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## Review of the Principles of Proprietary Rights in the Legal System of the People's Republic of China: Ukrainian Civilian's Perspective

### Introduction

Proprietary rights are one of the most important components of any legal system, and the enshrinement of this right in law, in particular in the text of any Constitution – is a sign of the rule of law. The regulation of proprietary rights in the law of the People's Republic of China (hereinafter – PRC) is of great importance for foreign investors, as the relevant rules not only define and consolidate property rights as such, but also affect property management, land use, mortgage rights and more. All these provisions are important when making investment decisions, ensuring stable investment and trade relations, and legal protection of property. Norms of proprietary law penetrate almost all spheres of public life, affecting the capabilities of all subjects of law without exception. But for a long time the regulation of this sphere was based on the non-recognition of private property, which was a consequence of the ideologizing of the economic sphere. The results of the codification of this institution of law are also not very common for a 'Western' researcher and contain significant innovations.

### Presentation of the Main Material

If we highlight the main periods of development of China's legal system, it can be noted that until 1949, the ideology of Confucianism had a great influence

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on law. Yes, the traditional Chinese concept does not deny the law, but points to the need for law for those who do not care about morality, or for foreigners for whom Chinese civilization is alien. Between 1949 and 1990, Chinese law was greatly influenced by the Soviet Union. From the late 1990s to the present day, the legal system has become more effective in implementing the institutions of continental European law and common law.

The doctrine of property in China was built on Soviet models, on the basis of the doctrine of property developed by Soviet civilians. Soviet law recognized socialist property as the basis of the economic system of the USSR, and distinguished three forms of socialist property:

- 1) state property, which “is the main and predominant, as it characterizes the highest type of production relations of socialist society, by volume has the largest share”;
- 2) collective farm-cooperative property;
- 3) property of trade unions and other public organizations, necessary for them to carry out their statutory tasks.

In addition, the personal property of citizens was recognized, which was considered a derivative of social socialist property, as “its emergence depends mainly on the labor participation of citizens in social production”.

The radical changes that have taken place during all the years of China’s independence have addressed a number of fundamental issues, including the legal regulation of property. Private property has reached the same level as other forms, gaining equal opportunities for legal protection. The situation in China is somewhat reminiscent of the post-Soviet situation, as with the onset of economic transformation associated with Deng Xiaoping’s reforms, ignoring and humiliating legal property has become virtually impossible. Gradually, the situation with the legal regulation of property of various types and forms began to level off, but there are reasons why we can not formally talk about equality of all forms of ownership, one of the main – is the constitutional provision on “sacred” nature socialist social property. Today, property in China has the same types and forms as in most ‘Western’ countries, as well as in Ukraine. Outstanding Ukrainian scientist-civilist I.V. Spasibo-Fateeva classified property at three levels, which distinguishes the types, forms and types of property:

1. Types of property – public and private;
2. Forms of ownership:
  - within the public type – property of the Ukrainian people, state and municipal property;
  - within the private type – property of legal entities and individuals;

### 3. Types of property within each of the forms:

- types of state property – property of the state of Ukraine, foreign states, state formation (autonomous Ukrainian Republic of Crimea);
- types of communal property – property of the territorial community of the village, settlement, city, district in the city;
- types of private property of individuals – property of citizens of Ukraine, foreign citizens and stateless persons;
- types of private property of legal entities – property of companies and institutions<sup>2</sup>.

Agreeing with I.V. Spasibo-Fateeva for the classification of property in Ukrainian law, we note that this classification can be applied to the classification of property in China (instead of communal, however, should be called collective property, and public type corresponds to the category of socialist property). However, there are a number of caveats related to the peculiarities of the legal regulation of property, which belongs to different types, forms and kinds. The latter, in turn, follows from the fundamental principles of property rights, which have changed significantly over the past thirty years. The refusal to recognize anything private, dictated by communist ideology, has become one of the biggest stumbling blocks in creating favorable conditions for economic growth. Following Soviet jurisprudence, the Chinese emphasized the priority of public property over other forms of property, endowing it with a sacred nature. In particular, in Art. 12 of the Constitution of the PRC states: “Socialist social property is sacred and inviolable.” Article 6 calls it “the basis of the economic system of China.”<sup>3</sup>

In addition to mentions of socialist property, which corresponds to the above classification of public property, the Chinese Constitution mentions such forms of property as state, collective and private, with state and collective property being forms of socialist property. In the already mentioned Art. 12 states that “the state protects socialist social property. It is forbidden to any organization or individual in any way to appropriate or undermine state and collective property“. The principle of inviolability of private property was proclaimed at the constitutional level only after the constitutional changes of 2004, as a result of which in Art. 13 of the Constitution of the PRC reads as follows: “Legal private property of citizens is inviolable. The state, in accordance with the law, protects the rights of citizens to private property and the right to inherit.”

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<sup>2</sup> V.I. Borysova, L.M. Baranova, T.I. Behova, I.V. Spasibo-Fateeva, V.L. Yarotskiy, *Tsyvilne pravo [Civil Law]*, Kharkiv 2011, p. 414.

<sup>3</sup> D. Cao, *Chinese Law: A Language Perspective*, Hants, England 2004.

Proprietary rights to private property is not sacralized at the constitutional level, but in fact it is of great importance nowadays given the reforms that have taken place in the economic sphere over the last almost four decades. Professor Jianfu Chen writes that political reforms in China have been slow, always lagging behind economic ones: while economic reform has been rapid, political and legal transformations have been slow, followed by trial and error, and continue to this day. In the legal field, this process is the most difficult in matters of reforming the property regime<sup>4</sup>. The scholar notes that, in fact, “economic reforms that have been going on since 1978 are a process of reforming the proprietary rights system, and therefore the final adoption of the Law on Real Rights in March 2007 is the culmination of this political and economic reform.”<sup>5</sup> The PRC Law on Real Rights of March 16, 2007 deserves special attention, as it finally consolidated the achievements of Deng Xiaoping and his successors at the normative level. This law is the result of the codification of the basic provisions on property and proprietary rights according to the best examples of `Western` law, in particular, structurally imitates the German, Japanese and Taiwanese legislation. Structurally, the Law consists of five sections, divided into 19 chapters and 247 articles.<sup>6</sup> The ambiguity of the attitude to property issues in modern Chinese society is illustrated by the fact that the process of adopting this law took as much as 13 years, which became a record in the history of the legislative power of China.

The leading ideology of the Chinese Communist Party, in particular Deng Xiaoping’s theory and his idea of “three represents”, played an important role in the drafting of the Real Property Law. This theory is that it is necessary to implement a comprehensive scientific concept of development, adhere to the correct political orientation, based on the national conditions and characteristics of China, the surrounding reality, fully and accurately reflect as a basis the current socialist economic system. According to the Constitution of the People’s Republic of China and its legislation, both collective and private property rights have an equal degree of protection. Increased legal protection is provided to state property, which is done in order to prevent the loss of state ownership of its property.

As the basic principles enshrined in the Law of the People’s Republic of China “On Proprietary Rights” – Ch. Lianwei identifies the following:

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<sup>4</sup> J. Chen, *Chinese Law: Context and Transformation*, Leiden–Boston 2008, p. 364.

<sup>5</sup> Ibidem, p. 364.

<sup>6</sup> A. Verbeke, V. Sagaert, B. Van Den Houte, *Introducing the International Encyclopaedia for Property and Trust Law*, Alphen aan den Rijn, NL 2016, p. 21.

- the principle of legal certainty of proprietary rights; types of proprietary rights and their content are established by law;
- the principle of openness and publicity, which is that a person exercises his real rights openly, is not a secret for others;
- the principle of establishing a single proprietary right for one object, which means that only one property right can be established for one object. Establishment of ownership of certain parts of the object is not allowed. Nor can ownership of property that is absent in nature be established;
- the principle of equality before the law – the central principle that gives all market participants equal status, equal rights and equal opportunities.<sup>7</sup>

In this regard, it should be noted that not all the principles mentioned here relate to property and proprietary rights, because the last principle – equality before the law – concerns the legal status of private law entities, but in no way means equality forms of ownership. Dean of the Faculty of Civil, Commercial and Economic Law of the Chinese University of Political Science and Law, Dr. Weiguo Wang notes two main features of property rights in China: closed system of real rights and concretization of proprietary rights in the sense that his only things can be an object.<sup>8</sup>

This attitude to property is due to the influence of German law, as the German Civil Code in § 90 includes only material objects (although in fact German legal doctrine and practice extend the concept of things to securities, patents, etc.). This German influence affected the Basic Provisions of the Civil Law of the PRC and the Law of the People's Republic of China "On Proprietary Rights", where property means only material objects that have spatial material characteristics, because in Art. 2 of the Law "On Proprietary Rights" mentions the need for direct control over specific things. In this regard, Weigo Wang notes that the requirement of physical control over the object of property rights is in favor of the thesis of the separation of real and personal rights on this basis. As a result, the rights to shares of companies (corporations) fall out of the system of proprietary rights, which, however, are recognized in commercial practice, although they are considered "substandard property."<sup>9</sup>

However, proprietary rights are associated with many other problems due to rapid economic growth, innovation policy in China, business virtualization. Thus, there is a problem of recognition of virtual property, caused by the need

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<sup>7</sup> J. Chen, *op.cit.*

<sup>8</sup> Weiguo Wang, *Restructuring. Modern Property Law on a Theoretical Basis*, „Towards a Chinese Civil Code: Comparative and Historical Perspectives”, Leiden–Boston 2012, p. 111.

<sup>9</sup> Weiguo Wang, *op.cit.*, p. 112.

to regulate the rights to information, domain names, websites, online databases, treasures and loans used in online games and more. Modern Chinese lawyers pay attention to these and many other issues in their doctrinal developments and at the level of legal practice.<sup>10</sup> Professor Yuanshi Bu (Chair for East Asian Business Law) at the University of Freiburg, Germany, names the following principles of property law<sup>11</sup>:

The principle of equal protection of different forms of ownership. Although the words “equal protection” disappeared from the text of the Law on Real Rights at the stage of discussion of the bill, its Art. 4 is still understood in the sense of equal (equal) protection of “proprietary rights of the state, collectives, individuals and other right holders.”

The principle of absoluteness. The owner of proprietary rights has the right to freely manage the object of this real right and demand the removal of obstacles from any other subjects (as noted by Ukrainian civilist O.S. Yavorska, the absolute nature of proprietary rights is expressed in the concept of “discretion.”<sup>12</sup> On the other hand, contractual rights are not absolute, their protection is possible only in connection with specific legal relations.

The principle of legal certainty of proprietary rights, according to which the list of proprietary rights is clearly limited by current legislation in the form of an exhaustive list. This principle is not a sign of absolute, property or any other subjective civil law – but a feature of the legal method of regulating certain civil relations, the interests of whose participants, third parties and law and order corresponds to the type of regulation by which the legislator compulsory determination of the types and content of those legal relations that the parties may enter into, a closed list of possible legal grounds for their occurrence, change or termination is established.<sup>13</sup> Such a principle, according to Yuanshi Bu, will promote better circulation of proprietary rights, because their acquirers can be sure of the content of such rights.<sup>14</sup> Moldovan civilist O.A. Khalabudenko notes that this principle leads to the forced typification of property and legal structures, which entails the restriction of the general principle of freedom of contract. Thus, the parties to the contract, based on the principle of dispositive-ness, can establish any binding effects, except those that are contrary to law, the

<sup>10</sup> M.M. Chew, *Virtual property in China: The emergence of gamer rights awareness and the reaction of same corporations*, „New Media & Society” 2011, pp. 722–738.

<sup>11</sup> Yuanshi Bu, *Chinese Civil Law*, Munchen 2013, pp. 192–194.

<sup>12</sup> O.S. Yavorska, *Pravove rehuliuвання vidnosyn vlasnosti za tsyvilnym zakonodavstvom Ukrainy [Legal regulation of property relations under the civil legislation of Ukraine]*, Kyiv 2008, p. 20.

<sup>13</sup> O.A. Khalabudenko, *Imushchestvennye prava. [Proprietary rights]*, Kishinev 2011, p. 145.

<sup>14</sup> Yuanshi Bu, op.cit., p. 194.

rule of law or morality. However, persons may not establish by their own acts any proprietary rights, except those directly provided by law. Otherwise, third parties would be in a legally infringed position, as they could potentially violate the “absolute” right established by agreement of the parties.<sup>15</sup>

The principle of “specificity”, according to which proprietary law must relate to a particular thing, follows from the principles of absoluteness and legal certainty of proprietary rights. The legislation establishes specific regimes for certain types of property (for example, real estate and movable property), defining, in particular, the procedures for its registration, creation, transfer, destruction, etc.

## Conclusions

Summing up the main approaches that have developed in modern Chinese jurisprudence regarding the principles of proprietary rights, we note that we can now say the existence of the following principles:

The principle of pluralism of forms of ownership. The Constitution of the People’s Republic of China names the following forms of ownership: state property; collective ownership; private property (Article 12 of the Constitution of the PRC).

The principle of priority of socialist social property (consists of such forms as state and collective). According to the provisions of Art. 6.12 of the Constitution of the PRC, this form of ownership is “the basis of the economic system of the PRC”, “sacred and inviolable”, which nominally puts it above other forms of ownership.

The principle of equal protection of different forms of ownership. Despite the priority of socialist property, this principle has come to the fore, because in Art. 4 of the Law of the People’s Republic of China “On Proprietary Rights” contains a thesis on the protection of “proprietary rights of the state, collectives, individuals and other right holders”, which at the level of legal doctrine is understood in the sense of equal protection of these forms of property. The essence of this principle is to provide equal opportunities to the subjects of property rights to protect their rights, as well as the obligation of the state to take equivalent measures to protect these rights.

The principle of absolute ownership. The subject of proprietary rights has the right to freely, unhindered and at its own discretion to manage the object of proprietary rights and demand the removal of obstacles from any other

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<sup>15</sup> O.A. Khalabudenko, *op.cit.*, p. 41.

subjects. To do this, all third parties must be informed about the existence and content of a proprietary right.

The principle of legal certainty of proprietary rights (closed system of real rights). This principle in the context of the legal system of the PRC means the following: a) the object of property rights is only a material object; b) the legislation contains a clear and exhaustive list of all proprietary rights, determines their nature and content (this is, in particular, the Law of the People's Republic of China "On Proprietary Rights").

The principle of openness and publicity of proprietary rights. The existence of property law must be reliably known to anyone and everyone who is interested in it. For immovable property, with the exceptions provided by law, publicity is achieved by state registration of rights in the register of immovable property. Adherence to this principle ensures the legal presumption of public authenticity of proprietary rights and guarantees their protection by law and order.

Thus, in our time, the development of Chinese law is characterized by China's attempts to find its own way, which meets the needs of integration of states and at the same time based on ancient Chinese legal customs and traditions. Over the past 40 years, Chinese law has undergone significant positive changes, adopting the European experience countries. China is currently active finding one's own way of developing law.

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## Review of the Principles of Proprietary Rights in the Legal System of the People's Republic of China: Ukrainian Civilian's Perspective

### Summary

The article analyses the basic principles of property law in Ukraine and the legal system of the PRC in the conditions of active reform of private law according to international standards. Based on the analysis of approaches prevailing in modern Chinese jurisprudence, there is proposed own view on the system of principles of property law. The changes that have taken place during all the years of China's Independence, which addressed many fundamental issues, including the legal regulation of property, are analyzed. The article describes many principles, so it should be noted that not all of them are directly related to property and proprietary rights because the latter concerns the legal status of private law, but in no way means equality of all types and forms of ownership. The paper explains different approaches to property treatment determined by the influence of German law. In modern conditions, Chinese law can be attributed to continental law, but along with them, there are many features highlighting its specific nature: the availability of normative legal acts (especially laws, codes); the presence of traditional legal norms and religious and ethical values in some areas of public relations; fixation of philosophical and traditional concepts, principles in legal understanding, legal norms, and other elements of the legal system; dualism of the system (existence of legislation and traditional norms).

Property law is associated with many other problems to be solved due to the rapid pace of economic growth, innovation policy in China, the virtualization of business. Therefore, there is the problem of recognizing virtual property, caused by the need to regulate the rights to information, domain names, websites, online databases, treasures and loans used in online games, and so on.

**Keywords:** property law, law, the PRC, principles of law, equal protection of ownership, proprietary rights

## Обзор принципов прав собственности в правовой системе Китайской Народной Республики: точка зрения украинских граждан

### Резюме

Статья посвящена основным принципам права собственности в Украине и правовой системе КНР в условиях активного реформирования частного права в соответствии с международными стандартами. На основе анализа подходов, сложившихся в современной китайской юриспруденции, предлагается собственный взгляд на систему принципов имущественного права. Анализируются изменения, происходившие за все годы Независимости Китая, которые касались решения ряда принципиальных вопросов, в том числе правового регулирования собственности. В статье описан ряд принципов, поэтому следует отметить, что не все эти принципы имеют прямое отношение к собственности и вещным правам, поскольку последний – касается правового положения частного права, но никоим образом не означает равноправия всех видов и формы собственности. Объясняются различные подходы к обращению с имуществом, которые определяются влиянием немецкого права. В современных условиях китайское право по ряду признаков может быть отнесено к континентальному праву, но наряду с этим существует ряд признаков, свидетельствующих о его особой специфике: наличие нормативных правовых актов (особенно законов, кодексов); наличие традиционных правовых норм и религиозно-этических ценностей в некоторых сферах общественных отношений; фиксация философских и традиционных концепций, принципов правопонимания, правовых норм и других элементов правовой системы; дуализм системы (наличие законодательства и традиционных норм).

Право собственности связано со многими другими проблемами, требующими решения в связи с быстрыми темпами экономического роста, инновационной политикой Китая, виртуализацией бизнеса. Поэтому возникает проблема признания виртуальной собственности, вызванная необходимостью регулирования прав на информацию, доменные имена, веб-сайты, онлайн-базы данных, сокровища и кредиты, используемые в онлайн-играх, и так далее.

**Ключевые слова:** вещное право, право КНР, принципы права, равная защита собственности, право собственности