

The Emergence of Private Property Law in China and Its Impact on Human Rights

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I. INTRODUCTION

In January 2011, when Chinese President Hu Jintao visited the United States, he conceded that "a lot still needs to be done" with regards to China's human rights issues.¹ He further elaborated that China has "made enormous progress."² Many are skeptical of the People's Republic of China's ("PRC")³ commitment to human rights, particularly civil and political rights.⁴ They point to the so-called "*Beijing Consensus*" as a system of rights based on the perceived interest of the government without recourse to international norms.⁵ The PRC has the highest death penalty

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¹ *Obama Presses China on Human Rights*, NBC NEWS, Jan. 19, 2011, http://www.msnbc.msn.com/id/41150249/ns/politics-white_house.

² *See id.*

³ The terms "China" and "People's Republic of China" will be used interchangeably throughout this article.

⁴ Jerome Cohen, *Crunch Time*, S. CHINA MORNING POST June 6, 2012, available at <http://www.usasialaw.org/?p=6979>; see also Keith Henderson, *Halfway Home and a Long Way to Go: China's Rule of Law Evolution and the Global Road to Judicial Independence, Judicial Impartiality and Judicial Integrity*, in JUDICIAL INDEPENDENCE IN CHINA 23-36 (Randy Peerenboom ed., 2010).

⁵ John Wagner Givens, *The Beijing Consensus is Neither: China as a Non-Ideological Challenge to International Norms*, 6(2) ST ANTONY'S INT'L REV. 10, 10 (2011); see generally Stefan Halper, *The Beijing Consensus: How China's Authoritarian Model will Dominate the Twenty-First Century* (2010).

rate in the world,⁶ repeatedly strikes down free speech,⁷ often incarcerates lawyers who sue the government under the Administrative Litigation Law (“ALL”),⁸ and continues to receive poor ratings on its human rights record from the U.S. Department of State⁹ as well as low “rule of law” ratings from the World Bank.¹⁰

The Chinese political and human rights landscape has been modified to provide for more definitive protections for its people. In 2004, China amended its 1982 constitution to purportedly guarantee private

⁶ In 2007, Amnesty International estimated that China carried out more executions than the rest of the world, and sentenced more people to death than the rest of the world combined. See AMNESTY INTERNATIONAL, DEATH PENALTY STATISTICS 2007, FACTS AND FIGURES ON THE DEATH PENALTY, available at <http://www.amnesty.org/en/library/asset/ACT50/001/2008/en/b43a1e5b-ffea-11dc-b092-bdb020617d3d/act500012008eng.pdf>. However, there have been some progressive changes in Chinese death penalty practices. This is evidenced by Professor Roger Hood’s observation that, “. . . the last few years have witnessed a distinct change in the discourse, evidenced by the willingness of the Chinese authorities to discuss the death penalty in human rights seminars and dialogues with European countries, the gradual opening up the subject to research, and the attempt to guard against wrongful conviction and control the incidence of executions through review of all death penalty verdicts by the Supreme People’s Court.” See Roger Hood, *Abolition of the Death Penalty: China in World Perspective*, 1 CITY U. H.K. L. REV. 1, 16 (2009). Reform is taking the form of reducing the number of offenses that carry the death penalty from 68 to 55. The 13 offenses include property crimes, such as falsely issuing value-added tax invoices, and fraudulent activities using financial certificates. *Chinese Lawmakers Oppose Proposal to Abolish Death Penalty*, THE TIMES OF INDIA, Aug. 28, 2010, available at <http://www.timesofindia.indiatimes.com/world/china/Chinese-lawmakers-oppose-proposal-to-ab>. See Megan Stack, *China Reviews Death Penalty*, L.A. TIMES, Aug. 25, 2010, available at <http://articles.latimes.com/2010/aug/25/world/la-fg-china-death-penalty-20100825>. Property crimes that would continue to carry the death penalty include accepting bribes and damaging public property. Stack, *China Reviews Death Penalty*. China also recently declared that confessions made under torture would be inadmissible. *Id.*

⁷ For example, China faces major contentions by the ISP corporation, Google over its censorship practices. See *id.*; see also THE OPENNET INITIATIVE, CHINA: COUNTRY REPORT (2012), <http://access.opennet.net/wp-content/uploads/2011/12/accesscontested-china.pdf>.

⁸ Leland Benton, *From Socialist Ethics to Legal Ethics: Legal Ethics, Professional Conduct, and the Chinese Legal Profession*, 28 UCLA PAC. BASIN L. J. 233 (2011).

⁹ BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, *Country Reports on Human Rights Practices for 2011: China (includes Tibet, Hong Kong, and Macau)*, U.S. DEP’T OF STATE, <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dclid=186268>.

¹⁰ Xiaozu Wang, Lixin Colin Xu, Tian Zhu, *Foreign Direct Investment under Weak Rule of Law: Theory and Evidence from China* (World Bank Policy Research Working Paper No. 5790, 2011), available at http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2011/09/06/000158349_20110906104511/Rendered/PDF/WPS5790.pdf.

property ownership and human rights.¹¹ In 1998, the PRC signed the International Covenant on Civil and Political Rights (“ICCPR”), though China has not yet ratified it.¹² In 2009, the PRC released its National Human Rights Action Plan.¹³ In this plan, China promised to increase safeguards for civil and political rights and pledged to protect its citizens from torture, ensure fair trials, and guarantee the rights of its citizens to participate in government and question government policies.¹⁴ These promises were subsequently reaffirmed in China’s 2012 National Human Rights Action Plan.¹⁵ In 2012, China amended its Criminal Procedure Law to include, among other things, a rudimentary exclusionary rule prohibiting the introduction of confession evidence when it is the product of torture.¹⁶ Amnesty International, while acknowledging gaps in these protections, welcomed the National Human Rights Action Plan, stating that it “signals the growing importance the Chinese authorities place on the protection of human rights and the adherence to international human rights standards.”¹⁷

¹¹ *NPC Closes Session, Adopts Amendment to Constitution*, Permanent Mission of the People’s Republic of China to the United Nations and Other International Organizations in Vienna (Jan. 14, 2004), available at <http://www.chinesemission-vienna.at/eng/xw/t127553.htm>. Some commentators submit that the new constitution is flawed. One commentator has stated, “the Chinese Communist Party’s proposal to amend the Chinese constitution to strengthen human rights and private property protection has drawn praise. But major flaws exist in the amendment The greatest limitation of the proposal is that it fails to provide for a mechanism to review whether a law or a government decision violates the constitution.” Mei Ying Gecklik (Veron Hung), *China’s Constitutional Amendment is Flawed*, CARNEGIE INTERNATIONAL HERALD TRIBUNE, Mar. 5, 2004, available at http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=1470_.

¹² International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171. While signatory states to international conventions are under an affirmative obligation to not take steps to frustrate the object and purpose of the treaty, only ratified states parties are bound by the substantive provisions of the treaty itself. See Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

¹³ Keith Bradsher, *China Releases Human Rights Plan*, N.Y. TIMES, Apr. 13, 2009, available at http://www.nytimes.com/2009/04/14/world/asia/14china.html?_r=1.

¹⁴ See *id.*

¹⁵ National Human Rights Action Plan of China, (2012-2015) (published by the Information Office of the State Council, Nov. 6, 2012), available at http://news.xinhuanet.com/english/china/2012-06/11/c_131645029.htm.

¹⁶ Zhong Hua Ren Min Gong Zhi Guo Xing Shi Su Song Fa [2012 Nian Xiu Zheng] Quan Wen (中华人民共和国刑事诉讼法[2012年修正](全文) (promulgated by Fifth National People’s Congress, effective Mar. 14, 2012) Art. 50 (2012) (P.R.C.).

¹⁷ AMNESTY INTERNATIONAL, CHINA’S NEW HUMAN RIGHTS PLAN EMPHASIZES ECONOMIC RIGHTS AT EXPENSE OF CIVIL LIBERTIES, Apr. 14, 2009, available at <http://www.amnesty.org/en/news-and-updates/news/chinas-new-human-rights-plan-economic-rights-expense-civil-liberties-20090414>.

Moreover, in its August 2006 country report, the United Nations' Convention to Eliminate All Forms of Discrimination Against Women ("CEDAW") Committee acknowledged that China had taken positive steps toward promoting equality for women, even though it still had many concerns.¹⁸ The Committee specifically cited China's 2005 amendment to the Law on the Protection of Rights and Interests of Women, the 2001 amendment to the Marriage Law, the 2002 Law on Contracting of Rural Land, the 2006 amendment to the Law on Compulsory Education, and the 2001–2010 Programme for the Development of Chinese Women.¹⁹

These trends, though deliberate, showcase China's inexorable drive toward compliance with international human rights norms. When contrasted with the stark realities of the "Cultural Revolution" of a few generations ago, these trends corroborate the claims of progress made by former President Hu Jintao. However, they also pose inevitable questions about what is motivating China's drive toward human rights and whether such motivating factors are genuine and sustainable.

One factor driving these changes is the PRC's introduction of a market economy and the emergence of private property rights. This article explores the implications for, and development of, private property law in the PRC and its connection to the growth of the nascent Chinese human rights system. It evaluates the vitality of newly emerging human rights trends, reviews their historic, legal, and social backgrounds, and discusses how the introduction of private property in China has fundamentally altered its civil society. Drawing upon a comparative examination of international authority and statutory analysis, and evaluating them from the perspectives of both Chinese and Western scholarship, this article analyzes the trends behind improving democratic structures by reviewing the self-governance of condominium owners associations and the human rights improvements they have spawned. It also examines evolving statutory law governing property expropriation and newly developing rights to property in the PRC. Such progressive trends are counteracted by local corruption, lack of enforcement, and inadequate judicial review.

¹⁸ The committee's areas of concern included, *inter alia*, implementation failures, insufficient empirical data, uneven distribution of economic growth and persistent culturally-based gender bias. See U.N. Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW") Committee, *Concluding Comment of the Committee on the Elimination of Discrimination Against Women: China (5th and 6th periodic reports in 36th Sess.)*, U.N. Doc. CEDAW/C/CHN/CO/6 (Aug. 25, 2006), available at http://www.un.org/womenwatch/daw/cedaw/cedaw36/cc/CHINA_advance%20unedited.pdf.

¹⁹ China signed the CEDAW on July, 17 1980 and ratified on November 4, 1980. *Id.* China also signed the Convention on the Prevention and Punishment of the Crime of Genocide on 20 July 1949, ratified on 18 April 1983 and signed the Convention against Torture signed on December 12, 1986, ratified on October 4, 1988. *Id.*

These negative factors have traditional and historic underpinnings, which are currently being addressed by the Chinese legislature. This article will review this relevant legislation and offer predictions for the future of the Chinese private property system as it begins to nurture budding human rights reforms. Finally, it suggests initiatives to maximize those reforms through efficient legislative drafting and other efforts designed to nurture the sensitive and sometimes volatile free market.

II. EVOLVING HUMAN RIGHTS TRENDS IN THE PRC

China has repeatedly defended its slow progress on human rights by saying that, as a country with a high population of poor citizens, it must provide for its people's economic rights before it can focus on their civil and political rights.²⁰ However, China's drive to improve its economy is also (perhaps unintentionally) fueling trends that favor wider civil and political rights. Moreover, the connection between the recently established market economy in China and its newly emerging sensitivity to human rights turns on the Central Government's motives and the sustainability and growth of the new rights regime taking shape. Indeed, as the PRC's wealth and international influence grow, its sensitivity to human rights grows as well. Thus, these changes are at least partly driven by economics.

Skeptics suggest that China's emerging human rights regime is insincere, that it is not motivated by a genuine belief in international human rights, but is only meant to lure continued foreign investment and trade.²¹ As a relatively closed society, this is an easy conclusion to reach, at least from the perspective of those on the outside looking in. Outsiders contend that real change will never take place until internal censorship abates and a free exchange of ideas, including criticism of the one party system, can occur without fear of reprisal. Others contend that the solution lies in universal suffrage and a robust judiciary with full judicial review authority, particularly with respect to constitutional interpretation.²²

²⁰ Junru Li, Annual Report on China's Human Rights No. 1 (2011) (中国人权事业发展报告No.1 2011) Social Science Academic Press (China) 社会科学文献出版社.

²¹ Uche Ofodile, *Trade, Aid and Human Rights: China's Africa Policy in Perspective*, 4(2) J. INT'L COM. L & TECH. 86, 90 (2009). According to Breffini O'Rourke, "China has never been known for shying away from business on grounds of human-rights abuses. Its policy has always been to ignore blemishes in a foreign country's record book, and it similarly expects not to be questioned on its own rights performance." See Breffini O'Rourke, *China: Africa Trade Offensive Part of Global Expansion*, RADIO FREE EUR. RADIO LIBERTY, Jan. 18, 2006, available at <http://www.rferl.org/featuresarticle/2006/01/1D874EF7-9CFC-4R46-A3BD-769D4EB443F2.html>.

²² See generally Guobin Zhu, *Weak Courts, Weak Rights: Assessing the Realisation of Constitutional Rights in PRC Courts*, 44 HONG KONG L. J. 713-744 (2013).

From this perspective, China's recent human rights initiatives can be linked to its newly obtained economic clout as a formidable international trade colossus. China has become the second largest world economy in terms of Gross Domestic Product ("GDP"), second only to the United States.²³ It is also one of the world's biggest lender states, even though its people still have a relatively low per capita income.²⁴ One popular hypothesis is that China's efforts to reform its human rights record is motivated by the desire to expand to foreign markets which might otherwise be squeamish at doing business with a perceived rogue nation, at least with respect to international human rights norms.

Indeed, reforms are motivated by a desire to curry favor from or emulate wealthy, prestigious states out of fear of retaliation or desire for favorable trade terms. During the Trustee²⁵ period of the 1950s and 1960s, when most of the world's colonial nations were moving toward self-determination, adherence to international norms and treaty obligations was often necessary to establish normal diplomatic relations. Most of these newly independent states were in no position to refuse due to poverty, lack of security, and the need for continuity of trade relations or relief. This duress often forced nations to acquiesce to human rights norms, sometimes casting doubt on their sincerity.²⁶

China, on the other hand, remained independent of the Trustee system and developed substantial economic clout despite a spotty rights record. Moreover, wealth patterns are changing, the old paradigms are no longer relevant, and many developing nations are acquiring greater economic muscle.²⁷ Generally speaking, if adherence to human rights

²³ *Special Report: Top 10 Largest Economies in 2020*, EUROMONITOR INT'L, Jul. 7, 2010, available at <http://blog.euromonitor.com/2010/07/special-report-top-10-largest-economies-in-the-2020.html>.

²⁴ In 2011, the US's GDP per capita was \$48,113 compared to China's \$5,442. See *GDP per Capita (Current US\$)*, WORLD BANK (2012), available at <http://data.worldbank.org/indicator/NY.GDP.PCAP.CD>.

²⁵ U.N. Charter, art. 86-91; see generally U.N. Trusteeship Council, General Overview, <http://www.un.org/en/mainbodies/trusteeship/>.

²⁶ Developing nations seem to be less susceptible to intimidation than they were in the middle of the 20th century. They have shown resistance to issues such as the continuing controversy over trade in the Doha rounds and refused to acquiesce in its trade relations with developed countries. See Sandra Polaski, *Winners and Losers: Impact of the Doha Round on Developing Countries*, Carnegie Endowment Report, March 13, 2006 at <http://carnegieendowment.org/2006/03/13/winners-and-losers-impact-of-doha-round-o> (last viewed Dec. 2, 2013). Additionally, developing nations showed their willingness to disagree with industrialized states at the Copenhagen Climate Summit in 2009. See John Vidal, Suzanne Goldenberg and Jonathan Watts, *Copenhagen Summit: Developing Countries Warn Against Pressure to Reach Deal*, THE GUARDIAN, Dec. 25, 2009 at <http://www.theguardian.com/environment/2009/dec/15/copenhagen-poor-countries-pre> (last viewed Dec. 2, 2013).

²⁷ FAREED ZAKARIA, THE POST-AMERICAN WORLD 2-3 (2008). In his book,

norms is grounded in the third world economic disparity of the twentieth century, then continuing subscription to these norms would evaporate within the states whose economies have substantially improved in the twenty-first century. Yet, many developing states are championing the cause of human rights with greater vigor than ever before.

While China's assertion that it was concentrating on social, economic, and cultural rights before civil and political rights has been met with skepticism, the objective evidence seems to support its claim. In building its economy, China has created market forces that favor, at least to a point, greater human rights compliance. Apart from the international trade component of China's economy, its domestic economic practices and reforms provide greater insight into what is transpiring in its human rights regime. From the inside perspective, the economic changes taking place are affecting the domestic law in a way that is driving structural change conducive to greater recognition of rights. The most significant change was the establishment of a basic market economy guided by economic self-interest. One could argue that the sustainability of self-interest provides a more reliable foundation than altruism.

In addition to public relations factors helping to drive international finance and trade, one domestic economic engine for change has been the legislative reform of newly established private property ownership laws in the PRC. These laws have led to the development of a market economy, something akin to a Frankenstein's monster in a post-Marxist society, where the monster ends up dictating to the master instead of the reverse. Thus, growth of the "market economy" becomes the overarching aspiration and policy must be reviewed in a prism adhering to the needs of market forces. The market economy in turn drives fundamental societal changes like the growth of democratic governance in the most basic social structure: the neighborhood (or condominium project). Moreover, the establishment of a market economy drives other human rights processes, like heightened government sensitivity to nuisances affecting market value. This is particularly true for checks on public takings, without which a market economy would remain emotionally and structurally insecure. Additionally, precluding free and full access to the market for some

Fareed Zakaria discusses the shifts in economic power from the industrialized states, particularly the United States, to developing countries which he characterizes as the "rise of the everyone else." Zakaria observes, "[o]ver the past few decades, countries all over the world have been experiencing rates of economic growth that were once unthinkable ... In 2006 and 2007, 124 countries grew at a rate of 4% or more ... [t]he 25 companies most likely to be the world's next great multinationals [are not U.S. companies] ... [t]he tallest building in the world is now in Taipei ... [t]he world's richest man is Mexican, and its largest publicly traded corporation is Chinese. The world's biggest plane is built in Russia and Ukraine, its leading refinery is under construction in India, and its largest factories are all in China. By many measures London is becoming the leading financial center, and the United Arab Emirates is home to the most richly endowed investment fund."

groups, such as gender-based or ethnic groups, only serves to limit the market and is bad for business. Thus, market forces tend to reform pre-existing discriminatory practices. These changes promote democratic governance, transparency, public participation in government, greater social and economic rights, and non-discriminatory practices.

As these reforms have sprung largely from the changing land law, one pragmatic way to promote human rights in the PRC may be in the drafting and enforcing of more sophisticated, efficient, and binding real property legislation and regulation. A 2004 amendment to the 1982 Chinese constitution introduced a notion of property that renders a free-market economy more viable and economic development more sustainable.²⁸ Nonetheless, this constitutional aspiration to private property rights (and related human rights) has yet to be fully realized in a concrete fashion. The Chinese constitution still fails to fully play a transformative role in the property law for a number of reasons, including defects in legislative drafting, local government interference, lack of enforceability of judgments, and unreliable judicial review.

III. BACKGROUND

China first began to reform its legal system during the late Qing Dynasty by drafting a modern civil code that was patterned after the German model as adopted by Japan.²⁹ Although this draft was never used, it established the civil law tradition in the Chinese legal system. The blossoming of the civil law occurred under the Kuomintang government. In 1930, the first Chinese Civil Code was promulgated. After revising and reexamining the Qing Dynasty's Draft Civil Code,³⁰ the Republican Civil Code Drafting Committee drew on the experience of civil law countries like Germany, Japan, and Switzerland to develop its civil law legislation.³¹ After repealing the Republican legal system in 1949, the Chinese Communist party implemented a portion of the 1950s Soviet legal system.³²

²⁸ Hanri Mostert & Lei Chen, *The Dynamics of Constitutional Property Clauses in the Developing World: China and South Africa*, 17.4 MAASTRICHT JOURNAL OF EUROPEAN AND COMPARATIVE LAW 377-405 (2011).

²⁹ PHILIP HUANG, CODE, CUSTOM AND LEGAL PRACTICE IN CHINA: THE QING AND THE REPUBLIC COMPARED 15-18 (2001); *see also* Youjiong Yang 杨幼炯, *Zhongguo jindai fazhishi 中国近代法制史 CHINESE CONTEMPORARY LEGAL HISTORY* 24 (1958); *see also* ZHANG JINFAN 张晋藩, *ZHONGGUO FALU WENHUA YU JINDAI ZHUANGZING [CHINA'S LEGAL CULTURE AND ITS MODERN TRANSFORMATION]* 444-46 (1997).

³⁰ JIANFU CHEN, FROM ADMINISTRATIVE AUTHORISATION TO PRIVATE LAW: A COMPARATIVE PERSPECTIVE OF THE DEVELOPING CIVIL LAW IN THE PEOPLE'S REPUBLIC OF CHINA 14 (1995).

³¹ HUANG, *supra* note 29, at 49-51

³² Lei Chen, *The Historical Development of the Civil Law Tradition in China: A Private Law Perspective*, 78 LEGAL HIST. REV. 159 (2010).

In 1976, China began encouraging foreign investment and the pursuit of legal reform to prevent a reoccurrence of policy-driven excesses. Significantly, Chinese leaders, especially Deng Xiaoping, began to prioritize economic development over class struggle.³³ However, in order to appeal to foreign investors, China also needed to improve the reliability of its legal system and place greater reliance on the law to provide security for investment.

Prior to 1988, all land in China was classified as either urban or rural. All urban land belonged to the state and all rural land belonged to collectives.³⁴ There existed no individual land rights and no private land ownership.³⁵ The challenge of providing sufficient housing was made increasingly difficult by urbanization and an exploding population.³⁶ To ease the housing burden, China introduced a new policy of creating wealth by marketing housing.³⁷ It also amended its Constitution to recognize privately owned and transferable land use rights.³⁸ However, because early land rights were in their infancy, the free market economy was officially characterized as a form of socialist well-being.³⁹ As a result, Chinese lawmakers initially did little to adopt sophisticated modern real property legislation,⁴⁰ and relied instead on half-measures as discussed below.

³³ XIAOPING DENG, *SELECTED WORKS OF DENG XIAOPING*, VOL. 1 319-22 (2nd ed. Renmin Press 1994).

³⁴ XIAN FA art. 10 (amended Mar. 15, 1999) (PRC).

³⁵ Samuel Ho & George Lin, *Emerging Land Markets in Rural and Urban China: Policies and Practices*, 175 CHINA Q. 681, 681-82 (2003); see Yaping Wang & Alan Murie, *The Process of Commercialization of Urban Housing in China*, 33 URB. STUD. 971 (1996); see also Xiaoli Wang, *Land law* (Law Press 2003).

³⁶ Mark Kremzner, *Managing Urban Land in China: The Emerging Legal Framework and Its Role in Development*, 7 PAC. RIM. L. & POL'Y J. 611, 611-22 (1998).

³⁷ In 1988, the State Council embarked on a staged housing reform by instituting national housing reform in urban areas. The housing reform provided a ten-year blueprint that would expedite the commercialization of residential property and reduce state subsidies of housing. See James Lee, *From Welfare Housing to Home Ownership: The Dilemma of China's Housing Reform*, 15 HOUSING STUD. 61, 66 (2000).

³⁸ On September 9, 1987, the first trial concerning the commercialization of land-use rights took place in Shenzhen. This trial led to an amendment to the Constitution, Article 10, enacted on April 12, 1988 to permit the assignment of the right to use land. XIANFA art. 10 (1988) (PRC). The amended Constitution of 1988 states: "[t]he right to use land may be transferred according to law." *Id.* Soon thereafter, Article 2 of the Land Administration Law was revised, stipulating that "the right to use State owned or collectively owned land may be assigned pursuant to the law."

³⁹ Peter Ho, *Who owns China's land?*, THE CHINA QUARTERLY, Jun. 2001, at 394-421, available at <http://www.jstor.org/discover/10.2307/3451163?uid=3739632&uid=2&uid=4&uid=3739256&sid=21102884701841>.

⁴⁰ Shansheng Xia, *Property Management Law* 8 (Law Press 2003).

In 1994, the State Council adopted a comprehensive privatized and commercialized national housing reform policy⁴¹. This served two purposes: (1) relieving the government's obligation to maintain and manage buildings which were constructed to accommodate state employees⁴² and (2) ensuring private property ownership (after further constitutional reform). The policy stated that, "individual private and other non-public economies. . . are major components of the socialist market."⁴³ More significantly, constitutional reform legally equated private property with state-owned property,⁴⁴ so citizens' private property rights were legally protected. It also provided for some compensation for government takings (though further legislative reform was still needed) and recognized private ownership of property as a fundamental freedom.

Despite these reform efforts, China still lacked a sufficiently comprehensive land law, resulting in contradictory property law statutes,⁴⁵ inconsistent administrative regulation,⁴⁶ overloaded judicial pronouncements,⁴⁷ and conflicting local practices.⁴⁸ Consequently, the early Chinese land law suffered from a wide range of issues, such as

⁴¹ Guowuyuan guanyu shenhua chengzhen zhufangzhidu gaige de jue ding (国务院关于深化城镇住房制度改革的决定) [The Decision of the State Council on Furthering Housing Reform in Urban Areas of 1994] (P.R.C.).

⁴² Lee, *supra* note 37, at 61.

⁴³ XIAN FA art. 11 (amended Mar. 15, 1999) (P.R.C.).

⁴⁴ *Id.* at art. 13.

⁴⁵ See e.g., Tudi Guanlifa, 土地管理法, Land Administration Law (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 29, 1998, effective Jan. 1, 1999, amended Aug. 28, 2004) (2004) (PRC).

⁴⁶ Examples include the Guanyu waiguoren siyoufangwu guanlide ruogan guiding (关于外国人私有房屋管理的若干规定) [Provisions Concerning the Administration of Private Houses Owned by Foreigners] (1984) (P.R.C.) and the Chengzhen guoyoutudi shiyongquan churang hezhuanrang zanxingtiaoli (城镇国有土地使用权出让和转让暂行条例) [Interim Regulations on Assignment and Transfer of Rights to Use State-Owned Land in Urban Areas] (1990) (PRC) *available at* http://www.mlr.gov.cn/zwgk/flfg/tdglflfg/200601/t20060119_642175.htm.

⁴⁷ For instance, the Guanyu shiyong zhonghua renmin gongheguo danbaofa ruoganwentide jieshi Zhongguo RenMin gongheguo zhigongrenminhuayuan (关于适用《中华人民共和国担保法》若干问题的解释 中华人民共和国最高人民法院) [Judicial Pronouncement Regarding the Application of Some Provisions of the Law of Security by the Supreme People's Court] (PRC).

⁴⁸ Examples include Shenzhenshi yezhudahui he yezhuweiyuanhui zhidaoguide (深圳市业主大会和业主委员会指导规则) [Guiding Rules on the Management Corporation and Its Executive Council] Shen Fu (深府) no. 11 (promulgated by the municipal government of Shenzhen City, January 17, 2005) (PRC).

fragmentation, structural weaknesses, inconsistent application, corruption, and inconsistency with sustainable development. Thus, further reform was necessary in China's land laws.⁴⁹

In response to these issues, the Central Government issued the Property Management Regulation of 2002 and the Property Law of 2007.⁵⁰ These moves were designed to regulate property and secure the protection of property rights by identifying different types of property, safeguarding title security, and providing greater economic stability in the real property marketplace.⁵¹ They were designed to unify Chinese land law under a single coherent model. Particularly noteworthy is that Article 4 of the property law allows for the individual property rights protections from any entities, including public sector and private developers.⁵²

The provisions of the Property Law of 2007 arguably bring the PRC into compliance with the principles set out in Article 17 of the Universal Declaration of Human Rights, which states, “[e]veryone has the right to own property alone as well as in association with others,” and “[n]o one shall be arbitrarily deprived of his property.”⁵³ Though the new

⁴⁹ The legislative implementation of the property law has been controversial, disjointed, and time consuming. Fourteen years have passed from the time it was first on the parliamentary agenda. As early as 1994, the Chinese legislature devised a plan to enact the code, but it wasn't until 1998 that a drafting panel was even tasked with the drafting. In October 1999, the drafting panel completed a model draft consisting of twelve chapters and containing 435 articles. See Huixing Liang 梁慧星, *Zhongguo Wuquanfa Caoan Jianyigao* (中国物权法草案建议稿) [Commentary on Chinese Property Law Draft], 1-88 (2001). In 2000, a model property law draft was also completed. Liming Wang 王利明, *Annotated Draft of China's Law of Things* (Renmin University of China Press 2001). Thereafter, in consultation with these two model drafts, the Standing Committee of the National People's Congress (“NPC”) deliberated and pruned its legislative draft seven times. Ultimately, eight parliamentary deliberations were held from December 2002 to March 2007.

⁵⁰ The enactment of Chinese property law immediately attracted international media attention. See, e.g., *China's Clause Four: The Recognition of Property Rights is an Ideological Landmark*, THE TIMES, Mar. 17, 2007, available at http://www.martinfrost.ws/htmlfiles/mar2007/china_clause4.html; see also *Chinas Volkskongress billigt Eigentumsgesetz*, FRANKFURTER ALLGEMEINE ZEITUNG, Mar. 16, 2007.

⁵¹ Lei Chen, *The New Chinese Property Code: a Giant Step Forward?*, 11(2) ELECTRONIC J. COMP. L. 1, 2 (2007) [hereinafter *The New Chinese Property Code*].

⁵² Many Chinese legal scholars maintain that the new property law should contain the fundamental principle that any legally acquired property, whether public, private, owned by the state, or by collectives, should be given fair and equal protection. See Huixing Liang, *supra* note 49; Hu Zhigang, *New Discourse on Real Property Law* (Shanghai: Xuelin Press, 2006), 22–24 (胡志刚, 《不动产物权新论》(上海: 学林出版社, 2006), 第22–24页).

⁵³ Universal Declaration of Human Rights art. 17, G.A. Res. 217A, U.M. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948).

legislation is specific to land ownership rights, it has consequences that are more pervasive and impact other rights as well. One area in which the introduction of personal ownership of real property impacts corollary rights is in the popular control and management of property associations and the resultant growth of local democratic governance.

IV. THE RIGHT TO DEMOCRATIC GOVERNANCE

Condominiums are the dominant mode of residential property in urban China.⁵⁴ In densely populated urban centers, condominiums are as familiar as they are practical. Condominium ownership is sharply increasing,⁵⁵ a trend fueled by both the conversion of former public housing units and new condominium construction. Thus, condominiums are highly significant to the economic fabric of the PRC and are an appropriate medium for studying the influences of free market forces on the human rights regime in Chinese society.

Condominium ownership is closely linked to the independence and autonomy of unit owners and raises issues of collective action, mutual dependence, and democratic participation.⁵⁶ Hence, “a regular feature of condominium ownership is the necessity for the management of buildings and the common areas such as swimming pools and elevators. Typically, the owners have influence over these issues. Thus, a degree of self-governance is, as a matter of practicality, unavoidable.”⁵⁷ Before private property rights legislation was enacted, all property, including apartments, were State-owned and government-managed.⁵⁸ With the release of government property to the private sector, government control came to an end.

An examination of condominium law exemplifies that social

⁵⁴ According to the Chinese Statistical Yearbook of 2009, by the end of 2008, the total construction area in urban China was 16.451 billion square meters. The area of residential condominiums was 10.769 billion square meters, which is 65.46% of the total construction area. Although there is no information available for industrial and commercial or mixed-use condominiums, the conclusion that the condominium is the principle housing feature of urban China is inescapable. LEI CHEN, *THE MAKING OF CHINESE CONDOMINIUM LAW: A COMPARATIVE PERSPECTIVES WITH AMERICAN AND SOUTH AFRICAN CONDOMINIUM LAWS* 5 (2010).

⁵⁵ *Id.* at 5-6.

⁵⁶ Ngaiming Yip & Ray Forest, *Property Owning Democracies? Homeowner Corporations in Hong Kong*, 17 *HOUSING STUD.* 703, 704 (2002), as cited in Lei Chen & Mark D. Kielsgard, *Evolving Property Rights in China: Patterns and Dynamics of Condominium Governance*, *CHINESE J. COMP. L.* 1, 3 (2013) [hereinafter *Evolving Property Rights*].

⁵⁷ Ngaiming Yip & Ray Forest, *supra* note 56.

⁵⁸ Lei Chen & Hanri Mostert, *The Unavoidable Necessity of Formalizing Condominium Ownership in China: A Pilot Study*, 2 *ASIAN J. COMP. L.* 64, 64-65 (2007).

obligation (by virtue of proximity) is inherent in property ownership. Condominium law cannot function well without the guiding principle of the ancient maxim *sic utere tuo ut alienum non laedas* (“use your land in such a way as not to injure the land of others”). Basic to condominium living is the principle that individuals must not be permitted to disrupt the integrity or condition of the overall condominium development with the unrestricted use of their own property.⁵⁹ The unit owner can alter the interior in a manner that does not endanger the building’s structural integrity or mechanical systems.⁶⁰ However, the structure, external elements, maintenance, available facilities and amenities, and use of land must be comprehensively managed. Restricting the use and enjoyment of individual units effectively protects all of the owners’ common interests and benefits all owners in the long run, both financially by increasing the condominium’s market value and by preserving a stable and orderly community.⁶¹ This is an easy fit for the traditional Chinese culture, as it is steeped in a custom of communal ownership consisting of individual sacrifice for the stability and harmony of the group.

This, however, is also an important point of intersection with a free market or quasi-free market economy when residential property often accounts for most of the owners’ net financial worth, and all owners are invested in encouraging appreciation and discouraging waste. Under the old government-run system, there was less incentive to encourage market value because there was no private real estate market and tenants were less invested in the management of properties. As a consequence of private property ownership, market value dominates management decisions, theoretically causing greater scrutiny and emphasis on long-term economic growth. Thus, management becomes more sensitive to the overarching desires to maintain or increase property values and to lower operating costs. The new Property Law encourages these efficiencies.⁶²

Moreover, because the condominium is the most common housing form in urban China, where resources are scarce and the population is

⁵⁹ Wuquan fa (中华人民共和国物权法) [Property Law] (promulgated by Standing Comm. Nat’l People’s Cong., Mar. 16, 2007, effective Oct. 1, 2007) art. 71, (2007) (P.R.C.).

⁶⁰ Hangwu Tang, *The Right of Lateral Support of Buildings from the Adjoining Land*, 66 CONV. & PROP. LAW 237 (2002).

⁶¹ Gregory Alexander, *Freedom, Coercion, and the Law of Servitudes*, 73 CORNELL L. REV. 883, 900-02 (1988); see Note, *The Rule of Law in Residential Associations*, 99 HARV. L. REV. 372, 481-82 (1985); see also CORNELIUS VAN DER MERWE & DAVID BUTLER, SECTIONAL TITLES, SHARE BLOCKS, AND TIME-SHARING 8-15 (1985) [hereinafter SECTIONAL TITLES].

⁶² Wuquan fa (中华人民共和国物权法) [Property Law] (promulgated by Standing Comm. Nat’l People’s Cong., Mar. 16, 2007, effective Oct. 1, 2007) art. 70, (P.R.C.); HUABIN CHEN STUDY ON MODERN CONDOMINIUM OWNERSHIP 91 (1995); ZHIGANG HU, NEW DISCOURSE ON REAL PROPERTY LAW 22-29 (2006).

vast, the communitarian perception of property is widespread and accepted at least to the extent of common economic interest.⁶³ Yet, while community solidarity may lead to the conclusion that “claims of property may be abridged in order to further more highly rated social objectives,”⁶⁴ it is noteworthy that such social-harmony limits on property rights are likely at the periphery rather than at the core.⁶⁵ Individual ownership is central. Without individual ownership interests, there is no point in expanding neighborhood or communal rights. By contrast, the earlier system of government-controlled properties failed to produce the renaissance of property design and attention to detail, which is prevalent in modern condominium developments.⁶⁶ It was wasteful and failed to provide for the efficiencies of free market ownership. Likewise, without the centrality of individual ownership, it is futile to emphasize the social obligations that unit owners need to bear.

Article 25 of the ICCPR provides:

“Every citizen shall have the right and opportunity . . . without any unreasonable restrictions:

- (a) To take part in the conduct in the public affairs, directly or through freely chosen representatives;
- (b) To vote and be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.”⁶⁷

⁶³ Eva Pils, *Chinese Property Law as an Image of PRC History*, 39(3) H.K.L.J. 595-611 (2010).

⁶⁴ Kevin Gray, *Property in Thin Air*, 50 CAMBRIDGE L.J. 297 (1991).

⁶⁵ Kennedy Duncan, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

⁶⁶ CHIEN-YUAN CHEN & CHRIS WEBSTER, PRIVATISING THE GOVERNANCE AND MANAGEMENT OF EXISTING URBAN NEIGHBOURHOODS, in 24 PROPERTY MANAGEMENT 98, 98-115 (2005).

⁶⁷ International Covenant on Civil and Political Rights art. 25, Dec. 16, 1966, 999 U.N.T.S 171; *see also* Universal Declaration of Human Rights art. 21, G.A. Res. 217A, U.M. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948). Article 25 provides:

- (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
- (2) Everyone has the right of equal access to public service in his country.
- (3) The will of the people shall be the basis of the authority of the government; this shall be expressed in periodic and genuine elections which shall be by universal

Though the Central Government in Beijing does not provide for equal access to government, citizen participation, or free elections, as contemplated in the ICCPR, democratic governance is taking root. This is reflected at the local level and at the neighborhood or condominium association level. Though modest, these developments foreshadow potentially substantial changes in the future. These changes account for the conversion of residents from tenants to property owners, making them stakeholders.

Recent changes to condominium management have stimulated democratic governance at the local level.⁶⁸ Once the government allowed for the private ownership of land, “self-governance provided a greater cost-benefit than government control, as duties were taken over by an unpaid association or an independent commercial management company that contributed to the economy in an efficient way as a profit-driven enterprise”⁶⁹ and could compete in the market. Moreover, private ownership requires the need for autonomous land rights, including the maintenance and management of the property. Unreasonable external control and limitations on the free exercise and personal enjoyment of land rights dampens the allure and marketability of property ownership such that “its value diminishes if it is run in accordance with ease of management rather than according to the dictates of market forces.”⁷⁰ Naturally, there are some inherent restrictions in land ownership, particularly in condominium ownership. These restrictions, however, represent only minor and mutually beneficial restraints and are common in other free market economies and the land law of other democratic states. Moreover, most people favor these restraints because they are directed at improving the marketability and appreciation of the property and thus reflect the democratic principle of majority rule.

The Chinese Property Law of 2007 has a mere fourteen articles regulating condominiums,⁷¹ but “[c]ondominium ownership is now institutionalized and unit owner’s autonomy of management is statutorily recognized.”⁷² The Property Law provides that all registered purchasers of

and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

⁶⁸ Benjamin Read, *Assessing Variations in Civil Society Organizations: China’s Homeowner Associations in Comparative Perspective*, 41 COMP. POL. STUD. 1240 (2008).

⁶⁹ *Evolving Property Rights*, *supra* note 56, at 6.

⁷⁰ *See id.*

⁷¹ Wuquan fa (中华人民共和国物权法) [Property Law] (promulgated by Standing Comm. Nat’l People’s Cong., Mar. 16, 2007, effective Oct. 1, 2007) art. 70-83, (P.R.C.).

⁷² Lei Chen, *The Developer’s Role in the Surging Chinese Condominium*

apartments or commercial units automatically become members of the management body of the condominium.⁷³ Moreover, the mode of management follows a democratic format with norms grounded in majority rule. Article 75 of PRC's Property Law provides that the owners shall function through a general meeting and an *elected* executive board, and that the owners shall establish these organs with the help and instructions from local government departments.⁷⁴ Article 76 further provides that rules governing the conduct of general meetings and the election and dismissal of the executive board, or the amendment of these rules, must be decided by *majority vote*.⁷⁵ Thus, at the most basic grassroots level, democratic governance is taking root and the logic of majority rule is beginning to supersede elitism or paternalism as the logic for public policy and decision making.

The impact of the emerging Chinese policy of self-governance can be glimpsed in increasing property owner expectations and greater evolving social expectations in general. Thus, the trending mood of the times is expressed in the public willingness to protest government action and the changing character of these demonstrations. Property owners and homeowners associations provide a template for the changing and staging

Housing: Through the Comparative Lens of the US System, 18 ASIA PAC. L. REV. 223, 223-44 (2010) [hereinafter *The Developer's Role*].

⁷³ Wuquan fa (中华人民共和国物权法) [Property Law] (promulgated by Standing Comm. Nat'l People's Cong., Mar. 16, 2007, effective Oct. 1, 2007) art. 70, (P.R.C.).

⁷⁴ *Id.* at art. 75 (emphasis added).

⁷⁵ *Id.* at art. 76(1) and (3) (emphasis added). The Property Law (see Judicial Interpretation) stipulates that the following matters must be decided by a simple majority:

- (i) the drafting and amendment of rules governing general meetings;
- (ii) the drafting and amendment of rules governing the management of the apartment ownership buildings and common facilities of the scheme;
- (iii) the election and replacement of members of the executive board;
- (iv) the appointment and dismissal of a professional management company or other managing agent;
- (v) other important matters which are interpreted to include a change of the purpose of parts of the common property; the use of the common parts for business operations; disposal of the common parts; and matters which, according to the bylaws governing general meetings or the management of the buildings and the common property, require a simple majority.

The following matters must be decided by a two-thirds majority:

- (i) raising of contributions to an administrative fund for the maintenance and repair of the apartment building and the common facilities; and
- (ii) alteration and reconstruction of the building or the common facilities of the scheme.

of public expressions of dissent. These displays have led to significant legal developments, including national and local legislative changes and friendlier judicial forums. These expressions also seem to match increased public expectations in the defense of homeowners' rights to make and enforce decisions affecting their property.

V. EVOLVING PROPERTY OWNER PROTESTS

Self-interest has proven a reliable engine for Chinese democratization. Shortly after the introduction of private property in China, property owners found they had increased bargaining power. These stakeholders' attitudes changed from supplication to rights-based demands as they began to enjoy wider success.⁷⁶ As citizens of society, "homeowners have stronger substance to oppose arbitrary rulings and ask for participation in rule-making."⁷⁷ Thus, they enjoyed a greater sense of entitlement and a more effective voice in matters affecting their interests.

Homeowner protests are typically brought as collective actions by self-governing community associations. These actions can influence government policy and sometimes overcome local corruption. Expressions of dissent frequently take the shape of public protests, direct appeal to the government, signature and letter campaigns, litigation, negotiation, appeals to the National People's Congress ("NPC") or Chinese Communist Party ("CCP"), antagonistic action⁷⁸ or even appeals to the media. Government tolerance of most of these actions showcases the changing trends in China. These trends favor the rights of citizens to participate in government and the right to own property. They also expose social sensitivity to popular opinion that is orchestrated and constructively harnessed by Homeowners Associations ("HOA") in general. Protests are becoming more common as more communities avail themselves of these strategies.⁷⁹ Although most homeowner protests are motivated by material

⁷⁶ In 2002, in the *Fangya Garden* case homeowners protested by presenting themselves as commoners in order to gain sympathy from the government. This can be contrasted with the 2009 *Lijiang* case where homeowner protesters presented their demands as a matter of rights. See Yongshun Cai, *China's Moderate Middle Class: The Case of Homeowners' Resistance*, 25(5) ASIAN SURV. 777 (2005); see e.g. Jiangang Zhu & Chao Wang, *Seniors Defending their Rights – Strategies and Culture in Collective Action: The Homeowners Rights Movement in Lijing Garden, Guangzhou*, 40(2) CHINESE SOC. & ANTHROPOLOGY 5 (2007); Benjamin Read, *Assessing Variation in Civil Society Organizations: China's Homeowner Associations in Comparative Perspective*, 41(9) COMP. POL. STUD. 1240 (2008).

⁷⁷ David Kelly, *Citizen Movements in China's Public Intellectuals in the Hu-Wen Era*, 79(2) PAC. AFF. 183 (2006).

⁷⁸ Ying Wu & Ngai-ming Yip, *The Homeowners' Protest in Beijing and Guangzhou: Rightful Resistance and Beyond*, 5(3) INT'L J. INTERDISCIPLINARY SOC. SCI. 513, 519-20 (2010).

⁷⁹ A study conducted of protests in Beijing and Guangzhou found only 50 reported cases in Beijing in 2003. After a slight drop, this number kept increasing steadily

items, like substandard construction and incompetent management, a significant number are also motivated by governance issues. These issues include firing or changing property management companies, control of public spaces and amenities in neighborhoods, and the election and powers of homeowners associations.⁸⁰ Moreover, existing studies suggest that the majority of these protesters are the “moderate middle class” of Chinese society.⁸¹ Some contend that they may be gaining greater traction because they employ largely peaceful measures⁸² instead of more antagonistic efforts. Rather than tolerating unfortunate circumstances, homeowners are clearly making efforts to change irrational, unfair, or corrupt policies and regulations.⁸³ Though less antagonistic than some other forms of protest, homeowner protests can still be viewed as a contest between the legitimacy of a rights-based regime and social-harmony paternalism.

Homeowner protests are not only affecting the government’s administrative policy, but they are perceived to be gaining greater support in the judiciary.⁸⁴ Increasingly, homeowners associations have been bringing actions to enforce their legitimate standing, to challenge local administrative decisions, and to contest corruption. Though modest in some jurisdictions, homeowners’ suits are arguably having some impact, at least procedurally. In 2003, five cases were submitted to Beijing courts as collective actions, including one case with forty-two homeowners.⁸⁵ In 2004, the then-largest homeowner litigation in Guangzhou had eighty-three plaintiffs.⁸⁶

and reached its peak in 2007 with 164. A small decrease in the disputes appeared in 2008, which can be attributed to the strict control of government during the Olympic Games. The number of disputes totaled 600 over six years in Beijing. In Guangzhou, the total frequency of homeowner related disputes during this same period totaled 1226, with more protests overall and a faster growth rate. Beginning with 122 reports, homeowner actions escalated sharply after 2006, to 427 in 2008. *See id.* at 517.

⁸⁰ *See id.* at 519.

⁸¹ Yongshun Cai, *China’s Moderate Middle Class: The Case of Homeowners’ Resistance*, 45(5) *ASIAN SURV.* 777-79 (2005).

⁸² *See id.*; see also Benjamin Read, *Democratizing the Neighborhood? New Private Housing and Homeowner Self-Organization in Urban China*, 49 *CHINA J.* 31-59 (2003) [hereinafter “*Democratizing the Neighborhood*”].

⁸³ Rong Hu & Yanmei Liu, *Zhongjie Jiecheng Zai Gonggong Lingyu Zhongde Weiquan Xingwei (Right Protection of Middle Class in Public Sphere)*, 8 *J. FUJIAN CCP SCH.* 41-44 (2006).

⁸⁴ Ying Wu and Ngai-ming Yip, *supra* note 78, at 522.

⁸⁵ *Unclear Public Area to Be Shared, 42 Homeowners Prosecuted the Developer*, *JINGHUA TIMES*, Sept. 12, 2003.

⁸⁶ *Developer Loses the Suit, 83 Homeowners Got Six Million Compensation*, *NANFANG DAILY*, Dec. 30, 2003.

In the landmark TM Complex case of 2006,⁸⁷ the Court determined that the plaintiff homeowners association had standing to bring an action collectively for the benefit of the property owners.⁸⁸ Many local jurisdictions strengthened this ruling with supportive legislation. Even though this case could only be characterized as a modest victory for homeowners, in a country with weak judicial administrative review,⁸⁹ the court could have simply dismissed the case on the grounds of standing.⁹⁰ Instead, it preserved the right of other associations to bring actions in the future. One factor impacting administrative and judicial tolerance for homeowner's rights is the weight of public opinion. Public opinion serves as an important and emotional influencing factor not only for courts and government bodies, but for free market economics. Real estate, like any other commodity, will suffer market reversals without consumer confidence in the product. By appealing to the media, homeowners associations have begun to successfully harness public opinion.

In some jurisdictions, different homeowners associations have banded together for common cause and strengthened their relative positions. This phenomenon can be seen in the cities of Beijing and Guangzhou, where solidarity organizations have taken root.⁹¹ In Guangzhou, this organization is called the "Preparatory Committee of

⁸⁷ Beijingshi chaoyangqu renminfayuan minshi panjueshu (2006) chaominchuzi di 25086 (北京市朝阳区人民法院民事判决书(2006)朝民初字第25086号) Beijing Chaoyang People's Court Civil Judgment (2006) Chao min chu zi No.25086.

⁸⁸ Meiliyuan xiaoqu yewehui gao wuye shouci daying wuyefei guansi, (美丽园小区业委会告物业 首次打赢物业费官司) [Meiliyuan HOA Wins First Property Lawsuit], XINHUA, Dec. 20, 2005, available at http://news.xinhuanet.com/house/2005-12/20/content_3944112.htm.

⁸⁹ Administrative law in the People's Republic of China was virtually non-existent before the end of the Cultural Revolution. The Administrative Procedure Law was passed in 1989 and went into effect on October 1, 1990. See FENG LIN, ADMINISTRATIVE LAW: PROCEDURES AND REMEDIES IN CHINA (1996). This law made it possible for individuals to bring a case against the administration and also laid down the relevant criteria and procedures for administrative law litigation. *Id.*

⁹⁰ Although condominium litigation continues to increase in China, most courts are reluctant to grant a HOA the power to sue or be sued in the absence of statutory authority. However, some provincial courts have issued judicial opinions allowing the executive council of a HOA to appear in court as either a plaintiff or a defendant on behalf of the owners. This has been well received, and may provide a HOA the exclusive right to pursue claims in common property disputes for three reasons. First, multiple party litigation with every unit owner individually is cumbersome and a procedural nightmare for the courts. Second, the HOA representation of the common interests of all members provides more protection than limiting litigation to each individual claim. Third, when the HOA has exclusive standing, defendants are protected from multiple and repeated suits of the same claim. Thus, the HOA's exclusive standing is an efficient way to resolve common property disputes.

⁹¹ Wu & Yip, *supra* note 78, at 523.

Guangzhou Homeowner Committee Solidarity.”⁹² Their goal is to teach homeowners how to protect their rights both rationally and legally. The founding members of this group also advocate for participation in political activities in order to get legal status for the homeowners’ union and to protect homeowners’ rights more effectively.⁹³ The Beijing group is the “Association of Homeowners Committee.” The conveners, most of whom are the directors of various Homeowners Committees (“HC”) in Beijing, said they would like to help neighborhoods without representation elect an HC and give suggestions on legislative and regulatory amendments, such as the Regulations on Realty Management.⁹⁴

China’s growing economy has created a larger middle class that is demanding a voice in matters affecting their welfare. This democratization of property ownership is fueled by several factors, particularly the mood of the community as it perceives the efficiency and benefits of self-rule and becomes more acclimatized to an empowering democratic process.⁹⁵ Compelling market forces also tend to encourage more robust democratic structures in a free market environment with a growing middle class. Furthermore, China’s market economy and the Central Government’s increasing tolerance for certain types of peaceful public dissent have impacted other rights-based areas as well. Homeowner protests have served as a template for peaceably making demands and have thus expanded the acceptance of the rights-based system to include other civil and social rights.⁹⁶ Among those other areas are protests that have contributed to changes in the Labor Contract Law,⁹⁷ environmental rights,⁹⁸ the repeal of the agricultural tax,⁹⁹ and the recent amendment to

⁹² Zhang Jingen & Zhuang Wenjia, Feizhengshi Zhengshi: yige caogen NGO de xingdongcelue 非正式政治：一个草根NGO的行动策略 Unofficial Politics: The Action Plan of a Grassroot NGO, 2 Shehuixue yanjiu 社会学研究 SOCIOLOGICAL STUDIES 133-150 (2008).

⁹³ *Guangzhou Homeowner Committee Solidarity Invited the Exports to Discuss and give Suggestion for the Amendment of Regulations on Realty Management*, NANFANG DAILY, May 11, 2006.

⁹⁴ *56 HCs Appeal to Build an Association*, BEIJING MORNING POST, Jan. 22, 2007.

⁹⁵ See generally Kevin O’Brien, *Rightful Resistance*, 49 WORLD POL. 31 (1996); see also Kevin O’Brien, *Neither Transgressive nor Contained: Boundary-spanning Contention in China*, 8(1) MOBILIZATION (2003).

⁹⁶ YUAN SHEN, TOWARDS CITIZENSHIP: HOMEOWNERS’ RIGHT PROTECTION AS A CITIZEN MOVEMENT, MARKET, CLASS AND SOCIETY: CRITICAL ISSUES ON SOCIOLOGY OF TRANSFORMATION (2007).

⁹⁷ Cynthia Estlund & Seth Gurgel, *A New Deal for China’s Workers? Labour Law Reform in the Wake of Rising Labor Unrest* 19 (New York University Public Law and Legal Theory Working Papers No. 297, 2012).

⁹⁸ For example, there were two recent anti-pollution protests. The first consisted

the Criminal Procedure Law.¹⁰⁰

VI. INADEQUACY IN LEGISLATIVE DRAFTING

Some of the flaws obstructing democratic governance are structural defects in the legislation itself. Though trends favor greater legislative efficiencies, some defects continue to create barriers to full democratic processes and reduce the efficiency of the owners' associations. This undercuts the developing market economy. Legislative defects tend to reinforce judicial inefficiencies, local government interference, and developer overreach and corruption. On a more basic level, poorly considered legislation makes for poorly-run owners' associations and ensures owner apathy and loss of the essential credibility needed for growing stronger democratic structures. Thus, even with the best intentions, poorly-drafted legislation will harm the rights regime.

The PRC's national law provides basic guidelines for its provinces and municipalities to follow and implement.¹⁰¹ Flaws in legislative drafting should therefore be viewed from the perspective of both the national land law (i.e., the Property Law of 2007) and the local implementing legislation or practice. The main flaws in the legislative drafting of the national laws as it relates to condominium rules) can best be observed within two issues: (1) the law as it pertains to majorities required for HOA resolutions, and (2) rules concerning the qualification and number of HOA executive council members. Issues concerning legislative drafting on the local level include whether the local rule specifically carries out the mandate or policy of the national law (i.e., its legislative intent), or whether it allows for a continuation of local overreach and corruption. Local compliance and implementation procedure can be observed by considering local legislation dealing with the formation of HOAs, the voting rights of the homeowners, and the legal personality of the association (i.e., whether it has express legal standing in

of a mass protest over the planned construction of a molybdenum-copper alloy plant in Shifanf, Sichuan. See Li Jing, *Protests Show Rising Green Concerns*, S. CHINA MORNING POST, Jul. 4, 2012, available at <http://www.scmp.com/article/1005800/protests-show-rising-green-concerns>. The second protest occurred in the coastal city of Qidong in Jiangsu in response to plans to build an industrial waste pipeline. See Tom Holland, *Anti-Pollution People Power Is Good for Growth*, S. CHINA MORNING POST, Jul. 30, 2012, available at <http://www.scmp.com/article/1008120/anti-pollution-people-power-good-growth>.

⁹⁹ Mai Lu & Calla Weimer, *An End to China Agriculture Tax*, 3(2) CHINA INT'L. J. 320 (2005).

¹⁰⁰ Bibo Li, *China Acts to Give Defendants Greater Rights*, CHINA MEDIA, Mar. 8, 2012, available at <http://www.chinamedia.com/2012/03/08/china-acts-to-give-defendants-greater-rights/>.

¹⁰¹ ALBERT CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PRC (2011).

the courts).

A. National Legislation

In reviewing the effectiveness of PRC's national laws, it is useful to compare PRC's Property Law of 2007 to statutes in other jurisdictions.¹⁰² Most rules governing the functioning of the general meeting¹⁰³ and the executive board,¹⁰⁴ as well as the rules governing common property and facilities,¹⁰⁵ are decided by supermajorities. These rules are usually included in statutes.¹⁰⁶ These statutes tend to either limit the adoption of organic changes in the initial stage¹⁰⁷ or require a supermajority.¹⁰⁸ These precautions help guarantee efficient management, the smooth running of general meetings, and the seamless transition from developer control to owner control. However, the national legislation of the PRC fails to adequately provide for this transition. Indeed, there is no uniform obligation on developers to organize the first meeting of the

¹⁰² Compare Land Titles (Strata) Amendment Act of 1999 in Singapore, and the Sectional Titles Act of 1971 in South Africa, with Uniform Common Interest Ownership Act of 1982 (as amended in 1994) in the United States of America.

¹⁰³ The regulation of a general meeting includes the notice required prior to convening general meetings, types of general meetings, agenda requirements, voting rights, quorum requirements, the representation of owners by proxies, and the keeping of minutes. Wuquan fa (中华人民共和国物权法) [Property Law] (promulgated by Standing Comm. Nat'l People's Cong., Mar. 16, 2007, effective Oct. 1, 2007) art. 72, 75, & 76, (P.R.C.).

¹⁰⁴ This includes, amongst others, the powers and functions of the executive board, whether it must consist only of owners, whether owners may attend its meetings, whether the members are entitled to remuneration, their fiduciary obligations and the duration of their office. See Wuquan fa (中华人民共和国物权法) [Property Law] (promulgated by Standing Comm. Nat'l People's Cong., Mar. 16, 2007, effective Oct. 1, 2007) art. 78 (P.R.C.).

¹⁰⁵ The rules governing common property and facilities are normally passed through the procedure set forth in the conduct rules, which requires more than a simple majority to pass an amendment.

¹⁰⁶ See e.g., *The New South Wales Strata Schemes Management Act 138 of 1996* regulates executive committees in § 16 to 25 and Schedule 3 of the Act, and general meetings in Schedule 2 of the Act; *The Singapore Building Maintenance and Strata Management Act 47 of 2004* § 53-6, the Second Schedule, Third Schedule to the Act; *The Queensland Body Corporate and Community Management Act 28 of 1997* regulate these matters in § 90 to 101 of the Act; *Strata Title Law 5 of 2007* of the Dubai International Financial Centre regulates them in § 60-64 of the Act; *The South African Sectional Titles Act 95 of 1986* regulates both these matters in Annexure 8 of the Regulations to the Act.

¹⁰⁷ See e.g., *South African Sectional Titles Act 95 of 1986*, reg. 30(1). Regulation 30(4) stipulates that these regulations may only be altered after 50 % of the units have been transferred and that they may only be altered by unanimous resolution.

¹⁰⁸ See e.g., *South African Sectional Titles Act 95 of 1986*, reg. 30(4).

management body as soon as possible.¹⁰⁹ This type of obligation has proven indispensable in other jurisdictions like South Africa and Singapore.¹¹⁰ This failure can unnecessarily bind future owners associations to contractors (including developer-owned commercial management companies) and limit the owners' options, degrading the democratic value of the owners' association.¹¹¹

There is no supermajority rule for changes to the purpose or use of common property or its use for business operations. Such changes only require a simple majority vote. In other jurisdictions, organic changes typically require a super-majority¹¹² and radical use changes are only allowed by a unanimous resolution or the written consent of all unit owners.¹¹³ A potential defect in the PRC's approach is the creation of institutional instability, which could result in negative market impact. Buyers crave certainty that the property they buy will retain its essential character into the future. While this approach may be counter-productive with regard to market forces, it does err on the side of majority rule.

The Property Law of 2007 provides that unit owners may elect (by majority vote) to either manage the scheme themselves¹¹⁴ or hire a professional management company.¹¹⁵ But the national legislation fails to

¹⁰⁹ One of the problems encountered in China is that owners are defined in Article 76 of the Property Law and § 11 of the Property Law as persons who have acquired ownership of units by registration. Under the latter section, persons who have acquired possession of a unit in terms of a recognised commercial transaction are also considered to be owners. This concession was made due to the fact that the registration of units in the names of purchasers in China is a drawn-out process.

¹¹⁰ SECTIONAL TITLES, *supra* note 61, at 14-37.

¹¹¹ The risk to the property owner is particularly heightened because of the lack of conventional constitutive documents and the developers role in the "participation quota" that allows developers to determine their own status early in the construction process and to ultimately dictate terms to the fledgling scheme. *See* Lei Chen, *supra* note 72, at 234-41. On the other hand, there are certain safeguards built into the legislation which allow for each owner to have one vote instead of one vote for each unit. The new voting scheme effectively offsets the unfair advantage that the developers previously had. *See* Judicial Interpretation on Property Law art. 9 §1 and §2 (2007) (P.R.C.); *see generally* CORNELIUS VAN DER MERWE, APARTMENT OWNERSHIP 145, 154, 158, 194 (1994).

¹¹² *See e.g.*, South African Sectional Titles Act 95 of 1986, reg. 30(4).

¹¹³ For example, § 17(1) of the South African Sectional Titles Act 95 of 1986 which requires a unanimous resolution, and § 34(1) of the Singapore Building Maintenance and Strata Management Act 47 of 2004 which requires a 90% resolution.

¹¹⁴ Wuquan fa (中华人民共和国物权法) [Property Law] (promulgated by Standing Comm. Nat'l People's Cong., Mar. 16, 2007, effective Oct. 1, 2007) art. 76 §4 (P.R.C.).

¹¹⁵ *Id.* at art. 81; *see generally* Lei Chen & Cornelius van der Merwe, *Reflections on the Role of the Managing Agent in South African and Chinese Sectional Title (Condominium) Legislation*, J. S. AFR. L. 22 (2009) [hereinafter *Reflections on the Role*

provide for guidance on the permissible number of executive council members. Self-management usually only occurs in smaller projects where the complexities of management are less demanding.¹¹⁶ Many foreign condominium statutes entrust the management of larger schemes either to the owners' executive board (which typically consists of owners assisted by a managing agent), or provide for the appointment of a professional manager as the executive of the scheme with the assistance of an owners' advisory board.¹¹⁷ The 2007 Property Law opted for the latter alternative: a professional manager as an executive organ functioning under the supervision of the owners.¹¹⁸ More importantly, the Property Law allows owners to replace a managing company or manager appointed by the developer.¹¹⁹ This legislation is designed to preclude developers from entering into "sweetheart" contracts with affiliated or subsidiary entities while in control of the association and binding it on a long-term basis.¹²⁰

Another important issue concerns regulations relating to the make-up of the HOA executive council members. Generally, the executive council is tasked with executing resolutions and administering the day-to-day affairs of the condominium complex.¹²¹ In some jurisdictions, all council members do not necessarily need to be unit owners.¹²² In the Chinese system, all executive council members must either be a unit owner or a representative of a corporate owner.¹²³ Though subject to

of Managing].

¹¹⁶ See Chen & van der Merwe, *supra* note 115, at 36.

¹¹⁷ *Id.* at 149.

¹¹⁸ Wuquan fa (中华人民共和国物权法) [Property Law] (promulgated by Standing Comm. Nat'l People's Cong., Mar. 16, 2007, effective Oct. 1, 2007) art. 82 (P.R.C.).

¹¹⁹ *Id.* at art. 81(2).

¹²⁰ See Chen & van der Merwe, *supra* note 115, at 29. The drafters of the Wuye Guanli Tiaoli (物业管理条例) [Property Management Regulation] amended the designation of professional managers to 'service providers' in 2007 in order to put professional managers in their place. See Uniform Common Interest Ownership Act § 3-105. These statutes usually provide for termination without penalty, upon not less than 90 days' notice to the developer, so long as they are cancelled within two years of the owners assumption of control of the association.

¹²¹ Wuye Guanli Tiaoli (物业管理条例) [Property Management Regulation] art. 15 (promulgated by the State Council, Jun. 8, 2003, effective Sept. 1, 2003) (P.R.C.).

¹²² See Uniform Common Interest Ownership Act of 1994 § 3-103(f) for USA; see also Sectional Title Act, Annexure 8 reg. 5 for South Africa.

¹²³ Wuye Guanli Tiaoli (物业管理条例) [Property Management Regulation] art. 16 (2) (promulgated by State Council, Jun. 8, 2003, effective Sept. 1, 2003) (P.R.C.); Shenzhen jingjitequ wuyeguanli tiaoli (深圳经济特区物业管理条例) [Property Management Regulation of Shenzhen Special Economic Zone] art. 23 (effective (2007) (P.R.C.).

criticism,¹²⁴ this mandate ensures that all executive council members have a genuine economic interest in the efficient management of the condominium and that decisions are made by the owners.

Legislation ensuring smooth transfers from developers to owners and exempting associations from certain future long-term contract obligations helps to provide greater democratic decision-making by foreclosing on developer-mandated long-term contracts. The 2007 Property Law allows owners to replace the developer-installed property manager, but precise remedies are left to local regulation.¹²⁵ China's National People's Congress is deferential to provincial authority in matters involving the regulation of real property. Establishing greater precision and binding effects in national legislation would help deter local corruption. These legislative flaws directly and negatively impact both marketability and the developing democratic governance currently taking root in the PRC.¹²⁶

China's legislation is a mixed bag. Although it provides for greater democratic structure and majority rule, allowing for structured flexibility at the local level could encourage efficiency and help to ensure that all condominium owners have meaningful and localized democratic representation. By taking a contrary approach and deferring to local statutes, the national legislation encourages corruption at the local level.

B. *Local Rules*

Although the 2007 Property Law and, to a lesser extent, the 2003 Property Management Regulation were designed to formalize the rules of condominium ownership nation-wide, many implementation issues remained largely unaddressed.¹²⁷ Local regulations were supposed to fill the gap. Many localities, however, still have obstacles to homeowners' enjoyment of their property and potential risks to homeowner association autonomy. These risks include fiat exercised by local government

¹²⁴ Some critics argue that candidates could bring necessary professional experience and skills to the executive council. *See generally* Katherine Rosenberry, *Response to the Consultation Paper: Commonhold Proposals for Commonhold Regulations*, Jan. 2003, available at <http://www.jrf.org.uk/sites/files/jrf/commonholdproposals.pdf>. Other critics suggest that an insufficient number of unit owners may be willing to serve as council members. *See generally* CORNELIUS VAN DER MERWE & DAVID BUTLER, SECTIONAL TITLES, SHARE BLOCKS, TIME-SHARING 14-66 (Lexis Nexis eds., 1985).

¹²⁵ Wuquan fa (中华人民共和国物权法) [Property Law] (promulgated by Standing Comm. Nat'l People's Cong., Mar. 16, 2007, effective Oct. 1, 2007) art. 76 §4 (P.R.C.).

¹²⁶ *See generally Evolving Property Rights*, *supra* note 56.

¹²⁷ Benjamin Read, *Assessing Variation in Civil Society Organizations: China's Homeowner Associations in Comparative Perspective*, 41 *COMPARATIVE POLITICAL STUDIES* 1240 (2007).

overriding owner's decisions, lack of owners associations' standing to sue in court, ineffective enforcement of judicial remedies, proclivity for corruption, and undue influence of developers, particularly in the handover of owners associations and the appointment of management companies and outside contractors.¹²⁸ As the predecessor landlord of all residential property, many local governments were reluctant to give up control of this responsibility.¹²⁹ With the appearance of privately held property, local governments nonetheless often retained control over the common elements and charged a fee. This transitioned into the so-called "Shenzhen mode," or the privatization of the services previously supplied by the public sector.¹³⁰ As private owners eventually gained control over these elements, local government continued to retain control over the service personnel, often in the form of for-profit management companies.¹³¹

The reluctance to surrender control of properties to the owners associations can also be observed in newly constructed condominium projects, with developers often maintaining profit-based common elements and professional management companies.¹³² The turnover of these income streams usually only occurs after a struggle with the owners. Developers are frequently aligned with the local government in this process and act with their support.¹³³ Moreover, judicial remedies sometimes prove pointless, as the lack of adequate judicial review or enforceability of judgments leads to abuse by local authorities.¹³⁴ This provides a rich

¹²⁸ Luigi Tomba, *Residential Space and Collective Interest Formation in Beijing's Housing Disputes*, 184 CHINA QUARTERLY 934, 934-951 (2005), available at <http://journals.cambridge.org/action/displayAbstract.jsessionid=2E4784DC1A0FFB00CDF6282F6BA90EA6.journals?fromPage=online&aid=358814>.

¹²⁹ BENJAMIN L. READ, PROPERTY RIGHTS AND HOMEOWNER ACTIVISM IN NEW NEIGHBORHOODS, in *PRIVATIZING CHINA: SOCIALISM FROM AFAR* (Li Zhang and Aihwa Ong eds., 2008).

¹³⁰ ZW Du, *Marketization of Property Management in Shenzhen (Part I)*, 111 HOUSING & REAL ESTATE 51, 3 (2003).

¹³¹ *Id.*

¹³² *Democratizing the Neighborhood*, *supra* note 82.

¹³³ YUAN REN, GLOBALISATION AND THE CHINESE CITY AND GRASSROOTS PRACTICES: COMMUNITY DEVELOPMENT IN CONTEMPORARY URBAN CHINA, in *GLOBALIZATION AND THE CHINESE CITY* (Fulong Wu ed., 2005) .

¹³⁴ Though perhaps not strictly applicable to local government, the Property Law of 2007 does allow for the protection of the individual owner from overreach by the owners's association. Decisions of the general meeting and the executive committee are binding on the owners unless an owner can prove that the decision adversely affects his or her legitimate rights and interests. See *Wuquan fa* (中华人民共和国物权法)

[Property Law] (promulgated by Standing Comm. Nat'l People's Cong., Mar. 16, 2007, effective Oct. 1, 2007) art. 78(2) (2007) (P.R.C.). In the latter instance, or if it can be proved that prescribed procedures have been violated, the owner can ask the court for

medium for local corruption. Thus, local implementation rules are vital for fostering legitimate and effective self-governing condominium owners associations and resulting democratic structures.

The breadth of local rules is as vast as the Chinese landscape, but insight into the evolution and statutory dynamics of local condominium law can be gleaned by examining the development of local regulations. To do this, a historical comparative methodology for studying statutory changes is helpful. Three localities were chosen to provide a coherent framework: Beijing, Shanghai, and Shenzhen. They were selected as representative of major metropolitan areas in the PRC. Moreover, these cities are among the first municipalities to enact local property management rules (Shenzhen enacted the earliest rule in 1994)¹³⁵ and are top-tier Chinese cities in terms of economic development. They are also cities with high-density private condominium complexes.¹³⁶ This survey considers three local regulatory issues: (1) regulation of the formation of owners' associations; (2) regulation of the voting rights of homeowners; and (3) legal personality for owners associations. All three have a crucial impact on the democratic rights of the owners. HOA formation significantly bears on the ability of associations to act and on developer/local government corruption. The regulation of owners' voting rights and legal standing issues determines the practical character of the democratic process and its enforceability. Local compliance can best be examined by considering the changes to local regulations prior to 2003 (before the enactment of the national Property Management Regulation), between 2004 and 2007 (before the enactment of the national Property Law of 2007), and after 2007. This model is intended to clarify how local authority has implemented national laws, regulations, and policy.

Prior to the passing of the Property Management Regulations in 2003, local rules surrounding the establishment and operations of homeowners' associations in Shenzhen, Beijing and Shanghai lacked uniformity and maturity. After the regulations of 2003 and the Property Law of 2007, these localities made significant changes. Before 2003, Beijing and Shenzhen required developers to notify the local housing authority after 50% of the units were occupied (or two years from the

invalidation of the decision within a year after the owner has become aware or should have become aware of the decision. *See* Judicial Interpretation on Property Law art. 12 (2007) (P.R.C.). This provision helps protect of minority rights.

¹³⁵ Shenzhen jingjitequ wuyeguanli tiaoli (深圳经济特区物业管理条例) [Property Management Regulation of Shenzhen Special Economic Zone] (promulgated by the Standing Comm. of the First Shenzhen Mun. People's Cong., June 18, 1994, effective November 1, 1994).

¹³⁶ *See generally* Jing Wu, Yongheng Deng, & Hongyu Liu, *House Price Index Construction in the Nascent Housing Market: The Case of China* (Institute of Real Estate Studies Working Paper No. 017 2011), available at http://www.ires.nus.edu.sg/workingpapers/IRES2011-017_new.pdf.

occupancy of the first unit) and the housing authority would have six months to convene a homeowners association. Shanghai required 30% of the square footage to be sold (not occupied) in existing projects and 50% of the square footage to be sold in new construction (or two years from the sale – not occupation – of the first unit).¹³⁷ None of the provisions required “double majorities” (meaning a majority of both the number of units and the gross square footage).

After the national legislative initiatives of 2003 and 2007, local regulations substantially changed. Beijing switched from requiring *occupancy* of 50% to *sale* of 50%, triggering earlier developer notification requirements to local housing authority.¹³⁸ Additionally, a new mechanism was introduced to allow homeowners to bypass the developer and notify the housing authority directly with only 5% of owners (or 5% of square footage) approval.¹³⁹ Moreover, the housing authority had significantly less time to establish the HOA (from six months to sixty days). In Shenzhen, the requirement changed from 50% of the units to 50% of the square footage.¹⁴⁰ Shenzhen also changed its statutory two-year period so that it started running from the *sale* of the first unit instead of the *occupancy* of the first unit.¹⁴¹ Shanghai added, for the first time, a provision calling for time limits on the local housing authority to establish the HOA (including a provision for the first meeting).¹⁴² Although the local implementing legislation varies significantly from one city to another, the trend in all three places is toward earlier owner control of the association, and thus an earlier voice in the management of the

¹³⁷ Shanghai shi juzhu wuyeguanli tiaoli (上海市居住物业管理条例) [Shanghai Residential Property Management Regulation] art. 7 (effective Jul. 1, 1997).

¹³⁸ E.g. Shenzhen jingjitequ wuyeguanli tiaoli (深圳经济特区物业管理条例) [Shenzhen Property Management Regulation] art. 19 (promulgated by Standing Committee of the First Shenzhen Municipal People’s Congress, Jun. 1, 1994, effective 2008); Shanghai shi zhuzhai wuyeguanli guiding (上海市住宅物业管理规定) [Shanghai Residential Property Management Regulation] art. 12 (effective Apr. 01, 2011)

¹³⁹ Beijingshi wuyeguanli banfa (北京市物业管理办法) [Beijing Property Management Measures] art. 14 (promulgated by Housing and Urban-Rural Development, effective of 2010).

¹⁴⁰ Shenzhen jingjitequ wuyeguanli tiaoli (深圳经济特区物业管理条例) [Shenzhen Property Management Regulation] art. 19 (promulgated by Standing Committee of the First Shenzhen Municipal People’s Congress, Jun. 1, 1994, effective 2008).

¹⁴¹ *Id.*

¹⁴² The first meeting of HOA shall be hosted within 90 days of the establishment of the preparatory group. While it no longer requires the supervision of government agencies, the preparatory group will now include government representatives. *See* Shanghai Juzhu wuyeguanli tiaoli (上海市居住物业管理条例) [Shanghai Residential Property Management Regulation] art. 15 (effective Jul. 1, 1997).

association. Local legal initiatives are also trending toward shorter time periods for the local housing authority to actually convene a HOA. In short, the overall trend in these three cities is quicker owner management.

The significance of these changes centers on developer and local corruption. Developers often retain large blocks of condominium projects after construction is completed, consisting of either commercial space or residential space or both. This may be done in order to manipulate supply to drive up price, or to wait for natural property appreciation, as collateral for large credit lines and as an investment for lease income.¹⁴³ Also, if they retain a sufficiently large amount of the project and prevent the owners association from taking control, the developer can manipulate the association to contract with property management companies, maintenance workers, landscape services, engineers, mechanical contractors, accountants, and other professionals who work for subsidiary corporations or other associated groups.¹⁴⁴ Additionally, local authorities sometimes conspire with developers and management companies to delay owner control in exchange for political influence or cash. This results in a delay or even a permanent denial of self-governance by the owners. Thus, legislative reform is essential to clarify when the developer must relinquish control of the association. In one example, in Nanjing Jiangsu Province in 2006, the local authority specifically addressed this concern by mandating that developers may not retain more than 5% of any condominium development.¹⁴⁵ However, the rule was repealed several years later.

The local rules in Beijing seem to be sensitive to this issue, as the legislation passed in October 2010 provides an alternate route to forming an owner-controlled HOA upon request of only 5% of unit owners (or 5% of square footage).¹⁴⁶ The regulation also helps bar local corruption by mandating unambiguous terms for the housing authority to follow. Indeed, the time limits on the housing authority in all three of the test cities were shortened. In Shanghai, the local rule changed from no time requirement to sixty days before the housing authority was required to act.¹⁴⁷ Under the

¹⁴³ Chen & van der Merwe, *supra* note 115.

¹⁴⁴ *Id.*

¹⁴⁵ *Nanjing: Developers Shall Not Reserve More Than 5% of the Condominium for Pre-Sale*, XINHUA NEWS (Jun. 9, 2006), http://news.xinhuanet.com/house/2006-06/09/content_4666343.htm.

¹⁴⁶ *Beijingshi wuyeguanli banfa* (北京市物业管理办法) [Beijing Property Management Measures] art. 14 (promulgated by Housing and Urban-Rural Development, effective of 2010).

¹⁴⁷ *Shenzhen jingjitequ wuyeguanli tiaoli* (深圳经济特区物业管理条例) [Shenzhen Property Management Regulation] art. 19 (promulgated by Standing Committee of the First Shenzhen Municipal People's Congress, Jun. 1, 1994, effective 2008).

pre-2004 rule, the Shanghai housing authority could have indefinitely refused to form the HOA. On the other hand, the establishment of double majorities could allow developers greater control. If they retain large blocks of property, developers could theoretically block the notification requirement on the basis of square footage. However, the local rules account for this possibility by incorporating a two-year statutory fail-safe in Shenzhen and Shanghai, and a 5% owner override provision in Beijing.¹⁴⁸ Moreover, the two-year fail-safe provisions in Shenzhen and Shanghai were shortened to start running from the time of the first unit sale instead of the first unit occupation. In some developments, this difference could be many months or even years.

Beyond HOA formation issues, local rules have substantially changed with respect to voting powers of private owners. Prior to 2004, owners in Beijing had no statutory or regulatory right to vote. In contrast, present day owners have a vote on all resolutions, including the election of the executive council, the appointment of the management company, and other significant contracts binding the association.¹⁴⁹ Additionally, these residents can vote on matters involving organic changes to the property, like changes in land use. Like Beijing, Shanghai also allows for voting rights of the owners.¹⁵⁰ Both use double majorities, requiring that the passage of routine resolutions consist of a majority of the units and of the square footage of the project.¹⁵¹ Both require 66.6% of units and square footage for resolutions calling for organic change to the development.¹⁵² Neither of these cities used double majorities for voting rights prior to 2007.¹⁵³ Shenzhen has never adopted a rule on double majorities but has always counted votes based on square footage, not units.

These rules still allow developer overreach because double

¹⁴⁸ (北京市物业管理办法) [Beijing Property Management Measures art. 13] (promulgated by Housing and Urban-Rural Development, effective of 2010); (深圳经济特区物业管理条例) [Shenzhen Property Management Regulation art. 19] (promulgated by Standing Committee of the First Shenzhen Municipal People's Congress, Jun. 1, 1994, effective 2008); (上海市居住物业管理条例) [Shanghai Residential Property Management Regulation arts. 12 & 13] (effective Jul. 1, 1997).

¹⁴⁹ (北京市物业管理办法) [Beijing Property Management Measures] arts. 11 & 17 (promulgated by Housing and Urban-Rural Development, effective of 2010)

¹⁵⁰ (上海市居住物业管理条例) [Shanghai Residential Property Management Regulation] art. 17 (effective Apr. 01, 2011).

¹⁵¹ I(上海市居住物业管理条例) [Shanghai Residential Property Management Regulation] art. 17 (effective Apr. 01, 2011).

¹⁵² (上海市居住物业管理条例) [Shanghai Residential Property Management Regulation] arts. 12 & 13 (effective Jul. 1, 1997).

¹⁵³ Shanghai utilized intermediate legislation established in November 2004 providing for "one unit one vote," but with a caveat that non-residential owners were limited to one vote per 100 square meters of floor area.

majorities leave greater latitude for developers to block owner's initiatives. The passage of a resolution is naturally very difficult if a majority (or super majority) of all owners are required to vote. The majorities are not of a quorum of a general meeting, but a majority of all units and square footage, which could be hundreds or thousands of units and the requisite floor area. If the developer retains a substantial portion of the square footage, then it becomes even more difficult to obtain the double majority consensus. In new construction, the developer formulates the initial contracts, often with subsidiary companies, which provides additional income.¹⁵⁴ It is in the developers' best financial interest to prevent a HOA vote to upset those contracts and eliminate that income source. Therefore, even if the developer cannot prevent the formation of the HOA, he or she can unduly influence its activities by blocking a majority and thwarting the democratic process. This also showcases the importance of efficient condominium structure in both national and local regulation and the detrimental effect of owner apathy. Owners who refuse to take part in the voting process based on the inefficient and cumbersome HOA structure play into developers' plans. Once owner apathy is taken into account, developers only need to retain a relatively small portion of the project to prevent a 50% (or 66.6%) majority and block any resolution. This is essentially veto power. Thus, despite national legislation and local implementation procedures, developer overreach and local facilitation of these activities still occur as a consequence of flaws in the regulations. Double majorities play into this matrix as developers can render owners' associations impotent.

In general, new local regulations have provided for a clearer demarcation of rights and obligations between the homeowners, their committee, the developers, property management companies, and government agencies. However, some matters are still left unattended. The question of whether the HOA or its committee is recognized as a legal person under the law remains unanswered.¹⁵⁵ The ability to vote and manage the association is only as good as the ability to enforce decisions. None of the local regulations have explicitly provided for legal standing of HOAs, but local courts have made rulings that imply standing. In a 2003 Beijing judicial opinion,¹⁵⁶ the court implied the powers of standing of a HOA.¹⁵⁷ In Shanghai, standing for HOAs was implied in 2002 in judicial

¹⁵⁴ *The Developer's Role*, *supra* note 72.

¹⁵⁵ Opinions Concerning Trialing the Property Management Cases of the Beijing High Court, see *supra* note 90.

¹⁵⁶ Shenzhen Shi Fu Tian Qu Zhong Hai Ya Yuan Housing Management Committee v. Haidian District, Beijing Land Resources and Housing Authority, (Beijing, Haidian District People's Ct., Nov. 20, 2003), available at <http://cietac.chinalawinfo.com/newlaw2002/slc/slc.asp?db=cas&gid=33621767>.

¹⁵⁷ *See id.*

guidelines.¹⁵⁸ In these cases, local courts have found that HOAs may be sued,¹⁵⁹ which indirectly presupposes standing as HOAs must be competent to put on a defense. Moreover, if they can defend themselves, they must be able to counter-sue and thus initiate cases in their own names. This is also consistent with the TM case,¹⁶⁰ which was championed as a victory because the court expressly recognized HOA standing. Shenzhen had a different scheme, whereby the president or head of the HOA bore personal legal responsibility for the operations of the HOA – certainly a disincentive for running for office. (HOAs had no legal standing in Shenzhen until a 2011 decision recognized their legal standing by judicial fiat.¹⁶¹) Naturally, in China's civil law system, judicial decisions are particularly vulnerable to legislative oversight and correction, and legal standing will never be positively observed absent local or national legislation.

Legal standing is an important component of democratic governance in the developing land law of China. However, standing in itself does not provide procedural or substantive due process. Judicial decrees are often overturned by the local civil authority without recourse. This renders the judgment valueless. Moreover, judicial officers are as prone to corruption as any other local officials, so owners sometimes have to appeal directly to the political authority or popular media sources.¹⁶²

Trends in democratic governance in the PRC are increasingly growing and are reflected in its burgeoning real estate market and the developing laws governing the control of condominiums. At the national level, laws and regulations create greater local obligation amongst housing authorities and tighter controls on corruption. At the local level, ordinances are corresponding with the national policy of reducing corruption and developer overreach. Yet greater efforts must be undertaken to shore up China's fledgling democracy, such as further advancing

¹⁵⁸ Answer to Questions Concerning Adjudication on Housing Management Disputes (Shanghai High People's Ct., Mar. 19, 2002), *available at* <http://www.law110.com/law/difangsifa/law1102009difangsifa182.html>

¹⁵⁹ *See id.*

¹⁶⁰ *See generally* Beijing Chaoyang People's Court Civil Judgment (2006), *supra* note 87.

¹⁶¹ 深圳市福田区南天一花园业主委员会 v. 深圳市城市建设开发(集团)公司 (2010)粤高法民一终字第114号 [Nan Tian Yi Hua Yuan Owners' Committee v. Shenzhen Urban Construction Development (Group) Company] (Guangdong Province High People's Ct., Yue Gao Minyizhong Zi No. 114, July 6, 2011), *available at* <http://www.gdcourts.gov.cn/gdcourt/front/front!content.action?lmdm=LM43&gjid=20120817095722296178>.

¹⁶² *See* Taisu Zhang, *Why the Chinese Prefer Administrative Petitioning over Litigation*, 3 SOCIOLOGICAL STUD. 139 (2009); *see also* Carl F. Minzner, *Xin角度: An Alternative to Formal Chinese Legal Institutions*, 42 STAN. J. INT'L L. 103 (2006).

legislation by providing greater drafting complexity. In the national laws, this includes accounting for the issues directly impacting democratic control like “double majorities,” the future binding powers of developer-owned management companies, and more explicit norms binding transfers from developers to owner associations. National legislation also needs to develop a more sophisticated approach to obstacles indirectly impacting democratic governance, such as improving efficiencies, open-ended executive council membership, and supermajorities on organic changes. Only with credible management will owner apathy evaporate and will the marketability of private property grow. At the local level, though trends strongly favor earlier owner control (including fail-safe provisions to override developer machinations), other weaknesses continue to dog the legislation.¹⁶³ These include legislatively recognized standing for associations and double majorities which can often delay owner control or thwart important resolutions after the owners have taken control of the association. Statutes like the Nanjing measure, which limits the amount a developer may retain in a completed project, have also proven abortive or unpopular.¹⁶⁴ Thus, an important recommendation calls for greater erudition in the drafting of Chinese condominium law legislation at both the national and local levels.

VII. RECENT STATUTORY CHANGES

Article 17 of the Universal Declaration of Human Rights (“UDHR”) provides expressly for the right to own property.¹⁶⁵ The UDHR also provides that “[n]o one shall be arbitrarily deprived of his property.”¹⁶⁶ China’s evolving property law has recently provided for enhanced protections of land and land use rights from government takings. This is a significant departure from collective ownership during the Marxist period.¹⁶⁷ There are two types of land tenure systems in China. One is urban land use, which can be commercially transferred. The second is rural land use, which is collectively-owned land and cannot be freely

¹⁶³ Chen, *The New Chinese Property Code*, *supra* note 51, at 177-78.

¹⁶⁴ Nanjing zhixing xingui quxiao kaifashang 5% ziliufang (南京执行新规取消开发商5%自留房) [Implementation of the New Regulations Nanjing Cancel Developer’s 5% Retention Room], Apr. 22, 2010, *available at* <http://finance.qq.com/a/20100422/003038.htm>

¹⁶⁵ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948). Article 17 states that “[e]veryone has the right to own property alone as well as in association with others.”

¹⁶⁶ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

¹⁶⁷ Daniel Abramson, *Transitional Property Rights and Local Development History in China* 48 *URBAN STUDIES* 553 (2011).

transferred.¹⁶⁸ Rural lands must be converted into urban land before they can obtain commercial value. It has been argued that the dichotomy of urban and rural land rights is actually a root cause of urban “overdevelopment” and “land hunger.”¹⁶⁹ Land expropriation (especially rural land and the subsequent sale of land to property developers) has become a lucrative revenue source for local governments, as rural people are usually undercompensated for their expropriated land.¹⁷⁰ Thus, conflict over expropriation of land is a simmering pot of social turmoil in China.¹⁷¹ There is increasing media coverage of forced evictions and demolition cases involving violence, sometimes even resulting in death, which has highlighted underlying social tensions and raised public awareness and concern. In 2010, a forced eviction at a home slated for demolition ended in tragedy when three family members set themselves on fire outside their house in Yihuang County, Jiangxi Province.¹⁷² One died and two were seriously injured. Several local Communist Party cadres were later suspended from their jobs in connection with these self-immolations.¹⁷³ In 2004, a local government party chief in Jiahe County, Hunan Province, was among several officials sacked for abuse of power in connection with illegal evictions.¹⁷⁴ Even the State Council was involved, calling a meeting to work out appropriate preventive measures and penalties.¹⁷⁵

The Regulations for the Administration of the Demolition of Urban Buildings and Relocation (“2001 Demolition Regulations”) was the first

¹⁶⁸ Tudi Guanlifa (土地管理法), [Land Administration Law] art. 8 (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 29, 1998, effective Jan. 1, 1999, amended Aug. 28, 2004) (2004) (P.R.C.).

¹⁶⁹ GEORGE LIN, *DEVELOPING CHINA: LAND, POLITICS, AND SOCIAL CONDITIONS* 27-29 (2009).

¹⁷⁰ This is because local governments have strong financial incentives to expropriate rural land for low compensation, as the land can subsequently be sold to private developers for high prices once the rural-urban land conversion is completed.

¹⁷¹ Juanrong Yu, *Land Issue Became the Focal Point of Peasant’s Rights Maintenance*, 8 *WORLD RES. & STUD.* 22-23 (2005).

¹⁷² *Loosen the Deadly Grip of Eviction Policy*, CAIXIN ONLINE, Sept. 21, 2010, <http://english.caixin.com/2010-09-21/100190928.html>

¹⁷³ *Id.*

¹⁷⁴ Jiahe Chaiqian: Jiandu Baolichaiqian de kaishi (嘉禾拆迁-监督暴力拆迁的开始) [Forced Eviction in Jiahe: The beginning to hold expropriation to accountable], BJ NEWS, Nov. 11, 2009, *available at* <http://www.bjnews.com.cn/news/2011/11/09/163186.html>.

¹⁷⁵ *See id*; *see generally* Cailiang Wang, 2012: Zhongguo chaiqian niandu baogao, 2012: 中国拆迁年度报告 *Annual Report of Expropriations in China 2012*, CAIJING.COM.CN 财经网, Jan. 1, 2013, *available at* http://blog.caijing.com.cn/expert_article-151549-46704.shtml.

special provision in China dealing with expropriations (the exact wording used was “*chaiqian*,” meaning “demolition and relocation”).¹⁷⁶ Under the 2001 Demolition Regulations, local governments were given wide discretionary powers to tear down urban buildings in order to achieve the broadly defined legislative intent of “preserving the smooth progress of construction and urban management.”¹⁷⁷ The extensive use of government power to order forced evictions has given the impression that Chinese property rights are precarious.

On the other hand, economic development has been achieved despite scant safeguards for court-enforced property rights. Various social arrangements can provide alternative forms of protection for property rights.¹⁷⁸ However, secure property rights formalized by the use of legislation are still the most reliable solution to achieve sustainable economic development. Focusing on economic development may well encourage further land expropriation in view of high housing prices and government urbanization policy. It is also the most pragmatic way to protect individual property rights. In the past, local governments were able to provide cheap land for foreign investors, but this is no longer sustainable.¹⁷⁹ Rather, the demand for legal certainty, provided by legislation and enforced by courts, has become apparent.

In 2011, new Regulations for Expropriation and Compensation for Houses on State-owned Land (“2011 Expropriation Regulations”)¹⁸⁰ were promulgated as a replacement for the 2001 Demolition Regulations. In many instances, this regulation supersedes China's 2007 Property Law.¹⁸¹

¹⁷⁶ Chengshi fangwu chanqian guanli tiaoli 城市房屋拆迁管理条例 [Administrative Regulations on Urban Housing Demolition and Relocation] (promulgated by the State Council, Jun. 6, 2001, effective on Nov. 1, 2001).

¹⁷⁷ [Urban Housing Demolition and Relocation Management Regulations art. 2] (promulgated by the State Council, Jun. 6, 2001, effective Nov. 1, 2001) ST. COUNCIL GAZ., 2011 (P.R.C.).

¹⁷⁸ Donald Clarke, *Economic Development and the Rights Hypothesis: The China Problem*, 51 AM. J. COMP. L. 89 (2003); Xiaobo Zhang, *Asymmetric Property Rights in China's Economic Growth* (2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=882446.

¹⁷⁹ Ruoying Chen, *Divided World: China's Land Tenure System and Implication to Foreign Investment in Investment in China* (2010), available at <http://ssrn.com/abstract=1665175>.

¹⁸⁰ [Urban Housing Demolition and Relocation Management Regulations] art. 1 (promulgated by the State Council, Jun. 6, 2001, effective Nov. 1, 2001) ST. COUNCIL GAZ., 2011 (P.R.C.).

¹⁸¹ JIANYUAN CUI 崔建远, BUDONGCHAN ZHENGSHOU SHIYEXIAXIANG DE FANGWU CHANQIAN 不动产视野下的房屋拆迁 (COMPARING HOUSING DEMOLITION WITH REAL ESTATE EXPROPRIATION), BUDONGCHAN ZHENGSHOU 不动产征收 (REAL PROPERTY

From the property owners' perspective, the 2011 Expropriation Regulations represented a leap forward in much of China's legal framework for takings.

First, the different types of "public interests" that justify and legitimize compulsory taking of private property rights by the government are clearly demarcated. The public interest requirement prevents the expropriation of private property for unlawful purposes and serves as a substantive safeguard. However, prior to the 2011 Expropriation Regulations, the relevant statutory instruments only provided that expropriations must be in the public interest, without further clarification.¹⁸² Local governments were essentially given free license to determine the meaning of public interest. In many instances, "public interest" was merely interpreted to mean anything the local government desired.¹⁸³ The question remained as to how to define or narrow the scope of public interest. In practical terms, it may be almost impossible to provide an explicit statutory definition in an all-inclusive fashion because the term "public interest" is itself pregnant with meaning and without specific context.¹⁸⁴ Moreover, this problem is compounded in China by the fine line between public interest and commercial interest, especially in the context of urban redevelopment.¹⁸⁵

The 2011 Expropriation Regulations list the conditions, which fulfill the public interest requirement. The local government, at the municipal or county level, shall make a decision to expropriate the private property only when it is necessary for (1) national defense and foreign affairs; (2) the construction of energy, transportation, water and other infrastructures initiated by the government; (3) public utilities like science and technology, education, culture, health, sports, environment and resource protection, disaster prevention and mitigation, protection of cultural relics, social welfare or municipal utilities; (4) the construction of

EXPROPRIATION) 309-311 (Shaokun Fang & Hongping Wang eds., 2009).

¹⁸² CAILIANG WANG, *THE LAW AND PRACTICE OF HOUSING EXPROPRIATION* 26-31(2008).

¹⁸³ Shaokun Fang & Hongping Wang, *On the Normative Model of Public Interest in PRC Expropriation*, 1 *CONTEMP. L. REV.* 68-71 (2006).

¹⁸⁴ Liming Wang 王利明, *Wuquanfa de shishi yu zhengshouzhengyong zhidu de wanshan 物权法的实施与征收征用制度的完善 (On Implementation of Property Law and the Improvement on Expropriation System)*, 4 *Faxue zazhi 法学杂志 LAW SCI. MAGAZINE* 15, 15-22 (2008).

¹⁸⁵ Ping Jiang, *Wuquanfa de lixiang yu xianshi 物权法的理想与现实 (The Ideal and Reality of the Property Code)*, 11 *Shehui kexue luntan 社会科学论坛 (FORUM SOC. SCI.)* 84-85 (2007).

government-subsidized housing; (5) redeveloping a deteriorating urban neighborhood with dilapidated buildings; (6) any other public interest as prescribed by a law or administrative regulation.¹⁸⁶ This legislation significantly narrowed the scope of “public interest.” It also reduced the risk of private land takings, which are abhorred in virtually every jurisdiction worldwide.

Second, there is a required cross-departmental review of all takings. The legislative intent behind the 2011 Expropriation Regulations was to regulate the procedure governing expropriation and compensation, while upholding the public interest and protecting the legal interests of property owners.¹⁸⁷ This is pointedly different from the 2001 Demolition Regulations, which emphasized the smooth operation of urban development.¹⁸⁸ Additionally, the 2011 Expropriation Regulations introduced detailed procedural safeguards, including public hearings, participation of the property owners affected, the selection of a real estate appraiser, and dispute settlements during the process as well as administrative review. Finally, the 2011 Expropriation Regulations clearly identify the government’s sole role in takings and precludes any function for third parties like developers or intermediaries, contrary to Article 17 of the 2001 Demolition Regulations.¹⁸⁹

Third, in relation to compensation, often the most contentious issue in any expropriation, payment levels would have to take into account the location of the property and market value based on independent third party assessments.¹⁹⁰

The 2011 Expropriation Regulations were sorely needed. They not only provide for a meaningful right to property while giving due deference to public interest, they also strengthen the procedural safeguards against the superior bargaining power of developers and local governments in negotiating compensation for expropriations while providing for administrative relief. As a result, they strengthen procedural due process. Additionally, the Chinese courts have gradually become unwilling to be blamed for social unrest resulting from forced evictions and improper expropriations.¹⁹¹ This is partly due to the Chinese Communist Party’s

¹⁸⁶ [Urban Housing Demolition and Relocation Management Regulations] art. 2 (promulgated by the State Council, Jun. 6, 2001, effective Nov. 1, 2001) ST. COUNCIL GAZ., 2011 (P.R.C.).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ Lei Chen, *The Legal and Institutional Analysis of Land Expropriation in China*, in *RESOLVING LAND DISPUTES IN EAST ASIA* (John Gillespie & Hualing Fu eds., forthcoming 2014).

increasing concern with maintaining social stability, in view of the sheer number of incidents caused by expropriation disputes.¹⁹² This is also partly due to the increasing number of disputes, which are arguably reinforced by the emergence of the Chinese middle class.¹⁹³ This emerging group associates property ownership with core middle class values and the notion of “*my property, my destiny.*”

Nonetheless, the 2011 Expropriation Regulations only cover urban expropriation and do not protect rural land seizures. Many forced evictions and land disputes are still taking place in rural areas. As long as the state continues to monopolize the conversion from rural land to urban land, local governments will continue to make land development and construction planning decisions arbitrarily.¹⁹⁴ Worse still, many commercial developers who are engaging in relocation and property valuation are linked to local governments. Further legislative reform, particularly concerning rural land, is needed.

The visceral public response to expropriations provides further evidence of property rights taking root in China. The passage of the 2011 Expropriation Regulations had its genesis in public outcry over takings and the desire to obtain and keep private property rights in China. Moreover, it continues to spur human rights advances, such as heightened sensitivity to procedural due process.¹⁹⁵ Against the backdrop of reform legislation, the National People’s Congress is also considering reform of the Land Administration Law.¹⁹⁶ The proposed amendments aim to streamline the administrative review and civil litigation processes for expropriation disputes.¹⁹⁷ The draft amendment seeks to standardize rural

¹⁹² Tang Zhongmin, (唐忠民), *Relevant Questions on the Judicial Review of the “Public Interest”* (“公共利益” 司法审查的相关问题) 10 THEORY JOURNAL (理论研究) 85-88 (2012).

¹⁹³ Andrew C. Mertha, *From “Rustless Screws” to “Nail Houses”: The Evolution of Property Rights in China*, 53 (2) ORBIS 233-49 (2009), available at http://falcon.arts.cornell.edu/am847/pdf/Microsoft%20Word%20-%20Mertha_Orbis_Article%5B1%5D.pdf.

¹⁹⁴ Jiming Cai, *Four Major Problems and their Solutions regarding Rural Land Expropriation*, SINA, Dec. 21, 2012, <http://zigong.house.sina.com.cn/news/2012-12-21/1014728452.shtml>.

¹⁹⁵ *Democratizing the Neighborhood*, *supra* note 82.

¹⁹⁶ According to Professor Wang Weiguo, a leading expert in land law, the NPC is considering drafting a Land Law dealing with both urban and rural land systems, which will supersede Land Administration Law and other relevant land-related statutes. Interview with Wang Weiguo, Professor, China University of Politics and Law (April 15, 2013).

¹⁹⁷ Peng Xiaoxia 彭小霞, *The Dilemma of Expression of Farmer’s Interests in Rural Land Expropriation in China and its Solution*, 农村土地征收中农民利益表达的困境及完善路径, 5 Truth Seeking, 求实, 87-93 (2013).

and urban procedures for land expropriation, set compensation standards, and build proper channels for handling disputes.¹⁹⁸ Separating urban from rural expropriations may no longer be deemed appropriate.

VIII. CONCLUSION

Recognition of human rights in China is growing, particularly in the area of grassroots democratic governance, citizen participation and sophisticated legislation providing for due process and property rights. Among the factors fueling this growth are the changing land laws and the private ownership of real estate. While unimproved real estate is still subject to government or collective ownership, private apartment ownership is becoming common. Private ownership of all real estate and the disbanding of the distinction between rural and urban land seem to be the next two hurdles for policymakers. The distinction between rural and urban land represents perhaps the last residue of socialism in the Chinese land scheme.¹⁹⁹ Privatization and free market economics are serving China's economic aspirations and, at the same time, helping an emerging rights regime to blossom. Evolving societal perceptions and expectations are driving market efficiencies and reducing transaction costs despite relatively minor yet persistent corruption and other temporary structural defects. While the existence of local government interference with owners' property rights, poorly drafted legislation, and lack of judicial enforcement cut against the market, these defects are subject to reform and will eventually relent in the face of market forces.

In order to promote the market-based changes taking place in the PRC, policymakers can adopt measures used in other states to encourage private land ownership and the creation of greater wealth. By growing the wealth of its citizens and developing an increasingly large middle class, the PRC can ensure continued economic prosperity and developing human rights. Among other initiatives, the PRC could create more binding laws overriding developer conflicts of interest in order to allow owner committees to take control of the management of their properties sooner

¹⁹⁸ Song Dahan, the director of the legislative affairs office of the State Council, admits that problems do exist in land expropriation in China. He stated, "The expropriation procedures need to be improved. The compensation mechanism is flawed: the standards are way too low and rigid. For those whose land has been expropriated, the guarantee for their long-term livelihood is insufficient. The forcible and illegal seizure of farmers' land threatens social stability." Luo Dan, *China to Amend Land Administration Law*, CRIENGLISH.COM, Dec. 25, 2012, <http://english.cri.cn/6909/2012/12/25/191s740211.htm>

¹⁹⁹ It should be noted that although there is no private land ownership in China, land use right holdings may be transferred and commercialized, thus making urban lands in China marketable and a capitalized asset. In China, there is a legal distinction between the status of the land and the buildings on it. See an extensive description of the Chinese land use right at PATRICK RANDOLPH & JIANBO LOU, *CHINESE REAL ESTATE LAW* (2000).

and make the transition smoother. This process has begun to evolve with substantial changes to the national statutes in 2003, 2007, and later changes in local legislation.²⁰⁰ Additional legislative challenges remain, however, and national and local legislators should continue to perfect the system in order to alleviate corruption and developer overreach as well as to create an equitable condominium structure that works efficiently.

The Central Government in Beijing needs to develop low income and lower-middle income housing options in order to allow those with modest incomes to grow wealth by acquiring equity in real estate and beginning their long march to the middle class. The government needs to eliminate barriers to this level of growth by introducing more scrupulous attention to zoning, making modest income properties a condition precedent to development contracts for large condominium schemes, and by eliminating distinctions between land rights to urban and rural property. The Central Government should also provide more government money for loans, such as first-time homebuyer's loan assistance, with reduced down payment requirements, low interest rates, and long-term government-backed loans.

Other developments that could positively impact market forces include more binding legislation against discriminatory practices in property sales and lending, the creation of better public transportation infrastructure to allow for even growth of marketable real estate, and concentration on infrastructure, particularly in rural areas. Additionally, the development of a national and provincial bureaucracy designed to provide effective oversight of the provisions of the real estate, particularly with regard to enforcement of judicial decisions and local corruption, would also be helpful. Finally, the 2007 Property Law should be amended to afford greater protection for ethnic groups, indigenous peoples, country people, women, and other groups traditionally discriminated against in the context of land law to allow greater popular access to real estate ownership.

On the other hand, wholesale importation of foreign legal schemes has never fully taken root in China without incorporating so-called Chinese characteristics. Arguably, neither importation of Japanese, German, nor Soviet Russian legal systems experienced complete acceptance in the PRC and were all either significantly changed to adjust to the Chinese culture or abandoned.²⁰¹ The importation of prevailing neoliberal macroeconomics is likely to share the same fate. While market forces are changing the social and legal order of China and encouraging human rights, China fares best when putting its own impress on the forces driving the change. Being a country newly emerging from a communist system, the implementation of a strict *laissez-faire* free market economy

²⁰⁰ *Evolving Property Rights*, *supra* note 56, at 22.

²⁰¹ HUANG, *supra* note 29.

may be inappropriate in the early stages, as China needs to gradually build its economic order.

China also faces unique challenges as it has denser populations, massive environmental considerations, lower per capita income, and significant challenges in providing basic needs (such as food, shelter, and clothing) for its huge population, a history of corrupt local governing practices, and a lack of transparency. The practical necessities of providing for its population and cutting against the tide of corruption require China to regulate its commerce to a greater extent than many Western states and means it must develop an economy that takes these exigencies into account. For example, imposing price restrictions on agricultural products has long been mandated by the Chinese government²⁰² because of the considerable risk of mass starvation. Such government interference with commerce is discouraged under the de-regulation emphasis in contemporary neoliberal economics. Additionally, the opposition to organized labor, which is comparatively prevalent in the United States, would not fit well with China's emphasis on economic rights and need to raise the basic standard of living. Thus, when imagining a market economy in China, a Keynesian or neo-Keynesian macroeconomic model emerges as more appropriate to best serve the needs of its people and is more consistent with its past economic tradition. This model creates less shock on the Chinese economy and social structure²⁰³ and allows the government to put in place regulations aimed at curbing wealth disparities and corruption, such as the failed Nanjing Jiangsu Province ordinance imposing restrictions on developers' control of condominium projects. This macroeconomic model helps control changing financial fortunes and grows a stronger middle class with improved human rights norms and practices.

These are only a few of the initiatives used by other countries and are offered for illustrative purposes only. Nevertheless, as the growth of private wealth from real estate equity is a significant factor in the ongoing trend toward greater human rights in the PRC, steps designed to stimulate property ownership are synonymous with steps to encourage human rights.

²⁰² Peter Wang, Sebastien Evrard & Yizhe Zhang, *Antitrust Alert: Chinese Pricing Enforcers Impose Higher Fines as New Rules Proposed*, JONES DAY, Jul. 2010, <http://www.jonesday.com/antitrust-alert--chinese-pricing-enforcers-impose-higher-fines-as-new-rules-proposed-07-21-2010/>.

²⁰³ See generally NAOMI KLEIN, *SHOCK DOCTRINE: THE RISE OF DISASTER CAPITALISM* (2008).