a driving cause of pushing for better legal protection of property rights. In answer to the demands, Property Code of 2007 was finally introduced. As a key to strengthening property rights, the property code tackles the deficiencies in the immovable property registration system in a coordinated and structured manner by stipulating uniformity in registrar offices at the national level. The immovable property registration system was substantially consolidated. In line with the Property Code of 2007, a more detailed Measures of Land Registration was introduced by the Ministry of Land and Resource in 2007 and the Measures of Housing Registration by the Ministry of Housing and Urban-Rural Development in 2008 respectively. Some details such as identification of the immovable property, methods of recording and indexing, and powers of review by Registrar are provided. In what follows, the salient feature brought about by the Property Code will be explored.

2. A HYBRID REGISTRATION SYSTEM UNDER THE 2007 PROPERTY CODE

2.1. Dual track registration of land use right and housing on the same apartment

In China, the immovable property registration has been operated as a public service by registrars, operating at the local government level. For urban housing registration in China, the owner has to register with two separate authorities in order to obtain two different entitlement certificates, namely, a certificate of housing ownership with a housing authority and a certificate for a land use right with the state land administration authority¹⁰. According to the Measures of Land Registration and the Measures of Housing Registration, the registrations of land and housing are separated. The land use right of state-owned land and collectively-owned land, as well as the mortgage over land use right, easement, and other property rights in the land need to be registered in the land authority at local level¹¹. The transfer of housing and any other housing related rights, however, need to be registered in the Housing Registrar¹². Nonetheless, we have recently

¹⁰ Patrick Randolph and Lou Jianbo, *Chinese Real Estate Law*, (Kluwer Law International, 2000) 167-171.

¹¹ Art. 2(1) of the Measures of Land Registration of 2007.

¹² Art. 2 of the Measures of Housing Registration of 2008.

witnessed a trend that in some places, notably in Shanghai, that the local housing authority and land authority have merged to issue a single certificate combining land use right and housing ownership. This is commendable, yet, whether this model can spread over to the whole country remains to be seen.

2.2. Co-existence of constitutive and declarative models

Although the civilian land registration system was referred to during the drafting the Property Code. However there was a debate on the choice of specific model within the civilian system. It was controversial as it is already not easy to fully understand the dynamic features between cognate systems, let alone to borrow it into a foreign soil with its unique social and demographic conditions. It was to be chosen between the Germanic model¹³ or the French model¹⁴, the difference between them being that the German-influenced ones make registration a requirement to establish a right to land or buildings while in the French-inspired ones registration merely declares the existence of rights that have already been created. The French model, also called the consensual system, is characterised by the fact that the consent of parties itself shall give effect to the sales contract in transferring land. The contract is valid from the moment when parties consent to its terms and conditions. The registration only makes the transaction effective against third parties but it does not give the creditor greater rights against third parties than against the person whose property is encumbered¹⁵. In contrast, the German model, sometimes called the constitutive system, is far more rigid than the French model since without registration there is no property right¹⁶. A civil-law notary is often required in the German model for a property right simply cannot exist without it being both notarised and registered.

In China, a hybrid registration system operates under the current laws. First, let us scrutinize the prevailing provisions in the Property Code:

Property Code Article 9: Unless otherwise provided by law, the establishment, modification, transfer and lapse of the right in real property shall only take effect upon registration pursuant to laws.

¹³ The German Bürgerliches Gesetzbuch, (Civil Code, BGB) Art. 873; the Swiss CC. Art. 656 (1); and the Austrian CC. Arts. 432, 451.

¹⁴ The French CC. Art. 158; the Italian CC Arts. 922, 2643 (1), 2644; and the Portuguese CC Arts. 1316, 1317.

¹⁵ Alejandro Garro, at 53.

¹⁶ BGB Art. 873 requires both deed/contract of sale and registration for validity.

Property Code Article 14: The establishment, modification, transfer and lapse of right in real property, which is required to be registered, shall take effect upon being registered.

From the above Chinese provisions, one may conclude that Chinese land registration system appears to adopt constitutive system on the fact that the Code stipulates that a change of certain property rights will take effect when they are duly registered. It seems that, like the German and Torrens system, registration is of the essence for conveyance of a property interest in China. However, with a closer look, one may discover the many exceptions in the same piece of legislation to this “no registration, no property right” norm. Exceptions refer to the declarative system that does not mandate the registration to effectuate the property interest. The current land recordation system can be said as a mixed model. The use right of the land of construction, the ownership of real estate, and the mortgage right of real property will come into effect after registration. In contrast, the recordation of contractual management rights of rural land, the use right of rural house site, the easement, and the floating charge merely enables them to stand against third parties. Table 1 surveys the scope of application of two different models in China.

Table 1 Evidence of the Two Models in China’s Land Registration System

For Registration of the following:	Type of Systems	
	Constitutive System	Declarative System
Type of Property	Alienation and Mortgages in <i>Flats, Buildings, Fixtures</i>	Creation, Alteration, Transfer or Extinction of the Property Right of the <i>Vessels, Aircraft, Motor Vehicles</i> (Art. 24)
	Creation of Mortgage of <i>Uncompleted Buildings</i>	Mortgage of <i>Movable Properties</i> (Art. 188)
		<i>Servitude</i> (Art. 1584)
Category of Land Use Rights	Transfer and Mortgage of the <i>Urban Land Use Right</i>	Exchange or Transfer of the Right to <i>Rural Land Contractual Management</i> (Art. 129)
		Transfer, Modification, and Cancelation of the Right to <i>Homestead Use in Rural Land</i> (Art. 155)

3. A BELATED PROPERTY TRANSFER THEORY

A major manifestation of the distinction between law of obligation and law of property in civil law systems is the relationship between contract for sale and conveyance (property transfer). To simplify, there are two major groups within the world systems that deal with this relationship: consensual system *vs.* *traditio* system. As discussed above¹⁷, the declarative model holds the consensual system. Under this system, a valid contract for sale itself is sufficient to render the property transfer. Nonetheless, the *traditio* system dictates that although a contract creates obligations, the transfer of property requires an additional element, delivery or act of conveyance in order to transfer a property right.

Depending on whether the property transfer is determined by the invalidity of sale contract, the *traditio* approach is further divided into casual and abstract systems.

When a transfer of a property right depends on a valid underlying contract, it is said the law adheres to the casual theory. On the contrary, abstract theory maintains that the invalidity of the preceding obligation-creating contract does not affect the validity of the property transfer, and that ownership can be transferred in the absence of a valid obligatory contract if there was a valid proprietary (real) contract, together with either delivery for movables or registration for immovable, as required in the *traditio* system.

When the Chinese Property Code was drafted, there was a heated debate on whether China needs to introduce the abstract system that has been in existence in Germany¹⁸. A majority of Chinese legal scholars, although valued its doctrinal refinement advocated by von Savigny and his disciples, took a dim view of this theory. There were two primary reasons for their objections. First, it is not user-friendly. As it departs from the actual practice of real estate transactions, it goes beyond the common understanding of the people. It makes the legal relationship unnecessarily complex and obscure¹⁹. Second, the function of the theory is to ensure the certainty and

¹⁷ Please refer to Section 2.2 “Co-existence of declarative model and constitutive model”

¹⁸ Actually, such a debate can be traced back to early 1980s when the General Principles of Civil Law (the GPCL), the prevailing law laying out general framework on Chinese civil law was drafted.

¹⁹ YAO HUI, “Recent development of Chinese Civil Law”, *Journal of Chinese and Comparative Law*, Vol. 5 No. 2, p 299.

conclusiveness of registration by providing protection for the third party who is aware of the vitiating factors in formation of contract. However, this function has been largely, if not completely substituted, by the principle of *bona fide* acquisition entrenched in Chinese civil law for a long time.

The Property Code includes the principle of *bona fide* acquisition (acquisition in good faith). *Bona fide* acquisition occurs when a purchaser acquires the ownership of the property without leaving any room for the original owner to make a claim for its return. In the code, three conditions must be met for acquisition in good faith: (1) the *bona fide* purchaser must not be aware that the transferor does not have legal entitlement to transfer the property; (2) the purchase price must be reasonable; and (3) the transfer of the property, if so required, must be registered. Failing any of these requirements, the original owner can recover the property²⁰.

In summary, Chinese law has avoided dealing with the doctrinal distinction between casual and abstract theory. In any event, the additional requirement is linked to the contract somehow because invalidity of the contract will defect the proprietary effects of conveyance. This, however, does not denote that Chinese law embraces casual theory absolutely. In practice, once registration is completed, if the purchaser challenges the transfer of title on the ground of an invalid contract, there is little need to discuss whether there should be a causal link or no link between the underlying contract and proprietary effect. Rather, what the purchaser needs to do is simply relying on the *bona fide* acquisition criteria set above to redress.

4. POWERS OF REVIEW AND PUBLIC ACCESS TO INFORMATION

Since registration is the ultimate component to trigger the transfer of property interests²¹, the scope of the Registrar's authority to review documents deserves discussion. Generally, powers of review by a Registrar are less stringent than that of German counterparts. In Germany, the powers of review extend not only to verify that the document complies with formal requirements, but also to examining whether the documents reflect that the applicant has a genuine and substantive right to the property. In addition, the German Registrar also has a power to verify whether the description of property, such as location, size and boundary matches the reality. If the Registrar is suspicious of any fraud or mistake, a registration application

²⁰ Art. 106 of the Property Code.

²¹ Exceptions i.e. the application of the declarative system are illustrated above.

suspends for further investigation. This is not the case in China as first, different from Germany, China's Registrars are part of governmental agency rather than part of judiciary. The administrative staff does not enjoy such wide power and discretion vested to and exercised by a judicial officer. Second, China does not have a uniform constitutive or compulsory registration model as in the case of Germany. For those property rights which do not require registration to be effective, a strong power of review is unnecessary and redundant. Third, since a right entails an obligation, having a strong power to verify denotes an obligation to make the registration entries reliable and conclusive, otherwise a liability to pay compensation will arise. In Chinese law, all entries on the land registry are deemed to or presumed to be correct unless there is evidence showing the mistake or defects of the Registrar²². On the other hand, a strong power of review should guarantee the correctness of the records giving its superior power in ensuring the truth of the documents. Because Chinese law only presumes the correctness of the registry, not guaranteeing, by implications, it appears that the Chinese Registrars would only have weaker power of review than their German counterparts. Fourth, it is not viable for a municipal Registrar with dozens of staff to deal with tens of thousands of applications every month vested with the German-like strong power of review. Moreover, at present the Registrar's staff are not well-trained enough to engage the strong power to review. In summary, the strong power of review is neither practical nor feasible in today's China.

According to the Property Code, when an applicant submits documents for registration, he needs to provide necessary documents such as proof of title, the location and size of the immovable property for registration to the Registrar. The Registrar then performs the following duties: (1) check the proof of title and other documents provided by the applicant; (2) make enquires to the applicant; (3) record relevant items accurately and promptly; (4) fulfill other duties prescribed by law and regulations²³. Under the circumstance where a further investigation is necessary in order to ensure certainty, the Registrar may require the applicant to submit supplementary materials or conduct a field survey of the immovable property²⁴. From these provisions one can say that while Chinese law does not follow German style of strong power of review, the Registrar is to some extent vested verification power to check the authenticity of the contract for sale.

²² Art. 17 of the Property Code.

²³ Art. 12 (1) of the Property Code.

²⁴ Art. 12 (2) of the Property Code.

Since the key function of land registration is ensuring transparency, public access to information of the registry is relevant. However, this leads to a number of practical questions, such as who is entitled to inspect the registry record? Can the Registrar run an open-door policy allowing all persons to freely examine the land registration information? Chinese law answers this question in the negative. According to Article 18 of the Property Code, only those who can show that he has a legitimate interest in inspecting the document is allowed access. In addition, the inspecting parties need to pay a fee for such a purpose. This makes sense because otherwise the Registrar's workload will unnecessarily rocket. The procedures to access the land registry have been fine-tuned in the Measures of Housing Registration and Measures of Land Registration.

5. PRELIMINARY NOTICE AND CAUTION AGAINST DEALINGS

5.1. *preliminary notice system*

The Property Code formalized the preliminary notice system for the first time in Chinese law. It was borrowed from German *Vormerkung*²⁵. The preliminary notice enables the registration of a personal right, usually a claim against a holder of a property right. It primarily functions as a pre-emptive mechanism to safeguard the claim holder against the third party from engaging a future dealing with the registered owner. In substance, a preliminary notice serves to suspend the Registrar and preserve the status quo. Consequentially, a preliminary notice has the legal effect of fettering the registered owner's power to dispose the interests attached to the property after the notice has come into force. In this sense, it can be argued that a preliminary notice mutates a personal claim, i.e. turning obligatory interest into a property-like right with a pre-emptive feature. In Chinese law, the eligible applicant for preliminary notice is the original right holder of realty registration. For instance, when A as a purchaser signed a pre-sale contract of a flat with B, as a developer, A is the right holder of a preliminary notice. Once a preliminary notice is submitted, the Registrar shall not accept any application to dispose of the property concerned without the right holder's consent²⁶. This is explained in the following rule:

²⁵ It has been argued that the registration of a pre-sale contract as regulated by the Urban Real Estate Administration Law of 1994 is an early form of preliminary registration system. See Zhu Yan., Gao Shengping and Chen Xin, Comments on Chinese Property Law, (Peking University Press, 2007) p 140.

²⁶ Art. 68 (1) of the Measures of Land Registration of 2007.

Property Code Article 20:

When the party concerned intends to sign an agreement on the purchase or sale of a house or other property right of immovables, he may, in accordance with what is agreed upon, apply to the registration office a preliminary notice (advance registration), in order to ensure the realization of his property right in future. Where after the registration is made in advance, such immovables are disposed of without the consent of the right holder of the preliminary notice, the property right of such immovables shall be invalid.

In Chinese law, a preliminary notice is applicable in the following situations. By way of preliminary notice registration:

(1) when a pre-sale contract of an apartment is signed off, by way of preliminary notice, a purchaser may request a developer to deliver the possession as well as other interests related to the apartment²⁷;

(2) When a developer obtained a contract on the transfer of the land use right for construction, the developer may request the Land Authority to transfer the interests in the acquired land²⁸;

(3) when transferring the ownership of housing caused by purchase, exchange, and donation and other legal activities, the transferee requests the original owner to transfer the interests related to the housing²⁹;

(4) when a creditor wants to set up mortgage on a commercial residence sold with a pre-sale contract, although to apply a mortgage registration is an ideal way for legal certainty, under circumstances where it is inconvenient or difficult to apply for a such registration, under the Measures of Land Registration, the creditor is allowed to apply for a preliminary notice³⁰;

(5) when creating a mortgage over an apartment, the creditor wants the mortgagor to register the creditor's rights with the mortgage³¹. It is of course ideal for the creditor to apply a mortgage registration. However, if other situations prevent the creditor from doing so, a preliminary notice suffices to ensure some legal certainty³²;

(6) when a contractual management right of rural land or servitude is conditional upon the occurrence of a future event, these rights do not become effective immediately when the contract comes into effect. In this situation, the parties are suggested to apply for a preliminary notice³³;

(7) when the real rights become effective immediately as a result of a contract of contractual management rights of rural land or easement entered into force, if other conditions make the registration of change of ownership impractical, a preliminary notice is a good solution³⁴.

²⁷ Art. 20 (1) of the Property Code.

²⁸ art 62 (1) of the Measures of Land Registration of 2007.

²⁹ Art. 67 (3) of the Measures of Land Registration of 2007.

³⁰ Art. 67 (2) of the Measures of Land Registration of 2007.

³¹ *Ibid.*

³² *Ibid.*

³³ art 67(4) of the Measures of Land Registration of 2007.

³⁴ Article 20 (1) of the Property Law, an open-ended provision, allows room for such an interpretation.

It is notable that a preliminary notice is dependent on the interests under its preservation. When the interests have been transferred or extinguished, the preliminary notice is also transferred or extinguished. The preliminary notice is removed if the right holder of the preliminary notice fails to apply for registration within 3 months of the day when the preserved interests have extinguished or the application for a registration of real right has become possible³⁵. The preliminary notice provides a powerful yet temporary protection of unregistered interests. Because the preliminary notice can be submitted unilaterally, their use is prone to be abused. Therefore, it is recommended that when a special statute on land registration is drafted, it should include provision making the person who applies for a preliminary registration liable to pay compensation to any person sustaining monetary loss caused by that application³⁶.

5.2. *cautions against dealings*

According to Article 19(2) of the Property Code and Article 60(1) of the Measures of Land Registration, as well as Article 76 of the Measures of Housing Registration, if the nominal person of the registration does not agree to changing the record when challenges have been raised by third parties, interested parties are entitled to apply for a caution against dealings. Where a caution against dealings is entered into the register, no entry in respect of a dealing or disposition may be made by the Registrar. In essence, a caution against dealings is a restriction by imposing an outright ban on any dealing:

Property Code Article 19

Any right holder or interested party that believes that any entry recorded in the registry is wrong may apply for correcting the registration. Where the right holder recorded in the registry agrees to correct the registration in written form or has evidence to prove that the registration is wrong, the registration office shall revise the registration accordingly.

Where the right holder recorded in the registry does not agree to the change, the interested party may apply for a caution against dealings (dissidence). If the registration office approves the cause but the applicant fails to bring an action within 15 days since the date of caution entry, the cause against dealings shall cease to be effective. If the caution is inappropriate and causes damages to the right holder, the holder may request the applicant to make compensation for damages.

³⁵ Art. 20 (2) of the Property Law, art 62(3) of the Measures of Land Registration of 2007.

³⁶ The claimant for compensation shoulders the burden of showing that the preliminary notice was submitted without reasonable cause.

Another instance where the Ministry of Land and Resources may issue a caution of dealing is when a challenge has been lodged in accordance. The Ministry of Land and Resources shall record the relevant challenges on the register, issue a certificate of a caution against dealings, and notify the right holder of the original registration by a written notice³⁷.

During the process of cautions against dealings application, the Registrar, without original right holder's consent, shall not deal with any application of registration of land ownership change or establishment of mortgage rights on land³⁸. The Measures of Housing Registration further stipulates that if the registrar has accepted an application of cautions against dealings, it shall record the challenges raised by third parties in the housing registrar³⁹. During the process of a caution against dealings application, if the original right holder disposes of the registered housing and applies for registration, the application should be withheld by the Registrar⁴⁰. When the registrar has accepted an application by a right holder but has not recorded relevant items in the register yet, and the third party challenges and files cautions against dealings, the registrar should stop processing the right holder's registration and notify the applicant by a written notice⁴¹.

Although the mechanism of cautions against dealings can protect the real right holder, it should be of temporary nature since the immovable property is in an unstable legal status under such cautions. In order to restore a clear legal status of the immovable property, the law limits the effective period of a caution against dealings application. According to Article 19(2) of the Property Law, if the registrar approves such an application, the applicant must sue within 15 days of the application otherwise the application becomes ineffective. The rationale behind this limit is that the inaction of the applicant demonstrates a lack of interests in seeking protection of his or her rights. Hence, despite a caution on dealing may cause harm to the original right holder and affect trade efficiency⁴², this short time limit available for the applicant to act serves as a balancing tool between the interests of all parties. Moreover, the original right holder may

³⁷ Art. 60 (2) of the Property Code.

³⁸ Art. 60 (3).

³⁹ Art. 77.

⁴⁰ Art. 78 (1).

⁴¹ Art. 78 (2).

⁴² Hu Kangsheng, *The Commentary in the Property Code of the PRC*, Law Press, 2007, p 60.

request a compensation for the loss caused by inappropriate (invalid) cautions against dealings⁴³.

6. LIABILITY FOR MISTAKES AND FRAUD

The claimant for compensation shoulders the burden of showing that the preliminary notice was submitted without reasonable cause.

Property Code Article 21:

Any party concerned that provides false application materials for registration and causes damages to any other person shall undertake the liability for compensation. Where a registration organ causes damages to any other person because of any mistake in registration, it shall undertake the liability for compensation. After making the compensation, the registration organ may recover the amount from the person causing the registration error.

In reality, there are three major causes of loss. First, the loss can be attributable to the negligence of the registrar's officers. Second, the discrepancy between records and true legal position may be due to fraud, forgery and mistake made by a transferee. Third, there may be a malicious conspiracy between registrar's officers and the party who provide forged documents. In the first instance, the party who suffers loss can simply invoke general principles of tort liability and the institution's vicarious liability for negligent or intentional wrongdoings of its officials. According to the Property Code, in this situation, the Registrar shall bear the responsibility for compensation and shall have the right of recourse to the person who is liable for such mistake⁴⁴. In the second situation where the loss is caused by the person who committed fraud, under the fault-based liability, the wrongdoing party is liable for the loss caused. This is to say, when the wrongdoing party submitted a forged document and the Registrar's staff exercise the due diligence to review it but do not discover the forgery, the liability to pay compensation should be attributable to the wrongdoing party.

Complications arise when there is connivance between Registrar's staff and wrongdoing party. In this situation, who is liable to pay compensation? The Registrar? Or the wrongdoing party? Or both based on the proportionate liability? Or just the one picked by the suffering party? The Property Code does not address this issue and thus is left to a future special statute on land registration to determine the position. Another tricky question

⁴³ Art19 (2) of the Property Code.

⁴⁴ Article 21 of the Property Code.

unanswered by the Property Code is the legal nature of the Registrar's liability. Is this a governmental liability or a simple civil liability? Despite a recent eye-catching case dealing with the governmental liability of the Registrar's mistake which involves a successful compensation claim of RMB 8.7 million⁴⁵, the majority of academics hold the view that the institutional liability to pay compensation should not be a governmental liability but an ordinary civil liability. This is mainly because first, without the creation of a public indemnity fund, the financial source of the Registrar cannot meet the demand of compensatory claims. Second, with a comparative glance, more often than not, the government liability for Registrar's wrongdoings is applicable to those jurisdictions where the Registrar enjoys a wide range of powers to verify the transaction. As discussed above, Chinese Registrars are not vested with such strong powers to review. Third, recently, the Supreme People's Court categorizes the Registrar's compensatory liability for mistake into the group of civil disputes via property rights disputes under the Rule on Cause of Action of Civil Cases in 2011⁴⁶. This reflects the judicial attitude to treat such case as a civil claim.

If the view is taken that the registrar should be liable for compensation for its own mistakes, the registrar must have a deep pocket to satisfy those seeking the recovery of loss. Common sense dictates that one would not wish that the public funding pool be hampered by clerical errors or even fraud. Inspired by the Torrens jurisdictions, maintaining an insurance fund to remedy their mistakes has been seriously advocated by both Chinese legislators and legal scholars. The details on the creation and administration of such indemnity fund need to be fleshed out in the future legislation. However, two recommendations are provided. First, the coverage provided by the proposed insurance fund cannot be overly comprehensive. For example, the compensation provisions should deny compensation for errors, omissions and mis-description resulting from the failure of an agency to notify the Registrar of the creation, amendment or termination of registrable rights. In such a case, the notifying agencies should be liable instead. Second, while the indemnity fund is in dire need to be set up, internally, the disciplinary rules for malpractice by registrar staff are needed in order to improve the quality of land registration.

⁴⁵ Shenzhen Non-ferrous Metals Co. Ltd. v. Shenzhen land, Housing and Urban Planning Authority 2009.

⁴⁶ The Supreme People Court's Rule on Causes of Action of Civil Cases (2011) Fa fa No. 41.

7. PROBLEMS AND PROSPECTS

As seen from above, the Property Code has overhauled and consolidated the land registration system. On the positive side, the property code contains two new mechanisms to protect private property tenure expectations more efficiently. These mechanisms have been borrowed from the German land registration system, namely preliminary notice and cautions against dealings. Other examples are the hortatory provisions setting up a uniform registration office at the national level and an indemnity fund for mistakes and fraud. Unfortunately, it leaves many concrete details unresolved, such as the crucial question of, which offices should be vested with uniform authority to carry out registration and the procedures for claiming compensations from the proposed indemnity fund. Even the question on which property rights are registrable has not been resolved. For example, whether property rights pertaining to underground garages, underground shopping centres, subways, and condominium roof gardens can be registered separately was unclear. All of these issues will need to be resolved in a special statute on immovable property registration. In spite of that, up to now such a much needed statute has not been put on the legislative agenda by the National People's Congress (parliament).

As the concept of private property ownership is still new and evolving in China, the incremental legislative approach seems to be a natural choice and, may, also be necessary. However, the speed of legal development must also keep pace with the increasing number of middle class owning private housing. One interesting phenomenon deserves noting that as national laws are abstract, hortatory and lacks applicability, the local regulations tend to fill the gap by fine-tuning the details. In return, when national laws such as a land registration statute are being drafted, the successful and relevant local regulations that have been proven by years of operation may serve a template; one example is the nuanced Shanghai local rule on Land and Housing Registration that has been shown be effective, and thus was commended by many scholars and practitioners. This fascinating interplay between national law and local regulations merits further research.