



Myths of tenure security and titling: Endogenous, institutional change in China's development[☆]



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ABSTRACT

Titling is often seen as a precondition for economic growth and the rule of law. By contrast, Chinese real estate has gone through a substantive economic growth *without* a cadaster, i.e. in the absence of registered rights to realty. Through a detailed review of state interventions since the early 20th century until today two critical points will be substantiated. First, it will be established that the Chinese state's titling schemes never came to fruition. Instead, we will see that titling, as a form of institutional intervention, is *by definition* a long term, protracted process of negotiation and dispute between state and other actors. In fact, the contemporary origins of Chinese titling can be traced to almost a century ago, the early 1920s. Second, it will be demonstrated that Chinese titling revolves around three "battlegrounds of bargaining" – major sources of conflict that require resolution over time: (i) the status of state and collective ownership; (ii) the fragmented authority over land; and (iii) the separation of land from housing. In this context, it is maintained that the cadaster, as a significant socio-economic and spatial institution, is the resultant of development rather than its *sine qua non*.

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1. Introduction: development without titling

Land development and real estate constitute a major portion of the economic growth and wealth generated in China. Well before the surge in real estate development, total average revenues from the sale of land use rights¹ had already aggregated to over a quarter of local government budgets during 1995–2002 (Lin, 2009, pp. 274–275).² A recent report estimated that revenues from land sales could account for an even greater amount of approximately 40%

Abbreviations: CCP, Chinese Communist Party; MLR, Ministry of Land and Resources; MoCA, Ministry of Civil Affairs; MoA, Ministry of Agriculture; MoHURD, Ministry of Housing and Urban Rural Development; NPC, National People's Congress; SBF, State Bureau of Forestry.

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¹ In particular, the revenue through "land conveyance" or *churangjin*, i.e. the sale of land use rights by the state to real estate developers on the so-called primary land market. The real estate market was liberalized in 1998 with the initiation of national housing reform.

² More specifically, this was calculated by Lin to be 26.2% of the budget of local government.

of local government budgets (Chovanec, 2012b).³ Similarly, real estate has also rapidly increased in significance (Stein, 2012, p. 4). According to the National Bureau of Statistics, real estate investment grew at a rate of 27.9% in 2011 compared to the previous year.⁴

At the same time, China has not completed land titling. Even more, it is not expected that titling can be accomplished in the near future. It might be difficult to comprehend how Chinese development could have occurred *without* secure, transparent, and formal property rights. In a Western industrialized context, it would be unimaginable, for instance, to purchase a home without concrete

³ However, in this regard, it is important to recognize that the proportion of land revenues is difficult to calculate as it is often understated or even concealed from regular budgetary overviews. For instance, it is probable that it is neither included in local government's intra-budgetary (*yusuan nei*) nor in the extra-budgetary (*yusuan wai*) income stream but is most likely included in the ill-defined extra-institutional (*zhidu wai*) revenues. Moreover, for a more accurate picture, it is crucial not to focus on gross income but, instead, on net income, i.e. the costs for expropriation and development should be excluded. Oral communication, 31 January 2013, professor George Lin, Hong Kong University.

⁴ Chovanec, however, has calculated that this figure is incorrect because it is a *nominal* rate, whereas the GDP growth rate figures are *real* figures (adjusted for inflation). The *real* (and, therefore, comparable) rate of expansion for real estate investment in 2011 should, according to him, be 20.0% (Chovanec, 2012a, p. 1).

evidence of ownership.⁵ This led an observer to note more than 10 years ago: “Making title to its new transferable land use rights secure is of paramount importance if China is to attract foreign investors and sustain its new market economy” (Palomar, 2002, p. 1).⁶ Enigmatically, the country’s double-digit growth and upsurge in land development have occurred precisely over the previous decades (Yueh, 2013; Lin, 2009; Hsing, 2010; Stein, 2012). Therefore, the tantalizing paradox of Chinese development – economic growth in the absence of secure, private and formal property rights – is perhaps nowhere more visible than with land as a means of production (see also Clarke, 2014).

This article aims to contribute to the discussion by charting the Chinese state’s efforts in land titling. The paper is based on primary, historical Chinese sources hitherto unavailable in English, such as internal Party and government notices, interpretations of laws and regulations, minutes, and rulings by the Supreme People’s Court. Where these are absent, secondary sources were used such as memories, biographies, and historiographies. The research was complemented by a series of 43 in-depth interviews conducted with senior government officials, legal experts, and academics. The analyzed period covers over a century (1911–2015), from the establishment of the Chinese Republic until the present. This article begins with an explanation of the theoretical relevance of the focus on the cadaster and titling in order to better comprehend institutional change. The subsequent section reviews the central state’s titling efforts of urban and rural land and housing since the beginning of the Republican Period. The final section discusses the three parameters that affect the institutional dynamics and bargaining over titling.

2. Theoretical relevance of the cadaster

2.1. Conceptualizing institutions

Different from, for instance, Western Europe and North America, the Chinese state continues to encounter *fundamental* choices of institutional design. One of the most obvious examples is the cadaster. Here, the term institution is defined as a “set⁷ of endogenously shaped, context-determined social rules”, i.e. defined along three axioms: (i) institutions are the result from interaction and, therefore, both cause and effect; (ii) political and economic actors cannot intentionally design institutions (albeit having intentions), as institutions are the outcome of an autonomously emerging order, and lastly; (iii) institutions are time and space-specific and as such, determined by the *use and disuse of their function*, reflected through actors’ aggregate perceptions of institutional credibility (Ho, 2013, pp. 1089–1090; Grabel, 2000; Chang, 2007).

Defined along these axioms, the cadaster is, therefore, one of a multitude of possible institutions. In other words, a formal law or right of ownership is an institution inasmuch as informal, customary law regarding forest, wasteland or grassland may be deemed an institution. Thus, the word “cadaster” in this aspect refers to

its (Western) conceptualization of how institutions should appear based on certain axioms or political considerations. The term is thus employed as an ideal-type, theoretical notion in contrast to the variety of institutions one could possibly encounter in time and space.⁸

Fundamentally, the land registry or cadaster (derived from the French *cadastre*)⁹ is a system whereby ownership of land plots is registered (generally by the state) to provide proof of title. The cadaster is entwined with concepts regarding the legal protection of ownership¹⁰ as the absolute, supreme right among legal rights,¹¹ and is perceived to be situated at the nexus of control over land and real estate. Yet, in globalized, urbanized society, the cadaster is more than a vehicle on which to record rights.¹² In fact, in highly industrialized economies, the cadaster functions as an overarching institutional repository for data related to space, environment, land, housing, infrastructure and taxation. It should come as no surprise that – rightly or wrongly so – the cadaster is often portrayed as an institutional epitome of Western capitalist development (De Soto, 2000, p. 47).¹³

2.2. Title versus deed: the act of registration

Whereas the cadaster is the register that records and establishes title, the act leading to its establishment is referred to as titling. The term is often intermingled with “land registration.” For all clarity, whereas title is the legal proof that establishes an entity (e.g. person or business) as the owner of a property, registration is the requirement by the state to demonstrate one has registered, and paid

⁸ For instance, various classical legal-anthropological studies have demonstrated how Western norms and values define the concept of ownership and how ownership may be conceptualized quite differently in other cultures and societies (Van Vollenhoven, 1909; Sonius, 1963; Von Benda-Beckmann, 1979). Also, in the case of imperial China, for which reliable, empirical material is difficult to obtain, studies have discovered differences in the conceptualization of property. Zelin (1986, pp. 20, 31–32), for example, has indicated that the contemporary notion of “private property” did not exist in rural, imperial China as it was considered a form of common property jointly owned and exploited by a farm household. See also Pomeranz (2005).

⁹ The French term is, in turn, attributed to the Late Latin *capitulum*, a register of the poll tax and the Greek *katastikhon*, a list or register literally from *kata stikhon*, “down the line”, in the sense of “line by line.”

¹⁰ Ownership is legally considered to comprise all other rights. As Van den Bergh (1996, p. 172) wrote: “Ownership is the supreme right; there can be no rights which would not be contained in ownership.” In this regard, Demsetz’ (1967) definition of property as a “bundle of rights” is relevant as well as Honoré’s (1961, p. 113) definition of ownership as: “. . . the 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: this makes eleven leading incidents.”

¹¹ As Van den Bergh critically characterized the civil law concept of ownership: “Ownership is absolute: apart from what the law expressly forbids, the owner may do whatever he likes, he can exclude everybody else from influencing the goods, everybody else is obliged to abstain from breaching his ownership rights, the owner is the supreme ruler over his goods” (1996, p. 172). However, Sonius has noted that “absolute ownership does not exist and has never existed. Ownership has always (in Justinian law as well) been restricted by all types of regulations which, in the general interest or in the interest of others, deprived the owner of part of his absolute power over the object” (1963, p. 19).

¹² As Rowton-Simpson (1976, p. 3) correctly noted: “study of land registration must clearly distinguish between its public and private function.” The former function typically relates to taxation, spatial planning and environmental management whereas the latter ensures “the rights of the owner or occupier of the land and to enable him to conduct his land transactions safely, cheaply and quickly.”

¹³ The same reasoning, for instance, contributes to North and Thomas’ *The Rise of the Western World* in which they noted: “In general, we shall observe that governments were able to define and enforce property rights at a lower cost than could voluntary groups and that these gains became even more pronounced as markets expanded. Therefore, voluntary groups had an incentive to trade revenue taxes in return for the rigorous definition and enforcement of property rights by government” (1973, p. 7).

⁵ However, in this regard, Clarke rightly pointed out that much of “the debate over [Chinese] state ownership is a distraction – the label turns out to have little if any determinate meaning, and virtually any social purpose can be accomplished with or without the form of state land ownership” (2014, p. 323).

⁶ Over the years, this argument has not significantly changed, as shown in a writing by Yale professor Ellickson (2012, p. 3).

⁷ It is significant to recognize that an institution is defined in this aspect as a “set of rules” and not a single rule that governs social actors’ behavior. For example, a customary rule that commuters in the Beijing subway system should stand on the right side of the escalator and walk on the left side if they are in a hurry is, therefore, not perceived as an institution. Contrarily, the various informal and formal rules that guide the behavior of Chinese subway commuters – ranging from how to board trains to giving up your seat for the elderly, an invalid, and women with children – could be perceived as an institution.

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