

Who owns China's housing? Endogeneity as a lens to understand ambiguities of urban and rural property☆

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ABSTRACT

When considering development and urbanization, a critical question relates to the institutions on the basis of which these ought to be achieved. Formal, private and titled property rights are oft considered as essential in this. However, contrary to the notion that such rights can be exogenously designed and implemented, this paper ascertains that the property rights of Chinese housing stem from *endogenous* development. The institutional amalgam of contradictory, overlapping and opaque rights points to endogeneity – resultant from actors' multitudinous interactions, bargaining and conflict – rather than the reverse. The housing property rights are analyzed in an evolutionary sense around ownership as an idealized concept. In so doing, the paper describes how the Chinese housing rights' structure developed into its current form; what has been commercialized and what not; and what is formally defined and what not. The analysis covers a half century: the collectivist period since 1962 until the present, with a focus on the time since the 1998 Housing Reforms. The analysis includes the main types of urban and rural housing. In light of the endogenous structure of China's housing, the article cautions against precipitous institutional intervention, and contends that formalization and titling should proceed with great care.

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1. Introduction

For many years, foreign observers have ascertained that China's economy needs formal, private and clear property rights to safeguard growth and investments (Ellickson, 2012; Zhu, 2005; Palomar, 2002). Paradoxically, however, Chinese real estate underwent an explosive growth apparently without these predicted institutional forms. The supposed relation between institutional form versus performance concurs with principles of what is generically referred to as “neoclassical” economics and its institutional pendant, neoinstitutionalism (Lawson, 2013). It is not suggested here that there is an individual body of thought that represents the “neoclassical” theory as consistent in its

entirety. Instead, what is referred to as such, consists of a variety of different strands of thought that may contradict or concur.

However, it is maintained that there are certain neoclassical axioms or postulates around which scholarly debate and empirical validation occur. These postulates have significant influence over urban policy, planning and intervention, and include:

- i). Institutions can be *exogenously* designed by intention;
- ii). Institutional change is predicated upon *equilibrium*;
- iii). Institutional *form* determines institutional performance, in other words, formal, private and clear tenure are conditional for economic growth and investments (Ho, 2016a: 1124–25 and 1129).

The prime objective of this article is to debunk the first postulate on exogeneity, and in so doing, provide the empirical evidence that institutional form indeed does not correspond to formal, private and clear rights as predicted for growth and development. Thus, the second postulate on equilibrium, and its opposing concept of “dynamic disequilibrium” will not be discussed in this writing.¹

¹ The discussion on dynamic disequilibrium is taken up in a separate writing, see (Ho, 2017).

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Endogeneity – as an important premise in Original Institutionalism² – holds that institutional structure is *not* the result of intentional design by which institutions can be “wrongly” or “rightly” engineered (Ho, 2013: 1093–6). Instead, it emerges in an autonomous fashion resulting from actors’ incessant, multitudinous interactions. Put differently, although actors may have intentions, institutions spontaneously emerge as an *unanticipated* outcome of actors’ infinite bargaining and conflict; in effect, result from an endogenous, *Unintended Intentionality*.

As the founder of the Austrian school of economics so eloquently phrased:

“How can it be that institutions which serve the common welfare and are extremely significant for its development come into being without a common will directed toward establishing them?” (Menger, 1871: 146).

The notion of endogeneity underpins the writings of Ferguson’s (1782: 205) seminal monograph, which in turn inspired thinkers such as Menger (1871: 146), before making its way into the Original Institutional school (Veblen, 1914: 31 and 334; Hodgson, 2004: 99–122).

A first step to understanding the endogenous nature of institutions consists of uncovering in minute detail how they have evolved into what they are today; conducting an “institutional archaeology” as it were, in a methodological fashion similar to that propagated by Original Institutionalism (Clark, 1927: 221). By so doing, we might be in a better position to understand the forces of conflict, bargaining and interaction that shaped institutions in the way how they have emerged. In this context, the property rights of Chinese realty might provide an interesting case because of a dual reason: i) the boom in property development that has continued over the past two decades (Stein, 2012: 4; Hsing, 2010; Lin, 2009: 274–5); ii) the apparent paradox that exists if it can be validated that this boom was predicated upon institutional forms that are out of sync with the third postulate of neoclassical thought.

In this context, the article delves into the property rights that underlie the housing sector of one of the largest emerging economies: The People’s Republic of China. It will do so in a comprehensive sense, dealing with urban *and* rural property. The paper is based on an in-depth review of historical government and Chinese Communist Party (CCP) documents, Supreme People’s Court rulings, minutes of the 1982 Constitutional Revision, laws and legal interpretations, state regulations and notices, reports on law enforcement and policy implementation, and other Chinese textual sources.

The question around which this article revolves is straightforward: who exercises the ownership of China’s housing from 1998 until today? The question is operationalized through three sub-questions: 1) How did the ownership of Chinese rural *and* urban housing evolve into its current form? 2) What has currently been commoditized (can be sold on the market) and what not? 3) What inconsistencies and ambiguities exist in the present legal and regulatory framework?³

The institutional analysis proceeds along three dimensions. First, it aims to assess what kind of property rights citizens and peasants enjoy through the lens of *ownership* as an idealized institution. In effect, it compares China’s existing housing rights by referring to an *ideal-type* ownership as the “supreme, absolute right”, as it were (Van den Bergh, 1996: 172). Using ownership in this way, simultaneously acknowledges its encumbrances in daily praxis.⁴ A discussion of how ownership is construed here is provided at the end of Section 2. Second, the institutional analysis zooms in on the *state-intended* property rights of housing. Its primary objective is to take stock of the “Formal”, the property rights that the state

formally accorded to citizens and peasants, in order to understand the pitfalls when intervening in that institutional fabric. Although important in their own right, the analysis leaves aside the “Actual” (experienced and lived) property rights, as well as the “Targeted” (desired and sought after) property rights.⁵ Three, the article digresses on the preceding collectivist, Maoist period since the early 1960s, while concentrating the bulk of the analysis on the time since the ending of Socialist public rental housing in 1998 until the near present.⁶

Apart from a methodology section and the conclusion, the remainder of the article consists of three main sections, each of which devoted to a particular set of housing rights (see also Table 1 in the conclusion), respectively:

- 1) Rural housing (not to be confounded with *zhaijidi*, which refers to housing land);
- 2) Urban, commercial residential property, consisting of two sub-types:
 - a) Privatized, work-unit housing (*danweifang* or *yangchanfang*);
 - b) Fully commercial housing (*shangpinfang*)
- 3) Common ownership or condominium, in light of the fact that most Chinese citizens live in apartment complexes rather than in row houses

For reasons of space, urban, social housing – namely, i) affordable housing, ii) low-rent housing and iii) public rental housing⁷ – as well as extra-legal, informal housing (popularly known as “Small Property Rights Housing”, Li, 2014a) are not the focus. Before turning to the empirical description of Chinese housing rights, the methodology section will first ascertain the implications that the concept of endogeneity entails for analyzing property rights.

2. Titling through an endogenous perspective: towards a methodology

The year 2013 appeared a memorable year to many inside and outside China due to the central government’s call for the “unified titling” of property (or *budongchan tongyi dengji*) as a measure against urban sprawl, arable land loss, speculation and the inflated housing sector (State Council, 2013).⁸ To provide a regulatory basis for unified titling the State Council also proclaimed the Provisional Measures on Real Estate Registration effective since March 2015. Unified titling refers to a uniform jurisdiction, platform and standard over the registration of land, housing, natural, mineral and water resources. Whereas in the past this authority was fragmented over various state agencies, it would now have to be carried out under the auspices of a single ministry.⁹ An important element of the work concerns the unification of land and housing registration, hitherto split over the Ministry of Land and Resources and the Ministry of Housing and Urban-Rural Development.

⁵ In terms of the so-called FAT Framework, the paper looks at the “Formal”, while (temporarily) excluding the “Actual” and “Targeted” (Nor-Hisham & Ho, 2016).

⁶ This implies that the paper will leave aside the history of urban housing, including the gradual confiscation of private property and its transformation into public rental housing in the 1950s, as well as its sudden nationalization during the Great Proletarian Cultural Revolution.

⁷ Urban, social housing can be divided into: 1) affordable housing (*jingji shiyongfang*); and 2) state rental housing, which in turn can be distinguished into: 2a) low-rent housing (*lianzufang*) i.e. for those with a local *hukou* in the place of residence (Ministry of Construction et al., 2007, Article 17.1); and 2b) public rental housing (*gongzufang*) for those without it, oftentimes, short-term migrants (Ministry of Housing and Urban-Rural Development, 2012, Article 7.3).

⁸ This is stipulated in Articles I.4 and II.12 of the State Council notice. However, it should be remembered that – although portrayed as a major breakthrough in 2013 – unified titling was already codified in law in the 1986 Land Administration Law. For more information, see also (Ho, 2015).

⁹ Land titling touches on the Ministry of Agriculture, the Ministry of Housing and Urban-Rural Development, the State Bureau of Forestry, and the State Oceanic Administration, and is now to be overseen by the Ministry of Land and Resources.

² Groenewegen and Vromen (1997) provide a clear discussion of the distinction between “new” and “neo” institutionalism whereby the former is defined as those opposing “original” or “classical” institutionalism and the latter as the later followers of Original Institutionalism.

³ Whereby: i) inconsistency is conceptualized as two or more elements of the legal and regulatory framework that are in contradiction with each other; and ii) ambiguity is seen as elements of the legal and regulatory framework that are indefinite or unclear.

⁴ Despite the comprehensive definition of ownership in civil law, it is restricted in various ways and the owner cannot do with his property as he pleases.

Table 1

Property rights of Chinese urban and rural housing.

Source: Illustrated by author

Type	Property right	Jurisdiction	Home ownership	Land use/lease	Term of land lease
Rural social housing (nongcun fangwu)	Encumbered home ownership (tradable/inheritable within collective only)	MLR ^a	Untitled	Often untitled	Not specified, i.e., lifelong (as collective member)
Urban commercial housing					
Privatized work-unit housing (danwei fang)	Full housing ownership	MOHURD ^b	Titled	Often untitled (or 1 title for an entire complex)	70 years since privatization by work-unit ^c
Commercial residential property (shangpin fang)	Full housing ownership	MOHURD	Titled	Titled, with exceptions	70 years since land allocation to developer ^c
Condominium (for apartments)	Common ownership e.g. elevators, hallways, parking lots ^d	MOHURD	Formal owner (= home owners' association/committee) no legal status	Titled?	Jointly according to urban construction land rights ^e

The symbol “?” denotes an uncertain situation.

^a MLR = Ministry of Land and Resources.^b MoHURD = Ministry of Housing and Urban-Rural Development.^c Commercial real estate: 40 years; industrial real estate: 50 years. Terms not stipulated in law, only in temporary national regulation. 2007 Property Law and 2007 Urban Real Estate Administration Law contradict each other on conditions for extension of land lease.^d Partly stipulated in 2007 Property Law, but common parts within building (foundations, bearing structures, outside walls, roofs, and places of public passage such as halls, stairs, and elevators) only addressed in 2009 legal interpretation by Supreme People's Court (2009), Article 3: 1).^e Addressed in (Supreme People's Court, 2009, Article 3, section 2).

Notably, the central government's first attempt at titling started 94 years ago: in 1922. In that year, the Nationalist government proclaimed the “Regulations for the Registration of Real Property” and preparations were made for titling (Hu, 2007). Yet, at the time the project never materialized. Another attempt at nation-wide titling was undertaken four decades later, during the Four Fixes in 1962, only to be halted a few years afterwards (Ho, 2005: 46–7). A third major attempt involving approximately 200,000 officials, local cadres and surveyors and investments of 1.2 billion RMB, was launched in 1984, 22 years later (Ho, 2015: 355). The fourth and current titling attempt has been associated with numerous problems of implementation, conflict and resistance for different properties (land and housing), as well as for various rights (ownership and use) (e.g. Lin, 2015; Hao, 2015; Wang, Chen, & Li, 2015; Yang, 2014; Sun, 2013). As a result, titling is ongoing – and given the complexity and magnitude of the endeavor – is not expected to be completed soon.

Why has it proven so difficult to move ahead with titling? Or, phrased in abstract terms: if institutional structure is the result of human design why is it so difficult to “get institutions right” and formalize, privatize and clarify property rights? Perhaps the notions of Intentionality (defined here as the ability to design, implement and enforce institutions *with intention* and *as intended*), and Exogeneity (i.e. the capability to *externally* design institutions for a group of actors *without* being drawn into the “institutional game” that binds this group of actors), are in need of reconsideration. In this context, an endogenous perspective on titling as a form of institutional design and intervention could be insightful. Adhering to an endogenous perspective, or more specifically, an analysis based on the notion that institutions emerge in a spontaneously ordered fashion, has three implications.

For one, there is the need for a temporal perspective over an extended period of time. Change is *a priori* a process in which a situation or entity shifts from one into the other. *Ergo*, the study of institutional change is by definition one *over time*, by which the institution and its effects are described and analyzed at multiple time-points (e.g. t_1 , t_2 , ..., t_x , or 1922, 1962 and 2012).¹⁰ One should be reminded, however, that institutions as they are endogenously shaped through actors' intentions, actions and interactions never emerge overnight, but are formed through

long, evolutionary processes in which a half century can, in fact, be considered momentary. This entails that the timescale of analysis should be set as long as possible. For instance, the establishment of the Chinese cadastre (or real estate registry) does not only show that the state's intentions never came to fruition, it also demonstrates that its institutional change can be traced back close to one hundred years ago. Similarly, irrespective whether one looks at the institutional development of the Indian Constitution (Austin, 2000) or suffrage in the United States (Keyssar, 2000), one will see long, protracted processes of endogenous change.

Second, an endogenous perspective also requires what above has been termed an “institutional archaeology.” It involves dissecting institutional structures in the way how a paleontologist or archaeologist would excavate a research site; meticulously scraping away layer by layer, while piecing together the different fragments to reconstruct the past. The principle holds regardless whether one adheres to a qualitative or quantitative methodology, in fact, traverses across the two. Would one be interested, for instance, in the statistical correlation between property value and titling, the latter should not be merely treated as an institutional “black box” or dummy variable. In contrast, it needs to be “opened” to understand how its form or shape (e.g. degree of formalization or privatization) relates to what it does and mean for actors (its function).¹¹ That understanding needs to define the premises of the model – be it linear regression, Probit or Ordinary Least Squares. In sum, contrary to neoclassical and neoinstitutional thought's (erroneous) idea that Original Institutionalism was only “content with description” (Williamson, 1996: 1792), did it regard empiricism as a precondition for analysis and theoretical validation. In this respect, Clark (1927: 221) duly noted that institutional analysis (and neoclassical economics in particular) in any way “must come into closer touch with facts and embrace broader ranges of data” across disciplines varying from law to history.

Lastly, seeing institutions and property rights through the lens of endogeneity necessitates caution when contemplating intervention in

¹⁰ Relevant in this regard is also Hodgson's (2001) thorough analysis of the issue of time in mainstream economics, or rather the neglect of it.

¹¹ This also explains why ambiguities between *de jure* and *de facto* property rights need not entail anarchy, in fact, are structured by “rational choices made under common law constraints driven ultimately by the land market” as Lai and Lorne (2014: 2052) convincingly demonstrate for rural housing in Hong Kong.

a spontaneously ordered institutional structure. Failure to do so may risk creating empty institutions or institutions that lack functionality and credibility. Spontaneous order does not imply that one cannot intervene, or that all institutional design is pointless. In fact, the two are interrelated: “Institutional design, the understanding of the rules and consequences and the conditions that determine their interplay, is part and parcel of spontaneous order and not inimical to it” (Aligica & Boettke, 2009: 25). Yet, it does imply that one needs to work with the “evolutionary flow” in which institutions have emerged from actors’ incessant interaction, conflict and bargaining.

Prior to proceeding to the empirical description of the property rights of Chinese housing, an important clarification is needed: we need to know *what* is being titled. An ideal-type ownership would theoretically consist of a full “bundle of rights” (Demsetz, 1967). An oft used interpretation for this, are the “eleven incidents” by Honoré (1961: 113).¹² However, for use in the specific Chinese context, this interpretation might need adaption. Therefore, we will deal with: 1) the *ownership* for housing and land; 2) the *use right* for rural construction land; and 3) the *lease right* for urban construction land (here differentiated from the use right as it calls for the lessee/tenant to pay rent to the lessor/landlord).¹³ Apart from use and lease, also other property rights derived from ownership will be reviewed, namely: the right to transfer (i.e. sell the ownership, use or lease); the right to manage; and the rights to mortgage and inherit. In the following section, we will begin by reviewing the property rights as they pertain to housing at the countryside.

3. Rural housing: free land, no ownership?

3.1. General principles

Given the numerous high-rising and modernized Chinese cities it might seem odd to begin a discussion of China’s housing with rural property. However, it should not be forgotten that the commonest kind of housing at the start of the economic reforms in 1978, was housing provided by the rural collective. At the time, the majority of China’s population (approximately 82%) was still living at the countryside (Zhang & Song, 2003: 388). To cater for the social welfare and livelihood of these millions of farmers, the village (i.e. rural collective) allocated a critical resource, apart from agricultural land: housing land or *zhajidi*.¹⁴ Thus, the collective did not provide housing itself, but the land. It was a duty of the collective to ensure that every farm family had access to a plot on which it could build a home.¹⁵

The institutional structure of rural housing land is best captured by the principles popularly used to describe it:

“Free of charge; no term; and non-transferable” (*wu chang, wu qixian, wu liudong*, see Ge, 2013).

In other words, housing land is provided to farmers for free, without a time limit, yet, without the right to pass it on to a third person. These principles are reflected in its institutional structure. The State Council’s (1982) Administrative Regulations on Residential Construction Land for Villages and Towns ruled that:

- i). Only villagers are entitled to rural housing land (Article 4)¹⁶;
- ii). Housing land is collective property, villagers only have the use right (Article 4)¹⁷;
- iii). The plot size is determined via provincial/county regulations, with attention to local variation and individual circumstances (Article 9)¹⁸;
- iv). If housing is sold or rented out, no new housing land can be applied for. Housing land vacant after commune members have migrated and demolished the house, will be taken back by the Production Team (Article 15).¹⁹

These rules were later reiterated in full through the proclamation of the 1986 Land Administration Law. To deal with the ongoing, illegal transfer of rural property, its 1998 revision specifically added that each farm household is only entitled to one plot of housing land (Article 62).

3.2. Ownership of rural housing

Since 1962, the ownership of rural realty is divided into housing ownership versus ownership of the land underneath. The Sixty Articles of the Rural People’s Communes distinguish this two-tiered ownership:

“All land of the Production Team, including (...) housing land cannot be rented out or sold” (Article 21).

And: “Commune members’ housing is their eternal property (*yongyuan gui sheyuan suoyou*)” (Article 45, CCP, 1962).

After the Maoist era, more particularly during the revision of the 1982 Constitution, there were voices opposing this division. According to a certain Beijing-based legal expert, Wang Yongquan, who commented on the draft of the revised Constitution:

“Rural housing land belongs to the individual, it should not be owned by the state or the collective (*bu yinggai gui guojia huo jiti suoyou*)” (Wang cited in Xu, 2003: 721).

However, the discussion was decided against this. The adopted version of the 1982 Revised Constitution unequivocally ruled: “[R]ural housing land (...) belongs to the collective” (Article 10). Or, as Peng Zhen, the Chairman of the Constitutional Revision Commission clarified:

“Rural housing land (...) can be given in long term use to farmers, but is not farmers’ private property” (*bushi shuyu nongmin siyou*, Peng, 1982: 445).

Regarding the property on *top of* the land the situation is confounding. In popular parlance no-one would contest farmers’ private ownership of housing, but formally speaking, the situation is not straightforward.

For one, rural housing is often untitled, while there are no regulations that determine its ownership. Ever since the 1982 Constitution, Chinese citizens enjoy ownership of “legal housing” (*hefa fangwu*, Article 13) and the right to inherit that property. The crux lies in the term “legal”. Conventionally the word “legal” should be understood as established and recognized by law. However, the untitled nature of rural housing poses a problem. In addition, the only statutory rule that unequivocally grants private ownership to rural housing is the (now

¹² More particularly, including: “[7]he right to possess, the right to use, the right to manage, the right to the income of the thing, the right to the capital, the right to security, the rights or incidents of transmissibility and absence of term, the prohibition of harmful use, liability to execution, and the incident of residuary” (ibid.: 113).

¹³ The commonly used Chinese term for urban land lease is actually “land use right” (*tudi shiyong quan*). However, for analytical clarity, we prefer to reserve the term “use right” for unpaid use of rural construction land, while using the word “lease” for the paid use of urban construction land.

¹⁴ Note that at the beginning of the 1980s, the term *zhajidi* was also used for urban housing land (Xu, 2003: 681). The village collective was also responsible for allocating a small plot of land for own use, the so-called *ziliudi* or *ziliushan*.

¹⁵ On this issue, the 1998 Organic Law of the Villagers’ Committee (Article 19, Section 7) stipulates that the plan for the use of housing land must be decided through consultation and decision by the Villagers’ Committee. This regulation is upheld in the 2010 revised version of the law (Article 24, Section 6).

¹⁶ The article here refers to “commune members”. However, under Article 18 it was possible for non-rural population to apply for rural housing. This was also allowed in the 1986 Land Administration Law (Article 41), but later left out in the 1998 revised version.

¹⁷ As Article 4 reads: “Land of the Production Team is the collective property of (...) the Production Team. Commune members only have the use right to (...) housing land according to its stipulated use; they do not have the ownership right.”

¹⁸ Article 14 also states that “housing land for building a house should be applied for through the Production Team, adopted by the Commune Members’ Congress, approved and checked by the Production Brigade, and reported for approval by the Administrative Commission of the Commune; when it is inevitable that agricultural or horticultural land is used, this must be reported to the County Government for approval. After approval, the approving department should issue a housing land use permit.”

¹⁹ This stipulation is a further restriction of the earlier stipulation in the 1962 Sixty Articles, which ruled that “commune members have the right to sell or rent out their housing” (article 45, CCP, 1962).

invalidated) 1962 Sixty Articles, which is a Party Decree and *not* formal law. Other relevant laws effective to date, such as the 2007 Property Law and the 1998 Land Administration Law, do not even mention the ownership of rural housing.²⁰ Why this is important is because rural housing enjoys an entirely different status than urban housing. This becomes immediately evident when examining the property rights derived from ownership: the right to transfer, to inherit or use the house to obtain a loan or credit.

3.3. Rights to transfer, inheritance and mortgage

Whereas today's urban property market is almost fully commercialized, there has been significant resistance amongst various factions in the Chinese party and state to introduce market forces in the countryside. This is reflected in the institutional structure of rural property. Thus, farmers may transfer, i.e. sell or rent out their homes, but only to someone who holds a rural *hukou* (i.e. rural residential status) and is a recognized member of the same village collective.²¹ If the head of a household (a status conventionally assigned to the husband) dies,²² his spouse or offspring may inherit the property on the same conditions. Should they have migrated and given up their rural *hukou*, they can only sell or rent out the property to members of the same village. Similar encumbrances to the ownership of rural housing apply to the use right of the land underneath.

According to the 1995 Guarantee Law, it is forbidden to mortgage the use right to rural housing land (see Article 37). However, under an institutional veneer of apparently strict prohibition, one can clearly witness the endogenous forces that have pushed and still push for change. Just a few years after the proclamation of the Guarantee Law (unrevised at this writing), the Municipality of Shanghai and Henan Province proposed legal changes to allow the mortgage of rural collective land (National People's Congress Legal Work Committee, 1998: 381). Not long after that, the first pilots for mortgaging rural collective land, including the land use rights of housing were initiated (Editorial, 2010). An important change at the national level was signaled by a Communiqué of the Communist Party after its annual congress in 2013. This stipulated that “pilot sites should be selected in order to cautiously and soundly further the mortgage and hypothec of farmers' housing assets” (Article 21, CCP Central Committee and State Council, 2014).²³ Despite the pilots, the national legal framework to date does not permit the mortgage of the land use rights to rural housing.

From the above, it can be ascertained that the use right to rural housing land (and as a result, also the ownership to housing, as one could not transfer one without the other) are thus more, what in legal terms is called a “personal” instead of “real right.” The latter (or *wuquan* in Chinese) is a right between a person and a property and is enforceable against *any other* person, such as in the case of ownership. In contrast, the former (*zhaiquan*) is a right between persons and can only be enforced against another person.

There are two issues at stake here. First, as a “personal right”, the ownership to rural housing (and the use right to the land underneath),

is a contractual relation between the (male) head of the household and the head of the village. Second, the rights to transfer, inherit and mortgage apply only as far as the inheritor (e.g. the spouse or when both parents have passed away, the children) is entitled to conclude a contractual right with the village. This entitlement is tied to the rural collective where an individual's *hukou* is registered. Thus, when the *hukou* is changed to a non-rural residential status, a farmer loses the right to that contract.

These restrictions may sound unfair, cumbersome, inefficient or a hindrance to rural development (see e.g. Zhou, 2013), but they arose in an era when approximately 800 million Chinese farmers were entitled to housing land for free. Therefore, in effect, rural housing was and still is a form of *affordable, social* housing. It is within this context that neither the village collective nor the farmers perceived a need to exercise ownership. Rural housing land and what was on top of it were simply distributed through customary and village-internal rules, outside of statutory law and without formal proof of ownership. The informality of the property rights of rural housing land were only then used and misused to the fullest, when farmers began to leave the village to work in the cities, and in that process (illegally) sold their homes to urbanites and rural migrants outside of the village. It was also *only then* that the institutional structure endogenously started shifting, as the central government increasingly felt a need to formalize these rights through titling.

Having reviewed the property rights of rural housing, we will move on to the second part of our discussion, and examine the property rights of housing in the cities. We will start with ownership, use and lease.

4. Urban, commercial housing: 70 years, no lease?

4.1. Ownership, use and lease of urban housing

Today legally speaking, housing in the cities is built on state-owned land, whereas housing in the countryside is built on collective land. Interestingly, while privately owned rural housing land became collective property as early as 1962, it would take a long time before private ownership to urban land was formally abolished. In fact, until the early 1980s, the predecessor of the current Ministry of Housing and Urban-Rural Development still called for recognizing *private* urban land and housing ownership, and wrote:

“According to the spirit of the Constitution, there are *various ownership systems* for urban real estate” (State Agency for Urban Construction, 1982: 1; italics added).²⁴

Yet, illustrative of the endogenous nature of institutional change, China's top legislators pushed the legal framework in the opposite direction. Just a few months later, they adopted the revised Constitution which unequivocally stated:

“Urban land is *state-owned*” (1982 Revised Constitution, Article 10, italics added).

Thus, it was not until more than three decades *after* the Chinese Communist state had been established, that land in the cities fully and formally came into state hands.

What about the ownership of that on top of the land, the house? At the present day, housing can be privately owned. Yet, during the urban collectivist era (1956–1998),²⁵ this was not self-evident.

²⁰ The 2007 Property Law merely reiterates Article 13 of the 1982 Revised Constitution (see: Articles 64 and 65). It does regulate the use right to rural housing land (see Chapter 3, Articles 152–155). The 1998 Land Administration Law only mentions in passing: “After the sale or renting out of rural villagers' housing, additional applications for rural housing land shall not be approved” (Article 62).

²¹ For more information on the *hukou* system, see (Cheng & Selden, 1994).

²² There are thus serious concerns whether rural women's rights are sufficiently protected upon being widowed or divorced. According to Article 48 of China's 2005 Revised Law for the Protection of Women's Rights, the spouse enjoys equal rights to commonly owned property. However, how this works out for rural women remains a topic for further research.

²³ The Party stipulations on the experimentation with mortgaging rural housing were reiterated by the CCP Central Committee and the State Council a year later. See Section 4, Points 17 and 19 (CCP Central Committee and State Council, 2014).

²⁴ The notice also stated: “The urban land and real estate administrations shall (...) distinguish between the *different situations* in land ownership and use” (State Agency for Urban Construction, 1982: 1). Before March 2008, the Ministry of Housing and Urban-Rural Development was known as the Ministry of Construction, and until May 1982 as the State Agency for Urban Construction.

²⁵ Starting in the year when the public rental scheme was proclaimed until the beginning of the urban Housing Reforms.

With the introduction of the 1956 State Rental Housing Scheme, urban landlords were forced to rent out housing above a certain threshold against a government-determined payment (CCP Central Secretariat Second Office, 1956). Later, ownership to urban housing was effectively nationalized due to the house raids (*chaojia*) and confiscation of property by the Red Guards during the Cultural Revolution (1966–1976).²⁶

Under the urban collectivist era, the work-units (or *danwei*)²⁷ – i.e. government departments, public institutions and state-owned enterprises – provided housing to their employees for free or against a symbolic rent. This work-unit housing (called *danweifang* or in Beijing *yangchanfang*)²⁸ could not be sold, and employees solely enjoyed the *use right* to housing.

The situation shifted in 1980 with the construction and sale of the first batch of newly built residential property (or *shangpinfang*) in Shenzhen. Developed by commercial real estate companies, it was the first time since the ending of the Maoist era that housing could be sold and legally owned again (Liao & Yang, 2005; Liu, 2010). Some years later, by the mid 1980s, urban work-units began to experiment with the privatization of their housing stock. The central state formalized this experimentation, and eventually requested the transfer of *all* urban public housing to individual households: a policy known as the 1998 Housing Reforms. Initially, owners of privatized work-unit property were not allowed to sell within a period of 5 years, but this regulation was first relaxed in Shanghai, and later nation-wide. As a result of these developments, there are two main types of housing on the market in Chinese cities: newly built commercial housing, and former public rental housing.

To enable the transfer of state-owned land on which homes were built, the Chinese government tried to establish up a system of “transferable ‘land use rights’ as distinct from ‘inalienable’ land ownership” (Lai, 1995: 287). What in Chinese legal terms has been euphemistically dubbed the “compensated use” (*youchang shiyong*) of state-owned land is, in fact, a leasehold system as can be found in several of the world’s metropolises, including London, Amsterdam, Hong Kong, and parts of Vancouver and Rotterdam. The right to sell the land lease – and thus, follow the house upon sale – was included in the 1986 Land Administration Law (Article 2). The land lease rights can be obtained in different ways depending on the type of urban housing:

- Commercial conveyance (*churang*, against payment) in the case of newly built commercial housing, or;
- Non-commercial allocation (*huabo*, with no or only nominal payment) in the case of former public housing.²⁹

Both commercial housing and privatized public housing can now be freely traded on the urban market, and – in theory – have recognized (registered) housing ownership and land lease, i.e. a housing permit issued by the municipal housing administration bureau (*fangwu guanli ju*), and a land lease permit issued by the municipal land administration bureau (*tudi guanli ju*). In some cities, such as

Shanghai and Shenzhen the housing and land lease permits are issued as a single permit.

The exception is constituted by privately owned real estate built before 1956 and confiscated (by the Red Guards) during the Cultural Revolution.³⁰ To date there are no national regulations that recognize this confiscation, and thus whether confiscated property – partly or in full – is still the ownership of former home owners or their descendants. Illustrative of the complexity of the issue is a highly unusual query to the government on the legal interpretation of the Constitution by the Supreme People’s Court (2009): 2) (normally the other way around, as the Supreme People’s Court interprets the Constitution and not the government):

“After the 1982 Constitution stipulated that ‘urban land is state-owned’, does the ownership of urban housing land *and* of the housing on top of it (...) automatically change into a use right?”

As land in the cities is owned by the state, the land lease is a significant property right for Chinese homeowners.

The land lease system was a major *exogenous* intervention by the Chinese state to strike a compromise between its own ideological foundations and the rising needs for a property market. Yet, there are two sources of contention that determine the *endogenous* dynamics and pace with which it can, and ultimately will, take shape: i) the renewal of the lease after expiration; ii) the registration of the lease between lessee (in our case, the homeowner) and lessor (generally, the state as represented by the municipality or county). Below we will consider these two sources of conflict, interaction and bargaining.

4.2. Lease term and renewal

As we have seen above, there are two ways in which the land lease can be obtained: through commercial conveyance or non-commercial allocation. In case of the latter, the lease term is indefinite (or separately set between lessee and lessor). In case of the former, the term is set at 70 years for residential land (*juzhu yongdi*). Exceptionally, the term is 40 or 50 years, when housing has been built on land for commercial and industrial purposes (*shangye/gongye yongdi*), which can be the case, for instance, when office buildings also contain residential units.

Notably, the exact term of urban land lease is only described in *temporary* regulations. The 2007 Property Law does not mention the issue, while the 2007 Revised Urban Real Estate Administration Law only states that “the maximum term for the conveyance of land lease rights is stipulated by the State Council” (Article 14).³¹ Suppose a prospective buyer wants to buy a house in the city. The term of the land lease will then depend on whether a fully commercial home or privatized work-unit housing is bought:

- For commercial property, which land lease right is always acquired through (commercial) conveyance, the term is counted from the date when the land lease right was assigned to the real estate developer, and not the date at which it was sold to the buyer. Let us assume that a real estate developer acquired this right on 1 December 2013, needed around two years to finish construction, and sold an apartment on December 2015. In this case, the remaining land lease term of this buyer would be 70 years – 2 years = 68 years;

²⁶ In fact, what we see here is that although the 1982 Constitution featured a sudden change in urban land ownership, under the surface – or this “institutional veneer” as it were – a concurrent trend had already undermined private land ownership long before that. For reasons of space, these developments are not reviewed in detail here, but are described in (Ho, 2017).

²⁷ The work unit refers to the (urban) place of employment. It is an institutional remnant of the collectivist and more heavily Socialist past, and is generally used in the context of (central or local) state-owned enterprises, government, and other public bodies.

²⁸ *Yangchanfang* literally means “central property housing”, thus owned by organs of the central state such as the Party, National People’s Congress, State Council, and Ministries.

²⁹ As described in (Ho, 2015: 355), land in the cities before 1982 had not been formally nationalized in contrast to land in the countryside. For the distinction between commercial conveyance and non-commercial allocation of land, see Fig. 2 in (Ho, 2013: 1102).

³⁰ After the ending of the Cultural Revolution, the housing that was allocated for own use appears generally to have been reregistered under the former owner. As the percentage of privately owned housing according to 1982 statistics had allegedly fallen to less than 4.5% of the built area (which figure includes collective property, see Zhou, 1989: 21), it is unclear what the present magnitude of this issue still is.

³¹ See the Temporary Regulations for the Transfer and Conveyance of State-owned Use Rights in Cities and Towns (State Council, 1990). To the author’s knowledge, to date there are no other regulations that stipulate the term for urban land use rights.

- For privatized work-unit housing, which land lease right is by definition acquired through (non-commercial) allocation, it means that the original owner – the work-unit – enjoyed an indefinite term. However, through the sale of public housing, the indefinite land lease right based on (non-commercial) allocation is changed into a fixed land lease right based on (commercial) conveyance. For this reason, the buyer not only needs to pay for the house, but also for the land conveyance fee.³² The land lease term for privatized public housing is counted from the date when the work-unit started the privatization of a certain building. So, if we assume that a work-unit privatized the building on 1 December 2000, and an employee bought his/her apartment (referred to as *maiduan*) on 1 December 2003, the remaining term is 70 years – 3 years = 67 years.³³

At the urban property market the big question is what will happen with the land lease right and the house after the ending of the lease term. Initially, national regulations made the far-reaching stipulation that:

“When the lease term ends, the land lease right, and the ownership of the construction(s) on top of it and additional property, will be obtained by the state at *no costs*” (italics added).³⁴

The 1994 Urban Real Estate Administration Law maintains this principle, but instead of taking back the ownership of buildings, states that “real estate cannot be transferred if (...) the land use right has been legally revoked” (Article 37).³⁵ At the same time, it stipulates that extension can be applied for, and should be granted lest public interest prohibits this. Extension should be applied for 1 year before the ending of the lease, and is contingent on payment of the land conveyance fee (Article 21). Yet, the law does not stipulate the standard for the fee.

In the long run-up to the 2007 Property Law, there were intense social and political discussions about the procedures for the extension of the urban land lease right.³⁶ When the Property Law was proclaimed in March, Article 149 stated that upon ending of the term, the land lease right would be automatically extended (*zidong xuyi*). Surprisingly and contradictorily, the 2007 Revised Urban Real Estate Administration Law adopted less than 6 months later, maintained the very same stipulations as the 1994 version.³⁷ Thus, it fully overturned the Property Law in this respect.³⁸

Although most land leases are not expected to expire in the next decades, the discussion was put on the forefront of national attention

due to the “Wenzhou case.” During the early years of housing reform, this southern metropolis had opted to deviate from the 70 years’ term, and set it at only 20 years. As a first batch of leases expired and had to be extended, it became clear that the Wenzhou municipal government planned to ask for a land lease fee amounting to an average of three times the original housing value (Liu, 2016). The plan created popular outrage, and although matters are still undecided at the time of this writing, might push forward new changes in the institutional structure.

4.3. The lease permit

Perhaps even more baffling to the outside observer might be the fact that the urban land lease right is often untitled, leaving homeowners without formal proof to lease the land on which the property is built. The lack of registered land permits to urban homes is not uncommon in China, and has been reported from localities varying from Kunming (Yang, 2014), Chengdu (Sun, 2013) and Baoding (JHM782, 2014). In a recent report about the situation in Taiyuan, the provincial capital of Shanxi, it was found that of approximately 800,000 homes, only 12.5% had been issued a land lease permit (Baogao China, 2012).

In the past, work-units received a single, non-commercial land lease permit for an entire complex. It is thus not surprising that individual land permits for former public housing are often lacking. Apart from this, other reasons why land lease permits are often missing include:

- The real estate developer did not apply for the titling of residential units;
- The real estate company lost the documentation on the property rights’ of a residential complex, or has (intentionally) gone bankrupt (which might occur to secure short-term, yet, significant speculative profits);
- The developer misused the land use plan, e.g. by building *commercial* property on land appropriated through *non-commercial* allocation (as in the case of social rental and affordable housing), or by constructing on rural collective construction land without formal expropriation (in the case of “Small Property Rights Housing”, see Li, 2014a);
- The developer illegally exceeded the area for which land lease rights had been allocated;
- The original land ownership was contested, unclear or missing, e.g. in historical, formerly confiscated urban areas or when the work-unit privatized its housing stock without issuing land permits (see Yang, 2014).³⁹

5. Condominium: common ownership

A quick tour around China’s urban landscape reveals that the majority of Chinese citizens live in apartments, rather than in row houses or terraced houses. In this case, the ownership of commonly used assets, such as hallways, heating systems, elevators and green areas needs separate discussion. In the following sub-section, we will first start by identifying the historical legacy of urban common property, and the effects of the 1998 Housing Reforms on the maintenance of that property. The next sub-section continues to assess what common property

³² According to the Administrative Measures for Bought and Marketized Public Housing of Beijing-based Central Work-Units (see National Government Offices Administration, 2003), “the buyer must pay a land conveyance fee equal to 1% of the cost price of the house in the year of the housing reform, or an equal sum of the land conveyance fee, when handling the titling procedures for the house” (Article 9). The revenues from the payments of the land conveyance fee are allocated as follows, the fee for “public housing originally owned by central administrative organs will be fully returned to central budgetary funds; [for public housing] originally owned by central public institutions, 50% will be returned to central budgetary funds, and 50% to the work-unit which originally held ownership; [for public housing] owned by central enterprises (including public institutions that are run commercially) [it] will be fully returned to the work-unit which originally held ownership” (Article 10).

³³ For more information, see also (Zhang, 2010a,b).

³⁴ See Article 40 of the Temporary Regulations for the Transfer and Conveyance of State-owned Use Rights in Cities and Towns (State Council, 1990). At the same time, Article 41 does allow for the application of an extension of the land use right upon payment of a land conveyance fee.

³⁵ Article 21 determines that “if the land user has not applied for extension of the term, or did apply for extension but this was not granted (...), then the land use right will be revoked at no costs by the state.”

³⁶ The Property Law took 13 years in gestation during which two draft versions circulated, and the finally adopted draft had been revised seven times. See, e.g. (Tencent, 2006).

³⁷ See Articles 22 and 38.

³⁸ In the Chinese legal system, specific law (i.e. Urban Real Estate Administration Law) takes precedence over general law (i.e. the Property Law).

³⁹ The lack of registered land use rights also posed problems during the privatization of work-unit housing in the late 1990s. In response, the central authorities allowed that public housing sold *without* land use permits before 2000, could still be transferred provided that a land use permit would be applied for within 30 days of the transfer (Ministry of Construction, 1999, Article 9). Interestingly, also the issue of missing housing ownership permits was addressed (ibid., Addendum, point 3). It was specified that no department or individual was allowed to frustrate or withhold the issue of housing ownership titles.

comprises, as well as the possible entities that are entitled to represent its ownership. The final sub-section looks at the most evident of these entities: the homeowners' committee.

5.1. An urban tragedy of the commons?

What in the United States is referred to as condominium, in France as “co-property” (*copropriété*), and in The Netherlands as “apartment right” (*apartementsrecht*), is a form of tenure under which separate housing units are individually owned whereas the common facilities are controlled by a home owners' association that jointly represents ownership of the entire building.⁴⁰

Before the 1998 Housing Reforms, ownership of common facilities (and no less important, also *maintenance*) was exercised by the work-units. Yet, after the privatization of public housing this became a legal twilight zone. The larger, well-endowed work-units – such as ministries, universities and significant state-owned companies – that owned entire complexes and neighborhoods continued to exercise ownership and maintenance on behalf of individual homeowners. However, smaller work-units – especially those forced into bankruptcy during the late 1990s' industrial reforms – frequently left common assets as “nobody's property” with their maintenance in the hands of fading property management companies (*wuye guanli gongsi*).⁴¹

Such situations could become more complicated if several work-units jointly owned a complex or even a single building. In this regard, a poignant case is the stalemate over the urban renewal of the Baiwanzhuang neighborhood in Beijing. This 1950s complex, once a symbol of the new China's modernist urban design and home to many representatives of the national elite, has now become a dilapidated, run-down neighborhood. Although located in a good area near the city centre, and notably, right in front of the Ministry of Housing and Urban-Rural construction, the plans for its preservation or demolition have reached a deadlock for many years (Xu, 2015).

The prime reason for the low maintenance and deadlock over its future must be sought in its complicated property rights: Baiwanzhuang is owned by a whole series of ministries and state departments, many of which have become defunct today, such as the Ministry of Airways (*hangkongbu*), Ministry of Railways (*tiedaobu*), Ministry of Infrastructure (*jijianbu*), and Ministry of Machinery and Industry (*jixie gongyeju*).⁴² On top of that, some of these work-units sold their housing stock, and some did not. In result, even within a single building, one may find a mix of home owners, long term tenants (former work-unit employees with a right to life-long tenancy), and commercial tenants (renting directly from homeowners or sub-rent from long term tenants).⁴³

The differences in the maintenance of these former public buildings, complexes and neighborhoods (known as *xiaoqu*) demonstrate a divide between well-endowed, functional and poorer, defunct work-units.⁴⁴ For commercial real estate, property management companies are often hired by the developer, ideally through open bidding (State Council, 2007, Article 24). Yet, according to law homeowners have the right to hire or dismiss the company (2007 Property Law, Article 81).

This might be particularly important when property management companies misuse maintenance funds or fail to maintain common facilities (De Bie, 2013: 9).

5.2. What is common property, and who represents it?

For homeowners to exercise common ownership two questions are important: what assets are commonly owned? And what is the legal status of the entity representing common ownership? In light of these questions, the drafting of modern China's Property Law was crucial. The Property Law rules that property commonly owned by homeowners (*shuyu yezhu gongyou*) includes: 1) roads and green areas within the zoning of the development (provided these are not public or private property); 2) other public areas and facilities; 3) rooms used by the property management company. Parking spaces and garages can be rented out or sold (on the condition that owners of the property enjoy priority) or can be freely included in the ownership of the individual apartment (Articles 73 and 74).

However, the law left a critical loophole as the common parts *within* the building had been forgotten. This issue was later addressed through a legal interpretation by the nation's highest court in which also structural parts and joint facilities were defined as common property, including the building's roofs, foundations, bearing structures, outside walls, and places of public passage such as halls, stairs and elevators (Supreme People's Court, 2009, Article 3, section 1).⁴⁵ The need to repair the legal loophole has been demonstrated by multiple cases in which skyscrapers' rooftops were, well after completion of the building, illicitly expanded with excessive structures, including traditional *Siheyuan* courtyards, villas, and mountain gardens. Such cases were reported in places varying from Zhengzhou (Henan Province), Suzhou (Jiangsu Province) and Beijing (Li, 2014b).

The second question, the status of the entity exercising common ownership, was a significantly more sensitive issue as it touched on the capacity of citizens to engage in collective action.⁴⁶ At this point, Chinese law is unclear. The entity that legally carries most decision-making power is the homeowners' assembly (*yezhu dahui*), whereas the homeowners' committee (*yezhu weiyuanhui*) acts as its executive organ.⁴⁷ The 2007 Property Law grants homeowners the right to establish a homeowners' assembly and elect a homeowners' committee. Both organs can make binding decisions by majority vote. At the same time, the law expressly stipulates that important matters should be decided collectively by the homeowners. It also allows homeowners to change or nullify otherwise binding decisions by taking them to court within one year (Articles 75, 76 and 78). In practice, however, it is difficult to act collectively with a body comprising *all* homeowners.⁴⁸ Collective action often depends on the capacity of a single individual or a smaller group of individuals to lead and organize homeowners, and China is not exceptional in this regard (see Zhu & Ho, 2011). However, homeowners' committees do not merely execute orders from

⁴⁰ In other regions of the world it may also be referred to as “strata title” (Australia and New Zealand), or “sectional title” (South Africa).

⁴¹ Also known as the “grasping the large and letting go of the small” policy (*zhua da, fang xiao*) adopted in September 1997 at the 15th Communist Party Congress. Under the policy, the central state relinquished control over smaller state-owned enterprises. This allowed local government to restructure, privatize or shut down firms.

⁴² Other owners include the Ministry of Housing and Rural-Urban Development, the Ministry of Metallurgy, and the State Agency of Atomic Energy.

⁴³ Oral communication, Jiang Min, urban designer, China Academy for Urban Planning and Design, 16-6-2016.

⁴⁴ In recent years, Beijing Municipality started upgrading former work-units' housing through external wall insulation, double glazing, and roof insulation. In cases where work-units have become defunct, the Beijing Housing Administration directly funds and carries out the projects (e.g. see Beijing Shangbao, 2015).

⁴⁵ National regulation expressly stipulates that commonly owned assets are not owned by developers and management companies, who can be punished for using these to their own benefit (State Council, 2007, Articles 51 and 66). By contrast, homeowners may exploit commonly owned property for commercial purposes, provided that any profits are invested in the common repair funds (ibid., Article 55).

⁴⁶ This needs to be seen in the light of the current political environment at the time, during which Chinese civil society was evidently on the rise and the central state was wavering how to cope with it. See also (Ho & Edmonds, 2011).

⁴⁷ This could be compared, for instance, with the National People's Congress and its Standing Committee.

⁴⁸ Or as Chen (2006: 3) writes: “In practice, residential committees of communities find it really difficult to have a plenary meeting. Neighbors that have been living together for years may not necessarily know each other, let alone get together for meetings.”

homeowners' assemblies, but enjoy a recognized level of discretion (State Council, 2007, Article 15).⁴⁹

5.3. Legal status of homeowners' associations

At the time when the Property Law was adopted one of the critical issues of juridical contention was the status of homeowners' organizations, and in connection to that, whether these can sue or be sued. For one, the Property Law does not mention formal procedures for their registration as set out for companies and non-governmental organizations.⁵⁰ Therefore, the homeowners' assembly and the homeowners' committee cannot qualify as legal persons.⁵¹ The Property Management Regulations only mention the capacity of the homeowners' assembly with regard to its meetings, thus suggesting the meeting as its only procedural component (State Council, 2007, Chapter 2).

Furthermore, the Property Law also places restrictions on homeowners' activities by stipulating that local government should "guide and assist" the establishment of the homeowners' assembly and the election of the homeowners' committee (Article 75). The state's powers are further expanded through national regulation, which places the meetings of the homeowners' assembly and committee effectively under the responsibility of local government and Party organs, such as the Sub-District Offices (*jiedao banshichu*), Town/Township Governments, and Residents' Committees (*jumin weiyuanhui*).⁵²

The ambiguity that the Property Law left around the status of homeowners' organizations led to a heated debate whether these could or should qualify as independent organizations representing the joint ownership of its members. In this debate we find those in favor (Cui, 2009: 220; Wang, 2007a: 616; Jiang & Li, 2007: 225–6) pitted against those against (Chen, 2011; Sun & Lü, 2007; Xia, 2007). Taking the argument a step further, some maintained that the homeowners' assembly could not participate in litigation (Huang, 2007: 267–8; Wang, 2007b: 178).⁵³ Interestingly, the latter argument is already being undermined by ongoing litigation conducted by homeowners' assemblies and their executive committees.⁵⁴ Or, as a reporter maintained: "Although courts in different places make different verdicts on cases brought in by homeowners' committees, the current trend increasingly confirms their right to litigate" (Long, 2010). To date, that trend may have culminated in what was heralded as the nation's first

homeowners' assembly with legal personality, obtained by (extra-legal) registering it as a social organization, i.e. non-governmental organization (Huang & Miao, 2013).

6. Conclusion: back to endogeneity and the ownership of China's housing

China's rapid urbanization and explosive development have fueled the ongoing discussions about the security of property rights in relation to titling, privatization and formalization. In neoclassical thought there is a deep-seated belief that economies and societies can intentionally design and implement the institutional structure that governs them. There is an equally strong belief that certain institutions are conditional for successful economic development and growth. Such beliefs are clearly reflected in a statement that:

"Institutions are *causal* in the sense that a poor country that is able to revise the rules of the game in the direction of strengthening the property rights of entrepreneurs and investors is likely to experience a lasting increase in its productive capacity" (Rodrik, 2004: 1).⁵⁵

There are, however, two empirical contradictions to the neoclassical belief.

- I. *Contradiction of design versus outcome.* The first contradiction that haunts neoclassical thought is the paradox between the postulate on exogenous, intentional design vis-à-vis the result of that design. As Aoki (2007: 2) put forward:

"[I]f institutions are nothing more than codified laws, fiats, organizations, and other such deliberate human devices, why can't badly performing economies design (emulate) 'good' institutions and implement them?"

This paradox brings us back to endogeneity, or better, neoclassical thinking's disregard of endogeneity in considerations over institutional change and titling.⁵⁶

When examining the property rights structure of Chinese housing there is no way how one can safely conclude that it results from intentional design, albeit being engendered by human interaction. Or, speaking with the words of 18th century Scottish philosopher, Adam Ferguson, it is undeniably "the result of human action, but not the execution of any human design" (1782: 205).⁵⁷ The institutional analysis of this article has uncovered and dissected this endogenously, unintentionally grown fabric, and in that exercise transcended the boundaries between the urban and the rural. Moreover, the analysis showed that the property rights of China's housing are in constant flux, being incessantly negotiated, renegotiated, and renegotiated ad infinitum. It is the essence of endogeneity: institutions that perennially shape-shift due to actors' interactions, bargaining and conflict. Having debunked the first postulate of neoclassical thought, another paradox arises from its third postulate.

- II. *Contradiction of institutional form versus performance.* There is ample evidence that Chinese real estate has gone through its most substantive development in recent history (Zhang, 2010a,b; Hou, 2009; Hui & Shen, 2006; Chen, 2005). By comparing the state-accorded rights of housing to an ideal-type ownership it was ascertained that the institutions that underpinned the Chinese real estate boom were and still are ambiguous at various levels. This is evident with regard to:

⁴⁹ For instance, it may represent the homeowners and homeowners' assembly vis-à-vis contractual issues of the property management company; it may after having timely solicited homeowners' opinions, supervise and support the property management company in its contractual tasks; it may even supervise the implementation of the homeowners' agreement; and lastly, it may take on "other duties" that the homeowners' assembly chooses to vest upon it.

⁵⁰ However, according to ministerial regulations the homeowners' assembly and committee are allowed to apply for an official seal after the necessary documentation has been archived with the district or county housing department and the sub-district office or town/township government (Ministry of Housing and Urban-Rural Development, 2009, Articles 33 and 34).

⁵¹ In this respect, China is different from other industrialized countries, such as France, Germany and Japan, where the law expressly grants homeowners organizations legal personality (Terré & Simler, 2002: 794, 799; Yamamoto, 2001: 194; Wagatsuma, 2008: 549).

⁵² According to Article 20 of the Property Management Regulations the Sub-District Office should be informed of decisions by the homeowners' assembly, while the homeowners' committee should "carefully listen" to suggestions by the Sub-District Office (State Council, 2007). Ministerial rules contain detailed prescriptions regarding the meetings of the homeowners' assembly and the homeowners' committee, as well as to whom they should report (Ministry of Housing and Urban-Rural Development, 2009, Articles 10–11; 50 and 54).

⁵³ According to Chen (2011: 68), earlier drafts of the Property Law did contain clauses clarifying the status of the homeowners' assembly with regard to litigation, but it was deleted from the fifth draft onwards.

⁵⁴ See for instance, the land mark case around the Nantian Yihuayuan complex in Shenzhen (Yao, 2014).

⁵⁵ They are similarly present in a statement that "[l]egislation to clarify ownership rights and improvements to China's land title registration system can make investors more secure in their ownership interests" (Palomar, 2002, 74).

⁵⁶ In the words of Grabel (2000: 11): "[N]eo-classical theorists deny the significance of factors endogenous to all societies which significantly influence the likelihood of a policy's success and hence its credibility."

⁵⁷ The precise reference is Part III, Section 2, page 205.

- 1) The extension of the urban land lease (with laws in full contradiction of each other, see note α in Table 1);
- 2) The ownership of rural housing (which is not only generally untitled, column 2, row 5, but is also not an indefeasible, absolute right to a thing, but a personal right granted by the collective, see column 2, row 3);
- 3) The land use/lease right (mostly unregistered for rural and – to a slightly lesser extent – for urban housing, see column 5, rows 3, 5–6);
- 4) Condominium or the joint ownership of apartment buildings (where ambiguities exist as to what is regarded as common property and who should represent it, see note β , and in relation to the registration of the lease of common facilities, see column 5, final row).

The findings above demonstrate that there is no unequivocal answer to the question: Who owns China's housing?

The troubling issue that arises is: if clear, private and titled property rights are predicted to be conditional for attracting investments and raise productive capacity, then why could China's property boom have taken place in the *absence* of such institutional forms? The likely answer is that such institutional forms are not *conditio sine qua non* for growth and investments. To comprehend this issue we need to abandon focus on institutional form towards what institutions do and mean for a group of actors, in effect, their function. Against this backdrop, a growing body of literature on credibility argues that a refocusing is needed away from the form of institutions, towards their function (Chang, 2007: 19–20; Grabel, 2000). It is more important to understand what institutions do (i.e. Function), rather than concentrating on their appearance (i.e. Form). Function could be seen in diverse terms, such as cultural cohesion, political support, social security or economic transaction.

Institutions as a *set of rules* evolve as a functional adaptation to their geo-physical environment determined by their use and disuse over time. From this follows that when institutions persist, they are credible, thus, functional, if not, they would have altered or vanished (Ho, 2016b: 1151). Dubbed the Credibility Thesis, this premise is posited to hold for whatever institutional form one examines – formal or informal, public or private, clear or unclear. To date, the thesis has already been validated for various sectors, assets and geographical contexts, ranging from land-based institutions in Mexico (Monkkonen, 2016); informal housing in China (Sun & Ho, 2017); labor markets in India (Miyamura, 2016); and financial institutions in Turkey (Marois & Güngen, 2016).

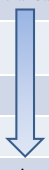
The neoclassically trained scholar would likely see inefficiency, disorder and perversity in the informal, opaque and contradictory structure of Chinese housing rights. Should we thus panic, and start formalizing and titling right away, and at all costs? Let us remind ourselves of the words of an eminent property expert, who warned that “registration is only a means to an end. It is not an end in itself” (Rowton-Simpson, 1976: 3).

A critical problem in neoclassical thought is its failure to recognize the institutional shades of grey that make up an economy or society's property rights structure. In the neoclassical view, property rights are dichotomous: formal versus informal, public versus private, and clear versus opaque. Yet, the choice is not one of titling versus non-titling, privatization versus nationalization, or clarification versus obfuscation. It comprises various alternatives situated on a *continuum* of possible interventions.

In effect, titling of land and housing could be conceptualized as consisting of a set of institutional building blocks, which may be differently “stacked”, combined or employed depending on the function that an existing and persisting institution fulfills for a certain asset. For example, whereas formal titling could work well to build up institutions that need to ensure the commercial transfer of land and housing for investors, it might work completely counterproductive when land and housing fulfill a function in safeguarding social welfare for resource-

Table 2

Continuum of (in)formalization in time and space.

Time and space dependent context	Institutional intervention	Effect
Strong function of economic transaction 	Full titling	Formalize all property rights
	Partial titling	Formalize selected property rights
	Voluntary titling	Formalize those willing
	Informal titling	Formalize the <i>Informal</i>
Strong function of social welfare	Non titling	No formalization, maintain status quo

Source: Drawn by author

poor groups, e.g. as could be the case for extra-legal housing, slums and informal settlements (Sun & Ho, 2017; Davy & Pellisery, 2013).

As depicted in Table 2, depending on a time and space-determined context, where institutional functions may vary (left column), one could therefore regard institutional interventions and their effects (middle and right columns) as ranging from, or consisting of various combinations of:

- “Full titling” (survey, recording and storage of all rights – i.e. ownership, use, and other derived rights – of property in an area)
- “Partial titling” (registration of selected rights of only larger or commercialized properties in an area);
- “Voluntary titling” (only registration of the properties for which owners have voluntarily applied);
- “Informal titling” (formalization of the *informal*, non-state contractual arrangements)⁵⁸;
- “Non-titling” (maintaining the status quo regardless the level of informality, inconsistency or opacity).

Another critical problem of the neoclassical view is its deficiency to account for the perspective of time and timing. Titling is by definition a long term, evolutionary process in which the state is just a single actor, continuously pushing, negotiating and renegotiating the institutional boundaries vis-à-vis other actors, who are doing exactly the same thing: i.e. pushing, negotiating and renegotiating the institutional boundaries. Being able to make a meaningful difference in this ever-changing, complicated and conflicting dynamics is most certainly *not* a simple matter of a neoclassical “credible commitment” to private, formal and clear institutions (e.g. Fellner, 1979). It is not so because “credibility is always secured *endogenously* (...) rather than *exogenously* by virtue of the epistemological status of the theory that promotes it” (Grabel, 2000: 1; italics added). Instead, what is needed is an awareness of the limitations of institutional interventions, anticipation to the long chains of action and reaction that institutional interventions inevitably trigger, and a solid grasp of what can be done, when and where as staged in time and space.

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⁵⁸ A fascinating case in this regard is provided by (Lai, Lorne, Chau, & Ching, 2016), who describes the non-governmental titling within Kowloon Walled City in Hong Kong.

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