

Whatever-ism with Chinese Characteristics: China's Nascent Recognition of Private Property Rights and Its Political Ramifications

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+ I dedicate this article to my beloved parents, Wang Jian (王健) and Wei Houmin (魏厚民), whose fierce perseverance, quiet dignity and raw wisdom have been an unfailing source of inspiration. I am indebted to my advisor, Professor William Alford, my friends Christopher Taggart and Jane Bestor, of Harvard Law School, for their guidance and insights. Thanks must be given to the editors of the East Asia Law Review, without whom, this publication would not have been possible. Last but not least, this work was partially supported by a grant from the Real Estate Academic Initiative at Harvard University.

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I. INTRODUCTION

How would a wealth maximizing absolute ruler behave towards his constituents? He can confiscate all their wealth, but such a once-and-for-all accumulation is inconsistent with maximization over time. . . . He can get more income by promising to let constituents keep a portion of their incremental output. However the ruler continually faces a tradeoff between the higher income he can obtain by relaxing restrictions on constituents (thereby increasing their productivity and both their and his income) and the increasing threat to his security that the relaxed restrictions entail because his subjects have both more freedom of action and resources to overthrow him. Equally the constituents face the dilemma that the ruler may at some point renege on his promises and confiscate the accumulated wealth of his constituents. It is at this point that . . . credible commitment[s] enter the picture.¹

Just as the rule of the game will determine how well a ruler may maximize his wealth, North's fable demonstrates that institutions or institutional constraints are the determinant of economic performance. Institutions, particularly political and legal institutions, may improve economic performance by reducing uncertainty and establishing a stable structure within which political and economic players interact, a process we call "making institutional commitments credible."² Since, from the

¹ Douglass C. North, *Institutions and Credible Commitment*, 149 J. INST. THEO. ECON. 11, 17 (1993).

² DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE 5-6 (1990).

constituents' standpoint, the key to credibility is how well the ruler will honor his promise not to confiscate their accumulated wealth, the enforcement of property rights is therefore central to credible commitment.³

China's economic performance since 1978 has been nothing but spectacular, especially compared to that of the former Soviet Union or those of the formerly socialist economies in Eastern Europe. When Deng Xiaoping, the then paramount leader of China, launched the economic reform by announcing "let some people get rich first,"⁴ he was less certain about the how-tos other than to "cross the river by groping for stepping stones."⁵ Three decades later, Deng's reform has been lauded by some as having engineered the monumental transformation of one-fifth of humanity⁶ and praised by others, who are awestruck by China's prescient determination not to follow advice from neo-liberal economic theorists, as a successful example of adopting a "homegrown" gradualist approach.⁷ Thus, it is clear that China's economic growth at break-neck speed has brought enormous prosperity, wealth and pride to its people.

Yet, like the "wealth maximizing absolute ruler" in North's fable, Deng was not immune to the threats to the political security of his party-state. When the student-led demonstrators poured into Tian'anmen Square in the summer of 1989, without hesitation, he moved quickly to crush them. Deng was not the first and certainly not the last in China's history to have succeeded in fostering economic prosperity while tightly maintaining sovereign supremacy. Such tradition may be traced back to the First Emperor of Qin who proceeded to burn unorthodox books and bury dissenting scholars promptly upon unifying China in 221 B.C., thereby setting the foundation for standardized political and economic systems of a dynastic China for the next two millennia. More than ten years have passed since Deng's death in 1997 and much has changed in China. Yet, much remains the same. The Chinese Communist Party (CCP), once a self-claimed revolutionary rebel, now clenches onto the two-millennia-old authoritarian wisdom exemplified by the First Emperor and perfected by Deng. To stay true to this tradition, the CCP remains steadfast in following the blueprint envisioned by Deng: "Socialism with Chinese characteristics

³ North, *supra* note 1, at 17.

⁴ Weixing Chen, *Has the Time Come for a New Ideology in China? The Creation of a New Authoritative Discourse*, 1998 CHINA REV. 259, 271.

⁵ RICHARD BAUM, BURYING MAO: CHINESE POLITICS IN THE AGE OF DENG XIAOPING 17 (1994).

⁶ David Shambaugh, *Introduction: Assessing Deng Xiaoping's Legacy*, in DENG XIAOPING, PORTRAIT OF A CHINESE STATESMAN I, 1 (David Shambaugh ed., 1995).

⁷ See e.g., JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 186 (2003) (stating that "[o]ne attribute of the success cases is that they are 'homegrown,' designed by people within each country, sensitive to the needs and concerns of their country. These and all other successful transitioning countries were pragmatic - they never let ideology and simple textbook models determine policy.").

(有中国特色的社会主义)."⁸ Laden with vagueness and ambiguity, the convenient phrase has been defined by the party-state to mean a full-scale market economy coupled with the CCP's monopoly on political power, a sermon not only preached but also practiced by the CCP. Economically, China has been liberalized, but politically, it has stagnated under the one party rule. Along with marketization came deepened social polarization and stratification, mounting grievances among the poor and the weak, not to mention rapid environmental degradation.

Setting aside the enormity of human costs, China seems to have succeeded in its economic performance without undertaking the kind of institutional rearrangements prescribed by the "liberal democratic" development model - privatization and civil and political liberties as preconditions for stable economic growth. For those who deem the moral of North's fable sensible, three issues figure prominently: Firstly, did China nonetheless achieve credible commitment in its institutional arrangements without having to privatize its property rights? Secondly, depending on the answer to the first question, will China ultimately privatize its property rights, however gradually, in order to either achieve or, alternatively, maintain the credibility to accommodate changes in its economy? Last but not least, will China's economic marketization bring about civil and political liberalization?

Confucius once said, rectification of names (正名) is a matter of paramount importance in carrying an affair to success.⁹ The CCP may have taken this advice to heart when it reaffirmed public property ownership through the passing of its new property law in March 2007 (the "Property Law"). After all, the Chinese translation of the "Communist Party" means the "Party of Public Property Ownership." As such, deciphering the true meaning and rectifying the name of "Socialism with Chinese characteristics" may be the key to answering the three questions. Originally a rhetorical slogan that reflected the collective ethos such as "old things must be put to present use" and "foreign things must be put to Chinese use" - the use of this term has been understood by many as having a prescriptive value imposed by the CCP with its ideological pretense and also a descriptive value reflecting what has taken place in China empirically. Others, eschewing the Orwellian sentiment inevitably invoked by it, wonder whether the phrase has a genuine normative value. Many have written about China's *de facto* capitalism, brushing off the party-state's insistent socialist claim. Many more have speculated on how soon

⁸ RICHARD EVANS, DENG XIAOPING AND THE MAKING OF MODERN CHINA 252-53 (1994).

⁹ See THE ANALECTS OF CONFUCIUS B. 13 V. 3 (James R. Ware trans., 1980) ("If names be not correct, language is not in accordance with the truth of things. If language be not in accordance with the truth of things, affairs cannot be carried on to success[.] Therefore [w]hat the superior man requires is just that in his words there may be nothing incorrect.").

socialism will fully recede from China's social milieu. But perhaps in the minds of many pragmatic Chinese, the question should no longer be "What -ism does China practice?" A more apt question concerns what it means to have "Chinese characteristics." If both "capitalism" and "socialism" are well-defined and China's development model is genuinely *sui generis*, then the features of this model would be embodied in what "Chinese characteristics" come to represent. However, "[c]onsiderable haziness surrounds"¹⁰ this term. Speculations abound that its ambiguity as well as the institutions it represents may prove to be the wisdom of the CCP in evading challenge, maximizing institutional flexibility and allowing trials and errors.¹¹ Could it mean the dual-track economic system under which continued operation of the state sector was allowed while giving space to a rapidly growing private sector? Or is it merely a codeword for Chinese pragmatism as epitomized by Deng's proclamation that "it does not matter if it is a white cat or a black cat, as long as it catches mice?"¹²

Against this backdrop, this paper intends to address the three issues posed above, i.e., credible commitment, privatization of property rights, and political liberalization, by analyzing China's legal institutional arrangements of the most essential kind of property rights, real property interests, within the institutional economics theoretical framework proposed by North. Part II of this paper begins with a historical overview of the real property systems that existed in dynastic China as influenced by its cultural traditions. It follows with a chronicle of the major land use policies and laws engineered by the CCP since 1949, including the Household Responsibility System (包产到户承包制) ("HRS") initiated in 1978 and completed in 1982, which played a pivotal role in Deng's economic reform, and the Property Law. Part III analyzes the interplay between China's economic performance and the institution of property rights. This part asks whether China's current property law system has achieved credibility by decentralizing and fragmenting real property interests, and concludes that it has. This part also ponders the question of whether privatization of rural land ownership would benefit the next stage of China's development. It finds that such privatization may not be the best course of action, as the cost of doing so outweighs the benefits it promises to offer. Part IV considers the practical implications that the current real property law has on Chinese society, through land related grievances in

¹⁰ Steven N. S. Cheung, *Will China Go "Capitalist"? An Economic Analysis of Property Rights and Institutional Change*, HOBART PAPER 21 (1982).

¹¹ See *id.*; see also Peter Ho, *Who Owns China's Land? Policies, Property Rights and Deliberate Institutional Ambiguity*, 166 CHINA Q. 394, 420 (2001) (concluding that China deliberately implements ambiguous policies to reconcile Marx-Leninist principles with privatization of land).

¹² WILLIAM A. JOSEPH, *Ideology and Chinese Politics*, in POLITICS IN CHINA: AN INTRODUCTION 129, 155 (William A. Joseph ed., 2010).

both urban and rural settings. It questions whether the awakening of the concept of property rights within its people, notwithstanding the party-state's tenacious grasp at the regime's legitimacy, will eventually lead to political institutional change and help achieve democratization in China. It ends on an optimistic note: "Hope is on the way," to borrow from recent American politics. Palpable throughout this paper is an attempt to decipher what "Socialism with Chinese characteristics" means within the context of China's legal, economic and political development.

II. PROPERTY RIGHTS AND LAND USE SYSTEMS IN CHINA

In *River Elegy*, a provocative TV documentary aired in China in 1988 which created the intellectual effervescence leading to the 1989 Tian'anmen student movement, Chinese civilization was called a land-based "Yellow Civilization," vis-à-vis the maritime-based "Azure Civilizations" of the West. Despite its pervasive sensationalism, the documentary rightly highlighted the indispensability of land, the most significant asset of the mankind, in defining a person's existence in traditional China and people's interactions with the state.

Institutions are "humanly devised constraints that shape human interaction," according to North.¹³ There are two forms of constraints - formal and informal. Formal constraints are "formal rules including political (and judicial) rules, economic rules, and contracts;" and informal constraints are, for instance, "codes of conduct, norms of behavior, and conventions."¹⁴ For this reason, my review of China's institutional arrangements of property rights begins with a legal review and closes with a cultural overview.

A. *Property Rights and Land Use Systems in Traditional China*

1. A Brief Legal Overview

Before China's unification by the First Emperor of Qin in 221 B.C., a feudal style system of land use distribution existed at least since the Shang dynasty (16th C B.C. - 11th C B.C.), under which all the land was owned by the king, the granted use rights were enjoyed by nobles, military officers and public officials, and other people were serfs who passed with the land.¹⁵ During the subsequent Western Zhou dynasty (11th C B.C. - 770 B.C.), the land grant became transferable and the grantees became the

¹³ NORTH, *supra* note 2, at 3-4.

¹⁴ *Id.* at 36, 46.

¹⁵ PATRICK A. RANDOLPH JR. & LOU JIANBO, CHINESE REAL ESTATE LAW 1-2 (1999).

de facto owners of the granted land.¹⁶ A land management system known as the "well" system (井田制度)¹⁷ was developed in the Eastern Zhou dynasty (770 B.C. - 221 B.C.), under which the entire parcel was owned *de facto* by the grantee of the land but each of the eight surrounding outer sections was allotted to an individual or a family to cultivate while the center section, the communal section, was also cultivated by all eight parties; in exchange, the parties could keep the proceeds or products from their own sections while handing over the proceeds or products from the center section to the *de facto* owner of the parcel.¹⁸

The quasi-private land ownership concept continued to develop during the Eastern Zhou Dynasty and was conferred additional security by the First Emperor of Qin, who issued an order requiring all peasants to report their private land and recognized their ownership.¹⁹ Subsequent dynasties also continued the practice of distinguishing state land, which was owned by the Emperor and could not be transferred, from private land of which free transferability was encouraged.²⁰ The Song Dynasty (10th C A.D.) developed a rough land registration system under which land ownership was represented by a government issued certificate.²¹ After a brief reversion to the feudal system during the Yuan Dynasty (1271-1368) under the Mongols, a comprehensive land survey system was established by the Ming Dynasty (1368-1644), together with the formalization of laws concerning real estate ownership, transfer, and the concept of *dian* (典) (or mortgage), which was first recognized during the Song Dynasty.²² The last dynasty of China, the Qing Dynasty established by the Manchu, witnessed a redistribution of large amounts of land to the Manchu people to the detriment of the Han Chinese. However, to encourage agricultural development, efforts were taken by the government to confirm the private land ownership of the peasants.²³

A brief interlude called the "Taiping Rebellion" is worth noting. For more than ten years starting from 1851, significant regions of southern China were controlled by a theocratic and militaristic regime known as the "Taiping Kingdom," established through the Taiping Rebellion.²⁴ The

¹⁶ LAW SCHOOL TEXTBOOK SERIES: THE HISTORY OF CHINA'S LEGAL SYSTEM (法学系列教材: 中国法制史) 42 (1985).

¹⁷ The Chinese character for the word "well" is 井, representing the division of the land into nine equal sections. Zhihou Xia, *Well-Field System*, ENCYCLOPÆDIA BRITANNICA ONLINE, <http://www.britannica.com/EBchecked/topic/639289/well-field-system> (last visited Mar. 14, 2011).

¹⁸ RANDOLPH & LOU, *supra* note 15, at 2.

¹⁹ THE HISTORY OF CHINA'S LEGAL SYSTEM, *supra* note 16, at 96.

²⁰ RANDOLPH & LOU, *supra* note 15, at 4.

²¹ *Id.*

²² TEXTBOOK OF CHINA'S LEGAL HISTORY 233 (Ye Xiao Yin ed. 1989).

²³ *Id.* at 249.

²⁴ JOHN KING FAIRBANK, THE GREAT CHINESE REVOLUTION 1800-1985 81 (1986).

regime abolished private land ownership, declared collective land ownership by all people and allowed peasants who worked on the land the right to use it.²⁵ Some viewed the Taiping Rebellion an inspiration for Mao Zedong in resorting to peasant uprising and revolutionary policies such as communal land ownership.²⁶

2. A Brief Cultural Overview

North believes that "culture defines the way individuals process and utilize information and hence may affect the way informal constraints get specified."²⁷ Further, he emphasizes the important role played by the long-run implication of the cultural processing of information in the incremental way by which institutions evolve.²⁸ For that reason, he identifies "culturally derived informal constraints" as a source of path dependence.²⁹

As William Alford notes, even though China's legal history goes back to before the establishment of the Western Zhou Dynasty in the 12th C B.C., as evidenced by the development of rules regarding civil matters during the Zhou Dynasty, a code of conduct evolved from the concept of *li* (礼) (or rites). *Li*, originating at least during the Western Zhou, became the public rules governing the political, social and religious behaviors of the pre-imperial society.³⁰ Confucianism, relying on concepts such as *li* though with lesser emphasis on religious rituals than before, was declared the "supreme principle of government and moral conduct" in 140 B.C. by Han Wu Di.³¹ It served as the cultural foundation for Chinese society and shaped the "mentality and conduct of the Chinese, both individually and as a collectivity."³² Law (法), on the other hand, originated from a secondary philosophical school, Legalism, which was relegated to an instrumentality by which the sovereign governed through punishing wrongdoings.³³ Despite the development of private law in traditional China, social and

²⁵ RANDOLPH & LOU, *supra* note 15, at 5-6.

²⁶ PAUL A. COHEN, CHINA UNBOUND: EVOLVING PERSPECTIVES ON THE CHINESE PAST 212 (2003); *see also* Orville Schell, *Unheavenly Kingdom*, N.Y. TIMES, Feb. 4, 1996 (*reviewing* JONATHAN D. SPENCE, GOD'S CHINESE SON: THE TAIPING HEAVENLY KINGDOM OF HONG XIUQUAN (1996)).

²⁷ NORTH, *supra* note 2, at 42.

²⁸ *Id.* at 44-45.

²⁹ *Id.*

³⁰ William P. Alford, *The Inscrutable Occidental? Implications of Roberto Unger's Uses and Abuses of the Chinese Past*, 64 TEX. L. REV. 915, 930 (1986).

³¹ ZHENGHUAN ZHOU, LIBERAL RIGHTS AND POLITICAL CULTURE: ENVISIONING DEMOCRACY IN CHINA 140 (2005).

³² *Id.* at 166.

³³ STANLEY B. LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO 15-16 (1999).

economic relations were predominantly enforced through reliance on informal norms based on social hierarchy.³⁴ The informal norms and the regime's public law system were not in opposition. Rather, the ideals expressed in the social norms were more or less reflected in the public law system and reliance upon public law did not obviate the need for such norms.³⁵ As Alford further observes, "[p]ublic, positive law was meant to buttress, rather than supersede, the more desirable means of guiding society and was to be resorted to only when these other means failed to elicit appropriate behavior."³⁶

Pierre Gourou marvels at the durability and effectiveness of the institutional framework within which the traditional peasantries of the Far East existed.³⁷ He remarks that, imbued with the Confucian moral principles, the social framework "compris[ed] the family, the clan, the village and the state."³⁸ He further notes that "[a] texture of local institutions (that might be regarded as the 'weft') and a hierarchy of political institutions belonging to the state (that could be looked on as the 'warp') created a vast and durable woven framework that made [Chinese] civilization particularly effective, in controlling vast numbers of people spread over vast territories, for thousands of years."³⁹ Contrary to a perhaps more popular view that traditional Chinese society was ruled by an autocratic government with absolute authority, he believes, "the peasants found in the traditional Chinese set-up some degree of protection against despotism; [b]ecause the institutions were more powerful than individuals, and the political framework depended on institutions rather than on the whims of a king[.]" To prove his view, he points out that "serf-dom was abolished in China long before it disappeared from Europe."⁴⁰

B. Property Rights and Land Use Law in Modern China

1. Pre-1949

The 1911 Xinhai Revolution overthrew the imperial Qing and founded the Republic of China (the "ROC"). Although, ideologically, the ROC was founded upon Dr. Sun Yat-sen's "Three Principles of the People," in reality, the central government was unable to implement land reform or

³⁴ PITMAN B. POTTER, *THE CHINESE LEGAL SYSTEM: GLOBALIZATION AND LOCAL LEGAL CULTURE* 8-9 (2001).

³⁵ WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* 944 (1995).

³⁶ *Id.* at 10.

³⁷ PIERRE GOUROU, *MAN AND LAND IN THE FAR EAST* 145 (1975).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

wealth redistribution. Endless political and military turmoil between the government, the warlords, the ruling Kuomintang (KMT) and the CCP marked the early years of the ROC rule. China remained largely agrarian, with most land in the countryside owned by landlords. Under the civil law concept of *yong dian quan* (永佃权), the right to the surface of the land belonged to the peasants while the basic ownership of the land, called *tian di quan* (田地权), rights to the subsurface of the land, belonged to the landlord.⁴¹ Under this system, the peasants actually enjoyed inheritable rights to continue in possession so long as they paid their rent to the landlord.⁴² In the countryside, most land was owned by landlords who leased land to the peasants in exchange for rent, often in the form of crops or other products rather than in cash.⁴³ Land in the urban areas were categorized as (1) leased land to foreign countries or individuals under the so-called "unfair treaties," (2) public land owned by government agencies, (3) land privately owned by various commercial entities including domestic real estate companies, (4) land owned by other social entities, such as religious societies, and (5) privately owned residential urban homestead land.⁴⁴

Despite disagreements among top authorities within the CCP, from very early on, Mao Zedong realized the key to the CCP's success lay in the peasantry.⁴⁵ In 1921, to appease peasants and to maximize incentives for the peasants, the CCP experimented with various land policies in areas it controlled. Under the Land Law of the China Soviet Republic, adopted in 1931, all land was confiscated by the government except that owned by poor peasants.⁴⁶ In 1942, the Decisions on Land Policies were adopted, which provided for private land ownership, presumably used to motivate productivity by the peasants. Also, related legislative rules confirming private ownership were issued, as were land ownership certificates.⁴⁷ Following victory in the Second Sino-Japanese War in 1945, the policy of

⁴¹ PRINCIPLES OF CIVIL LAW 351 (Zhang Jun Hao ed., 1991).

⁴² *Id.*

⁴³ RANDOLPH & LOU, *supra* note 15, at 8.

⁴⁴ *Id.* at 7-8.

⁴⁵ Mao Tse-tung, *Report on an Investigation on Peasant Movement in Hunan*, in SELECTED WORKS OF MAO TSE-TUNG 23 (1967). In March 1927, after conducting investigations in five counties in Hunan Province, Mao Zedong wrote an article entitled "The Importance of the Peasant Problem" where he urged that, "[a]ll talk directed against the peasant movement must be speedily set right. All the wrong measures taken . . . concerning the peasant movement must be speedily changed. Only thus can the future of the revolution be benefited. For the present upsurge of the peasant movement is a colossal event. In a very short time, in China's central, southern and northern provinces, several hundred million peasants will rise like a mighty storm, like a hurricane, a force so swift and violent that no power, however great, will be able to hold it back. . . Every revolutionary party and every revolutionary comrade will be put to the test, to be accepted or rejected as they decide." *Id.*

⁴⁶ RANDOLPH & LOU, *supra* note 15, at 6.

⁴⁷ *Id.* at 7.

confiscating private land from landlords and redistributing the land to peasants was resumed by the CCP. In the Shan-gan-ning liberated area, the CCP negotiated to buy land from landlords for redistribution purposes and paid the landlords with bonds.⁴⁸ By reallocating the surplus previously captured by the landlord class to peasants, the land reform created "a population of independent cultivators with roughly equal small holdings."⁴⁹

2. From 1949 to the 1978 Reform

Once the People's Republic of China (PRC) was founded, a sweeping socialist transformation in China began in earnest until it was abruptly halted by the Cultural Revolution (1966-1976). In the early 1950s, the CCP aimed to establish the so-called Socialist Public Land Ownership System by nationalizing the urban real property ownership and simultaneously collectivizing rural land ownership. The PRC's first constitution, adopted in 1954, embodied the fundamental principles of this land ownership and redistribution system.⁵⁰

In rural areas across China, the CCP expanded the scope of its very successful land reform policies based on its experience of the two preceding decades.⁵¹ The rural population was then categorized into various classes, and the landlord class was identified as the enemy of the people and the revolution.⁵² The CCP continued its policy of confiscating landlords' holdings and distributing them to the peasants through more widespread and at times ruthless class struggle.⁵³ As confirmed by the Revised Draft of the Operational Regulations on Rural People's Communes, promulgated in 1962, private ownership was completely eliminated after the establishment of the cooperatives, even though peasants continued to own their residential houses.⁵⁴ At first, the

⁴⁸ TEXTBOOK OF CHINA'S LEGAL HISTORY, *supra* note 22, at 416.

⁴⁹ MARK SELDEN, THE POLITICAL ECONOMY OF CHINESE DEVELOPMENT 69 (M.E. Sharpe, Inc. 1993).

⁵⁰ Art. 4 of the 1954 Constitution declares that the PRC is set out to gradually eliminate the system of exploitation and build a socialist society through socialist industrialization and reformation. XIANFA art. 4 (1954) (China). The 1954 Constitution generally provides that the state shall protect the ownership rights of peasants of rural land and allow a mixture of ownerships over urban real properties. *Id.* The 1954 Constitution does not specifically provide for ownership in land. Art. 8 provides that "[t]he state protects the right of peasants to own land and other means of production according to law." XIANFA art. 8 (1954) (China). It also provides that "[t]he policy of the state toward rich peasant economy is to restrict and gradually eliminate it." *Id.*

⁵¹ SELDEN, *supra* note 49, at 57.

⁵² Benjamin James, *Expanding the Gap: How the Rural Property System Exacerbates China's Urban-Rural Gap*, 20 COLUM. J. ASIAN L. 459 (2007).

⁵³ Many landlords were publicly attacked, punished and even executed during the struggle and their surviving families were condemned as having "bad class" status. *See id.* at n.23.

⁵⁴ *See* RANDOLPH & LOU, *supra* note 15, at 16.

collectivization of the land was greeted by the peasants with resistance as they were used to working on their small lots. Encouraged by the increased productivity, the CCP created lower-level agricultural producers' cooperatives, with each cooperative consisting of approximately thirty-five households whose members pooled land and farming tools.⁵⁵ In 1956, higher level cooperatives were created which averaged about 160 households per unit, and peasants were asked to give up their title to land as well as to other means of production.⁵⁶ As of the end of 1956, the percentage of higher-level cooperatives reached ninety percent.⁵⁷ By 1958, the CCP's ideological fervor to leap over the capitalism stage as predicted by Marx pushed rural collectivization to an extreme through the Great Leap Forward.⁵⁸ As many as five thousand households were organized into one giant commune in which all were required to contribute according to the best of his or her ability and receive food and other necessities of life in exchange.⁵⁹ The resulting famine caused by the CCP's disastrous mismanagement led to the death of over thirty million people from 1959 to 1961.⁶⁰ Blame for the failure divided the CCP's top leadership and criticisms against Mao Zedong propelled him to launch the Cultural Revolution in early 1966.

Upon occupying urban areas in 1949, the CCP moved to transform the urban real property ownership through confiscation, conversion and compulsory acquisition. Since all available resources were needed to reconstruct and govern the urban economy, care was given to allow a mixed ownership.⁶¹ The CCP's policy at that time was to abolish the system of exploitation.⁶² Consequently, urban real estate holdings owned by the so-called "bureaucratic capitalists, war criminals, traitors, and counter-revolutionaries" were confiscated in accordance with the "Instructions on Confiscating the Property of War Criminals, Traitors, Bureaucratic Capitalists and Counter-revolutionaries" and the "Provisions on Confiscating the Property of Counter-revolutionary Criminals" that were

⁵⁵ James, *supra* note 52, at 458.

⁵⁶ *Id.*

⁵⁷ *Id.* See also SELDEN, *supra* note 49, at 58.

⁵⁸ James, *supra* note 52, at 459.

⁵⁹ *Id.* at 459-60.

⁶⁰ *Id.* at 460.

⁶¹ Art. 5 of the 1954 Constitution permits four types of ownerships of the means of production: State ownership; collective ownership; individual proprietary ownership; and capitalist ownership. XIANFA art. 5 (1954) (China). Art. 11 provides for the protection of citizens' ownership rights in personal and real property, including housing. XIANFA art. 11 (1954) (China). Art. 12 allows the right to devise their private assets. XIANFA art. 12 (1954) (China). For a general discussion on the urban real property land reform, see William D. Soileau, *Past is Present: Urban Real Property Rights and Housing Reform in the People's Republic of China*, 3 PAC. RIM L. & POL'Y J. 299 (1995).

⁶² See RANDOLPH & LOU, *supra* note 15, at 14.

promulgated in January 1951.⁶³ A more gradual and gentler system was utilized to convert the real estate owned by the urban national bourgeoisie or urban capitalist companies. The system enabled compulsory government acquisition of the shares of former capitalist owners in their businesses, including real estate interests through a policy known as "State-Private Joint Management of Private Businesses."⁶⁴ The confiscated or converted property interests were allocated to state-operated enterprises, government agencies, public societies and urban laborers.⁶⁵ In 1956, the CCP issued the "Opinions on the Current Situation of Urban Private-owned Buildings and Their Socialist Transformation," which helped achieve nationalization of all real property owned by private real estate agents or urban real estate proprietors.⁶⁶ In 1964, two reports were promulgated by the State Council to confirm the socialist transformation of the privately-owned real property in cities and towns.⁶⁷ Private ownership of urban residential properties of urban citizens remained until 1982, when the second Constitution was adopted, which pronounced state ownership of all "urban land."⁶⁸

The early land reform efforts by the CCP were short-lived. As the nation swirled into the turmoil of the Cultural Revolution, many privately-owned houses in the cities were illegally confiscated or seized and state or collectively owned houses were forcefully occupied or illegally destroyed.⁶⁹ In the meantime, more than seventeen million urban youth, approximately one tenth of the urban population at the time, were sent down to the countryside and became members of the communes.⁷⁰ Collectivization was sustained throughout the rural areas during the Cultural Revolution, with the exception of the sporadic revival of private

⁶³ See Report: Institution of Finance and Trade Economics, Chinese Academy of Social Sciences, and Institute of Public Administration, New York, U.S.A.: "Urban Land Use and Management in China", 290.

⁶⁴ See RANDOLPH & LOU, *supra* note 15, at 9. The authors note, even though the state ought to pay an annual return to the former owners under this system, the payment system was rendered defunct as the owners "voluntarily surrendered" their claims for such payments. *Id.*

⁶⁵ *Id.* at 15.

⁶⁶ *Id.* The authors point out that the socialist transformation of this type of real estate was through the "State Trusteeship," under which the state was to operate the privately-owned real property and pay 20% to 40% of the rent it received to the former owners for a period of time, usually 15 - 20 years, and upon the expiration of such period, the state was to become the owners of such property. In reality, however, the payment period was severely shortened and, in any event, ended in 1967 when the Cultural Revolution commenced. *Id.*

⁶⁷ See Report on Enhancing the Administration for Buildings Belonging to the Whole People and Report Concerning the Socialist Transformation of Leased Private-owned Land.

⁶⁸ XIANFA art. 10 (1982) (China).

⁶⁹ RIGHTS AND INTERESTS OVER REAL PROPERTY AND REAL PROPERTY DISPUTES (房地产权益与纠纷) 73 (Intellectual Press 1991).

⁷⁰ Videotape: Up to the Mountain, Down to the Village (Small Handful Production 2005) (on file with Fung Library, Fairbank Center for Chinese Studies, Harvard University).

lots following the famine of the early 1960s and the subsequent abolishment of such revival in many regions.⁷¹

3. The Era of Deng's Economic Reform

Soon after the ending of the Cultural Revolution in 1976, Deng Xiaoping became the *de facto* paramount leader of China. A set of reform policies ensued in 1978. In China's vast rural areas, encouraged by the successful outcomes of regional experiments, the CCP reinstated the Household Responsibility System (HRS).⁷² The HRS proved the "ultimate solution in reconciling the Chinese state's ideological premises – state and collective ownership of the means of production – with the bare necessity of having to revive the agricultural sector dampened by years of collectivism."⁷³ Under the HRS, individual households, the most basic social unit throughout traditional Chinese society and in rural China to date, could enter into contracts with the collective to obtain the right to farm certain amount of land, in exchange for a certain portion of the produce.⁷⁴ The term of the contract was initially for three years and was extended to fifteen years in 1984 to induce more investment from peasant households into the land.⁷⁵ During the term of the contract, the right to the land was made inheritable.⁷⁶ The success of the HRS lay in its aim to stimulate peasants' incentives, the lack thereof having been the chief vice of collectivization. As Peter Ho points out, even though decentralization under the HRS led to an extreme fragmentation of land resources and its management, the introduction of the HRS certainly increased agricultural productivity in China, at least initially.⁷⁷ The increased rural productivity

⁷¹ SELDEN, *supra* note 49, at 239 n.2.

⁷² Some privatization activists believe that the nationwide adoption of this policy was a direct result of an event known as the "spontaneous land reform" secretly carried out by a small group of peasants in December 1978 in Xiaogang village in Anhui Province. See Jamil Anderlini, *Losing the countryside: a restive peasantry calls on Beijing for land rights*, FIN. T., February 19, 2008.

⁷³ Peter Ho, *Introduction: The Chicken of Institutions or the Egg of Reforms*, DEVELOPMENTAL DILEMMAS: LAND REFORM AND INSTITUTIONAL CHANGE IN CHINA 1, 9 (Peter Ho ed., 2005).

⁷⁴ NORMAN STOCKMAN, UNDERSTANDING CHINESE SOCIETY 137 (Polity Press 2000).

⁷⁵ James, *supra* note 52, at 461.

⁷⁶ *Id.*

⁷⁷ Ho, *supra* note 73, at 11. According to Ho, after a few years of the implementation of the HRS, collective land was contracted to over 160 million households with an average of around 0.5 ha per family. Furthermore, a survey in the early 1980s indicates that, the family land was frequently scattered over as many as 11 to 15 small plots of widely varying quality in terms of fertility, topography and texture. See *id.* From 1979 to 1984, the gross value of agricultural output increased at an annual rate of 7.6 percent and grain production rose by 4.9 percent annually. See Scott Rozelle, Loren Brandt, Li Guo & Jikun Huang, *Land Tenure*

also fostered the emergence of the so-called town and village enterprises ("TVEs") which had become the backbone of China's economic miracle during the reform era. By the early 1990s, the number of the TVEs exceeded one million across rural China, accounting for nearly one-fourth of the nation's industrial employment.⁷⁸

Ideologically, the CCP was steadfast in maintaining the state and collective land ownership. In 1982, a new constitution was enacted to reaffirm this principle. Article 6 of the 1982 Constitution provides that: "The basis of the socialist economic system of the People's Republic of China is socialist public ownership of the means of production, namely, ownership by the whole people and collective ownership by the working people." Article 10 clarifies that: "Land in the rural and suburban areas is owned by collectives except for those portions which belong to the state in accordance with the law; house sites and private plots of cropland and hilly land are also owned by collectives. The state may in the public interest take over land for its use in accordance with the law. No organization or individual may appropriate, buy, sell or lease land, or unlawfully transfer land in other ways. All organizations and individuals who use land must make rational use of the land." Similarly, the National People's Congress ("NPC") issued China's first Land Administration Law (土地管理法) in 1984, which became effective in 1987.⁷⁹ The law proclaimed that "collective land is collectively owned by the peasants of the village and is managed and administered either by rural collective economic organization such as the village agricultural producers' collectives (村农业生产合作社) or by villagers' committee (村民委员会)."⁸⁰

While emphasizing the collective notion of the rural land ownership, the CCP was also mindful of maintaining the individual incentives created by the HRS and the increasing insecurity felt by the rural households as the fifteen year contract term stipulated in 1984 was soon to expire. As Scott Rozelle, et al., point out, the sagging productivity experienced by the farm economy from 1985 to 1994 was due to the weaknesses in the institutional arrangements, which had called for either land privatization or for extending land contracts to thirty years or more.⁸¹ In 1997, the Secretariat of the CCP and the State Council issued a directive

in China: Facts, Fictions and Issues, DEVELOPMENTAL DILEMMAS: LAND REFORM AND INSTITUTIONAL CHANGE IN CHINA 107, 122 (Peter Ho ed., 2005).

⁷⁸ James, *supra* note 52, at 462.

⁷⁹ SELDEN, *supra* note 49, at 189.

⁸⁰ Tudi Guanli Fa (土地管理法) [Land Administration Law] (promulgated by the Standing Comm. Nat'l People's Cong., Jun. 25, 1986, effective Jan. 1, 1987) (China).

⁸¹ Rozelle et al., *supra* note 77, at 122. The authors observed, from 1985 to 1994, the productivity experienced a deceleration and the grain output during that period rose only 0.9 percent per year. *Id.*

that prescribed a stable lease period free from allocations for thirty years.⁸² This principle was embodied in the Revised Land Administration Law of 1998.⁸³ In Rural China, the HRS has proven successful, as it effectively motivated rural productivity without causing misuse of land resources, while rallying widespread social support from the rural populace.⁸⁴

The Law on Rural Land Contracting was adopted in 2002 to clarify the operational system and the technical details of rural land contracting. It states that the "two-tier management system" combines "centralized and decentralized management on the basis of household contractual management."⁸⁵ It also stipulates the rights and obligations of the parties under the contract.⁸⁶ While offering protection to the long-term stability of the relationships of the contracting of rural land,⁸⁷ the law also made it clear that the nature of the contract is a lease, not a sale or purchase, and that ownership of the land belongs to the collective.⁸⁸ The law made it easier for farmers to transfer their contract rights as long as the land use remained for agricultural purposes.

In addition to the so-called "responsibility land" (责任田), there are four other major types of land tenures existing in China's rural areas: ration land (口粮田), contract land (承包田), private plots (自留地) and reclaimed land (开荒田).⁸⁹ Responsibility land describes land allocated to farm households on the basis of the number of family members, the number of laborers in each family, or desire and/or ability of the household to engage in agricultural production. In exchange for use rights, farmers must deliver a mandatory quota to the state as a price below-market.⁹⁰ Ration land is land allocated to farm households typically on the basis of household size for the purpose of ensuring that each household is self-sufficient in producing grain, the use of which does not typically incur fees or other obligations.⁹¹ Private plots are parcels of land acquired by the rural household during the period of collective agriculture and retained with the implementation of HRS. Today this is mainly the land in courtyards, and not the private plot under collective times, since in many villages private

⁸² Ho, *supra* note 73, at 12–13.

⁸³ Revised Land Administration Law § 14, as amended (China). Since becoming effective on January 1, 1987, this law has been amended three times, in 1988, 1998 and 2004.

⁸⁴ Ho, *supra* note 73, at 14.

⁸⁵ Nongcun Tudi Chengbao Fa (农村土地承包法) [Law on Rural Land Contracting] (promulgated by the Standing Comm. Nat'l People's Congr., Aug. 29, 2002, effective Mar. 1, 2003) 5 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 347, ch. 2 (2002) (China), art. 1.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* arts. 3 & 4.

⁸⁹ Rozelle et al., *supra* note 77, at 123–24.

⁹⁰ *Id.* at 124.

⁹¹ *Id.*

plots are now collectively cultivated. Households enjoy almost complete control over short- and long-term management of such plots with the exception of the right of title transfer.⁹² Contract land is land contracted out to households by the villages for a fixed fee. Village leaders may set fees on these plots *ex ante* or farmers may have to bid on the land at a community auction.⁹³ Lastly, reclaimed land is land to which farmers acquire use rights through efforts to reclaim previously uncultivated land. For such land, there are not usually obligatory deliveries or fees tied to the use of the land.⁹⁴ Although tenure types are not uniform throughout China's villages, a 1992 survey by the State Statistical Bureau demonstrates that responsibility land covered 84.5 percent of cultivated land, ration land made up only 8.4 percent and, nationwide, farmers only cultivated 6.2 percent of their land as private plots.⁹⁵

As reiterated in the 1982 Constitution, "[l]and in the cities is owned by the state."⁹⁶ As a result, the Chinese government has not only consistently prohibited sale of state owned land, but has also been extremely cautious about avoiding the use of terms such as "sale" or "lease".⁹⁷ The Land Administration Law stipulates that "the State exercises, according to the law, a system of valued use of state-owned land."⁹⁸ As the owner of all state land, the government keeps strict control over land transaction through a two-tier urban land market system: On the first-level market (一级市场) the state assigns the use rights of urban state-owned land to buyers for a fixed period varying from forty to sixty years through auction, tender or negotiation; on the second-level market (二级市场) land users can transfer (转让) or contract (承包) the use rights obtained on the first-level market to other users in return for payment.⁹⁹ The period for the transfer cannot exceed the original term stipulated by the first-level market.¹⁰⁰

In 1986, the NPC adopted the General Principles of Civil Law to reinforce China's civil law tradition and the principles set forth in the Constitution.¹⁰¹ The G.P.C.L. defines "property ownership" as "the owner's

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ XIANFA art. 10 (1982) (China).

⁹⁷ Ho, *supra* note 73, at 15.

⁹⁸ Tudi Guanli Fa (土地管理法) [Land Administration Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 29, 1998, effective Jan. 1, 1999) 4 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 341, art. 2 (1998) (China).

⁹⁹ Ho, *supra* note 73, at 16.

¹⁰⁰ *Id.* at 17.

¹⁰¹ Minfa Tongze (民法通则) [General Principles of the Civil Law] (promulgated by the Standing Comm. Nat'l People's Congr., Apr. 12, 1986, effective Jan. 1, 1987) (China) [hereinafter G.P.C.L.].

rights to lawfully possess, utilize, profit from and dispose of his property"¹⁰² and prescribes that, unless otherwise stipulated by law or agreed by the parties, "the ownership of property obtained by contract or by other lawful means shall be transferred simultaneously with the property itself."¹⁰³ It further states that "state property shall be owned by the whole people"¹⁰⁴ and that "property of collective organizations of the working masses shall be owned by the working masses."¹⁰⁵ As Donald Clarke notes, the G.P.C.L. provided the basic principles for the operation of a market economy by "presuppos[ing] a universe of individual actors making decisions based upon free will - the antithesis of the universe of the planned economy[,]" but it fell short in providing for detailed rules.¹⁰⁶

The 1982 Constitution was amended in 1988 to incorporate the "transferable granted land use right,"¹⁰⁷ which was essentially a codification of what was taking place in practice. Shenzhen began this practice by selling transferable land use rights on state owned land in 1987 and was soon followed by other major cities, such as Fuzhou, Guangzhou, Xiamen and Shanghai.¹⁰⁸ Local legislation was adopted to allow sale of the granted land use rights.¹⁰⁹ After the constitutional amendment in 1988 to validate this practice, corresponding language was added to the Land Administration Law amended in the same year, together with interim provisions addressing the creation and transfer of granted land use rights on urban land.¹¹⁰ These legislative actions heralded the coming of a booming urban real estate market in China. Newly granted land use rights were created for office buildings, luxury hotels and shopping centers, even though much of the development occurred without significant mortgage financing.¹¹¹ In 1992, the NPC adopted "Decisions on Establishing the Socialist Market Economy System," further signaling the CCP's ideological green light to develop the market economy.¹¹² With the CCP's assurance, governments at various levels competed amongst themselves in establishing the areas in which the acquisition of transferable granted land

¹⁰² *Id.* art. 71.

¹⁰³ *Id.* art. 72.

¹⁰⁴ *Id.* art. 73.

¹⁰⁵ *Id.* art. 74.

¹⁰⁶ Donald C. Clarke, *Legislating for a Market Economy in China*, 191 CHINA Q. 570 (2007).

¹⁰⁷ XIANFA art. 10 (1988) (China).

¹⁰⁸ See RANDOLPH & LOU, *supra* note 15, at 580 n.87.

¹⁰⁹ *Id.*

¹¹⁰ 1990 Interim Provisions for the Granting and Transfer of Land Use Rights on State Owned Urban Land in Cities and Towns; Provisional Regulations Governing Development and Operation of Tracts of Land with Foreign Investment (May 19, 1990). See RANDOLPH & LOU, *supra* note 15, at 580 n.58.

¹¹¹ *Id.*

¹¹² *Id.* at 526.

use rights for development purposes were encouraged.¹¹³ To cool the overheated real estate market, the 1994 Urban Real Estate Administration Law imposed clear and strict requirements for planning prior to release of land for development and a much tighter control of public giveaways of land use rights by regulating the system for pricing those rights.¹¹⁴ To exert tighter control over land use management and halt land speculation, the State Council General Office issued a circular in 1999 which imposed ceilings on permissible construction in cities, villages and townships.¹¹⁵

China's urban housing system has also undergone a significant transformation. Most city dwellers were employed by various state owned enterprises (SOEs) or government agencies and thus, as social welfare benefits, were provided with dorm-like apartment units by their work units or the government, for virtually no rent.¹¹⁶ As of 1983, public housing constituted 88.44 percent of total urban housing at the time.¹¹⁷ As a result, there was virtually no incentive among the city populace to invest in housing and few granted land use rights for housing were issued.¹¹⁸ Along with the emergence of the private sector and the dwindling of the SOEs in cities,¹¹⁹ China embarked on a reform to end the city housing welfare system.¹²⁰ Under the reform system, working units no longer distributed public housing to their employees. Instead, public housing that was previously distributed were sold or rented to existing residents with increased rents in the latter situation, and newly built houses were sold to city dwellers.¹²¹ State employees were allowed to buy their own homes with the aid of subsidies (the amount of which was determined by their seniority), public housing reserve funds, bank loans, and their own savings.¹²² In 1995, the Security Law was passed which allowed real estate improvements to be used as mortgage collateral.¹²³ In 1999, the Ministry of Construction issued the "Interim Measures Governing the Resale of

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Circular of the General Office of the State Council on Strengthening Management of Transfer of Land Use Rights and Strictly Banning Speculative Land Dealing, issued on May 6, 1999. See RANDOLPH & LOU, *supra* note 15, at 540.

¹¹⁶ See *id.* at 549.

¹¹⁷ Soileau, *supra* note 61, n.156.

¹¹⁸ The ratio of allocated land use rights to granted land use rights by 1991 was 99:1. See RANDOLPH & LOU, *supra* note 15, at 533.

¹¹⁹ Joseph Stiglitz observes that, China did not rapidly privatize its state enterprises. Rather, as new enterprises were created, the state ones dwindled in importance, down to merely 28.2 percent of industrial production twenty years into the reform. See STIGLITZ, *supra* note 7, at 184-85.

¹²⁰ RANDOLPH & LOU, *supra* note 15, at 533.

¹²¹ *Id.*

¹²² *Id.*

¹²³ Danbao Fa [Security Law] (promulgated by the Standing Comm. Nat'l People's Cong., June 30, 1995, effective Oct. 1, 1995) art. 34, § 1 (China).

Housing Purchased from Working Units and the Resale of Economic, Appropriate Housing," which authorized the resale of housing purchased from work units and of other housing purchased at subsidized prices.¹²⁴ Notably, the absence of a healthy home mortgage financing system served as a significant impediment for a speedy growth of China's housing market. Such notwithstanding, by April 2000, the government reported that more than half of all urban residents own their own home and 75 percent of these had acquired their home in the preceding five years.¹²⁵ As of early 2007, 70 to 80 percent of housing is privately owned in Shanghai and other coastal cities.¹²⁶

In December 2001, more than fifteen years after China had begun the process to resume its status as a GATT contracting party, China joined the World Trade Organization (WTO). Although China's commitment to conform its laws and regulations to WTO standards and to improve its legal system did not directly entail amendments of existing laws and regulations relating to land use and real property rights, the principles of transparency and uniformity applied.¹²⁷ In 2004, the Constitution was further amended to encourage and provide protection for private property rights,¹²⁸ paving the way for the passing of the Property Law.

4. The Property Law of 2007

a. *The Legislative Process*

On October 1, 2007, the much-awaited Property Law became effective after a painstaking drafting process. The law was first drafted in 1993 and first reviewed by the Standing Committee of the NPC ("NPCSC") almost ten years later in 2002.¹²⁹ In an unusual move, the NPC made the draft, considered by many as the "most contentious bill" in PRC's legal

¹²⁴ RANDOLPH & LOU, *supra* note 15, at 533.

¹²⁵ *Id.*

¹²⁶ Dennis M. Horn & Kai Yang, *Riding the Chinese Juggernaut*, 21-OCT PROB. & PROP. 9 (2007).

¹²⁷ For a discussion of China's commitment to the WTO and its implication on construction of rule of law in China, see Cao Jianming, *WTO and The Rule of Law in China*, 16 TEMP. INT'L & COMP. L.J. 379 (2002).

¹²⁸ Article 10 of the Constitution was modified to require compensation in the event that the state, "for the public interest, expropriate or take over land for public use." XIANFA art. 10 (1982) (China). Article 13 was modified to include a statement that "[t]he lawful private property of citizens may not be encroached upon" and, more specifically, "[t]he state protects by law the right of citizens to own private property and the right to inherit private property." XIANFA art. 13 (1982) (China).

¹²⁹ See WUQUANFA LIFA BEIJING YU GUANDIAN QUANJI (物权法立法背景与观点全集) [PROPERTY LAW COMPLETE LEGISLATIVE BACKGROUND AND VIEWS] 4-5 (Law Press 2007).

history,¹³⁰ available to the general public and solicited public comments in July 2005.¹³¹ During a forty-five day public consultation or "citizen legislation," the comments collected from the general public were more than ten thousand and there were more than one hundred seminars and discussion meetings conducted in order to gather comments from the general public, legal scholars and government agencies.¹³² The draft was greeted with heated debates among scholars, party officials and the general public, representing the ideological struggles within the country after three decades of economic reform. Supporters of the law believed it would protect people's private rights, stimulate their incentives to create wealth and enhance social stability.¹³³ Those who resisted centered their rhetoric on sensitive political and social issues such as worsening corruption, siphoning of state assets and the growing disparity between the rich and the poor.¹³⁴ The most vocal opposition came from left-leaning scholars who denounced the draft as "unconstitutional" and accused it as a deceitful "betrayal of socialist principles" in an attempt to "cater to the trend of capitalist globalization and absurd theories of neo-liberal economics."¹³⁵ Oppositions notwithstanding, the law was eventually passed in March 2007 with much compromise after seven drafts.¹³⁶

b. Major Features of the Law

The 247-article law intends to codify a more expansive notion of the property law, by consolidating and updating the pre-existing legal system of property rights established over the last two decades, which consists of the G.P.C.L., the Land Administration Law, the Urban Real

¹³⁰ Ting Shi, *Debate on ideology defined Property Law's formation: Drafter says political wrangling slowed down passing of land bill*, S. CHINA MORNING POST, May 21, 2007, at 6, available at 2007 WLNR 9495752.

¹³¹ *See id.*

¹³² *Id.*

¹³³ David Lague, *China, in big policy shift, is set to pass property law*, INT'L HERALD TRIB., Mar. 9, 2007, at 1, available at 2007 WLNR 4502342.

¹³⁴ Shi, *supra* note 130.

¹³⁵ *See, e.g.,* Gong Xiantian, *yibu weibei Xianfa de Wuquan Fa cao an: wei XianFa di 12 tiao he 86 nian Minfatongze di 73 tiao de feichu xie de gongkaixin* (巩献田, 一部违背宪法的《物权法<草案>》:为《宪法》第12条和86年《民法通则》第73条的废除写的公开信) [A Draft Property Law that Violates the Constitution: Open Letter Written Upon the Abolition of Art. 12 of the Constitution and Art. 73 of the 1986 General Principles of Civil Law], CHINA ELECTIONS AND GOVERNANCE, Aug. 12, 2005, <http://www.chinaelections.org/NewsInfo.asp?NewsID=45986> (last visited April 11, 2008).

¹³⁶ For a detailed account of its legislative process, *see* Su Yonglong, *Road to Legislating China's Property Law: Never So Tortuous, Never So Resolute*, SINOPOLIS.COM, Mar. 23, 2007, available at http://www.sinofile.net/saiweng/sip_blog.nsf/d6plinks/YZHI-6ZKAZI (last visited April 25, 2008); *see also* *Caught Between Right and Left, Town and Country*, ECONOMIST, Mar. 8, 2007.

Estate Administration Law, the Law on Rural Land Contracting, and the Security Law. While the Property Law covers both immovable and movable property, only the immovable (real) property aspect of the law will be addressed here.

Hailed as a "landmark private property measure,"¹³⁷ the Property Law covers three categories of property rights: Ownership (所有权) (Part Two), Usufructuary (用益物权) (Part Three) and Security (担保物权) (Part Four). Ownership means "the right to possess, use, seek profits from and dispose of the property."¹³⁸ For the first time in PRC's history, the principle of equal protection is extended to private property, in addition to property owned by the state and collectives.¹³⁹ In a legislative interpretation issued by the NPCSC, the emphasis was on the civil law nature of the Property Law and, therefore, the civil law principle that the rights of the right-holders shall be protected equally.¹⁴⁰ In addition to the three well-established ownership rights, i.e., state, collective and private ownership, Part Two of the Property Law deals with additional types of real property ownership rights. Chapter VI concerns owners' partitioned ownership of building areas, recognizing the growing importance of the ownership rights of urban dwellers who own apartment units for residential or business purposes. Such ownership includes ownership over the exclusive parts within the buildings, common ownership and the right of common management over the common parts other than the exclusive parts. Chapter VII relates to the relationship between adjacent property owners, which includes rights to water, drainage, passage, air, and light from the owner of an adjacent property. Chapter VIII regulates common ownership, which includes several co-ownership and joint ownership. Article 42 of the law provides that, "where houses and other real properties of entities and individuals are expropriated, compensation for demolition and resettlement shall be paid according to law in order to maintain the legal rights and interests of those whose properties were expropriated; where individual residences are expropriated, the residential conditions of those whose residences were expropriated shall be guaranteed."

¹³⁷ Lague, *supra* note 133.

¹³⁸ Wuquan Fa (物权法) [Property Law] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 16, 2007, effective Oct. 1, 2007) art. 39 (China) [hereinafter Property Law].

¹³⁹ Article 4, entitled "Equal Protection," provides that "the property right of the state, collective, individual or any other right holder shall be under the protection of law, and no entity or individual may infringe upon it." *Id.* art. 4 (China).

¹⁴⁰ Wang Zhaoguo, Deputy Chairman of NPCSC, *Guanyu Zhonghua Renmin Gongheguo Wuquan Fa (Caoan) de Shuoming (Jielu)* (关于《中华人民共和国物权法(草案)》的说明(节录)) [Clarifications Concerning the Draft Property Law of the PRC] (por.), March 8, 2007, in WU QUAN FA SHI YONG ZHI NAN (物权法适用指南) 46 (China Legal Publishing House 2007).

Expanding on and further refining a civil law concept that was first used in the G.P.C.L., Part III of the Property Law concerns usufructuary rights.¹⁴¹ A usufructuary right is defined as "the right to possess, use and seek proceeds from the real property [] owned by someone else in accordance with law."¹⁴² It allows individuals and other legal persons to use the land and other natural resources owned by the state and the collectives.¹⁴³ Usufructuary rights include right to the contracted management of land (土地承包经营权) (Chapter XI), construction land use right (建设用地使用权) (Chapter XII), right to use house sites (宅基地使用权) (Chapter XIII) and easement (地役权) (Chapter XIV). With regard to the right to contracted management of land, it reinforces the two tier management system "characterized by the combination of centralized operation with decentralized operation on the basis of household contracted management" in rural areas.¹⁴⁴ It provides that the term of a contract for cultivated land shall be 30 years and that the holder of such right may renew the term of the contract in accordance with relevant regulations upon the expiration of the original term.¹⁴⁵ More important, it allows the holder of such right to assign, exchange or transfer the right provided such transaction is not for non-agricultural use.¹⁴⁶ To further protect the holder's right, the law prohibits agricultural collectives from readjusting the contracted land or taking back the contracted land during the term of the contract, and requires corresponding compensation paid to the holder of such right in the event that a contracted land is expropriated.¹⁴⁷ The Property Law does not allow agricultural collectives to sell their land or to create granted land use rights. The intent is to reinforce the legal restrictions on the conversion of arable land to non-agricultural use. As to the right to use construction land, the law differentiates the right separately established on the surface of or above or under the land,¹⁴⁸ regulates the creation, transfer, use and mortgage of the right,¹⁴⁹ and allows automatic renewal of the right to use dwelling houses upon the expiration of its initial

¹⁴¹ This concept was first introduced in Articles 80 and 81 of the G.P.C.L. to address the right to use state- and collective-owned land, but without a systemic construction of this type of rights. See G.P.C.L., arts. 80 & 81 (China).

¹⁴² Property Law, *supra* note 138, art. 117.

¹⁴³ See *id.* ch. 10, General Provisions of Part III.

¹⁴⁴ *Id.* art. 124. Benjamin James notes one highly symbolic change made by the Property Law in the term it uses to identify contracting farmers. Unlike the Rural Contracting Law, where it calls the contracting farmers "the contracting-undertaking party" (承包方), the property law uses a more respectful phrase, "holder of the right to operate the contracted land" (土地承包经营权人). See James, *supra* note 52, at 474.

¹⁴⁵ Property Law, *supra* note 138, art. 126.

¹⁴⁶ *Id.* art. 128.

¹⁴⁷ *Id.* arts. 130–32.

¹⁴⁸ *Id.* art. 136.

¹⁴⁹ *Id.* arts. 137–48.

term, which is currently 70 years.¹⁵⁰ More specifically, it allows automatic extension of land use rights for residential construction.

The third category under the Property Law is property rights for security. Part IV of the law amends, supplements and updates the Security Law with respect to provisions on security interests, and includes the general principles and provisions on mortgage (抵押权), pledge (质权) and lien (留置权).¹⁵¹ It further improves the system of property rights for security, extends the scope of collaterals, and revises the rules for the realization of security rights. By amending relevant provisions of the Security Law, Part IV of the Property Law offers more protections to a mortgagee. Article 195 permits a mortgagee to request a court to auction or sell off the collateral if there is a disagreement between the mortgagee and the mortgagor with respect to the method of realization of the mortgage. As a result, the transaction cost for a mortgagee's realization of the mortgage will be foreseeably reduced.

The law adopts a uniform real property registration system in Chapter II. Article 9 requires registration for the creation, change, transfer or elimination of the right to real property to be effective.¹⁵² Registration is carried out by the registration organ of the place where the realty is located and the realty ownership certificate is the proof of the holder's ownership.¹⁵³ Article 20 allows advanced notice registration to protect the rights of a party under a purchase agreement on a real property by requiring consent of the holder in the advanced notice registration before the subject real property may be disposed of. Article 21 allows compensation for damages occurring as a result of fraudulent registration.

c. Assessment of the Law

Lauded as a milestone in China's legal development, the Property Law streamlined and consolidated the fragmented real property and land use law into a single comprehensive legal framework. By officially recognizing private ownership in certain real property interests and offering equal protection to such ownership, it signals the CCP's determination to push the nation forward on the path toward a market economy. By aiming to enhance the much needed clarity and stability of property rights in China, it gives confidence to the real property market, which will continue to generate real estate developments in urban and suburban areas. Its true genius, however, lies in its ability to achieve these goals without

¹⁵⁰ *Id.* art. 149. The Property Law does not itself stipulate specific duration periods for these rights but leaves that to regulations.

¹⁵¹ *Id.* chs. 16–18.

¹⁵² *Id.* arts. 6 & 9.

¹⁵³ *Id.* arts. 10 & 17.

fundamentally challenging the socialist regime. Consistent with the CCP's ideological rhetoric, the "private ownership" recognized under the Property Law differs from the "fee simple" concept in the common law tradition as it does not connote absolute private land ownership. Rather, it is a type of nonexclusive ownership with less pervasive qualifications, i.e., usufruct. This gradual innovation allows private actors to use the land under certain conditions and for certain purposes while maintaining the constitutional mandate that land belongs to the state or collectives.¹⁵⁴ The system before the new law was fragmented, ambiguous, inconsistent and lacking uniformity, especially in the areas of ownership rights, land use rights, mortgage regulations, and the title registration process. The new law aims to correct those shortcomings by offering stronger protection of ownership rights, allowing renewal of land use rights, broadening the parameters of mortgage regulations, and adopting a uniformed registration process.

However, since it is a product of political compromise, the Property Law is far from perfect. Lengthy paragraphs affirming the supremacy of the "socialist system" and "state ownership" were added in the law, as a concession to the leftist critics who opposed private ownership.¹⁵⁵ From the standpoint of defining land tenure, the law fails to specify, among the three levels of a rural collective, the title holder of rural land, which will not hamper the rampant problem of land expropriation in rural areas.¹⁵⁶ The law does not limit the government's powers to appropriate land,¹⁵⁷ nor does it address historical land claims that predate the land reform of the early 1950s.¹⁵⁸ On an operational level, like most other legislation in China, the law leaves the details of implementation to future laws or regulations, which will likely cause serious enforcement problems. Setting aside the disturbing reality that local governments often deviate from enforcing standardized laws and regulations issued by the central government and even assuming the provisions of the law will be faithfully followed, the ambiguity of the law will result in differing interpretations and applications. This will in turn intensify the lack of uniformity in its application across the country. Another major problem relates to the renewal of land use rights. Even though the law allows automatic renewal of the right to use construction land for residential purposes, it does not stipulate a specific period for the right but leaves it to

¹⁵⁴ XIANFA arts. 6 & 10 (1982) (China).

¹⁵⁵ Shi, *supra* note 130.

¹⁵⁶ A provision reinstating the lowest collective level as the basic owner of the rural land was deleted from the final version of the Property Law. See a discussion of a draft version of art. 135 in PETER HO, INSTITUTIONS IN TRANSITION: LAND OWNERSHIP, PROPERTY RIGHTS, AND SOCIAL CONFLICT IN CHINA 195 (Oxford University Press 2005).

¹⁵⁷ Shi, *supra* note 130.

¹⁵⁸ HO, *supra* note 156, at 196.

regulation by other appropriate governmental agencies.¹⁵⁹ Further, it is unclear how the renewal process will be carried out, whether it will be subject to any conditions or whether a fee will be charged. There is speculation that local and regional governments will have the power to exact additional payments at the time of renewal applications.¹⁶⁰ The law allows the renewal of the use rights of nonresidential properties but details of the renewal are left to other legislation.¹⁶¹

The same uncertainty applies to the provision permitting the automatic renewal of the right to use contracted management land in the rural areas. Under the new law, farmers still cannot sell or mortgage their plots, which will continue to prevent them from enjoying the fruits of the market economy.¹⁶² For these reasons, many do not believe the Property Law will likely bring about radical change in the way real estate transactions are handled in China, even though the effectiveness of the law remains to be seen.

Despite the above-mentioned ideological, jurisprudential and technical constraints, China's real property law regime, as codified by the Property Law, will have long-term, broad ramifications for Chinese society. Is this mosaic-like system of land ownership and use rights capable of ensuring the certainty and predictability essential to real estate transfer and development? Are the institutional arrangements of property rights under this system perceived credible by economic players in China? Will the sense of ownership enjoyed by a burgeoning urban middle class awaken an enhanced feeling of individual autonomy? Or will it be an adhesive unifying the beneficiaries of economic reform and the current political regime, thereby perpetuating the unequal distribution of social wealth? Is the law capable of protecting farmers in the impoverished countryside, who have long been left behind by the economic reform, from losing their farmland to corrupt local officials seeking lucrative land sales? Will the central government eventually be pressured to allow full private ownership rights over the land? These issues will be discussed and analyzed in Parts III and IV below.

¹⁵⁹ Patrick A. Randolph, Jr., *The New Chinese Property Law*, 21-OCT PROB. & PROP. 16 (2007).

¹⁶⁰ *Id.* at 17.

¹⁶¹ Property Law, *supra* note 138, art. 149.

¹⁶² *Id.*

III. CAPITALISM WITH CHINESE CHARACTERISTICS: THE INTERPLAY BETWEEN ECONOMIC PERFORMANCE AND INSTITUTION OF PROPERTY RIGHTS

Observers of China's economic reform and legal reform have been quick to point out China's significant departure from the path delineated by the neo-liberal theorists of the law and development school, as exemplified by those advocated by the Washington Consensus. The theoretical framework for the Washington Consensus mainly consists of the new institutional economics ("NIE") influenced by, on the one hand, Ronald Coase's "transaction cost economics" and Douglass North's designation of law as an "institution," and on the other the "public choice economics" which harbors a fundamental distrust of state interference into economic affairs.¹⁶³ The neo-liberal rule of law proposed by the Washington Consensus was a response to the needs for systemic reform presented by the transitional socialist legal systems in the 1990s. The Washington Consensus views clear and enforceable private property rights as the precondition for stable economic development and well-functioning markets. The Washington Consensus also recognizes that the need for credibility and commitment within a market economy leads to the formation of independent legal institutions.¹⁶⁴

As evidenced by the policies and legal reforms undertaken through the reform era set forth in Part II, China's "gradualist approach" differs in two aspects from the so-called "big bang" method of privatization followed by the former Soviet Union and most former socialist states in Eastern Europe. First, in an attempt to move from a centrally planned economy to a market economy, China did not engage in an outright privatization of its real property rights. Second, China's substantial change in economic institutions was not accompanied by a simultaneous political transformation.¹⁶⁵ The impressive economic growth that China has enjoyed since the late 1970s seems to defy the need for privatization of land ownership. Under the banner of a "Socialist market economy with Chinese characteristics," China seems to have pioneered an alternative model of

¹⁶³ See R.H. Coase, *The Nature of the Firm*, 4 *ECON.* 386 (1937); see also NORTH, *supra* note 2, at 6; John Williamson, *From Reform Agenda to Damaged Brand Name: A Short History of the Washington Consensus and Suggestions for What to Do Next*, *FIN. & DEV.* 10 (Sept. 2003). See generally John K.M. Ohnesorge, *Developing Development Theory: Law and Development Orthodoxies and the Northeast Asian Experience*, 28 *U. PENN. J. INT'L ECO. L.* 232 (2007) (explaining why observers are suspicious of government intervention in the economy).

¹⁶⁴ See Ohnesorge, *supra* note 163, at 243–49.

¹⁶⁵ See David L. Weimer, *The Political Economy of Property Rights*, in *THE POLITICAL ECONOMY OF PROPERTY RIGHTS* 1, 1–2 (David L. Weimer ed., Cambridge University Press 1997).

development that ensures long-term economic growth without abandoning the principles of state and collective land ownership.¹⁶⁶

Part III of this paper introduces the theoretical framework of the credibility of property rights, which functions as the precondition to stable economic performance. Part III then examines whether the particular institutional arrangements of property rights in China have achieved credibility, and therefore served as the driving force for the economic growth despite a lack of outright privatization of ownership rights. Lastly, in pondering the question of whether privatization of land ownership is in order for the next stage of China's economic development, Part III concludes that the cost of invoking full privatization may outweigh its benefits. Thus, a better course of action is to rectify the current pitfalls of the use and management of rural land, and to improve the credibility of the use rights over such land.

A. *Credibility of Property Rights*

"Credibility" can be viewed as "a consequence of the stability of individual expectations about future government actions to redefine or violate relevant property rights."¹⁶⁷ Just as the "constituents" in North's fable face the dilemma that the "ruler" may at some point renege on his promises, property right holders fear that their rights risk being infringed upon by the very government who defined their rights. Therefore, credibility of the commitment is the "fundamental question of property rights."¹⁶⁸ For a reform to be effective in promoting economic growth and political stability, property rights must be credible. This section begins with an investigation of the nature of property rights, including an analysis of property rights in China, and then examines what makes property rights credible.

1. What are Property Rights?

When considering property or property rights, most people, including legal professionals, intuitively construe such rights as ownership rights, and view property as things that are owned by persons. This view has its historic origin. William Blackstone famously proclaimed that the right of property means "dominion" over things that "one man claims and exercises over the external things of the world, in total exclusion of the

¹⁶⁶ See Ho, *supra* note 11, at 397.

¹⁶⁷ Daniel Diermeier, Joel M. Ericson, Timothy Frye, & Steven Lewis, *Credible Commitment and Property Rights: The Role of Strategic Interaction between Political and Economic Actors*, in *THE POLITICAL ECONOMY OF PROPERTY RIGHTS* 20-22 (David L. Weimer ed., Cambridge University Press 1997).

¹⁶⁸ *Id.* at 20.

right of any other individual in the universe,"¹⁶⁹ although he later qualified his claims of dominion with uncertainties over the origins of title.¹⁷⁰ However, as Charles Donahue, Jr. points out, both a historical review and a comparative study easily show the extraordinary diversity in the concept of property that has existed in the West as well as in non-Western societies.¹⁷¹ Such a finding makes it clear that "any concept of property other than the definitional one" must be examined within the "culture in which it is found."¹⁷²

2. Property Rights in the Western Tradition: Common Law View vs. Civil Law View

Let us examine property rights in the common law system first and then turn to the civil law system. In the common law tradition, some modern property theorists differentiate themselves from the Blackstonian view by dissolving the notion of ownership.¹⁷³ Wesley Hohfeld analyzes the concept of property within the framework of jural relationships that consist of the pairing of what he called "the lowest common denominators of the law," namely, rights and duties, privileges and no-rights, powers and liabilities, immunities and disabilities.¹⁷⁴ He points out that as a fee-simple owner of Blackacre, A's "'legal interest' or 'property' to the land consists of a complex aggregate of rights (or claims), privileges, powers and immunities," which include (1) A's multital legal rights, or claims, that others shall not enter on the land or cause physical harm to the land; (2) A's indefinite number of legal privileges of entering on the land, etc. within the confines of law (correlative to A's legal privileges are the respective legal no-rights of other persons); (3) A's legal power to alienate his legal interest to another (correlative to all such legal powers are the legal liabilities in other persons); and (4) A's indefinite number of legal immunities (non-liability or non-subjection to a power on the part of another person) (correlative to the immunities are the respective legal disabilities of other

¹⁶⁹ 2 WILLIAM BLACKSTONE, COMMENTARIES *2.

¹⁷⁰ See Carol M. Rose, *The Moral Subject of Property*, 48 WM. & MARY L. REV. 1897, 1899-07 (2007).

¹⁷¹ See Charles Donahue, Jr., *The Future of the Concept of Property Predicted from its Past*, in PROPERTY 30-31 (J. Roland Pennock & John W. Chapman eds., New York University Press 1980).

¹⁷² *Id.* at 31.

¹⁷³ See Thomas G. Grey, *The Disintegration of Property*, in PROPERTY 78 (J. Roland Pennock & John W. Chapman eds., New York University Press 1980).

¹⁷⁴ WESLEY NEWCOMB HOHFELD, SOME FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING, reprinted in FUNDAMENTAL LEGAL CONCEPTIONS 63-64 (Yale University Press 1964).

persons in general).¹⁷⁵ Thus, A's property rights relating to Blackacre lie in these various elements.

Even though Hohfeld's jural relationships approach appears to be the first attempt at the articulation of the common law "bundle-of-rights" or "bundle-of-sticks" conception of property,¹⁷⁶ Donahue believes that the Hohfeldian definition of property has universal application due to its descriptive nature.¹⁷⁷ The Restatement of Property adopts a Hohfeldian definition of "property."¹⁷⁸ It states that the word "property" is used to "denote legal relations between persons with respect to a thing" and that "[l]egal relations between persons can be of widely differing types," including "relations designated by the words 'right,' 'privilege,' 'power' and 'immunity.'"¹⁷⁹ Therefore, in the common law tradition, the law of property "deals with the complexity of those jural relationships with respect to things, those things being normally tangible things, although in some legal systems, those intangibles that the law somewhat arbitrarily classifies as property are also included."¹⁸⁰

Although the relational dimension of the concept of property rights can indeed apply to both common law and civil law systems as suggested by Donahue, the fragmentation of ownership approach adopted by the common law system is certainly not a feature shared by the civil law system. As a general rule, the civil law countries of Europe have followed a "unitary theory of property rights" since the nineteenth century, under which all property rights in an asset (both movable and non-movable properties) must be concentrated in the hands of a single owner rather than divided into partial rights shared among two or more persons.¹⁸¹ The totality conception of ownership is emphasized in the civil law definition of "property." As Alain Levasseur points out, in the *Vocabulaire Juridique* of Professor Gérard Cornu, the civil law equivalent of Black's Law Dictionary, "property," "used by itself, refers to the private ownership – individual right of ownership – and the full ownership or the highest level of a real right: to use, to enjoy and to dispose[.]"¹⁸² Therefore, Article 544 of the French Civil Code defines "ownership" as "the right to enjoy and dispose of things in the most absolute manner, provided they are not used

¹⁷⁵ *Id.* at 96–97.

¹⁷⁶ See Grey, *supra* note 173, at 78.

¹⁷⁷ See Donahue, *supra* note 171, at 31.

¹⁷⁸ See Restatement (First) of Property ch. 1, intro. note (1936)

¹⁷⁹ *Id.*

¹⁸⁰ See Donahue, *supra* note 171, at 30.

¹⁸¹ Henry Hansmann & Reinier Kraakman, *Property, Contract, and Verification: The Numerus Clausus Problem and the Divisibility of Rights*, 31 J. LEGAL STUD. (SUPP.) 373, 375 (2002).

¹⁸² Alain A. Levasseur, *The Boundaries of Property Rights: La Notion de Biens*, 54 AM. J. COMP. L. 145, 146 (2006).

in a way prohibited by statutes or regulations[.]¹⁸³ Article 947 of the Québec Civil Code offers a similar definition with the addition that "[o]wnership may be in various modes and dismemberments."¹⁸⁴ In describing the "substance of ownership" Article 903 of the German Civil Code uses more absolute language and states "[t]he owner of a thing may, to the extent that it is not contrary to the law or the rights of third parties, deal with the thing as he pleases and exclude others from any interference."¹⁸⁵

Both civil law and common law systems recognize a limited number of partial or divided property rights. In the common law system, property rights for limited uses of land include, for example, easements, real covenants, and equitable servitudes.¹⁸⁶ In the civil law system, the theory of *numerus clausus* (closed number) allows a relatively small number of specifically defined exceptions to the "unitary theory of property rights," and these "incidents of ownership (particularly with regard to real property) are grouped into code-defined *jura in re aliena* (other real property rights, including usufruct rights)."¹⁸⁷ Civil law jurisdictions also impose more rigid restrictions on such rights.¹⁸⁸ Permissible exceptions include, for example, cotenancy, servitudes on real property, mortgages on real property. And partial property rights that do not conform to one of these specific exceptions, such as private trust, are unenforceable.¹⁸⁹ On the other hand, although the condominium has long been recognized by the civil law and widely employed in Europe, it was not accepted into U.S. property law until 1961, and English law continues to decline its adaptation.¹⁹⁰

Despite the varying degrees of differences between the two legal systems as illustrated above, they share similar philosophical underpinnings. Based on a historical review of the concept of property in both the Roman law tradition and English legal system, Donahue finds that "one tendency seems to characterize the legal concept of property in the definitional sense in the West: a tendency to agglomerate in a single legal person, preferably the one currently possessed of the thing that is the object of inquiry, the exclusive right to possess, privilege to use, and power to convey the thing."¹⁹¹ Further, he concludes that the "Western legal concept

¹⁸³ *Id.* n.6.

¹⁸⁴ *Id.* ("Ownership is the right to use, enjoy and dispose of property fully and freely, subject to the limits and conditions for doing so determined by law").

¹⁸⁵ *Id.*

¹⁸⁶ See Hansmann & Kraakman, *supra* note 181, at 376.

¹⁸⁷ Frank Xianfeng Huang, *The Path to Clarity: Development of Property Rights in China*, 17 COLUM. J. ASIAN L. 191, 206–08 (2004).

¹⁸⁸ Hansmann & Kraakman, *supra* note 181, at 376.

¹⁸⁹ *Id.* at 375.

¹⁹⁰ *Id.* at 376–77.

¹⁹¹ See Donahue, *supra* note 171, at 32.

of property has always been associated with various forms of individualism," some of which lie behind the Roman concept of property and others the emergence of property in English law.¹⁹² Although individualism is only one side of a dichotomy, namely individualism versus communalism, the concept of property in the West has normally been associated with the former only.¹⁹³ He urges that, given the tension between both sides of the dichotomy, i.e., the individual and society, self-protection and self-giving, the legal system must resolve the tension between them.¹⁹⁴

3. Locating China's Property Rights

A review of China's property rights systems, described in Part II, against the theoretical framework of the Western conception of property rights, summarized in Subpart A.1.a of Part III above, reveals that the current property rights regime in the PRC is a unique product of two main factors: (i) China's conscious, voluntarily or coerced, effort starting from the end of the imperial era, to internationalize its overall legal system and (ii) China's recognition of its potent indigenous legal culture shaped by path dependence. In other words, China's property rights regime features a collectivist legal order based on Confucianism, as influenced by continental civil law system with an infusion of Marxist-Leninist ideology. As Potter observes, the development of property rights in the PRC is a process of mediating the conflicts between the individualist orientation of liberal property rights regimes and the collectivist norms of Chinese tradition and PRC policy.¹⁹⁵ He further points out that, "[t]he patrimonialism of Confucianized Marxism-Leninism-Mao Zedong Thought combines with the sovereignty of party-state supremacy to establish a powerful modality of governance in the PRC."¹⁹⁶ If indeed that was the end that the party-state tries to achieve, then the means to accomplish that end is to import legal forms from Europe, the former Soviet Union, and increasingly from North America, through a process called "selective adaptation."¹⁹⁷

The authoritarian and hierarchical principles of Confucianism, which are deeply embedded in Chinese culture, dictated that the interests of the individual should be subordinate to those of the collective.¹⁹⁸ The collective was represented by community organizations, such as clans,

¹⁹² *Id.* at 58.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ See POTTER, *supra* note 34, at 56.

¹⁹⁶ Pitman B. Potter, *Legal Reform in China: Institutions, Culture, and Selective Adaptation*, 29 LAW & SOC. INQUIRY 465, 477 (2004)

¹⁹⁷ *Id.* at 476–81.

¹⁹⁸ See POTTER, *supra* note 34, at 61–62.

guilds, and governments.¹⁹⁹ Despite the existence of private property rights described in Part II, the predominant feature of the property rights regime in dynastic China was its collective tradition,²⁰⁰ which remains strong in present day China. Notwithstanding the prevalent cultural influence, the property rights regime of the PRC is distinctively molded by transplanted civil law influences. The renowned Chinese jurist Shen Jiaben was designated by Guangxu Emperor to supervise the drafting of a new civil code, which was completed in 1911 but never officially promulgated due to the collapse of the Qing Dynasty later that year.²⁰¹ The draft Civil Code of the Qing Dynasty (大清民律草案), which was modeled after the German Civil Code and the Japanese Civil Code, in turn influenced the Civil Code of the KMT government.²⁰² Efforts to transplant legal institutions from the West, mainly European countries, and Japan continued by the KMT government without much success, as such attempts were inconsistent, hasty and mechanical.²⁰³

Upon the CCP's takeover in 1949, China adopted a Soviet style "command economy," featuring state and collective ownership of land and other means of production, which was later abandoned in the late 1950s.²⁰⁴ In the civil law arena, the conception of ownership in the PRC has been overwhelmingly influenced by Soviet civil law jurisprudence.²⁰⁵ Unlike the European civil law tradition described above, the Soviet system gave greater preference to the unitary nature and totality conception of ownership.²⁰⁶ As Frank Huang observes, ownership under this system "was understood as an indivisible and absolute whole and *jura in re aliena* was not provided for."²⁰⁷ As reflected in the 1954 Constitution, all means of production were publicly owned and centrally managed.

The economic reform and the accompanying legal reform begun in late 1970s saw China's efforts to interpret and justify newly created individual interests brought about by the decollectivization of property rights and the creation of new individual property interests based on the old narrow conception of ownership.²⁰⁸ It has been a challenging task to create and maximize economic incentives to enhance institutional efficiency and productivity without challenging the supremacy of party-state and the public ownership. It was not until the early 1980s after the introduction of

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 62.

²⁰¹ See RANDOLPH & LOU, *supra* note 15, at 29.

²⁰² *Id.* at 29 & n.5.

²⁰³ See LUBMAN, *supra* note 30, at 31.

²⁰⁴ See BARRY NAUGHTON, *THE CHINESE ECONOMY: TRANSITIONS AND GROWTH* 59 - 68 (The MIT Press 2007).

²⁰⁵ Huang, *supra* note 187, at 207.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

HRS that the Chinese legislature and legal scholars began formulating a consistent and comprehensive real property rights theoretical framework. Even then it was largely to justify and then codify what had been practiced on the ground.

One of the central agendas of this task was to develop ownership theories to formalize and streamline the decentralized lesser interests. Save those rare instances where common law concepts, such as the doctrine of "estate," were borrowed, the dominant view among legal scholars was to use the civil law jurisprudential framework, as they were convinced that "the Pandectist system of 'real property rights' (物权) is more appealing because of its legal specificity, uniformity and publicity."²⁰⁹ The elaborate use of the concept of "other real property rights" (他物权), particularly "usufruct" (用益物权) is of critical importance in "propertizing" the decentralized lesser interests, such as the "land use right" of state-owned, mostly urban, lands, the "contractual management right" of collectively owned rural lands, the "enterprise management right" of SOEs, and "*profits a prendre*" of state-owned natural resources.²¹⁰

Much of the legal scholarship leading up to and concurrent with the drafting and implementation of the Property Law was about usufructuary rights.²¹¹ For example, Fang Shaokun traces the historical origin of this term to ancient Roman law, which consisted of *diyi quan* (地役权), *renyi quan* (人役权), *yongdian quan* (永佃权) and *dishang quan* (地上权).²¹² He believes the concept of usufructuary rights contained both in the French Civil Code and the German Civil Code was influenced by the ancient Roman law.²¹³ In an effort to prove that this concept was an integral part of China's legal tradition, he notes that the practical contents of usufruct existed in traditional China's *dianquan* (典权) system, such as *diyi quan*, *yongdian quan* and *dishang quan*, even though no specific statutory sections were singled out for this type of rights.²¹⁴ Further, he observes that usufructuary rights were classified into four categories, *dishang quan*, *yongdian quan*, *diyi quan* and *dianquan* in the Second Draft of Civil Code of Qing Dynasty (第二次民律草案), which classification was adopted by the civil law principles of the PRC.²¹⁵

²⁰⁹ *Id.*

²¹⁰ *See id.* at 206–08 (noting "*Profit a prendre*" refers to the right of entering the land of another to extract profit); *see also id.* n. 94.

²¹¹ *See, e.g.*, FANG SHAO KUN, WUQUAN FA YONGYI WUQUAN BIAN (物权法用益物权编) [COMPILATION ON USUFRUCT RIGHTS OF PROPERTY RIGHTS] (People's University Press, 2007); CHEN HUABIN, WUQUAN FA YUANLI (物权法原理) [PROPERTY LAW THEORY] (College of Public Administration Press 1997); LIANG HUIXING, ZHONGGUO WUQUANFA YANJIU (中国物权法研究) [RESEARCH ON REAL RIGHTS IN CHINA] 1–4 (Law Press 1998).

²¹² FANG, *supra* note 211, at 21.

²¹³ *Id.* at 22.

²¹⁴ *Id.* at 22–23.

²¹⁵ *Id.* at 23.

One of the lesser ideologically driven debates surrounding the draft Property Law concerns whether to treat the rural land contracted management rights as a species of contract rights or usufructuary rights.²¹⁶ To better protect the interests of individual lessee villagers, stabilize the economic relationship between the collective owners and individual users, and enhance the transferability of the right, the Property Law adopted the usufruct approach.²¹⁷

4. What Makes Property Rights Credible?

North tells the story of the "wealth maximizing absolute ruler" to illustrate what makes a commitment credible.²¹⁸ He offers two kinds of credible commitments:

The ruler may be able to structure the game so that it is both in his and his constituents' interest to abide by the rules -- motivational credibility. Or the ruler may find that further wealth accumulation can only be realized by binding himself irreversibly (such as giving over rights and coercive power to constituents or their representatives) -- imperative credibility.²¹⁹

He further elaborates that,

[a] commitment is motivationally credible if the players continue to want to honor the commitment at the time of performance. In this case it is incentive compatible and hence *self-enforcing*. It is credible in the imperative sense if the player cannot act otherwise because performance is coerced or discretion is disabled.²²⁰

Subsequent law and development theorists, including those who influenced the Washington Consensus, have focused on the "imperative credibility" option, which deems a commitment credible only if such commitment devices *compel* actors to abide by a set of rules because a violation of such would have been too costly. Since "[i]nstitutions are the rules of the game"²²¹ and since legal systems are institutions,²²² under the "liberal democratic" development model they espoused, competitive markets, free individuals, and civil and political liberties protected by "the

²¹⁶ Huang, *supra* note 187, at 218.

²¹⁷ *Id.*

²¹⁸ North, *supra* note 1, at 17–19.

²¹⁹ *Id.*

²²⁰ *Id.* at 17.

²²¹ *Id.* at 15.

²²² See NORTH, *supra* note 2, at 46–47.

rule of law" are critical preconditions to stable economic growth.²²³ Central to this liberal democratic understanding is the privatization of property rights, especially as applied to the formerly socialist economies. As prescribed by Cheryl Gray, those economies must establish the institutions of private market economy because "[s]ocialism either crippled or reoriented these institutions to reflect the goals of central planners" and, as a result, "[l]egal frameworks defining property rights, private contract regimes . . . atrophied."²²⁴

The popularity and widespread application of the policies advocated by the Washington Consensus at that time largely overshadowed North's motivational credibility option, which focuses on credibility achieved through self-enforcing, not compelled, institutional constraints. Under this option, credibility is self-enforced if players are incentivized to honor the commitment at the time of their performance. Unlike orthodox law and development theory, this analysis no longer simply insists that privatization is the precondition to development, because the key inquiry is shifted to whether the underlying institutional arrangements, including property rights, can achieve sustained credibility by creating sufficient incentives.

Propelled by sufficient incentives created by strategic interaction or bargaining among political and economic actors, credible commitment to property rights emerges as an equilibrium; and in equilibrium, the behavior of political and economic agents is self-enforcing.²²⁵ In other words, property rights "are respected only if the relevant agents cannot improve their payoff by violating them."²²⁶ In a "dictatorial decision making" setting, Daniel Diermeier et al. observe, the credibility of the property rights depends on the strategic incentives facing the actors, for the government it is the probability of its political survival, i.e., the likelihood that the government will not be overthrown, and for the "producer" the "equilibrium tax rate," under which his gains will not be expropriated by the government with higher than expected "tax rates."²²⁷ It follows that property rights are credible only if the expected benefits for the government are high enough to make it worthwhile to forgo expropriation and if all actors are able to observe a defection by the government. For there to be an investment equilibrium, a partial or "noisy" observability of defections will suffice.²²⁸

²²³ Ho, *supra* note 11, at 396.

²²⁴ Cheryl W. Gray, *In Search of Owners: Privatization and Corporate Governance in Transition Economies*, WORLD BANK RESEARCH OBSERVER, Aug. 1996, at 179, 181.

²²⁵ Diermeier et al., *supra* note 167, at 24–25, 36–37.

²²⁶ *Id.* at 36.

²²⁷ *Id.* at 30–33.

²²⁸ *Id.* at 33.

By contrast, Diermeier et al. apply the same economic analysis to a "stylized majority rule decision making" model under which the decision makers come from different demographics and are driven by varied incentives when voting for a tax rate.²²⁹ Diermeier et al. find that, by reducing the influence of any individual political actor somewhat, the credibility of property rights could be increased because the cost of changing the "tax rate" increases. In other words, since decisions are made by a majority through a democratic process, the incentive on the part of the government to deviate will be decreased; as a result, property rights will be more secure under this model than the dictatorial decision making model.²³⁰ Applying the same analysis to a "federalistic decision making" setting, where authority and responsibility are allocated among different levels of a hierarchy of autonomous governments, and to a "interest group decision making" setting, Diermeier et al. conclude that, "[t]his logic suggests a testable hypothesis: Other things being equal, governments with dispersed political power are better able to make a credible commitment to property rights than are governments with more concentrated power."²³¹

B. Are Property Rights in China Credible?

The legislative process in the area of real property law reflects the general development approach adopted by the party-state elsewhere in the reform, i.e., incremental transition rather than radical reform. Instead of abandoning altogether the state and collective ownership of land and opting for outright privatization, China utilized innovative lesser real property interests, such as the "right to contracted management of land" in the countryside and "construction land use right" in cities, which essentially combined centralized ownership with decentralized use and management rights. By doing so, China was able to establish a preliminary legal framework in this area which functioned to stimulate growth in the rural areas and real estate development in the urban areas.

But are property rights offered by the current system credible? As observed by Diermeier et al., in a system where decisions are made by a single actor, credibility of the property rights does not mean perfect security, rather it rests on whether the commitment is capable of creating sufficient incentives on both the government and the economic actors. In other words, whether an observability of the government's defections has induced sufficient incentive on the part of the government to honor its commitment and whether such commitment is perceived by the economic

²²⁹ *Id.* at 34.

²³⁰ *Id.* at 34, 36.

²³¹ *Id.* at 30–36.

actors to be sufficiently secure in order to create an incentive for them to continue to invest.

Despite the lack of land tenure security, clarity or uniformity in enforcement, the system has achieved "motivational credibility," to borrow from North. This is accomplished by creating sufficient incentives in the minds of China's economic actors, namely the farmers in rural areas and real property investors and the general public in the cities with regard to both commercial and residential real properties. There exists an incentive on the part of the party-state to honor its decentralization commitment in the real property law regime, arising from an observability by both the party-state and the general public of a defection, i.e., the vanishing legitimacy of the one-party rule resulted primarily from the gross mismanagement by the party both economically and politically since the founding of the PRC. An incentive on the part of economic actors, on the other hand, is created because they deem the commitment by the party-state credible.

1. Political Vulnerability of the Party-State

The disadvantaged, disenfranchised and the self-enlightened, in spite of the government's suppression, managed to make their discontents heard through political disobedience, such as the Tian'anmen student movement in 1989 and the surging activism recently seen in land related grievances.²³² Deng's suppression of the Tian'anmen student movement notwithstanding, the process of marketization resumed two years later. Further, as mentioned in Part I above, the determination to push forward for a system of Socialist market economy was reaffirmed in 1992.²³³ As indicated in a television speech Deng gave in the immediate aftermath of Tian'anmen, he called the political "turmoil" inevitable and said that "it was [] independent of all human will."²³⁴ In the same speech, he stated that the reform policies "ought to stand."²³⁵ It had become clear to Deng that reform was not only inevitable but also the only salvation for the party-state's political survival. As Robert Weatherley observes, "[u]nable to reconcile its Marxist ideology with the increasingly active role of the market and unwilling to wholeheartedly embrace institutional and other

²³² See *supra* Subpart III.A (discussing land related grievances in both the rural and urban areas).

²³³ See RANDOLPH & LOU, *supra* note 15, at 526 (noting the "Decisions on Establishing the Socialist Market Economy System" was adopted by the NPC in 1992).

²³⁴ EVANS, *supra* note 8, at 298-99.

²³⁵ *Id.* at 300.

political reforms, the party looked more and more to the economy as a means of shoring up its popular appeal."²³⁶

Similarly, the process China took to draft and enact its Property Law demonstrates the party-state's acute awareness of its political vulnerability as exposed by the surging social activism and unrests relating to land grievances. It is reported that rural land grievances have become the major source of unrest in China²³⁷ and that "property rights have displaced tax burdens as the primary focus of peasant activism."²³⁸ The unprecedented move for the NPC to seek public consultation on the draft Property Law was propelled by its desire to test the public's expectations about how much commitment from the party-state would make the rights credible. The public consultation process, which involved seven drafts over a period of thirteen years, is a vivid illustration of the bargaining process between political and economic actors in achieving what North and Diermeier et al. called an equilibrium, i.e., self-enforcing credibility through motivation.²³⁹

2. Decentralization and Deliberate Non-Interference

Conversely, the commitment by the party-state to decentralize property rights has created sufficient incentives for farmers and city dwellers alike, both developers and residents, to invest in the lesser real property interests. Much of the literature on China's legal system and legal reform has pointed to considerable deficiencies, including ambiguity, lack of clearly defined property rights and weak enforcement, and concluded that China has not achieved "rule of law."²⁴⁰ Granted such may be the case, but it was the same indeterminacy and institutional ambiguity that created the incentives desperately needed to improve productivity which was previously lacking for an economy to emerge from a centrally planned model. As Peter Ho remarks, "this 'deliberate institutional ambiguity' makes the system tick."²⁴¹ Although, given the muddling-through and "trial and error" characteristics of Deng's reform trajectory, Ho himself has

²³⁶ ROBERT WEATHERLEY, *POLITICS IN CHINA SINCE 1949: LEGITIMIZING AUTHORITARIAN RULE* 133 (Routledge 2006).

²³⁷ Keliang Zhu & Roy Prosterman, *Green shoots of hope*, S. CHINA MORNING POST, OCT. 12, 2007, at 25. The authors note that, among the 17,900 cases of "massive rural incidents" documented in the first nine month of 2006, 80 percent related to illegal land seizures. See also ZHU KELIANG & ROY PROSTERMAN, *SECURING LAND RIGHTS FOR CHINESE FARMERS A LEAP FORWARD FOR STABILITY AND GROWTH* 1 (CATO Institute, No. 3 2007).

²³⁸ James, *supra* note 52, n.103.

²³⁹ See Diermeier et al., *supra* note 167, at 24–25, 36–37; NORTH, *supra* note 2, at 48.

²⁴⁰ See generally, Clarke, *supra* note 106; see generally Xianchu Zhang, *Commentary on "Legislating for a Market Economy in China"*, 191 CHINA Q. 586–89 (2007); LUBMAN, *supra* note 33.

²⁴¹ Ho, *supra* note 11, at 420.

qualified that the "deliberate" nature of the institutional ambiguity, the lack of clearly defined property rights has indeed "provided flexibility and fluidity that were needed for increasing productivity of the land."²⁴²

To increase productivity through incentives was clearly a goal Deng had in mind when he announced "let some people get rich first" in 1978 and launched the HRS shortly after. At the heart of Deng's legacy is his *unleashing* of the largest labor force in the world by "allow[ing] economic (but not political) developments to unfold without constant interference from the Party or government."²⁴³ In other words, "he has displayed a personal talent for *laissez-faire*: he has mastered the ruler's art of non-acting."²⁴⁴ The trademark feature of a centrally-planned economy is the party-state's omnipresence at all levels of the economic structure. By adopting a non-interference strategy, *de facto* deregulation became the key to effecting the decollectivization and decentralization policy, which was primarily responsible for HRS's resounding success in rural China.

If credibility is initially created by incentives, it is sustained by trust. While articulateness can help build trust, trust may also be induced by vagueness. When commenting on someone's work, Ronald Coase once remarked: "Not being clear, it was never clearly wrong."²⁴⁵ In other words, "[a]n idea which is not clearly stated can never be proved clearly wrong[.]" since the advantage of vagueness is its ability to elude challenge.²⁴⁶ Some argue that vagueness and ambiguity in the policies and laws of the PRC may have helped the CCP in evading ideological challenges from its supporters and non-supporters alike, at least during the initial phase of the reform. Peter Ho observes that, since property rights, especially ownership of such rights, touch upon the very foundations of the PRC, it is crucial for the party-state to strike the right balance between ideology and socio-economic reality, in order to avoid social conflict.²⁴⁷ Therefore, land policy-making is "an alternation of restraining practices that exceed legal boundaries and giving space to experimentation by formulating intentionally unclear policies and laws."²⁴⁸ He further observes, "[t]he ambiguity results in a lot of confusion about the officially condoned land property arrangements," but at the same time, it "allows a certain degree of [local] experimentation."²⁴⁹

²⁴² *Id.* at 394–421.

²⁴³ BARRY NAUGHTON, *DENG XIAOPING, PORTRAIT OF A CHINESE STATESMAN* 84 (David Shambaugh ed., Oxford University Press 1995).

²⁴⁴ *Id.*

²⁴⁵ R.H. Coase, *The Problem of Social Cost*, 3 J. LAW AND ECON. 1, 39 (1960).

²⁴⁶ See Cheung, *supra* note 10, at 21.

²⁴⁷ Ho, *supra* note 11, at 420.

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 417.

Barry Weingast argues that China's reform policies had inadvertently created what he called a system of "self-enforcing market-preserving federalism."²⁵⁰ According to Weingast, the pragmatic approach to the reform resulted in the decentralization of powers, including fiscal authority. Such decentralization not only created incentives among local governments for "preserving their newfound power, but [also] gave them the fiscal resources and muscle to resist efforts by the central government to undo the system."²⁵¹ In Peter Ho's view, the institutional ambiguity, as supported by the party-state, has "not only served as the lubricant of a well-oiled machine, but also prevented the large-scale eruption of land-related grievances over ownership that ruptured transitional economies such as in former socialist states in East Europe."²⁵²

In analyzing economic history through an institutional framework, North warns that the powerful influence of the past on the present and future should not be neglected. As he points out, "[l]earning of history [] is an incremental process filtered by the culture of a society that determines the perceived payoffs[.]"²⁵³ The political turmoil and extreme volatility of organized social unrest such as the Great Leap Forward and Cultural Revolution during the Mao era had rendered a very low threshold for what could be credible in measuring the expectations of the general public. The structure of the centrally planned economy had by that time virtually destroyed any incentive to improve productivity before the reform policy was introduced. Against this historical backdrop, the relative social stability of the Deng era and its decentralization measures are highly conducive to creating strong incentives for the public. Conceivably, credibility on the part of the economic actors was achieved with little difficulty. By achieving motivational credibility, property rights arrangements in China during the reform era, however vague, indeterminate or ambiguous, had fostered the nation's stellar economic performance, while defying the policy guidelines proposed by the neo-liberal economic theorists. In praising the incremental approach taken by the Chinese government, Joseph Stiglitz remarks that: "The ultimate irony is that many of the countries that have taken a more gradualist policy have succeeded in making deeper reforms more rapidly."²⁵⁴

²⁵⁰ Barry R. Weingast, *The Political Commitment to Market and Marketization*, THE POLITICAL ECONOMY OF PROPERTY RIGHTS 43, 46 (David L. Weimer ed., 1997).

²⁵¹ *Id.* at 47.

²⁵² HO, *supra* note 156, at 188.

²⁵³ Douglass C. North, *Epilogue: Economic Performance through Time*, in EMPIRICAL STUDIES IN INSTITUTIONAL CHANGE 342, 349 (Lee J. Alston, Thrainn Eggertsson and Douglass C. North eds. 1996).

²⁵⁴ See STIGLITZ, *supra* note 7, at 185.

C. Legal Reform with Chinese Characteristics

As shown by China's recent legislation in the area of real property rights, although it falls short in setting forth clearly defined ownership rights, especially in the rural areas, and providing concrete enforcement procedures, the Property Law nevertheless proves efficient. China's experience in this area may have validated Richard Posner's view that "the focus of [legal] reform [of poor countries] should be on creating substantive and procedurally efficient rules of contract and property rather than on creating a first-class judiciary[.]"²⁵⁵ A major rationale, according to Posner, is that a poor country may benefit from making modest initial expenditures on law reform, aimed to improve its rules of contract and property, as a tradeoff because a small expenditure on law reform can increase the rate of economic growth.²⁵⁶ Once the rate of economic growth is increased and resources are generated, it will enable such country to undertake more ambitious legal reforms in the future.²⁵⁷ Further, informal substitutes for the formal legal system not only are less expensive but also play a significant role in the enforcement and protection of property and contract rights.²⁵⁸ Among the informal substitutes that Posner identifies, the following prove particularly effective: Arbitration (with or without legal enforcement of the arbitrator's award), reputation (which may be accompanied by retaliation), and altruism (which enables many family-owned firms to operate effectively outside a legal framework).²⁵⁹ In Posner's view, China proves and embodies his theory.

Donald Clarke et al. echo Posner's view, albeit with less conviction. Based on an examination of the relationship between law, institutions, and property rights in post-Mao China, Clarke et al. conclude that "the Chinese experience may show support for a theory that development induces law."²⁶⁰ They begin their analysis by positing the so-called "China Conundrum" - the seeming contradiction between the China experience and the Rights Hypothesis, which accords importance to a well-functioning legal system.²⁶¹ After applying several theories, Clarke et al. find that, "while contract institutions do affect some things[,] it is property rights institutions that matter for investment and long-run economic

²⁵⁵ Richard A. Posner, *Creating a Legal Framework for Economic Development*, 13 WORLD BANK RES. OBSERVER 1, 9 (1998). Posner also discusses delaying the creation of an extensive system of civil liberties.

²⁵⁶ *Id.* at 1-7.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ Donald Clarke, Peter Murrell, and Susan Whiting, *Law, Institutions, and Property Rights in China*, 129 WOODROW WILSON INTERNATIONAL CENTER FOR SCHOLARS ASIA PROGRAM SPECIAL REPORT 42, 45 (2005).

²⁶¹ *Id.* at 44.

growth."²⁶² They conclude that, "the various shortcomings of China's legal institutions insofar as they protect contract rights [vis-à-vis property rights] may not matter very much, provided that the political structure in a sufficient number of places provides a reasonable degree of certainty to investors, both public and private."²⁶³

The CCP's conscious effort to maintain the legitimacy of its regime has unconsciously stricken a chord with the belief held by Posner, as discussed immediately above, and North, as stated elsewhere in this paper, that informal institutions play a significant role in shaping the overall institutional change and thereby impact economic performance. Commenting on the importance of political commitment, Posner notes:

It should be obvious that effective legal reform depends ultimately on a political will to reform, which in turn is likely to depend on a political will to implement economic reform. If the dominant political groups in society want economic prosperity and are willing to risk the loss of political control over the economy that modern economic conditions dictate, they will also want legal reform. If they do not want economic reform, the will to adopt legal reform is likely to be absent.²⁶⁴

While it is true, as illustrated in Subpart III.B above, formal institutional changes aimed at decentralization have been critical in obtaining credibility of new property forms in the reform era, changes in informal institutions have played a significant role in providing the guarantee of nonintervention.²⁶⁵

One of the considerably more powerful, albeit informal, institutions in the PRC is party policies of the CCP. As Yuanyuan Shen points out, the CCP policy certainly enjoyed supremacy before Deng's reform, due to the doctrine that "Party policy is the soul of socialist law."²⁶⁶ The early phase of the law reform starting from the late 1970s, signaled the CCP's attempt to establish the authority of law.²⁶⁷ However, despite legal and political efforts at the time, "[i]n both theory and reality, [] it is impossible to have a comprehensive and institutionalized legal system with a high degree of authority when law is neither 'autonomous' nor 'supreme,'

²⁶² *Id.* at 45.

²⁶³ *Id.* at 45.

²⁶⁴ Posner, *supra* note 255, at 8.

²⁶⁵ Steven Lewis, *Marketization and Government Credibility in Shanghai: Federalist and Local Corporatist Explanations*, in *THE POLITICAL ECONOMY OF PROPERTY RIGHTS* 259, 281 (David L. Weimer ed., 1997).

²⁶⁶ Yuanyuan Shen, *Conceptions and Receptions of Legality: Understanding the Complexity of Law Reform in Modern China*, in *THE LIMITS OF THE RULE OF LAW IN CHINA* 20, 30 (Karen Turner et al. eds., 1999).

²⁶⁷ *Id.* at 30.

but used only as an instrument of [p]arty rule."²⁶⁸ As Alford observes, this instrumentality was reflected in "the willingness of states or individuals to use legality as an instrument to achieve their policy objectives but to depart from it when compliance with the law no longer serves the attainment of such ends."²⁶⁹ For this reason, the ambiguity and vagueness in formal legal institutions made it possible for the party-state to adeptly maneuver from legality to party policy to respond to the emerging interests and rising needs that resulted from unpredictable social changes. As demonstrated in Subpart III.B above, this responsiveness not only stimulated economic growth by creating incentives, but also enabled CCP to weather political unrests time and again despite its political vulnerability, and helped it maintain its political monopoly, a paramount order of the day.

However, the ever increasing complexity of the market economy compels the CCP to further advance its legal reform. The more in-depth the legal reform progresses, the greater the CCP risks losing its political control over the economy. It is at this juncture that the regime's legitimacy begins to morph from an ideological legitimacy to one that is based on economic performance.

During the stage of metamorphosis, law remains more or less an instrumentality. Central to the success of Posner's model illustrated above is the so-called "rules-first strategy". In his view, China has followed this approach by "introducing modern, commercially oriented rules of law at the same time that it liberalized the economy."²⁷⁰ His observation is valid. China has seemingly pursued and succeeded in striking a balance between transplanting international legal institutions and maintaining the law's indigenous roots, at least for the current phase of the property rights legal reform.²⁷¹ Resistance against the "wholesale transplantation" approach in China's legal reform was born out of the CCP's imperative to maintain its legitimacy. It was a desire shared by many jurists in China, perhaps largely influenced by, and intended to defend, the party policy but nonetheless genuine, to indigenize the legal reform. The incremental nature of the property rights legislation proved that "the guiding principles for legal reform are instrumentalism, utilitarianism and authoritarianism as underlying philosophies in building a new legal system which regards maintenance of political regime as being the main goal of legal reform. . . ."

²⁶⁸ *Id.*

²⁶⁹ William P. Alford, *Double-Edged Swords Cut Both Ways: Law and Legitimacy in the People's Republic of China*, in *CHINA IN TRANSFORMATION* 45, 65 (Tu Wei-ming ed., 1994).

²⁷⁰ Posner, *supra* note 255, at 4.

²⁷¹ As some aptly put, "Crossing the river by groping for stones' shows a distrust for other people. Why can't we borrow from other people's experience and theories? You can cross the river very well through bridges others already built." See Su Yonglong, *supra* note 136.

²⁷² At the same time, it reflected a belief among jurists as represented by Zhu Suli that "in China's pursuit of the rule of law, the key is not to copy the Western legal system, but rather is to pay attention to the functioning, through customs, of China's society."²⁷³ He urges that "[f]ocus should be directed towards social institutions that have been proven by experience to be useful[.]" because "[o]therwise, the formal legal system could be ignored and made irrelevant, possibly doing great harm to social order and culture."²⁷⁴ This view is echoed by Daniel Bromley, who asserts that "[h]istory plays a role here for the simple reason that any social commitment is necessarily informed by prevailing ethical norms[, and] within those prevailing social commitments, each generation brings its own imperatives for continuity and change[.]"²⁷⁵

China's legal recognition and formalization of lesser real property interests in property rights as codified by the Property Law gave rise to disintegration and fragmentation of property rights. When "the single-owner presupposition is dropped," the difference between organizing an economy according to capitalism or socialism becomes less plausible.²⁷⁶ As such, Thomas Grey notes, "capitalism and socialism become, not mutually exclusive forms of social organization, but tendencies that can be blended in various proportions," although "differences between profit-oriented market exchange and political collective decision as methods of organizing and operating enterprises remain."²⁷⁷ The blending of both socialism and capitalism elements of the economic order, coupled with a Confucianized Communist ideology, might be at the core of what it means to be "Socialism with Chinese Characteristics."

D. Is Privatization in Order?

The reaffirmation of state and public land ownership by the CCP in its Property Law was more than a product of compromise resulting from fierce political debates about ideology and redistribution of social wealth accumulated through the reform era. It was a political stance taken by the party-state. While the decentralization and recognition of the multiplicity

²⁷² Jianfu Chen, *Market Economy and the Internationalisation of Civil and Commercial Law in the People's Republic of China*, in *LAW, CAPITALISM AND POWER IN ASIA* at 85–86 (Kanishka Jayasuriya ed., 1999).

²⁷³ Suli, *Qiu Ju's Puzzle and Grandpa Shangang's Tragedy* (秋菊的困惑和山杠爷的悲剧), in *FAZHI JIQI BENTU ZIYUAN* (法治及其本土资源) [THE LAW AND LOCAL RESOURCES] at 14–15 (2004).

²⁷⁴ *Id.*

²⁷⁵ Daniel W. Bromley, *Property Rights and Land in Ex-Socialist States: Lessons of Transition for China*, in *DEVELOPMENTAL DILEMMAS: LAND REFORM AND INSTITUTIONAL CHANGE IN CHINA* 31, 41 (Peter Ho ed., 2005).

²⁷⁶ Grey, *supra* note 173, at 80.

²⁷⁷ *Id.*

of forms of property rights had proved to be highly effective in stimulating China's economic growth, such institutional arrangements did little to resolve pre-existing jurisprudential and technical conflicts in the area of land ownership. Rather, it highlighted the role property rights play in wealth distribution. As noted by Milton Friedman, "the final distribution of income and wealth [] may well depend[] markedly on the rules of property adopted."²⁷⁸ Consequently, "the privatization of ownership [] remains one of the most explosive issues in Chinese society," particularly in rural China.²⁷⁹

1. Land Related Grievances

Decades of double-digit growth, booming development in urban centers, and soaring government revenues would have been causes for celebration for any other country, but ironically the CCP has much to worry about. And property rights are at the root of the problem. Some have predicated that China has two revolutions waiting to happen: "One is the bourgeois revolution led by the emerging property-owning middle class that the [Property Law] will help. The other is the potential for the simmering resentment in the countryside to boil over, perhaps in frustration at the law's shortcomings."²⁸⁰ This may not be a false alarm, considering the fact that land related grievances have become the primary source for social unrest in today's China.

a. Rural Areas

When Deng proclaimed "let some people get rich first" at the outset of what was to become an unstoppable, jaw-dropping economic transformation, it was anyone's guess whether he had foreseen the huge and ever-growing income disparity between the rural populace and the city dwellers. Despite China's impressive industrialization in recent decades, it remains an agrarian nation, as two-thirds of its population are still

²⁷⁸ MILTON FRIEDMAN, CAPITALISM AND FREEDOM 162 (1982).

²⁷⁹ Peter Ho, *Contesting Rural Spaces, Land Disputes, Customary Tenure and the State*, CHINESE SOCIETY: CHANGE, CONFLICT AND RESISTANCE 94 (Elizabeth J. Perry & Mark Selden eds., 2nd ed., 2003) (detailing case studies regarding land ownership disputes among the three levels of the rural collective, namely people's commune, production brigade and production team from 1958 to mid-1980s, and township, administrative village and natural village since early 1980s).

²⁸⁰ *China's next revolution: A new property law is a breakthrough, even though it raises hopes that one-party rule may dash*, THE ECONOMIST, Mar. 8, 2007. For *chai qian* related grievances, see Michael T. Stanczyk, *Note: Enter the Dragon's Liar: The New Socialism and Private Property Ownership in the People's Republic of China*, 22 ST. JOHN'S J.L. COMM. 805, 828-38 (2008).

farmers.²⁸¹ Most of China's 700 million plus rural population are left behind by the economic reform. It is reported that the average urban-rural income disparity had reached a record 3.34:1 in the first half of 2007.²⁸²

The Property Law did little to improve farmers' land use rights, as it neither imposed new limitations on the governments' powers to appropriate land—a rampant practice whereby local governments would seize land for non-agricultural uses or for lucrative resale as the industrial economy expands—nor allowed farmland mortgages.²⁸³ The constitution mandates that collectives own the rural land without clearly defining who the collectives are. Since the Property Law does not clarify the actual ownership of the rural land, increasingly, local township and village heads acted as the *de facto* owners and sold the land for industrial or commercial purposes as urbanization invaded the countryside.²⁸⁴ Additionally, due to the high demand and the resulting high prices of the urban land, city residents have bought lands from farmers who, without prior authorization, sold their lands to developers.²⁸⁵ As many as one out of five homes purchased in Beijing is on unauthorized rural land.²⁸⁶ In January 2008, the central government had to issue a directive to reiterate to the city residents that they were banned from buying village properties.²⁸⁷ Since officials from various levels of the local government often illegally seize and reallocate farmers' land, farmers are discouraged from making long-term investments or engaging in any meaningful land transactions.²⁸⁸

Unsurprisingly, as Xiaolin Guo points out, land expropriation has been primarily responsible for the "proliferation of rural conflicts" in China in the past decade.²⁸⁹ Since the Property Law did little to stop the practice, it persisted. Land expropriation is a form of "government behavior (政府行为)" which is described as "using coercive measures to acquire private land under compensatory arrangement by the government in the public interest."²⁹⁰ It is a two-level "government behavior" under the law. Even though the law provides that rural land is owned by the village collectives, such collectives have the right to manage (经营) and supervise (管理) the use of land, but they have no right to transfer land for

²⁸¹ See *China's Farmland: This Land is My Land*, THE ECONOMIST, Feb. 14, 2008.

²⁸² Zhu & Prosterman, *supra* note 237.

²⁸³ See *Governing China: Caught Between Right and Left, Town and Country*, THE ECONOMIST, Mar. 8, 2007.

²⁸⁴ Zhu & Prosterman, *supra* note 237.

²⁸⁵ See *id.*

²⁸⁶ See *id.*

²⁸⁷ See *id.*

²⁸⁸ Zhu & Prosterman, *supra* note 237.

²⁸⁹ Xiaolin Guo, *Land Expropriation and Rural Conflicts in China*, 166 CHINA Q. 422, 424-25 (2001).

²⁹⁰ *Id.*

compensatory use.²⁹¹ The power to expropriate land is reserved for the state, who "may, in accordance with the law, expropriate land which is under collective ownership, if it is in the public interest."²⁹² Under this structure, land development involves a two-step process: Land expropriation (土地征用) by the government from villages, and land transactions (土地出让) between the government and potential users.²⁹³ Only the second step requires that a transfer of the users' right be priced according to market value.²⁹⁴ Guo observes that "land expropriation is, in a sense, a procedure by which all rights formerly held by the village collective are relinquished to the local government."²⁹⁵

His study reveals that the institutional relations between local governments (county and township) and village collectives not only jointly contributed to but also facilitated land expropriation.²⁹⁶ He observes that the "bifurcation of the state perceived by the villagers[] wherein the central state stands for justice and the local stands for injustice is significant to an understanding of the complexity of state-peasant relations in China."²⁹⁷ He attributes the "image of the bifurcated state" to "the increasingly predatory behavior" of local state officials.²⁹⁸

Mao Zedong repeatedly warned his fellow party members about how poverty gave rise to peasants' desire for change and how powerful desire for change could in turn push them to revolution.²⁹⁹ Chinese farmers have played an instrumental role in bringing the nation to prosperity. In return, they have not only been unfairly neglected when it comes to wealth distribution, but also have been asked to bear the brunt of the social costs resulting from China's urbanization and industrialization. Though reasons for their plight range far beyond land ownership alone,³⁰⁰ the land issue remains at the core and has emerged as the key to finding a solution. The regime simply cannot afford turning a blind eye to rural land grievances.

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 422–39.

²⁹⁷ *Id.* at 439.

²⁹⁸ *Id.* at 438.

²⁹⁹ Mao Zedong, *Introducing a Co-operative*, in *SELECTED WORKS OF MAO TSE-TUNG VOL. VIII* (1958).

³⁰⁰ For a case study of other heavy burdens that the Chinese farmers have to bear, see Joseph Kahn, *Frustration in China Hinterland Peasants Fight for Equality, But Still without Much Success, The Great Divide: Managing Rebellion*, *INT'L HERALD TRIB.*, Oct. 14, 2004, at 1.

b. Urban Areas

Since the late 1990s, China's urban landscape has undergone a rapid transformation because of its sweeping housing privatization.³⁰¹ Pressured by the urban residents' desire to protect their newly acquired assets, the CCP did much to please the emerging house-owning middle class by making their properties more secure through the Property Law.³⁰² However, the increasing dissatisfaction among urban dwellers caused by grievances in the *chai qian* (拆迁) (demolition and relocation) process remains a major concern of the party-state.

According to Michael Stanczyk, the decentralization of land management and land use control led to vicious competition among local governments to attract private real property investments in order to increase their local revenues as well as grow the economic clout and political power of their locality.³⁰³ This thirst for investment by local governments has given rise to huge displacements of residential communities across China.³⁰⁴ As observed by You-tien Hsing, this process is further complicated by the competition for control over land and, at times, a necessary coalition between two dominant sets of statist players—the territorial local governments and their leaders on the one hand, and the so-called "socialist land masters" on the other.³⁰⁵ The second set of players come from China's centrally planned economy legacy, where central-level government, party and military units, and SOEs that are physically located within the jurisdiction of municipal governments formed a vertical administrative bureaucratic structure known as *tiao-kuai*.³⁰⁶ Hsing finds, in the struggle against the socialist land masters over control of premium urban land, the municipal governments adopt numerous strategies to consolidate and reinforce their power, which include setting up new government agencies to rationalize land management, embarking on urban redevelopment projects in the name of modernization, and establishing institutions such as land banks in an attempt to monopolize urban land supplies.³⁰⁷ The socialist land masters, on the other hand, capitalize on transactions of urban land use rights by forming their own land development companies and trading the use rights by negotiation, tender or

³⁰¹ See generally *Governing China*, *supra* note 283.

³⁰² *Id.*

³⁰³ See Stanczyk, *supra* note 280, at 828–38.

³⁰⁴ *Id.* at 831 (stating that officials exploit lax property laws by taking property for public purpose "without considering what the purpose is").

³⁰⁵ You-tien Hsing, *Socialist Land Masters: The Territorial Politics of Accumulation*, in *PRIVATIZING CHINA: SOCIALISM FROM AFAR* 57, 57 (Li Zhang & Aihwa Ong eds., 2008).

³⁰⁶ *Id.* at 58.

³⁰⁷ *Id.* at 62–63.

open auction.³⁰⁸ As the war for dominance over urban land proceeds between these two sets of players, ordinary city residents are the ones who lose out.

On a procedural level, the method of auctioning land use rights by the local governments is often flawed, as the bidding process allows both formal written rules and informal practice.³⁰⁹ Take Shanghai for instance. Since its municipal government is not required to select the highest bidder, the process is susceptible to favoritism and corruption.³¹⁰ In fact, many local governments tend to grant real estate developers "sweetheart" deals, forming what can be viewed essentially as a loose partnership.³¹¹ Often, when a collective or individual does not want to deal with a real estate developer directly, the developer would "hire" the local government to take the land for a "public use."³¹² Under the law, the local governments not only have the power to define what a "public purpose" is, but also decide the amount of compensation necessary for the taking.³¹³ As Stanczyk observes, the cooperation between the real estate developers and the local governments has caused mounting violations of zoning and building codes by the developers and has turned inner-city redevelopment into a process of "speculation, private deals and corruption."³¹⁴

From a due process protection perspective, the current law lacks necessary procedural requirements to protect the residents who are in the midst of a demolition and relocation process. The law does not require judicial review, and no injunction is available for those who object to a taking.³¹⁵ Although the issue of compensation may be litigated, practically speaking, since local courts are subsidiaries of the government, little help is available.³¹⁶ As illustrated by the high-profile Chongqing "nail house" case in March 2007, most disputes arise from what residents perceive as

³⁰⁸ *Id.* at 60-62.

³⁰⁹ Gregory M. Stein, *The Chinese Land Use Right: Is It Property?*, 21 *PROB. & PROP.* 22, 24-25 (2007) (detailing how Shanghai's process of auctioning and bidding for land use rights is susceptible to favoritism and corruption).

³¹⁰ *Id.* at 24.

³¹¹ See Stanczyk, *supra* note 280, at 831 (stating that "many local governments have negotiated with real estate developers and granted these developers 'sweetheart' deals, which can be viewed as loose partnerships").

³¹² *Id.* (describing how developers will "employ the local government to take the land for a 'public purpose'").

³¹³ *Id.*

³¹⁴ *Id.* at 831-832.

³¹⁵ *Id.* at 832 (stating that "farmers who object to a taking cannot obtain an injunction" due to the lack of judicial review in China).

³¹⁶ *Id.* at 832-833 (describing how the possibility of litigating for compensation is often futile because local courts are government subsidiaries and agents).

mistreatment by developers, which range from lack of adequate compensation to a highly demoralizing and disrespectful process.³¹⁷

For those reasons, demolition of homes for fast-paced urban expansion and building development has become a highly contentious issue and a leading cause for urban unrest.³¹⁸ Since 2002, many large cities in China have seen a sharp increase of the amount of litigation over unjust and unlawful relocations as well as self-organized protests.³¹⁹ It is reported that the number of protests by displaced citizens has been steadily increasing and, in two extreme cases, people set themselves on fire in protest against the government's demolition of their homes.³²⁰ To palliate widespread, escalating social discontent, in January 2011, the State Council promulgated the Rules for Expropriation and Compensation for Properties on State-owned Land to replace a ten-year old set of rules governing the expropriation of urban properties. The new Rules aim to offer a better understanding of what may constitute "public interests" and the types of compensations recoverable, in addition to providing stronger procedural protections for the property owners.³²¹

2. The Call for Privatization of Land Ownership

As evidenced by the intense political struggle and fierce debate through the drafting process of the Property Law, the issue of whether China should adopt a policy of outright privatization of land was a highly sensitive political and ideological one. In the end, the drafters chose to reaffirm the state and collective ownership of the land, despite prior, popular speculations about a greater level of privatization. However, the call for privatization of land ownership persisted.

Barely two months after the law was passed, about 1,000 farmers gathered in the village meeting hall in Changchunling in Heilongjiang Province and took back and redistributed the ownership of land originally owned by the village collective to each family.³²² Elsewhere in Fujin City, where the village is located, more than 70 villages tried to privatize their

³¹⁷ See generally Zhang Rui, *The Inside Investigation of the Chongqing "Nail House"*, NANFANG ZHOUMO [SOUTHERN WEEKEND], March 29, 2007.

³¹⁸ See Stanczyk, *supra* note 280, at 830–33.

³¹⁹ Hsing, *supra* note 305, at 68–69.

³²⁰ See Stanczyk, *supra* note 280, at 834.

³²¹ See Guoyou Tudi shang Fangwu Zhengshou yu Buchang Tiaoli (国有土地上房屋征收与补偿条例) [Rules for Expropriation and Compensation for Properties on State-owned Land] (promulgated by the State Council., Jan. 21, 2011, effective Jan. 21, 2011) chs. 2–4 (China).

³²² See Edward Cody, *Farmers Rise In Challenge To Chinese Land Policy*, THE WASH. POST, Jan. 14, 2008.

land within a month.³²³ Through an internet statement issued in the name of Fujin villages, they denounced collective land ownership as a means to deprive the farmers of land ownership and declared, "[o]ur farmers' land rights should include the right to use the land, the right to make income from it, the right to inherit it and dispose of it and the right to negotiate over it and set the price of it with developers."³²⁴ Within a few weeks, the movement quickly spread to regions such as Jiangsu and Shaanxi provinces, Tianjin city and as far as Chengdu in Sichuan.³²⁵ Although the so-called "Fujin privatization movement" mainly grew out of farmers' desperate frustration with illegal expropriation of farmland by corrupt local officials and land developers, it was viewed by the government as a rural revolt and was quickly put down.³²⁶

Chinese farmers are not alone in advocating for land privatization. Legal and political analysts in China's academia have also urged rural land privatization. Some believe it would be the final move toward China's agricultural modernization.³²⁷ Others view it as a must for redressing the economic disparity between China's booming cities and impoverished countryside.³²⁸ At the very least, there seems to be a consensus that "[p]ublic ownership of land in the countryside has become a breeding ground for corruption, waste and environmental degradation," which, if left unsolved, will threaten social stability.³²⁹

3. A Theoretical Outlook

In discussing how non-revolutionary institutional changes might take place, North notes the following: "The agent of change is the individual entrepreneur responding to the incentives embodied in the institutional framework. The sources of change are changing relative prices [which alter the incentives of individuals in human interaction] or

³²³ *Id.* (describing how the farmers hoped that, like the "spontaneous land reform" movement that propelled the CCP to adopt HRS in 1978, this movement would push the central government to adopt a policy toward rural land privatization).

³²⁴ *Id.*

³²⁵ *Id.* (describing how internet news contributed to the spreading of the movement to farmers in Jiangsu and Shaanxi provinces and in the Chendu and Tianjin regions).

³²⁶ Antoaneta Bezlova, *China: Academics Praise India's New Farmer-Friendly Budget*, GLOBAL INFORMATION NETWORK/INTERPRESS SERVICE, Mar. 3, 2008, available at http://goliath.ecnext.com/coms2/gi_0199-7587376/CHINA-ACADEMICS-PRAISE-INDIA-S.html. The leader of the movement, Yu Changwu, was sent to a labor camp for two years on charges of "endangering state security." *Id.* According to an official estimate, which tends to be quite conservative, some 40 million farmers have lost their land over the last decade due to urbanization. *Id.*

³²⁷ Minnie Chan, *Official affirms principle of collective land*, S. CHINA MORNING POST, Dec. 27, 2007 at 4.

³²⁸ Bezlova, *supra* note 326.

³²⁹ *Id.*

preferences. The process of change is overwhelmingly an incremental one."³³⁰ When relative price changes achieve "institutional equilibrium," then an institutional change will follow. "Institutional equilibrium" is achieved when "given the bargaining strength of the players and the set of contractual bargains that made up total economic exchange, none of the players would find it advantageous to devote resources into [recontracting within the framework of the existing rules]."³³¹ When they are no longer motivated to invest into the current arrangement, then a change is in order. Applying this line of logic to China's landownership system, the question becomes: Has China's current land ownership system achieved "institutional equilibrium" where the economic actors are no longer motivated to make further investment into the land?

A strong argument can be made that a further change in land ownership is in order at least for rural land, as the urban land is believed to have been *de facto* privatized due to the longer term of the use right and the permitted transferability and mortgageability of such rights. In contrast, farmers enjoy a shorter term of thirty years under the contracted land management rights, and such rights cannot be mortgaged under the Property Law. As a result, the farmers' incentive to make further investments to the land has been severely reduced. The lack of investment motivation is worsened by the rampant land seizures and illegal expropriations by the corrupt local governments to make quick and lucrative profits by converting land to commercial or industrial uses. Unlike the booming urban real estate market, where credibility tends to be more secure, the problematic collective ownership in the rural areas has proven to be much less credible, which calls for an institutional change.

Similar to the "lack of credibility" argument advanced above, a view has emerged among many that the next phase of China's reform will require more drastic institutional changes as the going gets tough. Barry Naughton views China's economic reform as having a two-phase framework: The first phase occurred during the period from 1978 through 1993, and the second from 1993 to present.³³² While, in his view, the policy focus for the first phase was to shift power and resources from the hands of central planners to local actors, the central agenda for the second phase is to build a firmer institutional basis for the market economy.³³³ He argues that this policy shift would make China more closely resemble other transitional economies in that the much touted polar opposition between "big bang" and "gradualist" transitions may become less pronounced.³³⁴ He

³³⁰ See NORTH, *supra* note 2, at 83 & 84.

³³¹ See *id.* at 86.

³³² BARRY NAUGHTON, THE CHINESE ECONOMY 90–110 (2007).

³³³ *Id.* at 90–91.

³³⁴ *Id.* at 107.

predicts that China will face political challenges during the second phase as it struggles to "develop a broader and sounder system of ownership, with a stronger, and more transparent system of property rights[.]"³³⁵ Naughton's view is shared by Peter Ho who believes that the institutional ambiguity has served China well for the development stage of the reform, however, further institutional reform in the land system must be carried out to avoid grave consequences.³³⁶

4. A Practical Outlook

a. Pros and Cons of Rural Ownership Privatization

It is one thing to establish that rural land ownership needs to be fixed, it is quite another to rush to the conclusion that outright privatization is the cure. That said, many have engaged in heated, meaningful academic debates about the pros and cons of privatization. Four of the most popular arguments against rural land privatization, together with their counter-arguments, are summarized below. Conspicuously missing from both sides are two elephants in the room: ideological constraints and technical difficulties involved in carrying out land privatization such as titling. Nonetheless, these arguments offer a feasibility study of privatization for current day rural China.

First, the policy of "land to the tiller" does not suit the current economic conditions of China's market economy. The reasons are two-fold. Further fragmentation of rural land will reduce agricultural productivity. In addition, the weakening bargaining power of an individual farmer or the household will most likely result in land concentration in the hands of a few due to market competition.³³⁷ They point to the failed experiment of land privatization in the early 1950s and the subsequent policy adjustment toward collectivism.³³⁸ Supporters of privatization have dismissed this view as absurd, for it erroneously presumes that farmers will either "squander" their land, or be less responsible toward their land than the corrupt local government officials who have been acting as the *de facto* owners of the rural land.³³⁹

³³⁵ *Id.* at 108.

³³⁶ HO, *supra* note 156, at 190.

³³⁷ He Xin, *On Rent, Land Privatization and "Three Peasant" Problems* (何新: 关于地租、土地私有化及"三农"问题), available at <http://www.wyzsx.com/Article/Class10/200612/13388.html> (last visited Apr. 28, 2008). See also Zheng Xianli, *Land Privatization will Create Parasite Nobles* (郑现莉, "土地私有化"只会催生"寄生贵族") CHUTIAN METROPOLIS DAILY, Nov. 19, 2007, available at <http://opinion.hexun.com/2007-11-19/101432064.html>.

³³⁸ *Id.*

³³⁹ See Qin Hui, *Lun DiQuan de Zhen Wenti Ping "Wu Di Ze Fan" Shuo* (论地权的真问题 评"无地则反"说) [On Real Problems of Land Rights: A Commentary on the Theory of

The second opposition is closely related to the first one. Holders of this view believe that land privatization will give rise to rural landlessness and large slums in cities. This group points to the adverse social consequences that occurred in other formerly socialist countries, most notably Russia, as a result of a hasty rural land privatization, and social unrests due to landlessness existing in India and Brazil.³⁴⁰ In contrast, as one scholar points out, the reason "why China has no real slums in spite of its 200 million migrant workers" is that under the current land ownership, everyone of them has a piece of land in their home village that they can return to.³⁴¹ Those who believe privatization is the right course of action argue that the number of landless peasants in China reached 70 million as of 2006 and is growing by 3 million each year.³⁴²

Third, privatizing rural land would lead to grain shortage and would jeopardize China's long-term mandate to ensure food security.³⁴³ Two counter arguments are advanced to invalidate this view. First, the food shortage concern might be an unrealistic, obsolete vestige of the Cold War Era and, therefore, in the age of globalization, this concern is perhaps unsound. And second, some have argued that, to impose the burden of securing the nation's food supply on peasants alone is unfair, especially considering the alternative arrangements under which they could convert the land to capital.³⁴⁴ Admittedly, the grain shortage concern is a grave one considering the recent exacerbation of the loss of China's much needed arable land.

Lastly, some have argued that rural land privatization would delay China's urban expansion, as it will increase the transaction costs to urbanize farmland if ownership of the land is redistributed to individual farmers or households.³⁴⁵ This view has been criticized as meritless because again it advances urban interest to the detriment of China's rural population.³⁴⁶ On the contrary, some believe that the increasing commodification of rural

Landlessness Causing Unrest], JINGJI GUANCHAO BAO (经济观察报) [THE ECONOMIC OBSERVER], Aug. 21, 2006, available at <http://www.eeo.com.cn/eeo/jjgcb/2006/08/21/37641.html>.

³⁴⁰ See Jamil Anderlini, *Losing the countryside: a restive peasantry calls on Beijing for land rights*, FINANCIAL TIMES, Feb. 19, 2008.

³⁴¹ *Id.*

³⁴² See generally Joshua Muldavin, *Testimony to the U.S.-China Economic and Security Review Commission in 2006* at 186, available at www.uscc.gov/annual_report/2006/annual_report_full_06.pdf.

³⁴³ See Bezlova, *supra* note 327.

³⁴⁴ *Id.*

³⁴⁵ See Yuhui Li, *The Necessity of Rural Land Privatization in China: A Matter of Both Equality and Efficiency* (March 30, 2008) (unpublished manuscript) (on file with author).

³⁴⁶ *Id.*

land resources, if unchecked by the state, will result in "a rapid concentration of land in the hand[s] of a mighty few."³⁴⁷

b. Preliminary Thoughts on What Changes are Needed

In a critique of adopting a utilitarian approach to evaluating policies and institutions, Amartya Sen uses property rights as an example.³⁴⁸ He warns against judging a particular arrangement of property rights by their "constitutive features" alone; he believes the likely consequences of a particular arrangement should also be taken into consideration.³⁴⁹ To focus on the former alone will risk producing two equally inadequate "purist approaches," i.e., no restrictions on property, on the one hand, and abolition of private property on the other. Holders of the first view "found it to be constitutive of individual independence and have gone on to ask that no restriction be placed on the ownership, inheritance and use of property, rejecting even the idea of taxing property or income."³⁵⁰ Others, repelled by inequalities of ownership, "have gone on to demand the abolition of private property."³⁵¹ A perhaps more useful approach, Sen suggests, is to "examine the consequences of having-or not having-property rights."³⁵² He then discusses two arguments supporting private property according to the consequentialist perspective. On the one hand, private property has proved to be a "powerful engine of economic expansion and general prosperity;" on the other hand, unconstrained use of private property "can contribute to entrenched poverty and make it difficult to have social support for those who fall behind for reasons beyond their control." Further, "it can also be defective in ensuring environmental preservation, and in the development of social infrastructure."³⁵³

Just as there does not exist a Blackstonian view of absolute dominion over a thing, there is no pure sense of absolute private ownership. As Sen cautions, the trick is to strike the right balance. Disallowing private land ownership would risk harming efficiency and productivity; yet an

³⁴⁷ See Peter Ho & Max Spoor, *Whose Land? The Political Economy of Land Titling in Transitional Economies*, 23 LAND USE POL'Y 583 (2006).

³⁴⁸ See AMARTYA SEN, DEVELOPMENT AS FREEDOM 60 (Alfred A. Knopf, Inc., 1999).

³⁴⁹ *Id.*

³⁵⁰ See Barry Bracewell-Milnes, *Land and Heritage: The Public Interest in Personal Ownership*, HOBART PAPER 93 (The Institute of Economic Affairs 1982) (arguing that "[l]and is not only a *personal* asset, being worth more to the owner than to strangers; it is also *proprietary wealth*, being worth more to society when owned by private persons than by the state or its agencies. . . [a]s both a personal asset and proprietary wealth, land is particularly unsuitable for government interferences; in state hands property rights become sterile."

³⁵¹ See SEN, *supra* note 348, at 60-61.

³⁵² *Id.* at 61.

³⁵³ *Id.*

unconstrained private land ownership might lead to worsened poverty and greater social inequality. The defining feature of the current property rights arrangement in China is privatization of use and management rights,³⁵⁴ rather than ownership rights. Some call this approach *de facto* privatization. It starts out as an innovative device for the party-state to hold on to the imperative "public ownership" ideology, while creating economic incentives. An unintended, positive consequence of this approach is that it not only echoes the concept of *dianquan* existing in the traditional Chinese land use system, but also coincides with the Hohfeldian view of placing property rights in a web of relations and the tendency of disintegration and fragmentation of property rights occurring elsewhere as identified by Donahue.³⁵⁵ Perhaps the pluralist approach to property ownership goes far beyond merely constraining private property rights. But considering China's path dependence, not only its more recent Socialist legacy but also its long-run collectivist tradition, the focus should be on how to make the rural use and management rights more credible so as to motivate farmers' investment, rather than an outright privatization of rural land.

Although voices calling for rural land ownership privatization remain strong,³⁵⁶ the social cost of such a move outweighs its benefits. As a tradeoff, the most pressing task, at the moment, is to make the use and management rights more credible through institutional capacity-building and to create more secure rights through both substantive and procedural guarantees. Briefly stated, these include, *inter alia*, clarifying rural land ownership rights to eliminate ambiguity, extending the length of contract term for contracted management rights, allowing mortgageability of such rights, and improving rural land registration. Essentially, this approach would level the playing field between the urban dwellers and the rural populace by according the later equally attractive rights without having to confront the potentially massive social cost that an outright privatization of rural land would trigger.

³⁵⁴ See HO, *supra* note 156, at 192 (analogizing between China's privatization of land use rights to that under the British system where land is in name owned by the Crown but can be leased to legal persons).

³⁵⁵ See discussions in Subpart III.A.1 *supra*.

³⁵⁶ Among various privatization suggestions, one model is for the central government to consider allowing shareholder ownership of land by farmers to better protect them from abuses by local officials, also to protect China's arable land and guarantee food security. See Chan, *supra* note 327; see also Li, *supra* note 345.

IV. DEMOCRACY WITH CHINESE CHARACTERISTICS: POLITICAL RAMIFICATIONS OF THE INSTITUTION OF PROPERTY RIGHTS

North believes, in equilibrium, "a given structure of property rights [] will be consistent with a particular set of political rules [and] changes in one will induce changes in the other."³⁵⁷ Through economic analysis, he proves that the evolution of polities from single absolute rulers to democratic governments is a move toward greater political efficiency.³⁵⁸ Conversely, "[o]ne gets *efficient* institutions by a polity that has built-in incentives to create and enforce efficient property rights."³⁵⁹ Take England for instance, he says, the built-in incentives include "[p]arliamentary supremacy, [] curtailment of royal prerogative powers, independence of the judiciary [], and the supremacy of the common law courts."³⁶⁰

Milton Friedman echoes North's view, even though he puts it in a slightly different way. He maintains that, between the two fundamental ways of coordinating economic activities, i.e., "central direction involving the use of coercion" and "voluntary co-operation of individuals," i.e., the market place, the latter is more valued because it promotes both economic and political freedom.³⁶¹ He views economic freedom as not only an end in itself but also an indispensable means toward the achievement of political freedom.³⁶² However, mindful that economic freedom is a *necessary* condition for political freedom, but not a *sufficient* condition, he warns that it is "possible to have economic arrangements that are fundamentally capitalist and political arrangements that are not free."³⁶³ Similarly, Joseph Stiglitz finds that "[e]conomic growth and development do not automatically confer personal freedom and civil rights."³⁶⁴ This view is proved by a bleak picture recently painted by Jerome Cohen of a persistent lack of political freedom and personal liberty in China despite its thriving economic growth,³⁶⁵ a deficiency that earned Deng's reform the title "partial reform."³⁶⁶

³⁵⁷ See NORTH, *supra* note 2, at 48.

³⁵⁸ See *id.* at 51.

³⁵⁹ See *id.* at 140.

³⁶⁰ See *id.* at 139.

³⁶¹ MILTON FRIEDMAN, CAPITALISM AND FREEDOM 12–13 (1982).

³⁶² *Id.* at 8.

³⁶³ *Id.* at 8–10.

³⁶⁴ See STIGLITZ, *supra* note 7, at 183–84.

³⁶⁵ Jerome A. Cohen, 'Rightist' Wrongs, WALL ST. J., June 26, 2007; see also AMNESTY INTERNATIONAL, INTERNAL MIGRANTS: DISCRIMINATION AND ABUSE; THE HUMAN COST OF AN ECONOMIC 'MIRACLE' (London: Amnesty International Mar. 2007), available at [http://web.amnesty.org/library/pdf/ASA170082007ENGLISH/\\$FILE/ASA1700807.pdf](http://web.amnesty.org/library/pdf/ASA170082007ENGLISH/$FILE/ASA1700807.pdf).

³⁶⁶ See Carl M. Rose, *Privatization - The Road to Democracy?* 50 ST. LOUIS U. L.J. 691 (2006) (arguing that modern privatization efforts, especially state-led ones, do not necessarily lead to democracy).

The Great Debate about democracy and China has spawned a great deal of literature that devotes to analyzing, speculating, and forecasting China's political future, some more hopeful than others.³⁶⁷ It is certainly tantalizing to join the debate, but to tackle such an all-encompassing universe would have been overly ambitious for this paper. That said, the indispensability of political institutions to property rights arrangements makes it impossible to ignore political ramifications of China's *de facto* privatization of property rights. Therefore, Part IV attempts to inquire into China's political future by examining with brevity a much narrower issue, i.e., how the *de facto* privatization of property rights will contribute to the emerging rights consciousness among China's citizens, in both urban and rural settings, and thereby furnish the bedrock for democracy to come in China. To put it differently, will China's nascent recognition of private property rights ultimately lead to China's political liberalization?

A. *Rights Consciousness on the Rise*

Those who are influenced by notable Western liberal thinkers such as John Locke and Friedrich Hayek hope that China's recent privatization effort will awaken a sense of individual autonomy and inalienable rights among its people.³⁶⁸ Others dismiss this possibility by pointing to the utilitarian and right-averse nature of recent Chinese legalization. Neil Diamant et al., for instance, view Chinese law and legality as a conflict management tactic and an outlet for expressing grievances.³⁶⁹ They believe, unlike its Western counterparts, the Chinese legalization program is neither generated by liberal enlightenment nor by social negotiations between the state and the rising bourgeoisie.³⁷⁰ Rather, it echoes a long-standing statist orientation which accorded the state a key, proactive role in political, economic, and social development.³⁷¹ In this sense, law and rights are essential to the regime because it contributes to a more orderly society rather than to empowering the citizenry.³⁷²

³⁶⁷ See, e.g., BRUCE GILLEY, CHINA'S DEMOCRATIC FUTURE (Columbia Univ. Press 2004); cf. An Chen, *Why Does Capitalism Fail to Push China Toward Democracy?* in CHINA'S EMERGENT POLITICAL ECONOMY: CAPITALISM IN THE DRAGON'S LAIR 146, 146-65 (Christopher A. McNally ed., 2008).

³⁶⁸ Locke believes that the right to property was so fundamental that government's primary purpose was to protect that right. See C. B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE (1964). Hayek claims that the system of private property is the most important guaranty of freedom. See FRIEDRICH A. VON HAYEK, THE ROAD TO SERFDOM 103 (1944).

³⁶⁹ NEIL J. DIAMANT, STANLEY B. LUBMAN, AND KEVIN J. O'BRIEN, ENGAGING THE LAW IN CHINA: STATE, SOCIETY, AND POSSIBILITIES FOR JUSTICE 6-7 (2005).

³⁷⁰ *Id.* at 6.

³⁷¹ *Id.*

³⁷² *Id.*

As a response to mounting grievances in both urban and rural areas, China's legislature has shifted its focus toward social legislation. It is reported that, in the NPC's effort to shift the focus from regulating economic matters to resolving social issues, social legislation has increased rapidly in recent years since the commencement of the 10th NPC in 2003, and reached 20 percent at the NPC level and 40 percent at the provincial and lower levels in the past five years, compared to a mere 4.7 percent prior to 2003.³⁷³ As Minxin Pei identifies, rapid economic and legal development has created a more hospitable environment for individuals to utilize the system, assert their rights and challenge the regime.³⁷⁴ Law and legal system, as observed by Alford, have become a "double edged sword" for the party-state:

the regime has not only through its law provided a legal, moral, and political vocabulary with which those who wish to take it to task might articulate their concerns, but also has proffered these individuals a singular platform from which their concerns might be broadcast. In seeking to deploy formal legality for highly instrumental purposes, the regime has unwittingly handed its opponents a keenly honed instrument through which to seek to accomplish their own, very different ends.³⁷⁵

Naturally, the process of utilizing the system has also increased overall rights consciousness among ordinary people. According to a public opinion survey conducted in as early as 1993, nearly 80 percent of the respondents agreed with the statement that "[p]rivate property is sacred and must not be violated," and two-thirds opposed the suggestion that the "government may confiscate private property under any circumstances in the national interest."³⁷⁶ Rights consciousness among China's citizens has risen to a new level along with the sweeping privatization of urban housing since the late 1990s and presumably more so with the passing of the Property Law.

³⁷³ *Focus is on Property Law*, CHINA DAILY, March 14, 2008 (noting that according to the Director of the Law Institute of Chinese Academy of Social Sciences, only 4.7 percent of new legislation passed by the four National People's Congress (NPC) prior to 2003 were on social issues, but commercial matters accounted for 36.5 percent).

³⁷⁴ Minxin Pei, *Rights and Resistance: The Changing Contexts of the Dissident Movement*, in CHINESE SOCIETY, 2ND EDITION: CHANGE, CONFLICT AND RESISTANCE 23 (Elizabeth J. Perry & Mark Selden eds., 2003).

³⁷⁵ Alford, *supra* note 269, at 62.

³⁷⁶ Pei, *supra* note 374, at 40–41.

1. Grassroots Urban Resistance Movement

As alluded to in Subpart III.D.1 above, urban home ownership has given rise to one of the most contentious issues in China as the entire nation is going through a urban renewal craze. Disputes over compensation, forced demolition and compulsory eviction to distant suburbs abound in the demolition and relocation process. In addition, wealthier owners of modern flats in new residential neighborhoods and luxury homes in gated communities have organized homeowners' associations to fight abuses by the developers and property management companies.³⁷⁷ To protect their rights, homeowners have resorted to voting, demonstration, protest, self-administration³⁷⁸ against the intermediate players such as developers, and collective civil resistance against the government.³⁷⁹

For instance, in June 2007, residents living in shared facilities in north-east Beijing, Jiuxianqiao, voted to accept an offer from a developer to demolish their buildings.³⁸⁰ In the high-profile Chongqing "nail house" case mentioned earlier, the property owners, unlike their neighbors, refused to vacate their two-story brick building to give way to a major property developer and stood firm as construction began around them.³⁸¹ They remained there even after a court deadline ordering them to allow demolition had expired.³⁸² The image of a lone brick building standing tall amid the huge construction pit, with a banner reading: "The legal private property of citizens cannot be violated," had spread all over the internet, making the case a national cause célèbre.³⁸³ The lone "nail house" may have invoked, in the minds of some people, the iconic image of the lone protester who single-handedly halted the progress of military tanks on Tian'anmen Square in 1989. The fact that the owners of the "nail house" fought for protection of their private property rights as basic human rights

³⁷⁷ Yongshun Cai, *China's Moderate Middle Class: The Case of Homeowners' Resistance*, 45 ASIAN SURVEY 777 (Sept/Oct. 2005); see also Benjamin L. Read, *Property Rights and Homeowner Activism in New Neighborhoods*, in PRIVATIZING CHINA 41 (Li Zhang & Aihwa Ong ed., 2008) (noting Homeowners' Associations are state-sanctioned).

³⁷⁸ See Read, *supra* note 377 (indicating that a Homeowners' Association is a state-sanctioned organization for self-administration by residents).

³⁷⁹ See Yongshun Cai, *Civil Resistance and Rule of Law in China: The Defense of Homeowners' Rights*, in GRASSROOTS POLITICAL REFORM IN CONTEMPORARY CHINA 174 (Elizabeth Perry & Merle Goldman, eds. 2007). See also Benjamin L. Read, *Inadvertent Political Reform via Private Associations: Assessing Homeowners' Groups in New Neighborhoods*, in GRASSROOTS POLITICAL REFORM IN CONTEMPORARY CHINA 149 (Elizabeth Perry & Merle Goldman, eds. 2007).

³⁸⁰ See *One Household, One Vote*, THE ECONOMIST, Jul. 12, 2007.

³⁸¹ Rui, *supra* note 317.

³⁸² *Id.*

³⁸³ *Woman Defies Chinese Developers*, BBC NEWS, Jan. 7, 2008, available at <http://news.bbc.co.uk/2/hi/asia-pacific/6483997.stm>.

and the moral support they received from the public and the Chinese media bear testimony to the much heightened awareness of property rights among the ordinary Chinese.

According to an investigation conducted by Luigi Tomba of the so-called *weiquan* ("protect your rights") movement in some of Beijing's gated residential communities, the new spatial and organizational autonomy brought about by the homeownership experience not only helped form a new culture among the residents but also became a catalyst in the formation of their collective identities.³⁸⁴ Even though conflicts and protests within the group are reoriented toward intermediate players, such as local institutions, developers and property managers, rather than toward the state and its policies, their new identify and sub-culture increase their awareness of rights and motivations to defend those rights and, as such, redefine their relationship with the state.³⁸⁵ According to Tomba, among the court-reported disputes, housing related disputes have experienced a 42 percent increase from 1997 to 2000 nationwide.³⁸⁶

In their study of a collective resistance action directed at the government sustained by homeowners in Shanghai, Fayong Shi and Yongshun Cai find that, taking advantage of connections or social networks of the action participants and exploiting the discrepant, and often fragmented, interests of different levels of state authorities had helped create opportunities for successful resistance by the homeowners.³⁸⁷ A perhaps more interesting observation is that "the unique social networks blur the boundary of the state and society, and make political participation, or the way citizens exercise political influence, more subtle and perhaps more effective."³⁸⁸ Consequently, the efforts by the Chinese middle class appear largely moderate due to "their intention to maintain the political order and limited ability to stage disruptive action."³⁸⁹

2. Rural Resistance

As noted earlier, an even more urgent and threatening problem confronts the regime in rural China. Chinese farmers are much more land-bound than their urban cousins. Despite China's sweeping industrialization, it remains an agrarian society. Not only have the farmers been left behind by the economic reform but they also continue to be victimized by a

³⁸⁴ Luigi Tomba, *Residential Space and Collective Interest Formation in Beijing's Housing Disputes*, 185 CHINA Q. 934, 934–51 (2005).

³⁸⁵ *Id.* at 951.

³⁸⁶ *Id.* at 935.

³⁸⁷ Fayong Shi & Yongshun Cai, *Disaggregating the State: Networks and Collective Resistance in Shanghai*, 186 CHINA Q. 314 (2006).

³⁸⁸ *Id.* at 332.

³⁸⁹ Cai, *supra* note 379.

perpetual policy bias favoring the city-dwellers. Their plight is exacerbated by the ill-defined rural collective land ownership, which has fueled land seizures by corrupt local government officials for illegal personal gains and local revenues. As highlighted by the "Fujin privatization movement" discussed in Part III.D.2 above, today's farmers are better equipped with communication and organizational skills, making them more threatening to the regime.

According to Cai, local governments' reluctance to pay reasonable compensation for farmers who lost farmland is a major source of rural conflicts today.³⁹⁰ Among the mass confrontations between farmers and the police in 2004 that he analyzed, about 67 percent were land-use related; and among the land related confrontations, 55 percent occurred because farmers tried to prevent construction on land that had been taken away from them.³⁹¹ The nature of the confrontations could be quite violent, involving fatalities of farmers, due to the high stakes the farmers had in the land and because often times collective resistance such as confrontation was their last resort after their peaceful petitions failed.³⁹² Since the central government rarely intervenes unless it feels the pressure of protecting stability or regime legitimacy, few protests receive media coverage and most were suppressed by the local governments.³⁹³

3. Emergence of Civil Society

The reconfiguration of Chinese society as a result of economic freedom has led to a diversity of interests that, in some instances, give rise to the freedom of association. According to Bruce Gilley, there were 135,000 officially registered "social groups" in China by the end of 2002, among which more than half were sub-national level groups, representing groups as diverse as women, environmental causes, new religions, and charities, in addition to homeowners.³⁹⁴ Gilley observes, despite fantasies of an orientalist bonding between state and society, all evidence shows that civil society in China is developing in opposition to state power, which some in the leadership see as potentially posing a serious threat to political stability and unity.³⁹⁵ Many believe that the gradual creation and

³⁹⁰ See Yongshun Cai, *Local Governments and the Suppression of Popular Resistance in China*, 93 CHINA Q. 24, 26 (2008).

³⁹¹ *Id.* at 34.

³⁹² *Id.*

³⁹³ *Id.* at 27–35.

³⁹⁴ GILLEY, *supra* note 367, at 72–77.

³⁹⁵ *Id.*

development of a civil society is "creating favorable conditions for China's future democracy."³⁹⁶

4. State-Sponsored Village Election

To quench rural conflicts preemptively, the central government has initiated numerous state-sponsored reform measures on both village and township levels, ranging from village election, village assemblies, and the cadre responsibility and evaluation system, with mixed success.³⁹⁷ As Elizabeth Perry and Merle Goldman observe, even though such measures are state-sponsored, they are reconfiguring local politics in surprising and significant ways.³⁹⁸

So far the most successful state-sponsored reform mechanism remains village elections, which reportedly have been conducted in over 80 percent of China's villages.³⁹⁹ The Organic Law of Village Committees was passed in 1987 to give villagers the opportunity to elect village officials and establish a number of democratic institutions for village governance, and to permit villagers to monitor local cadres and allow villagers to elect a leader and a village committee.⁴⁰⁰

Despite the active participation by villagers across China, some have cast serious doubt on village election as a mode of grassroots self-government. They view China's village elections as a measure to improve local governance in order to buttress regime stability, and warn of the danger that China's current grassroots political reforms might help forestall rather than facilitate the advance of formal democracy at the national level.⁴⁰¹ Perry and Goldman argue that "[d]eferring progress toward national political reform in favor of dealing with the immediate challenge of curbing corrupt local cadres may be viewed as an acceptable tradeoff by ordinary Chinese citizens, for whom abusive and rapacious local officials pose the more urgent and immediate concern."⁴⁰² They do acknowledge

³⁹⁶ ELIZABETH PERRY & MERLE GOLDMAN, GRASSROOTS POLITICAL REFORM IN CONTEMPORARY CHINA 1, 16 (2007).

³⁹⁷ *Id.* at 14–15.

³⁹⁸ *Id.* at 19, 390.

³⁹⁹ See Lily L. Tsai, *The Struggle for Village Public Goods Provision: Informal Institutions of Accountability in Rural China*, in GRASSROOTS POLITICAL REFORM IN CONTEMPORARY CHINA 117, 120 (Elizabeth Perry & Merle Goldman, eds. 2007); John James Kennedy, *The Implementation of Village Elections and Tax-for-Fee Reform in Rural Northwest China*, in GRASSROOTS POLITICAL REFORM IN CONTEMPORARY CHINA 48, 49 (Elizabeth Perry & Merle Goldman, eds. 2007).

⁴⁰⁰ Kennedy, *supra* note 399, at 49.

⁴⁰¹ *Id.* at 2.

⁴⁰² *Id.*

that, despite their top-down nature, whether these reforms are working to empower or imperil the party-state remains unclear.⁴⁰³

B. Counterforces at Work

The responsiveness demonstrated by the CCP in the economic sphere is part and parcel of its perennial struggle for legitimacy. Weatherley observes that, throughout the history of the PRC, the CCP has utilized traditional legitimacy, which lies somewhere in between charismatic legitimacy and legal rational legitimacy, ideology legitimacy in the Mao era, and performance based legitimacy during the Deng era, i.e., a combination of economic legitimacy and legal rational legitimacy.⁴⁰⁴ The Tian'anmen student movement has taught the regime that economic legitimacy alone would not suffice. In fact, Samuel Huntington's warnings seem to ring true that, "[r]eform can be a catalyst for revolution rather than a substitute for it" and that "[t]he very fact that a regime makes reforms and grants concessions encourages demands for still more changes which can easily snowball into a revolutionary movement."⁴⁰⁵ The collapse of the former Soviet Union and its swift dismemberment caused by its bold political reforms still loom large as a negative example in the minds of Chinese leaders.⁴⁰⁶ Meanwhile, the regime is increasingly aware of the mutual reinforcement between economic reform and political liberalization as well as the inevitability of political reform. While preemptively experimenting with state-sponsored reform measures, such as village elections, the CCP looked elsewhere and found social stability as a means of legitimacy,⁴⁰⁷ as reflected by the main thrust of Hu Jintao's signature ideology, "harmonious society."

As China emerges from its isolated past onto the international stage, the CCP has increasingly sought to identify itself as "a nationalist force, transforming China into an economic superpower and standing firm against attempts by foreign governments to undermine its process."⁴⁰⁸ Historically, Chinese nationalism has inspired pro-democracy movements, such as the May Fourth enlightenment movement of 1919, against tyrannical rulers.⁴⁰⁹ In present day China, along with the emergence of a property-owning middle class, the desire of its citizens to build a cultural and national identity that is uniquely Chinese is ever so strong. As Yingjie

⁴⁰³ *Id.* at 3.

⁴⁰⁴ WEATHERLEY, *supra* note 236, at 1–13.

⁴⁰⁵ SAMUEL P. HUNTINGTON, *POLITICAL ORDER IN CHANGING SOCIETIES* 363 (Yale University Press 1968).

⁴⁰⁶ PERRY & GOLDMAN, *supra* note 396, at 17.

⁴⁰⁷ WEATHERLEY, *supra* note 236, at 14.

⁴⁰⁸ *Id.*

⁴⁰⁹ GILLEY, *supra* note 367, at 13.

Guo describes, this identity is said to be "a new culture, a new mode of knowledge, a new socio-political and cultural-moral system, 'a framework of universal values, which contains the best of East and West, past and present', and a 'Chinese' alternative to modernity."⁴¹⁰

However, the CCP has mastered the art of invoking and buttressing nationalism at appropriate times to reinforce its legitimacy. Deng himself invoked the name of the "Yellow Emperor" upon signing the agreement with Britain over the return of Hong Kong.⁴¹¹ The political elites in China increasingly realize the role of what Joseph Nye called "soft power" in international politics. A key political adviser to Jiang Zemin notes that the "power shift" taking place in international politics from the "reliance on violence and wealth" to "a knowledge-based power structure" and that control over knowledge will become the focal point in future global power politics.⁴¹² He advocates that China ought to maintain its own position and orientation, come up with strategies to enhance its "soft power," legitimize its power, and make its culture attractive to others.⁴¹³

As demonstrated by the events surrounding the global protests against the Chinese policy toward Tibet and China's Olympic torch relay around the globe in 2008 and the subsequent anti-West protests by young nationalist Chinese students both within and beyond China, a distinct possibility exists where the CCP hijacks its citizens' fervent nationalism and turns it into a unifying force between itself and the emerging middle class, thereby thwarting the process of political liberalization. However, it may turn out to be a "double-edged sword." One can never underestimate the critical importance of mass mobilization in China. The CCP is acutely aware of the irony as well as the danger of mishandling nationalist sentiment as it may turn its back and challenge rather than boost the regime's legitimacy.⁴¹⁴

V. CONCLUDING REMARKS

The collective ownership and control of real property in China was established in 1949 when the CCP took control. More than half a century later, the rapid economic transformation taking place within China has

⁴¹⁰ YINGJIE GUO, CULTURAL NATIONALISM IN CONTEMPORARY CHINA: THE SEARCH FOR NATIONAL IDENTITY UNDER REFORM 126 (2004).

⁴¹¹ EVANS, *supra* note 8, at 274.

⁴¹² See GUO, *supra* note 410, at 112 (referencing two articles entitled "Culture as a Component of National Strength: Soft Power" and "Cultural Expansion and Cultural Sovereignty: Challenges to the Concept of Sovereignty," Prof. Wang Huning refers to the "soft power" concept as "such resources as the attraction of one's ideas" or "the ability to set the political agenda in a way that shapes the preferences others express" and believes that "the core of soft power is culture.").

⁴¹³ *Id.*

⁴¹⁴ WEATHERLEY, *supra* note 236, at 14.

resulted in the reemergence of private property rights and de-collectivization of rural lands. The question of "who owns what" has never been so vital and pressing. To recognize the fruits of economic reform and to reinforce its performance-based legitimacy, the party-state codified its *de facto* privatization of real property rights, particularly in urban centers, to signal its determination to carry forward China's thriving market economy. Coming out of a self-imposed isolation three decades ago, China was soon greeted by industrialization, urbanization, and privatization. They came roughly in that order, but all three are here to stay. Un-disoriented and unfazed, the party-state steadfastly plods down the path charted by the "architect" of its reform policy - a path called "Socialism with Chinese Characteristics."

Just like Wesley Hohfeld's groundbreaking analysis of "rights" renders it possible for us to define "liberty" (an absence both of a duty and of a right),⁴¹⁵ I hope an examination of "Socialism with Chinese characteristics" through China's real property rights as an institution would enable us to pause and gain a new perspective on what it means to be uniquely Chinese in both economic and political spheres, free from the ideological pre-conceptions the party-state envisaged. Compelled by political survival and guided by unwavering pragmatism, the party-state has loosened its tight grip over its people to unleash the largest workforce the world had yet to see. The co-existence and entanglement of public and private, collective and individual, "us" and "self" have reconfigured the contemporary Chinese social fabric. But however much has changed, one thing remains the same: The constant negotiation between the ruler and its constituents.

Economically, through negotiation, the pendulum swings between decentralization/privatization and collectivization. When the behavior of political and economic actors becomes self-enforcing, it creates credible commitment for its economy to steadily grow. The great divide between town and country exposes serious defects in China's property law regime. More credible and secure land tenure is necessary not only to motivate the performance but also to build the capacity of the Chinese peasantry. Politically, through negotiation, the pendulum swings between the tendency to converge and the tendency to diverge between the ruler and its constituents. Privatization of property rights has awakened a sense of "self," and thus autonomy, among the constituents.

As is increasingly clear, more thorough marketization of the economy erodes the party-state's control over the economy. Along with more economic freedom, the beneficiaries of the economic reform demand for more secure protection of their wealth, while those who are left behind call for equal opportunity to participate in profits. With widely available

⁴¹⁵ HOHFELD, *supra* note 174.

modern technology at their disposal, Chinese citizens across the nation are capable of organizing themselves at unprecedented speed. As Mao famously heeded: "A single spark can start a prairie fire." Decentralization and divergent interests cause fragmentation between the central and local governments as well as among different regions. The enhanced rights consciousness among the citizens, coupled with the power fragmentation within the government, is a force to be reckoned with. It is not a question of whether, but a question of when and how, this force will be put to use to fragment the party-state's political monopoly.

If liberty is indeed the absence of both a "duty" and of a "right," then liberalization is the process it takes to reach that state, a state perhaps we can call freedom. Freedom is achievable if we begin with a better delineation of "rights." Similarly, if property rights in China are "rectified," to borrow from Confucius, China should be on its way to attaining the state called freedom.