

Rural Land Rights under the PRC Property Law

While land for urban and industrial use has been largely secured by the *PRC Property Law*, Chinese farmers have yet to achieve secure and marketable land rights. The law could be instrumental in bringing about changes in this regard, *but only if it is fully implemented*. Authors Zhu Keliang and Li Ping examine the status of rural property rights and recommend a series of institutional measures, such as improving compensation measures for land-losing farmers as well as standardizing registration and renewal processes, which will be necessary in order to make the law a reality.

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The landmark *PRC Property Law* [Property Law] adopted by China in March became effective on October 1 2007. The legislation sets the record for taking the longest time to be successfully passed, as it took the National People's Congress thirteen years and eight rounds of formal deliberations (versus the usual three for most bills), and also establishes for the first time the legal concept of private property ownership in China.

BACKGROUND ON RURAL PROPERTY RIGHTS

The timing of the law could not be more fortuitous for the nearly 800 million farmers in China, as their fundamental property rights – the right to land – now face increasingly grave threats from state expropriations and other sources. Despite numerous corrective measures by the central government, the number of land expropriations has skyrocketed in recent years, affecting the lives of millions of rural residents across the country. According to a large survey conducted by the Seattle-based Rural Development Institute in 2005, approximately two-thirds of all land-losing farmers were dissatisfied with the compensation paid for their losses. This dissatisfaction has become the top grievance of Chinese farmers, resulting in much social unrest.

Coinciding with worsening land grievances in the countryside, the rural-urban income disparity has also become increasingly aggravated. In 2006, the urban-rural income ratio reached a record high of 3.28:1. Additionally, the official income ratio does not reflect many of the benefits such as basic medical care, elementary education, and social security insurance that are mostly available only in cities. It is clear that the wealth created by China's economic reform in the past decades has yet to spread evenly into the vast countryside.

Secure, long term rights to land are a necessary foundation for making mid- to long-term investments in land and creating sustainable rural

economic growth. For example, small-farmer systems operating with secure individual land rights were the source of huge increases in agricultural production and incomes in Japan, South Korea, and Taiwan after World War II. The impact would be tremendous if such results were replicated in the PRC today.

Such achievement was partially realized in the late 1970s and early 1980s when China dismantled its collective farmland system by giving individual farmers limited freedom to farm. After the initial success, this system spread rapidly. Technically, the collectives remained the land owners and contracted out land parcels to individual households to use for private farming for a limited period of time, usually allocating the land on an equal per capita basis. This scheme is called the "Household Responsibility System" or the HRS. The introduction of the HRS unleashed the energy and resources of hundreds of millions of rural families and jump-started China's agricultural growth. As a result, between 1979 and 1984, the average net income for rural residents increased by 11% annually, compared to an average annual increase of 8.7% for urban residents.

However, farmers' land rights under the HRS were generally insecure and short-term. Although land use rights were theoretically allocated to farm households for a specific period of years, most villages in China adopted the practice of periodically "readjusting" or reallocating landholdings in response to changes in individual household makeup, total village population, loss of land through land takings or expropriations, or other dubious purposes. Rights to a piece of land subject to periodic and unexpected readjustments cannot be considered either secure or marketable. Like any other property holders or owners, farmers will not make mid- to long-term investments on a piece of land that they may not possess the next year. With land improvements constrained, the initial benefits brought by the HRS tailed off beginning in the mid-1980s, and Chinese farmers' income gains again started to lag far behind those of urban residents.

The central government began to seek a solution in 1993, issuing a policy directive that seemingly provided that farmers' rights to their farmland should last for thirty years. The thirty-year policy was embodied into formal law for the first time as a result of the adoption of the revised *Land Management Law* (LML) in 1998. The LML places serious restrictions on land readjustments by providing that land readjustments should only be conducted in isolated cases when they are approved by two-thirds of villagers and by relevant government agencies.

Under these policy and legal reforms, China began the second round of contracting that extended farmers' land use rights to thirty years in the mid- to late-1990s (the first round of contracting was the initial HRS). Written contracts or certificates were issued as a part of the campaign especially with the advent of the revised LML.

Then, in 2002, China passed the *Rural Land Contracting Law* (RLCL), with sixty-five articles devoted to farmers' land use rights, rather than one article and part of another as in the LML. The new law represents a breakthrough in the process of strengthening farmers' thirty-year rights and is the first piece of modern Chinese legislation to exclusively address farmers' rights to their most important asset. Going beyond the LML, the RLCL requires an end to the practice of land readjustments in China in all but extreme cases such as natural disasters.

The RLCL reinforces the LML's requirement that written contracts and certificates be executed and issued to confirm farmers' rights to land. In addition, going beyond the bare acknowledgement of marketability of the farmers' land rights in the LML, the RLCL spells out in detail the right to lease, assign, exchange, and carry out other transactions related to contracted land (except for sale and mortgage). Unfortunately, however the RLCL never received much publicity or implementation measures.

Besides land readjustments, takings or expropriations of land by government have become another major threat to farmers' land rights in the past decade. The demand for land for industrial or urban expansion continues to grow, as millions of poor farmers are rendered landless. Against such a backdrop, the Property Law was enacted and could become significant and relevant in many aspects concerning rural land rights.

THE PROPERTY LAW AND AGRICULTURAL LAND RIGHTS

First of all, the Property Law characterizes farmers' land rights as property rights or rights in *rem* (as opposed to contractual rights as apparently defined by previous laws). This definition provides greater legal protection for farmers' land rights. In the case of state expropriation of farmland, the concept of property rights dictates that such a loss should be compensated for its full value and the compensation should go to rights-holders who suffer the loss. The compensation formula that arbitrarily caps the compensation for expropriated farmland, as in earlier laws, needs to be revisited and probably discarded. Instead, the value of the loss must be determined by independent appraisals and mutual negotiation between the parties.

The establishment of land rights as property rights also means that an expropriating government agency must change its current practice that prevents the rights-holders or land-losing farmers from meaningfully participating in the bargaining process. All procedural due process associated with the sanctity of property rights thus should now be afforded to farmers.

Land rights as property rights should also serve as a foundation for strictly prohibiting another harmful practice - land readjustment. Despite explicit prohibition against land readjustments, the practice is widespread and ongoing. With the Property Law in place, readjustments will become much harder to justify because property rights, once created, cannot be taken away and reallocated administratively without compensation.

Secondly, the new Property Law significantly improves the security of farmers' land rights by extending their duration. Individuals' land rights have specific terms of duration - in general, 70 years for urban residential land and 30 years for farmland. Before the Property Law,

confusion existed as to what would happen once land terms expire. The Property Law eased this uncertainty by providing that, when the term (currently 70 years) for urban residential land ends, it will automatically renew and be extended. In the case of rural land, when the present 30-year term expires, the law states that "farmers should continue extending the contract according to relevant law." This language is not as strong as the language covering urban residential land (automatic renewal), but it is clear that the thirty-year term will undoubtedly be extended given all present land laws and policies favoring long-term security for farmers' land rights.

The remaining question is of course the length and manner of the extension. The best scenario would be automatic and repeated renewals by operation of law, which would essentially perpetuate farmers' rights to their land. This option would create the least amount of uncertainty. If farmers are required to pay a fee, or go through a land readjustment to obtain their renewal, then the security and the market value of rural land will be considerably decreased as the end of the term looms. It is unclear right now if or when China will consider granting farmers full, private ownership of land; therefore, a modest amount of uncertainty in land tenure, particularly at the end of the term, will remain despite the new Property Law.

Thirdly, the law provides that all real properties (land and houses) should be registered in a unified, national registration system. To fulfill this legal mandate will require surmounting monumental practical challenges. For example, urban registration - which is fairly sophisticated in major cities but not as much so in smaller cities - adopts a dual registration model where land and structures are registered separately by different government agencies. Rights concerning land are registered by the local offices of the Ministry of Land & Resources, while buildings and fixtures are registered by the Ministry of Construction. The dual registration system has already caused considerable confusion and inefficiency, and a few cities are considering experimentation with consolidating these two registration systems. This experimentation will require significant work on streamlining separate registration rules and integrating registration records. Another critical question to answer will be which Ministry should be in charge of the consolidated registration, or whether an entirely new agency should be created for such purpose. This question is as much a legal issue as a political one.

Meanwhile, there is virtually no functional registration in a modern sense in the countryside. According to the 1998 LML and the 2002 RLCL, farm households should receive contracts and certificates for their contracted farmland. According to the same 2005 survey by the Rural Development Institute as referred to earlier, 63% of farmers received one or two pieces of the documentation, but a mere 10% of the documentation contained all the necessary elements (such as names, specific contract duration, adequate land description, and other details) and could be considered legally compliant or valid. Stated otherwise, registering rural land rights will require a tremendous amount of on-the-ground work such as surveying, record compilation, and rights adjudication because the existing documentation is fundamentally inadequate.

Next, the question of how to integrate rural registration with urban registration arises. This question is a significantly more troublesome

challenge for two reasons. First, there are a number of agencies such as the Ministry of Agriculture involved in issuing model documentation for different types of rural land, such as arable land, grassland, forest land, waste land, water surfaces, residential foundation plots, and others. A consolidation of registration would mean a consolidation of various agency authorities, a task of enormous difficulty.

Also of concern are the rules on land takings or expropriations. The law and practice concerning the conversion of rural land to urban land must be improved before any meaningful integration can take place. This area will have significant impact on how a rural land registration should be designed and eventually integrated with an urban system.

Finally, the issue of land takings must be addressed. Article 42 of the Property Law seems to be a step forward in stating that, in addition to the compensation provided by the 1998 LML, affected farmers should have social security and their livelihoods should be protected. This article formally incorporates the policy directive established by a central document issued in 2004 and is consistent with best practice internationally, which is that any land expropriation or resettlement must not adversely affect the living standards of the affected people. The key now is to figure out how to put this general principle of law into practice. As China is beginning to establish a general social security system for all low-income rural residents, it should be noted that the compensation to land-losing farmers should be entirely independent of any general social security they may or may not receive. In other words, the government's responsibility for providing general social security benefits to its citizens is separate from its duty of offering just and fair compensation for farmers' loss in land takings.

RECOMMENDATIONS FOR FURTHER REFORMS

Regardless of the above, the issue of utmost importance today is ensuring that all farmers' land rights are secure and protected during the present thirty-year term. If large numbers of farmers continue to lose their contracted land through illegal takings or readjustments, the question of future renewal could become steadily less significant. Given current circumstances in rural China, the full implementation of this law is crucial, and it will require concerted and focused efforts by the government to carry out the law at local levels including the following three important aspects.

Issuing and collecting adequate documentation

First, the government must issue documentation to all farmers to confirm their land rights. The first task should be to make sure that more than 90% of all farm households receive the necessary documentation. The central government recently announced an ambitious plan to reach a 90% issuance goal by the end of this year, indicating a strong desire to make sure farmers' land rights are confirmed and secured through the documentation-issuance process.

In addition to the quantitative goal, the documentation to be issued must comply substantially with controlling laws and regulations and contain all necessary elements (e.g., adequate land description, specific starting and ending dates for the thirty-year rights, etc.). In the case of readjustments, takings, or disputes involving transfers, valid contracts or certificates will provide enhanced protection for farmers' rights.

Improving methods of compensation for taking of land

China must also reform its land takings law to improve compensation standards and procedural fairness. The compensation formula fixed by the 1998 Land Management Law has been proven drastically inadequate. The overarching principle should be that the living standards of the affected people should not be lowered as a result of the land taking. Because of their relatively low education and non-agricultural skill level, it is extremely difficult to transform traditional farmers into urban workers after their land is gone. Therefore, any compensation package must be able to ensure long-term livelihood as required by the Property Law. Equally important, the law needs to make sure that the bulk of the compensation actually goes to the land-losing farmers. Since secure thirty-year land rights represent 75-95% of the economic value of full private land ownership, farmers should be allocated at least 75% of the total compensation, and the share for collective landowners and local governments should not exceed 25%.

Moreover, affected farmers should have the right to participate in and influence the decision-making processes concerning land takings. Laws and practices for land takings should be revised to increase farmers' participation and create a process that brings government, commercial developers, collectives and farmers together to resolve relevant issues in a far more transparent and democratic manner. Farmers should receive meaningful notices in advance and be fully informed about forthcoming decisions, and public hearings and legal remedies should be easily accessible to all aggrieved farmers.

Another important complementary measure could be the use of an escrow agent in lieu of directly handing the compensation over to the collectives and then asking the collectives to distribute it to farmers. Laws need to be reformed so that an independent state bank can be designated as the unit responsible for receiving the payment of the required compensation from the state or the land developer and for receiving all documentation from the collectives and land-losing farmers. Upon completion of the transaction, the escrow agent would then be responsible for distributing the compensation directly to affected households, greatly decreasing the possibility of illegal interceptions by collectives or local governments.

Allowing the mortgage of farmland

Finally, the government should allow the mortgage of farmland. One of the earlier drafts of the Property Law permitted farmland rights to be used as collateral for obtaining bank loans or credit, but this provision was eventually removed. Access to credit is an essential factor in farmers' ability to make long-term, productivity-enhancing, and income-generating investments on their land. The existing legal prohibition against mortgages grows out of concerns over farmers' permanent loss of their land rights to the mortgagee due to loan default and foreclosure, thus bringing back the unpleasant collective memory of landlords in times past. Such concerns could be addressed through additional legal measures as well as improved banking practices. For example, only a selected few state banks, at least initially, could be allowed to engage in mortgage lending. Any borrower in default should have a reasonably long period of time (e.g., no less than 90 days) to cure the default before any foreclosure proceedings can begin. In addition, the foreclosing bank cannot change the nature of the use of land, such as from agricultural to urban.

CONCLUSION

There is a long way to go before Chinese farmers achieve secure and marketable land rights. The Property Law will be considered a landmark event during this process, *but only if it is fully implemented*. Besides the primarily legal reforms recommended above, a series of institutional measures need to take place as well to make the law a reality. For example, widespread publicity of the law, through multiple channels, is critical to improve awareness among farmers and local officials. The people's courts need to improve their accessibility and credibility by allowing the cases concerning farmers' land rights to be heard in a

more unbiased and transparent manner. If resources permit, legal aid should be made available to farmers in need as well.

"Granting legal title to peasant land could, with the stroke of a pen, substantially narrow the wealth gap between urban and rural residents." This is was written by former U.S. Federal Reserve Chairman Alan Greenspan in his new book, *The Age Of Turbulence*, speaking of China. A fully implemented Property Law could be that "stroke of a pen," serving as a foundation not only for further economic growth but also for the formation of the rule of law in the countryside.