

Institutional Restrictions: Why can't the Property Owners' Committee be Established?: An Analysis of the Practice Process of Legal Texts

Cheng Yu, Associate Professor
Zhang Junlong, Doctor

Cheng Yu, Associate Professor in Public Governance, College of Humanities and Social Sciences, University of Electronic Science and Technology of China, Zhongshan Institute, Zhongshan, Guangdong, China. Zhang Junlong, Doctor in Business Management, Business School, Macau University of Science and Technology, Macau, China. Correspondence Author: Zhang Junlong; pacy2014@126.com

Abstract: Why cannot property owners' committees be established? This study answers this question from the perspective of legal practice process, which is different from previous discussions about the owner's actions. Previous studies regard the law as a weapon and tool for owners to safeguard their rights, while this study focuses on the legal texts and regards the legal system as the key variable of the establishment of the property owners' committees. We adopt field observation and in-depth interviews to analyze the establishment process of Guangzhou property owners' committees in Guangzhou in the past 20 years. It is found that the legal system is often transformed into a governance tool, which is specifically characterized as the "anti-mobilization ability" of the system. In this case, local governments intervene in the development of legal texts by means of self-empowerment, raising the bar, and intentional delay, to embed administrative objectives and facilitate the convenience of administrative control and regulation, which partly results in the difficulty to establish owner's committees.

Keywords: property owners' committees; organizational mobilization; institutional restrictions; administration of justice; anti-mobilization ability

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PHENOMENON AND PROBLEMS

Institutionalization is one of the important ways to build national governance capabilities, which can be well established through the legal system and policy design. This also applies to community governance, as the standardized grassroots social order can be built through legal system among other approaches. With the implementation of the reform and opening-up policy and the promotion of urbanization, property owners' committees (hereinafter

referred to as owners' committees) have appeared in communities in China, aiming to better realize the autonomous management of communities and protect the rights of property owners. The owners' committee is not only a sign of maturity of the owners' autonomous management, but also a sign of urbanization in China. Its appearance presents a possibility for the structural transformation of society's basic relationship and the emergence of a new public space in society as well.¹ According to statistics from the Ministry of Housing and Urban-Rural Development of China, the ratio of the

establishment of the owners' committees in most cities nationwide is less than 30%. Though the proportion of the owners' committees in cities like Shanghai, in which the establishment is largely led by government's administrative power, is as high as 80%, they are often merely formalism due to the dominance of the government. It is difficult to operate effectively, handle community's public affairs, or organize public decision-making process of the community. Owners can supervise the property situation in the community through the owners' committee, which is not only an improvement in the internal property management, but also a positive change in the way that the residents defend their interests.

In the previous literature, the owners' committee is regarded as the key for the owners to defend their rights according to laws effectively. The discussion mainly focuses on the actions to protect the owners' rights, and the strategies they can adopt to defend their rights when their interests are infringed upon. For example, political opportunity organization,² resource mobilization theory^{3,4} and collective action strategy⁴ well explain the owners' actions to defend their rights. In these studies, the law is one of the important weapons for the property owners in right-defense through methods such as "resistance in accordance with the law",⁵ "resistance with the power of the law",⁶ and "resistance and adjustment of laws".⁷ However, these studies only treat the law as a tool or background, and do not pay attention to the initiative of the law itself. The determining factors for the owners to participate in rightful resistance include not only their awareness, the organization of collective actions, and the amount of resources at their disposal, but also the constraints of the external environment, even the methods of resources mobilization used by the owners. For example, the laws that play a role in the actions of owners include not only institutional texts such as laws, regulations, and policies, but also various organizational relationships and practical operations in the implementation of laws and policies, all of which constitute the external environment of the owners'

actions. In the previous literature, few studies have regarded the laws and regulations as the focus of research; instead, they are often taken as a hidden existence. Although some researchers have noticed that "the law has dual attributes in the actions to defend rights; it is both a weapon and a bottleneck for rights protection",⁸ these views have not been fully supported by empirical evidence. How does political/legal system restrict the establishment of owners' committees? What is the underlying mechanism? These problems all must be answered at the empirical level.

This study pays attention to "the dilemma of the establishment of owners' committees", and regards the legal text and its practice process as the research problem instead of the research object, which is different from the discussion of the property owners' resistance in existing literature. The failure to establish the owners' committee was not entirely due to the influence of the action takers, and the conflicts and restrictions between the legal texts also contribute to the failure, which bring natural defects of the owners' committee at the beginning of their birth. The legal system is the key variable of the dilemma that makes the establishment of the property owners' committees difficult. Therefore, the major objective of this study is to find out how the legal text and its practice process shape and influence the establishment and operation of the owners' committees. That is, how the local government develops the law. The political/legal structure is taken as the main perspective to explain the reasons and mechanism of why owners' committees cannot be established as an organization.

LITERATURE REVIEW: FROM THE ACTIONS TO PROTECT THE OWNERS' RIGHTS TO THE CONSTRUCTION OF THE LEGAL SYSTEM

Research on Owners' Actions

In the previous literature on owners' actions to defend their rights, some researchers mainly focus on the weapons used in rightful resistance, factors that influence the success of their actions, or governance strategies adopted by local governments. It is found in the literature that, as a window for expression of organized owners, the owners' committee is one of the key elements in influencing their actions and the core

part for the owners to tackle the difficulties in defending their rights. Taking owners' committees as organizational carriers for their actions, these studies mainly focus on how owners defend their rights, what strategies they adopt, and the reasons for their success or failure, and regard the owners' committee as an organizational carrier for their actions. For example, in the research on how owners defend their rights and the strategies that they adopt for rights defense, Chen Peng proposes the "resistance for the law" based on "resistance with the law" and "resistance through the law" to enrich the understanding of law-centered resistance actions of the owners.⁷ The emphasis of "resistance for the law" is that, in the process of owners' resistance, the law is no longer regarded as a basic standard or a weapon for resistance. Instead, the law itself is regarded as the object of resistance, and the owners participate in the formulation, revision, promulgation, and implementation of the law. It is a process in which the owners participate in developing the law to protect their interests.⁷ However, in the research on owners' actions to defend their rights, the law is basically regarded as one of the "weapons" adopted and "the law is the core of the strategy on rightful protection".^{2,9} The law is treated as a tool rather than an important variable that affects the establishment of the owners' committees.

Researchers not only take owners as the object of analysis and discuss the strategies they can adopt, but also introduce local governments as an important research object. This is presented in the changes of local governments' strategies to cope with grassroots governance problems in the owners' actions to defend their rights. For example, Huang Weiping and Chen Jiayi find that local governments often adopt tailored strategies including absorption of owners' suggestions, negotiation, suppression, division, encouragement and mobilization, and compensation, etc., to quell owners' actions.¹⁰ On this basis, it is found that in the dilemma of community governance and under the pressure of uncertain risks in the future, local governments often resolve the potential risks faced by the

national administrative system through the establishment of a series of targeted systems and organizations.¹¹ From the perspective of Lefffield's theory of space production, Sun Xiaoyi and Huang Ronggui point out that in the contradiction between owners' rights defense and community governance, grassroots governance bodies (local governments, subdistrict offices, etc.) use their administrative power and discourse to diagnose the conflicts and realize the administrative absorption of the owners' committee through preparation and filing of the owners' committees under the guidance of the government.¹² Wang Hansheng and Wu Ying explore the influence of the country's changes and the methods of state intervention on social growth from the perspective of state-society relations.¹³ However, these studies only focus on the inherent contradictory relationship between the institution/policy and urban communities, and fail to study the institution/policy itself by introducing the policy/system into the research and analyzing it as an important variable to discover its inhibitory effect on the establishment of owners' committees.

In the analysis of the factors affecting the success of owners' rights protection, Cao Yu believes that in the post-unit system, successful rights defense needs effective autonomous subjects, complete organizational systems, extensive social networks, legal rights protection procedures, and favorable political orientation. Some researchers also emphasize "restrictive effect of political and legal systems".¹⁴ The state can take strategic actions including intervention, disengagement, and bystander regulation to respond to the governance of owners' committees.¹⁵ Zhuang Wenjia finds out that in the case of owners' protest in Guangzhou, owners' appeal changes from reactive appeal to aggressive appeal.¹⁶ In this transition process, the law is only regarded as the right of discourse sought by owners to defend their rights or express their appeals in constructing the legitimacy of their appeals.

Discussion of the Owners' Committees as An Organization

Another study regards owners' committees as a type of social organizations, but mainly explains why the same type of social organizations can develop so differently when there is no significant regional

difference in economic development, population mobility, and scale. This study provides an explanation from the perspective of urban government structure.¹⁷ Different from the research that does not distinguish different types of owners' committees, Chen Peng divides them into two types, i.e. resistant and conventional committees based on the different work stages of right-defending and autonomous management. These two types differ in aspects of organizational orientations, governance mechanisms, and cognitive logic.¹⁸ Guan Bing and Yue Jinglun discuss the establishment and development of social organizations from external and internal legitimacy based on the case study of owners' committees in 19 communities in Beijing. External legitimacy provides an institutional guarantee for the social organizations to interact with the outside world, while internal legitimacy is the foundation of the sustainable development of social organizations.¹⁹ However, the study does not further discuss the mechanisms of how external and internal legitimacy affect the establishment and development of owners' committees.

Why are some owners' committees organized successfully while others are not? What are the determinant factors? Previous studies attribute this to the power of collective actions, resistance strategy,²⁰ structure of political opportunities, governments' attitude, initiative of community elites, etc.²¹ For example, by studying the establishment and operation of the owners' committees of four commercial housing communities in City B, Chen Peng discusses the reasons why some owners' committees can maintain stable operation for many years and form different governance models, even though it is generally difficult to establish owners' committees, and even if they have been established, it is difficult to operate normally. Chen Peng classifies the basic models of commercial housing community and evaluates its governance performance based on the theory of community polity.²² Some scholars have also analyzed the inherent limitations in the development of the owners' committees from three aspects, i.e. leading elites, oligarchy, and

quasi factional politics. Small-scale trust, institutional absence, and state intervention are external constraints in the development of owners' committees.²⁰ However, this study only probes into the internal factors of owners' committees, while excludes the external factors from the discussion. After studying owners' committees in Shanghai, He Pingli discovers several major problems, such as the difficulty in convening owners' assembly, preparing the establishment of owners' committees, regular operation, rightful resistance, and internal supervision of owners' committees.²³ The difficulty in establishing owners' committees is also highly related to the establishment procedure, especially the institutional arrangements, procedural and structural design, and rational behaviors embedded in it.²⁴ Though that study realizes that the establishment procedure hinders the initiation of owners' committees, it fails to further discuss how institutional arrangements functions in the hinderance and the underlying mechanism. Zhang Lei's research discovers that it is the medium and micro mobilization mechanism that enables owners' committees to defeat interest groups of the real estate. In order to achieve active mobilization for collective actions, consensus, resources, and members' participation are the necessary components.²⁵

At the same time, there are few studies on the influence of external mechanism such as relevant governmental sectors and residential committees, whose interests conflict with that of the property owners. With anti-mobilization ability, they aim to dispel the mobilization ability of the owners.²⁶ Some researchers believe that the anti-mobilization ability from the institution are presented in persuading the opponents, credibility of information sources, and the legitimacy etc.²⁷ In his research, Huang Xiaoxing discovers that there is a mechanism of the resistance outside the owners' committees. The resistance can be used to create mutual conflicts between different governmental departments and community organizations who take office in turns, and the autonomous management of the government. Then the resistance can be weakened to some extent, and the owners' committees could use these inconsistencies to improve the mobilization and operation of community affairs.²⁸

It is proved an effective strategy for rightful protection that owners can use mutual supervision

between governmental departments, or even inter-departmental conflicts to obtain support from them. Studies have shown that the state intends to strengthen grassroots social management through community construction, thereby controlling the autonomous space of the community and facilitating the possibility of a civil society.²⁹

To sum up, though previous studies have accumulated rich knowledge on the generation of owners' actions and strategies for rights defense, these studies have not paid enough attention to the owners' committee as an organization, nor have they detailed explained the empirical phenomenon of the dilemma of the establishment of owners' committees. Some studies treat legal texts as a macro- institutional factor, and others treat the legal system as a strategy adopted by owners to defend their rights. Almost none takes the law as a research subject. Even though few studies have mentioned the linkage between the success of owners' committees and the legal system, they hardly discuss its micro-process and mechanism. Therefore, this study exemplifies a case of more than 20 years and tries to reveal some institutional obstacles and their causes faced by the owners' committees in the process of establishment.

THE PROPERTY OWNERS' COMMITTEES IN LEGAL TEXTS

With the implementation of the reform and opening-up policy, China has gradually adopted a model of commercialized property management, and Guangzhou is the first city

which adopts this model. In the early 1980s, Donghu New Village in Guangzhou, as the first commercial housing project in China, tried to apply the property management model of Hong Kong in the management of its community and made some achievements.³⁰ In 1998, Guangdong Province was the frontrunner in legislation and promulgated Regulations on Property Management of Guangdong Province. With the implementation of this regulation, owners' committees developed stably. Later, in 2003, the State Council of China issued the Regulations on Realty Management, which was the first detailed provision on property at the national level. In 2007, the National People's Congress (NPC) promulgated the long-awaited Real Right Law, which marked great progress in China's legislation and empowered property owners to protect their rights by an upper-level law; in the same year, the State Council promulgated the revised Regulations on Realty Management. In 2011, Guangzhou Municipal Housing and Urban-Rural Development Bureau (Hereafter referred to as Guangzhou Housing Management Bureau) issued Guiding Rules for the Procedure of the Establishment of Property Owners' Assembly and Election of Owners' Committees of Guangzhou (Draft for Comments). Although the Guiding Rules was still in the drafting stage, many administrative departments in Guangzhou have already applied the provisions to handle affairs on property and owners' committees. Regarding the development of owners' committees in Guangzhou in the past decades, this study marks the promulgation of these legal provisions or landmark events, and clarifies the development process in the following stages (Figure 1):

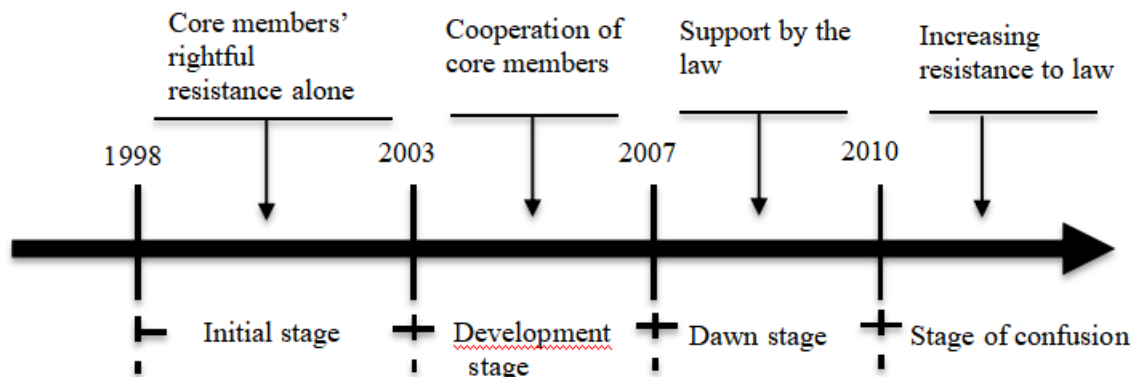


Figure 1

The Establishment Process of the Property Owners' Committees

Legal Texts at the National Level

In order to study the legal background of owners' committees, it is necessary to study owners' autonomous management, which cannot be realized without the protection of citizens' private rights by national legislation. As a researcher said: "As a continuous administrative, legal, and compulsory system, laws, regulations, and policies are important means and ways for a country to build state-society relations".¹³

By analyzing the existing legal texts, this study finds that the top-down legal systems related to owners' autonomous management include Constitution, Real Right Law, Regulations on Property Management, guiding rules, judicial interpretation of the Supreme Court, and regulations on property management of different provinces and cities. Article 39 of the Constitution stipulates that "The residences of citizens of the People's Republic of China are inviolable. Any illegal searches or intrusion are prohibited." Based on these key principles, the Constitution affirms that citizens' legal rights are recognized and safeguarded by the state. Since the implementation of reform and opening-up policy, China has adopted the socialist market economic system and began to emphasize the protection of legal rights and interests of individuals, as well as the protection of social and economic rights throughout the country. China's legal system was featured with a tendency to regard civil laws as public laws in the past, especially before the reform, which is a legal ideology that many jurists have been trying to eliminate over the years.³¹ The General Principles of the Civil Law of China was issued in 1987 when the implementation of reform and opening-up policy was approaching its 10th anniversary. Article 5 of the Civil Law stipulates that "the civil rights and legal interests of citizens and corporations are protected by the law, and no organization or individual may infringe upon them." The birth of this law broke through the constraint of the conventional planned institution at that time, marking the end of the era of

adjusting civil relations mainly through the means of policy guidance.³² In 1994, the Ministry of Housing and Urban-Rural Development issued Order No.33, Administrative Regulations for Newly Built Residential Communities in Cities (hereinafter referred to as Administrative Regulations). At that time, the concept of owners' autonomous management still had great cognitive defects in China, and there were very few studies in society and academia. Therefore, the Administrative Regulations was issued in the form of departmental regulations, with only 19 articles. Many of the specific articles have some ambiguities and uncertainties, and the scope of this order was relatively narrow. It was defined as more of a trial to pave the way for future legislation. On the eve of the release of Real Right Law in 2007, the Administrative Regulations was abolished. In 2003, the Regulations on Property Management was officially promulgated, which had loopholes and aroused disputes due to lack of clear definition of differentiated ownership of buildings and properties in the laws. With the validity of the Real Right Law, the State Council revised the specific provisions of the Regulations on Property Management. The revised Regulations came into effect on October 1, 2007, together with the newly promulgated Real Right Law. The Regulations on Property Management is of great significance to the development of owners' autonomy and property management enterprises in China, as the rights and obligations of owners' committees, owners' assembly, property service enterprises, and other stakeholders are clearly defined in the form of administrative regulations for the first time. In addition, it also stipulates the rules for procedure of electing owners' committees and convening the owners' assembly, promotes the awakening of owners' awareness of rights protection in accordance with laws, and provides a direct legal basis for judicial sectors to deal with property disputes.

Nowadays, in China's legal system, in addition to the Constitution and the General Principles of Civil Law, the highest-level law on owners' autonomy and property management is the Real Right Law officially promulgated in 2007, followed by the property management provisions issued by various provinces

and cities. In addition, in view of the increasing number of property dispute cases in China, the judicial sectors have studied the relevant legal provisions and made corresponding judicial interpretations. In April 2009, the Supreme People's Court promulgated the Interpretation of the Supreme People's Court on Several Issues Concerning the Specific Application of Laws in the Trial of Property Service Disputes; in May 2009, the Interpretation of the Supreme People's Court on Several Issues Concerning the Specific

Application of Laws in the Trial of Cases of Differentiated Ownership of Buildings was issued. Both came into effect in October 2009. So far, a legal system has been formed, with the Constitution as its foundation, the Real Right Law and General Rules of the Civil Law as upper-level laws, the Regulations on Property Management and the two Interpretations of the Supreme People's Court as specific guiding rules for the whole country, together with the property management regulations of various provinces and cities as lower-level laws (Figure 2).

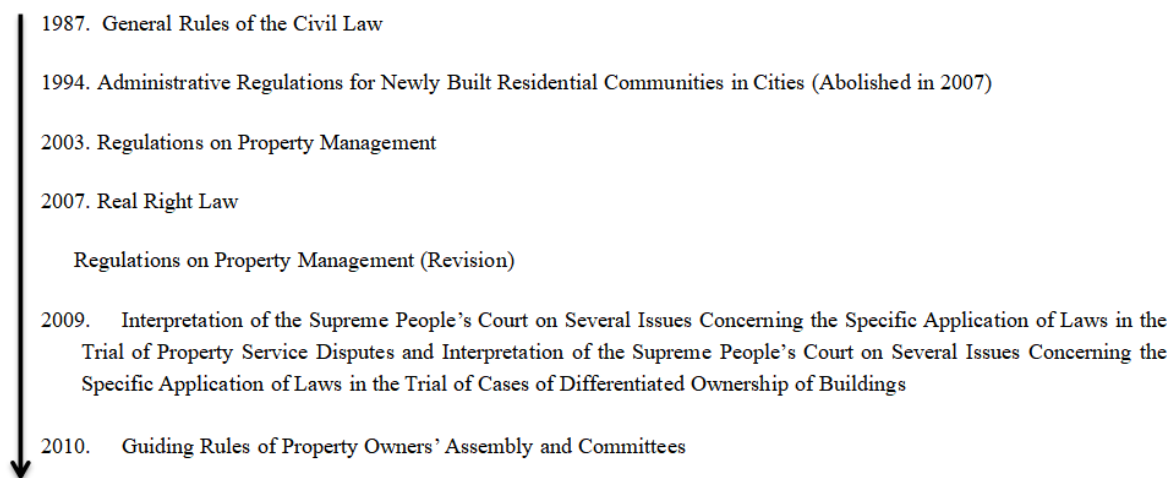


Figure 2
Legal Texts at the National Level

Local Case: Legal Texts of Guangzhou

As the birthplace of the first batch of commercial residences in China, Guangdong is also the first place to introduce the concept of "property owners". Its legislation on the autonomy of owners used to be a national pilot. The Regulations on Property Management in Guangdong Province was adopted by the Fourth Session of the Standing Committee of the Ninth People's Congress of Guangdong Province in 1998. It was nearly 10 years before the national Real Right Law was promulgated. During this period, this Regulations was applied in judicial practice to deal with the disputes of owners' autonomy and property management within the province. In 2002, the General Office of the Guangdong Provincial Government issued the Implementation Plan for the Institutional Reform of the Urban Grassroots Management in

Guangdong Province, which took effect in the province in the same year. Article 8 particularly mentions the need to straighten out the relationship between the owners' committees and the property management department, and the property management companies shall support and assist subdistrict offices in community construction. In 2007, NPC promulgated the Real Right Law, followed by the State Council's revised Regulations on Property Management. In order to match the Real Right Law, the national upper-level law of owners' autonomous management, and link up with the newly promulgated Regulations on Property Management, the People's Congress of Guangdong Province passed the newly revised Regulations on Property Management of Guangdong Province in 2008, which came into effect later. In the next few years since then, cities and districts including Guangzhou have used this Regulations as important rules and guidance when dealing with owners' autonomy and property disputes.

Although in 2001, the Guangzhou Municipal Government promulgated the Regulations on Property Management of Guangzhou, it was abolished in 2004. Therefore, before 2011, disputes settlement related to property and owners in Guangzhou was fully referred to the laws and regulations of the state and those of Guangdong Province, and no legal texts was issued by the Guangzhou government.

In 2011, the Guangzhou Housing Management Bureau prepared to officially promulgate Guiding Rules for the Procedure of the Establishment of Property Owners' Assembly and Election of Owners' Committees of Guangzhou in order to add a local applicable legal provision related to owners and their committees to the national and provincial laws. In November 2011, a draft of the Guiding Rules was posted on the Bureau's official website to solicit comments from the public. This provision was still at the stage of drafting for comments and did not have legal effect then. However, as indicated by the interviews, the draft Guiding Rules was adopted by many local organizations in their practice since its released.

"Now all districts in Guangzhou are acquiescing to this draft. Even if it has not yet been issued, (the property owners' committees) are required to follow the guiding rules... We have called for a cessation of this regulation before, but local departments use the administrative power of different districts to enforce this law in advance."

As far as Guangzhou is concerned, before 2011, the laws applicable to owners' committees were completely consistent with those of the state and the province. After 2011, many local departments and organizations also implemented the guiding rules. It is indicated that, since 2011, the owners' committees in Guangzhou have been experiencing a dismal period. *"After this guideline was launched, so many owners' committees are complaining, and it is even more difficult for them to survive."*

THE PROPERTY OWNERS' COMMITTEE IN LEGAL PRACTICE

Some scholars have noticed the paradox of legal definition of owners' committees and application in practice.⁷ They believe that there is a big gap between the definition of state power in the existing rules (Guiding Rules of Owners' Assembly and Committees) and the owners' expectations of rights in autonomous management, which bring ambiguity of the rules and lead to the absence of owners' committees' corporate status in law and the control from the local authority of the owners' committee.¹⁶

In the research of stability maintenance, some scholars have noticed that the grassroots government adopts a comprehensive strategy to appease the resistance of the general public by playing procedural games. In order to solve specific disputes, the local government takes inter-departmental actions and arbitrarily uses various institutional methods, including grassroots judicial offices, mediation committees, labor offices, mediation centers for labor disputes, village elections, petition centers, subdistrict offices, etc. These resources constitute the national fortress and span the boundary between political society and civil society.³³ In practice, "owners' committees have become the main arena for action takers to compete for community dominance. The establishment of owners' committees has become an important factor affecting the result of owners' rightful resistance";³⁴ "Institutional arrangements, procedures, and rational behaviors are deeply embedded in every step of the establishment of owner's committees and provide a "political opportunity" for its establishment".³⁵ Specifically speaking, how did legal text and its practice influence the establishment and operation of owners' committees in Guangzhou in the past 20 years?

Self-Empowerment

Early in 2009, Guangzhou Housing Management Bureau began to prepare for the city's first guiding rules for owners' assembly and committees. *In 2011, the draft was roughly completed and published. In November 2011, Guiding Rules for the Procedure of Setting up Property Owners' Assembly and Electing the Owners' Committees of Guangzhou (Draft for Comments) was posted on the official website of Guangzhou Housing Management Bureau to solicit comments from public.* During the interview, it was learned that the guiding rules generally received poor

reviews from owners, and a member of an owners' committee said that "if this regulation is actually implemented, it will make Guangzhou's owners' autonomy go backwards." This regulation aroused wide controversy in terms of legislative procedures and the expression of provisions. It has not been promulgated; strictly speaking, this regulation does not have any legal effect. However, as mentioned above, since the publication of the drafted regulation, many local departments have referred to it to supervise and regulate the work of owners' committees in actual operation.

About legislative procedure, this regulation was not proposed by the legislature, the People's Congress at any level, during the drafting process, but drafted by the housing management department. Apart from the Constitution, the most important law to guide the legislation of local governments is the Legislation Law, which was adopted in 2000 and has been implemented since then. In terms of municipal legislation, article 63 of the Legislation Law stipulates: "The People's Congress and the standing committees of larger cities can formulate local laws and regulations, and report them to the standing committees of the People's Congresses of the province or autonomous region, for approval before implementation according to the specific conditions and actual needs of the city, on the premise that the local laws and regulations will not conflict with the existing Constitution, laws, and administrative regulations." As the provincial capital of Guangdong Province, Guangzhou is qualified to legislate and its legislative power is vested by the People's Congress and its Standing Committee; at the same time, when laws are promulgated within the jurisdiction of Guangzhou, they need to be approved by the Standing Committee of the Provincial People's Congress before implementation.

However, the Guiding Rules for the Procedure of Setting up Property Owners' Assembly and Electing the Owners' Committees of Guangzhou (Draft for Comments) was not compiled by the People's Congress of Guangzhou, a legislative body, but formulated by the Housing

Management Bureau, a functional department, and People's Congress never participated in the formulation of this provision. The legislature authorities were exceeded in this process.

"The Regulations on Property Management of Guangdong Province was developed by the NPC Committee of Legislative Affairs. This approach is in line with the requirements of legislation. The Guiding Rules (Draft for Comments) of Guangzhou were developed by the Housing Management Bureau instead of NPC, which is obviously inappropriate and unreasonable. At that time, we asked them to submit the Guiding Rules to the Guangzhou Municipal People's Congress to be further submitted to the Guangdong Provincial People's Congress for approval, rather than skipping the People's Congress at both levels. Now some lawyer representatives have suggested that Guangzhou should let People's Congress take over or supervise this regulation. After all, Housing Management Bureau is not a legislative body."

The Draft for Comments is "illegal" regarding legislative process, but it can still be effective in practice. *In May of the following year, the Guangdong Hua'nán Harmonious Development Community Center and other representatives of owners' committees, in conjunction with the New Express, the Yangcheng Evening News, and other media published articles criticizing the unreasonableness of this law. The Guangdong Hua'nán Harmonious Development Community Center submitted a joint letter to the city leaders. "After reading these reports and our letter, the city leaders suggested that our comments were very useful, and this guiding rules really need to be re-discussed and re-formulated."* The representatives of the owners and the lawyers expressed strong opposition to the draft guiding rules, and the Guangzhou Housing Management Bureau also held a discussion meeting. However, it was more like a formalism procedure rather than an occasion to hear different voices.

"A director of an owners' committee tried to have a discussion with the Housing Management Bureau. After arriving there, he found that he was the only one from owners' committee, and all the others present were managers of six or seven property management companies. Then the director automatically became the owner's representative of Guangzhou. It was the

managers from the property companies that spoke throughout the meeting.”

When the Guiding Rules was released in the beginning, it was just a draft for comments. However, since the Housing Management Bureau published it online, agencies and departments below the municipal level have implemented it as the actual legal text in operation.

“Although this Guiding Rules is not officially launched, the guiding spirit has been affecting the local administration for more than one year. At present, all the districts in Guangzhou are required to follow it in practice even though it has not been officially issued yet.”

In March 2013, we learned from Guangdong Hua’nan Harmonious Development Community Center that the Guiding Rules would finally be approved by the Municipal People’s Congress and became a regulation with legal status; it was only a matter of time.

“Basically, the Guiding Rules (the objections, suggestions for modification, etc.) does not reflect our (the owners, representatives of the owners’ committee) opinions. It is said that the

Housing Management Bureau has passed it, and the Commission of Legislative Affairs of Guangzhou People’s Congress will approve it. It means that the rules will be enforced eventually.”

It can be observed that the Guiding Rules is not a legally-effective provision. In order to obtain a legal status, administrative power is used to submit the draft for review by the municipal People's Congress for approval. The Guiding Rules has been implemented in many places in Guangzhou, and the approval at this time is more of a process for obtaining legalization qualifications. Although the final draft issued by NPC and the Municipal Housing Management Bureau has not yet been published, the procedural approval is only a matter of time.

Based on the analysis on the interviews and documents, the following are the legal procedures (left) and the actual procedures (right) that the Guiding Rules should go through (Figure 3). Aside from the specific provisions of the law that are worth further discussion, as far as the legislative procedure is concerned, it is against requirements of the Legislative Law. Once approved by NPC, the legal status of the Guiding Rules will be consolidated.

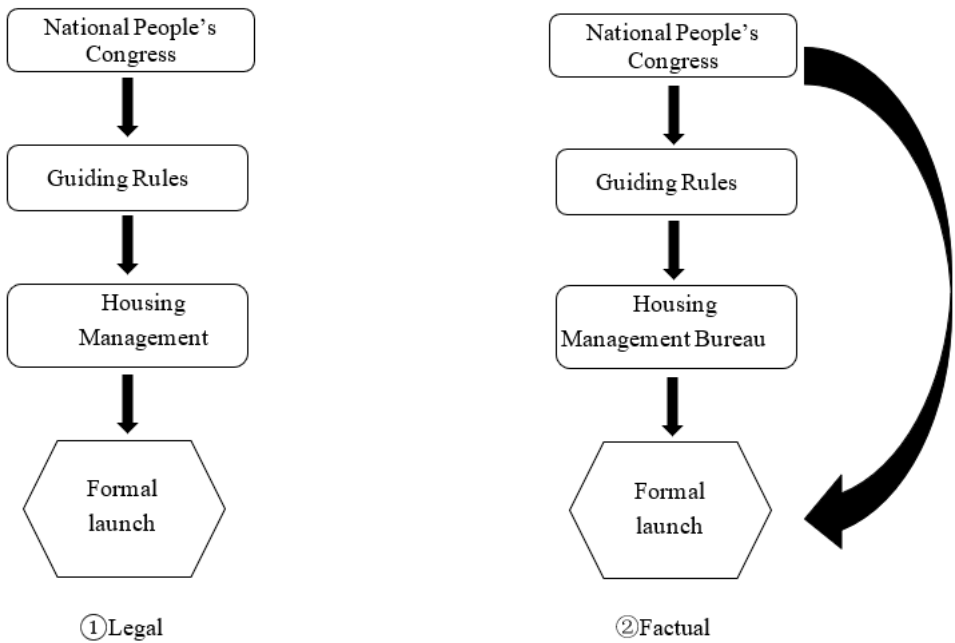


Figure3
The Legal Procedures and the Actual Procedures that the Guiding Rules

To sum up, the Guiding Rules has major problems in the legislative procedures; second, in the practical implementation, the administrative power is used to forcibly implement a Draft for Comments that has no legal effect. When the draft was released in November 2011, the proportion of communities with owners' committees in Guangzhou was 20%-30%, which was relatively low. In the following half a year after the draft Guiding Rules was announced, the establishment rate of owners' committees dropped to 10%. The reason for this change is necessarily related to the implementation of the draft as an actual law by the local government organization in Guangzhou. The interviews with committee members who knew this guiding rules revealed that they did not accept or even opposed it.

"For we owners and the owners' committees, there is no exaggeration to say that it is a bad law".

.....

Many representatives of owners and lawyers have commented that the Guiding Rules is harmful to owners' autonomous management and owners' committees. This regulation cannot be passed with full legal effect. If it is approved, the owners' committees will not sustain.

The chaos in the legislation and enforcement process has made the Guiding Rules a veritable draconian law in the opinions of the owners before it is formally published. Due to the defective legal procedure, the Guiding Rules contains many unreasonable and even harsh clauses.

Raising the Bar

In the Regulations on Property Management of Guangdong Province and the Guiding Rules of Guangzhou, there are definitions of the working group for preparation. "These regulations provide legitimacy for state intervention in the process of community autonomous management".³⁵ The convening of the first owners' assembly is a prerequisite for the establishment of the owners' committee.

It is necessary to hold the first owners' assembly before establishing the owners' committees in Guangzhou. Therefore, Guangzhou should set up a preparatory group before the first owners' assembly is held, and all the work needs to be passed by the group in the preliminary phase. Then the owner's assembly can elect the members and establish the first owners' committee. Therefore, if the preparatory group cannot be formed, then the first owners' assembly cannot be held smoothly, and the establishment of the first owners' committee will be impossible. However, the work of government-related preparations or preparatory group for the first owners' assembly is not mentioned in China's upper-level law, the Real Right Law. In the Regulations on Property Management, there is no provision about preparation; only Article 10 stipulates that "the real estate administrative department of the governments, or the subdistrict office of the district or county where the property is located, townships governments should guide the property owners to organize the owners' assembly and elect the owners' committees."

Both the regulations of Guangdong and Guiding Rules of Guangzhou mention the preparatory group of the owners' assembly. The Regulations on Property Management of Guangdong Province even required government departments to participate in the preparatory work for the first time. In addition to the representatives of the owners, it is required that the preparatory group must be composed of other three parties, i.e. representatives of the subdistrict office (township government), the property developers, and the subdistrict office. In the preparation group of 7-15 people, the representatives of the owners should occupy at least 60% of the total number, and representatives of other three parties can account for up to 40% in the preparatory group. The owners' assembly has not been successfully convened, and the owners' committee has not yet been established. However, there are various stakeholders in the preparatory group. If there are different opinions in the preparatory group, it will inevitably cause resistance to the entire preparatory process and even affect the owners' assembly and the regular work of the owners' committee. Based on this fact, the preparatory group is apt to be affected by factors such as local governments and property developers.

The Regulations on Property Management of Guangdong Province is the local upper-level law of the Guiding Rules of Guangzhou, which should coincide with the former. Regarding the provisions related to the preparatory group, the Guiding Rules of Guangzhou covers all the specific provisions of the Regulations on Property Management of Guangdong. At the same time, in comparison with the two regulations, it is found that the Guiding Rules of Guangzhou are more stringent in some requirements. For example, in terms of the composition of the preparatory group, in addition to the same requirements in the provincial regulations, the members of preparatory groups in Guangzhou must meet the additional requirements:

"The leader of the preparatory team shall be the representative of the subdistrict office (township government);

The number of owners' representatives is determined by the subdistrict office (township government);

The subdistrict office (township government) can entrust the neighborhood committee to organize owners in the recommendation and election of owners' representatives."

...

In the composition of the preparatory group, there are three more detailed provisions in the regulations of Guangzhou than that of Guangdong. In the Guiding Rules of Guangzhou, governments have a greater voice and influence on the preparatory group compared to that of Guangdong. Subdistrict offices (township governments) can not only decide the number of owners' representatives but also entrust neighborhood committees to organize and elect owners' representatives. Therefore, it is doubtful if these representatives are selected to facilitate the convenience of local government's management. The local government may discuss with property developers and management companies before determining the size and candidates of the preparatory group. Many owners' representatives have expressed their concerns and objections on the requirements of

the composition of the preparatory group. Owners who object to this regulation believe the main body of the preparatory group should be owners' representative as they are the ultimate owners of the properties. If the representatives of the property developers apply to participate, they can only participate as "special owners with limited rights."³⁶ In addition, previous research has found that owners' interests conflict with those of property developers, grassroots administrative agencies, and property management companies in the rights protection activities.²⁵ Therefore, property developers and grassroots administrative agencies, especially developers, can occupy no more than up to 40% in a preparatory group.

Finally, the most unacceptable clause is that the leader of the preparatory group must be elected from subdistrict offices or township governments. The follow-up clause stipulates that the neighborhood committee of the community where the property is in will take the place of the owners' committee in the six months of preparation before the first owners' committee is formed.

Compared with the regulations of Guangdong Province, this Guiding Rules has an additional time limit requirement for the preparatory group: "The preparatory group should be dismissed on its own if it fails to organize the first owners' assembly to vote and pass management stipulations and rules of procedure of owners' assembly, or elect the owners' committee within six months from the date of its establishment." The owners' committees find it difficult to accept such an unreasonable clause.

"Guangzhou's current Guiding Rules stipulates that in the six months before the establishment of the owners' committee, the local neighborhood committee will take the place of it. On the one hand, the owners' committee doesn't empower the neighborhood committee to replace it. On the other hand, should the work of owners' committees, such as collection of maintenance funds and rental of shared properties, be taken over by the neighborhood committee during this period? If the neighborhood committee causes any property disputes, should the responsibilities be attributed to them or we owners?"

...

"The last clause is even more unreasonable. If the preparatory group fails to finish the preparatory work within six months, it will be dismissed by itself. But the reason for delay could be attributed to the government or the property developer. Why should this time limit be set, and why should the owners bear the responsibility? I have seen this unreasonable clause in many other places in China. Guangzhou's regulations on the preparatory group cannot be justified by either law or principles."

Compared with the upper-level law, Guangzhou's Guiding Rules gives local governmental sectors such as subdistrict offices and neighborhood committees more power in owners' autonomy. In the upper-level laws such as the Real Right Law and the Regulations on Property Management of the province, the role of subdistrict offices and neighborhood committees are stipulated as assistance-provider; however, in this lower-level law, the organization of local government takes the leading role.

We also interviewed a lawyer representative who was invited to review and comment on the Guiding Rules. A few years ago, he also participated in the peer review and collection of lawyers' opinions of the Regulations on Property Management of Guangdong Province. Regarding the clause of six-month time limit for the preparatory group, he pointed out that the provincial bureau of housing management had also tried to place this clause in the draft. At that time, the experts' group and the owners' representatives strongly opposed it, and successfully prevented writing this a clause in the main body of the Regulations on Property Management of Guangdong. Now in the Guiding Rules of Guangzhou, the Housing Management Bureau once again included the six-month time limit, and the representatives of the owners and lawyers expressed their own strong opposition as before.

"The Housing Management Bureau really insists to include the clause on disbanding the preparatory group. When we first reviewed the provisions on the Guiding Rules, we eliminated this annoying clause that if the preparatory group can't hold the preparatory meeting within six

months, then the group will be dismissed and re-organized. Even though we removed this clause, the Housing Management Bureau has put it back. The Guiding Rules is estimated to be officially promulgated very soon. Even if it is unreasonable, NPC will not veto it as it is proposed by the Housing Management Bureau."

This provision stipulates that if the first owners' assembly cannot be held within six months, the preparatory group will be dismissed, and if the community residents still insist on setting up the owners' assembly and establishing the owners' committee, they have to re-organize a new preparatory group. As a result, many communities have been encountering difficulties in the preparation process, such as problems left by the developers, failures in procedural review by the grassroots government, etc., and they are likely to fall into the predicament of "repeated preparations". The dilemma of the establishment of owners' committee has been transformed into the dilemma of the establishment of the preparatory group. Establishing such a restriction hinders the development of owners' committees. It is understandable that after the draft Guiding Rules was implemented by grassroots governments, the establishment ratio of the owners' committees in Guangzhou dropped from 20%-30% to 10% within half a year.

Intentional Delay

In this study, the procedures to establish the first owners' assembly and committee are summarized according to the Regulations on Property Management issued by the State Council, Regulations on Property Management of Guangdong Province and Guiding Rules for the Procedure of the Establishment of Property Owners' Assembly and Election of Owners' Committees of Guangzhou (Draft for Comments). The establishment procedure is as follows(Figure 4):

First, the owners of the residence should apply to set up owners' assembly. There are two prerequisites for the application. The first is that the area of the property that has been delivered for use has reached at least half of the total property management area or the construction area of the pre-development area; second, at least 20% of owners should jointly submit a written application to the subdistrict office or township government.

The second step is the organization of the preparatory group. To meet the requirements for setting up owners' assembly, the subdistrict office or township government and the housing management department of the government where the property is in, should guide and assist the owners to recommend candidates and organize the preparatory group for owners' assembly within 30 days after receiving the written application. The preparatory group should be composed of an odd number of seven to fifteen people, including representatives of the owners, the subdistrict office (or township government), construction companies, and neighborhood committees.

After the members of the preparatory group are determined, the first owners' assembly should be held within six months. At the first owners' assembly, the rules of procedure and the management regulations of the owners' assembly should be discussed and voted, and the members of the owners' committee and their positions should be confirmed through election.

Finally, the members of owners' committee should be recorded in files by the subdistrict office, township government, and local housing management department within 30 days from the date of its establishment. After this process, the owners' committee will be affirmed legally, and its internal rules and seal can be used formally. In essence, the requirement for filing provides the possibility for the government to intervene in this process.²⁵

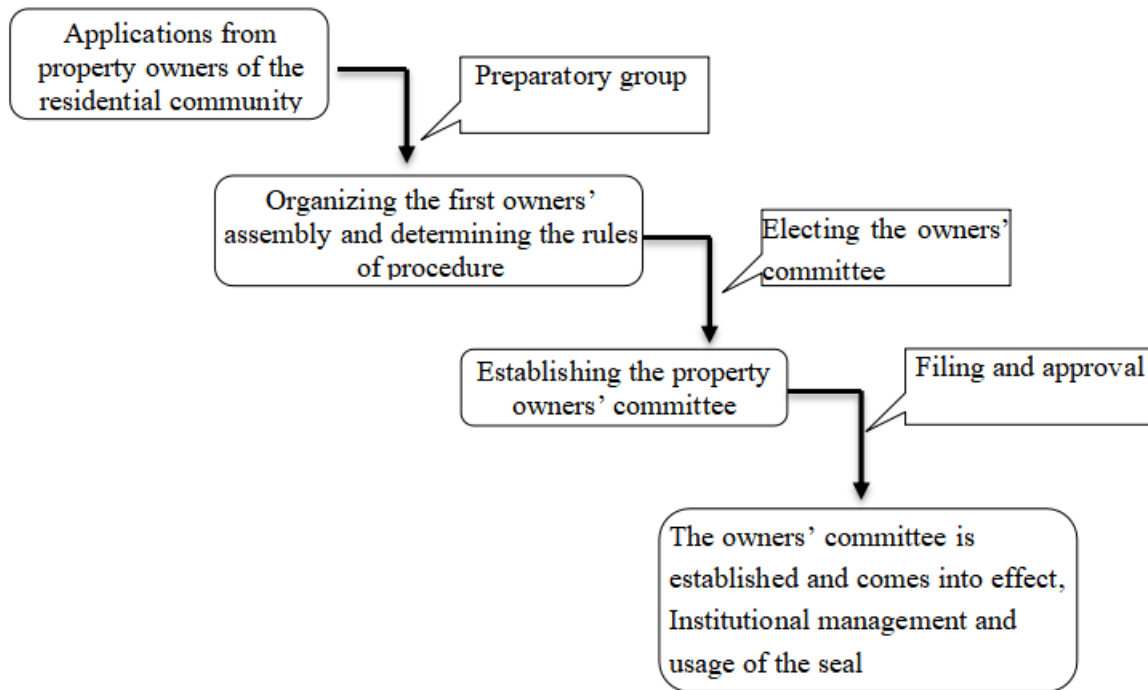


Figure 4
Establishment Process of Industry Committee

The first step of establishing an owners' committee is to apply to the subdistrict office and neighborhood committee. "I know a community in Tianhe District that has applied for establishing owners' committee for several years. The occupancy rate of the community has already exceeded 90%, but there is no response to their application so the committee cannot be

established." In addition, the preparatory work of owners' committee needs to be completed within 60 working days, but it may be delayed by staff of the subdistrict office or the Housing Management Bureau. This brings various difficulties to the preparatory work. At last, the preparatory work needs to be officially recorded in the subdistrict office before the owners' committee can be successfully established.

However, the procrastination and prevarication in this process put owners' committees in an informal status with incomplete legal effect.

Every country under the rule of law has its own judicial relief system. If the administrative department does not act to its responsibility, or even violates the law, citizens can protect their legal rights and interests through administrative reconsideration and administrative litigation. Administrative Reconsideration Law of China stipulates that "Citizens, corporations, or other organizations who believe that specific administrative actions infringe their legal rights and interests can submit an administrative reconsideration application to the administrative agency. The administrative agency accepts the administrative reconsideration application and makes an administrative reconsideration decision." "Citizens, corporations, or other organizations who believe that specific administrative actions infringe their legal rights and interests can submit an application for administrative reconsideration within 60 days from the date of knowing the specific administrative actions." China has a specialized provision on judicial relief in this respect. However, though the terms are clearly written, it is common for local administrative departments to find the gap in practice and do not follow the law.

"Administrative reconsideration needs to be accepted by government departments. They may not refuse you directly, but they can delay your application without any follow-up actions, or suspend it until it expires the deadline. It is very likely that there is no response in the end. In fact, administrative litigation may not work, let alone administrative reconsideration. Simply speaking, if the local court does not even recognize the litigation qualification of the owners' committee, how can we apply for administrative litigation?"

The whole process of establishing owners' committees is intervened by administrative forces, from application to officially filing, which can be regarded as owners' autonomy in the limited space restricted by the country.³⁴ Once the local administrative departments do not cooperate or act to their responsibility, it will be

difficult to establish owner's committees. At the level of national legislation, there is a judicial relief system for administrative reconsideration, but that requires the implementation in practice and the cooperation of local administrative departments. However, if owners' committees apply to correct the mistakes and omissions of local administrative functional departments through the last step of judicial remedy and administrative litigation, they will be blocked at the threshold of qualification of litigation subject. In Guangzhou and many other places in China, the establishment and operation of owners' committees cannot be separated from the support of administrative power. Once the administrative power intervenes, it may be difficult for owners' committees to sustain.

DISCUSSION AND CONCLUSION

In conclusion, previous studies on property owners or owners' committees mainly focus on the discussion of owners' actions to defend their rights. They either take the owners as the research subject to analyze the reasons which trigger owners' rightful resistance and discuss the tools adopted in this process, or explore the countermeasures taken by the local governments from the perspective of their standpoint of community governance. It is found previously that the law is used as a weapon by both property owners and local governments. However, what are the micro process and mechanism of legal texts in practice? There is not enough empirical analysis on this aspect in literature. This study focuses on the formulation process of Guangzhou's legal texts related to the owners' committees over the past two decades, and reveals the characteristics of government intervention with legal support, which is summarized as the phenomenon of judicial administration, that is, "replacing the contents of the justice with administrative purposes, structures, methods, mechanisms, and effects, and forming a judicial system operated by administrative means".³⁷ Some issues of the judicial field have been handled administratively. In this case, the local government uses strategies such as self-empowerment, raising the bar, and deliberately delaying to intervene in the formulation of the legal texts, and embeds administrative goals in this process to achieve the purpose of enhancing administrative control. Therefore, the power from the local government is the key to the survival and development of owners'

committees. The main contribution of this study is to provide an observable micro-process for the initiation of legal texts and to deeply discuss and analyze the mechanism. On the purpose, this research expands the existing discussion from the following two dimensions. On the one hand, this study expands the existing research on owners' committees, and analyzes the reasons why owners' committees are difficult to be established and the underlying mechanism from the structural perspective; on the other hand, this study reflects on the phenomenon of judicial administration and probes into the mechanism of how administrative power affects the formulation of legal texts. Although previous studies have mentioned the role of law in owners' rights protection, they mainly indicate the influence of the law on owners' actions, or the usage of the law as a strategy for rights protection.³⁸ Different from the discussion that takes the law as an independent variable, this study pays more attention to the shaping effect of the legal system itself to owners' committees and discovers the underlying mechanism. The change of the research focus will help to study owners' committees and the owners' resistance in depth. The institutional structure has a profound impact on the expression of organizational interests of owners.

Through the development of policy texts, such as filing, setting the requirements of the members of owners' committees and the composition of candidates, local governmental departments have realized the administrative absorption of owners' committees, which finally results in the restriction of the establishment of owners' committees by legal texts. As some scholars pointed out, "Intentional political/legal restrictions on citizens' autonomy have become an institutional bottleneck of citizens' organized expression and social development".² In the process of safeguarding owners' rights, though the appeals have changed from participating in the implementation of rules to the formulation of rules, civic rights are gradually developed; in other words, the protesters have developed the awareness of the rights from the awareness of rules.¹⁶ However, the legal system itself has

produced an anti-mobilization mechanism due to the administrative intervention of local governments, constantly generating and intensifying contradictions. No matter how owners' appeals have changed, they cannot surpass the "rights granted by the state".¹⁶ Restrictions from the legal system lead to owners' powerlessness in defending their rights. The law is supposed to be an institutionalized means of resolving disputes and protecting owners' rights and interests, but it becomes an obstacle for establishing owners' committees because too many governance purposes have been placed in it.

In the integrated authoritative system, local governments present structural tension in the face of the demand of the rule of law and governance. Under the requirement of building a country ruled by law, relevant administrative regulations need to be issued to regulate the behavior of various action takers at the grassroots level. In order to respond to the demand of local governance, local governments need to take technical and standardized measures to prevent problems and avoid risks. Legal texts at the national level entitle the owners to limited autonomy and reserve the possibility of local power's intervention of the community. In process of establishment of owners' committees, the filing system and the preparation procedures among others indicate that local governments make use of the gap in the legal system to embed their purpose of grassroots governance. Through the system channel of the legal texts, the legitimacy of local government intervention is constructed, and the power of local governments is reconstructed and re-produced. In community governance, local governments implement a series of institutional restrictions on the establishment of the property owners' committees through the construction of legal texts, presenting the characteristics of judicial administration of local governments. This not only changes the behavior of local governments, but also eliminates the governance effects of legal policies. In the previous research of owners' rights protection, owners often adopt lawsuits and petitions in accordance with the law to express their appeals. At the same time, local governments may respond with tolerance, suppression, compromise, or a mixed strategy of compromise and suppression.³⁹ In order to facilitate management and control, local governmental departments abandon repressive

methods, but adopt a more secretive controlling mechanism which incorporates the governance objectives into the framework of legal and policy formulation, requesting and guiding protesters to form community order in accordance with the governance requirements of local governments.

As a part of the overall social governance system, the law imposes restrictions on procedures and provisions, and hardly serve as the last line of defense for citizens to move toward a civil society. As Chen Baifeng suggested, "The construction of a country under the rule of law is rooted in the construction and improvement of the basic structure of national power, which provides an overall framework and basic structure for the overall promotion of the national strategy of the rule of law, and the construction of the government and the society under this strategy".⁴⁰ Rightful resistance has shaped the legal system, while the legal system is not just the consequence of the resistance. On the contrary, the legal system itself affects the capabilities of group mobilization and organization, and the development, direction, and results of expression of organizational interests of owners. Actions for right protection is often regarded as an important driving force for the growth of civil society, the construction of state power, and institutional transformation. Conversely, the gradual opening of the political system also provides important opportunities for rightful defense actions. In practice, the legal system is often transformed into a governance tool.⁴¹ In the process of community governance, the owners will initiate collective actions because their interests are violated or they wish to claim their own appeals. Local governments adopt corresponding strategies to eliminate risks and transfer conflicts.⁴¹ First, local governments will redefine a judicial issue as a governance issue, and the legislative process becomes departmental legislation, which is often guided by departmental interests and management convenience. Then, a set of administrative processes will be carried out to prevent risks and governance problems, further avoid multiple risks, such as pressure of property disputes and owners' resistance, etc., and enhance the

legitimacy of local government departments. However, it brings the difficulties in establishing owners' committees, and, as a result, owners constantly fight for their rights. This results in a paradox in community governance. Local governments continue to promulgate various laws, regulations, and policies to reduce the risk of future governance at the source. However, such system settings cannot motivate owners but instead become the largest obstacle to the establishment of owners' committees. The owners' committees provide an opportunity and platform for the owners to participate in grassroots politics, which is conducive to enhancing their ability of interest expression and unity and expanding community autonomy". However, when the platform on which owners rely cannot be established, this often becomes another appeal of owners' resistance and falls into a vicious circle.

Conflicts of Interest Disclosure Statement

The authors declare no conflict of interest in the authorship or publication of this work. The authors declare no sponsored financial sources by any organization related to tobacco production for the undertaken study.

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