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Analysis

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Property and (Extra)legality in Uneven Development in Post-Mao China: A Scaled Analysis

Ting Xu*

Abstract: This article examines an important and timely question on the relationship between property, (extra)legality, and development in post-Mao China. In the post-Mao era mass rural-urban migration and rapid urban expansion have been eroding the geographical and administrative boundaries between urban and rural areas, giving rise to extralegal property. Extralegal property in this article refers to legitimate claims to land and housing that are not against state law but are also not recognised by state law as formal property rights. The legitimacy of this kind of extralegal property is based on long-term use of the land and housing, which has not yet evolved into customary or indigenous tenure. This article develops a scaled analysis that looks beyond the scope of state law, paying attention to diversity in property, and examines development as an uneven process. The key components of the new analytical framework include diversity in property in various communal networks; (extra)legality and the ways it is defined and interpreted in state law, judicial decisions, development policies, and community norms; and uneven development. The findings will provide insights for post-Mao China and other countries, especially developing and transition countries moving towards a market economy, to rethink the relationship between property, legality, and development when searching for a more sustainable approach to development.

Keywords: diversity in property, (extra)legality, uneven development, scale, extralegal property, minor rights property, communal networks, the law-in-community approach

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1. INTRODUCTION

In the post-Mao era mass rural-urban migration and rapid urban expansion have been eroding the geographical and administrative boundaries between urban and rural areas. The legal distinctions between the urban and rural land systems, however, remain an obstacle to bridging the urban-rural divide, which is both a feature of, and a cause for, uneven development in contemporary China. China's development has witnessed a close correlation between converting rural land for urban use and economic growth (He et al., 2014: 2888). In the process of urbanisation and industrialisation, rural land is generating significant profits. However, local government and property developers have enjoyed most profits, while farmers have often been excluded and even exploited. Against this background, extralegal property emerged in urban villages in the early 1990s, leading to the formation of a *de facto* property market, as opposed to the 'legal', primary rights property market. Extralegal property in this article refers to legitimate claims to land and housing that are not against state law but are also not recognised by state law as formal property rights. The legitimacy of this kind of extralegal property is based on long-term use of the land and housing, which has not yet evolved into customary or indigenous tenure. The 'primary' (legal) rights properties and the 'minor' (extralegal) rights properties co-exist in China's urban space. Here, the term 'primary rights' means that those property rights are recognised by the state and state law, whereas 'minor rights' cannot obtain such recognition. Legal provisions in the Constitution (1982, amended in 2018), the Land Administration Law (1986, amended in 2019) and the Civil Code of PRC (2020) cannot explain the co-existence of primary and minor rights properties in the context of urban renewal.

What is the relationship between property, legality, and development? To answer this research question, this article focuses on the transformation of a specific type of extralegal property in the Chinese context, that is, minor rights properties. Minor rights properties in post-Mao China are built on collectively owned land that is reserved for agricultural purposes or for farmers' residential use. The nature of minor rights property is often characterised as 'illegal' (see Qiao, 2017). This article does not consider those properties built on rural land reserved for agricultural purposes, as building this type of properties contravenes the control of the use of rural land. In fact, those built on rural land reserved for agricultural purposes only constitute a small portion of minor rights properties (Lou, 2022: 47). The flourishing of minor rights properties clearly challenges conventional approaches to examining the relationship between property, legality, and development, which often start from the question of private property rights protected by state law and see development as a linear and progressive process with private property rights as a precondition (see de Soto, 2001). Conventional approaches cannot capture diversity in property in post-Mao China, which allows various persons and entities—including individuals and communities—who are not necessarily the owner, to claim proprietary rights such as use rights or interests over a resource and participate in the governance of the resource. Nor can conventional approaches explain the complexity of the relationship between property, legality, and development in post-Mao China.

This article argues that extralegal property is embedded in uneven development and that the (extra)legality of property can be better understood through a scaled analysis. The key components of the new analytical framework include diversity in property, (extra)legality, and uneven development. Legality may be interpreted broadly (see Příbáň, 2007; Valenzuela and Cordero, 2023). de Sousa Santos (1987: 287), for example, argues: ‘The modern state is based on the assumption that law operates on a single scale, the scale of the state.’ But state law constitutes only one dimension of legality. Rather, ‘our legal life is constituted by an intersection of different legal orders, that is, by *interlegality*’ (de Sousa Santos, 1987: 298; italics original). Cowan and Wincott (2016: 14-15) also point out: ‘A key series of moves made in law and society scholarship in recent years has been away from thinking about “law and” towards thinking about legalities in society.’ The term (extra)legality discussed in this article looks beyond the legal vs. illegal distinction and emphasises the fluidity of both legality and extralegality. The scaled analysis examines the ways (extra)legality is defined and interpreted in state law, judicial decisions, development policies, and community norms. The scaled analysis also examines uneven development manifest in the urban-rural divide, regional disparities, different sectors of the economy, as well as inconsistent legal and policy frameworks.

Scale ‘is the ratio of distance on the map to the corresponding distance on the ground’ (Monnonier, 1997: 4). That said, scale is not just a geographical approach. Scale occupies an important place in not only contemporary social theory but also interdisciplinary studies (Valverde, 2009:140). Scale aids socio-legal scholars in examining the distance between what is prescribed in the law and what is going on in society and in measuring the extent to which that law may capture the complexity of society. For example, de Sousa Santos (1987: 282) argues that ‘the relations law entertains with social reality are much similar to those between maps and spatial reality.’ A scaled analysis anchors this article’s theoretical and methodological concerns in the broader law in society literature. Specifically, the significance of a scaled analysis is manifest in several areas. First, if we regard property as social relations between individuals and groups of people with respect to land (extralegal property as legitimate claims to land is based on such social relations), a scaled analysis enables us to examine the ways these social relations are co-evolving with legal, economic, and political transformations and being (re)constituted through spatial processes. These interactions are scaled, ranging from local to global. Second, a scaled analysis moves beyond the state-centric approach to examining land ownership and highlights the importance of looking at how property is being transformed in various communal networks. Third, a scaled analysis broadens our conception of legality beyond the scale of the nation-state. Finally, a scaled analysis helps us examine uneven development and its various manifestations.

The structure of this article is as follows: Section 2 of this article outlines the first judgment regarding minor rights property and highlights the controversy surrounding the disputes. Section 3 sets out the framework of a scaled analysis and highlights the originality and methodological and theoretical significance of this framework when being applied and developed in a new context, that is, the context where issues in relation to property, (extra)legality, and development are intertwined. Section 4 applies the scaled analysis to examine policies and institutional frameworks underlining uneven development in post-Mao China, which have given rise to the minor rights property market. Section 5 looks at the

key components of the scaled analysis and the ways they interact with each other through the lens of governing the minor rights property market. The conclusion maps findings onto the analytical framework and highlights the conceptual, theoretical, and methodological contributions of this study.

2. THE ‘SONGZHUANG PAINTER VILLAGE’ LAWSUITS: THE FIRST JUDGMENT ON MINOR RIGHTS PROPERTY

Songzhuang Town is in Tongzhou District in the southeastern suburbs of Beijing. Many farmhouses have courtyards or gardens, providing a dream living and working space for artists. In the early 1990s, due to farmers migrating to cities as temporal workers, more than 50% of those farmhouses were vacant (Zhao, 2007: 27). Since 1994 many painters from the urban area have moved to Songzhuang Town, transforming the farming community into an artist community as ‘The Songzhuang Painter Village’. As of 2007, more than 1500 artists lived there including painters, sculptors, photographers, and art collectors. There were also many studios, shops, cafes, and galleries. More than 200 artists bought vacant farmhouses and paid a higher price—five to ten times the standard price of the transactions between the farmers (Sohu, 2007; Zhao, 2007: 27). Many artists obtained a 50-year lease to use the farmers’ residential plots where those farmhouses are built (Jiang, 2015:72). Those artists also helped pay for improving the infrastructure including road building and street lighting (Duncan, 2015).

‘We brought prosperity to Songzhuang Town, but also brought lawsuits to ourselves,’ a painter told reporters (Sohu, 2007). When the painter first came to the village in the mid-1990s, it only cost RMB 10,000 to 20,000 to buy a farmhouse with an area of 100 square meters, but ten years later it cost RMB 200,000 to 300,000 (Sohu, 2007). The soaring property prices prompted farmers to sue artists to return the farmhouses. Farmers filed lawsuits based on normative documents issued by the State Council stipulating that urban residents are not allowed to buy farmers’ houses. A farmer said: ‘we did not know the law ten years ago, and those painters took advantage of the legal loopholes. Now we understand the law and know that we can still ask our houses back’ (Sohu, 2007). Li Yulan’s case is the first case which has received the judgment.

In 2002, Li Yulan, a painter and urban resident, bought a farmhouse with a courtyard in Xindian Village, Songzhuang Town from Ma Haitao, a farmer at Xindian Village, with a payment of RMB 45,000. The contract was witnessed by Chairman of the Village Committee and stamped by the Village Committee. In 2007, Ma Haitao sued Li Yulan, requesting a declaration that the contract was invalid on the grounds that Li Yulan is not a farmer of Xindian Village and therefore does not have the right to use the farmers’ residential plots (Zhao, 2007: 27). In 2007 after trials at the first and second instances, the Beijing No. 2 Intermediate People’s Court held that the sale contract of the farmhouse was invalid. The Court held that urban residents could not buy the houses belonging to members of the rural collective. But the Court also ruled that Ma Haitao should compensate Li Yulan with a payment of RMB 93,808. The compensation included the added value to the farmhouse through refurbishment and extensions done by Li Yulan (Wang, 2008).

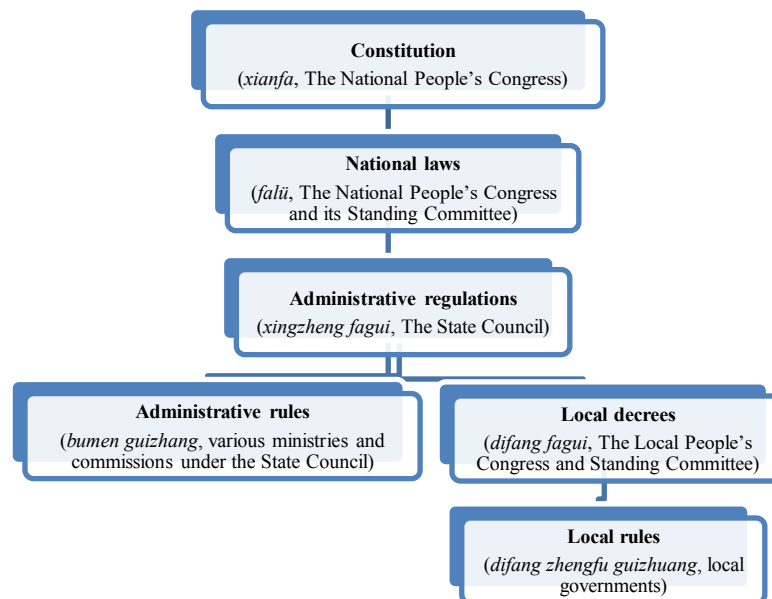
The controversy surrounding these cases focuses on whether it is legal for urban residents to buy farmers' houses. In 1999, the General Office of the State Council issued the 'Notice on Strengthening Land Transfer Management and Strictly Prohibiting Land Speculation', which stipulated that 'farmers' houses shall not be sold to urban residents.' In 2004, the 'State Council Decision on Deepening Reform and Strictly Managing Land' also stipulated that 'urban residents are prohibited from purchasing farmers' residential plots.' These normative documents have become the basis for farmers who have sold their houses to artists to file lawsuits requesting the return of the houses.

Chen Xu, Li Yulan's lawyer, said in court that the judgment of this case should not be based on national policies:

There is no provision in our national laws and administrative regulations prohibiting the sale and purchase of private houses on farmers' residential plots. The Land Management Law stipulates that farmers' application for residential plots after selling or renting their houses shall not be approved. This legal provision indicates that the law does not prohibit farmers from transferring use rights to their residential plots when selling their houses (Sohu, 2007).

Chen Xu argued that the court judgment on the invalidity of a contract should be based on national laws and administrative regulations. The notices of the General Office of the State Council and the decisions of the State Council are normative documents (Sohu, 2007). Normative documents are not state law but policies (see Figure 1). The agent of the farmers who sold their houses, however, only replied: 'I don't care about the law. I don't understand it. Anyway, Li Yulan is not a farmer in Xindian Village, Songzhuang Town. She should not buy this house' (Sohu, 2007).

Figure 1: Scale and State Law in China



Similar lawsuits keep arising. The artists' property claims continue clashing with other communal networks' economic and political interests. More tensions emerged around the 2008 Beijing Olympics when authorities started to see the 'Painter Village' as a dangerous community (Duncan, 2015). Checks and censors were imposed by the state, and exhibitions were closed (Duncan, 2015). Moreover, Beijing municipal government grand plans to relocate government offices and civil servants to Tongzhou, the district where Songzhuang Town is located, increased land speculation in Songzhuang Town (Duncan, 2015). Land prices are rising. Artists are facing more lawsuits and evictions. Many have moved out of Songzhuang Town (Duncan, 2015). The Songzhuang Painter Village is a microcosm of post-Mao China where complex issues in relation to property, (extra)legality, and development are intertwined. Different communal networks have merged, blurring the urban-rural divide that defines the boundaries of property. These communal networks have also clashed, generating different definitions and interpretations of legality.

3. A SCALED ANALYSIS: PROPERTY, (EXTRA)LEGALITY, AND UNEVEN DEVELOPMENT

3.1 EXAMINING PROPERTY'S SPATIAL AND TEMPORAL DIMENSIONS

Property has both spatial (see Babie, 2013; Blomley, 2016; Byer, 2023) and temporal dimensions (see Epstein, 1986). A scaled analysis helps explore both dimensions (see Fennell, 2009; Fox O'Mahony and Roark, 2022). The territorial dimensions of the relationship between scale and space are often defined by political boundaries (Cartier, 2005: 24). For example, in post-Mao China these political boundaries include townships, counties, cities, provinces, and the nation-state. By contrast, the non-territorial space constitutes 'scaled arenas' for the constitution of social relations, including the household, neighbourhood, workplace, and various institutions (Marston, 2000; Cartier, 2005: 24). The Songzhuang artist community can also be seen as a non-territorial space. This echoes Lefebvre's (1991) argument that space is a social product. Further, various agents—individuals, communities, institutions, and the state—enable the formation of social relations at different scales (see also Cartier, 2005: 24). Bringing human agents into the analysis of space is important, as it broadens our thinking of scale beyond a merely hierarchical framework. Scale is 'a contingent outcome of the tensions that exist between structural forces and the practices of human agents' (Marston, 2000: 220). The boundaries of the non-territorial space therefore do not necessarily match the territorial space defined by political boundaries. Non-territorial space invokes a rethinking of property's boundaries, as property's boundary exclusion often 'connects to notions of territoriality' (Fennell, 2019: 536). However, if property is also linked to non-territorial space, the assumptions that property has fixed boundaries will be problematised (see Blomley, 2016).

Thinking space through scales leads us to question whether categories such as 'the urban' exists as a homogenous space and those categories such as 'urban land' fails to capture diversity in property. It further problematises the concept of state ownership of urban land. Indeed, the idea that urban spaces are national is now

being deconstructed (Sassen, 2006: 1). But a ‘national’ urban space is still assumed in Chinese law. Would it be more helpful to think of the meaning of ‘the urban’ through various communities? Locality is important; people are often bound together via living in a common place. That said, community is not merely a geographical notion, as people may be bound together by a common interest that transcends the territorial boundaries. Community may be formed by a distinctive network of social relations or style of life (Clarke, 2014: 47-48). Community may also be shaped by a strong sense of connection or belonging (Clarke, 2014: 48). The Songzhuang artist community is a vivid example.

In addition to spatial dimensions, property has important temporal dimensions. For example, Epstein (1986: 667) argues that ‘[a]ll human interactions, and hence all legal rules, have a temporal dimension.’ Cotterrell (2012: 2; italics original) points out that ‘law exists only in *specific times and places*.’ Further, long-term possessory interests are being divided through socio-economic transformations. For example, Fennell (2019: 521-522) argues that ‘... as slices of on-demand access increasingly replace lumpy long-term possessory interests, the presumed strong complementarity associated with temporal continuity and spatial continuity begins to break down.’ Allowing the use of land for different purposes and over different periods of time is not unique to the common law of property. Property rights to both urban and rural land in post-Mao China are scaled.

3.2 COMBINING THE LAW-AND-COMMUNITY APPROACH WITH A SCALED ANALYSIS

Since property rights can be disaggregated, it is important to invoke the concepts of ‘community’ and ‘communal network’ to develop a new scaled analysis. As a classic social science concept, there are many interpretations of what community is or should be. The law-and-community approach developed by Roger Cotterrell (e.g., 2006) sees ‘community’ as networks of social relations held together by a variety of bonds including convergence of economic interests, shared customs, and common values. Drawing on Weber’s four ideal types of social action, Cotterrell’s networks of community encompass four ideal types of community: instrumental community; traditional community; community of belief; and affective community. In this approach, the idea of community differs from our usual understanding that sees community as physical and geographical entities or simple agglomerations of individuals. To put it another way, community ‘is not a thing but a *quality of social relations*’ (Cotterrell, 2006: 273; italics original). Seen through the lens of community, abstract society is disaggregated ‘into many different networks of social relations in and beyond nation states’ (Cotterrell, 2006: 65). Invoking the concept of community therefore enables us to examine property transformation beyond the scale of the nation-state.

In social reality, these types of community ‘rarely exist in pure form’ but often ‘interact in complex ways as networks of community’ (Cotterrell 2008: 17, 23). A communal network can exist at the local, national, supranational, international, or transnational level; each can comprise any or all of the four types of community. A communal network, such as the Songzhuang artist community, may include ‘a diversity of social collectivities, commitments and systems of interests, values or beliefs, coexisting, overlapping and interpenetrating’ (Cotterrell, 2006: 67). People

can be members of different communal networks; their memberships are often ‘transient’ and ‘fluctuating’ (Cotterrell, 2013: 56). For example, the artists, through the purchase of farmhouses in Xiaobao Village in Songzhuang Town, were initially welcomed by farmers in the village but were later rejected by them. The clashes between the artist communal network and the local communal network bound by membership of the rural collective show that communal networks can also be ‘rife with conflict and power struggles’ (Djelic and Quack, 2010: 383).

Further, invoking the concept of communal network enables us to look beyond the state-centric approach to examining land ownership and to examine how property in land is being transformed in and between various communal networks. Combining the law-and-community approach with the scaled analysis further enables us to explore the interaction between property transformation and various factors affecting development including economic conditions, communal norms, state law, and policies. It should be noted it is often easy to label Cotterrell’s approach as an ‘ideal-type’ western theory. However, the approach is in nature a methodology, and is not characteristically western (Cotterrell, 2008:17-18). The law-and-community approach does not intend to prescribe but offers a method to observe and explain the interaction between law and communal networks. It should also be noted that while this article adopts a broader conception of law, it distinguishes state law from community norms. Applying and developing the law-and-community approach to examine diversity in property in development helps us re-evaluate the conventional approaches to examining the relationship between property, legality, and development.

3.3 BRINGING THE LITERATURE ON UNEVEN DEVELOPMENT TO THE SCALED ANALYSIS

This article’s methodological framework further brings in the literature on uneven development, which has been overlooked by studies of property law in general and studies of the transformation of property in China in particular. It is, however, difficult to find a single definition of uneven development (see Wang and Hu, 1999; Harvey, 2005; Reinert and Kvangraven, 2023). For example, uneven development studied by Smith (2008/1984: 134) ‘refers not simply to the geography of capitalism but also to uneven rates of growth between different sectors of the capitalist economy.’ For Smith (2008/1984: ix, 6), uneven development is marked by ‘the extension of market logics and private property arrangements.’ Said (1993: 225) points out that Smith’s study ‘brilliantly formulates how capitalism historically has produced a particular kind of nature and space, an unequally developed landscape that integrates poverty with wealth, industrial urbanization with agricultural diminishment.’

This article develops the literature on uneven development in the context of post-Mao China and examines the unevenness of development which is manifest in post-Mao China’s urban-rural divide, regional disparities, different sectors of the economy, and inconsistent legal and policy frameworks. This research also examines the association of uneven development with increasingly tensions including those between efficiency and equity, private ownership and public regulation, and the rights of individuals and of communities. Space constitutes an important subject of the research in uneven development. But this study does not just adopt a

geographical approach to uneven development but examines socio-economic, political, and legal transformations associated with uneven development.

3.4 RESEARCH SOURCES

This article draws on primary sources, including the interaction between Chinese national law and development policies as well as pilot schemes regarding property implemented at local level. It also looks at representative cases in relation to disputes over the validity of the contract regarding the transfer of minor rights properties. The sampling strategy contains three steps. First, using the keywords including ‘minor rights property’ (*xiao chanquan fang*) and ‘civil cases’ (*minshi anjian*) to search the Supreme People’s Court of China’s judgments database, a major judgments database in China, gave rise to 26,651 cases. Second, using the keyword ‘farmers’ residential plots’ (*zhuajidi*) to search those 26,651 cases gave rise to 5,799 cases. Finally, using ‘minor rights property built on farmers’ residential plots’ (*zhuajidi xiao chanquan fang*) to search those 5,799 cases gave rise to 22 civil cases. Among these 22 civil cases, nine cases have been tried at the second instance with six cases regarding the validity of the contract on the transfer of minor rights properties.¹ Analysis in Section 5.3 focuses on these six cases. As statistically inclined readers may query the representativeness of these cases, it is important to highlight that this is a qualitative study rather than a quantitative study. These cases give us sufficient information on the following themes: (1) key issues and debates in the validity of the contract regarding the transfer of extralegal properties; (2) statutory provisions relied on by courts in judging these disputes; (3) judicial interpretation of these laws and regulations; (4) the reasoning behind court decisions; and (5) the relationship between court decisions and local and national development policies. This article also looks at secondary sources including academic publications and newspaper reports.

4. DEVELOPMENT POLICIES AND INSTITUTIONAL FRAMEWORKS UNDERLINING THE EMERGENCE OF THE MINOR RIGHTS PROPERTY MARKET

4.1 THE LAND SYSTEM AND UNEVEN DEVELOPMENT IN POST-MAO CHINA

Urbanisation and the formation of ‘modern’ cities in China from the early Republican period (1911-1949) onwards began to give birth to an urban-rural divide (see Xu and Murphy, 2008). The Maoist regime (1949-1976), although claiming to be pro-village and anti-city, was fundamentally urban-oriented (Wang, 2011). Industrialisation was the priority in the making of the modern state, and agricultural

¹ *Liang Shangyan, Ren Pengfei, and Ren Hailiang v. Liu Yongmian and Liu Yongxian* (2021) Guangzhou Intermediate People’s Court, Civil Judgment, Final, No. 23587; *Wu Zhongchao v. Liu Jimei* (2021) Guangzhou Intermediate People’s Court, Civil Judgment, Final, No. 27733; *Fu Yubeng v. Lu Peigang and Zhou Bingmei* (2021) Jilin Intermediate People’s Court, Civil Judgment, Final, No. 438; *Li Xinrong v. Luo Feng and Xie Yanzhen* (2020) Guangzhou Intermediate People’s Court, Civil Judgment, Final, No. 6968; *Lie Jiancong v. Xu Cunxiang* (2016) Guangzhou Intermediate People’s Court, Civil Judgment, Final, No. 8533; *Chen Zhenming and Chen Moujia v. Zhang Mou* (2014) Guangzhou Intermediate People’s Court, Civil Judgment, Final, No. 4991.

resources were transferred to urban centres to subsidise the industrial sector. Furthermore, the mobility of rural people to cities was controlled by the state through the household registration system (*hukou zhidu*). Under this system, people registered as rural households received less support for social security, education, and health care compared to that offered to urban residents. The rural-urban divide has given rise to two different land systems: urban land is owned by the state and rural land is owned by the collectives; ownership of the land itself cannot be transferred. In the post-Mao era, and especially in the post-Deng period (1992-), mass rural-urban migration and rapid urban expansion, however, have been eroding the legal and administrative distinctions between urban and rural. In 2016, 31 provinces across China abolished rural household registration (Xinhua News Agency, 2016). Yet, the legal distinctions between the urban and rural land systems remain an obstacle to bridging the urban-rural divide, which is both a feature of, and a cause for, uneven development in contemporary China.

Against the background of the urban-rural divide, a dual-track land use rights (LURs) allocation system emerged, which has a significant impact on the nature and the shape of the urban property market (Li, 1999; Xie, Ghanbari Parsa and Redding, 2002: 1387; Ding and Song, 2005; Zhu, 2005: 1374; Po, 2011: 509). A dual-track LURs allocation system means that LURs are assigned in two ways: ‘allocation’ (*huabo*) and ‘grants’ (*churang*). Allocation is the transfer of LURs to state owned or non-profit users without either time limits or LURs transfer fees (Article 23 of the Urban Real Estate Administration Law 1994, amended in 2019). Grant is the transfer of LURs to non-state users for a fixed period in return for LURs transfer fees (Article 8 of the Urban Real Estate Administration Law 1994, amended in 2019). The emergence of the dual-track LURs allocation system is another manifestation of uneven development in China.

The close association between the land system and uneven development needs to be assessed by taking the central-local government relations, another question of scale, into account. For example, the Land Administration Law (1994) was amended in 1998, aiming to strengthen the power of the State Council to enable better centralised management of land. However, ‘real’ power shifted to different levels of government and was mobilised in the dynamics of their interactions (Li, 1999: 32). At the national level, the then Ministry of Construction (now transformed into the Ministry of Housing and Urban-Rural Development) under the State Council played an important role in regulating the property market. At provincial and local levels, however, real estate and land management departments are directly responsible to provincial and local governments below the provincial level (Li, 1999: 32). The central Ministries provide working guidance but are unable to exert direct control over their counterparts at the local level. The degree of state involvement in the emerging LURs and property markets highlights the importance of a scaled analysis.

There is, however, no single scale of ‘the local government’, which, according to the administrative hierarchy in China, refers to provincial, city (prefecture-level), county, and township governments. The label of ‘the city’ can mean different things. The city could mean a directly administered municipality (*zhixiashi*) of China such as Beijing; a prefecture-level city (*dijishi*) such as Zhengzhou (in Henan province); or a county-level city (*xianjishi*) such as Xinmi (in Zhengzhou). Further, the boundaries of these tiers keep shifting in urbanisation through various scaling processes. These processes speak to Smith’s (1995: 65; italics original) argument that

‘geographical scale is best conceptualized as the *spatial* resolution of contradictory social forces; in particular the resolution between opposing forces of competition and cooperation.’ These processes also involve ‘jumping scale’, that is, ‘the reorganization of specific kinds of social interaction at a higher scale and therefore over a wider terrain, breaking the fixity of “given” scales’ to claim more power (Smith, 1995: 62).

The central and local governments are competing for financial resources (Huang, 1996; Xu, 2014:106-111). A tax sharing system (*fenshui zhi*) was adopted in 1994 to enhance the revenue of the centre and increase the transparency of tax revenues (at least to Beijing). As a result, central government grants to cities for urban infrastructure have been significantly reduced. Local governments must find more financial resources to finance urban construction (Xie, Chanbari Parsa and Redding, 2002: 1392). Land has become an important source of revenue and the main vehicle for local governments to compete and bargain with the central government in the fiscal and administrative decentralisation (Hsing, 2006a: 576). Indeed, there are many sources of revenue that can be extracted from land, for example, tax. Land-use taxation developed in parallel with the LURs system. Both users and transferors of LURs pay tax (Ding, 2003: 113-114). As a result, local government are keen to embark on a wide range of urban development projects, which involve more transfers of LURs to develop commercial housing for revenues. Local governments can also extract revenue from land such as local taxes and LURs transfer fees, which do not need to be shared with the central government (see Ho and Lin, 2003; Hsing, 2006b: 108). These are ‘extra-budgetary’ revenue (*yusuanwai zijin*). Such income has become the main incentive for local government support for the property booms of the 1990s and 2000s.

In addition to uneven development manifest in the urban-rural divide and the complex central-local relations, regional disparity constitutes another feature of uneven development in China. These regional variations include ‘geographical conditions, resource endowments, the sectoral distribution of economic activity, and the level of socioeconomic development’ (Wang and Hu, 1999: 3). Investment policy in the Mao’s era prioritised peripheral and undeveloped regions (Wang and Hu, 1999: 4). However, market reforms commencing in 1978 started to emphasis efficiency (Wang and Hu, 1999: 4). Coastal regions were encouraged to become rich first, through and resulting in ‘price realignment, resource reallocation, and spatial restructuring’ (Wang and Hu, 1999: 5). The establishment of the LURs system, along with uneven development, has led to the formation of the legal, primary rights property market and its contrast with the extralegal, minor rights property market.

4.2 THE EMERGENCE OF THE TRANSFER OF LAND USE RIGHTS AND THE ‘LEGAL’, PRIMARY RIGHTS PROPERTY MARKET

Urban land in China before early 1950s was privately owned, subject to free transfers. However, following the ‘socialist transformation’ in 1956, private housing, as well as the urban property market, was virtually abandoned during the period from the late 1950s to the 1970s. The state allocated land to its agencies including government agencies, service units, large state-owned enterprises (SOEs), and other social organisations affiliated with the government, which constituted the public-sector employers, that is, work units (*danwei*) (Hsing, 2006a: 579). Work units (*danwei*)

are a special social organisation in China, primarily bound by employment relationships, which controlled many important aspects of the life of urban residents, including employment, housing, and education from 1949 to the late 1990s (Bjorklund, 1986; Walder, 1986; Lu, 1989; Lü and Perry, 1997; Bray, 2005). Work units were not just land users but also held management rights and acted as the *de facto* owners of urban land (Hsing, 2006a: 580). They allocated and provided housing to their employees. This kind of housing constituted part of remuneration. Up until the late 1970s, a work unit constituted a communal network, a scale which manifested state ownership of urban land and housing.

Public housing provision, however, added much burden to state finance (Guan et al., 1988: 18). In July 1984, the Ministry of Urban and Rural Construction and Environmental Protection and the Office for National Statistics started a two-year national survey on housing conditions, covering 1.5 billion population (Lin and Tian, 1988). Housing conditions in urban China were poor. Against this background, as early as 1980, the Central Committee of the Communist Party of China and the State Council approved the implementation of the policies on the marketisation of housing, marking the beginning of the reforms of China's urban housing system (Database on China's Reforms, 2013). In 1982 four cities—Zhengzhou, Changzhou, Siping, and Shashi—became pilot cities to experiment with the sale of public housing, with the government, the work unit, and the individual covering one third of the housing price respectively (Database on China's Reforms, 2013). The sale of public housing, however, was not sufficient to improve housing conditions. Government did not have funding to build more housing either. Moreover, rapid urbanisation has driven up the commercial value of urban land, calling for a new mechanism to enable the marketability of urban land while maintaining the doctrine of state ownership of urban land.

The needs to reform the land system were especially pertinent for the construction of Special Economic Zones (SEZs) such as Shenzhen, a city in Guangdong province adjoining Hong Kong. On 1 December 1987 Shenzhen had the first auction of LURs. The LURs system—in emulation of 'legacy' leasehold in Hong Kong—was developed to attract foreign direct investment (FDI) to fund the construction of Shenzhen, including more housing. Urban land was leased to property developers and foreign investors so that they could access and use the land for a limited period (see Ding, 2003: 112). The auction, however, contravened the Constitutional provision (1982, Clause 4 of Article 10) that 'no organisation or individual may appropriate, buy, sell, or lease land, or unlawfully transfer land in other ways.' The auction of LURs in Shenzhen was illegal in this sense. However, four months later, in April 1988 the Constitution was amended and confirmed that LURs can be transferred.

In the late 1980s, with the legal recognition of the transfer of use rights to urban land, urban households in China were given the opportunity to purchase private housing for the first time after three decades of abandoning private property. In March 1998, Premier Zhu Rongji introduced a package of reforms that included terminating housing provision and allocation by work units (see Zweig, 2011). Employees must go to the property market to purchase their housing. Work units should no longer be involved directly in housing construction and provision but may provide housing subsidies for their employees. This new policy was in response to the 1997 Asian financial crisis and the government strategy at that time to expand

internal consumption. It was also in line with the World Bank's (1993) housing market enabling policy. The marketisation of housing sped up in the 2000s. While the state remains the owner of urban land, urban households can own apartments and the use rights to urban land for a period of 70 years, which, according to Article 359 of the Civil Code of PRC (2020), 'shall be renewed automatically upon the expiration of the term.'

Urban land, an important state-owned asset, has become legally transferrable through the lease and transfer of LURs, which has significantly contributed to the emergence of a legal, 'primary' rights property market. That said, the auction of LURs in Shenzhen emerged 'illegally' but conformed to the overarching state policy of urban development and the need to promote the marketability of urban land. The experiment with the transfer of LURs in Shenzhen, a communal network at the scale of a Special Economic Zone, was supported by central and local party officials and was scaled up as a practice nationwide. The practice was eventually 'legalised' after being an illegal experiment. The examination of reforms to China's urban land system also shows the relevance of looking at the international scale such as the World Bank's market enabling strategy (see Cao and Keivani, 2014) and the financial crisis. The development of China's urban property market is, however, not directly driven by the global influence but driven by national and local development policies. In summary, the examination in this section demonstrates that the (extra)legality of property is defined differently within and across various communal networks and the ways it is defined are scaling processes.

5. GOVERNING THE MINOR RIGHTS PROPERTY MARKET

5.1 THE LEGAL VACUUM AND UNEQUAL URBAN AND RURAL LAND RIGHTS

Like state ownership of urban land, since 1978 collective ownership of rural land has been fragmented into different kinds of use rights. These use rights include the rights to farm, categorised in law as 'contractual management rights', and use rights for construction purposes. The latter is further divided into use rights for farmers' residential plots reserved for farmers to build their houses and those for industrial and business projects. Unlike use rights to urban land, there is no maximum term specified in law regarding the use of rural land for construction purposes. Moreover, the extent to which the use rights to rural land may be transferred and disposed of has raised a lot of debate. For example, when the Property Law (2007) was still in operation (abolished due to the introduction of the Civil Code in 2020), Chapter 13 of the Property Law (2007) dealt with LURs to rural residential plots but failed to clarify the issue of the transfer and sale of these use rights (in instances where the plot has not been reclaimed by the state first). This clearly leaves a legal vacuum when determining the nature of minor rights property.

The only way that farmers' LURs can enter the market was to be converted into state-owned land through land acquisition by the state. The urban vs. rural divide is clear when assessing the nature of LURs in Chinese law. The state (represented by local government at city and county levels) leases land to property

developers in return for fees; then, property developers sell properties at high prices to urban home buyers. By contrast, the state can acquire collectively owned land while offering low compensation to farmers. Local government and property developers enjoy most profits from rural land, while farmers are being excluded and even exploited. Urban land rights and rural land rights are unequal.

The boundaries between the urban and the rural, however, become blurred; one pertinent example being the formation of ‘villages within the city’ or ‘urban villages’ (*chengzhong cun*) (see Zhang, 2002, 2004, 2005). Urbanisation has speeded up in China since the late 1980s. During the process of urbanisation, villages have been gradually enclosed in newly constructed urban areas. These spaces cannot be categorised as typical rural areas, as they are no longer used for farming purposes but, rather, are rented out; for example, as rented houses or rooms to temporal workers in the city. These spaces, however, cannot be regarded as standard urban areas either, especially when considering the difficulty in defining the identities of the owners of houses and flats in those villages. These ‘villagers’ live in the city; they do not farm, but instead rely on rents to make a living (see Xu and Gong, 2016: 202). These villagers lease their houses to migrants who work in the city but choose to reside in these urban villages because of the affordable housing prices. As time goes along, the distinction between lease and purchase has become blurred, and many leases have transformed into de facto sales, leading to the formation of the minor rights property market. Urban villages constitute communal networks, transcending the legal and administrative distinctions made by the urban-rural divide.

It should be noted that the Land Administration Law (1986) was amended in 2019 to allow use rights to rural land for construction purposes to enter the market through transfers (Article 63). Conversion into state-owned land as the precondition for the rural construction land to enter the market is no longer required (Article 45). That said, these new provisions are only concerned with construction land for industrial and commercial projects not farmers’ residential plots. The Civil Code (2020) leaves issues regarding the transfer of use rights to farmers’ residential plots to the relevant land administration law (Article 363). As a result of the gaps in the law, informal norms concerning the transfer of LURs to farmers’ residential plots continue to exist at the grassroots level, giving rise to various sorts of property claims which are not necessarily recognised by state law as property rights.

5.2 THE (EXTRA)LEGALITY OF MINOR RIGHTS PROPERTY THROUGH SCALES

As noted in the Introduction, there are various types of minor rights property. This section is concerned with the (extra)legality of one type of minor rights property which is built on farmers’ residential plots. This sort of property includes a farmhouse such as that in the Songzhuang Painter Village or a big house which contains several flats. In Guangzhou, for example, minor rights properties often have more than four floors (Na, 2022). Farmers may retain one or two flats for the use of their own family while making the other flats available for sale. In other areas such as Beijing, minor rights properties may be flats located in a residential community constructed through urban village renovation. These flats are owned by the village’s property development company. Some flats are reserved for local

farmers; other flats are available for sale to buyers outside the village (Wang, 2013). The ‘minor’ nature of such properties is manifested in the inferior status of the LURs to the collectively owned rural land compared to those to urban land in terms of transferability on the property market, and by their non-registrable status. Despite this inferior status, a minor rights property market is flourishing, due in large part to the fact that prices are low and more affordable compared to those available on the primary property market and that these properties enable people to secure ‘shelter’ and promote human dignity and equality in the expanding urban area. There were already 50,000,000 minor rights properties nationwide by the end of 2018 (Xin Xiaoxi Bao, 2020). In Shenzhen, for example, approximately 50% of properties were characterised as minor rights properties as of the end of 2020 (Xin Xiaoxi Bao, 2020).

Massive construction of minor rights properties started in the early 1990s in the context of rapid urbanisation and was driven by farmers’ strong motivation to benefit from urbanisation. Ironically, the early stage of the construction of minor rights properties was an active response to a series of governmental reforms and was supported by local governments from the 1980s to the 1990s. As discussed in Section 4.2, the private housing market has emerged since the late 1980s, which required more land for construction. Property developers and the rural collectives thus collaborated—property developers provided funding, and the rural collectives provided land. These property developers were often members of the rural collective, and the collaboration was usually based on reputation, blood relations, and trust (Chen et al., 2014). Personal relations (*guanxi*) functioned as an alternative to formal law (Jones, 1994; Chen 1999). In 1992 the then Mayor of Guangzhou supported this way of constructing minor rights properties in a public speech (Xu, 2008). The formation and flourishing of the minor rights property market echoes Abramson’s (2011: 554) observation that ‘the locally diverse and historically particular qualities of property relations’ constitute an essential feature of China’s development. Further, property is not only ‘a legal concept of rights and obligations’, but also ‘a cultural, political and moral concept that people invoke to oppose development they believe is unfair or damaging to their interests’ (Abramson, 2011: 554). The minor rights property market constitutes a communal network—consisting of various participants including local farmers, rural collectives, buyers outside rural collectives, property developers, and local government—bound by nested interests transcending the legal and administrative boundaries between the urban and the rural.

The evolution of the minor rights property market has a strong regional feature in association with uneven development. Like the emergence of the transfer of LURs, this market began to develop in coastal regions, which were encouraged by the central government to ‘get rich first’. For example, the booming of minor rights properties has been driven by industrialisation that has taken place in the Pearl River Delta region since the early 1980s. Foreign investment was introduced in this region, and many enterprises and migrant workers moved in, creating a huge demand for space for factories and housing. As a result, many rural collectives constructed factories and residential houses on rural land for rental or sale (Huang, 2011: 273).

In 2004, however, the State Council declared that city and township residents should not purchase minor rights properties in rural areas. Following this declaration, many minor rights properties were forcibly demolished (Ding, 2007).

By contrast, township governments clearly acquiesced in the development of these properties. Township governments do not have the authority to assign LURs (Articles 40, 60, and 61 of Land Administration Law 1986, amended in 2019) and therefore they cannot profit from collecting the land leasing fees. That said, township governments do have the authority to examine and approve the land to be used as farmers' residential plots (Article 62 of Land Administration Law 1986, amended in 2019). As a result, township governments have managed to find an alternative source of income by encouraging the development of minor rights properties. Moreover, there exist provincial variations in dealing with minor rights property. For example, the Beijing municipal government ordered the demolition of minor rights properties, whereas in Shanghai the Higher People's Court has recognised the purchasers' right to continue possessing and using minor rights properties (REICO, 2012). This clearly shows that the (extra)legality of minor rights property in China is embedded in patterns of uneven development such as regional disparity.

Despite the prohibition from the central government, there are no national laws prohibiting farmers from selling minor rights properties or prohibiting urban residents from buying these properties. Prohibition was issued via the publication of a series of normative documents, which reflect government policies (Xu and Gong, 2016: 206). The declaration made by the State Council that minor rights properties are 'illegal' does not have a solid legal foundation. The nature of minor rights property is extralegal rather than illegal.

5.3 JUDICIAL DECISIONS ON DISPUTES OVER MINOR RIGHTS PROPERTY

An examination of the representative cases identified in Section 3.4 enables us to specify principles and mechanisms used by the court to solve disputes over minor rights property that have not been specified in the legislation. In four cases, the plaintiffs in the first instance trial were sellers. After the house value increased, they claimed that the houses sold were minor rights properties and that the sales violated the mandatory provisions of national laws and regulations. They requested a declaration that the contract was invalid.²

In *Chen Zhenming and Chen Moujia v. Zhang Mou* (2014), Zhang Mou was the plaintiff in the first instance trial. He signed an agreement with Chen Zhenming and Chen Moujia's father with whom he helped pay off debts and pay part of the pension, and in return, upon the death of Chen Zhenming and Chen Moujia's father, Zhang Mou was designated to inherit his house. Zhang Mou sued because the house was not transferred to him after fulfilling his obligations specified in the agreement. The defendants in the first instance trial (Chen Zhenming and Chen Moujia) claimed that Zhang Mou is an urban resident not a member of the defendants' rural collective, so the house cannot be transferred to Zhang Mou according to national laws and policies. The court held that it can only confirm the house has been rightly bequeathed to Zhang Mou by Chen Zhenming and Chen Moujia's father. As for

² *Liang Shangyan, Ren Pengfei, and Ren Hailiang v. Liu Yongmian and Liu Yongxian* (2021); *Wu Zhongchao v. Liu Jiwei* (2021); *Li Xinrong v. Luo Feng and Xie Yanqun* (2020); *Lie Jiancong v. Xu Cunxiang* (2016).

whether the house should be transferred, it is not within the scope of its review. Therefore, the court did not touch upon the issue regarding minor rights property.

In *Fu Yuheng v. Lu Peigang and Zhou Bingmei* (2021), the plaintiff (Fu Yuheng as the buyer) in the first instance trial was a member of the rural collective where the house is located. Because of a lengthy delay in acquiring a property certificate for the house, he sued and claimed that the contract concerning the sale of minor rights property is invalid and that the sellers should take back the house and return the purchase money to him. The court agreed that the sale of minor rights property is invalid. But since the property certificate was being processed, Fu Yuheng should be able to retain the house. In this way, the court implicitly allowed the sale of minor rights property, as Fu Yuheng was a member of the rural collective.

In all the cases, the judgments followed the principle to rule that the contract concerning the transfer of minor rights property is invalid, but that justice should be maintained. For example, in *Li Xinrong v. Luo Feng and Xie Yanzhen* (2020), the judge said that Li Xinrong had the right to recover the house because the contract is invalid. However, Li's behavior was against the spirit of the contract and the principle of good faith. Further, Li could not make a profit through violating the principle of good faith. In the time since, however, the house's price has risen sharply. If Luo Feng and Xie Yanzhen were to purchase a new house, they must pay more and will incur extra costs. According to the principle of fairness, the increase in the value of the house should belong to Luo Feng and Xie Yanzhen to compensate for their losses.

The case analysis further puts the law-and-community approach in context, which helps us examine the judicial interpretation of the interplays between community norms, state law, and policies. To adopt the law-and-community approach does not claim any superiority or desirability of communal networks; we live within such relations. These relations may be strong or fragile, well or poorly governed (Cotterrell, 2006: 77). Different communal networks point to different regulatory challenges (see Perry-Kessaris, 2008, 2011). Since a communal network such as Songzhuang Town may not be structured to ensure equality, the law that expresses and frames a communal network may be regarded as unjust and illegitimate by some members of the communal network as well as outsiders. Under such circumstances, a much larger, powerful communal network and its law (e.g., the state and its law) may attempt to control smaller, less powerful communal networks and 'remedy' community norms. Here 'to remedy' community norms means to bring these community norms into conformity with the norms of the more powerful communal network. The remedy may fail and give rise to more conflicts. To solve these conflicts and make communal networks better governed therefore requires judges to maintain a certain degree of stability and a sense of justice not only within various types of communal networks but also between them.

6. CONCLUSION

This article challenges the conventional approaches to examining the relationship between property, legality, and development through a new scaled analysis of the extra(legality) of property in uneven development. The scaled analysis contains key

elements such as diversity in property, (extra)legality, and uneven development, bringing concepts and theories from multiple disciplines including human geography, political economy, development studies, and sociology to socio-legal studies of property. This article also further develops the scaled analysis through invoking the concept of communal networks and applying and developing the law-and-community approach. Thus, it introduces a new unit of analysis, that is, communal networks, which has been overlooked by existing studies that have applied a scaled analysis of property.

This scaled analysis not only looks beyond a hierarchical framework but also disaggregates the abstract, unified concept of ownership into property being transformed in various communal networks. This scaled analysis therefore helps us grasp diversity in property in various communal networks in post-Mao China—for example, work units, urban villages, the minor rights property market. This scaled analysis also breaks the fixed boundaries of property such as those between urban and rural land defined by legal and administrative distinctions in post-Mao China.

Integrating the law-and-community approach into a scaled analysis helps us examine legality beyond that is recognised at the scale of the nation-state. This approach broadens the examination of the intersection of different legal orders, conceptualised as interlegality by de Sousa Santos (1987). de Sousa Santos (1987: 287) illustrates three scales of legality as examples: '[l]ocal law is a *large-scale legality*. National state law is a *medium-scale legality*. World law is a *small-scale legality*.' His scaled analysis of legality is still within a hierarchical framework ranging from the local, the national, to the global and does not specifically point to extralegality. This article examines (extra)legality, which emphasises the fluidity of both legality and extralegality, conceptualised differently in various communal networks. Echoing Cotterrell's (2012) argument, the (extra)legality of property only exists in certain times and spaces. The transformation of property finds great proximity to extralegality in economic reforms in post-Mao China. Many initiatives that have propelled the reforms have emanated from the grassroots. Yet, in many cases such as the Songzhuang Painter Village lawsuits, grassroots initiatives tend to run into obstacles when they seek legal recognition. The study of the evolution of minor rights property and changes in defining its nature over more than three decades shows that the interpretation of the (extra)legality of property is scaled, constantly interacting with community norms, state law, local and national policies.

To propose the new scaled analytical framework, this article brings in the literature on uneven development developed in economic and human geography and political economy. It develops the literature on uneven development through linking this literature with studies of the (extra)legality of property, as both areas of study points to the central question of scale. This article further develops the literature on uneven development through examining uneven development in the Chinese context. It explores the features of, and causes for, uneven development in post-Mao China, which is manifested in the urban-rural divide, regional disparity, growth in different sectors of the economy, and inconsistent legal and policy frameworks. The various dimensions of uneven development, all closely related to scale, help us understand the socio-spatial, economic, and political contexts of the evolution of minor rights property and its contrast with primary rights property. A scaled analysis taking account of uneven development further allows us to examine different scales of governance and various interests embedded in the interaction of

governance and property. The power can scale up, for example, the transfer of LURs was first experimented in China's Special Economic Zones and was later adopted nationwide and recognised in state law. The power can also scale down, for instance, the power of controlling urban land has gradually shifted from central government to local government. The concept of scale looks beyond the scale of governance at the nation-state level but also the scale of power in making decisions on land use, resulting in different layers of legislation and policies on property and various forms of property and property claims.

Finally, a scaled analysis helps us re-evaluate the neo-liberal assumptions about the relationship between property and economic development. As shown in this study, formal property rights do not often precede development as a precondition. It echoes Hirschman's argument (1958: 4), for instance, that 'development had taken place somewhere without the benefit of the "prerequisite."' The evolution of property is embedded in uneven development; the process how property transforms itself is uneven. In summary, the scaled analysis developed in this article can bring together the three interrelated areas—property, (extra)legality, and uneven development—and provides new perspectives to study each area and generates new insights into the relationship between property, legality, and development. The findings and insights will potentially help other countries, especially developing and transition countries moving towards a market economy, to rethink the relationship between property, legality, and development when searching for a more sustainable approach to development.

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