

The Right to use Land in China: an Instrument of Economic Development?

CAMILLA MANTESE*

Abstract: This article aims to give an in-depth review of land use rights in China, comparing the similarities and differences between land use rights in China and in the Western World, with an eye specifically on Italy. From a historical perspective, we will try to understand how the entire system evolved to the point in which it is today. We will discuss land leasing as a form for cities and local governments to have a steady source of revenue genuinely within their control and the process of land conversion. We will analyze how the land use system became a sort of zoning arrangement for China. We will see what is the role of the courts in this delicate system, that balances socialist ideals and capitalistic needs, through some decisions on different aspects of the right to use land. We will try, even though it is most surely impossible, to give a complete analysis of the matter through the lenses of the comparative jurist. We will touch on some economic and financial aspects of the land use right.

Keywords: China; Private law; Right to use land; Right of property; Legal comparison

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1. *Introduction*

Real rights are always extremely fascinating because they are strictly connected to the economic history of a country, and they tend to be particularly important in developing ones. However, their importance does not diminish during the industrialization process. They are simply reformed in order to be better suited for answering the needs of the changing society.

In this article, the focus will be on the right to use land in China. This agrarian right, always mistreated under Italian law - and Western law in general - is of paramount relevance in China, where the communist ideology, which became the basis for the society and for the economy after the revolution, does not allow individuals - either citizens or non-citizens - to own land.

At first, a chronological thread will be followed: we will start by analyzing the right of property under the imperial epoch up until the time of the revolution, leading to the need to distinguish the right to own property from the right to use land.

We will then focus on the essential characteristics of the right to use land in China, by looking at important jurisprudence precedents and at the different laws that discipline the matter, with an eye specifically on the newly approved Chinese Civil Code.

In addition, we will analyze more in depth some economic issues, such as how the local administrations sell the right to own land to private parties in order to finance public services and how they have managed to create new municipally owned state land through the process of land conversion.

2. History of the Land Policy System

2.1. The Land Policy System in the Imperial Age

During the imperial age, the law regarding property was quite primitive. Historically, Chinese emperors had a much stronger position in society than their Western sovereign counterparts. There were no strong vassals in Imperial China who could limit the possibilities of power of the monarch, thus creating a balance of power¹. Because of this, the Chinese emperors could confiscate and redistribute land with much less difficulty than Western governments could. The government vested the ultimate ownership of land and redistributed large amounts of land with the change of ruling dynasties². Landlords only had economic power and no judicial power over their land³. As a consequence of this, notions of property rights were weak. This does not mean that property law did not exist in Imperial China⁴, but rather that the law was not a strong protector of property rights.

The establishment of the People's Republic of China brought many fundamental changes to the country, among which some of the most important were the changes in land ownership.

* Camilla Mantese is a third-year student at the Faculty of Law of the University of Trento. She has always been interested in the way in which the economic structure and law are interconnected. Her academic interests spin across commercial law, investment law and international law.

1. See Alsen Jonas, *An Introduction to Chinese Property Law*, 20(1) *Maryland Journal of International Law* 5 (1996).

2. See *id.*, at 6.

3. See Liu Wei and Lui Shouying, *Evolution of the Land Between 1921 and 2021* english translation of 经济日报 at 2 (Economic Daily 2021).

4. China had a long history of private property rights in land, unlike many developing countries that have maintained forms of customary land tenure that tend to hinder development. Some colonial powers, as in Latin America and Australia, have actually managed to successfully displace the indigenous communal land system with a private property system in the form of freehold tenure. Many others allowed the customary system to operate in rural areas in order to pacify the indigenous people while implanting private property in the form of freehold or leasehold in the urban cores. To pave the way for economic development, many colonial governments took the opportunity offered by the constitutional change of forthcoming independence to carry out land reforms to replace customary land tenure, which was believed to hinder incentive. For a detailed overview see Lawrence Wai Chung Lai, *Land use rights reform in China: Some theoretical issues*, 12(4) *Land Use Policy* (1995).

2.2. *The Land Policy System before 1949*

Before 1949, private land ownership existed, and land transactions were quite frequent⁵. The establishment of private property rights in China even pre-dated the emergence of the English freehold system, even though it was quite rudimentary.

In the 1930s, a Land Reform in the old revolutionary base areas was carried out with the least possible social disruption. This Land Reform allowed middle and rich peasants to keep part of their land holdings, whereas expropriated landlords were allocated sufficient land to make a living. Yet, directly after the Second World War, Land Reform took a more radical turn.

2.3. *The Land Policy System after 1949*

In 1949, during the period of national economic recovery, the Common Program of the Chinese People's Political Consultative Conference and the Land Reform Law of the People's Republic of China of 1950 called for the abolition of land ownership by the exploitative landlord class and the implementation of peasants' land ownership to liberate rural productive forces, develop agricultural production, and create a path for PRC's industrialization⁶.

For this reason, a land reform was launched. It aimed to reduce social inequality by confiscating land from the rich and then redistributing it to the poor. In this way, the farmers' dream of "land to the tillers" was achieved⁷.

By 1958, all urban land was state-owned whereas farmland was collectively owned⁸ with a few exceptions. Farmers organized themselves into producers' cooperatives - later the people's communes

5. See Chengri Ding, *Land policy reform in China: assessment and prospects*, 20(2) Land Use Policy 109, 110 (2003).

6. See Wei and Shouying, *Evolution of the Land Between 1921 and 2021* at 5 (cited in note 2).

7. See Liu and Yang, *China's land use policy under change* at 1 (cited in note 3).

8. China's Rural Land Contract Law and Property Law defined collective ownership as "land collectively" owned by peasants in rural areas that is fundamental to the basic rural operation system' and 'the collective owner of collective land, in accordance with the law, is entitled to possess, utilize, dispose and obtain profits from the collective land'. The "peasant collective", as the subject of land ownership, had three

- and pooled their land and tilled together. This type of land ownership structure remains to the present day.

The state would allocate the land to state-owned enterprises free of charge for an indefinite period. The constitution banned land transactions. The land was not considered a commodity and had no value.

State-owned enterprises were established using state revenue, and they were required to return their economic profits to the state. The state and local governments decided what and how much these enterprises would have to produce. The state-owned enterprises did not have their own identities as independent economic bodies. This was one of the main reasons for economic deficiency⁹.

Through land acquisition¹⁰, collectively owned land in rural areas was converted to state-owned land. The state did not pay market prices to acquire land from peasants. Instead, it provided a compensation package that included job opportunities for farmers, housing compensation, and compensation for the loss of crops. In this package, the State also granted urban residency licenses. Although peasants were not paid market prices, they were willing to give their land to the state. This was because, by doing so, they would be granted a city residency license making them eligible for social welfare such as medical insurance, retirement plans, access to high-quality schools, and subsidized agricultural goods that were not previously available to peasants¹¹.

levels: the village peasant collective, the intravillage peasant collective and the township peasant collective.

9. Under the planned economy, land value and land income were hidden in the overall profits of the state-owned enterprises. When these state-owned enterprises were allowed to keep a percentage of their profits, they would virtually keep land rents. Because land rents varied across space due to locational and/or access advantages, this implied that some enterprises might have larger profits than others. See Gregory M. Stein, *Acquiring land use rights in today's China: a snapshot from on the ground*, 24(1) UCLA Pacific Basin Law Journal (2006).

10. Land acquisition is a process through which the central government can acquire private (or in this case, collectively owned) land by paying a price that is normally lower than the market price.

11. Urban residents had a higher standard of living than rural residents and the residents of large cities had an even higher standard of living than small city residents. Rural-urban migration was tightly controlled by the Chinese government through the Hukou system, which greatly limited labor mobility. Thus, when farmers were granted urban residency they were happy to give their land to the government and

The state and local governments were responsible for the administration of land allocation¹².

The fact that the state owned the land made it easy for the governments to acquire land to accommodate the land needed for economic development. The governments often substituted land for capital to overcome the poor cash flow. Consequently, many projects occupied more land than they needed.

The enterprises were either state or collectively owned. Because of this, the land-use rights granted to them were not separable from land ownership. Transactions between them were prohibited by the law¹³.

2.4. *The Land Policy Reform after 1978*

This centrally planned, state-run economy was not leading to economic prosperity. Thus, a reform was needed. In 1978, the CPC Central Committee brought a new chapter of rural reforms. The administrative system of people's communes in the countryside was abolished¹⁴. Rural land was distributed among farmers according to their family size, and each family bore the sole responsibility for tilling the land. The reform was based on the principle of "paying enough to the state, leaving enough to the collective, and the rest is their own"¹⁵. Peasants were granted the right to use contracted land¹⁶.

even considered themselves fortunate when they were chosen to do so. See Ding, *Land policy reform in China: assessment and prospects* (cited in note 5).

12. There were plans that laid out specific goals for economic growth measured by industrial outputs. After examining existing capacities, the governments decided where capacity should expand and how much was needed to achieve economic development goals. Since the land did not have much value and did not affect the equation of total project costs, land input was the last factor to be considered. See Ding, *Land policy reform in China: assessment and prospects* (cited in note 5).

13. The law also provided that state or collectively owned enterprises had to return the land if unused. In reality, there was no incentive for them to do so, nor were they penalized for not returning the land to the state. Because of all of these reasons, the land was almost never returned. As a consequence, land transactions and land markets did not exist in China for nearly half a decade.

14. See Jonas, *An Introduction to Chinese Property Law* at 21 (cited in note 1).

15. See Liu Wei and Lui Shouying, *Evolution of the Land Between 1921 and 2021* at 7 (cited in note 2).

16. In the State Council of 2004 it was said that "land contract rights are a special type of property usage right. The legislation on the matter clearly states that

The new system has three main advantages: first of all, the separation of land ownership and the right to use it makes the farmers independent, thus arousing enthusiasm and promoting farm production¹⁷; secondly, the principle of "more pay for more work" can finally be realized; thirdly, this new system helps to promote the transformation from a self-sufficient natural economy to a commodity economy¹⁸. This land policy reform ended China's decades-long political isolation from the West. After the reform, direct foreign investment and the number of joint ventures increased exponentially. The demand for land increased. This challenged the land-use tenure system. The old land allocation system also conflicted with the ultimate goal of improving economic efficiency.

In the early 1980s, China established special economic development zones (SEDZs) along its east-coast areas to attract foreign investment. In these zones, businesses and enterprises enjoy special privileges including tax exemption and the "land-use rights system"¹⁹.

The land use rights system, similar to the land leasehold system in Hong Kong, was first developed to accommodate the needs of foreign direct investments, as it allowed foreign investors to access land by leasing them land for a certain period. Investors paid up-front land-use rights fees and rents²⁰. This early reform in the land tenure system

contracting farmers are entitled, in accordance with the relevant law, to use and obtain profits from the contracted land, to transfer the land contract rights, and to organize the production, operation, and disposal of products. If contracted land is expropriated by law, the contractor has the right to receive appropriate compensation. Within the statutory period of the contract, no organization or individual shall interfere in farmers' production and management autonomy, the contracted land shall not be unlawfully adjusted or claimed, the wishes of farmers shall not be contravened by forcing the transferral of the contracted land and farmers shall be protected from illegal encroachment on contracted land".

17. See Wei and Shouying, *Evolution of the Land Between 1921 and 2021* at 7 (cited in note 2).

18. This is a consequence of the fact that the improvement of farmers' productivity has reduced the number of laborers needed in agriculture. Thus these laborers were able to move into the industry sector and the service sector, consequently stimulating the development of small enterprises and of the tertiary sector in rural areas.

19. See Jonas, *An Introduction to Chinese Property Law* at 45 (cited in note 1).

20. Neither the Chinese nor the foreign investors were pleased with the system which required the foreign investors to pay an annual rent, because the fee was specified by law, without any regard to changes in the conditions of the real estate market.

marked a new era of land policy in modern Chinese history. For the first time, land-use rights and land ownership were separable.

The most significant changes to land policy occurred in the late 1980s. The bureau of land administration was established in 1986 and was responsible for land allocation and acquisition, monitoring of land development, comprehensive land-use plans, and implementation of land laws.

In a clear attempt to develop the land market in China, the Land Administration Law was passed in 1986. It allowed private organizations and individuals to access state-owned land. The Law had been criticized as unconstitutional because the 1982 constitution had banned any transferring of land-use rights. Thus, the Constitution was amended in 1988 to resolve the constitutional challenges.

The separation between land-use rights, land ownership, and the state's remaining ownership of land ensured the avoidance of political turmoil and helped to promote land market development. The socialist principles were respected: it was not the property of the land that could be sold to individuals and therefore privatized, but the rights to use the (state-owned) land.

The State Council promulgated "The Provisional Regulation on the Granting and Transferring of the Land Rights over State-Owned Land in Cities and Towns" in 1991. As a consequence, land users were allowed to transfer, rent, and mortgage land-use rights. Since then, land-use rights have spread throughout the country.

According to the 1991 regulations of the State Council, there are two kinds of land transactions. One is the sale of land-use rights and the other is the transfer of land-use rights. The former defines the "first" level land market, where a local government sells land-use rights to buyers for a fixed period. The transfer of land-use rights defines the "second" level of the land market.

Land use rights in the first-level land market are now mainly sold through an auction. The main reason for this decision is that private negotiations have been fertile ground for corruption in the past.

The state intends to control land markets through its monopolization of the first level of land markets (or its monopolization of land supply).

The introduction of the land-use rights system in China has had a remarkably positive impact on land development, government

finance, real estate and housing development, infrastructure provision, and urban growth. Land markets began to emerge and land prices started to rationalize land-use allocation and land use.

The land-use rights system helps to improve land-use efficiency. Before the land-use system reforms, 3-5 percent of industrial land in cities was unused and 40 percent was used inefficiently²¹. Since the adoption of a series of land policy reforms, collective enterprises have returned unused land to the governments and there has been a decline in the amount of vacant urban land.

In 1991, the central government extended the land-use rights system, which had previously been granted only to SEDZs, to virtually the entire country. This resulted in a diversification of investments geographically and partly explained the drop in land prices in 1993. The adoption of the land-use rights system has enabled local governments to launch large-scale infrastructure provisions, particularly in cities along coastal areas.

There are, unfortunately, numerous problems arising from land reforms. These include the "over-supply of land and loss of control of land markets, widespread hidden or invisible land markets, over-designated special land development districts that have caused repeated construction, bribery and corruption, increasing social conflicts, and the violation of land laws and land-use plans"²².

Although the state prohibits the entry of land allocated free of charge into land markets, many units still illegally participate in land markets by renting and transferring land-use rights. It is very profitable for people to bribe government officials to obtain land-use rights at low prices and then to resell these rights to developers at high prices. Corruption continues to be a serious issue.

Many social conflicts can emerge with land reforms. Two conflicts are particularly relevant in the case of China: one is the conflict between urban governments and peasants and the other is the conflict among peasants. The conflict between urban governments and peasants happens mainly in two cases. In the first case, it is related to the fact that granting an urban residency is no longer appealing to

21. See Ding, *Land policy reform in China: assessment and prospects* at 109 (cited in note 5).

22. See *ibid.*

peasants²³. Moving and living in a city is less difficult now than before. But finding a decent job has become increasingly more difficult. In the second case, conflict is associated with the compensation packages farmers receive for their land-use rights. These compensation packages do not match the kind of profits that farmers can make if they develop the land themselves. Because of this, farmers reluctantly sell their land-use rights to the governments and social conflict arises when the governments expropriate their land to acquire it.

The latter type of social injustice arises when the law prohibits land development on quality farmland. Farmers would quickly realize that if they were to develop the land themselves, they might generate profits 200-300 times higher than the net profits they receive from farming. Without income transfers and/or a spatially differentiated tax rate system, farmers in quality farmlands will be economically disadvantaged, compared to farmers whose land is not restricted for land development.

3. *The Right of Property*

In order to first understand what land use rights in China are, we have to define the right of property. Indeed, we cannot talk about land use rights without talking about property and the changes in property law policies.

It is known that "China is a communist country with a "socialist" market economy"²⁴. In Marx's theory, private property regarding the means of production is banned, and for this reason it should be State property. After the communist revolution of 1949, all private property was abolished, and all the land was state-owned. The 1982 Constitution expressly forbids private property of land. It was only with the

23. With the deepening of socio-economic reforms, social welfare programs such as medical insurance, pension, and retirement homes in cities that used to be accessible primarily to urban residents have now been restructured and are now available to all people, regardless of where they live. Unlike before, living in the city does not necessarily mean a better life. Thus, urban residency is no longer desired by peasants. See Ding, *Land policy reform in China: assessment and prospects* at 109-120 (cited in note 5).

24. See Jonas, *An Introduction to Chinese Property Law* at 3 (cited in note 1).

1988 constitutional reform, that amended the fourth paragraph of article 10 of the Constitution²⁵ into "no organization or individual may appropriate, buy, sell, or otherwise engage in the transfer of land by unlawful means. The right to the use of land may be transferred according to law" that the right to own land was finally separated from the right to use the land²⁶. This helped tremendously the Chinese economic system, especially regarding government finance, real estate and housing development, infrastructure provision, and urban growth.

The right of property can be divided into personal property and real property. China's statutory law divides the personal property²⁷ into state property, collective property, and individual or private entity property²⁸. Many Chinese scholars criticize this doctrinal division, thinking that it is anachronistic²⁹.

The public ownership is divided between the state and the collectives, and this property is sacred and inviolable³⁰. The state-owned sector, or the part of the public sector owned by the people as a whole, is the leading force in the national economy. Heavy industry and so-called "strategic industries," such as weaponry, telecommunications, and mass media are reserved areas of the state. The private sector is allowed to act in certain fields of the light industry and the service sector but is only to be seen as a complement to the state-owned sector³¹. Articles 9³² and 10³³ of the Constitution number which goods are owned by the state and which are owned by the collectives.

25. Art. 10, Constitution of the People's Republic of China.

26. See Yhenhuan Yuan, *Land Use Rights in China*, 3 Cornell Real Estate Journal 73 (2004).

27. Personal property is defined as all movable property, except for property that has become a part of real property, such as a door or a fence.

28. See Chapter V, Chinese Civil Code.

29. See Fei Anling, *I regimi proprietari in Cina: la nuova legge sui diritti reali*, 3 Riviste Web 641 (Il Mulino 2007).

30. See art. 12, Constitution of the People's Republic of China.

31. See Jonas, *An Introduction to Chinese Property Law* at 29 (cited in note 1).

32. See art. 9, Constitution of the People's Republic of China.

33. See art 10, Constitution of the People's Republic of China.

Collective ownership has its legal basis in Article 8 of the Constitution³⁴. Regulation on the matter is lacking, and this tends to be a problem for collective enterprises, as their legal status is uncertain.

As for private entity property, it played a role of little importance in pre-reform China. All land and means of production were owned by the State or the collectives.

Real property rights in China can be divided into three groups: ownership rights, usufructuary rights, and security rights.

Ownership rights are protected under article 266³⁵ of the civil code which gives the owner the right to possess, utilize, dispose of, and obtain profits from the real property.

The owner of a usufructuary right has the right to possess, utilize and obtain profits from the real properties owned by others. There are several types of usufructuary rights, which include the right to land contractual management, the right to use construction land, and the right to use residential housing land and easements. In this essay, we will focus on the right to use construction land³⁶ and on the right to use residential housing land³⁷.

4. *The Right to use Land*

Private ownership of land is not possible in China. When this socialist principle hindered too much the economic and social growth of the nation, a constitutional reform was adopted in order to distinguish between land use rights and land ownership. Because of this,

34. See art. 8, Constitution of the People's Republic of China.

35. See art. 266, Chinese Civil Code.

36. The right to use construction land is only with regard to State-owned land, and the owner of the right is able to build buildings and their accessory facilities. This is in addition to being able to possess, utilize and obtain profits from the land. This right may be established by means of assignment or transfer, but transfer is limited. The ownership of the buildings will change together with the land. As a protection of the right, the term of the right shall be automatically renewed upon expiration. If it has to be taken back, compensation shall be given.

37. The owner of the right to use residential housing land can possess and utilize such land as collectively owned, and can build residential houses and their accessory facilities. The Law of Land Administration and other regulations will apply to the attainment, exercise and assignment of the right to the use of residential land.

land use rights could be subject to a process of privatization, which improved economic growth³⁸.

4.1. *Legislation on Land Use*

The earliest comprehensive piece of legislation on land use is the Land Administration Law of 1987. This law was revised, and the new formulation came into effect on January 1, 2020³⁹. It requires government bodies at all levels to formulate land use plans so that cultivated land is not converted into other uses without proper approval and justification. They are required to follow the guiding principles of the central government and to use the land rationally and economically.

Land administration authorities of local governments are in charge of land administration within their regions. Together with other relevant departments, they must prepare statistics so that the central government can supervise the implementation of the State policy.

To regulate real estate markets, there are currently two pieces of legislation in China: the State Council Regulations and the Urban Real Estate Law, both adopted in 1994. The most important aspect of any real estate transaction in China is obtaining land use rights, without which, the aboveground structures will be of very little value. There are two ways to secure land use rights: by grants and by allocation.

The main difference between the two methods is the intended use of the land. Land use rights may be allocated for different uses, such as for state establishments or military purposes; urban infrastructure or

38. See Zhenhuan Yuan, *Land Use Rights in China* at 73 (cited in note 26).

39. See Art. 45 and 63, Land Administration Law of the People's Republic of China (December 29, 1987). The revised Land Law allows "collective land for for-profit construction" in a rural area to be transferred to others or leased out by landowners. These transactions must be approved by a villagers' committee or village meeting. The previous Land Administration Law prohibited such rural construction land from entering the market. Meanwhile, after obtaining the "land-use right" for such land as provided for under Chinese law, the user can further transfer the right. (Art. 63.) Conversion into state-owned land by the government, which was required by the previous Law as the prerequisite for the rural construction land to enter the market, is no longer required under the new Law (Art. 45). The revised Law specifies that the rural land may be expropriated for the purposes of military or diplomacy; infrastructure construction organized by the government; the government's public welfare undertakings; and the alleviation of poverty and relocation of the poor.

public facilities; projects related to energy, communications or water conservancy, and others selectively supported by the State or other purposes as provided by laws, administrative regulations, and rules.

Under the Urban Real Estate Law, land use rights can be allocated by local governments only for State-supported projects and public works. The ones obtained by way of allocation are not restricted to a specific term, unlike those obtained through grants. An important restriction on the land use rights obtained through allocation is that such land use rights cannot be transferred by the owners without a particular procedure, which involves the obtaining of an appropriate approval. In return for grants of land use rights, users must pay the State a granting fee⁴⁰. In addition, to obtain land use rights by grants, land users must follow urban development plans and all the local government approval procedures. The Urban Real Estate Law specifies that land use rights may be granted through auction, bidding, or agreement between the parties concerned. These methods tend to be preferred over the method of agreement between parties mainly because there were concerns linked to corruption. The government is concerned that the land use rights fee may not be correctly assessed if the matter is left to private parties to determine. Therefore, the Urban Real Estate Law sets a minimum land use rights fee⁴¹. After the approval process, the land user and the land administration department of the local government must enter into a contract in writing⁴². Such a contract gives both parties the right to compensation in case of a breach⁴³. Like any other legal document, a contract for granting land use rights may be modified upon the mutual agreement of the parties involved.

40. See Urban Real Estate Administration Law of the People's Republic of China (30 August 2007). If the land involved belongs to Collectives, the land must be first requisitioned by the State and converted into State-owned land before rights can be granted to private land users.

41. See *ibid*. It is stipulated that where land use grant fees are determined through agreement between private parties, the fee must not be lower than the prescribed lowest price in State provisions.

42. See art. 348, Chinese Civil Code.

43. For instance, after the local government and the land user conclude a contract and the land user has paid the fee, if the local government fails to provide the land under the contract, the land user is entitled to the withdrawal from the contract, the reimbursement of fee, and compensation.

The administrative departments of big cities, such as Beijing, Shanghai, Shenzhen, and Guangzhou, have designed standard contract forms for the transfer of land use rights or real estate. Nevertheless, these forms are sometimes criticized as very rudimentary and incapable of protecting the interest of purchasers.

Local governments are prohibited from usurping land use rights before the contract expires⁴⁴.

The Urban Real Estate Law requires that a contract for granting land use rights specify the maximum number of years for use of the land, which is prescribed by the State Council according to the intended use⁴⁵.

Only land use rights obtained by grants are freely transferable in the secondary market, whereas there is a multitude of restrictions applied when transferring land use rights obtained by allocation.

The authority to approve the transfer of land use rights gives some government bodies immense power. Government bodies deal with most of the approvals at the county level, even though they can only grant approvals for land up to a certain size⁴⁶.

44. There are some exceptional circumstances in which this is permissible. Local government bodies have the authority to withdraw the grant of land use rights if: (i) land use unit is dissolved or has moved away; (ii) land is vacant for 2 consecutive years even after approval; (iii) land is used in a way inconsistent with the approved scope; (iv) public roads, railways, airports, mining areas, etc., have been abandoned upon due verification and approval. In case of special circumstances relating to public good, the State may redeem the land and pay appropriate compensation to the land user. For comprehensive analysis see Yuan, *Land Use Rights in China* (cited in note 26).

45. See art. 12, Interim Regulations of the PRC concerning the Assignment and Transfer of the Rights to the Use of State-owned Land in the Urban Areas, n. 55 (May 19, 1990).

46. See Yuan, *Land Use Rights in China* at 73-77 (cited in note 26). To get around this limitation, applicants started subdividing large land use plans into a number of sub-plans. They treated each sub-plan as a separate plan for approval, so that the local government would have the authority to approve. The central government was concerned with this devious practice. On 22nd July 1989, the State Council issued a notice on the authority to approve land use rights. This notice prohibited land users from subdividing their land use plans and emphasized that government bodies should follow the spirit of the Land Administration Law. This limited corruption and reigned in local government practices.

4.2. *Land Use Transactions*

Individuals can obtain the right to use land from the state. The land-use right is a "usufructuary right" that allows the right-holder, the usufructuary, to legally possess, use, and benefit from property owned by another⁴⁷.

The 1988 amendment to the Constitution is a significant step in the process that brought to the possibility for people to own the right to use land. Until 1988, the land use system had not been established on a leasehold basis. In the past, most Chinese enterprises were assigned free property for use. Because of this, there is currently a dual land use system. On the one hand, new private investors have to pay for the use of the required site. On the other, old owners who are already in possession of the rights to use still control the land obtained free from the State⁴⁸. Both owners may transfer their rights to other parties under certain conditions.

In urban areas, the state grants land-use rights to land users. For doing so, land users pay the state granting fees for a certain number of years. Under the current rules prescribed by the State Council, land may be used for residential purposes for up to seventy years; for industrial purposes for fifty years; for education, science, culture, public health, and physical education purposes for fifty years; and for commercial, tourist, and recreational purposes for forty years⁴⁹.

According to the 2007 Property Rights Law⁵⁰, when the term for the right to use the land for residential purposes expires, it will be automatically renewed. The law is not clear, however, in stating whether

47. See art. 324, Chinese Civil Code.

48. The State is entitled to claim part of the profits from the owners of the land use rights that have been allocated for free. Despite this, the lack of binding legal provisions that would force the State to make these claims has exempted the owners from having to give part of the profits to the State.

49. See art. 12, Interim Regulations of the PRC (cited in note 45).

50. See Property Law of the People's Republic of China, no. 62 (March 16, 2007). The provisions of the Property Rights Law were inglobated into the new civil code. This did not change the matter in a significant way; in particular, it remains impossible for (private) organizations and individuals to acquire land as property: in this way companies and investors are still forced to acquire land use rights for their production facilities, etc.

the state would charge another granting fee at the time of renewal or how the fee would be determined.

Land-use rights may also be allocated for government purposes or military use, and urban infrastructure or public utilities use. If this is the case, the land users pay no fee, only compensation or resettlement expenses⁵¹.

Individuals can privately own real estate, including residential houses and apartments, although not the land on which the houses and apartments are situated. When an individual buys a house, he will acquire a right of property regarding the house and a right to use the land regarding the site on which the house rests. Land users may transfer their rights to others through sale, exchange, or gift⁵². Additionally, the real estate property may be transferred, mortgaged, or leased.

When real estate is transferred, land-use rights and home ownership are transferred simultaneously⁵³. Restrictions on the sale of real property are established by law⁵⁴. There are particular situations under which the transfer of real property is prohibited, including when the granted land-use rights were obtained by means that fail to meet the conditions of a proper grant or the property has not been properly registered, and certificates of ownership have not been obtained⁵⁵.

In the transferring of real estate, including the land-use rights and the homeownership, the new owner obtains the land-use rights only for the period equivalent to the original assigned term minus the number of years the original owner has used the land⁵⁶.

51. See Laney Zhang, *China: Real Property Law* at 3 (The Law Library of Congress Global Legal Research Center 2014).

52. See art. 19, Interim Regulations of the PRC (cited in note 45).

53. See Laney, *China: Real Property Law* at 4 (cited in note 51).

54. For example, if the transfer of the land-use rights is priced substantially lower than the market price, the government has the preemptive right to purchase the rights.

55. See Laney, *China: Real Property Law* at 4 (cited in note 51).

56. The land user who has acquired the right to the use of the land by means of the transfer thereof shall have a term of use which is the remainder of the term specified in the contract for assigning the right to the use of the land minus the number of the years in which the original land user has used the land. See Art. 22, Interim Regulations of the PRC (cited in note 45)..

4.3. *The Registration Process*

China has adopted a system of registering both land use rights as well as ownership of property. The State Land Administration Bureau is the regulatory authority responsible for the overall administration of the State's land: all the land has to be registered and recorded by it. In turn, the Bureau issues a land registration certificate for entitlement of any specific use. No rights can be acquired from the primary market or further traded on the secondary market unless the site has been granted such a certificate. To obtain these rights, land users need to apply to the Bureau for approval, making the Bureau play the most significant role in regulating land use activity in both the primary and secondary market.

5. *Local Governments as Land Entrepreneurs*

The Government has benefited substantially from these land policy reforms. In regions without strong industrial bases, revenue from the sale of land-use rights has become an important mean to support municipal governments, allowing them to fund infrastructure and provide public services.

Land leasing has been a key element of China's fiscal decentralization. In China, the central government retains all tax policy authority over local governments; municipalities cannot change tax rates, nor can they introduce new taxes of their design or eliminate dysfunctional local taxes. Land leasing was an attempt by municipalities to gain control over a revenue source genuinely within their control.

Local governments have recognized the possibility of financing infrastructure investment through asset sales. As a general rule, however, asset sales of this kind have been viewed as a temporary financing expedient, made possible by the government's decision to exit certain activities like the provision of public housing or the operation of economic enterprises that compete with the private sector.

Fiscal experts have warned that cities are at risk of becoming dependent upon asset sales as a significant source of capital financing. The sale of municipally owned land may be a partial exception because it can sustain infrastructure finance for a longer period. In countries

where all urban land is owned by the public sector, "land is by far the most valuable asset on the municipal balance sheet"⁵⁷.

5.1. *Land Leasing*

The actual process for the local government's sale of a land use right, like so many other procedures in Chinese law, derives from a combination of written law and actual practice⁵⁸.

Originally, municipalities transferred land rights to developers primarily through private negotiation. In the mid-1990s, a review by the Ministry of Land and Resources found that more than 95 percent of all transfers had taken this form. The problem is that private negotiations with developers provide a fertile ground for corruption, with a consequent revenue loss to the government. In 2002 the central authorities promulgated a new circular, instructing municipalities to conduct all land leasing through public bidding at auction.

The procedure is now an auction-based one: the local government will initiate the sale process by deciding on the requirements and specifications for a tract, it will ask the Department of Land Administration, which will establish a minimum price for the land use right, to evaluate the property's value⁵⁹. And, finally, will publicize these requirements and specifications making the relevant documents available to prospective bidders. Bidders then will submit sealed bids. Each bid from a developer is solely a price bid, as the local government already has established all the specifications in advance.

57. See George E. Peterson, *Land Leasing and Land Sale as an Infrastructure-Financing Option*, World Bank Policy Research Working Paper n. 4043 at 2 (2006).

58. See Stein, *Acquiring Land Use Rights In Today's China* (cited in note 9).

59. The calculation of "minimum price" that the Department of Land Administration undertakes can be a complex one. The floor price should reflect some base value for the land use right itself. But if the government plans to undertake the additional costly tasks of relocating current residents and demolishing existing structures, it will pass the costs of these activities along to the bidders in the form of a higher minimum price. In some cases, the government also factors in a third component, reflecting certain infrastructure costs that the redevelopment of the land will necessitate. The price of a land use right is a function of the total buildable area that can be constructed on the land. If that number changes as the building evolves, the price is adjusted accordingly. See Stein, *Acquiring Land Use Rights In Today's China* (cited in note 9).

The local government does not have to choose the highest bidder but it will consider the reputation, experience, and skill of each of them, to ensure that the winning one can complete the project successfully⁶⁰.

Land leasing in China involves the up-front sale of long-term occupancy and development rights. The practice was introduced on an experimental basis in 1987 in Shenzhen and other coastal cities, as part of the de facto decentralization of China's fiscal system. Up to that time, public authorities allocated land administratively and land use was free.

From the beginning, land leasing was tied to infrastructure investment. This practice provided a potentially large source of income for the municipalities, whose revenues were to be invested primarily in infrastructure systems, further enhancing cities' competitive position for economic growth.

In 1988, China's constitution was amended to permit land leasing while retaining public ownership of land. In 1990, the State Council formally affirmed land leasing as public policy. By 1992, Shanghai and Beijing had adopted land leasing as a local practice, and the practice began to spread. Likewise with many of China's economic development and fiscal reforms, the practice of land leasing moved from coastal experimental cities to Shanghai and the capital, and then to the rest of the country.

Land that is "sold" and approved for development can be reclaimed by the government if it is not developed within a specified period.

The importance of land-leasing revenues to cities' fiscal capacity and infrastructure investment has turned municipal governments into some sort of land-market entrepreneurs. Municipalities try to acquire as much land as possible, as cheaply as possible, then either sell it at market rates, use it as collateral for infrastructure loans, or provide it at below-market rates to strategic -mostly foreign- investors for industrial development⁶¹.

60. Prospective bidders with good personal relationships with high profile members of the local government are widely perceived to be enjoying an unfair advantage. In some extreme cases even the specifications have seemed to have been drafted with a particular prospective bidder in mind.

61. Municipalities acquire land in various ways. They can move municipal state-owned enterprises from central locations to the urban outskirts, where the

The possibility of profiting from the sale of land use rights creates enormous tensions for local governments. Municipal planning bodies may have devised long-term land use programs that restrict certain types of developments in specified areas. At the same time, these municipal governments must glimpse enormous revenue-raising possibilities from the sale of prime, restricted land to a developer who wishes to use it in a way that might not comport with the overall land use plan.

5.2. *Land Conversion*

Municipally owned land is not a static asset but can be created in different ways, such as by expanding the urban area into the rural-urban fringe; in this case, the process is called "land conversion". In particular, the law that regulates land conversion is the Land Administration Law, promulgated in 1998⁶². The law stipulated that "the right to use of land collectively owned by peasants shall not be transferred, retransferred or leased for non-agricultural construction", and it retained the provision that "rural collective economic organizations may jointly organize enterprises with other units and individuals in the form of equity participation of land use rights and joint operations"⁶³.

China has made the largest-scale commitment to converting land assets into infrastructure. Many cities in China have financed half or more of their very high urban infrastructure investment levels directly from land leasing.

companies have better transportation access but land is cheaper, then sell the vacated land to developers. This re-location is part of a broad rationalization of land use created by land pricing. They can expand the urbanized area by acquiring land from rural communes and converting it to urban use, through the so-called "land conversion". Perhaps the most novel form of freeing up land for resale involves moving city hall and all of the municipality's administrative buildings to a new location, outside the urban center, then auctioning off the vacated central land to developers. See Peterson, *Land leasing and land sale as an infrastructure-financing option* (cited in note 57).

62. See Garnaut Ross et al., *China's 40 years of reform and development 1978-2018* at 433 (Australian National University Press 2018).

63. See Land Administration Law of the People's Republic of China (December 29, 1987), revised and adopted at the Fourth Session of the Standing Committee of the Ninth National People's Congress of the People's Republic of China, 29 August 1998.

6. *The Land Use Right System as Land Control*

The Chinese land use right system functions similarly to a sort of zoning arrangement⁶⁴. When the government announces the availability of land, it also places limits on the uses allowed⁶⁵.

The establishment and transfer of land use rights is not the only method of land use control in China, but it is one component of a more complex system.

7. *Courts' Decisions on the Matter of Land Use Rights*

The Courts have dealt with the matter of land use rights on many different occasions. One of the most important judicial cases regards the expiration of land use rights in many residential areas in the city of Wenzhou. The local government had asked the citizens to pay for the renewal of land use rights. Many conflicts arose because of the differences regarding the dates on which the various land use rights would expire, as well as the differences regarding the cost of the renewal and payment methods.

The central government has since declared that the desire of the Chinese citizens to have long-term protection of their land use rights had to be supported⁶⁶.

Many other cases deal with expropriation: for example, the Supreme Court has issued a decision in which it says that those who have lost the right to use land have no right to request compensation for expropriation⁶⁷.

64. Zoning is a particular method of urban planning in which the government will divide an area into smaller areas, called "zones". Every one of these zones will be devoted to particular activities. The zones can either be defined for a single use (such as residential use, or commercial use) or they can be devoted to multiple uses (for example, a zone that is both residential and commercial).

65. See Stein, *Acquiring Land Use Rights in Today's China* at 47 (cited in note 9).

66. Ivan Cardillo, *Dieci questioni e casi esemplari di diritto costituzionale cinese del 2016* (Istituto di Diritto Cinese, October 18, 2017), available at <https://dirittocinese.com/2017/10/10/dieci-questioni-e-casi-esemplari-di-diritto-costituzionale-cinese-del-2016/>

67. See Judicial Committee of the Supreme People's Court, 1368th Session, October 24, 2005. In this particular case, the parties had invested all the land use rights

8. Land Use Rights under Italian Law

The notion of land use rights in Italian law mainly derives from Roman law⁶⁸.

Nevertheless, the Italian civil code of 1865 did not contain any provisions regarding land use rights. In the first groundworks of the civil code of 1942, we do not find the right to use land. However, the legislator will later introduce in the text provisions regarding it, this change can be attributed to the influence exerted by the German and Swiss models.

Nowadays we find references to land use rights in Italy both in the civil code and in many other laws but still, this right has no constitutional basis: this is one of the main differences between the Italian right to use land and the Chinese one, which has a constitutional basis in article 10 of the Constitution.

When we talk about land use rights in the Italian legislative system, we can distinguish between two different rights: the so-called "*proprietà superficaria*",⁶⁹ which is the right to own an already-existing building (but not the land on which the building stands) and the "*concessione ad aedificandum*"⁷⁰ of a future building to a different person from the owner of the land, that will later acquire the land.

involved in the case into a different company and then transferred some shares. The parties have later lost the right to use the land involved. The administrative organ had decided to expropriate and compensate the parties that had the right to use the land. The company to which the shares had previously been transferred was not compensated. Under this circumstance, the administrative organ issued a notice to the parties to withdraw the right to use the state-owned construction land, which did not infringe on their legitimate rights and interests).

68. In particular, the word "*superficies*" was used regarding everything connected to the ground. In the first stages of Roman law development, after a building was erected, it could not be perceived to be disconnected from the ground. This changed approaching the classical period. In fact, in this period, we can find provisions regarding the granting of a right to use the land to build edifices: this was first defined as *locationes-conductiones*. See Mario Talamanca, *Istituzioni di Diritto Romano* (Giuffrè 2015).

69. See art. 952(2), Civil Code of the Republic of Italy.

70. See *id.* at art. 952(1).

The first category is similar to the right to use residential land present in Chinese legislation, while the second one is analogous to the right to use the land for construction purposes⁷¹.

The granting of the *ius aedificandi* is quite frequent when it comes to bathing establishments and gas stations on highways.

Under Italian law, the *ius aedificandi* will be absolute and unconditional in the relations between the right holder and other people, whereas it will be considered a sort of "lessened right" if we analyze the relations between the right holder and the public administration. This dual nature derives from the dual nature of the act used to create the right, which contains on one hand an act of concession and on the other a private law contract.

The provisions on land use rights in the Italian legislation are articles 953⁷² and 954⁷³ of the Italian Civil Code.

Article 953 of the Italian Civil Code provides that the landowner will become the owner of the edifice after the right to use the land expires. This rule can be derogated because it doesn't concern state interests. If the parties do not make further arrangements, derogating this rule, the building will become the property of the party who is the owner of the land at the moment in which the right to use the land will expire.

Article 954, paragraph 1 of the Italian Civil Code provides that the extinction of the right to use the land will result in the extinction of the real rights that had been imposed on the land by the so-called "*superficiario*"⁷⁴.

Any leasing agreements concerning the building will expire in the same year in which the land use rights will expire.⁷⁵

The destruction of the building will not impact the *ius aedificandi* whatsoever⁷⁶. However, the right-holder will have to rebuild the edifice in no more than 20 years, otherwise, the *ius aedificandum* right will decay.

71. Chapter XII, Chinese Civil Code.

72. See art. 953, Civil Code of the Republic of Italy.

73. See *id.* at art. 954.

74. Holder of the right to use the land.

75. Those agreements will have to be stipulated in the specific forms of the *atto pubblico* or of the *scrittura privata* in order for them to be enforceable.

76. See art. 954(3), Civil Code of the Republic of Italy.

This is very similar to what happens in China; the most important difference is that the term for re-building is much more stringent under Chinese legislation.

In conclusion, land use rights are quite similar in Italy and China. The main difference is the importance that is given to the legal institute. Under Chinese law, the importance of land use rights is paramount, which is a direct consequence of the fact that no individual, whether citizen or non-citizen, can own the land in China. Land can only be owned collectively by all the citizens or by the State.

In Italy, the situation is quite different: land in Italy can be owned both by the State and by the people. As a consequence, the legal institute of the right to use land is much less important. It is mainly only used in the rare cases of specific types of land that can only be owned by the state. Cases in which the land use right is created by two parties through a contract are much less frequent.

9. *Conclusions*

Land use rights in China are supremely important. In fact, we may say that they are the reason for which China was able to transform its economy into one of the leading economies of the world. The importance of China in the world is directly correlated to the changing policies regarding land use rights.

Before the communist revolution in China, people could own land, this was later forbidden under the communist revolution during which private property of land was abolished:and could only be owned either by the State or by the Collectives. This land reform, however, did not lead to prosperity; another reform was needed. At the same time, the central government could not legalize the private ownership of land, because this was something that was in contrast with the basis of socialism. Thus, they decided to use a ploy: they did not legalize the private ownership of land, but they distinguished between the right of property and the right to use land. The first one could not be held by an individual, whereas the second could. This reshaped the whole economy; China no longer had a socialist economy, but rather an economy that could be described as a "socialism with Chinese characteristics".

After this reform, China was able to create a real estate market in which it was not the property of the land that was sold and purchased, but the land use right. Through this reform, China was able to enrich its citizens and become a more developed country⁷⁷. Through land policy reforms, China was able to reach its dream of being a nation of moderate prosperity⁷⁸.

The importance of the right to use land under Chinese law is beyond doubt. However, perhaps because of a Western preconception, we tend not to talk about this legal institute and its importance in China. Many jurists may not even know that no individual can own land in the People's Republic of China. If they do know it, surely they don't know all of its peculiarities. There might be many different reasons that concur to explain this phenomenon: first of all, land use rights tend to be quite unimportant in most of the Western World; secondly, this might be due to the different ideological basis of the economy in China and in the Western World. China has a socialist economy, which means that no one but the Chinese citizens as an entity can own land. In the Western World, the economy is a capitalistic one. Nonetheless, this approach is not the wisest: China is set to become the biggest economy of the world - even now it is the leading economy of the world - and one of the reasons for its economic take-over is to be attributed to the land use policy reforms that have been implemented throughout the years.

Another reason in favor of studying the Chinese legal system is that the country of China is profoundly different from Italy, or any other Western country and its legal system is quite distant from our

77. Through land leasing the local governments were able to broaden their revenue, and they later used these funds to better the infrastructure system.

78. On the 100th anniversary of the founding of the Communist Party of China, President Xi Jinping solemnly declared to the world that we have realized the first centenary goal of building a moderately prosperous society in all respects, and we are now marching in confident strides toward the second centenary goal of building China into a great modern socialist country in all respects. The idea of a moderately prosperous nation is strictly connected to the need to reduce poverty. On another occasion, Yu Weiping, the Vice Minister of Finance said: "China achieved its goal of poverty reduction in the new era as scheduled at the end of 2020". See State Council Information Office of the People's Republic of China, *Poverty Alleviation: China's Experience and Contribution* (2021), available at <http://pk.china-embassy.gov.cn/eng/zt/2356800/202104/P020210911658013307874.pdf>.

own. In the past, the legal comparison with the Chinese legal system or with Chinese legal institutes was considered to be an "extreme legal comparison". We no longer use this term, but the extreme difference between our legal system and the Chinese one remains unchanged. This should not be considered a reason to oppose the study or the legal comparison of Chinese legal institutes or of the Chinese legal system as a whole. On the contrary, this should be considered a great reason in favor of it. After all, this diversity of legal institutes can be helpful to emancipate us from the prejudices, ideas, and notions of the legal system of our own country, which would inevitably shape our legal studying in the case in which the legal system studied was one similar to our own.

When we study Chinese law or even when we expand our understanding in other branches, different from the legal ones, but still linked to cultures far away from our own, we have to detach ourselves from the previously held information, due to the fact that the things studied will be extremely different from our basis of knowledge. We will start learning while being in the state of a "*tabula rasa*". Later, through a comparative approach, it will be possible to compare the different legal institutes, to see what are the differences and similarities. In doing so we will have to cling to the previously gained knowledge. This is actually the usual comparative approach, but it is an approach that is very difficult to sustain in cases in which the legal institutes compared are very similar to our own. It is much easier to maintain this type of approach if the legal institutes to be compared are quite different.

This is not exactly the case for the legal comparison of the institute of land use right in Italy and China, since this institute tends to be quite similar in the two countries, at least in regard to the juridical aspect. Nevertheless, the difference in regard to the importance given to it in the two countries, which is tied to the historical matrix of this right, enables us to detach ourselves from the previously held knowledge of Italian law and allows us to analyze the Chinese perspective almost from scratch.

Moreover, the fact that we find in Chinese law legal institutes that cannot be found under Italian law - and vice versa - helps us examine the different solutions that can be applied to the same problem, or to a very similar problem, happening in both countries. This is not to say

that the Chinese legal institutes would surely be able to survive inside the Italian legal system - legal transplants tend to be quite problematic, especially when made between countries with contrasting legal traditions - but surely this opens a space for discussion that gets seldom opened.

On another hand, the legal comparison with the Chinese legal system gives us the possibility to compare just for the pleasure of comparing, just to enrich our knowledge, without any utilitarian motive.