
PEASANT LAND TENURE SECURITY IN CHINA'S TRANSITIONAL ECONOMY

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I. CHINA'S RURAL POPULATION

The Chinese economy has undergone remarkable growth. Living standards have risen considerably, construction is at an all time high and high rises have transformed the skylines in major cities. Sprawling luxury villa

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Thank you to Professor Matthew Wilson of Temple University. His guidance, support and encouragement were invaluable. Thank you to Ashley Howlett in the Beijing office of Jones Day for generously supplying official English language translations. I am grateful to Watanan Petersik and Joe Stevens for their edits and comments. I am most indebted to the children of the Hong Qi Migrant School for providing the inspiration. Mistakes are, of course, all mine.

complexes with names like Beijing Riviera, Grand Hills, and Chateau Regalia have sprung up outside city centers catering to China's new wealthy class. Foreign and domestic firms are pouring funds into China's urban property sector at such a rate that the Chinese authorities were forced to institute restrictions to limit the swelling speculative property markets in urban areas.¹ However, most of China dwells beyond the gates of these luxury compounds and their teams of private security guards.

China is home to an enormous rural population. It is estimated that China has over two hundred million agricultural households. That is 784 million people numbering about two thirds of China's population.² While the rural population has enjoyed income growth alongside their urban brethren, the problems of rural poverty and the widening gap between China's rural and urban population continue to plague China's existence.³ In January 2006, Premier Wen Jiabao said that efforts to narrow the rural-urban income divide were falling short and that land seizures by local officials were provoking mass rural unrest that could threaten China's national security and economic growth.⁴ According to the Minis-

¹ The State Council and its Ministries have been implementing macroeconomic controls since 2003 to cool off the overheated property sector. The controls include raising interest rates, imposing taxes, restricting construction projects and restricting foreign investment. See, e.g., *Circular of the General Office of the State Council on Effectively Stabilizing House Prices*, 8 Dir. No. Guo Ban Fa [2005] (Mar. 26, 2005) (stressing local government responsibility for implementing the measures); *Circular of the General Office of the State Council on Distributing the Opinions of the Departments including the Ministry of Construction on Adjusting the Housing Supply Structure and Stabilizing the Housing Price*, 37 DIR NO. GUO BAN FA [2006] (May 24 2006) (requiring (i) increase in supply of small units; (ii) suppression of speculation through increased taxes; (iii) rationalization of the scale of housing demolition; (iv) local efforts to suppress unlawful property development and sales transaction; (v) increase in the amount of affordable housing to low income families; and (vi) promotion of market efficiency and transparency). New measures continue to be adopted on a frequent basis. See, e.g., CB Richard Ellis, *Continued Regulatory Tightening: Assessing China's New Residential Property Landscape*, CBRE Research, available at <http://www.cbre.com/NR/rdonlyres/CE70C5DC-D108-41D6-A440494D98534CE4/465146/ChinaResiMktJan2007.pdf> (last visited Mar. 29, 2008). New measures continue to be adopted on a frequent basis.

² Rural Development Institute, *China* (Sept. 21, 2006), available at http://www.rdiland.org.OURWORK/OurWork_China.html (last visited Mar. 29, 2008).

³ Urban income levels have risen much more rapidly than rural levels. In China, rural incomes are, on average, 40 percent of urban incomes while in most other countries rural incomes are about 66 percent of urban incomes. In each provincial area rural incomes are between half and one quarter of urban incomes. DOUG GUTHRIE, *CHINA AND GLOBALIZATION* 205 & 207 (2006).

⁴ Zhu Keliang & Roy Prosterman, *From Land Rights to Economic Boom*, *China Business Review* 44, 45 (July-Aug. 2006), available at <http://www.china-businessreview.com/public/0607/zhu.html> (last visited Mar. 29, 2008). Guidi Chen,

try of Public Security statistics, China witnessed an astounding 87,000 social unrest incidents in 2005, up six percent from 2004 and fifty percent from 2003.⁵

China has enacted an impressive array of legal reforms since the 1978 introduction of socialist market economy under the leadership of Deng Xiaopeng.⁶ Within the past decade, “readjusting and perfecting” China’s property system became part of a fundamental policy strategy in China’s effort to build and maintain economic growth and provide for the rational use of agricultural land.⁷ In 2004, the Chinese Constitution was amended to include a constitutionally enshrined right to private property.⁸ While the Chinese Constitution is a non-justiciable⁹ document, the inclusion of

Rural Wrongs Retold, S. China Morning Post A14 (May 23, 2006); Thomas Lum, *Social Unrest in China*, CRS Report to Congress, May 8, 2006, available at <http://www.fas.org/sgp/crs/row/RL33416.pdf> (last visited Mar. 29, 2008).

⁵ As cited in Keliang & Prosterman, *supra* note 4, at 45. Experts believe official reports underestimate and the true number of incidents is actually much higher. See Esther Pan, *China’s Angry Peasants*, Council on Foreign Relations, Background (Dec. 15, 2005) available at <http://www.cfr.org/publication/9425/> (last visited Mar. 29, 2008). Statements by Vice-Minister Liu Jinguo at a November 2006 press conference indicate that incidents of “mass unrest” handled “by police” have declined 16.5 percent in 2006, available in *Chinese* at <http://www.chinapeace.org.cn/wszb/20061106/wz.htm> (last visited Mar. 29, 2008). However, the definition of “mass unrest” with police involvement is not clear. As a result, meaningful comparisons among official estimates since 2005 have become difficult to make.

⁶ From 1977 and through most of the 1980s Deng Xiaopeng served as head of the Chinese Communist Party. Although he did not hold any of the highest ranking governmental posts, Deng was the most powerful Chinese leader since Mao Zedong. See generally GUTHRIE, *supra* note 3, at 37-38.

⁷ Frank Xianfeng Huang, *The Path to Clarity: Development of Property Rights in China*, 17 COLUM. J. ASIAN L. 191, 192 (2004). See also Article 3 of the Revised Land Administration Law which provides: “[m]ost sparing and rational land utilization and earnest protection of cultivated land constitute China’s basic state policy.” 1998 Revised Law of the P.R.C. on Land Administration (also known as Land Management Law), adopted 16th SCNPC, 6th Session (1986), amended 9th SCNPC 7th Session, revised 9th SCNPC 4th Session, Eng. transl. available at www.Chinalaw.gov.cn, path select English/select Laws & Regulations/search title Land Administration Law (last visited Mar. 29, 2008). [hereinafter Revised LAL].

⁸ Article 13 of the P.R.C. Constitution now provides: “The State protects the right of citizens to own lawfully earned income, savings, houses and other lawful property. . . .” Other 2004 amendments include a reference to respect human rights, art. 24; encouragement in development of non-public sectors of the economy, art. 21; and a constitutional requirement to provide compensation for land expropriation and requisition, art. 13. XIAN FA art.13, 21, 24 2004 (P.R.C.). Official Eng. transl. available at P.R.C. National People’s Congress website, <http://www.npc.gov.cn/zgrdw/english/constitution/constLink.jsp> (last visited Mar. 29, 2008).

⁹ Because the Chinese Constitution is a non-justiciable document, it cannot be used as the basis of a lawsuit. Rather, implementing legislation which embodies the constitutional principle must be passed before the principle can be enforced. Donald

private property rights is a clear signal of the importance of this issue to the Chinese leadership. Further, to implement constitutional changes, Chinese legislators were tasked with drafting a new comprehensive law on property rights. Drafts of the law underwent extensive review, and the public was given the chance to view and submit comments.¹⁰ It was reviewed by the National People's Congress (NPC) an unprecedented seven times before the NPC finally agreed upon a final draft and it came into force October 1, 2007.¹¹ Legal reform of the property structure, in a transitional economy of a socialist state, with a population exceeding 1.3 billion, is no small task. This paper attempts to demonstrate the complexities involved in such an endeavor through an evaluation of land tenure security for China's rural population.

Legal reform has provided a strong framework for establishing that security. Its successes and failures will be evaluated and suggestions for further legal reform will be offered. However, legal reform alone cannot ensure peasant land tenure security. The law cannot be divorced from the political and economic forces that drive it. Land tenure security must be considered in the context of China's political and economic institutions as well as its practical realities. In that sense, an evaluation of the peasant land tenure system is an evaluation of those political and economic institutions.

Section II of this paper will begin with an outline of China's legal institutions, legal hierarchy, and discuss the fundamental principles of China's socialist system of public land ownership. It will then provide an historical review of China's property ownership shifts from the Mao era through the beginning of the current reform era that have created ambiguity and left the law open to abuse. Section II will then establish the context of this analysis in terms of the economics and politics beginning in the 1980s that caused China's irrational development of rural land and threatens the land tenure security of its enormous rural population. Section III will discuss the goals, achievements and failures of the reform era legislation in safeguarding peasants' interests, focusing, in part, on the issues of land readjustments. Section IV will focus on expropriations and suggest that

Clarke, *What's Law Got to Do With It? Legal Institutions and Economic Reform in China* 10 UCLA P. BASIN. L.J. 1, 27-28 (1991). See *infra* Sec. II.A. See also Dingjian Cai, *The Development of Constitutionalism in the Transition of Chinese Society*, 19 COLUM. J. ASIAN L. 1, 13-15 (2005) where the author discusses the potential of the P.R.C. Constitution ((see *supra* note 8) to form the basis of constitutional claims.

¹⁰ On July 10, 2005, the Standing Committee of National Peoples' Congress ("SCNPC") publicized the full text of a draft property to solicit opinions from the public. In 40 days, it received over 11,543 comments. See NPC, *NPC Adopts Draft Property Law*, available at <http://www.10thnpc.org.cn/english/20071h/203173.htm> (last visited Mar. 29, 2008).

¹¹ Property Rights Law of the People's Republic of China, 5th Sess. 10th NPC, 16 Mar 2007 [hereinafter *New Property Law*], transl. John Jiang, Babel.com (Mar. 2007) available at www.cclaw.net (last visited Mar. 29, 2008).

the goal of land tenure security will be better achieved when implementation of existing law becomes a priority for the party at local levels. Expropriation in China in its current stage of development will be compared to expropriations in the United States during its nineteenth century development. There are some broadly based similarities, but the pace and irrationality of China's land development has put it in a far more precarious position. The circumstances considered in the "public interest" to expropriate land and the inadequacies in valuation and distribution mechanisms for "compensation" will be discussed. Section V will discuss the remedies available to the dispossessed landowners and illustrate, in a few specific cases, the promises that the reform era has failed to fulfill.¹²

While this paper suggests additional reform measures, it also recognizes that the current law has the potential to achieve a significant measure of land tenure security for China's peasants. However, the law's ability to reach that potential depends entirely on its proper implementation and enforcement.

II. LEGAL AND HISTORICAL BACKGROUND

A. *Legal Institutions and the Hierarchy of Law*

The Chinese Constitution is the highest source of law in the country.¹³ It was adopted in December 1982 and amended four times in 1988, 1993, 1999 and 2004.¹⁴ It establishes the framework of the Government, codifies the general principles of government and society, and lists the fundamental rights and duties of the people of China.¹⁵ Its preamble clearly articulates supremacy of Chinese Communist Party (CPC) leadership.¹⁶ It states, in part, "[u]nder the leadership of the Communist Party of China and the guidance of Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory . . . the Chinese people of all nationalities will continue to adhere to the people's democratic dictatorship . . ."¹⁷ Laws

¹² See, e.g. the case discussed in Eva Pils, *Land Disputes, Rights Assertion, and Social Unrest in China: A Case from Sichuan*, 19 COLUM. J. ASIAN L. 235, 284-85 (2005).

¹³ XIAN FA, *supra* note 8, preamble. See, e.g., Albert HY Chen, *A Brief Introduction to the Legal System of the Peoples Republic of China*, available at <http://faculty.cua.edu/fischer/ComparativeLaw2002/bauer/China-main.htm>. Amendments to the Constitution require a special 2/3majority of the NPC; XIAN FA art. 64, *supra* note 8.

¹⁴ Chen, *supra* note 13. See also website: The National People's Congress of the People's Republic of China: Constitution. http://www.npc.gov.cn/englishnpc/Constitution/node_2825.htm.

¹⁵ *Id.* Chen, *supra* note 13.

¹⁶ *Id.*

¹⁷ XIAN FA, , *supra* note 8, preamble; Chen, *supra* note 13.

must theoretically be consistent with the Constitution,¹⁸ however, in reality, the CPC is regarded as the supreme authority in China and a constitutional principle can be overruled (or ignored) if there is a conflict between it and the CPC.¹⁹ Because the Constitution is not justiciable, it is regarded by some scholars to be more of a policy statement than a law.²⁰

The State Council is another term for the Central People's Government, the supreme administrative organ of state power or executive branch,²¹ currently comprising 27 ministries.²² Its ministers are all high ranking members of the CPC.²³ The Council has the authority to issue government directives and their implementing regulations²⁴ and these directives have legislative effect. An official Chinese Government internet site states: "[i]n terms of law, administrative regulations are lower in position than the Constitution and other statutes, but higher than local ordinances and regulations and effective for the entire country."²⁵

The legislative branch of government is the National Peoples Congress (NPC).²⁶ Law that applies to the entire country is passed by it or its per-

¹⁸ XIAN FA, , *supra* note 8, art. 4; Chen, *supra* note 13.

¹⁹ See, e.g., Hal Blanchard, *Constitutional Revisionism in the PRC: "Seeking the Truth from Facts"*, 17 FLA. J. INT'L L. 365, 374 (2005) (discussing of the function of the PRC Constitution, the changing role of the CPC and an argument that the CPC is seceding some of its traditional power to a unique brand of Chinese constitutionalism and rule of law.) Nonetheless, the author also states "in China the CPC itself establishes the social agenda in its role as vanguard of the people. Currently, this agenda consists of four cardinal principles: the leadership of the Communist Party, adherence to the socialist cause, the dictatorship of the proletariat, and devotion to Marxism-Leninism-Mao Zedong thought. No constitutional amendment may violate any of these principles." *Id.*

²⁰ The Constitution is "regarded as more of a political-philosophical declaration than a set of legally binding norms." *Id.* at 367. See also Clarke, *supra* note 9; Cai, *supra* note 9, at 13; *Property Rights in China, China's Next Revolution*, ECONOMIST, Mar. 8 2007 (where the author states "the constitution is less a prescriptive document than a constantly changing description of what has just happened").

²¹ XIAN FA, *supra* note 8, art. 85, 89,.

²² Ministries and Commissions under the State Council, *available at*, http://english.gov.cn/2005-08/05/content_20741.htm (last visited Mar. 30, 2008).

²³ See *id.* See also, *Who's Who of China's Leadership*, China Internet Info C. *available at* <http://www.china.org.cn/english/features/leadership/86673.htm> (last visited Apr. 15 2007).

²⁴ XIAN FA, *supra* note 8, art. 89 §1.

²⁵ China Internet Info C., <http://www.china.org.cn/english/kuaixun/76340.htm#d1> (last visited Apr. 15, 2007).

²⁶ The NPC and SCNPC exercise the legislative power of the state and the NPC is a supreme organ of state power. XIAN FA, *supra* note 8, art. 57, 58.

manent body, the Standing Committee of the NPC (SCNPC).²⁷ The SCNPC also enacts subsidiary regulations and rules.²⁸ There exists a hierarchy in law which includes three levels: fundamental law (the Constitution), basic law, and specifically enacted law. Basic laws must be enacted by the entire NPC and provide a general framework for more specific enactments.²⁹ Specifically enacted laws are those that deal with a specific area, such as land administration or economic contracts, and can be enacted by the SCNPC.³⁰ Additionally, and occupying a lower level of the hierarchy, are local laws that can be passed by local People's Congresses and local administrative rules made by local administrative bodies.³¹

In two decades of reform the SCNPC has enacted about seven hundred new laws.³² These include numerous specific pieces of legislation dealing with such topics as labor practices, company law, enterprise law, intellectual property law, marriage law, and others.³³ One of the most extensive pieces of reform era legislation adopted by the NPC was the 1986 General Principles of Civil Law of the People's Republic of China (GPLC).³⁴ It clarified the scope of the civil law and is the foundation for specific laws dealing with personal and property law.³⁵ A number of specific laws dealing with land have also been enacted. They include the 1986 Land Administration Law (LAL)³⁶ and its 1988,³⁷ 1998,³⁸ and 2004³⁹ revisions and the 2002 Rural Land Contracting Law (RLCL).⁴⁰ Because legal reform did not occur in a single sweep, these laws and their amendments

²⁷ The SCNPC may enact all laws except those requiring enactment by the entire NPC. XIAN FA, *supra*, note 8, art. 67. See Chen, *supra* note 13.

²⁸ XIAN FA, *supra* note 8, art. 67.

²⁹ *Id.* art. 62 §3.

³⁰ *Id.* art. 67 §2.

³¹ Local laws and administrative rules cannot contravene other laws or the Constitution. *Id.* art. 100.

³² GUTHRIE, *supra*, note 3, at 67.

³³ *Id.* at 54-57, 66-71, 80-81, 88.

³⁴ General Principles of the Civil Law of the P. R. C., 6th NPC, 4th Sess. Apr. 12, 1986. Off. Eng. transl. *available at* www.Chinalaw.gov.cn; path select English/select Laws & Regulations/search title Civil Law (last visited Mar. 30, 2007).

³⁵ Chen, *supra*, note 13.

³⁶ Law of the P.R.C. on Land Administration, 6th SCNPC, 16th Session (1986) [hereinafter LAL]. Eng. transl. *available at* www.Chinalaw.gov.cn, path select English/select Laws & Regulations/search title Land Administration Law (last visited Mar. 30, 2008)

³⁷ *Id.*

³⁸ Revised LAL, *supra* note 7.

³⁹ Law of the P.R.C. on Land Administration, 10th SCNPC, 2nd Sess. (2004) [hereinafter 2004 Revised LAL]

⁴⁰ Law of the P.R.C. on Contracting of Rural Land, 9th SCNPC 29th Sess. (2002). [hereinafter RLCL] Eng. transl. *available at* http://english.gov.cn/2005-10/09/content_179389.htm (last visited Mar. 28, 2008).

were enacted at different times as it became necessary to deal with different issues. Unfortunately, the existence of numerous sources of law creates complexities. This is especially so because it is not always clear from the title of the law which body enacted it. Its position in the hierarchy can only be determined by looking into its enactment history. The New Property Law will not remove the complexities. As a general law, it provides the framework for future subsequent legislation. Pursuant to Article 8 of the New Property Law, provisions of specifically enacted laws apply even if those provisions provide otherwise than provisions of the New Property Law.⁴¹ It appears that this applies even to legislation enacted prior to the New Property Law.⁴²

B. *Fundamental Principles of China's Socialist Public Land Ownership*

China follows a system of socialist public ownership. The Constitution states “[t]he 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.”⁴³ Article 10 of the Chinese Constitution reads:

Land in the cities is owned by the state. Land in the rural and suburban areas is owned by collectives except for those portions which belong to the State as proscribed by law; house sites and privately farmed plots of cropland and private hilly land are also owned by collectives.⁴⁴

Thus, rural and suburban land is owned by the collective unless state ownership is proved.⁴⁵ Unfortunately, the collective is vaguely defined in Chinese law (leading to fierce disputes).⁴⁶ Generally, collective land is publicly owned by rural township collective entities, village collective entities, or smaller collective units that do not amount to entire villages.⁴⁷ Farmers of the towns, villages, and smaller areas are members of the agricultural collectives.⁴⁸

According to Article 10, all urban land is owned by the state and cannot be owned by the collective. Nonpublic entities can only possess the right to use publicly owned land and these rights are subject to a number of limitations and restrictions.⁴⁹ Four constitutional revisions have left

⁴¹ Article 8 provides: “Where there are laws stipulated otherwise in respect of property rights, such laws shall be observed.” New Property Law, *supra* note 11.

⁴² *Id.*

⁴³ XIAN FA, *supra* note 8, art. 6.

⁴⁴ XIAN FA, *supra* note 8, art. 10.

⁴⁵ XIAN FA, *supra* note 8, art. 10; PETER HO, *Institutions in Transition, Land Ownership, Property Rights and Social Conflict in China* 24 (2005).

⁴⁶ *Infra* Sec. III.D. (discussing the vague definition of the collective in more detail).

⁴⁷ HO, *supra* note 45, at 27-32.

⁴⁸ *Id.*

⁴⁹ *Id.* at 24; *infra* Sec. III.B. & Sec. III.C. (discussing limitations).

these fundamental principles of the system of socialist public ownership unchanged.⁵⁰ In sum, land rights can be divided into state ownership of land, collective ownership of land, the right to use state owned land, and the right to use collectively owned land.

C. *The Reform Era*

China has a long history of social upheaval as a consequence of peasant dissatisfaction with land tenure arrangements.⁵¹ In fact, it was Mao's recognition of the peasant's revolutionary potential that led to the overthrow of the nationalist forces and the 1949 declaration of victory of the Chinese Communist party (CPC).⁵² Once in power, the CPC ended the reign of the rural elite and did away with any property rights structure that existed under imperial and republican eras.⁵³ The existing institutional structure of land ownership was destabilized and land was expropriated.⁵⁴ At first this occurred in a relatively rational manner with little social disruption where rich peasants were allowed to keep some of their land.⁵⁵ Former landlords (whose property had been expropriated) were given enough land to make a living and land was distributed to farming households on an egalitarian basis.⁵⁶ In the mid 1950s, Mao introduced communal farming in an effort to increase farm yields.⁵⁷ Landowning households were forced to surrender their land.⁵⁸ Rural land was reorganized into village communes.⁵⁹ Individual farmers were allocated a proprietary right to the produce of the communal plot, and were also

⁵⁰ Huang, *supra* note 7, at 201-02.

⁵¹ Shu-Ching Lee, *Agrarianism and Social Upheaval in China*, 56 AM. J. SOCIOLOGY 511, 511-18 (1951).

⁵² *See id.*; In addition to peasant involvement in Mao's revolution, the overthrow of the Qing Dynasty in 1911 was successful, in part, due to peasant dissatisfaction. HO, *supra* note 45, at 5, 6. In 1911, the harvests failed in central China causing distress among the peasants. A heavily taxed wealthier class was also unhappy. Powerful military leaders had been snubbed by the imperials. These three segments of society were briefly united under Dr. Sun Yat Sen to remove the Qings. This was followed by a period of feuding warlords (1912-27), a period of Nationalist Party control (1927-49), and the period of Japanese occupation (1937-45). *See generally* GUTHRIE, *supra* note 3, at 77. Communist ideology was spread through mass campaigns delivered in the country sides. *See generally id.* at 28.

⁵³ HO, *supra* note 45, at 5,6.

⁵⁴ *Id.* at 5-6.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*; Ping Li, *Rural Land Tenure Security Reforms in China: Issues, Regulations and Prospects for Additional Reform, Land Reform, Land Settlement and Cooperatives* 59 (spec. ed., RDI 2003/3), available at http://www.rdiland.org/RESEARCH/Research_Publications.html (last visited Mar. 29, 2008).

⁵⁸ HO, *supra* note 45, at 5-6.

⁵⁹ *Id.*

permitted to retain a small private lot.⁶⁰ Subsequently, during the Cultural Revolution, expropriation became radical and violent.⁶¹

Under Mao's system, agricultural ownership rights were divided among three collective units: the people's commune (2,000 to 20,000 households), the production brigade (usually a village, 200-400 households), and the production team (20 to 40 households).⁶² For a few years, it was unclear if the brigade or the team was the primary holder of ownership rights.⁶³ The hierarchy was clarified in the 1962 Work Regulations for Rural People's Communes, known as the Sixty Articles.⁶⁴ Under these regulations, the production team was the primary owner, manager, and accounting unit of the land.⁶⁵ However, the state remained in control of transfer of rights, determined the crops to be cultivated, and set prices. The collective simply organized production according to state directives.⁶⁶ The rural population was bound to the land, unable to transfer ownership rights, and prohibited from migrating.⁶⁷ As a result, there was little incentive to make capital improvements to the land, agricultural output was very low and farmers lived in poverty.⁶⁸

The Chinese Government was dissatisfied with the low agricultural output and concerned about extreme poverty among the rural population.⁶⁹ In 1978 Deng Xiaoping revealed his economic plan to gradually institute economic reforms while maintaining the communist state apparatus.⁷⁰ At that time China's economy was suffering from a decade of stagnation and the disastrous consequences of the Cultural Revolution.⁷¹ Deng's initial challenge was to motivate labor and farmers to produce a larger surplus, to eliminate rural poverty, and to get the nation back on track following

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*; see also *Government and Politics: China: The Commune System*, available at <http://www.columbia.edu/itc/eacp/japanworks/china/gov/communes.htm>.

⁶³ *Id.* at 27.

⁶⁴ *Id.*

⁶⁵ *Id.* at 5, 6.

⁶⁶ *Id.*

⁶⁷ To prevent the migration of individuals between urban and rural areas, the state instituted the household registration system (known as the *hokou* system). Chinese citizens were forced to live where their household registration was. Prior to 1978 this was a "birth-subscribed" status. Once assigned a registration, individuals were unable to change it. GUTHRIE, *supra* note 3, at 209.

⁶⁸ In 1978 annual per capita net income in rural areas was 133.6 yuan (about \$16.25). Because individuals were dependent upon the state for provision of goods, this low per capita income overstated the poverty to some extent. Nevertheless, the rural population was, by any standard, extremely poor, *Id.* at 44.

⁶⁹ *Id.*

⁷⁰ His vision was shared at the Third Plenum of the Eleventh Central Committee of the Communist Party of China in December 1978. *Id.* at 38.

⁷¹ *Id.*

the Cultural Revolution. He promoted modernization and re-engagement with the world while incrementally abandoning state controls.⁷² China's leadership was tasked with creating incentives to increase agricultural production; developing a decentralized system to give a measure of autonomy to local economies while retaining a planned economy; addressing the social security system; developing a private economy; and attracting foreign investment.⁷³ To reach these objectives, it was necessary to create a rational economic process which included the dismantling of the structure of the rural communes.⁷⁴

In 1978 the era of rural land reform was ushered in with the implementation of the Household Responsibility System (HRS).⁷⁵ Although the commune system was dismantled, a three-tiered structure was maintained.⁷⁶ The commune became the township, the brigade became the administrative village and the production team became the natural village or villagers' group.⁷⁷ Under the HRS, land-use rights were contracted to individual households.⁷⁸ The state continued to issue directives, but farmers were required to produce only a certain quota to be sold to the state at fixed prices.⁷⁹ Any surplus could be sold on the open market.⁸⁰ By 1984, farmers were given 15 year contractual land-use terms.⁸¹ The amount of land contracted was, in principle, based upon household size.⁸² As household sizes changed, the land allocations were readjusted.⁸³ These reforms were hugely successful in increasing agricultural output and alleviating rural poverty.⁸⁴ They generated sources of income to rural households and increased grain output from 305 to 405 million tons between 1978 and 1984.⁸⁵ These successes resulted in widespread support for the Deng reforms.

⁷² *Id.* at 37-38.

⁷³ *Id.* at 42.

⁷⁴ *Id.* at 66.

⁷⁵ See generally Keliang & Prosterman, *supra* note 4, at E para 8.

⁷⁶ Ho, *supra* note 45, at 28, 30.

⁷⁷ *Id.*

⁷⁸ Huang, *supra* note 7, at 216.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* In 1993, land use terms were extended by official policy to 30 years. See Samuel Ho & George Lin, *Emerging Markets in Rural and Urban China: Policies and Practices*, 175 *THE CHINA QUARTERLY* 681, 689-690 (2003). The policy was subsequently enacted into law as Article 14 of the Revised LAL. See Revised LAL, *supra* note 7 at art. 14.

⁸² Li, *supra* note 57 at 1.

⁸³ *Id.*

⁸⁴ GUTHRIE, *supra* note 3, at 44, 45; Keliang & Prosterman, *supra* note 4.

⁸⁵ GUTHRIE, *supra* note 3, at 44, 45.

D. *Land Seizure, Decentralization, and Loss of Agricultural Land*

Prior to the introduction of the HRS there was little demand for rural land for residential construction.⁸⁶ But when the HRS brought a wave of prosperity to rural communities, demand for better housing caused large amounts of rural land to be used for residential building.⁸⁷ With a rising Chinese middle class in urban areas, demand for better housing saw the rapid development of rural land for residential use by the urban population as well.⁸⁸ In the real estate boom much rural land was overtaken by urban sprawl as cities continued to expand and encroach upon rural land.⁸⁹ A major cause of the loss of agricultural land has been the conversion of farmland to non-agricultural land.⁹⁰

It is in the economic and political interest of both the townships and counties to develop land.⁹¹ This became particularly apparent in the 1990s when the Central government exerted pressure on provincial governments to find alternative sources of revenue.⁹² Local governments expropriated land and sold usage rights to developers, often profiting handsomely.⁹³ The financial pressures of decentralization along with the promise of substantial economic gain triggered an enormous growth of development zones in former rural areas and use of rural land for construction.⁹⁴ Cheap land and cheap labor had the potential to bring in developers and raise much needed revenue for cash starved provinces.⁹⁵ The economic successes of villages, towns and provinces translated into political clout for their leaders.⁹⁶ The politics and economics of decentralization produced a system that dictated development of agricultural land regardless of actual need.⁹⁷

⁸⁶ Ho & Lin, *supra* note 81, at 693.

⁸⁷ *Id.*

⁸⁸ Ho, *supra* note 45, at 32-33.

⁸⁹ *Id.*

⁹⁰ *Id.* at 1, 25; see Ho & Lin, *supra* note 81, at 693.

⁹¹ See Pamela Phan, *Enriching the Land or the Political Elite? Lessons from China on Democratization of the Urban Renewal Process*, 14 PAC. RIM L. & POL'Y J. 607, 615-18 (2005).

⁹² *Id.*

⁹³ Pils, *supra* note 12, at 246-47.

⁹⁴ See Phan, *supra* note 91, at 617; see also *id.* at 245-46.

⁹⁵ See Pils, *supra* note 12, at 246; see generally Xiaolin Guo, *Land Expropriation and Rural Conflicts in China*, 17 THE CHINA QUARTERLY 422, 428 (June 2001).

⁹⁶ Phan, *supra* note 91.

⁹⁷ China has greater than 97 million square meters of idle property, with 57 million meters of that residential, yet 25 to 50 percent of local city revenue is generated from land development. *Id.* at 617. See also National Bureau of Statistics of China, *The Real Estate Climate Index Declined in December 2004*, http://www.stats.gov.cn/english/newsandcomingevents/t20050308_402233616.htm. Income from land sales constitutes 20 to 30 percent of county revenue and 80 percent of township revenue. Guo, *supra* note 95.

The government, concerned about the loss of farming land, developed land utilization plans and set quotas for the amount of rural land permitted for construction.⁹⁸ Despite these plans, because of the ambiguous boundary delineations, it was not uncommon for collective land to be bought and sold without legal transfer of ownership to the state (theoretically, only the state can grant land use rights to private developers).⁹⁹ In other cases rural land was occupied for non-agricultural purposes without gaining the necessary approval or by approval obtained by fraud.¹⁰⁰

The use of rural land for construction was controlled by a hierarchal approval system, at a town, county, or provincial level depending upon the amount of land to be used.¹⁰¹ The profits from conveyance of the expropriated land to the developer were shared among the different levels of government. Officials more senior in the hierarchy could not be relied on to ensure that excessive amounts of land were not converted for use.¹⁰² It was also easy for lower level officials to get around the approval process by dividing larger projects into smaller ones to stay within the quotas.¹⁰³ These manipulations led the State Council to order a prohibition¹⁰⁴ on use of primary farmland for construction. Subsequently, in 1998, the LAL underwent a major revision establishing “[m]ost sparing and rational land utilization and earnest protection of cultivated land constitute China’s basic state policy.”¹⁰⁵ The 1998 Revised LAL replaced the hierarchal approval system with one requiring approval at either the provincial or State Council level.¹⁰⁶ Further, it strictly limited the amount of agricultural land permitted to be converted to use for construction and provided that the total amount of cultivated land could not be reduced.¹⁰⁷ It is still possible to circumvent the rules, however, by falsely classifying

⁹⁸ The requirements to develop land utilization plans and set quotas were legislatively mandated in the 1986 LAL, *supra* note 36; Ho & Lin, *supra* note 81, at 693.

⁹⁹ Ho, *supra* note 45, at 32-33; Patrick Randolph, *Thoughts on Chinese Property Law: Integrating Private Property Into a Socialist Governmental Structure*, Presentation to AALS Prop. and Env. Law Conf., Portland, Or. (2004), available at <http://aalsweb.aals.org/midyear2004/randolph.pdf> (last visited Mar. 29, 2008); see *infra* Sec III.C. (discussing the two mechanisms for state grants, allocation and conveyance).

¹⁰⁰ See Ho & Lin, *supra* note 81, at 696.

¹⁰¹ *Id.* at 694.

¹⁰² See generally *id.* at 694.

¹⁰³ *Id.*

¹⁰⁴ State Council Order No. 162 of Aug. 18, 1994, available at <http://faolex.fao.org/docs/texts/chn23948.doc>. (last visited Mar. 30, 2008).

¹⁰⁵ Revised LAL art. 3, *supra* note 7; see Ho & Lin, *supra* note 81, at 695.

¹⁰⁶ Revised LAL art. 45 (3), *supra* note 7.

¹⁰⁷ Revised LAL art. 34, *supra* note 7.

land.¹⁰⁸ Despite these reforms, seizures continue at a staggering pace resulting in significant rural discontent and even violence.¹⁰⁹ These often include expropriations of rural land ostensibly for public use, but in reality for development use in the commercial sector.¹¹⁰ Powerful local party officials are induced by local economic development to the point that their interests are often not aligned with central reforms.

III. REFORM UNDER THE REVISED LAND ADMINISTRATION LAW, RURAL LAND CONTRACTING LAW AND THE NEW PROPERTY LAW

Consistent with the underlying socialist ideology of public land ownership, agricultural land is owned by agricultural collectives.¹¹¹ Peasants cannot own land, and hold only a contractual right to use agricultural land.¹¹² The goal of rural land reform, as stated by the Central Committee¹¹³ of the CPC, is to provide farmers with “long-term secure land use rights.”¹¹⁴ Without secure land rights, there is little incentive for farmers to invest in land.¹¹⁵ Because there are reported cases of farmers returning home to find a developer tearing into his plot of land, one can understand why farmers are reluctant to invest in, for example, crop diversification or implement efficient agricultural techniques.¹¹⁶ Without such investment, however, China’s farmers will remain competitively dis-

¹⁰⁸ Ho & Lin, *supra* note 81, at 695. (The authors cite an example of one village classifying poor land as “primary farmland,” and “primary farmland” with good development potential as poor land.) *Id.* at n. 39.

¹⁰⁹ Keliang & Prosterman, *supra* note 4. A deputy minister, in China’s Office of the Central Leading Group on Financial and Economic Affairs, reportedly said that disputes regarding land seizures accounted for half of the rural unrest in China in 2006. *Land Seizures Main Cause of Social Unrest*, ASIANNEWS.IT, Jan. 31, 2007, <http://www.asianews.it/index.php?l=en&art=8366&geo=33&size=A> (last visited Mar. 28, 2008).

¹¹⁰ See Phan, *supra* note 91; see also Pils, 284-285 *supra* note 12.

¹¹¹ XIAN FA, *supra* note 8, art. 10.; Revised LAL art. 8, *supra* note 7.

¹¹² Revised LAL art. 14, *supra* note 7.

¹¹³ The Central Committee is the highest body of the CPC that meets between CPC Congresses (CPC Congresses meet every five years). See Intl. Dept. of CPC, Communist Party of China in Brief, <http://www.idcpc.org.cn/english/cpcbrieff/cpcbrieff.htm> (last visited Mar. 28, 2008) PRC President Hu Jintao is the General Secretary of the Central Committee of the CPC and Premier of the State Council, Wen Jiabao, as well as other State Council Ministers, are also high ranking members of the Central Committee. *Who’s Who of CPC Leadership*, *supra* note 23.

¹¹⁴ Decision of the Third Plenary Session of the 15th Central Committee, *discussed in* Brian Schwarzwald, Roy Prosterman, Ye Jianping, Jeffrey Riedinger & Li Ping, *An Update of China’s Rural Land Tenure Reforms: Analysis and Recommendations Based on a Seventeen-Province Survey*, 16 COLUM. J. ASIAN L. 141, , 175 (2002).

¹¹⁵ See *id.*; Keliang and Prosterman, *supra* note 4, at 45.

¹¹⁶ *Id.* at 45.

advantaged relative to agricultural producers of other countries who invest in their land to increase productivity and efficiency with the assurance that their investment will reap benefits.¹¹⁷ For example, in Taiwan's land to tiller program of the 1950s annual rice yields increased sixty percent when peasants were given secure land rights.¹¹⁸ It has also been suggested that the economic benefit to China's rural population, provided by secure land rights, could release a giant consumer market of some 780 million peasants with the power to purchase consumer goods.¹¹⁹

A. *Achievements of Reform Era Legislation*

Irrespective of the underlying land ownership system, security can be measured in terms of the quantity and quality of the land rights, the duration of those rights and the assurance that those rights are free from interference.¹²⁰ Farmers' land use rights, judged by these criteria, were strengthened with the 1998 revision to the LAL.¹²¹

Specifically, the 1998 revisions lengthened contractual land use terms to thirty years, prohibited land readjustments (changes in plot sizes) and required written contracts be issued to individual farming households.¹²² The purpose of the written contract is to document important contractual land use rights such as duration of land use-terms.¹²³ Prior to this, there existed no requirement, even as a matter of policy, for written contracts specifying such an important right.¹²⁴ The issuance of written contracts has strengthened farmers' confidence in the security of their land-use rights.¹²⁵ The more secure in his land rights, the more likely the farmer is to invest in capital improvements.¹²⁶ In fact, a large scale survey study

¹¹⁷ *See id.*

¹¹⁸ *Id.* Taiwan's Land to tiller program took place in three phases. In phase one farmers were given lower rents in phase two farmers were permitted to buy the land at reduced rates, and in phase three, some farmers were forced to sell part of their land to an additional 166,000 new farmer landowners. There was a 64percent decrease in land tenancy and over 450,000 land owners were created. Taiwan Agricultural Information Center, *Economic Achievement: Land Reform*, <http://taiwan-agriculture.com/taiwan/rocintro4.html> (last visited Mar. 28, 2008).

¹¹⁹ *Id.* As the authors point out, broadening of the consumer base and increase in consumer occurred on a smaller scale in China following the breaking up of collective farms and the granting of limited individual land rights under the household responsibility system. Keliang & Prosterman, *supra* note 4.

¹²⁰ *Id.* at note 28.

¹²¹ Revised LAL, *supra* note 7.

¹²² *Id.*

¹²³ Li, *supra* note 57, at 61.

¹²⁴ *Id.*

¹²⁵ Shwarzwalder et al., *supra* note 114, at 175.

¹²⁶ *See id.*; see also Guo Li, Scott Rozelle & Jikun Huang, *Land Rights, Farmer Investment Incentives, and Agricultural Production in China*, ARE Working Paper,

undertaken by the Research Development Institute (RDI)¹²⁷ found that households with documented land-use rights have more than tripled their investment in the land compared to households that have not been issued the legally required contract documents.¹²⁸ Another study suggested that longer land terms resulted in an increased use of fertilizer and bolstered production.¹²⁹

A watershed event occurred in 2002 when the SCNPC enacted the RLCL. This was the first piece of legislation to deal exclusively with rural land tenure and stood as the most important legal breakthrough in rural reform since the adoption of the HRS in 1978.¹³⁰ Like the Revised LAL, the RLCL also mandates the rational use of land and protection of cultivated land.¹³¹ It also explicitly provides a number of important transaction rights. Article 16 of the RLCL gives peasants the right “to reap the yields and to circulate the right to land contractual management, and the right to make their own decisions regarding the arrangements for production and operation as well as the disposition of the products.”¹³² Prior to RLCL, the Revised LAL permitted transactions “in accordance with law.”¹³³ Farmers believed they had the right to transfer or assign their land to both villagers and non-villagers.¹³⁴ Households exchanged plots to consolidate holdings or sub-contracted plots for a season when farmers moved to work in nonagricultural sectors.¹³⁵ This was an opaque area of law, endemic in the early reform era, and no law existed that provided any guidance on the types of transactions permitted.¹³⁶ In the absence of law, informal practices prevailed among the local residents.¹³⁷ Generally, land transfers were based on a mutual understanding, without compensation, where the transferee assumed the tax and fee obligations and did not require approval of the collective owner.¹³⁸ The RLCL has since provided clarity and legality to transactions that had become commonplace

Dept. of Agric. & Resource Eco. Univ. Calif. Davis (2000), available at <http://repositories.cdlib.org/are/arewp/00-024/>.

¹²⁷ Shwarzwalder et al., *supra* note 114, at 175.

¹²⁸ *Id.* at 182. Although the RLCL requires the issuance of contracts, only 40 percent of farmers surveyed indicated they had actually been issued the contracts. *See id.*

¹²⁹ Guo Li et al., *supra* note 126, at 15.

¹³⁰ Li, *supra* note 57, at 61.

¹³¹ Article 8 of the RLCL provides “the rational development and sustainable use of land resources shall be maintained.” RLCL, *supra* note 40, art. 8.

¹³² RLCL *supra* note 40, art. 16.

¹³³ Revised LAL, *supra* note 7, art. 2.

¹³⁴ Shwarzwalder et al., *supra* note 114, at 171; Li, *supra* note 57, at 65.

¹³⁵ Ho & Lin, *supra* note 81, at 691.

¹³⁶ *Id.*; Li, *supra* note 57, at 65.

¹³⁷ *Id.*

¹³⁸ *Id.*

in rural communities.¹³⁹ Many transactions are permitted provided they do not change ownership of the land, alter the use of the land or extend rights beyond the contractual period.¹⁴⁰ Specifically, farmers can transfer land-use rights to other village households, lease land to non-village households, or exchange, assign or transact by other means in accordance with law provided that the land remains used for agricultural purposes.¹⁴¹ Because farmers are permitted to transfer outside of the collective unit, a weak secondary market has developed for agricultural land.¹⁴²

Farmers are also given homestead rights to possess and use the land owned by the collective to construct a dwelling unit and ancillary facilities.¹⁴³ The Revised LAL provides “one homestead per family.”¹⁴⁴ Homestead residents can sell or lease their dwelling units, but once sold or leased, the resident will not be allotted another homestead site (homestead residents, however, are free to swap homesteads).¹⁴⁵ Homestead rights are inheritable, but can also be reclaimed by the collective in certain circumstances, for example, if the dwelling house has been abandoned for two successive years or if the residents fail to restore the house within two years after its destruction.¹⁴⁶

B. Assurance of Rights: Prohibiting Land Readjustments

Under the HRS, a significant obstacle to land tenure security is the frequent adjustment of plot size.¹⁴⁷ Local officials frequently carry out readjustments of plot sizes for such reasons as changes in household size¹⁴⁸ or in redistributions as compensation for land expropriation for development elsewhere in the collective.¹⁴⁹ This contributes to land frag-

¹³⁹ *Id.* at 62; see also RLCL, *supra* note 40, art. 32..

¹⁴⁰ RLCL, *supra* note 40, § V.

¹⁴¹ RLCL, *supra* note 40, art. 32.

¹⁴² Ho & Lin, *supra* note 81; see *e.g. infra* notes 258-67 and accompanying text (discussing a secondary market transaction in rural land-use rights).

¹⁴³ Revised LAL, *supra* note 7, art. 8; New Property Law, *supra* note 11, art. 152.

¹⁴⁴ Revised LAL, *supra* note 7, art. 62.

¹⁴⁵ *Id.*

¹⁴⁶ 1995 Provisions on Affirming Land Ownership and Land Use Rights art. 52, noted in Joyce Palomar, *Land Tenure Security as a Market Stimulator in China*, 12 DUKE J. COMP. & INT'L. L. 7, 37 at n. 29 (2002).

¹⁴⁷ Li, *supra* note 57, at 60-61; Fu Chen & John Davis, *Land Reform In Rural China Since the Mid-1980s*, SDdimensions: Land Reform 1998/2, available at <http://www.fao.org/sd/LTdirect/landrf.htm>.

¹⁴⁸ Professor Ho notes studies that indicate farmers support readjustment in response to changes in the composition of the family, including both plot size expansion and retraction. Ho, *supra* note 45, at 18. RDI's survey concluded that farmers strongly support continuation of 30 year land-use rights, but could not draw conclusions in respect of readjustment due to the farmers' differing interpretations of the meaning of the prohibition. Schwarzwald et al., *supra* note 114, at 165-166.

¹⁴⁹ Li, *supra* note 57, at 64; Chen et al., *supra* note 147, at 125.

mentation and inefficient use of agricultural land.¹⁵⁰ Article 27 of the RLCL appears to take a strong line on readjustments specifically prohibiting them during the 30 year term of the land-use rights except in “special circumstances” such as “natural disaster.”¹⁵¹ Readjustments in special circumstances are, in theory, further protected by a provision that requires approval of two-thirds of the villagers’ assembly or village representatives and approval by township and county governments.¹⁵²

Prior to enactment of the RLCL, the CPC issued a policy statement, 1997 Document No. 16, providing guidelines on readjustments.¹⁵³ Those guidelines included prohibitions on land readjustments nearly identical to those eventually enacted as law in the RLCL.¹⁵⁴ The policy guidelines were not well implemented and village and town officials continued to carry out land readjustments frequently.¹⁵⁵ The RLCL directs each province to promulgate implementing regulations.¹⁵⁶ There is a very real danger that implementation of the RLCL at the provincial level will result in a variety of different interpretations of the meaning of “special circumstances.” This danger is compounded since both the RLCL and the New Property Law provide scant guidance on the meaning of “special circumstances.”¹⁵⁷

In fact, despite the RLCL prohibition on land readjustments during the 30-year contractual periods, some village administrations have since adopted measures, in what appears to be a flagrant disregard for the law, to continue conducting readjustments.¹⁵⁸ Clearly an extremely broad reading of “special circumstances” at the local level is to be expected. Rather than delegating the task of drafting implementing regulations to the Provincial Governments, the central authorities should issue a set of nationwide implementing regulations that are consistent with its policy and legal objectives.¹⁵⁹

¹⁵⁰ *See id.*

¹⁵¹ RLCL *supra* note 40, art. 27,

¹⁵² *Id.*

¹⁵³ Li, *supra* note 57, at 61.

¹⁵⁴ *Id.*

¹⁵⁵ *See Id.*

¹⁵⁶ RLCL, *supra* note 40, art. 64, .

¹⁵⁷ Li, *supra* note 57, at 68.

¹⁵⁸ The policy pronouncements in Document 16 of 1995 permitted small readjustments, Li, *supra* note 57, at 61. Under the RLCL there is a complete prohibition on readjustment during the 30 year contract term (RLCL, *supra* note 40, art. 27). RDI’s survey indicates that 40 percent of the villages in fifteen of the seventeen provinces studied would continue to carry out small adjustments and 10 percent of the villages in six provinces plan to carry out large scale adjustments, contrary to RLCL. Schwarzwalder et al., *supra* note 114, at 204.

¹⁵⁹ *See id.* at 222.

C. *Legislative Omissions*

The RLCL fails to deal with the issue of mortgaging land use rights and mortgaging is prohibited under Article 36 of the Guarantee Law.¹⁶⁰ Reportedly, during the drafting process of the New Property Law, the issue of permitting farmers to mortgage their land use right had been the subject of some controversy.¹⁶¹ Ultimately, Chinese lawmakers opted to affirm the prohibition on mortgages of rural land-use rights.¹⁶² This is unfortunate since mortgaging could provide farmers with the capital necessary to make improvements to the land.¹⁶³ Farmers could invest in, for example, irrigation, crop diversification, or the purchase of capital equipment.¹⁶⁴ It would also increase the marketability and market value of land-use rights.¹⁶⁵ It is also quite clear, however, that frequent land readjustments and expropriations carried out by local governments are significant obstacles to development of a real market for rural land-use rights.¹⁶⁶ These potential intrusions create uncertainty and therefore make rural land of little value to banks,¹⁶⁷ with few banks willing to

¹⁶⁰ The Guarantee Law was formulated to promote capital flow and commodity circulation. According to Articles 1 and 2, it governs guaranties, mortgages, pledges, liens and deposits. Article 37 prohibits mortgaging of “use-rights of such collectively-owned land as farmland, homestead, land allotted for personal needs and hilly land allotted for private use.” Guarantee Law (P.R.C.), 8th SCNPC 14th Sess., June 30, 1995, and effective as of Oct. 1, 1995), available at <http://www.jus.uio.no/lm/china.guarantee.law.1995/portrait.pdf>.

¹⁶¹ *Specific Issues, Rather than Ideology, Become Focus of China’s Property Law Debate*, People’s Daily Online, Aug. 24, 2006, http://English.people.com.cn/200608/24/eng20060824_296189.html (last visited Mar. 29 2008).

¹⁶² New Property Law, *supra* note 11, arts. 183, 184.

¹⁶³ See Keliang & Prosterman, *supra* note 4; see generally *How to Make China Even Richer, Let the Peasants Own their Land*, ECONOMIST, Mar. 23, 2006.

¹⁶⁴ See Keliang & Prosterman, *supra* note 4.

¹⁶⁵ *Id.*; see generally *How to Make China Even Richer, Let the Peasants Own their Land*, *supra* note 163.

¹⁶⁶ See Ho & Lin, *supra* note 81, at 693; see also Schwarzwalder et al., *supra* note 114, at 175.

¹⁶⁷ China’s banking system remains in transition as China moves from its centrally planned economy to its socialist market economy. Prior to banking reform (beginning in the 1970s) the People’s Bank of China carried out all banking functions. China’s first banking reform was the creation of four big banks; each specializing in different areas of the economy as its names indicates (The People’s Bank of China (PBOC) Industrial and Commercial Bank of China, the China Construction Bank and the Agricultural Bank of China). PBOC was tasked with implementing monetary policy, like the US Federal Reserve. The banks were tightly controlled by the Government and their key function was funding state owned enterprises (SOEs). The financing provided to inefficient and loss producing SOEs resulted in a high number of nonperforming loans (NPLs). Over the past few years, the Government has been encouraging efforts to increase transparency, improve corporate governance, and implement effective measures to reduce NPLs. Chinese banks, striving to become

accept uncertain land-use rights as collateral.¹⁶⁸ Until real progress is made in controlling expropriation and land readjustments, a significant secondary market in rural land use rights is not likely to develop. The New Property Law's reiteration of the prohibition on mortgaging rural land-use rights may reflect lawmakers' recognition that security of land-use rights is a necessary precondition to the ability to effectively mortgage those rights. The banking sector, coping with modernization, can ill afford to accept uncertain land use rights as mortgage security.¹⁶⁹

The RLCL does not contain a provision that land-use rights include the right to pass land to children through inheritance.¹⁷⁰ Notwithstanding, most farmers believe that an inheritance right exists.¹⁷¹ In fact, RDI's field survey found those farmers who believe that they have this right were substantially more confident in their land use rights than those who did not, contributing to a better assurance in the security of their land tenure.¹⁷² Despite the lack of law and the failure of RLCL to specifically address this issue, it is common practice to allocate land directly to children in the event of death.¹⁷³ The legislative omission is based on the fact that land-use rights are contracted to households rather than individuals and the death of a member of the household should not affect the status of the land-use right.¹⁷⁴ The New Property Law includes provisions which discuss inheritance in general terms in relation to real property rights, but do not specifically provide for inheritance of contractual land-use rights.¹⁷⁵ Given the common practice, and to prevent possible exploitation by local governments, the right should be explicitly laid out in the law. Unfortunately, it is left for provisions of future specifically enacted law to articulate this right and whether future law will do so is not clear.

Collective ownership is inalienable. Land-use rights can be transferred in a number of ways, but ownership of rural land cannot be transferred by

competitive as foreign banks, are granted Chinese banking licenses, and are increasingly offering more personal finance products. With the success of urban land rights reforms (*see infra* notes 178-185 and accompanying text discussing urban rights), there has been an expansion in mortgage lending and the number of mortgages obtained in China is expected to grow rapidly. For more discussion on China's banking sector, *see generally* China's Business Guide 2006, *Industry Overview, Banking*, China Econ. Rev. Publg. 228-241; *see* Li, *supra* note 57, at 66.

¹⁶⁸ *See* Ho & Lin, *supra* note 81, at 693; *see also* Li, *supra* note 57, at 66.

¹⁶⁹ *See Industry Overview, Banking, supra* note 167.

¹⁷⁰ RLCL, *supra* note 40.

¹⁷¹ Schwarzwald et al., *supra* note 114, at 186.

¹⁷² *Id.*

¹⁷³ *Id.* at 185.

¹⁷⁴ A. Gu, 2002 Report of the NPC Law Comm. on Revisions of Rural Contracting Law [Draft] Bill, PRCNPCSC 2002(5): 357-359, *cited in* Li, *supra* note 57, at 62.

¹⁷⁵ New Property Law, arts. 29, 65, *supra*. note 11.

the collective except to the state.¹⁷⁶ Although the 2004 constitutional amendments now provide for the inviolability of private property, all land, both urban and rural is publicly owned (either by the State or the Collective) and by definition cannot be private property.¹⁷⁷ However, relative to the rural population, the urban population is in a significantly better position.

Twenty-five years ago, essentially all urban housing was provided by the state.¹⁷⁸ In a hugely successful economic reform scheme, most urban land was privatized.¹⁷⁹ China commercialized urban land-use rights in 1998 and introduced a dual-track system; one for the planned economy and one for the market. Land-use rights are “allocated” for state or non-profit use without time limits and “conveyed” for market use (for terms of 40 years for commercial use, 50 years for industrial use, and 70 years for residential use).¹⁸⁰ The state technically remains the owner of the land, but urban dwellers are given land-use rights which effectively act as leaseholds.¹⁸¹ The urban dweller has a host of marketable rights unavailable to the rural villager. Urban land-use rights in China can be mortgaged, leased and subdivided and most importantly, the urban land-use rights holder can exit his position as owner and transfer for a fee (i.e. sell) his land-use rights.¹⁸² As a result of the fewer restrictions on urban land use, a booming private property market has developed in urban areas.¹⁸³ This has helped develop China’s growing middle class, increased consumer demand and catalyzed positive popular sentiment in support of the

¹⁷⁶ Ho & Lin, *supra* note 81, at 685; Ho, *supra* note 45, at ch. 2.

¹⁷⁷ See *supra* Sec. II.B; Ho & Lin, *supra* note 81, at 685; Ho, *supra* note 57, at ch. 2.

¹⁷⁸ The labor relationship in China’s command economies was characterized by lifetime employment where urban workers were assigned to a state-run enterprise work unit. That work unit was responsible for the worker’s salary, housing and other benefits. The system was colloquially referred to as eating from the “iron rice owl.” The reform has brought an end to the institution of lifetime employment. See generally GUTHRIE, *supra* note 3, at 58-59.

¹⁷⁹ *Id.*; *How to Make China Even Richer, Let the Peasants Own their Land*, *supra* note 163, at para. 10.

¹⁸⁰ Allocation and conveyance constitute the primary market for urban land-use rights and require payment of fees. The fee for conveyance includes a market determined component plus the allocation fee (cost of land expropriation and a government set fee). The secondary market exists because holders through conveyance (not allocation) may transfer, rent or mortgage their rights. Secondary market rights are open to those whose land was acquired through allocation by paying the state compensation fees (the difference between the allocation price and the conveyance price). Ho & Lin, *supra* note. 81, at 687.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ In the 1990s the secondary market activities increased significantly. The number of land transactions increased from about 130 thousand in 1993 to about 450 thousand by 1998 and the number of times land was used as collateral increased from about 16 hundred to over 100 thousand; Ho & Lin, *supra* note 81, at 700-701.

2004 inclusion of private property rights as amendments to the Constitution.¹⁸⁴ In turn, the development of the rule of law in China has been furthered because the wealthy middle class now seeks the use of the law to create and ensure protection of its new found wealth.¹⁸⁵

Reportedly, to raise living standards, boost consumer demand and ensure long-term economic growth, China plans to move millions of peasants to city areas.¹⁸⁶ Currently, rural migrants often work in urban areas as cheap construction or factory labor and are kept at severe disadvantage due to the “hokou” system, which ties peasants to their collective and prevents them from receiving education, healthcare and other services beyond their home provinces.¹⁸⁷ Individual peasants are prevented from terminating their membership from rural collectives by, for example, getting the collective to sell land. The only way to move land out of the collective structure is by getting the state to expropriate it.¹⁸⁸ The decision to sell rural land can only occur through a series of administrative expropriation decisions, theoretically in accordance with the overall

¹⁸⁴ See *Property Rights in China, China's Next Revolution*, *supra* note 20, at para 4; see also *How to Make China Even Richer, Let the Peasants Own Their Land*, *supra* note 163, at para. 10.

¹⁸⁵ See *Property Rights in China, China's Next Revolution*, *supra* note 20, at para. 4; see also *How to Make China Even Richer*, *supra* note 163, at para. 10.

¹⁸⁶ According to China's National Overall Plan and Outline Regarding Land Use, an estimated 1.2 million hectares of cultivated land will be used for construction from 2001 until 2010 requiring the resettlement of 26.5 million farmers over ten years. Asian Development Bank, *Capacity Building for Risk Resettlement, Thematic Rept. No. 3, Improving Resettlement Policies and Practices to Manage Impoverishment Risk 1* (Mar. 2006) available at www.adb.org/Resettlement/activities/TA6091REG/PRC-Thematic-Report-3.pdf (last visited Mar. 29, 2008) [hereinafter ADB Thematic Rpt. 3]; see Antonaneta Bezlova, *China Has Issues Aplenty, None to Share*, World Soc. Forum (Apr. 14, 2006), where the author cites plans to move 300 million peasants to city areas by 2020, available at www.ipsnews.net/news.asp?idnews=32686 (last visited Mar. 29, 2008).

¹⁸⁷ See *supra* note 67 for a brief description of the hokou system. Migrant workers are temporary laborers from rural areas working in cities without official urban permits. According to a survey carried out by China's State Statistical Bureau, China had 113.9 million migrant workers from rural areas in 2003. See *China had 113.9 million migrant workers in 2003*, China Daily, Xinhua, available at http://www.chinadaily.com.cn/english/doc/2004-05/15/content_330991.htm (updated May 15, 2005, last visited Mar. 29, 2008). Under the current regulations farmers cannot have access to urban benefits (e.g. education, housing) unless they are included in the household register of the towns. Only a low percentage of farmers have been included on the town registers. For example, in Tinjian city only 7.5 percent of dispossessed farmers have been included; in Shandong Province the rate is 20-30 percent, and in Hubei Province, 30 percent of farmers have been included on the town registers. *Capacity Building for Risk Resettlement, ADB Thematic Report No. 3*, *supra* note 186, at 2.

¹⁸⁸ Ho & Lin, *supra* note 81, at 707; Li *supra* note 57, at 66.

land utilization plan, to turn rural land into urban land.¹⁸⁹ However, once the land becomes urban land, peasants' rights are severed and the peasant has no further claim to it.¹⁹⁰ Giving farmers the same rights as their urban counterparts would allow them to sell their land-use rights and acquire the capital necessary to begin life in urban areas.¹⁹¹ Further, keeping peasants trapped in a system of inefficient and unproductive land use cannot benefit either the individual peasant or the national economy.¹⁹² Taking this one step further, it is tempting to argue for outright ownership of land in both urban and rural sectors.

The Chinese Government's ostensible purpose of keeping the current system in place is to protect the rural collectives and its members from improper distribution of land and purely private transactions.¹⁹³ There are also fears that allowing peasant alienation would restore a land owning class and peasants would descend upon cities unprepared for urban life exacerbating the problems associated with its large rural migrant population and their social stratification in urban areas.¹⁹⁴ Opponents to more liberal measures also point to the lack of a social security system and argue that at least the limited control over the land they till offers peasants some degree of security.¹⁹⁵ In fact, the land-use rights system in rural China is credible in the eyes of the farmers¹⁹⁶ in that most support the continuation of the 30 year land-use rights system.¹⁹⁷ But such support must be considered in the context of the farmers' current condition and specifically the absence of alternative employment.¹⁹⁸ The farmer

¹⁸⁹ Huang, *supra* note 7, at 215; Pils, *supra* note 12, at 244; HO, *supra* note 45, at 32-33; *see supra* notes 98-110 and accompanying text (discussing the land utilization plan).

¹⁹⁰ Pils, *supra* note 12, at 244.

¹⁹¹ *See How to Make China Even Richer, Let the Peasants Own Their Land, supra* note 163, at para 8.

¹⁹² *See id.*

¹⁹³ *See* Huang, *supra* note 7, at 215; Pils, *supra* note 12, at 242.

¹⁹⁴ *How to Make China Even Richer, Let the Peasants Own Their Land, supra* note 163, at para. 6. Rural migrants are not permitted to build or buy houses in urban areas. However, in recent years migrants have been "unofficially buying" urban housing giving rise to shantytowns. These shantytowns have even begun establishing their own schools, hospitals and other institutions. They are subject to local government supervision and, if so ordered, mandatory removal. GUTHRIE, *supra* note. 3, at 213; *see supra* note 187 (discussing migrant workers).

¹⁹⁵ *How to Make China Even Richer Let the Peasants Own Their Land, supra* note 163, at 1.

¹⁹⁶ HO, *supra* note 45, at 11.

¹⁹⁷ Schwarzwald et al., *supra* note 114, at 165-66; *see also supra* note 148 and accompanying text (discussing farmers' views on 30 year land-use rights and readjustments).

¹⁹⁸ *See* HO, *supra* note 45, at 11.

needs his plot for basic social security.¹⁹⁹ However, he is not adequately protected from compulsory land transfers through state expropriation, requisition decisions, and the state's subsequent selling of those rights to private developers.²⁰⁰ In reality, the current system has neither prevented corrupt local officials from developing rural land for profit or gaining favor with senior administrative and political bodies, nor prevented unskilled peasant workers from descending upon cities.²⁰¹ The arguments opposing privatization of rural land begin to ring hollow when one considers that illegal land transfer, carried out by local governments exceeding their authority, is pervasive in China²⁰² and that China's goal is to actually move peasants to the urban areas.

Ideologically, however, collective and state ownership of land are fundamental pillars of socialist society. China's leaders are opposed to the full scale incorporation of western institutions into China's unique socialist market economy. Rather than proceeding too quickly, China is gradually experimenting with institutions and implementing reforms within its existing institutional arrangements.²⁰³ Individual ownership rights, they argue, would promote further land fragmentation and inefficient use of land.²⁰⁴ They also fear that moving too quickly can be destabilizing for the country, maintaining that the "shock therapy" approach to market reforms caused the collapse of the Soviet Union in 1991.²⁰⁵ Additionally, left-leaning intellectuals and officials²⁰⁶ are becoming increasingly concerned that the country is turning too capitalist.²⁰⁷ This was demonstrated when approval of the New Property Law proved to be far more contentious than Chinese lawmakers had anticipated. Following the solicitation of public comment in 2005, a Marxist leaning economist wrote an open letter to the chairman of the SCNPC, warning that putting private property on the same legal basis as public property would "undermine the legal foundation of China's socialist economy" and set off a lengthy and politically charged debate.²⁰⁸ Clearly, China is not ideologi-

¹⁹⁹ *Id.*

²⁰⁰ *See id.* at 30-31.

²⁰¹ *See supra* notes 187 and 194 and accompanying text (discussing migrant workers).

²⁰² *See Ho & Lin, supra* note 81, at 696; *see also supra* Sec. II.D.

²⁰³ GUTHRIE, *supra* note 3, at 38-42.

²⁰⁴ Chen et. al., *supra* note 147, at 127.

²⁰⁵ *See generally* GORDON CHANG, *The Coming Collapse of China*, 58 (2002); *see also* HO, *supra* note 45, at 11, 148.

²⁰⁶ *Governing China, Caught Between Right and Left, Town and Country*, ECONOMIST Mar. 8, 2007, at 23.

²⁰⁷ *Id.*

²⁰⁸ David Lague, *China Considering Property Protection*, INTL. HERALD TRIB. (Mar 8, 2007). Wang Zhaoguo, vice-chairman of the NPC's Standing Committee delivered an explanation of enactment of the law. He stated "[i]f the different subjects of the market are not provided with equal protection, or if the methods used for

cally prepared to renounce its public land ownership system.²⁰⁹ Borrowing Deng's famous metaphor for gradual reform, China continues to "cross the river by feeling the stones."²¹⁰

The approach of gradual reform is well illustrated in the New Property Law. Article 3 reaffirms the principle of public ownership but also acknowledges private ownership. It states: "[d]uring the primary stage of socialism, the State shall adhere to the basic economic system, with public ownership playing a dominant role and diverse forms of ownership developing side by side."²¹¹ While private property is recognized and even afforded protection, land remains publicly owned. The principle of public ownership continues to be dictated by China's Constitution,²¹² the Revised LAL²¹³ and the RLCL. The RLCL confirms that granting contractual land-use rights does not change the public ownership of rural land. Article 4 states:

The State protects, in accordance with law, the long-term stability of the relationship of land contract in rural areas. After the land in rural areas is contracted, the nature of ownership of the land shall remain unchanged. The contracted land may not be purchased or sold.²¹⁴

D. *Quality of Land Use Rights: Ambiguous Definitions*

Although Chinese land reforms have been significant, the litany of usage rights granted to peasant households does not adequately address the quality of those rights. Land-use rights have historically been con-

settling disputes or the legal responsibilities to be borne are varied, it will not be possible to develop the socialist market economy, nor will it be possible to uphold and improve the basic economic system of socialism." See *Full Text: Explanation of the Draft Property Law*, available at http://english.peopledaily.com.cn/200703/08/eng20070308_355491.html. For the complete chronology of the adoption of the Draft Law, see *NPC Adopts Property Law*, <http://www.china.org.cn/english/2007lh/203173.htm> (last visited Mar. 29, 2008).

²⁰⁹ See generally Huang, *supra* note 7; see also HO, *supra* note 45, at 1-11.

²¹⁰ Deng Xiaoping spoke his famous metaphor following his introduction of his reform plan in 1978. See Guthrie *supra* note 3 at 43. . See also CHANG, *supra* note 206 at 43. By the early 1990s, Deng made rapid growth official CPC dogma. See *Id.*, at 59. Deng's successor, former CPC Chairman and PRC President, Jiang Zemin, continued to carry out Deng's plan. But Mr. Zemin's successor, the current CPC Chairman and PRC President, Hu Jintao, and his administration, is perceived as more left leaning, preferring a more gradualist approach to reform, and social and poverty issues have dominated their agenda (or at least their rhetoric). *Governing China, Caught Between Right and Left, Town and Country*, *supra* note 206, at 2.

²¹¹ New Property Law, *supra* note 11, art. 10.

²¹² Xian Fa, *supra* note 8, art. 10, . See also *supra* Sec. II.A.

²¹³ Article 2 of the Revised LAL states "[t]he People's Republic of China practises the socialist public ownership of land, namely ownership by the whole people and collective ownership by the laboring masses. . . ." Revised LAL, *supra* note 7, art. 2.

²¹⁴ RLCL, *supra* note 40.

tractual rights with qualities akin to usufruct rights.²¹⁵ Farmers were given contractual rights to possess, use, and appropriate the fruits from the land.²¹⁶ Once the New Property law goes into effect, the land-use rights will be defined clearly as usufruct rights.²¹⁷ Usufruct rights are legally stronger rights than contractual rights because they are considered rights in rem to the property itself.²¹⁸ Because the farmer's right will be tied to the actual plot of land as a real right, he is better protected from involuntary transfer of his land-use right from one plot of land to another plot or from readjustment of his plot size.²¹⁹

Defining rural land-use rights as usufructs is a positive step in clarifying the nature of rural land-use rights. However, the quality of land-use rights is compromised by an ambiguity far more profound than the question (now moot) of whether the rights are contractual or usufruct. That ambiguity is found in the law's failure to clearly identify or define the collective.²²⁰ To illustrate this point, it is necessary to examine the complicated provisions of the 1998 Revised LAL specifying the collective entities that own rural land. Article 8 states:

Land in urban areas of cities belongs to the state. Land in rural areas and suburban areas of cities, excluding those belonging to the state prescribed by law belongs to peasants' collective ownership; house sites, land allotted for personal needs and hilly land allotted for private use belongs to peasants' collective ownership.

Article 10 states:

Peasants' collectively-owned land that belongs to peasants' collective ownership of a village according to law shall be managed and administered by the village collective economic organization or villagers' committee; the land that belongs separately to more than two rural collective economic organizations and owned collectively by peasants shall be managed and administered by the respective rural collective economic organizations or villagers' teams; the land that belongs to village (township) peasants' collective ownership shall be managed and administered by the village (township) rural collective economic organization.²²¹

²¹⁵ Usufruct is a civil law concept defined as "A right to use and enjoy the fruits of another's property for a period without damaging or diminishing it, although the property might naturally deteriorate over time." *Blacks Law Dictionary* 1580 (8th ed., West 2004).

²¹⁶ Huang, *supra* note 7, at 218-19.

²¹⁷ New Property Law, , *supra* note 11, p, t. 3.

²¹⁸ Keliang & Prosterman, *supra* note 4, at 49.

²¹⁹ Huang, *supra* note 7, at 218.

²²⁰ Ho, *supra* note.45 , at 27-32.

²²¹ Revised LAL, *supra* note 7, arts. 8 and 10.

Under Mao's commune structure, the production team was primarily the owner of collective land.²²² Following the implementation of HRS,²²³ no such statement can be made because no definition of the "farmers' collective" or the "collective economic organization" exists.²²⁴ Further, the provisions do not make clear if the exercise of management and administration by the collective economic organizations also includes the power to exercise ownership rights.²²⁵ It has been suggested that this ambiguity in ownership has resulted in the wide scale improper expropriation of the past.²²⁶ It has been further suggested, and is widely accepted, that the ambiguity in the definition is intentional.²²⁷ Professor Peter Ho, China land law expert, explains that frequent expropriations of land from the production teams by higher level administrative units, for purposes of development, was common prior to reform.²²⁸ These expropriations were often carried out without proper compensation paid to the production teams, who proved incapable of protecting their own interests.²²⁹ Because the land has been developed, it cannot now be returned to its former interest holders.²³⁰ Further, the commune system has been replaced and the production teams no longer exist, making it impossible to return the land to the production teams.²³¹ Following development, land values have increased considerably and if the ownership structure of the communes were continued after reform, those expropriated would have legal claims creating widespread conflict.²³² It is widely acknowledged that the State kept the definition of the collective vague in hopes that in course of development the conflicts will resolve themselves.²³³ As Professor Ho states, "legal indeterminacy is a major feature of the current Chinese land rights structure."²³⁴ Many Chinese lawmakers and leaders believe that property forms must be kept vague in transitional economies.²³⁵ They maintain, the classical economic theory, that a well-defined property regime is essential to an efficiently functioning market economy

²²² Ho, *supra* note 45, at 27-28; *See also supra* Sec. II.C. (discussing the commune structure).

²²³ *Id.* at 31.

²²⁴ *Id.* at 29.

²²⁵ *Id.*

²²⁶ *Id.* at 32; Guo, *supra* note 95, at 438.

²²⁷ Ho, *supra* note 45, at 30.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ *Id.* at 30-31.

²³⁴ *Id.* at 30.

²³⁵ Huang, *supra* note 7, at 194-95.

has been contradicted by China's successes.²³⁶ Academics have posited that the existence of legal ambiguity has prevented an explosion of land ownership conflicts like those that crippled transitional economies of East Germany and Kyrgystan.²³⁷ Nevertheless, their continued existence also has the potential to trample upon the rights of China's 780 million peasants.²³⁸

Although vesting collective ownership in the natural village or villagers' group (former production teams), may create conflict over former interests, it was clear to lawmakers that the ambiguity could not continue. Former Vice Chairman of the NPC, Li Boyong, suggested the law should be changed because it was not clear who represents the farmers' collective.²³⁹ Indeed, NPC Law Committee issued an interpretation of Articles 8 and 10 of the Revised LAL.²⁴⁰ The Law Committee did not provide a definition of "farmers' collective" or the "collective economic organization."²⁴¹ However, it did explain that the land owned by each of the tiers in the pre-HRS commune system (the commune, production brigade, and production team)²⁴² is now owned by the undefined "farmers' collective" or "collective economic organization" of the township, the administrative village and the villagers' group.²⁴³

Without a clear stipulation as to who represents ownership of collective land, expropriation by higher level administrative units could continue at the expense of the village units and individuals will lack the legal standing to have their cases heard.²⁴⁴ The New Property Law has taken a step in clearing up the ambiguity. Though it too does not go as far as defining the "farmers' collective" or the "economic collective organization," it does clearly give the power to exercise ownership rights (rather than just management and administrative duties) to those entities.²⁴⁵ Prior to the New Property Law it was typical for ownership rights to be exercised by

²³⁶ For a discussion why the classical theory does not account for the China phenomenon, *see id.* at 195-199. The author also points out that China's current effort to formalize its property regime challenges the view that a formal property regime is irrelevant to economic growth. *Id.* at 223. *See also* Ho, *supra* note 45, at 1-16. Some theorists argue that the role of property rights is an outcome of socio-economic evolution while others point to the law as a necessary precondition. Professor Ho takes the middle ground, arguing that sometimes socioeconomic institutions drive the law and sometimes the law is a precondition for the social institutions. *Id.*

²³⁷ *Id.* at 188. Professor Ho maintains that the ambiguity in China's law allows China to function at its current stage of reform. *Id.* at 11.

²³⁸ *See id.*

²³⁹ *Id.* at 29-30.

²⁴⁰ *Id.* at 29.

²⁴¹ *Id.* at 29-30.

²⁴² *Id.* at 31.

²⁴³ *Id.* at 29-30.

²⁴⁴ *Id.* at 27-31.

²⁴⁵ New Property Law, *supra* note 11, art. 60.

the administrative villages under the supervision of the townships rather than by the villagers' group (also called the natural village).²⁴⁶ The New Property Law does not ensure that ownership decisions are made at the basic unit of the collective hierarchy (the villagers' group and natural village). It simply includes the ability to exercise ownership rights in the bundle of management rights that had already existed under Articles 8 and 10 of the Revised LAL²⁴⁷ for each of the tiers (village, administrative village, and township). Whether this will better protect villagers from improper expropriation remains to be seen. Giving village economic collective organizations and village committees the power to exercise ownership rights will not result in more secure land-use rights for the individual villager, unless the leaders of those entities can abandon practices of the past and execute their duties in accordance with the law.

China's rural reform is essentially the decentralization of collective ownership.²⁴⁸ Individual provinces are given broad leeway to conduct their affairs. This has led to some unfortunate consequences for the individual farmer. The administrative village is supposed to be a self-governing body made up of an elected village committee and elected village heads.²⁴⁹ Village committee members and village group leaders are to be elected in accordance with Article 14 of the Organic Law of the Villagers' Committees.²⁵⁰ In some cases, the reality is that laws are not followed and village committees and heads are dominated by local government and Party authorities.²⁵¹ Article 2 of that law states: "[t]he villagers' committee is the primary *mass organization of self-government* in which the villagers manage their own affairs"²⁵² Article 4 states "the People's Government of a township . . . shall guide, support and help the villager's committees in their work, but may not interfere with the affairs that fall within the scope of the villagers self- government."²⁵³ Rather than *self-governing mass* organizations, the power in administrative villages often

²⁴⁶ HO, *supra* note 45, at 31.

²⁴⁷ Revised LAL arts. 8, 10. .

²⁴⁸ GUTHRIE, *supra* note 3, at 43.

²⁴⁹ Organic Law of the Villagers Committees (P.R.C) arts. 9-11, 14, *available at* <http://www.china.org.cn/english/government/207279.htm> (last visited Mar. 19, 2008) [hereinafter Villagers' Committee Law]., An institutional governing body for the natural village/villagers' group does not exist. *See* HO, *supra* note 45, at 194.

²⁵⁰ Villagers' Committee Law, *supra* note 249 at arts. 9-11, 14,.

²⁵¹ *See* Kevin O'Brien & Lianjiang Li, *Accommodating "Democracy" in a One-Party State: Introducing Village Elections in China*, THE CHINA QUARTERLY NO. 162 at 479, 487 (2000) (discussing methods used by local Party officials to control election outcomes including controlling nominations and disqualifying candidates); *see, e.g.,* Pils, *supra* note 12, at 258 (discussing case where village committee heads were appointed by local Party officials).

²⁵² Villagers' Committee Law, *supra* note 249, art. 2 (emphasis added).

²⁵³ *Id.* at art. 4.

falls to a small group of leaders.²⁵⁴ Village leadership enjoys bureaucratic relationships with the township governments (to whom they are subordinate) and were historically appointed by the township and higher administrative bodies.²⁵⁵ The Villagers' Committee Law now expressly prohibits this. The relevant provision states: "[n]o organization or individual may designate, appoint or replace any member of a village's committee."²⁵⁶ Even when democratic village election procedures are followed, it can become economically and politically rewarding for the village administration to enter into institutional relationships with the town and county.²⁵⁷ The sheer enormity of China and its population make it very difficult for central oversight at the local level.

While it is ideologically impossible for Chinese leadership to give individuals ownership rights of the land itself, it is not inconsistent to adopt western theoretical models to clearly define individual interest in collective ownership. In fact, in some progressive provinces, alternative models have been used with significant success. For example, in the village of Xiabai, in the Pearl River Delta area of Guangdong province, a juridical person model is used.²⁵⁸ Under this model of ownership, collectives are organized into economic organizations called Township and Village Enterprises (TVEs) and members hold shares in accordance with collective charters.²⁵⁹ The core feature of this system is that shares are allocated, and there is no actual distribution of physical plots.²⁶⁰ In exchange, for the shares, the farmer voluntarily surrenders his land-use right to the administrative village.²⁶¹ The administrative village manages large scale farming by contracting farming work in a bidding process to farming teams.²⁶² Profits are distributed according to the number of shares held.²⁶³ In a traditional shareholding company shareholders can freely sell or transfer their shares; shareholders of the Xiabai economic organization, however, cannot withdraw or transfer their shares.²⁶⁴ Despite the inability to freely transfer shares, the shareholding cooperative has tangible benefits. Because it makes large scale farming possible, it is a more efficient use of agricultural land compared to system of fragmented individual farming existing elsewhere in China.²⁶⁵ In fact, the

²⁵⁴ Guo, *supra* note 95, at 425-26.

²⁵⁵ O'Brien & Li, *supra* note 251, at 479.

²⁵⁶ Villagers' Committee Law *supra*, note 249, art. 11

²⁵⁷ See Guo, *supra* note 95, at 427.

²⁵⁸ Chen et al., *supra* note 147, at 132.

²⁵⁹ Membership in the collective is the main criterion for share entitlement. Age is an additional consideration; children are normally entitled to half shares. *Id.* at 133.

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

Xiabai experiment has resulted in a tenfold increase in the amount of land cultivated in Xiabai.²⁶⁶ While in the past, it was unclear if this type of arrangement transcended the law's boundaries, the RLCL has made clear that such an arrangement is legal.²⁶⁷ Re-contracting in a manner similar to that in Xiabai is part of the legal secondary market in rural land-use rights.

However, the use of this type of model can also be exploited. Often the motivation behind the reorganization of the collective is short term profit derived from fees officials can impose on third-party contractors but cannot impose directly on households.²⁶⁸ In some cases the land is compulsorily re-contracted without consultation, compensation, the formation of an enterprise or the distribution of shares and profit.²⁶⁹ RDI fieldwork found that in some cases households were deprived of their entire land-holding and subsequently labored on the land upon which they previously had rights.²⁷⁰ The RLCL now prohibits the compulsory taking back of the land.²⁷¹ Enterprise or non enterprise re-contracting can only occur legally if the farmer voluntarily returns his land to the rural collective organization.²⁷²

IV. EXPROPRIATION OF RURAL LAND

A. *Expropriation as a Tool for Development*

China's Constitution recognizes the right of the state to expropriate. Pursuant to Article 10 of the Chinese Constitution "[t]he State may, in the public interest and in accordance with the provisions of law, expropriate or requisition land for its use and shall make compensation for the land expropriated or requisitioned."²⁷³ It has been suggested that land appropriation to further economic development in America at different periods in its history and the current practice in China reveal similar strategies.²⁷⁴ The language of the Fifth Amendment to the U.S. Constitution, com-

²⁶⁶ *Id.* at 134.

²⁶⁷ RLCL, *supra* note 40, art. 32 (authorizing circulation of land-use rights); *Id.* at art. 29 (authorizing voluntary surrender of land-use rights to the administrative village); *see supra* notes 140-42 and accompanying text (discussing transaction rights under the RLCL).

²⁶⁸ Li, *supra* note 45, at 65.

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ RLCL, *supra* note 40, art. 26.

²⁷² *Id.* at art. 29.

²⁷³ XIAN FA art. 10, *supra* note 8.

²⁷⁴ *See generally* Phan, *supra* note 91; Theresa H. Wang, *Trading the People's Homes for the People's Olympics: The Property Regime in China*, 15 PAC. RIM L. & POL'Y 599, 601 (2006) (comparing U.S. nineteenth and early twentieth century development); Yan Zhang & Ke Fang, *Is History Repeating Itself? From Urban Renewal in the United States to Inner City Redevelopment in China*, 23 J. PLANNING

monly referred to as the Takings Clause, implicitly recognizes a preexisting power to take private property for public use.²⁷⁵ The clause provides: “nor shall private property be taken for public use, without just compensation.”²⁷⁶

During development, the U.S. government heavily regulated land use in efforts to create a vibrant economy. From about 1850, a principal goal of land management was to transfer public land into private hands, to raise revenue, encourage settlement and improve the land.²⁷⁷ The power of eminent domain was used to take private property and put it into the hands of developers.²⁷⁸ At first, this doctrine began with the Mill Acts which granted special land use rights for the public good.²⁷⁹ These state statutes permitted mills to operate though their operation injured nearby lands because the mills, though privately owned for profit, offered immediate public benefit.²⁸⁰ Later, with westward expansion, the railroad cases saw the government condemning property and immediately transferring it to private railroad companies.²⁸¹ State courts viewed the takings with a sense of urgency and consistently came down on the side of development.²⁸²

The public right to land justified private takings.²⁸³ Expropriation was seen as a legitimate tool to implement overall land management scheme which prioritized efficiency and usefulness of land over stagnancy.²⁸⁴ Renowned legal historian, Morton Horowitz, describes eminent domain as a “most potent weapon” and its power to take away and redistribute wealth as the “one truly explosive legal time bomb in all antebellum law.”²⁸⁵ Throughout the nineteenth and early twentieth century,

EDUC & RESEARCH 286 (2004). (comparing the U.S. urban renewal process in the 1950s and 1960s with China’s urban development). .

²⁷⁵ *Kohl v. United States*, 91 U.S. 367 (1875) (upholding the federal government’s use of eminent domain power to procure land for a post office).

²⁷⁶ U.S. CONST. amend. V.

²⁷⁷ HARRY SCHEIBER, *PROPERTY LAW EXPROPRIATION AND RESOURCE ALLOCATION BY GOVERNMENT: THE UNITED STATES IN PROPERTY RIGHTS IN AMERICAN HISTORY*, 294 (James Ely ed., Vanderbilt U. 1997); *see also* Wang, *supra* note 274, at 601, 612.

²⁷⁸ SCHEIBER, *supra* note 277, at 299; *see also* Wang, *supra* note 274 at, 612-13.

²⁷⁹ SCHEIBER, *supra* note 277, at 301-.

²⁸⁰ *Id.* at 301.

²⁸¹ *Id.* at 304.

²⁸² *Id.* at 301-02.

²⁸³ Wang, *supra* note 274, at 612; *See e.g.*, *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112 (1896) (upholding the constitutionality of a California state statute permitting a taking for the purposes of constructing an irrigation district).

²⁸⁴ *E.g.*, *Fallbrook*, 164 U.S. 112. *See also* Wang, *supra* note 274, at 612. *See generally* MORTON J. HOROWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, 31 (1997).

²⁸⁵ HOROWITZ, *supra* note 284, at 258-59.

America built canals, railways, bridges and highways under the authority of eminent domain.²⁸⁶

B. *Public Use and Benefit*

Explicit in the Takings Clause of the U.S. Constitution is the requirement that the taking be for a public use.²⁸⁷ This constitutional limitation is violated if a State takes property for any reason other than a public use.²⁸⁸ The question of what is a “public use” has been left to the judiciary, but nineteenth century American courts assisted the government in achieving national development goals with generally broad interpretations and a high degree of judicial deference to legislative intent.²⁸⁹ In fact, the ability to invoke the Takings Clause of the Fifth Amendment is not limited to nineteenth and early twentieth century development. As recently as 2005, in *Kelo v New London*,²⁹⁰ the U.S. Supreme Court upheld the use of eminent domain to further a comprehensive economic development plan. A divided court held that the general benefits to the community from economic growth were “public use” under the Takings Clause.²⁹¹

While the U.S. experience shows some broadly based similarities, it does little more than support the proposition that expropriation by the state in furtherance of development is considered a legitimate use of state power. Expropriation in China must be considered in the context of its own institutional and factual realities. Certainly, the recent judicial deference to the legislature in the *Kelo* decision must be viewed in the context of the U.S. as a “mature representative democracy” where the state legislative enactment permitting the use of eminent domain and the decisions of the municipal authorities will be evaluated at the ballot box.²⁹²

²⁸⁶ SCHEIBER, *supra* note 277, at 299.

²⁸⁷ U.S. CONST. amend. V.

²⁸⁸ Fallbrook, 164 U.S. 112.

²⁸⁹ SCHEIBER, *supra* note 277, at 301-02; Wang, *supra* note 274, at 613.

²⁹⁰ *Kelo v. New London*, 545 U.S. 469 (2005). The case concerns the eviction of residents of the Fort Trumbull neighborhood of New London so that private developers could build a high technology and development project. Following unsuccessful negotiations, the city council authorized the development corporation to use the power of eminent domain to acquire the property. The corporation filed condemnation proceedings and the residents brought an action challenging the condemnation. The state court found in favor of the development corporation and the case was heard by the U. S. Supreme Court.

²⁹¹ In delivering the Court’s opinion, Justice Stevens stated: “Promoting economic development is a traditional and long accepted function of government. There is, moreover, no principled way of distinguishing economic development from the other public purposes that we have recognized.” *Id.* at 484.483.

²⁹² A point made by counsel for the development companies in *Kelo*. See Brief for Respondent, *Kelo v. New London*, 454 U.S. 469 (2005). See also Phan, *supra* note 91, at 642-43.

Reaching further back into history, the Mill Acts lost substantial legislative support around 1830 (by permitting injured parties to recover permanent damages) and were subsequently repealed.²⁹³ Further, expropriations carried out illegally would likely be invalidated under the Due Process Clause²⁹⁴ of the Constitution.²⁹⁵ Similar guarantees provided by the U.S. checks and balances simply do not exist in China's institutions.²⁹⁶ This is not meant to suggest that corruption and development for profit did not or does not occur in the United States. Nor is it intended to minimize the plight of dispossessed Americans, who in all likelihood are the most vulnerable on the socio-economic scale. However, it is meant to emphasize that comparisons of the two countries must be considered in the context of the state institutions that define them. Further, China's laws, though not its realities, have set rational land use as a basic state policy.²⁹⁷ One can only postulate how nineteenth century American jurists would have balanced a legislative mandate to rationally use agricultural land against a municipal body or local statute authorizing the taking of that land. They simply were not faced with such a dilemma.

China has over twenty percent of the world's population and seven percent of the world's arable land.²⁹⁸ The efficient use of its agricultural land is a paramount necessity for China. What's more, China cannot afford to contribute more people to the ranks of its population of 113.9 million floating migrant workers. Resettlement procedures for dispossessed peasants are, by China's own admission, inadequate.²⁹⁹ Further, China is at a breaking point. International experts have calculated China's Gini Coefficient³⁰⁰, the international measurement of income inequality, at

²⁹³ HOROWITZ, *supra* note 284, at 52.

²⁹⁴ The due process clause provides: "nor shall any state deprive any person of life, liberty or property without due process of the law." U.S. CONST. amend. XIV.

²⁹⁵ Phan, *supra* note 91, at 643-44.

²⁹⁶ *Id.* at 644-45.

²⁹⁷ Revised LAL, *supra* note 7, art. 3; RLCL, *supra* note 40, art. 8.

²⁹⁸ *China to Conserve 120 Million Hectares of Arable Land Till 2020*, XINHUA NEWS AGENCY, Oct. 17, 2006; See *Can China Feed Itself in the 21st Century: Land Use Patterns May Provide Some Answers*, U.S. Embassy Beijing, Env., Sci. & Tech. Sec., June 1996, available at <http://www.usembassy-china.org.cn/sandt/mui1lbrn.htm>. Further (last visited Mar. 19, 2008) ("China's arable land shrank to 121.8 million hectares by the end of last October (2006), losing 306,800 hectares in the first ten months of 2006."); *China's Arable Land Shrinks to 121.8 Million Hectares*, XINHUA NEWS AGENCY (Apr. 12, 2007) ("The country has set a target of maintaining 120 million hectares of arable land by 2010 to ensure food security" and is dangerously close to dropping to that level.).

²⁹⁹ ADB Thematic Rpt. 3, *supra* note 186, at 1.

³⁰⁰ The Gini Coefficient is a mathematical measure of income inequality ranging from zero (complete equality) to 1 (complete inequality). While economists disagree as to whether the Gini coefficient can provide an accurate measure of stability, it is clear the Chinese leadership is paying close attention to the urban rural income gap

0.45.³⁰¹ This level is considered a threshold for social unrest.³⁰² The Ministry of Official Statistics's tally, 87,000 incidents of unrest in 2005, provide stark evidence of this reality.³⁰³

C. *Defining the Public Interest*

The public interest requirement for land expropriation is stipulated in the Revised LAL. Pursuant to Article 2, collectively owned land can be expropriated "out of necessity of public interest."³⁰⁴ Article 63 permits the dissolution of farmer's rights "for constructing township village public utilities or public welfare undertakings upon approval by the appropriate governmental authority."³⁰⁵ Under the 2004 amendment to the Revised LAL, expropriation of collective land and subsequent construction is for the purposes of national projects or public works and compulsory leasing to the state through requisition is for the "public benefit."³⁰⁶

In China, factories, development zones and industrial parks are often cited as reasons for expropriation.³⁰⁷ For example, the peasants of Bagou Village, Hongqi Township, Zigong City, Sichuan Province were promised a "High Technology Park" and an engineering college.³⁰⁸ Decisions were approved to requisition the land, demolish a number of specific homes and resettle those dispossessed.³⁰⁹ The local population perceived the benefit in terms of employment and educational opportunities for their children.³¹⁰ Despite promises, neither the High Tech Park nor the engineering college was ever constructed. In its place stands a block of highly priced flats and most peasants are not living on the land.³¹¹ The case of the peasants of Zigong is unfortunately not an anomaly. In another case, the farmers of Qingkou Town, Minhou County, in Fujian province were

and is very concerned about social unrest. See *The Limitation of the Gini Coefficient in China*, People's Daily Online (July 20, 2006), available at http://english.people.com.cn/200607/20/eng20060720_285083.html (accessed last visited Apr. 20, 2007). See also *supra* notes 4-5 and accompanying text (discussing the Chinese Premier's concerns about social instability); see also *Land Seizures Main Cause of Social Unrest*, *supra* note 109.

³⁰¹ Ben Robertson, *Rural Wrongs Retold*, SOUTH CHINA MORNING POST, May 23, 2006.

³⁰² *Id.*

³⁰³ *Supra* note 5; see *supra* note 4 and accompanying text; see also *supra* note 109.

³⁰⁴ Revised LAL, *supra* note 7.

³⁰⁵ New Property Law, *supra* note 11.

³⁰⁶ 2004 Revised LAL, *supra* note 39. The distinction between requisition and expropriation is the only difference between the 1998 and 2004 versions of the RLAL. See Ho, *supra* note 45, at 26 n.34.

³⁰⁷ Pils, *supra* note 12, at 246-249.

³⁰⁸ *Id.* at 240, 246.

³⁰⁹ *Id.* at 245.

³¹⁰ *Id.* at 247.

³¹¹ *Id.* at 240, 247.

promised an automotive plant that was never built.³¹² The promise of so-called “development zones” is repeatedly used to justify the conversion of agricultural land to commercial use in the name of public interest.³¹³

While it is impractical for the law to generate an exhaustive list of public interests, it is possible for China’s lawmakers to sufficiently define the public interest to prohibit the taking of agricultural land for solely commercial purposes.³¹⁴ The Chinese legislature had the opportunity to do just that in the New Property Law, but it opted to retain the status quo. The New Property Law reiterates the public interest requirement,³¹⁵ but according to an NPC lawmaker, the definition of ‘public interest’ in this context would be dealt with at a later stage.”³¹⁶ With the number of angry peasants and dwindling supply of arable land, one hopes that the “later stage” does not come too much later.

³¹² The English translation of the peasants petition allege three illegalities: (i) failure to put the development bid out to tender (ii) illegal transfer of land-use rights from an approved developer to a co-conspirator and (iii) laundering enormous financial gains. See Zhao Yuan, *An Investigative News Report*, available at http://www.zonaeuropa.com/2000929_1.htm (last visited Mar. 29, 2008).

³¹³ In another reported case, jobs, green space and shares were promised in exchange for peasants surrendering land use rights to reorganize the collective into a TVE. *See supra* notes 258-267 and accompanying text). The case involved a former Beijing city official who secured rights to a plot of wheat fields, on which he built his chateau. The land was previously farmed by the Yangge Village peasants collective. When the Changping District in Beijing initially agreed to the development, the peasants were told the plot would be converted to a conservation zone and the lease to the official was subject to the condition that it would remain mostly green space. The official promised employment on the conservation zone to all able bodies and a monthly stipend of US \$45 to the elderly. Changping District made the chateau a part of its annual plan. Local leaders were to use fees paid by the official to start companies and distribute the shares. Yangge residents claim shares were never issued and companies were not formed. The peasants ultimately had their interests severed from the ongoing development of the land. Phan, *supra* note 91, at 627.

³¹⁴ A number of U. S. states prohibit the use of eminent domain for commercial development and many more are considering the enactment of legislation prohibitions in the wake of *Kelo* (*Kelo v. New London*, 545 U.S. 469 (2005)). (See Arthur O’Donnell, *Eminent Domain Restrictions Spread Through the Nation*, Environment & Energy Publishing Land Letter, LexisNexis Academic (Mar. 1 2007). Forty states and the Federal Government have enacted new legislation prohibiting or curbing economic development takings. Ilya Somin, *The Limits of the Backlash: Assessing the Political Response to Kelo*, George Mason Law & Econ. Research Paper No 07-14, Mar. 2007, available at <http://ssrn.com/abstract=976298> (last visited Mar. 29, 2008).

³¹⁵ New Property Law, *supra* note 11, arts. 42, 148.

³¹⁶ Wei Wang, *Specific Issues Focus of Property Debate*, CHINA DAILY, Aug. 26, 2006.

D. *Legal Procedures for Expropriation*

Under the 1998 Revised LAL, rural land development required a two-step process. First, land is expropriated from the collective by the State and transfer of land ownership title to the State is required.³¹⁷ Once ownership is vested in the State, it becomes urban land and transferable to private developers and other entities by conveyance or allocation.³¹⁸ Once the land becomes State-owned, collective ownership is severed and peasants have no further claim to it.³¹⁹ Developers are then granted land-use rights for a term of 40 to 70 years and the land must (theoretically) be used as specified in the grant.³²⁰ Very often, the legal requirement of transferring from the collective to the State has been ignored.³²¹ There are many instances of village cadres selling collective land to cities.³²² Any of these transactions occurring prior to 2004 are completely illegal.³²³

The 2004 Amendment to the Revised LAL now makes a distinction between expropriation and requisition.³²⁴ A change in ownership from collective to State land is no longer required in requisition decisions, though formal title must still be changed in expropriations.³²⁵ Expropriation results in a changing of legal ownership; in cases of requisition, the owner of the land does not change and remains vested in the collective.³²⁶ Legally, the difference is quite significant. Because ownership will not change in cases of requisition, rights of the peasants will no longer be severed when the land is requisitioned and, therefore, peasants will retain their legal standing. But, it is not yet clear if in practice such a distinction is meaningful.³²⁷ Despite this distinction, without a clear definition of public interest, the state essentially has unrestricted power to expropriate and requisition property.

E. *Compensation*

Prior to the 2004 amendment to the Chinese Constitution there was no constitutional requirement for compensation. Nevertheless, the require-

³¹⁷ Ho, *supra* note 45, at 24-32; Ho & Lin, *supra* note 81 at 687-688.

³¹⁸ *Id.*

³¹⁹ Ho, *supra* note. 45, at 26 n.34.

³²⁰ Ho & Lin, *supra* note 81, at 688.

³²¹ Ho, *supra* note 45, at 32-33.

³²² *See id.*

³²³ *Id.*

³²⁴ Expropriation is now the taking of collective land by the state for the purposes of national projects such as building highways, railroads, bridges, and the like. Requisition, on the other hand, is the temporary leasing of collective land to the state for the public benefit. Ho, *supra* note 45, at 26 n.34.

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ *See id.*

ment for compensation existed in Article 2 of the Revised LAL, which provides that the state may, in the public interest, lawfully expropriate or requisition land by paying compensation.³²⁸ Often, the compensation is very low with little or no cash compensation going to the individual farmers in exchange for their land rights.³²⁹ The collective organization spreads the loss among all farmers by conducting a large scale land readjustment.³³⁰ Farmers who lose their land receive a smaller plot of land at the expense of other farmers whose land is readjusted into yet smaller plots.³³¹ This type of compensation, known as “resettlement through agricultural production,” with its repeated reduction in plot size, is at odds with the rational use of land mandated by both the Revised LAL and the RLCL and results in an inefficient system of agricultural land use and production yield.³³²

Additionally, fees paid to the collective unit by developers (the source of cash compensation) often do not find their way to the rural population. A number of high profile cases describe the plight of peasants displaced at the hands of officials and developers with little or no compensation. The case from Zigong is a typical case where the local government was selling off land in an attempt to generate income.³³³ As one local economist put it, cheap land and labor could attract investment and advance the careers of the local officials.³³⁴ The peasants put their hope in the development of a factory where they could work and earn a living.³³⁵ Instead, the farmers allege they were compensated at a rate of one-fifth the cost of their replacement homes and never given the factory jobs promised.³³⁶ In the Qingkou Town case the developers apparently paid up, but according to reports, the farmers received only a fraction of the

³²⁸ Revised LAL, *supra* note 7.

³²⁹ Li, *supra* note 57, at 67.

³³⁰ *Id.*

³³¹ Chen *et al.*, *supra* note 147, at 123.

³³² *Id.*; see RLCL *supra* note 40, art. 8; see also *supra* note 131 (for the text of art. 8); see also Revised LAL, *supra* note 7, art. 3 (for the text of art. 3).

³³³ Pils, *supra* note 12, at 246.

³³⁴ *Id.* at 246-47.

³³⁵ *Id.* at 246.

³³⁶ *Id.* Reportedly, some members of the Zigong population obtained urban household registration documents as part of their compensation packages. See *id.* at 259 n. 64. However, a number of those dispossessed have joined the Chinese floating peasant population and made their way to the outskirts of Beijing. Migrant children are prohibited from attending school in the greater Beijing area schools. After several evictions by the city government, their “school” secured permission to occupy a dilapidated structure with broken windows and doors and without heat. The Hongqi Village children attended this school in the bitter cold of Beijing winter. The Beijing government allows the school to operate, but is under no obligation to subsidize it in any way. Renovation of the “school” occurred through private community efforts in which the author was privileged to participate.

promised compensation and jobs never materialized.³³⁷ Interviews with local officials offered different explanations of what happened to the funds.³³⁸

The purpose of compensation, according to the State Council, is to enable the farmers to both maintain their living standards and to provide for their long term livelihood.³³⁹ The Revised LAL provides that compensation shall include compensation for the land, resettlement subsidies and compensation for attachments and young crops on the land.³⁴⁰ Compensation standards for land are set by law based on annual outputs of the land plot.³⁴¹ Provinces have developed their own regulations on standards for compensation of young crops, attachments and settlements.³⁴² The compensation standard is to be decided through consultation.³⁴³ Additionally, the collective organizations as well as the farmers have rights to apply for a hearing into the matter of compensation.³⁴⁴

³³⁷ See Zhao Yuan, *An Investigative News Report*, *supra* note 312; see also Zhao Yuan *et. al.*, *Modernization and the Peasants of Qingkou*, available at www.hrichina.org (last visited Mar. 29, 2008).

³³⁸ Developers of the automotive plant paid the county the compensation for the dispossessed farmers in a number of towns including Hongsan and Hongsi towns. The developer's fees included an amount for peasant compensation of over one million yuan. The peasants were given only 248 thousand. The county itself had also agreed to invest a percentage in the development of the automotive plant. When reporters began to ask questions, one official stated that because the county's financial situation was weak, it used the peasants' compensation to pay for its portion of the shares in the enterprise. Another official reportedly stated that "we took into account that the farmers were not very sophisticated. If we would have given all of the compensation to them in a lump sum, we were afraid they'd spend it all at once. So we put the bulk of the compensation into a County Agricultural Foundation Project, which included a production support fund, a grains rations fund, a deposit fund and a pension fund." Yuan, *Modernization and the Peasants of Qingkou*, *supra* note 337.

³³⁹ The 2004 Decision of the State Council on Deepening the Reform of Strict Land Administration, *cited in* Asia Development Bank, *Capacity Building for Resettlement Risk Management, P.R.C. Thematic Rpt. No. 4* at 22 (Mar. 2006) available at <http://www.adb.org/Resettlement/activities/TA6091REG/PRC-Thematic-Report-4.pdf> [hereinafter ADB Thematic Rpt. 4].

³⁴⁰ Revised LAL, *supra* note 7, art. 47.

³⁴¹ For requisition of cultivated land, the standard compensation for taking is six to ten times the average annual output value of the land for the preceding three years. Resettlement subsidies are to be divided among those members of the collective needing resettlement and should be four to six times the average output value for the preceding three years. *Id.*

³⁴² *Id.*

³⁴³ RLCL, *supra*, note 40, art. 36.

³⁴⁴ Provisions on Hearing for Land Resources, *cited in* ADB Thematic Rpt. 4, *supra* note 339, at 8.

But, in reality, these safeguards are of little significance since the rural reality lags behind both official policy and law.³⁴⁵ First, farmers have insecure, non-marketable land rights and no access to information about land values, which provide little negotiating power.³⁴⁶ Second, the standards for land compensation are set by law. Third, few farmers are actually consulted although consultations are legally required.³⁴⁷ Fourth, the administrative decision to requisition is usually made unilaterally.³⁴⁸ Lastly, few farmers actually know what their rights are under the reformed law.³⁴⁹

Compensation for rural land expropriation is a difficult area to reform for a number of reasons. The compensation standards for land set by law are very low.³⁵⁰ Rather than using the annual output to determine compensation standards for the land, which will remain low because peasants are trapped in a system of inefficient land use causing low annual outputs, compensation standards could be set according to market value.³⁵¹ However, tying compensation to market value is not a simple task.³⁵² There is difficulty in valuing land that farmers have no right to sell.³⁵³ Its value is not realized until it is developed by future commercialization.³⁵⁴ One can legitimately question whether gains completely out of proportion to the land value prior to development are appropriate.³⁵⁵ And one can also question why the members of a particular collective should benefit any more than the community at large given the underlying egalitarian characteristics of a socialist society.³⁵⁶ Alternatively, there is a fundamental unfairness when the land-use rights holder gets no share of the value created in changing the purpose of his land-use rights. It has been suggested

³⁴⁵ See generally Rural Development Institute, , *In China's Land Reforms Rural Reality Lags Official Policy* (Apr. 16, 2006) available at http://www.rdiland.org/ABOUTRDI/About_PressCenter.html.

³⁴⁶ Pils, *supra* note 12, at 248; Asia Development Bank, *Resettlement Risk Management, Asset Valuation in Land Acquisition Compensation, P.R.C. Thematic Rpt. No. 2* at 22 (Mar. 2006) available at <http://www.adb.org/Resettlement/activities/TA6091REG/PRC-Thematic-Report-2.pdf> [hereinafter ADB Thematic Rpt. 2].

³⁴⁷ Keliang & Prosterman, *supra* note 4, at 47 (reporting that 2005 fieldwork in seventeen provinces found only 22 percent of farmers reported consultation by local authorities prior to the taking).

³⁴⁸ *E.g.*, in the Zigong case decisions were made unilaterally. See Pils, *supra* note 12, at 241.

³⁴⁹ Li, *supra* note 57, at 66.

³⁵⁰ ADB Thematic Rpt. 3 *supra* note 186, at 1-2; Keliang & Prosterman, *supra* note 4, at 47.

³⁵¹ Pils, *supra* note 12, at 248-51.

³⁵² *Id.*; see generally ADB Thematic Rpt. 3 *supra* note 186.

³⁵³ Pils, *supra* note 12, at 240-41, 250.

³⁵⁴ *Id.* at 244.

³⁵⁵ *Id.* at 257.

³⁵⁶ *Id.* at 257.

that the fundamental unfairness is the cause of much of the rural unrest.³⁵⁷ In the long run, providing the rural population with the same marketable rights as their urban counterparts would equip them with negotiating power³⁵⁸ and a market mechanism for valuation of pre-developed land could evolve.³⁵⁹

Additionally, prohibitions on interference with cash compensation must be strictly enforced.³⁶⁰ Interference, often under the pretext of collective economic expansion, occurs despite several laws which make misappropriation of compensation criminal offenses with severe penalty.³⁶¹ Revised LAL recognizes embezzlement and misappropriation of expropriation proceeds as a crime. Interestingly, the provision seems to indicate that there is some level of misappropriation that does not rise to the level of criminality. The relevant section states:

Whoever infringes on and uses the compensation fee and other related fees for land requisition of the requisitioned unit for other purposes constituting a crime shall be investigated of criminal liability according to the law; where a crime has not been constituted, administrative sanctions shall be imposed according to law.³⁶²

The RLCL explicitly states that misappropriation of compensation is a crime and prohibits local officials from intercepting or reducing farmers' compensation. Article 59 states:

Any unit or individual that, in violation of the regulations on land administration, requisitions or occupies land or embezzles or misappropriates the compensations paid for the land requisitioned, which constitutes a crime, it/he shall be investigated for criminal responsibility in accordance with law; and if damages are caused to others, it/he shall bear such responsibilities as paying compensation for the damages.³⁶³

The success of these provisions in putting an end to misappropriation depends entirely upon the law's proper implementation at the local level.

V. REMEDIES AND DISPUTE RESOLUTION

Prior to the RLCL there were very few avenues open when promised compensation was inadequate, not forthcoming, or when an expropria-

³⁵⁷ See ADB Thematic Rpt. 2, *supra* note 346, at 22. However, the peasants' complaints in the case of Zigong were characterized by the author not only as demonstrating bitterness at corrupt officials getting rich, but also concentrating on subsistence. Pils, *supra* note 12, at n. 59.

³⁵⁸ See Pils, *supra* note 12, at 244.

³⁵⁹ See ADB Thematic Rpt. 2, *supra* note 346, at 31.

³⁶⁰ See Li, *supra* note 57, at 67.

³⁶¹ See *Id.*; e.g., *supra* note 338 (discussing the use of the proceeds of the Qingkou town case).

³⁶² Revised LAL, *supra*, note 7, art. 79. .

³⁶³ RLCL, *supra* note 40.

tion or land adjustment was carried out illegally.³⁶⁴ The RLCL provides a framework under which disputes can be settled. Pursuant to Article 51 of the RLCL, the parties may settle the dispute through consultation and may request the villagers assembly or the township government to help settle the dispute through mediation.³⁶⁵ Such a procedure illustrates the Chinese preference for mediation and non-judicial resolution over litigation.³⁶⁶ But, the efficacy of such a provision was highly questionable, given that the town government, local officials and assembly leaders were historically responsible for both the requisitioning or expropriation decision as well as involved in the distribution of compensation.³⁶⁷ In an administrative review, an enormous balance of power is tipped clearly in favor of the local officials.³⁶⁸

Additionally, farmers generally lack a clear understanding of what their rights are and when rights are violated a common course of action for the uninformed is inaction.³⁶⁹ Even when equipped with knowledge of his rights, a farmer seeking administrative review is often met with the repeated county, town or provincial response to submit another letter to another official body before anything further could be done.³⁷⁰ Lost in this bureaucratic quagmire, the individual farmer would often just give up in the past.³⁷¹

The RLCL recognized the impracticality of such dispute settlement mechanisms and goes further than the previous law. Prior to the RLCL, administrative reviews were to be exhausted before a farmer could file a complaint with a People's court.³⁷² Under the new law, where the parties are not willing to settle through consultation or mediation or where con-

³⁶⁴ Li *supra*, note 57, at 66; *see e.g.*, Pils, *supra* note 12, at 263-66 (detailing the procedures implemented by the peasants of Zigong and demonstrating their ineffectiveness).

³⁶⁵ RLCL, *supra* note 40.

³⁶⁶ This Confucian based preference however, is suspect given that China historically did not have the institutions to hear legal disputes. While this could be a chicken and egg dilemma, it is interesting to note that the number of suits filed against the government alone increased 12 thousand percent since the implementation of reform. *See* GUTHRIE, *supra* note 3, at 69.

³⁶⁷ The case of Zigong peasants (*see* Pils, *supra* note 12) and Qingkou peasants (*see supra* notes 337-338) requisition and compensation distributions reportedly were carried out by the same officials.

³⁶⁸ *See* Li, *supra* note 57, at 66.

³⁶⁹ *Id.*

³⁷⁰ *Id.* Jerome Cohen, expert on Chinese law and Senior Fellow for Asia studies at the Council on Foreign Relations, describes the difficulties: "[t]he common thread is that when people seek to make their grievances known—by petitioning government offices or going to court—they are often frustrated by the runarounds, delays, excuses, and inaction they face there." Pan, *China's Angry Peasants*, *supra* note 5.

³⁷¹ *See* Li, *supra* note 57, at 66.

³⁷² *Id.*

sultation or mediation is not successful, the peasant may apply to an arbitral body in charge of rural land contracts for arbitration, or directly bring a suit in the People's Court.³⁷³ Because the administrative review mechanism has been ineffective in the past, this ability to go directly to a court without the need to invoke administrative review by the parties generally on the opposing side of the grievance is potentially a powerful tool for the dispossessed farmer.³⁷⁴

However, without the institutional capacity necessary to implement it, that potential will not be realized.³⁷⁵ Ability to go directly to a court would require (i) that the farmer understand he has this right; (ii) that he has the means necessary to institute a legal proceeding; and (iii) that the court is an impartial people's court. Institutional capability would be enhanced by ensuring farmers are provided information on their rights and afforded legal aid, ensuring they are able to enforce their rights.³⁷⁶ Unfortunately, judges are often susceptible to corruption,³⁷⁷ as they are appointed, promoted and removed by local government and Party leaders rather than by a central or high provincial authority.³⁷⁸ They are subject to the pressures of *guanxi*³⁷⁹ (social connections based on family, friendship, school or local ties) and local protectionist abuses.³⁸⁰ It is difficult to see how farmers' grievances will be heard without the creation of a rural lands tribunal,³⁸¹ answerable to a central or high provincial authority, made up of judges independent from the local party officials.

Further, a leading member of the ruling CPC Standing Committee was recently reported as stating the Communist Party must maintain its dominance over lawyers, judges and the correct political stand of such persons is "where the party stands."³⁸² The People's courts are political bodies and their independence is often called into question.³⁸³ The subjugation of courts to the Central Party's will has created a system where the law is

³⁷³ RLCL, *supra* note 40, art 52.

³⁷⁴ Li, *supra* note 57, at 66; *see e.g.*, Pils, *supra* note 12, at 263-66 (detailing the administrative review process implemented by the peasants of Zigong and demonstrating its ineffectiveness).

³⁷⁵ Li, *supra* note 57, at 66, 70.

³⁷⁶ Schwarzwald et al., *supra* note 114, at 224-25.

³⁷⁷ *See* Jerome A. Cohen, *Law in Political Transitions: Lessons from East Asia and the Road Ahead for China*, Written Statement to Council on For. Rel. (July 26, 2005), available at http://www.cfr.org/publication/8458/law_in_political-transition.html.

³⁷⁸ *Id.*

³⁷⁹ *Id.* For additional discussion of the concept of *guanxi*, *see* GUTHRIE, *supra* note 3, at 103-12.

³⁸⁰ *See* Cohen, *supra* note 377.

³⁸¹ Li, *supra* note 57, at 66.

³⁸² Mary Anne Toy, *Party Dictates the Law Says Top Party Official*, INTL. HERALD TRIB., Feb. 5 2007.

³⁸³ *See* Cohen, *supra* note 377; *see also* Donald Clarke, Peter Murrell, Susan Whiting, *The Role of Law in China's Economic Development, Public Law and Legal*

not respected and its implementation ineffective.³⁸⁴ Central Party policy and SCNPC enacted legislation currently favors farmers' rights, but it is clear that local party policy often does not. While much has been made of local abuse of power, it is somewhat duplicitous to put all the blame on local party officials for flouting the law, when the central party position is that the law is a party tool.

VI. CONCLUSION

China has made progress on the reform of its property laws. Nevertheless, China's reform measures fail to address a number of contentious issues that directly impact the livelihood of China's 780 million farmers. Enactment of the RLCL is seen by some as a watershed moment in protection of peasant land tenure security.³⁸⁵ Yet frequent land readjustments continue to contribute to land tenure insecurity, farming plot fragmentation and inefficiency.³⁸⁶ The ability to farm more efficiently remains hindered, because farmers lack the ability to obtain capital through mortgages to invest in the land.³⁸⁷ Both the Revised LAL and the RLCL establish sparing and rational land utilization as China's basic land policy.³⁸⁸ Yet illegal expropriations continue to be carried out by village, town and county officials. Both the Revised LAL and the New Property Law fall short in their role as safeguard against irrational land development because they fail to clearly articulate the meaning of the "public interest." The RLCL gives farmers the right to bring a suit, yet does not create an independent and unbiased lands tribunal to hear their grievances. The Central CPC articulates policy and support for land reform and protection of farmer's rights, however, their use of law as a tool to implement party will has created a system where law is often ignored and its ambiguities exploited.

The significance of legal reform, however, should not be underestimated. Land ownership in China is an extremely sensitive and complicated question inextricably intertwined with China's chosen socialist ideology. It is only recently that private property has become a constitutional principle and clarification of property rights in implementing legislation has become a major policy objective. Pursuant to the New Property Law, private property and public property are to be given equal

Theory Working Paper No. 187 at 22, George Washington University Law School (Jan. 27 2006), available at <http://ssrn.com/abstract=878682>.

³⁸⁴ See Blanchard, *supra* note 19, at 382-83; Cai, *supra* note 9, at 20-24; Clarke et al., *supra* note 383, at 22..

³⁸⁵ Li, *supra* note 57, at 61.

³⁸⁶ Chen et al., *supra* note 147, at 125.

³⁸⁷ See *How to Make China Even Richer, Let the Peasants Own Their Land*, *supra* note 163, at para. 5.

³⁸⁸ Revised LAL, *supra* note 7, art. 1.

protection.³⁸⁹ This is a remarkable achievement in a socialist state.³⁹⁰ Opaque institutional arrangements can no longer work in a climate of increased peasant dissatisfaction as they fuel instability. Indeed, China's legal reform signals acceptance of such a supposition. Reform measures, however, will not achieve their goals without their implementation and enforcement at all levels of government: central, provincial, and local. Further, the decisions to provide marketable rural land-use rights and dispute resolution institutions free from political interference will not be made by the law; these decisions can only be made in the political arena. Enactment of law is just one step in China's process of gradual reform. The next step must include respect for that law.

³⁸⁹ New Property Law, *supra* note 11, art. 3.

³⁹⁰ See Jacque deLisle, *Property Rights Reform in China, Presentation to Carnegie Endowment for Intl. Peace on "Future of Political Reform in China,"* For. Policy Research Inst. (Jan. 29, 2004), <http://www.fpri.org/transcripts/lecture.20040126.delisle.chinapropertyrights.html>.

