

# Land Policy Reform in China: Dealing with forced Expropriation and the Dual Land Tenure System

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## Introduction

Contemporary China is a country full of contradictions. It is at once opening up its external borders to trade, travel and study, while internally censoring its 500 million internet users. It is at once creating extraordinarily wealth, while facing extreme destitution and exploitation among large segments of its populace. It is at once paying tribute to its socialist roots, while creating a hyper-capitalist culture where money reigns supreme and “to get rich is glorious”.<sup>1</sup>

China’s land and property rights regime is not immune to similar paradoxical tensions. Socialist public ownership – one of the cornerstones of the Communist Party of China’s (CPC) platform since 1949 – remains entrenched in the current property rights system. However, since the promulgation of the 1982 *Constitution of the People’s Republic of China*, rural and urban land tenure systems have been on different tracks, with significant consequences for both types of citizens.<sup>2</sup>

During the 1980s, in order to facilitate economic growth while keeping up the appearances of socialist public ownership, land use rights (LURs) were separated from underlying land ownership, as land in China continued to be owned by the State (in the case of urban land) and by rural collectives (in the case of rural land).<sup>3</sup> Through this ingenious conceptual sleight of hand, a land use market was created in urban China upon which rapid economic growth and

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<sup>1</sup> See generally Evelyn Iritani, “Great Idea but Don’t Quote Him”, *Los Angeles Times* (9 September 2004) online: Los Angeles Times <<http://articles.latimes.com/2004/sep/09/business/fi-deng9>> (on the importance of the phrase, 致富光荣, which is a catchphrase for market reform commonly misattributed to Deng Xiaoping, China’s paramount leader after the death of Mao Zedong).

<sup>2</sup> See *Constitution of the People’s Republic of China*, 1982, art 10, online: People’s Daily Online: <<http://english.people.com.cn/constitution/constitution.html>> [1982 *Constitution*].

<sup>3</sup> *Ibid*, Article 10 of the 1982 *Constitution* established communal ownership of rural and suburban land and state ownership of urban land.

development could be facilitated. However, while urban residents were eventually able to sell, lease and collateralize urban LURs, rural peasants have been heavily restricted from doing the same with their rural LURs. Another critical difference between rural and urban land rights is that urban LURs allow for essentially any type of development, while rural LURs can only be held for limited agricultural and household residential purposes. Any other development on rural land must first go through expropriation by the government, conversion to urban land and finally sale to private developers.<sup>4</sup>

The dual land tenure scheme has exacerbated the income disparity between urban and rural areas, creating widespread resentment among a rural population that has been largely left behind during China's economic boom. In 2009, the average urban household income exceeded the average rural household income by a factor of 3.33 times – its highest ratio since recording began – while overall income inequality has surpassed even the pre-1949 era.<sup>5</sup>

The 2007 *Property Law of the People's Republic of China* was expected by many observers to address these incompatibilities and tensions in the property and land use rights regime.<sup>6</sup>

However, after a protracted and heated thirteen year debate, the result was a document that largely perpetuated the status quo: confirming private property rights in the abstract while

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<sup>4</sup> See National Bureau of Statistics, *China Statistical Yearbook: 2010*, (Beijing: China Statistics Press, 2010).

<sup>5</sup> See Guus Van Westen, "Land in China: Struggle and Reform" (2011) 54:1 Development 55 at 56.

<sup>6</sup> *Property Law of the People's Republic of China*, 2007, online: Lawinfochina <<http://www.lawinfochina.com/display.aspx?id=6642&lib=law>> [*Property Law*].

maintaining state ownership of urban land and rural collective ownership of rural land as well as fundamental inequality between urban and rural LURs.<sup>7</sup>

Yet the laws on the books are only part of the land problem in China – a massive push towards industrialization and urbanization combined with a general lack of respect for the rule of law has led to systemic abuses of power and illegal forced evictions and demolitions across the country. Of the over 90,000 ‘mass incidents’ that occurred in 2006, more than 60% were related to land disputes and grievances towards local governments<sup>8</sup> and private developers – more than all other causes of social unrest in China combined.<sup>9</sup> Four years later in 2010, the number of mass incidents was estimated to have doubled to over 180,000 – with land disputes still compromising about 60% of all mass incidents.<sup>10</sup> This makes disputes over land issues, as of the time of this writing, the *de facto* number one internal social stability issue in China.

As can be expected for a country of over 1.3 billion people, the scale of land expropriation in China is absolutely stupendous. Since reform and opening, approximately 6-7 million hectares of farmland have been expropriated for urban or commercial use.<sup>11</sup> Yu Jianrong, a prominent

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<sup>7</sup> *Ibid* at Part 3.

<sup>8</sup> “Local governments” in this paper refers to any government organ at the sub-national level. In China, there are five *de facto* levels of local governments. They are (listed in order of seniority): provincial, prefectural, county, township and village level governments.

<sup>9</sup> See Tao Ran, “China’s land grab is undermining grassroots democracy”, *The Guardian* (16 December 2011) online: The Guardian <<http://www.guardian.co.uk/commentisfree/2011/dec/16/china-land-grab-undermining-democracy>> (a ‘mass incident’ refers to “any kind of planned or impromptu gathering that forms because of internal contradictions” and may refer to group protests, speeches, or physical conflicts as a result of social grievances).

<sup>10</sup> Todd Balazovic, “Demolitions cause most social unrest” (27 June 2011) (podcast), online: China Daily <[http://www.chinadaily.com.cn/2011-06/27/content\\_12819896.htm](http://www.chinadaily.com.cn/2011-06/27/content_12819896.htm)>.

<sup>11</sup> See Zhu Keliang & Li Ping, “Drawing a Line in the Sand? The Definition of ‘Public Interest’ and China’s Struggles to Limit the Government’s Power in Compulsory Land Expropriations” (Presentation for Landesa Rural Development Institute, delivered at the Annual World Bank Conference on Land and Poverty in Washington, D.C., 24 April 2012) online: Land and Poverty <[http://www.landandpoverty.com/agenda/pdfs/ppt/keliang\\_powerpoint.pdf](http://www.landandpoverty.com/agenda/pdfs/ppt/keliang_powerpoint.pdf)>.

sociologist at the Chinese Academy of Social Sciences (CASS), estimates that 50-60 million rural residents alone have been affected by land expropriation since reform, of which about half cannot find new jobs and do not have sufficient social security, thus becoming chronically impoverished and destitute.<sup>12</sup> So far, it is still uncertain as to how many urban residents have been affected by land expropriation, but a survey conducted between 1991 and 2010 estimates that, over this time, 2.5 million residents had land expropriated by local government in the Shanghai area *alone* – an indication that the total number of urban residents affected would also be material and significant.<sup>13</sup>

Compensation in many of these expropriation cases has been woefully insufficient. With respect to rural compensation, a 2011 survey of 1,791 farmers across 17 provinces found that no compensation was given *at all* in 22.5% of expropriation cases.<sup>14</sup> Even in those cases where compensation was distributed to farmers, it has often been extremely grossly unfair. The average compensation paid to farmers was RMB 18,739 per mu (approximately \$17,850 per acre), only 2.5% of market value realized upon sale to private developers (RMB 778,000 per mu or approximately \$740,000 per acre).<sup>15</sup>

Three additional points should be made here at the outset to avoid oversimplifying the subject of land policy reform in China. The first point is that there are ‘many Chinas’ – that is, given the

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<sup>12</sup> Yu Jianrong (于建嵘), ed, *Subaltern Politics – Dialogues and Lectures* (底层政治—对话与演讲) (Beijing: 2009) at 122, cited in Eva Pils, "Waste No Land: Property, Dignity and Growth in Urbanizing China" (2009) 59 Cornell Law Faculty Working Papers at 2.

<sup>13</sup> See Steve Hess, "Nail-Houses, Land Rights, and Frames of Injustice on China's Protest Landscape" (2010) 50:5 Asian Survey 908 at 918.

<sup>14</sup> Landesa, "Summary of 2011 17-Province Survey's Findings" (26 April 2012), online: Landesa <<http://www.landesa.org/china-survey-6/>>.

<sup>15</sup> *Ibid.*



tremendous geographical diversity of the nation, as well as the decentralization of power and autonomy to provincial, county, township and village-level governments, different parts of China have vastly different levels of wealth, human capital, legal development, respect for rule of law and party cadre discipline.<sup>16</sup> To assume that what is true about China in general is true about all localities is unwise, while conversely, extrapolating nationwide generalities from local case studies should also be approached with calculated caution.

The second point is that China's contemporary legal institutions are relatively young and the herculean task of building a comprehensive, modern and functional system of law for the world's most populated country only truly (re)started in 1979, after the tremendous damage wrought upon the legal profession by the Cultural Revolution.<sup>17</sup> The field of property and real estate law in particular is still at an early stage of development and constantly in flux – the fact that it took until 2007 for China to finally draft a comprehensive statute on property rights is indicative of this developmental immaturity. Therefore, it is to be expected that there will be significant gaps between property rights according to black letter law and property rights in practice.<sup>18</sup> However, as the rule of law slowly but surely seeps its way into mainstream Chinese society, laws and regulations become capable of providing both rhetorical support for the legitimate expectations of the people and carving out a “legal space” in which parties can carry on their daily business.

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<sup>16</sup> For further discussion on the administrative and fiscal decentralization of China, see generally Ping Xinqiao and Bai Jie, “Fiscal Decentralization and Local Public Good Provision in China” (2005) NO.E2005004 China Center for Economic Research Working Paper Series.

<sup>17</sup> See Cai Dingjian & Wang Chenguang, *China's Journey toward the Rule of Law: Legal Reform, 1978-2008* (Brill Academic Publishers, 2010) at 33.

<sup>18</sup> This defined by Professor Albert Chen as legal efficacy, which is essentially “the gap between the law as stated in the statute book and actual behaviour on the part of officials and citizens”. See Albert HY Chen, *An Introduction to the Legal System of the People's Republic of China*, 1<sup>st</sup> ed (Hong Kong: Butterworths Asia, 1992) at 92.

Therefore, the substantive legal framework has no small role to play in land policy decisions and a significant part of this article is devoted to understanding this legal framework.

The third point is that not all residents facing expropriation are opposed to it. In fact, there are a large number of residents, both rural and urban, who would welcome expropriation of their land and the compensation that would accompany it, so long as that compensation is deemed sufficient.<sup>19</sup> For urban residents, land is generally more valuable, as compensation is based off of comparable market value for similar properties and resettlement conditions are guaranteed by law. Furthermore, urban residents know that given China's meteoric rise towards modernization, office towers, condominiums, shopping malls, factories and a host of new public infrastructure will have to be built on land where there are many incumbent residents; land expropriations are simply an unavoidable fact of life in a rapidly modernizing and densely populated China. In the cities, if expropriation procedures are properly followed, compensation packages can be quite lucrative.

In the rural context, since rural LURs cannot be sold, leased to others or collateralized through mortgages, land expropriation is the only legal avenue available for farmers to monetize their land rights, particularly if they were planning to move to the cities anyway.<sup>20</sup> The compensation package may in some cases be seen as a preferable option compared with small-scale farming, even if compensation is only a fraction of the realizable market value of the land.<sup>21</sup> In other words, most residents facing expropriation are not opposed to eviction, demolition and

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<sup>19</sup> Interviews of various rural and urban landholders in Guangdong province (July 2012) archived with the author [*Guangdong Interviews*]. These interviews were granted on the condition of anonymity, therefore the identities of the interviewees will not be divulged in this paper.

<sup>20</sup> *Ibid*, interview with Baishui village committee member.

<sup>21</sup> *Ibid*.

development *per se*, so long as they get fair compensation. Of course, what is ‘fair’ is subject to varying interpretations, to say the least.

Given the gravity and complexity of land issues in China, this paper will attempt to do several things. First, it will attempt to provide a general overview of land policy in China, including a brief history and discussion of the legal framework in which land rights are conceptualized. Second, it will attempt to detail the shortcomings of the current land and property rights regime as well as how it affects the livelihoods of hundreds of millions of ordinary Chinese people, young and old, from all parts of the nation. Third, it will attempt to deconstruct land disputes and grievances in order to better understand their root causes. Are land disputes occurring because of poorly drafted and contradictory laws? Are they occurring because of systemic weaknesses in the judiciary and a lack of respect for the rule of law? Are they occurring because of a fundamental difference in the State’s conception of land ownership versus the common people’s conception? The third section will attempt to pose answers to these questions. Finally, the paper will explore some of the ways that the government is trying to alleviate these problems as well as offer some suggestions that may provide insights on the rocky road towards a more effective and just land and property rights regime in China.

### **Brief History of Land Policy in China**

Land reform in any country is an intensely political process. Because the allocation and use of real property undergirds every economic system in the world, modifications of existing institutional arrangements are bound to create winners and losers, although net social welfare can

be dramatically changed for better or for worse.<sup>22</sup> Therefore, land tenure systems and associated legal regimes are not static, but are constantly changing depending on the prevailing political ideas and developments of the time. The modern history of China provides an excellent example of this dynamic process.

### Post-Qing Dynasty (1911-1949)

After the fall of the Qing Dynasty in 1911, no government was fully in control of a united China in terms of political and military consolidation. In the North, different warlords competed with each other for territory and resources, essentially reverting back to a feudal system of land tenure. Meanwhile in the South, two competing systems of land policy were being advocated by the Guomintang and the Communist Party of China.<sup>23</sup> The Guomintang, drawing from the political thought of Sun Yat-Sen, was heavily influenced by the civil law statutes of the Japanese Meiji government, who in turn had largely taken their system from the German civil codes.<sup>24</sup> Accordingly, the land policies of the Guomintang strictly adhered to private ownership rights and incorporated other Western land concepts and innovations. After Chiang Kai-Shek's 'White Terror' campaign against the Communists in 1927, the Guomintang property rights system based off of the German civil law tradition proliferated, particularly in urban areas, in which Guomintang influence was far stronger and consolidated than rural areas.

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<sup>22</sup> See generally M Riad El-Ghonemy, "The Political Economy of Market-Based Land Reform" (1999) 104 UNRISD Discussion Papers.

<sup>23</sup> See Patrick A Randolph & Lou Jianbo, *Chinese Real Estate Law* (Aspen, 2002) at 1-27.

<sup>24</sup> *Ibid.*

In contrast, the CPC's system of land tenure was heavily influenced by the world's preeminent Communist state at the time, the Soviet Union.<sup>25</sup> The CPC's ideas about land tenure were a direct result of Marxist political thinking. The old regime of consolidation of land and resources by wealthy bourgeois landowners was to be completely abolished and land was to be returned to peasants and the proletariat masses in order to finally free the forces of production blocked by oppressive elements.<sup>26</sup> However, the CPC never got the chance to fully implement their land reform ideas until they finally defeated the Guomindang in 1949 and consolidated China proper.

### **CPC Revolution (1949-1957)**

When the CPC came into power in 1949, land reform was a top priority, even among many other pressing issues facing the country. Following the issuance of the *Joint Guidelines of the People's Political Consultative Committee*, which introduced the "land to the tiller" principle, hundreds of millions of Chinese rural farmers were issued their own plots of land and housing.<sup>27</sup> In addition, they were guaranteed broad property rights, including rights to farm, to reside on the land and to buy, sell, or transfer the land to another party.<sup>28</sup> Initially, the land targeted to supply this massive reform was forcefully taken from those classified as anti-revolutionary elements: Guomindang government and military officials, war criminals, traitors, as well as foreigners and overseas Chinese who were deemed absentee landowners exploiting the masses.<sup>29</sup>

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<sup>25</sup> See Cao Pei, *Real Estate Law in China* (Hong Kong: Sweet & Maxwell Asia, 1998) at 3.

<sup>26</sup> *Ibid.*

<sup>27</sup> See Zhang Jialin, "China's Slow Motion Land Reform" (2010) 159 *Policy Review* 59 at 60, online: Hoover Institution <<http://www.hoover.org/publications/policy-review/article/5383>>.

<sup>28</sup> *Ibid.*

<sup>29</sup> See Cao, *supra* note 25 at 4-5.

The *Land Reform Law* was published on June 30<sup>th</sup>, 1950 and defined the principles and methods of expropriation and reallocation of land.<sup>30</sup> Similar to other mass campaigns led by the CPC, the people themselves were encouraged to carry out land reform and forcibly take back land from their landlords. As a result, violence was widespread and the numbers killed during this time of great social and economic upheaval is estimated to be in the millions.<sup>31</sup> Despite the violence, there is evidence that the new land reform resulted in significant economic gains, particularly for rural farmers. For example, from 1949 to 1952, total production of grain rose 50% while the real purchasing power of rural farmers doubled over the same period.<sup>32</sup> Certificates of Land and House Ownership were issued to each household in 1952 and thus for some, it seemed that private property rights, particularly for the working classes, were going to be permanently entrenched.<sup>33</sup>

By 1953 however, the CPC moved land policy in rural areas away from individual land ownership and towards collective land ownership. Although it was true that collective ownership of land fit neatly with socialist political thinking, fiscal pressures were also a driving factor for land collectivization, as noted by Jialin Zhang of the Hoover Institution.<sup>34</sup>

According to Zhang, the Chinese economy in the 1950s was still primarily agrarian and thus the nascent Communist government relied heavily on agricultural output to fund its coffers. The government had originally planned to raise the agricultural tax and spur industrialization, but this

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<sup>30</sup> “1950: The Land Reform” *China.org.cn* (15 September 2009), online: [China.org.cn](http://www.china.org.cn/features/60years/2009-09/15/content_18530605.htm) <[http://www.china.org.cn/features/60years/2009-09/15/content\\_18530605.htm](http://www.china.org.cn/features/60years/2009-09/15/content_18530605.htm)>.

<sup>31</sup> See Philip Short, *Mao: A Life* (Henry Holt, 2001) at 436-437; see also Jonathan D Spence, *The Search for Modern China* (New York: WW Norton, 1990) at 490-492.

<sup>32</sup> See Zhang, *supra* note 27 at 61.

<sup>33</sup> *Ibid* at 60.

<sup>34</sup> *Ibid*.

tax hike was resented by farmers and ran into stiff resistance. Instead, from a political and practical standpoint, it was much simpler for the government to simply collectivize land ownership in order to directly control agricultural surplus. Farmers were forced to join agricultural production cooperatives and eventually had to delegate their land use rights to the cooperatives as well. By 1956, the National People's Congress officially reclaimed all individual land rights in rural areas and put them under the control of collectives, formally institutionalizing collective ownership of rural land.<sup>35</sup>

In the cities, the State owned all urban land and reallocated land into work units (*danwei*), which functioned as the primary structure through which party policy could influence all facets of an individual's life. It was through their *danwei* that people were assigned housing and employment, among other things. Transfer of land rights was subsequently banned, shutting down all markets in land rights.<sup>36</sup>

### **Great Leap Forward and the Cultural Revolution (1958-1976)**

By 1958, all land in China was either collective or state owned, while the transfer of any land rights remained strictly prohibited. The Anti-Rightist Movement of 1957 had essentially crippled the functions of the judicial system and undermined the role of legal rules and protections in governing society.<sup>37</sup> Housing and land policies became increasingly politicized during “socialist transformation” and Housing Administrative Bureaus were created all across

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<sup>35</sup> *Ibid.*

<sup>36</sup> See Ding Chengri, “Land Policy Reform in China” (2003) 20:2 Land Use Policy 109 at 110.

<sup>37</sup> See generally Albert HY Chen, “Toward a Legal Enlightenment: Discussions in Contemporary China on the Rule of Law”, 17 UCLA Pac Basin LJ (1999) 125 at 125-126.

the country in order to manage and allocate housing according to these ideologically charged policies.<sup>38</sup>

In the early 1950s, although land ownership in urban areas reverted back to the State, for non-land property (such as housing), the pre-existing Guomindang system of private property rights remained largely intact. This began to change in the late 1950s and 1960s. The Housing Administrative Bureaus initiated “joint state-private ownership” in order to more aggressively nationalize housing from reluctant property owners. Policies such as rent control, taxes and repair and investment in new housing were controlled through *danwei*.<sup>39</sup> Expropriation of urban housing and property was usually compensated with a small amount of rental income, usually for durations of 15-20 years, but subject to arbitrary change.<sup>40</sup>

In rural areas, under the policies of the Great Leap Forward, agricultural cooperatives were further collectivized and transformed into People’s Communes. These large-scale communes were then divided into smaller production brigades and production teams. In addition to pooling their land rights in these communes, farmers also contributed other property, such as private animals and personal belongings. Many stopped eating at home altogether and dined at their commune’s public canteens.<sup>41</sup> While rural land remained collectively owned by the communes and urban land by the State, the level of collectivization of moveable property and housing truly peaked during the Great Leap Forward.

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<sup>38</sup> See Wang Ya Ping & Alan Murie, *Housing Policy and Practice in China* (London: Macmillan, 1999) at 82.

<sup>39</sup> See Song Yan, Gerrit Knaap & Ding Chengri, “Housing Policy in the People’s Republic of China: An Historical Review” in Ding Chengri & Song Yan, eds, *Emerging Land Housing Markets in China* (Cambridge, MA: Lincoln Institute of Land Policy, 2005).

<sup>40</sup> See Randolph & Lou, *supra* note 23 at 10.

<sup>41</sup> See Zhang, *supra* note 27 at 60.



The onset of the Cultural Revolution in 1966 threw the very roots of Chinese society into turmoil and the existing land and property rights system was no exception. While socialist transformation in the preceding decade was carried out through official policy guidelines to administrative agencies, the Cultural Revolution was driven by intensely ideological ideas and the judgment of the masses (or at least those who purported to represent the will of the ‘masses’).<sup>42</sup> Land expropriation was usually initiated by criticism and labeling of an individual or family as “reactionary”. While much of the criticism was initiated by Red Guards, the masses were encouraged to join in as well, creating ample opportunities for settling personal vendettas or old hatreds. Targets of criticism were then subject to punishment, ridicule and often seizure of personal possessions, including their plots of land and housing. No real attempt was made to follow objective criteria during land and property expropriation and rules-based decision making in general fell by the wayside.<sup>43</sup>

### **Reform and Opening (1977-Present)**

The deaths of Mao Zedong and Zhou Enlai, the arrest and trial of the Gang of Four and Deng Xiaoping’s return to the spotlight of state and party affairs marked the end of the Cultural Revolution and the beginning of the “Reform and Opening” (*gaige kaifang*) era. Attention and energies were shifted away from political ideology and towards strengthening the country through rapid economic growth. Reforms were undertaken to steer China into becoming an export-based powerhouse by de-collectivizing rural areas, opening up markets to foreign trade

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<sup>42</sup> See Kara L Phillips & Amy L Sommers, “A Tragedy of the Commons: Property Rights Issues in Shanghai Historic Residences” (2010) 28 Penn State International Law Review 1 at 18.

<sup>43</sup> *Ibid* at 18-20.

and investment, purchasing technology and machinery from Japan and the West and acquiring modern management knowledge and experience.<sup>44</sup>

Land policy reform was contemplated primarily to facilitate this new strategic focus on economic growth. In rural areas, the household responsibility system (HRS) was officially adopted in 1981, although it had first been introduced by authorities in Yongjia County, Zhejiang Province way back in 1956 and had been adopted in varying degrees by many different provinces in China before its official promulgation.<sup>45</sup> The HRS worked by separating land use rights from land ownership in order to provide economic incentives for farmers that were non-existent in the communal farming system, while at the same time maintaining collective ownership of rural land. Rural collectives would subcontract land out to *individual* households for a certain period of time<sup>46</sup> on the condition that they return a specified percentage of their output back to the collective.<sup>47</sup> The household would then be able to keep any output that exceeded this quota and, importantly, have the autonomy to make its own decisions about production and land management.

The HRS system was adopted by about 95% of rural farming households by the end of 1983, coinciding with the official abolishment of the People's Commune system.<sup>48</sup> This had the effect

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<sup>44</sup> See generally Loren Brandt & Thomas G Rawski, "China's Great Economic Transformation" in Loren Brandt & Thomas G Rawski, eds, *China's Great Economic Transformation* (New York: Cambridge University Press, 2008) at 4-22.

<sup>45</sup> See Zhang, *supra* note 27 at 61.

<sup>46</sup> The Central Committee of the CPC initially set this lease duration for 15 years, although it was later extended to 30 years. See Hu Wei, "Household land tenure reform in China: its impact on farming land use and agro-environment" (1997) 14:3 *Land Use Policy* 175 at 176; see also *Land Administration Law of the People's Republic of China*, 2004, art 14, online: China.org.cn <[http://www.china.org.cn/china/LegislationsForm2001-2010/2011-02/14/content\\_21917380.htm](http://www.china.org.cn/china/LegislationsForm2001-2010/2011-02/14/content_21917380.htm)> [*Land Administration Law*].

<sup>47</sup> See Zhang, *supra* note 27 at 61.

<sup>48</sup> See Hu, *supra* note 46 at 176.

of significantly boosting agricultural output and improving the livelihoods of millions of Chinese farmers. From 1979 to 1984, rural net income per capita grew at a scorching pace of 11% annually, compared to urban net income per capita growth of 8.7% per annum.<sup>49</sup>

Over the years, the HRS system has been broadened and refined. The output quota requirement was abolished in 1994<sup>50</sup> and the 2002 *Law on Land Contract in Rural Areas* delineated a number of land use rights – for example rights of use, revenue and compensation in the case of expropriation – to be contracted to farmers for the long term.<sup>51</sup> However, the HRS system of rural land use rights still prohibited non-agricultural use of land as well as the sale and lease of the LURs to others – prohibitions that would have significant ramifications as China matured on its path of reform and opening.

In urban areas, the push towards privatization of land and housing went even further. Similar to the HRS, LURs were also implemented in the cities. This was done as a response to the surge in foreign direct investment (not just from the West, but also significantly from Hong Kong, Taiwan and Japan), as the needs of foreign investors were incompatible with the existing, inflexible land tenure system.<sup>52</sup> Urban LURs encompassed a much larger bundle of rights than rural LURs: among other things, they could be developed for non-agricultural uses, could be freely leased, sold, or transferred, had better security of tenure (70 years as opposed to 30 years,

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<sup>49</sup> See Brian Schwarzwald, “A Quiet Revolution Begins: Reinventing China’s Farms”, *South China Morning Post* (12 February 2003).

<sup>50</sup> See Jonas Alsen, “Introduction to Chinese Property Law” (1996) 20 *Md J Int’l L & Trade* 1 at 44.

<sup>51</sup> *Law of the People’s Republic of China on Land Contract in Rural Areas*, 2002, art 16, online: The Central People’s Government of the Republic of China <[http://english.gov.cn/laws/2005-10/09/content\\_75300.htm](http://english.gov.cn/laws/2005-10/09/content_75300.htm)> [*Law on Rural Contracting*].

<sup>52</sup> See Phillips & Sommers, *supra* note 42 at 22.

with the term automatically renewed upon expiry) and could be collateralized for loans or mortgages.<sup>53</sup>

The Urban LUR system was first introduced in the early 1980s when China created Special Economic Zones (SEZs) that would act as a breeding ground for experimental free market policies and progressive governmental measures that could be studied and, if successful, be implemented on a national scale.<sup>54</sup> Among these experimental reforms was the sale of urban LURs to foreign investors, who obtained them by paying land use fees and rents. The first four SEZs: Shenzhen and Shantou in Guangdong Province, Xiamen in Fujian Province and Tianjin Municipality, were particularly important for driving land policy in China towards the privatization of LURs.<sup>55</sup>

This separation of use rights from technical ownership facilitated economic development while at the same time retaining the status quo of state and collective ownership of land. It was officially implemented on a nationwide scale with the passing of the first iteration of the *Land Administration Law* in 1986.<sup>56</sup> However, there were those in the Party who argued that the Law was unconstitutional given that Article 10 of the *1982 Constitution* explicitly banned transfer of land.<sup>57</sup> In order to settle this conflict of laws, the Constitution was amended in 1988 to

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<sup>53</sup> See Ding, *supra* note 36 at 112.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

<sup>56</sup> *Land Administration Law of the People's Republic of China*, 1986, online: China.org.cn <<http://www.china.org.cn/english/environment/34345.htm>>.

<sup>57</sup> *1982 Constitution*, *supra* note 2, art 10.

specifically allow transferability of Urban LURs as opposed to the transfer of land ownership, which remained restricted.<sup>58</sup>

The implementation of the HRS in collectively owned rural areas and the LUR system in state-owned urban areas were the primary building blocks of Chinese land policy in the Reform and Opening period. It is very interesting to note that, contrary to mainstream law and development theory that presupposes a stable property rights system and a strong, independent judiciary as requirements for strong economic growth, China has been able to string off over two decades of near double-digit annual GDP growth *without* strong legal protections for private property rights.<sup>59</sup> It may be the case, as Frank Upham posits, that "China does not need property law to create wealth, but [rather] to manage it and to provide some measure of justice in the face of the social dislocation that inevitably accompanies rapid economic growth".<sup>60</sup>

The next section will provide a more detailed overview of the land and property rights regime that currently operates in China today as well as how land reform remains incomplete, contributing to serious social systemic problems.

## Legal Framework

The 2004 Constitutional amendment was the first time in the history of the PRC that private property rights were explicitly given Constitutional protection; Article 22 of the amendment

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<sup>58</sup> *Amendment to the Constitution of the People's Republic of China*, 1988, art 2, online: The National People's Congress of the People's Republic of China <[http://www.npc.gov.cn/englishnpc/Constitution/node\\_2829.htm](http://www.npc.gov.cn/englishnpc/Constitution/node_2829.htm)>.

<sup>59</sup> For a discussion on the Chinese experience as a counterexample to traditional law and development theory, see generally Frank K Upham, "From Demsetz to Deng: Speculations on the Implications of Chinese Growth for Law and Development Theory" (2009) 41 NYU J Intl L & Pol 551.

<sup>60</sup> *Ibid* at 556.

states that “the lawful private property of citizens may not be encroached upon.”<sup>61</sup> Why did it take so long for the Chinese government to give official protection to private property rights, especially when it had *de facto* accepted private property rights in facilitating economic development since the early 1980s?

One explanation is that the CPC’s core ideology is still very much influenced by that of the former Soviet Union, which in turn emphasizes the sacred and inviolable nature of ‘socialist public ownership’ of land as a central tenet of a socialist state.<sup>62</sup> For China, a country that is trying hard to both retain its socialist roots (which is an important element in legitimizing the rule of the CPC) while pursuing rapid economic modernization, this is a fundamental tension that cannot be easily reconciled.

This rhetorical impasse has served as a crucial factor in retarding the developing of broader private property rights protection and private land ownership in particular, as was demonstrated in the tortuously long drafting and consultation process leading up to the promulgation of the 2007 *Property Law*, discussed below.

### The 2007 Property Law

When attempting to understand China’s rapidly changing and sometimes confusing land and property rights system, it is helpful to start with the broadest law possible: the *Property Law of*

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<sup>61</sup> *Amendment to the Constitution of the People’s Republic of China*, 2004, art 22, online: Lawinfochina <<http://www.lawinfochina.com/display.aspx?id=6183&lib=law>>. It may also be helpful to note here for readers not familiar with the Chinese legal system that Constitutional provisions cannot be directly cited by courts in judicial reasoning, thus precluding Constitutional jurisprudence arising from unconstitutional private property rights violations. These provisions must be implemented by subsequent legislation or regulations in order to take judiciable effect in Chinese courts. See Albert HY Chen, *An Introduction to the Legal System of the People’s Republic of China*, 3<sup>rd</sup> ed (Hong Kong: Buttersworth Asia, 2004) at 47.

<sup>62</sup> See generally Chen Jianfu, *Chinese Law: Context and Transformation* (Martinus Nijhoff, 2008) at 363-364.

*the People's Republic of China*, passed by the National People's Congress on March 16<sup>th</sup>, 2007.<sup>63</sup> This statute lays the general framework under which land and property rights in China can be conceived of and understood.

### Heated Debate

The 2007 *Property Law* was highly unusual due to the length of the law-making process, the public nature of its consultative process and the sheer intensity of debate.<sup>64</sup> There were two preliminary “expert drafts” of the property law: one was completed by a working group led by Professor Liang Huixing CASS in 1999, while the second was completed by Professor Wang Liming of the Renmin University School of Law in 2000.<sup>65</sup> The reason for the separate drafts was that right from the beginning Liang and Wang had serious disagreements, including several technical disagreements on provisions on usufruct rights, co-ownership, servitudes and condominium rights.<sup>66</sup> Based on these two distinctly different drafts, the Working Committee on the Legal System of the National People's Congress wrote its own draft which was circulated to academics, governmental departments and judicial organizations for feedback.<sup>67</sup>

After several delays due to unsuccessful attempts at integrating the *Property Law* into a draft of a full civil code, as well as three deliberations by the Standing Committee of the National People's Congress (NPCSC)<sup>68</sup>, the NPCSC decided that the draft should be published for nationwide

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<sup>63</sup> *Property Law*, *supra* note 2.

<sup>64</sup> For a detailed account of the 13 year consultative and drafting process, see generally Matthew S Erie, “China’s Post Socialist Property Rights Regime” (2007) 37:3 HKLJ 919 at 932-940.

<sup>65</sup> *Ibid* at 933.

<sup>66</sup> See Chen, *supra* note 62 at 375.

<sup>67</sup> See Liang Huixing, *Struggling for China’s Civil Code* (Beijing: Law Press, 2002) at 191-196.

<sup>68</sup> Normally, after three deliberations by the NPCSC, a draft law would be adopted and passed as a matter of practice, to not do so would be rather unusual.

public consultation. While the period of public consultation was limited to one month (July 10<sup>th</sup> to August 10<sup>th</sup>, 2005), the draft nevertheless received an unprecedented 11,543 public submissions.<sup>69</sup>

The public debate was framed in highly ideological terms. Notwithstanding their differences, Liang and Wang were seen as representatives of the ‘Neoliberals’ (*youpai*) in that they viewed the *Property Law* as (1) providing the necessary framework for clear property rights in order to form the basis of commercial law, (2) introducing equal protection for all property and safeguards against encroachment and (3) emphasizing market order and transactional security.<sup>70</sup> In general terms, private property rights were seen as necessary for continued economic growth under a socialist market economy framework.

Shortly after the official end of the public consultation window, Professor Gong Xiantian, a legal scholar at Peking University Law School, drafted an open letter strongly condemning the new *Property Law* draft on August 12<sup>th</sup>, 2005.<sup>71</sup> Gong’s open letter drew significant support as it was co-signed by over 700 Chinese scholars and government officials.<sup>72</sup> Professor Gong represented the ‘New Left’ (*zuopai*) that sought to pursue reform that balanced economic growth with socioeconomic equality. Gong’s core argument was that the *Property Law* Draft was unconstitutional in that it violated socialist public ownership – the defining feature of a socialist Constitution and “the most important and fundamental protection” of “the laboring masses and

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<sup>69</sup> See Chen, *supra* note 62 at 376.

<sup>70</sup> See Erie, *supra* note 64 at 935.

<sup>71</sup> Gong Xiantian, “A Property Law (Draft) that violates the constitution and basic principles of socialism” translated by Eva Cheng (12 August 2005), online: Links <<http://links.org.au/node/221>>.

<sup>72</sup> See Jennifer Chou, “Chinese ‘Debate’ Property Rights” *The Weekly Standard* (12 March 2007), online: The Weekly Standard <[http://www.weeklystandard.com/weblogs/TWSFP/2007/03/chinese\\_debate\\_property\\_rights.asp](http://www.weeklystandard.com/weblogs/TWSFP/2007/03/chinese_debate_property_rights.asp)>.



all Chinese citizens”.<sup>73</sup> Specifically, he argued that the *Property Law* Draft violates Article 12 of the *Constitution* as well as Article 73 of the 1986 *General Rules of Civil Law of the People’s Republic of China*.<sup>74</sup>

While the black letter of the *Property Law* calls for protection of property under (1) state ownership, (2) private ownership and (3) collective ownership, its spirit is to protect the property rights of a small minority of people, Gong argues.<sup>75</sup> Gong also rightfully points out that facial equality does not mean that all property owners are in the same socioeconomic position to exercise those rights.<sup>76</sup> This is especially true when the Chinese judiciary is still at a developing stage and easily influenced by external economic and political pressures; Gong is concerned that protection of private property rights may simply be used as a tool for already well-to-do property owners to amass more capital, more land and foment further inequality.

The general public was also highly concerned with how the *Property Law* would deal with the problem of forced expropriations. Specifically, they were concerned with procedural protections against forced demolitions, an overly broad “public interest” requirement for expropriation, as well as lack of clarity on the definitions of the terms “reasonable compensation” and “appropriate resettlement”.<sup>77</sup>

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<sup>73</sup> Gong, *supra* note 71.

<sup>74</sup> *General Principles of the Civil Law of the People’s Republic of China*, 1986, art 73, online: Lawinfochina <<http://www.lawinfochina.com/display.aspx?id=1165&lib=law>>.

<sup>75</sup> Gong, *supra* note 71. See also *Property Law*, *supra* note 6, art 4 which provides for the three types of property ownership.

<sup>76</sup> See Erie, *supra* note 64 at 938.

<sup>77</sup> *Ibid* at 933.

When it was finally passed in 2007, the *Property Law* had gone through an unprecedented 6 readings in the NPC and had consulted 47 central government departments, 16 large companies, 22 academic institutions and some 11,543 members of the public.<sup>78</sup>

### Substantive Provisions

The 2007 *Property Law* is one of the most highly debated and controversial pieces of legislation in Chinese history. It is also one of the most extensive: comprising of 5 parts, 19 chapters and 247 articles. While the previous sub-section on the background debate was written to highlight some of the broader ideological divides in property as a concept (particularly the divide between the *youpai* and the *zuopai*), this section will deal with some substantive provisions, particularly those relevant to the two foci of this paper: forced expropriations and the rural-urban dichotomy in the land tenure system.

Two conceptual distinctions have to be made from the outset. First, Article 2 distinguishes property into two categories: immovable property (real estate) and movable property.<sup>79</sup> Second, following the reform era trend of separating LURs from ownership in order to create a ‘socialist market economy’, the *Property Law* explicitly distinguishes ownership rights from use rights.<sup>80</sup> Ownership rights include singularly-held ownership rights<sup>81</sup>, ownership of building areas<sup>82</sup>, relationships of adjoining properties<sup>83</sup> and joint possession rights.<sup>84</sup> Functionally however,

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<sup>78</sup> *Ibid* at 934.

<sup>79</sup> *Property Law*, *supra* note 6, art 2.

<sup>80</sup> See Erie, *supra* note 64 at 940.

<sup>81</sup> *Property Law*, *supra* note 6, ch 5.

<sup>82</sup> *Ibid*, ch 6.

<sup>83</sup> *Ibid*, ch 7.

<sup>84</sup> *Ibid*, ch 8.

almost all land rights fall under the category of use rights, which include usufructary rights<sup>85</sup> and security interests.<sup>86</sup>

The most important provision in the 2007 *Property Law* may be Article 4, which states that “the real rights of the state, collectives, individuals or any other right holder shall be protected by law and shall not be infringed by any entities or individuals.”<sup>87</sup> Whether or not this protection means that each of these parties are privy to *equal* protection before the law is unclear, but commentators have argued that the ‘principle of equal protection’ is indeed part of the spirit and broader context of the *Property Law*.<sup>88</sup>

Part 2 establishes the requirement of a public LUR registry that tracks “creation, change, transfer, or elimination” of rights in real property.<sup>89</sup> Rights holders in immovable property are to be issued certificates to act as official proof.<sup>90</sup> Pursuant to the registration requirement, Article 139 states that “the right to use land for construction purposes shall be established upon registration”<sup>91</sup>, while Article 187 indicates that mortgages must also be registered.<sup>92</sup>

For the purposes of our land policy discussion, Part 3 on usufructary rights is likely the most relevant part of the 2007 *Property Law*. Article 117 states that usufructary rights include the

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<sup>85</sup> *Ibid* at part 3.

<sup>86</sup> *Ibid* at part 4.

<sup>87</sup> See Erie, *supra* note 64 at 940-941; see also *Property Law*, *supra* note 6, art 4.

<sup>88</sup> Notably, Professor Wang Liming himself has advocated the view that Article 4 provides for equal protection between state, collective, and private ownership. See generally Wang Liming (王利明), “Analysis of the Principle of Equal Protection in the Property Law (物权法平等保护原字之探索)” (2007) 2 Law Science Magazine (法学杂志).

<sup>89</sup> *Property Law*, *supra* note 6, art 9.

<sup>90</sup> *Ibid*, art 17.

<sup>91</sup> *Ibid*, art 139.

<sup>92</sup> *Ibid*, art 187.

right of possession, the right of use and the right to seek profits from property owned by another party.<sup>93</sup> The four main usufructary rights outlined in the *Property Law* are (1) easements, (2) rights to use land for construction purposes (urban LURs), (3) rights to use land for building houses (residential rights) and (4) rights to contracted management of land (evolved from the old HRS system); the latter two being rural LURs.<sup>94</sup>

The specifics of the rural right to contracted management of land (*chengbao*) are outlined in Chapter 11. It states that rural land cannot be used for non-agricultural purposes without governmental approval.<sup>95</sup> Term of contract is 30 years and upon expiry of the contract term, the holder “*may continue to fulfill the contract according to the relevant provisions of the state*” (emphasis added).<sup>96</sup> What this means is somewhat ambiguous, but the protection of the right upon expiry is certainly weaker than automatic renewal for urban LURs, which in turn negatively affects security of tenure. Importantly, the 2007 *Property Law* also allows transfer of the right to contracted management of land<sup>97</sup>, as well as requiring local governments at county level or above to issue rights certificates to *chengbao* holders.<sup>98</sup>

Complementing the rural *chengbao* is the rural residential right, outlined in Chapter 13. This right allows members of rural collectives to use collectively-owned land for “constructing residential houses and affiliated facilities”.<sup>99</sup> The specifics of the right are governed by the *Land*

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<sup>93</sup> *Ibid*, art 117.

<sup>94</sup> *Ibid*, part 3.

<sup>95</sup> *Ibid*, art 128.

<sup>96</sup> *Ibid*, art 125.

<sup>97</sup> *Ibid*, art 128.

<sup>98</sup> *Ibid*, art 127.

<sup>99</sup> *Ibid*, art 152.

*Administration Law*<sup>100</sup>. Each rural household is allotted one piece of land for the purposes of building a house, with lot size standards provided by the government at the provincial (or equivalent) level.<sup>101</sup> Sale or lease of these houses is prohibited and the rural residential right (like the rural *chengbao*) cannot be transferred for non-agricultural construction.<sup>102</sup> In other words, the residential right is very similar to the contracted management right and complements the basket of LURs that rural Chinese are allowed to hold.

Urban LURs (otherwise known as the right to use land for construction purposes, or construction LURs) are governed by Chapter 12 of the 2007 *Property Law*.<sup>103</sup> A quick analysis of the provisions makes the preferential treatment of urban LURs over rural LURs glaringly obvious. Holders of urban LURs are able to use the land for “constructing buildings, fixtures and their auxiliary facilities” and to possess, use and profit from them.<sup>104</sup> Also, holders of urban LURs may “transfer, exchange, use as equity contributions, endow or mortgage” the right<sup>105</sup>, making the LUR far more fungible and fixing its economic potential as an asset. Furthermore, unlike rural LURs, the 70 year term for urban LURs used for residential construction is *automatically renewed* upon expiry, strengthening security of tenure for urbanites vis-à-vis rural residents.<sup>106</sup>

One of the main goals of the 2007 *Property Law* is dealing with the growing problem of forced expropriations, which are addressed primarily through Articles 42-44 (for rural expropriation) and Article 148 (for urban expropriation). Article 42 states that expropriations of collectively

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<sup>100</sup> *Land Administration Law*, *supra* note 46.

<sup>101</sup> *Ibid.*, art 62.

<sup>102</sup> *Ibid.*, art 63.

<sup>103</sup> *Property Law*, *supra* note 6, ch 12.

<sup>104</sup> *Ibid.*, art 135.

<sup>105</sup> *Ibid.*, art 143.

<sup>106</sup> *Ibid.*, art 149.

owned land can only occur for the purposes of public interest and in line with legal procedure.<sup>107</sup> Compensation must be paid and that compensation consists of: (1) resettlement subsidies (to “guarantee” the “residential conditions of the expropriated”), (2) compensation for fixtures, (3) compensation for young crops, (4) compensation for social security, as well as (5) compensation for the actual land expropriated. Article 42 also explicitly states that “no entity or individual may embezzle, misappropriate, privately share, detain or delay in the payment of the compensation fees for expropriation” – a provision squarely targeted at corrupt local government officials. Article 43 states that the government strictly controls the conversion of rural farmland into urban land for construction purposes.<sup>108</sup> This control is exercised through a quota system initially authorized by the *Land Administration Law*, detailed later in this paper. Article 148 states that the five types of compensation required for urban expropriation are the same as that of rural compensation.<sup>109</sup>

### Other Relevant Laws and Regulations

While the 2007 *Property Law* sets out the general framework of land policy in China, there are many other laws and regulations that provide further detail. Some of the more important provision, which provide additional insights into land use rights and expropriation, will be outlined below.

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<sup>107</sup> *Ibid.*, art 42.

<sup>108</sup> *Ibid.*, art 43.

<sup>109</sup> *Ibid.*, art 148.

## Land Use Rights

The Urban LUR, first officially implemented by the 1986 *Land Administration Law* and the 1988 Constitutional Amendment, is further defined in scope by 1990 State Council regulations. Local governments may grant urban LURs for residential purposes with a maximum duration of 70 years. LURs used for commercial purposes have a maximum duration of 40 years and LURs used for industrial and other purposes are granted for a maximum duration of 50 years.<sup>110</sup>

Initial sales of urban LURs by the government to rights users constitute the *primary market* for LURs. The secondary market is the forum in which LUR transfers are executed between private economic actors. Prior to 2002, primary market sales of urban LURs to developers were done entirely privately (a perfect opportunity for officials to extract bribes). Since then there has been a strong push towards using public bidding methods, such as auctions or bid invitations, in primary market sales.<sup>111</sup> Importantly, private developers must pay transfer fees to governments in order to obtain the urban LUR.<sup>112</sup> The revenue generated by these fees is substantial and may commonly represent up to 50-74% of local governments' incomes.<sup>113</sup>

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<sup>110</sup> *Provisional Regulations on Assigning and Transferring the Urban State-Owned Land Use Right*, 1990, art 12, online: Lehman, Lee & Xu <<http://www.lehmanlaw.com/resource-centre/laws-and-regulations/real-estate/provisional-regulations-of-the-peoples-republic-of-china-on-assigning-and-transferring-the-urban-state-owned-land-use-right-1990.html>>.

<sup>111</sup> *Property Law*, *supra* note 6, art 137. See also Finance Asia, "China's Land Law: An Overview", online: Habitat International Coalition <<http://www.hic-net.org/articles.php?pid=1553>> stating that as of June 2002, approximately 95% of LURs were granted through private, bilateral agreements between local land bureaus and grantees with little to no competitive pricing or transparency.

<sup>112</sup> *Property Law*, *supra* note 6, art 141.

<sup>113</sup> See Roger Cohen, "A Woman Burns", *The New York Times* (25 January 2010) online: The New York Times <[http://www.nytimes.com/2010/01/26/opinion/26iht-edcohen.html?\\_r=2&pagewanted=all](http://www.nytimes.com/2010/01/26/opinion/26iht-edcohen.html?_r=2&pagewanted=all)> citing economist Arthur Kroeber on land sale revenue in China from 2009. See also Ding, *supra* note 36 at 114 who estimates, as of 2003, land sale revenue accounted for up to 50% of a city government's revenue and Simon Rabinovitch, "Debt Worries grow as China land sales slump", *Financial Times* (5 January 2012) online: The Globe and Mail <<http://www.theglobeandmail.com/report-on-business/international-business/debt-worries-grow-as-china-land->

Also interesting to note is that according to the 1994 *Law on Urban Real Estate Administration*, the Urban LUR grantee must technically develop their land within two years or the LUR will be forfeited without compensation.<sup>114</sup> While this provision is rarely enforced strictly by local authorities and can usually be skirted by paying an additional fee or initiating a minimal amount of development, in some cases it can be used by the government as a tool to slow overheating real estate markets.<sup>115</sup> For example, in Shanghai, this provision has been used to revoke LURs in order to dissuade real estate speculation and underdevelopment.<sup>116</sup>

By controlling the primary market, the state can control land markets through monopolizing Urban LUR supply.<sup>117</sup> This ability is especially critical given China's policy of self-sustainability, especially when it comes to protection of its arable land for agricultural production. China has limited arable land to feed its immense population; this problem is further exacerbated by widespread conversion of rural agricultural land to urban land for development. In this spirit, the *Land Administration Law* set up the 'reclamation principle' in which those who want develop on cultivated land for non-agricultural purposes must reclaim the same amount of cultivated land of the same quality elsewhere.<sup>118</sup> Those that fail to meet this requirement must pay land reclamation fees. Governments are not supposed to convert more than an allotted quota

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[sales-slump/article620468/](#)> citing Tsinghua University researcher Guan Qingyou that land sales, as of 2010, formed 74% of local government revenue.

<sup>114</sup> *Law on Urban Real Estate Administration*, 1994, art 26, online: Lawinfochina

<<http://www.lawinfochina.com/display.aspx?id=702&lib=law&SearchKeyword=real%20estate&SearchCKeyword=>

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<sup>115</sup> See Gregory M Stein, *Modern Chinese Real Estate Law* (Ashgate Publishing, 2012) at 32.

<sup>116</sup> *Ibid.*

<sup>117</sup> See Ding, *supra* note 33 at 112.

<sup>118</sup> *Land Administration Law*, *supra* note 46, art 31.



set by general land use plans; although evidence suggests that these quotas are often greatly exceeded given the tremendous economic incentives to do so.<sup>119</sup>

Rural LURs are governed by the 2002 *Law on Rural Contracting*.<sup>120</sup> When it comes to contracting with individual households for rural LURs, either the village collective economic organization or the village committee may represent the rural collective.<sup>121</sup> The rural LUR may be circulated by means of subcontract, lease, or exchange; although this can only be done for agricultural use and only the amount remaining on the duration of the contract can be transferred, greatly reducing the realizable value of the LUR.<sup>122</sup> The Law also protects rural LUR holders from land readjustment (reallocating plots of land due to population changes and other factors) during the remaining duration of the contract.<sup>123</sup> It is unclear, however, whether this protection applies once the term of the rural LUR expires.

### Expropriation Provisions

The rural and urban divide in land policy extends to the area of expropriation as well.

Expropriation procedures are governed primarily by the *Land Administration Law* as well as the 1998 *State Council Regulation on the Implementation of the Land Administration Law*<sup>124</sup> and the 2001 *State Council Regulation on the Dismantlement of Urban Houses*.<sup>125</sup> As stated earlier,

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<sup>119</sup> See Ding, *supra* note 33 at 114.

<sup>120</sup> *Law on Rural Contracting*, *supra* note 51.

<sup>121</sup> *Ibid*, art 12.

<sup>122</sup> *Ibid*, s 5.

<sup>123</sup> *Ibid*, art 27.

<sup>124</sup> *Regulation on the Implementation of the Land Administration Law*, 1998, online: Lawinfochina <<http://www.lawinfochina.com/display.aspx?id=1118&lib=law&SearchKeyword=land%20administration&SearchCKeyword>>.

<sup>125</sup> *Regulation on the Dismantlement of Urban Houses*, 2001, online: Lawinfochina <<http://www.lawinfochina.com/Display.aspx?Lib=law&Id=4872&keyword>>.

collectively-owned land must be first converted into urban land before it can be developed. Land can be expropriated for urban infrastructure, use by governmental organs, public interest undertakings, as well as energy, communications, water conservancy and other infrastructure projects.<sup>126</sup> However, the public interest category is so broad that it is used to justify expropriation for even purely commercial endeavours.

According to Article 44 of the *Land Administration Law*, rural land expropriation requires governmental approval from different levels, depending on the purpose for which the expropriation is taking place. Local governments generally are broadly empowered to approve village-level expropriations.<sup>127</sup> Article 45 is a control provision which is intended to allow the central government to exercise control for the sake of protecting arable land. State Council approval is technically required for the expropriation of any basic farmland, land plots exceeding 35 hectares in areas just outside basic farmland and any other land plots exceeding 70 hectares.<sup>128</sup> However, as demonstrated by some of the case studies, the size restriction can be skirted by artificially dividing up land into smaller plots for separate approval.

After governmental approval, the next step is filing for compensation registration.

Compensation is more clearly defined in Article 47. While there are many categories of compensation, the *Land Administration Law* ties rural compensation to agricultural output of the land. For example, the land compensation fee (usually by far the largest component in the compensation package) is set at 6-10 the average output value of the three years preceding

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<sup>126</sup> *Land Administration Law*, *supra* note 46, art 54.

<sup>127</sup> *Ibid*, art 44.

<sup>128</sup> *Ibid*, art 45.

expropriation.<sup>129</sup> However, this is often only a small fraction of the market value that private developers are willing to pay for the land, meaning that farmers are systematically shut out from enjoying the windfalls of land ownership in an increasingly wealthy China. Article 49 also requires that receipt and payment of land compensation fees be made public, while simultaneously prohibiting any embezzlement of these fees.<sup>130</sup>

The *Land Administration Law* includes a consultation requirement for local governments to hear the opinions and concerns of the expropriated, but only after the compensation and resettlement plan has been finalized.<sup>131</sup> The timing of these procedural requirements essentially precludes farmers from having any real say in the expropriation process until it is far too late.

Another interesting protective mechanism for rural farmers facing expropriation is found in Article 18 of the 1998 *State Council Regulation on the Implementation of the Land Administration Law*.<sup>132</sup> This provision states that, in line with the reclamation principle, 60% of newly cultivated land *may* be used to compensate those who have had land occupied for construction. However, it is uncertain whether or not this language is strong enough to help guarantee the resettlement conditions of expropriated farmers.

The urban expropriation procedure detailed in the 2001 *State Council Regulation on the Dismantlement of Urban Houses* is similar to that of rural expropriation but different on certain major points. Conceptually speaking, urban expropriation involves a ‘taking back’ of what was originally state-owned land. This is a simpler process than rural expropriations, in which the

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<sup>129</sup> *Ibid*, art 47.

<sup>130</sup> *Ibid*, art 49.

<sup>131</sup> *Ibid*, arts 46, 48.

<sup>132</sup> *Regulation on the Implementation of the Land Administration Law*, *supra* note 124, art 18.

government must expropriate collectively-owned land, convert it to state-owned urban land and then resell the LURs. Urban houses cannot be demolished without the issuance of a ‘house dismantlement permit’.<sup>133</sup> This permit can be obtained through a house dismantlement administrative department of a city or county after a strict approval process including issuance of “a dismantlement compensation and resettlement fund certification issued by the financial institution taking in deposits”.<sup>134</sup>

Further, the dismantler and dismantlee must sign a compensation agreement agreeing on the terms and amount of compensation, resettlement details, as well the time limit for removal.<sup>135</sup> If no compensation agreement can be reached, upon application, a binding decision can be made by the house dismantlement administrative department (or the local people’s government if the administrative department itself is the dismantlee) within 30 days. If any party refuses to accept the decision, it may bring a lawsuit to the people’s court within 3 months.<sup>136</sup> Surprisingly, however, ongoing judicial review of the expropriation decision will not stave off dismantlement if monetary compensation or resettlement has already been provided. This is strange given that the compensation agreement is often the very thing being disagreed upon.

The greatest difference between rural and urban expropriation is of course, the compensation. Compensation for urban expropriation must consist of both LUR compensation and resettlement compensation.<sup>137</sup> Article 24 states that “the amount of monetary compensation shall be determined on the basis of evaluated market price while taking account of the location, purpose,

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<sup>133</sup> *Regulation on the Dismantlement of Urban Houses*, *supra* note 125, art 6.

<sup>134</sup> *Ibid*, art 7.

<sup>135</sup> *Ibid*, art 13.

<sup>136</sup> *Ibid*, art 16.

<sup>137</sup> *Ibid*, art 4.

building area of the houses to be demolished and other factors.”<sup>138</sup> This is the key provision that links compensation for urban expropriation to market value, making urban compensation far higher than rural compensation, which remains tied to agricultural output. Another interesting bonus for urban dismantlees is Article 33, which offers compensation for suspension of production or business caused by dismantlement of non-residential houses.<sup>139</sup> This provision allows for recovery of lost profits for businesses facing expropriation, in addition to other compensation.

## **Deconstructing the Root Causes of Land Disputes**

Facing a situation where 50-60 million rural farmers and millions more urban residents have faced land expropriation and where land disputes are the number one cause of mass incidents in China, there is a pressing need to correctly identify what the root causes of these disputes are. While the symptoms are clear for all of society to see, the diagnosis is far more complex and accordingly, without common agreement on the diagnosis, there will also be significant disagreement on what potential solutions might look like.

While these land issues are clearly complex and multifaceted, this section lists six potential root causes of land disputes which the author believes are most relevant, with references to individual cases where available. These six causes are: (1) shortcomings in the law itself that lead to insufficient protections for rights holders, (2) mass urbanization and effects of the hukou system, (3) the inability to subject rural collective land to market forces creating “dead capital”, (4)

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<sup>138</sup> *Ibid*, art 24.

<sup>139</sup> *Ibid*, art 33.

chronic institutional problems (particularly the weakness of the judiciary), (5) the state policy of protection of arable land for the purpose of maintaining food security and (6) vested interests in the current land regime.

### **Root Cause #1: Legal Shortcomings**

From the previous discussion of the legal framework of land policy in China, several problems with the law become clear. The first is the conceptual problem of ownership. Socialist public ownership is reflected in the current land tenure system through state ownership of urban land and collective ownership of rural and suburban land.<sup>140</sup> Urban expropriation can be argued as a ‘taking back’ (*shouhui*) of land that was originally the state’s property anyway.<sup>141</sup> In this way, the decision to expropriate itself can never be challenged, giving authorities and private developers more leverage in terms of subsequent compensation and resettlement negotiations.

While the LUR system has moved China towards something resembling that of a private real estate market in urban areas, rural collective ownership in particular has had harmful consequences in countryside, by separating rights of allocation and sale (currently vested in village committees and local governments) from those who have the most direct interests in the land (the rural farmers themselves).

While the Chinese economy and society has rapidly moved towards capitalist values, socialist ideology has remained strong in certain circles, particularly within ideas of land ownership. The persistent strength of socialist ideology was amply demonstrated by the great public rallying of

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<sup>140</sup> See Phillips & Sommers, *supra* note 42 at 3.

<sup>141</sup> See Eva Pils, “Contending conceptions of ownership in urbanising China” (Paper delivered at the workshop on resolving land disputes in East Asia, Centre for Comparative and Public Law, University of Hong Kong, 26 November 2011), [unpublished] at 5. [Pils, “Contending conceptions”].

support behind Professor Gong Xiantian's Marxist critique of the *Property Law Draft*. But while collective ownership of rural land traditionally functioned to protect the interests of the working class and farmers<sup>142</sup>, in an ironic twist of fate, this mechanism has been perverted in reform era China to exploit rural farmers instead. The situation may be appropriately described as “socialist ownership, capitalist expropriation” in that rural farmers have their land taken for capitalist development anyway, but are only able to recover a small fraction of the land's real worth because of the lingering rhetoric of socialist public ownership.<sup>143</sup>

Second, rural LURs are much weaker in terms of rights and protections than urban LURs, exacerbating the income disparity between the cities and the countryside. The prohibition on non-agricultural development, shorter duration, weaker security of tenure, inability to sell and discrepancy in compensation upon expropriation (all described earlier in the paper) make rural LURs far less valuable. This situation is seen as particularly unjust given that the CPC has historically derived its legitimacy from the support of the rural peasantry. For many farmers, they share a desire for equal treatment between rural and urban land rights as well as a return of land ownership to the farmers themselves.<sup>144</sup> China has recently seen the phenomenon of open, unilateral declarations and collective letters from tens of thousands of rural Chinese, from provinces as diverse as Heilongjiang to Shanxi to Jiangsu, who have been ousted from their

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<sup>142</sup> For a more in-depth analysis of the rational choice explanation behind collective ownership of production and land, see generally Mario Ferrero, “A Rational Theory of Socialist Public Ownership” (2004) 16:4 *Rationality and Society* 371.

<sup>143</sup> Eva Pils, “Property Law in the PRC” (Lecture delivered at the Faculty of Law, University of Hong Kong, 6 June 2012).

<sup>144</sup> See Zhang, *supra* note 27 at 65-69.

lands.<sup>145</sup> The open letters and declarations often make reference to illegal expropriation at the hands of corrupt officials, the desire for equal treatment and private ownership of land based upon long-standing historical claims.

Third, the public interest requirement for expropriation is so broadly framed as to be functionally redundant. While Article 42 of the 2007 *Property Law* clearly sets out the public interest purpose as a requirement for land expropriation, this clause in practice is almost never successfully used to argue against expropriation decisions (unlike the significant roles that public interest tests play in restricting eminent domain type powers in Western jurisdictions). What the legal framework lacks is an explicit definition of what public interest means in the context of land expropriation. Furthermore, there are no incentives for authorities to use this as a constraint for expropriation. In fact, incentives are aligned in the opposite direction. Local governments rely on land transfer fees as a significant source of revenue, while individual officials are often evaluated based overwhelmingly on GDP growth criterion, with which expropriations and private development help boost.<sup>146</sup>

Fourth, the decision to expropriate itself cannot be legally challenged. Whereas procedural violations may result in delays, administrative penalties, or even criminal prosecutions in particularly egregious cases,<sup>147</sup> the decision to expropriate, once approved, is generally unassailable from a legal perspective. Furthermore, the amount of compensation for

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<sup>145</sup> *Ibid.*, *supra* note 27 at 66-67. See also Guo Shipeng & Benjamin Kang Lim, “China detains farmers urging land privatization” *Reuters* (25 December 2007), online: Reuters <<http://www.reuters.com/article/2007/12/24/us-china-land-idUSPEK21353120071224>>; for details on the Heilongjiang Declaration, see Pils, “Peasants’ Struggle”, *supra* note 4 at 156.

<sup>146</sup> Zhu & Li, *supra* note 11.

<sup>147</sup> See e.g. *Regulation on the Dismantlement of Urban Houses*, *supra* note 125, arts 34-38.



expropriation can essentially be set at will by the local government. This is because decisions on compensation amounts (as well as the expropriation decision itself) are often classified as administrative decisions with “general binding force” – which are not amenable to judicial review under the *Administrative Procedure Law*.<sup>148</sup> The only issues that can normally be litigated are procedural violations or cases where compensation has been withheld entirely.

### **Root Cause #2: Urbanization and the Hukou System**

Due to its economic liberalization, China is experiencing a massive shift away from a largely agrarian economy to an economy weighted more heavily towards manufacturing, service provision and knowledge-based industries.<sup>149</sup> This shift has been accompanied by a flood of rural migrants to the cities – 2011 marked the first time in history that the urban population of China exceeded its rural population (51.3% to 48.7%), compared to only 26% urbanization in 1990.<sup>150</sup> The urbanization movement has also significantly changed the urban/rural land dynamic. The total amount of urban land in China has increased by a factor of four since 1982, with a corresponding decrease in rural and suburban lands that have since been converted to facilitate this trend.<sup>151</sup>

Essentially, economic development and the urbanization of China have been the key drivers behind both urban and rural expropriation. To a certain extent, conflicts over land in the face of

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<sup>148</sup> *Administrative Procedure Law of the People’s Republic of China*, 1989, art 12(2), online: Lawinfochina <<http://www.lawinfochina.com/display.aspx?id=1204&lib=law>>.

<sup>149</sup> According to CIA Factbook statistics, as of 2011 agriculture in China comprises only 10.1% of total GDP while industry makes up 46.8% and services 43.1%. See CIA, *The World Factbook, GDP – Composition by Sector*, online: CIA <<https://www.cia.gov/library/publications/the-world-factbook/fields/2012.html>>.

<sup>150</sup> See Shan Juan, “Census: Population hits 1.37b”, *China Daily* (29 April 2011) online: China Daily Europe <[http://europe.chinadaily.com.cn/china/2011-04/29/content\\_12418282.htm](http://europe.chinadaily.com.cn/china/2011-04/29/content_12418282.htm)>.

<sup>151</sup> See Zhu & Li, *supra* note 11.

rapid economic development are unavoidable and this problem has been a shared experience industrializing countries all over the world. Old housing stock needs to be replaced, modern infrastructure has to be built and land needs to be rezoned for new purposes. As increases in agricultural labour productivity push more rural workers out of employment in the countryside, they simultaneously face the ever-looming prospect of losing their land to expropriation.<sup>152</sup> Given the promise of higher wages and more opportunity, an increasing number of rural Chinese choose to migrate to the cities.

Once they get to the cities however, rural migrants find that they are less than welcome. The Household Registration System (or *hukou* system) ensures that many of these rural migrants will not be able to enjoy baseline social services or even the ability to find legal employment or residency.<sup>153</sup> The *hukou* system is not so much a root cause of land disputes, but rather a factor that influences the set of opportunities available to rural migrants and exacerbates the rural-urban income divide. The system operates as a *de facto* internal passport mechanism that, among other things, controls internal movement in China. The modern form of the system first emerged in 1958 with the promulgation of the *Regulation on Hukou Registration* which was supplemented in the reform period by the *Regulation on Resident's Personal Identification Card* in 1985.<sup>154</sup> These two regulations create the legal framework for the *hukou* system that exists today.

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<sup>152</sup> See generally Kam Wing Chan, "A China Paradox: Migrant Labor Shortage amidst Rural Labor Supply Abundance" (2010) 51:4 Eurasian Geography and Economics 513.

<sup>153</sup> See Jason Young, "China's hukou system impinges on development and civic rights" *East Asia Forum* (14 August 2010), online: East Asia Forum <<http://www.eastasiaforum.org/2010/08/14/chinas-hukou-system-impinges-on-development-and-civic-rights/>>.

<sup>154</sup> See Fei-Ling Wang, "Brewing tensions while maintaining stabilities: the dual role of the *hukou* system in contemporary China" (2005) 29:4 Asian Perspective 85 at 87.

The *hukou* system requires that every Chinese citizen register with a particular *hukou* authority. Similar to citizenship, a person's *hukou* location is passed down from either the father or mother.<sup>155</sup> An especially important feature is that each registration is categorized either as urban or rural, depending on the location of one's *hukou*. An outsider is by law denied residency, employment, healthcare, social security and various other rights, opportunities and privileges if they do not have local *hukou*. For stays longer than one month, one must apply for a temporary residence permit.<sup>156</sup>

A tension therefore comes into play between the rapid urbanization of China's population and the *hukou* system's control over freedom of movement and internal migration. It is estimated that there are about 150 million rural migrants in Chinese cities that do not have urban *hukou*.<sup>157</sup> They are essentially treated as 'second-class citizens' in these cities and many languish in a legal 'vacuum'. Without access to such benefits as legal residence, employment and healthcare, they face a significant lack of opportunities relative to others in the cities.<sup>158</sup> This problem is exacerbated for those rural farmers who have had their land expropriation and were given little or no compensation to find alternative housing and farmland. For these people, who rely on their land for their livelihood and social security, they may be forced to migrate to the cities where they must pick up any odd jobs they can find. Unfortunately, while relocation programs are supposed to provide urban *hukou* to those who have had their land expropriation, a recent survey

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<sup>155</sup> Prior to 1998 however, *hukou* location could only be inherited from the father's side. Due to pressure for greater gender equality, this was reformed to allow women to pass on *hukou* location as well. See Li Tao, et al, "How Status Inheritance Affects Marriage Segregation: Evidence from China" (2012) [unpublished, archived online: <<https://cde.buseco.monash.edu/site/DefaultSite/filesystem/documents/ADEW/Tao%20Li-workingrevise2.pdf>>] at 3-4.

<sup>156</sup> See Wang, *supra* note 154 at 88.

<sup>157</sup> See Chan, *supra* note 152 at 515.

<sup>158</sup> See Young, *supra* note 153.

shows that only 21.8% of affected farmers were actually provided with urban *hukou*.<sup>159</sup> Clearly then, with no meaningful opportunities left to them, expropriated farmers will be driven towards protest and social disturbance to voice their anger and grievances.

### **Root Cause #3: Dead Capital**

The idea of ‘dead capital’ in the context of property law is most typically attributed to Peruvian economist, Hernando De Soto. The basic premise of this idea is that the poor may have wealth and assets, particularly in land and housing, but because their property rights are not fully respected or recognized, they cannot leverage these assets to build capital.<sup>160</sup> This theory, if accepted, adds another interesting incentive for giving private ownership of land back to rural farmers – namely that, aside of protection of housing rights, social fairness and the building of social stability, private ownership will finally allow this land to be collateralized and for wealth building to occur in the countryside.

Currently, the LURs held by Chinese rural farmers lack one major characteristic crucial in releasing the potential of ‘dead capital’: asset fungibility. That is, the ability of an asset representation to be easily combined, divided, mobilized and used to stimulate other economic activity.<sup>161</sup> The current legal framework, while nominally allowing the transfer and leasing of rural LURs, holds back the ability of rural LURs to interact with market forces by disallowing transfer for non-agricultural purposes. Furthermore, a great number of rural farmers are still without LUR certificates, despite the fact that the law requires certificates be issued to each

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<sup>159</sup> See Landesa, *supra* note 14.

<sup>160</sup> Hernando De Soto, *The Mystery of Capital*, 1<sup>st</sup> ed (Basic Books, 2000) at 5.

<sup>161</sup> *Ibid* at 56.

household. These factors impede the development of robust rural land markets and in turn, the ability of rural farmers to leverage their land and houses to apply for credit or a mortgage.

Although these farmers are sitting on potentially valuable assets, they are not able to meaningfully realize their true economic value.

These restrictions and encumbrances also go against the wishes of many rural LUR holders to develop their own land as they see fit, which has led to the development of so-called ‘minor property rights’ (*xiao chanquan*).<sup>162</sup> This is a term that is given to the circumvention of legal property rules, particularly the requirements of rural land expropriation and conversion for non-agricultural development. These sorts of informal and technically ‘illegal’ innovations were also identified by De Soto as arising when the opportunity cost of staying inside the legal system is far higher than the opportunity cost of doing business extralegally.<sup>163</sup>

From a purely economic perspective, it makes a great deal of sense for rural farmers to cut out the government middleman entirely and contract directly with private developers. They may do this by (1) developing their own land and selling or renting out units, (2) developing their land in conjunction with a private developer and selling or renting out units or (3) selling their LURs directly to private developers without involving the government.<sup>164</sup> In any case, they realize a significant portion of the benefits that come from developing the land for commercial use; something that would not be possible under the current legal framework.

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<sup>162</sup> See Pils, “Peasants’ Struggle”, *supra* note 4 at 152.

<sup>163</sup> See De Soto, *supra* note 160 at 82-103.

<sup>164</sup> See Pils, “Peasants’ Struggle”, *supra* note 4 at 152.

Because minor property rights violate the restriction on rural LURs for non-agricultural use (enunciated in both the 2007 *Property Law* and the *Land Administration Law*), there is no real security of contract. This means that buyers of minor property rights must make the gamble that they will not be thrown out and hope that their *de facto* occupation will eventually result in legal recognition.<sup>165</sup> The risk of illegality and demolition without compensation is adjusted for in the market as minor property right residences are significantly cheaper than legal residences – attractive for urbanites that have been priced out of increasingly expensive urban real estate.<sup>166</sup> Another effect of this extralegality is that because normal contract terms cannot be enforced, there may be less incentive for the landlords to fulfill promises. For example, in Grand Jade Garden, a minor property rights complex in the suburbs of Beijing, apartments are shoddily built and many promised amenities remain unfinished.<sup>167</sup> Residents do not have the option to lodge a complaint based on their legal rights and thus live in a space where informal social contracts necessarily govern.

How widespread are minor property rights? Estimates vary, but the consensus seems to be that minor property rights housing is becoming increasingly common, especially around major cities such as Beijing, Shanghai and Shenzhen.<sup>168</sup> The National Bureau of Statistics in China estimated that as of June 2007, the total land area occupied by minor property rights housing was greater

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<sup>165</sup> *Ibid.*

<sup>166</sup> See John Garnaut, “Peasants take law into their own hands”, *The Sydney Morning Herald* (29 December 2007) online: The Sydney Morning Herald <<http://www.smh.com.au/news/world/peasants-take-law-into-their-own-hands/2007/12/28/1198778702606.html>>.

<sup>167</sup> *Ibid.*

<sup>168</sup> See Ashley M Howlett, *Resolving the Minor Property Right Problem in China*, online: Jones Day <<http://www.jonesday.com/resolving-the-minor-property-right-problem-in-china-08-28-2008/>>.

than 6.6 billion square metres<sup>169</sup>, while a 2007 survey of 400 residential developments around Beijing found that 18% were minor property projects.<sup>170</sup> Anecdotal evidence from the author's own interviews with Shenzhen officials in 2012 indicate that minor property housing may make up half of all residential housing in some of the larger cities in China.<sup>171</sup>

While there had been hope among many members of the public, academia and the bar that minor property housing would eventually be legalized, the government's response so far has been profoundly negative. In December 2007, the State Council issued a *Notice Regarding Strictly Implementing the Laws and Regulations of the Rural Collective Construction Land* (Notice 71), which clearly supports the status quo and states that (1) urban citizens cannot purchase land or housing in collectively-owned lands and (2) private developers cannot build on these lands for non-agricultural purposes.<sup>172</sup> This was followed in July 2008 by the Ministry of Land and Resource's *Notice on Promoting the Housing Land Use Right Registration and Certificate Issuance* (Notice 146), which explicitly states that urban citizens with minor property right housing would not be able to obtain any LURs nor be allowed issuance of any land or property rights certificate.<sup>173</sup> The Ministry's notice was followed by a crackdown in several areas

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<sup>169</sup> *Ibid.*

<sup>170</sup> See Li Qian, "'Minor Property Right' – better than none?" *China Daily* (11 July 2007), online: China Daily <[http://www.chinadaily.com.cn/china/2007-07/11/content\\_5433121.htm](http://www.chinadaily.com.cn/china/2007-07/11/content_5433121.htm)>.

<sup>171</sup> Interviews with Shenzhen municipal officials (July 2012) filed with Author.

<sup>172</sup> *Notice Regarding Strictly Implementing the Laws and Regulations of the Rural Collective Construction Land*, 2007, online: The Central People's Government of the People's Republic of China <[http://www.gov.cn/zw/gk/2008-01/08/content\\_852399.htm](http://www.gov.cn/zw/gk/2008-01/08/content_852399.htm)>.

<sup>173</sup> See Howlett, *supra* note 168.

including Jinan, Shandong Province, where reports indicate that minor property rights apartments had been systemically demolished.<sup>174</sup>

The phenomenon of minor property rights can be seen as a way for private parties to get around a cumbersome legal framework that longer conforms to practical reality or legitimate expectations. Instead of continuing to sit on dead capital until the government comes to expropriate their land, rural landowners are increasingly taking the initiative in joining the capitalist game by selling and renting developments extralegally. The State must be very wary about cracking down too harshly on minor property rights housing, lest they not only antagonize rural farmers, but also urban residents who cannot afford skyrocketing urban real estate prices. As De Soto recognized in his study of the difficult transitional period in the United States towards an integrated property system, the key is to adapt “the law to the social and economic needs of the majority of the population”<sup>175</sup> – something that has not yet been done with the State’s response to minor property rights.

#### **Root Cause #4: Institutional Problems**

Most of the discussion so far in this paper has focused on the problems with the law itself. However, many of the problems that arise in the more serious and difficult disputes are not concerned with the law *per se*, but rather with forced expropriations that are conducted with a general disregard for rule of law as a whole. In other words, there is still a very large gap between the law on the books and actual practice on the ground. This ‘legal efficacy’ gap can only be properly explored by looking into more systemic institutional problems at work.

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<sup>174</sup> See Gamut, *supra* note 166.

<sup>175</sup> De Soto, *supra* note 160 at 106.



The first institutional problem is that local governments have every economic incentive to push forward with land expropriation, conversion and resale. As mentioned earlier, land transfer fees from the sale of urban LURs to private developers are an indispensable part of local and municipal governments' coffers. The trend of decentralization of responsibility in China down to lower levels of government mean that fiscal and administrative obligations are increasing without corresponding increases in tax and other revenue streams – leading to budget deficits and increasing debt burdens.<sup>176</sup> LUR sales are therefore a way to make up for this budget shortfall. Any potential land policy reform would have to consider alternative revenue streams for local governments to meet their obligations.

In addition, performance measures for government officials in reform era China have been overwhelmingly tilted towards economic indicators such as GDP growth and remittances of taxes and fees.<sup>177</sup> This creates an additional personal incentive for local officials to support land expropriation, given that it both contributes towards positive GDP growth and higher fee collection at the same time.

A second institutional problem is the general weakness of the judiciary in fairly and consistently applying the law to all citizens. While the law has been updated to technically guarantee

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<sup>176</sup> See Lan Lan, “Concerns rise over local govts’ increased debt burden”, *China Daily* (25 December 2012) online: China Daily <[http://www.chinadaily.com.cn/bizchina/2012-12/25/content\\_16050284.htm](http://www.chinadaily.com.cn/bizchina/2012-12/25/content_16050284.htm)>.

<sup>177</sup> John P Burns and Zhou Zhiren, “Performance Management in the Government of the People’s Republic of China: Accountability and Control in the Implementation of Public Policy” (2010) 2 *OECD Journal on Budgeting* 1 at 4.

administrative or judicial challenges of evictions on various substantive and procedural grounds, achieving just outcomes in reality is often frustrated for various reasons.<sup>178</sup>

Judicial independence in China remains relatively weak. Judges are under tremendous pressure from local governments to either rule in favour of expropriating authorities or to refuse to accept land expropriation cases altogether. One of the primary reasons for this pressure is that the judiciary is still seen as a political organ, directly under the control and financing of each level of government.<sup>179</sup> Judges' salaries and tenure are decided via the discretion of their corresponding level of government. Therefore, judges can be unduly influenced by local government officials and can be reprimanded or removed from their posts if they do not bend to political whims.

Interestingly however, the interests of the judiciary and local government officials often conflict in cases that draw public sympathy, as most land expropriation cases do. Cases studies in Jiangsu Province show that complainants are learning to use innovative tactics to transform courts into public platforms for social grievances.<sup>180</sup> Complainants often come to court wearing the same uniforms and display slogans emphasizing the corruption and collusion of officials, property developers and judges.<sup>181</sup> Court hearings often take on a sort of theatrical atmosphere, with packed public galleries, close media scrutiny and emotional pleas and speeches from

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<sup>178</sup> *Provisions of the Supreme People's Court on Several Issues Concerning the Handling of Cases for Application to the People's Courts for Compulsory Enforcement of Decisions on Compensation for Expropriation of Buildings on State-Owned Land*, art 26, online: Lawinfochina

<<http://www.lawinfochina.com/display.aspx?lib=law&id=9358&CGid>> [*SPC Expropriation Opinion*].

<sup>179</sup> Pils, "Contending conceptions", *supra* note 141 at 10.

<sup>180</sup> See He Xin, "Protest supported housing demolition litigation in China" (Paper delivered at the workshop on resolving land disputes in East Asia, Centre for Comparative and Public Law, University of Hong Kong, 26 November 2011), [unpublished] at 2.

<sup>181</sup> *Ibid* at 4.

complainants and their counsel. Together, these factors put both the defendants and the judges in a morally and legally unpleasant situation.

Judges are in a particularly unenviable ‘lose-lose’ situation. Even if they side with the populist (and often legally legitimate) view and rule for the plaintiffs, enforcement of administrative rulings remains weak and local governments may simply end up refusing to ultimately implement the decision.<sup>182</sup> This puts judges at odds with powerful political and economic interests while simultaneously reducing the credibility of court decisions in the eyes of the public. If they side with the defendants however, they draw criticism of corruption and incompetence. They may also trigger an escalation of collective protests and potentially violence once evictees realize that their legal avenues have been shut off to them. Furthermore, housing authorities are in the best position to take bribes from developers and then shove responsibility and media scrutiny over to courts and judges, who have little to gain but much to lose. Facing this unpleasant situation, courts often make the decision to avoid the problem altogether by refusing standing to plaintiffs in many cases.<sup>183</sup> However, the divergence of interests between courts and housing authorities in cases of land expropriation may provide an interesting source of political support for land policy reform in China down the road.

### **Root Cause #5: Arable Land Protection and Food Security**

Linked to China’s massive urbanization is the corresponding mass loss of arable land. China has always had difficulty with food security as it grapples with the exceedingly difficult task of

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<sup>182</sup> See Pils, “Contending conceptions”, *supra* note 141 at 10.

<sup>183</sup> *Ibid.*

feeding 22% of the world's population with less than 10% of the world's arable land.<sup>184</sup> Since reform and opening, it is estimated that China has lost about 8.3 million hectares of arable land – 6.5% of China's total arable land – largely in the most fertile eastern coastal regions.<sup>185</sup> To compound troubles, demand-side consumption has risen significantly as incomes rise and China's middle class continues to burgeon.<sup>186</sup> In light of these concerns, President Hu Jintao announced in 2011 that China should continue to adopt and implement strict regulations to protect arable land; endorsing a “red line” of 120 million hectares in arable land that China must never fall below.<sup>187</sup> Hu also specifically mentioned that, in line with this strategy of arable land protection, developers should refrain from using arable land for new projects.

In fact, laws and regulations in China have already reflected this concern of arable land loss and food insecurity for many years. For example, in 1994 the State Council enacted the *State Council Regulations on the Protection of Basic Farmland*, which in effect prohibited the development-related conversion of “moderate quality farmland” for a planned period of 5-10 years and “high quality farmland” for the long term.<sup>188</sup> Any conversion of designated high quality farmland requires authorization by higher levels of authority. In addition, the *Land Administration Law* requires that 80% of land be reserved as “Basic Arable Land Protection Zones” in which State Council approval is necessary for any conversion for the purposes of

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<sup>184</sup> See Wang Guanqun, “Shrinking arable land adds concern on China's grain security”, *Xinhua* (18 October 2010) online: [http://news.xinhuanet.com/english2010/china/2010-10/18/c\\_13562418.htm](http://news.xinhuanet.com/english2010/china/2010-10/18/c_13562418.htm).

<sup>185</sup> See Ronnie Vernooy, “China tries alternative to industrial agriculture”, *The Solutions Journal* (20 July 2012), online: OurWorld 2.0 <<http://ourworld.unu.edu/en/china-tries-alternative-to-industrial-agriculture/>>.

<sup>186</sup> See generally Xiao Yulai & Nie Fengying, *A Report on the Status of China's Food Security* (China Agricultural Science and Technology Press, 2009) online: United Nations <<http://www.un.org.cn/cms/p/resources/30/1320/content.html>>.

<sup>187</sup> See Zhang Xiang, “President Hu stresses arable land protection in China”, *Xinhua* (23 August 2011) online: [http://news.xinhuanet.com/english2010/china/2011-08/23/c\\_131069671.htm](http://news.xinhuanet.com/english2010/china/2011-08/23/c_131069671.htm).

<sup>188</sup> See Ding, *supra* note 36 at 113.

development.<sup>189</sup> However, implementation and enforcement of these provisions was generally ineffective in curbing continued loss of arable land.<sup>190</sup>

This underlying concern of arable land protection has been one of the core reasons for resisting the implementation of private land ownership rights in rural China and upholding the current prohibition on non-agricultural uses of rural land. The argument is that if rural farmers were given unrestricted private land ownership rights, the government would no longer be able to control rural land conversion and an enormous amount of China's arable land would be rapidly lost to private developers, undermining national self-sufficiency in foodstuffs and throwing the country into a food security crisis.

While recognizing that there is a certain amount of merit to this argument, it must also be understood that the total area of farmland being preserved means little if the quality and efficiency of food production is low – which is precisely the consequence of having many small, inefficient food suppliers in the market.<sup>191</sup> Policymakers must understand that the point of food security is to ensure a sufficient output of foodstuffs, not just protecting large amounts of arable land just for the sake of protecting arable land.

When rural LURs are highly restricted in terms of use and fungibility, the result is that farmers are left with small plots of land that have relatively low-quality soil (especially in the rugged Western areas of China) and produce predictably low yields. Rural farmers are often unable to grow the critical amount of food required for self-sustenance, necessitating migration of able-

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<sup>189</sup> *Land Administration Law*, *supra* note 46, art 23.

<sup>190</sup> See Erie, *supra* note 64 at 930.

<sup>191</sup> See Tom Orlik & Scott Rozelle, "China's Land Reform: Speeding the Plough" (2008) 171:9 *The Far Eastern Economic Review* 18 at 18, online: <[http://www.viet-studies.info/kinhte/FEER\\_chinas\\_land\\_reform.htm](http://www.viet-studies.info/kinhte/FEER_chinas_land_reform.htm)>.

bodied men to urban areas in search of work and contributing to the feminization of rural Chinese areas.<sup>192</sup> Furthermore, these small-scale rural farmers cannot raise sufficient money for (nor have incentives to invest in) soil testing, tractors and other productivity-enhancing agricultural technologies.<sup>193</sup> Therefore, although highly restrictive rural LURs help in preserving the total amount of arable land, these restrictions (particularly on fungibility) impede the ability of farmers to achieve the economies of scale necessary for efficient foodstuffs production.

Fungibility and use restrictions on rural LURs, as policy instruments, are too blunt and draconian for the purposes of protecting China's food security. The socioeconomic costs to China's rural population as well as the efficiency losses of small-scale agricultural production are simply too great to justify their continued use. While policy experiments are already underway that attempt to improve transferability and fungibility of rural LURs while addressing the issue of food security, all parties must understand that these two objectives are not mutually exclusive in that the promotion of one of these objectives need not critically undermine the other.

### **Root Cause #6: Vested Interests**

As usual with important policy reforms, there are significant vested interests at play – individuals and groups who profit from the current land tenure system and would be strongly opposed to any proposal that threatens existing institutional arrangements. This section will look at a (non-exhaustive) list of four important groups that have a vested interest in the status quo and would likely pose some of resistance against land policy reform. These four groups are: (1) private

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<sup>192</sup> It is estimated that women constitute some 70-80% of the agricultural labour force in most rural Chinese provinces, see Vernooy, *supra* note 185.

<sup>193</sup> See Orlik & Rozelle, *supra* note 191.

property developers and construction companies, (2) local governments, (3) the Ministry of Land and Resources and (4) urban worker interest groups.

Certain private property developers and construction companies clearly profit from both the existing dual rural-urban land tenure as well as the general disregard for the rule of law in many instances of land expropriation. Developers and construction companies can acquire land use rights for construction purposes at rock bottom prices in rural and suburban areas.<sup>194</sup> The key for these companies is to collude with local government officials so that the rural land is converted into the appropriate urban LURs so development may proceed. They can then purchase the urban LURs for a certain fee and pay a resettlement and compensation package that (as described earlier in the paper) is based off of agricultural output instead of market value. By acquiring rural land at low prices, they make an enormous profit from their ultimate development purpose: constructing condominiums, shopping malls, factories, hotels, etc. Many of these companies have deep pockets and can thus take advantage of the institutional weakness of the judiciary by hiring local thugs to intimidate local residents into leaving without facing any significant ramifications from the courts.<sup>195</sup>

As mentioned earlier, local government officials and party cadres are evaluated heavily based on economic growth criteria while local government revenues depend critically on land transfer fees from expropriation. Commercial and industrial development is therefore often prioritized over economic and social considerations. The collusion between local governments and private developers are likely the most significant vested interest group for reformists to overcome.

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<sup>194</sup> See Zhang, *supra* note 27 at 65.

<sup>195</sup> See Pils, “Contending conceptions”, *supra* note 141 at 6.

The third vested interest group is the Ministry of Land and Resources, a ministry under the jurisdiction of the State Council and a key ministry of the central government in Beijing. While the State Council as a whole is concerned with social stability and the consequences of rural-urban income disparity, the Ministry of Land and Resources is primarily concerned with arable land preservation.<sup>196</sup> While it is not fair to say that the entire Ministry of Land and Resources is against stronger protection of individual land rights, there are elements in the Ministry that certainly believe the current land system is essential in preserving the ability of China to follow a self-sufficient food production strategy.<sup>197</sup> However, there continue to be efforts from other elements of the Ministry to address these land concerns for the sake of social stability in rural areas. For example, on August 31<sup>st</sup>, 2011, the Vice Minister of the Ministry of Land and Resources, Wang Shiyuan, met with other officials from the Ministry of Finance and the Ministry of Agriculture to work out methods of accelerating the issuance of land registration certificates to rural LUR holders.<sup>198</sup>

Finally, urban residents in major Chinese cities, particularly many in the urban working class, harbour concerns that giving rural farmers the ability to sell and alienate their land use rights will result in a flood of new migrants to the cities from the countryside that will overburden urban infrastructure and housing as well as create greater competition for certain jobs. Mega cities such as Beijing and Shanghai are already experiencing great strains in terms of traffic,

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<sup>196</sup> The Ministry of Land and Resources upholds, as part of its mission statement, the responsibility of organizing the protection of capital farmland, see The Ministry of Land and Resources of the People's Republic of China, *Responsibilities of the Ministry of Land and Resources* (15 October 2007), online: The Ministry of Land and Resources of the People's Republic of China <<http://www.mlr.gov.cn/mlrenglish/about/mission/>>.

<sup>197</sup> See e.g. An, "China upholds policy of food self-sufficiency: Chinese Vice Premier" *Xinhua* (25 March 2011), online: Xinhua <[http://news.xinhuanet.com/english2010/china/2011-03/25/c\\_13798399.htm](http://news.xinhuanet.com/english2010/china/2011-03/25/c_13798399.htm)>.

<sup>198</sup> See Wang Fan, "Reform of rural collective land speeds up" *ECNS.CN* (15 September 2011), online: ECNS.CN <<http://www.ecns.cn/in-depth/2011/09-15/2405.shtml>>.



government services and education and are in no rush to see accelerated rural migration for whatever reason.<sup>199</sup> Low skilled workers in urban areas also face the expected prospect of having wages driven even lower as more rural families decide to sell their land interests and move into the cities for good.<sup>200</sup> This may cause an outcry from politically salient urban working groups against the potential liberalization of rural LURs.

### **Policy Experiments and Potential Solutions**

While land-related problems have been progressively growing in severity over the past decade or so, the central government is well aware of these grievances and is ramping up efforts in an attempt to address some of these problems. This section of the paper will briefly present a non-exhaustive list of several policy experiments currently underway in China while offering some basic policy suggestions, bearing in mind the root causes that contribute to these land disputes.

Before going into an analysis of these policy ideas, it should be noted that a major consideration that must always be taken in account is political economy – in other words, how politically feasible are some of the options that are being explored?

Reform efforts in China have traditionally been extremely sensitive to questions of political economy (which at times completely overwhelm more nuanced and technocratic questions). Out of that tradition, the Communist Party often uses an incremental approach to policy reform – choosing trial areas to test out and iterate upon new ideas before implementing them on a

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<sup>199</sup> See Rachel Wang, “Beijing and Shanghai Native Unite to Defend Their Children’s Privilege” *TeaLeafNation* (26 October 2012), online: <<http://www.tealeafnation.com/2012/10/beijing-and-shanghai-natives-unite-to-defend-their-childrens-privilege/>> outlining some of these urban infrastructure difficulties and the negative view many locals hold towards migrants for contributing to these problems.

<sup>200</sup> See John Knight, “China, South Africa and the Lewis Model” (2007) 82 UNU-WIDER Research Paper at 7.

national basis.<sup>201</sup> This is often a very effective approach as the government can collect real life data from competing policy options in a country that supports an enormous population and is comprised of widely heterogeneous regions.

Historically, this approach has saved China from potential policy disasters – one only needs to contrast the Chinese experience of transitioning to a market economy with that of Russia. While Russia followed a ‘big bang’ reform approach by implementing free market policies and institutions immediately after the fall of the Iron Curtain, China implemented a ‘staged’ approach which gradually decollectivized agriculture and permitted private industry through a ‘dual-track’ system, which was sensitive to the vested interests of State-Owned-Enterprises (SOEs).<sup>202</sup> This incremental approach to economic liberalization served China extremely well: since 1978, China’s GDP growth has averaged approximately 10% year-over-year.<sup>203</sup> Russia on the other hand, incurred tremendous transition costs in rapidly moving away from their centralized, defense-heavy economy: total GDP contracted approximately 43% between 1990 and 1997, leading to widespread suffering amongst its people.<sup>204</sup>

Although for the sake of brevity, supporting political economy analysis will be excluded from the rest of this section, the interplay between vested interests and policy reformists will shape undoubtedly shape the face of China’s land and property rights framework in the years to come.

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<sup>201</sup> See Fan Gang, “Incremental Changes and Dual-Track Transition: Understanding the Case of China” (1994) 9:19 *Economic Policy* 99 at 104.

<sup>202</sup> *Ibid* at 108-113.

<sup>203</sup> See The World Bank, *China Overview – Context*, online: The World Bank <<http://www.worldbank.org/en/country/china/overview>>.

<sup>204</sup> See Michael S Bernstam & Alvin Rabushka, *Fixing Russia’s Banks: A Proposal for Growth* (Hoover Institution Press, 1998) at 6.

Given China's incremental and experimental approach to policy reform, a long and arduous road to a more just land rights system is natural and to be expected.

### Rural Collective Corporations

One of the ways that the Chinese government is attempting to alleviate rural land problems is through the use of rural collective corporations. While the types of corporations (sometimes known as rural 'cooperatives') that are permitted and commonly used in China differ region by region, the underlying idea is the same: allowing farmers to pool their individual rural LURs in order to achieve economies of scale.<sup>205</sup> Rural collective corporations have been so successful that the 2007 *Property Law* includes a provision that explicitly allows rural collectives to establish corporations or limited liability corporations (LLCs) to pool LURs and enjoy asset returns.<sup>206</sup>

By allowing farmers to pool their rural LURs, the collective corporation can amass enough land to justify the purchase of more efficient agricultural technologies as well as the hiring of professional staff and management.<sup>207</sup> Farmers have the choice of either opting in to the collective agricultural corporation or opting out and retaining their own separate land. The ones that opt in give up their rural LURs or other assets to the corporation in exchange for shares. These shares function just like ordinary shares of a corporation in that the holder is entitled to

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<sup>205</sup> See generally Chang Tianle, "Rural Cooperatives: Getting together again" *China Development Brief* (16 March 2007), online: China Development Brief <<http://www.chinadevelopmentbrief.com/node/1030>>.

<sup>206</sup> *Property Law*, *supra* note 6, art 67.

<sup>207</sup> Chang, *supra* note 205.

dividend payments when the corporation is profitable.<sup>208</sup> Most farmers choose to opt into the corporate arrangement as pooling allows for more efficient division of labour and the prospect of migration to the cities or abroad while retaining a source of *passive* income.<sup>209</sup>

Residents of the suburban and rural areas surrounding Shenzhen take the idea of the rural collective corporation even further. In addition to pooling rural LURs, rural corporations are allowed to engage in non-agricultural activities or lease land for non-agricultural purposes.<sup>210</sup> For example, private developers can lease vast swaths of land through one contact point (the “village corporation”) for profitable commercial or industrial use and not have to worry about holdouts (*dingzi hu*) or aggressive village resistance.<sup>211</sup> This has the extra benefit of promoting the development of economically efficient activities on a wide scale in rural and suburban areas while ensuring that local residents receive a significant piece of the pie. In fact, well-run “village corporations” often produce vast amounts of wealth for villagers and help align incentives between village committee leaders, rural LUR holders and private developers.<sup>212</sup>

### Abolishing Hukou Distinctions

As mentioned earlier in the ‘Root Causes’ section, the parallel rural-urban divide in both the *hukou* system as well as the land tenure system works to systematically undermine the welfare of

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<sup>208</sup> See e.g. Kao Hang, “Guijiayu village one of 10 most attractive villages in China” *Want China Times* (20 November 2012), online: <<http://www.wantchinatimes.com/news-subclass-cnt.aspx?id=20121120000005&cid=1103>>.

<sup>209</sup> *Guangdong Interviews*, *supra* note 19.

<sup>210</sup> *Ibid.*

<sup>211</sup> *Ibid.*

<sup>212</sup> The most famous of these village corporations is Huaxi Village, Jiangsu province, which has at its core a multi-sectoral village corporation and is considered the “richest village in China”. See Michael Wines, “Sharing the Wealth and Living Large in a Tiny Chinese Village” *The New York Times* (11 July 2011), online: The New York Times <<http://www.nytimes.com/2011/07/12/world/asia/12huaxi.html?pagewanted=all>>

rural Chinese. Reforms of both of these systems must go hand-in-hand. Even if distinctions in land rights were eliminated and rural LUR holders were given all the rights currently afforded to urban LUR holders, reform would remain necessarily incomplete.

Allowing for transfer and alienation of rural LURs will likely precipitate increased migration flows from rural areas to urban areas. However, so long as one's *hukou* continues to function as the basis for receiving government benefits, it will continue to act as shackles for rural Chinese attempting to work and live in the city.<sup>213</sup> It is also clear that lack of *hukou* is not stopping rural migration to the cities, but is rather facilitating a large 'floating population' of vulnerable, second-class citizens, whose population will only get larger over time. Therefore the elimination of the rural-urban LUR distinction without *hukou* reform may end up increasing the number of migrants living in the cities that live and work largely illegally. Not only will these migrants suffer from lack of access to basic government services, but crime and violence may also increase while the government will miss out of opportunities to tax otherwise legitimate economic activities.

On the other hand, *hukou* reform without corresponding land policy reform will also run into serious problems. Although efforts to reform the *hukou* system had already started in 1997 with a pilot program initiated by the Ministry of Public Security that eased granting of urban *hukous* in smaller cities, widespread reform has repeatedly run into obstacles.<sup>214</sup> For example, in 2010,

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<sup>213</sup> See Sascha Matuszak, "Chengdu's Pilot Program to Abolish the Hukou" *Chengdu Living* (9 December 2010), online: Chengdu Living <<http://www.chengduliving.com/chengdus-pilot-program-to-abolish-the-hukou/>>.

<sup>214</sup> See Kam Wing Chan & Will Buckingham, "Is China Abolishing the *Hukou* System?" (2008) 195 *The China Quarterly* 582 at 592, online: Willamette University <[http://www.willamette.edu/cla/debate/Curriculum/YouthForum2010/MTTResearch/RoleofGovernment/Anca\\_Abolishing%20the%20Hukou%20system.pdf](http://www.willamette.edu/cla/debate/Curriculum/YouthForum2010/MTTResearch/RoleofGovernment/Anca_Abolishing%20the%20Hukou%20system.pdf)>.

trial efforts to unify the *hukou* system in Chongqing stagnated as rural residents refused to give up their rural *hukou* for urban *hukou* as the reform regulations stipulated that they would have to give up rights to their farmland.<sup>215</sup> In other words, rural farmers will not give up their rural *hukou* without some of guarantee that they will not lose rights to their lands. But without a formal system that consolidates and reconciles contradictions between rural LURs and urban LURs, *hukou* reform will remain a difficult sell for rural *hukou* holders. A formal system also cannot come into place without a broader conceptual agreement on land and property rights; an agreement that seems all the more elusive in the aftermath of the polarizing 2007 *Property Law* debates.

The unification of urban and rural *hukou* for the purposes of unifying government service provision has already occurred in Shenzhen (where neighbouring rural areas are given urban *hukou*) and is also occurring in places such as Chengdu.<sup>216</sup> Success in these trial areas will be critical in determining whether *hukou* distinctions will be abolished nationwide.

### Changing Incentives for Local Officials

Performance assessments for government officials in China are still predominately focused on one specific indicator: GDP growth rate.<sup>217</sup> After the 1994 Tax Reform, tax authority was decentralized and local government officials were given strong incentives to promote local

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<sup>215</sup> See Zhang Xiaohui, “Chongqing Universities Pressure Students to Change their Hukou”, translated by Rose Scobie, *Economic Observer* (November 2, 2010), online: Economic Observer Online <<http://www.eeo.com.cn/ens/homepage/briefs/2010/11/02/184638.shtml>>.

<sup>216</sup> See Matuszak, *supra* note 213.

<sup>217</sup> See “Officials setting too great a store on GDP growth figures” *Xinhua* (13 August 2009), online: China Daily <[http://www.chinadaily.com.cn/bizchina/2009-08/13/content\\_8566896.htm](http://www.chinadaily.com.cn/bizchina/2009-08/13/content_8566896.htm)>.

economic development in order to raise the local tax revenue base.<sup>218</sup> At the same time, central governments had every incentive to promote local government officials who prioritized economic growth, due to a central/regional shared revenue system.<sup>219</sup> This system led to the development of performance assessments for officials that revolved primarily around GDP growth rates, in which high economic growth was considered crucial for promotion.

Unsurprisingly, this myopic focus on high GDP growth rates and related economic indicators, such as investment rates, has had certain negative consequences for public administration, one of which is exaggeration of local performance numbers. For example, in 2009, aggregate GDP figures released on a provincial level were some 10 percent (or \$2.05 trillion USD) higher than GDP figures released by the National Bureau of Statistics.<sup>220</sup> Another negative consequence has been the prioritization of economic development over other key interests that contribute to overall human welfare. In the land and property context, this has meant governments supporting widespread land expropriation while turning a blind eye to abuses in the compensation, eviction and demolition process.

A more enlightened view of government function must be incorporated into performance assessments. Officials should be assessed on a broader range of indicia, including their handling of important environmental and social issues as well as fiscal transparency and accountability. These changes have already been instituted in select Chinese cities and provinces. For example, Li Yuanchao, the Communist Party Secretary of Jiangsu Province, initiated the use of various

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<sup>218</sup> See Wanda Bailing Wang, “Fiscal Incentives and Local Government Behavior in China” (2007) 6:1 China Currents, online: China Research Center <<http://www.chinacenter.net/fiscal-incentives-and-local-government-behavior-in-china/>>.

<sup>219</sup> *Ibid.*

<sup>220</sup> See Xinhua, *supra* note 217.

social and environmental measures in performance assessments of Jiangsu officials.<sup>221</sup> In 2011, the Ministry of Water Resources selected seven Chinese cities and provinces, including Beijing, to pilot adding water conservation efforts to performance assessments of local officials.<sup>222</sup>

These initiatives show a willingness among certain elements of the CPC to change incentives for government officials to reflect social justice and a more sustainable development model.

Implementing metrics for the purposes of promoting rule of law, income equality and anti-corruption could have a significant impact in alleviating some of the major problems associated with current land disputes.

## Property Taxes

In order for local governments to move away from reliance on land transfer fees derived from land expropriation and conversion, they will need a significant source of government revenue to make up for the inevitable budget shortfall. It is estimated that in 2010, land transactions generated some RMB 2.7 trillion in revenue for local governments, a 70.4% increase over land transaction revenue in 2009.<sup>223</sup> Given that there is only a finite amount of desirable land that can be developed and a finite number of land use grants that can be issued, it is clear that, notwithstanding the social costs of conversion and relocation, continued reliance on land transfer

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<sup>221</sup> Interview of Li Yuanchao by Robert Lawrence Kuhn (20 February 2008) in Robert Lawrence Kuhn, “Building ‘Intra-Party Democracy’ in China” *Bloomberg Businessweek*, online: Bloomberg Businessweek <<http://www.businessweek.com/stories/2008-02-20/building-intra-party-democracy-in-chinabusinessweek-business-news-stock-market-and-financial-advice>>.

<sup>222</sup> See Mu Xuequan, “China to assess local officials’ performance based on water conservation efforts” *Xinhua* (19 January 2011), online: Xinhua <[http://news.xinhuanet.com/english2010/china/2011-01/19/c\\_13698360.htm](http://news.xinhuanet.com/english2010/china/2011-01/19/c_13698360.htm)>.

<sup>223</sup> See Jing Ulrich, “Impact of China’s New Property Tax and Latest Round of Tightening – Views from Shanghai”, *JP Morgan’s Hands-On China Series* (2 February 2011) at 2, online: JP Morgan <<http://www.jpmorgan.com/cm/BlobServer?blobcol=urldata&blobtable=MungoBlobs&blobkey=id&blobwhere=1158623168831&blobheader=application%2Fpdf>>.



fees is unsustainable. The major substitute that China is considering is the implementation of an annual property tax – a funding instrument of choice for local governments in the United States as well as many other jurisdictions.<sup>224</sup>

The central government's impetus for supporting a new property tax does not rely solely on alleviating local government dependence on land transfer fees, but is also seen as a part of a policy strategy to curb speculation, cool off the red-hot Chinese property market and to help fund new affordable housing schemes.<sup>225</sup> A property tax has the advantage of providing a stable source of revenue which slowly increases year after year as land prices increase, while incentivizing governments to provide stable economic growth. The policy reasons for implementing a property tax are so strong that many private property developers in China feel that implementation of such a tax is unavoidable and actually want the government to quickly come out and be transparent about their property tax rates in order to eliminate a major overhang that creates uncertainty for future projects.<sup>226</sup>

On January 28<sup>th</sup>, 2011, Shanghai and Chongqing became the first cities in China to implement a trial property tax.<sup>227</sup> While the tax is relatively lenient and targets a very small subsection of the population, it has significant symbolic weight and will be used to help determine what a nationwide property tax regime might look like in the future. In Shanghai, the property tax specifically targets purchasers of luxury real estate, applying to only property that exceeds 60 square metres

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<sup>224</sup> In 2009, property tax revenue in the United States compromised some 34% of local tax revenue. See "Time for a property tax", *The Economist* (4 February 2012), online: <<http://www.economist.com/node/21546014>>.

<sup>225</sup> Ulrich, *supra* note 223 at 4.

<sup>226</sup> *Ibid* at 3.

<sup>227</sup> *Ibid* at 1.

per adult family member.<sup>228</sup> The tax only applies to non-primary (investment) homes for local Shanghai residents and any new purchases for non-Shanghai residents. Importantly, the tax does not apply retroactively – property purchased before January 28<sup>th</sup> is exempt. In terms of absolute amount, the property tax is not particularly onerous. The effective tax rate is 0.28% (of total market value) for homes less than twice the average cost of new properties in the preceding year and 0.42% for more expensive homes above that cutoff rate.<sup>229</sup>

Chinese officials have indicated that there are plans to further expand the pilot property tax program and “gradually establish a system of property related taxes”.<sup>230</sup> However, beyond the obvious political economy difficulties, there are serious obstacles to implementing a comprehensive, nationwide property tax system. For starters, the proper administrative infrastructure has to be put in place before property taxes can be collected. Land has to be surveyed and land registries set up at each locality, as well as corresponding systems for recording and tracking property sales. Also, property holders need to be issued LUR certificates to show official proof that they hold land rights. Any attempts to expand the trial property tax system, particularly to rural areas, must be met with caution and preparation with these obstacles in mind.

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<sup>228</sup> *Ibid* at 2.

<sup>229</sup> *Ibid*.

<sup>230</sup> See Shao Xiaoyi & Lucy Hornby, “China to expand pilot property tax scheme” *Reuters* (21 September 2012), online: Asian Legal Business <<http://asia.legalbusinessonline.com/news/breaking-news/china-to-expand-pilot-property-tax-scheme/109239>>.

## Defining 'Public Interest'

As stated in Articles 42 and 148 of the 2007 *Property Law*, expropriation of land, houses and other real property in China requires a public interest purpose.<sup>231</sup> The dual requirements of public interest and just compensation for expropriation by the State are common features of most land and property systems in Western nations. For example, these requirements can be found in the Fifth Amendment on the Constitution of the United States.<sup>232</sup> However, what is perceived to be in the public interest may differ greatly from jurisdiction to jurisdiction. In other words, every jurisdiction has to answer the question: how high do we set the public interest standard to justify a legal property taking?

In China, this public interest requirement has, until 2011, been largely toothless. While the requirement is stated in law, it has little effect as a legal defense to challenge the actual decision of expropriation. Public interest, in the context of a largely authoritarian country throwing all its political weight behind economic growth and development, encompassed essentially any sort of use that developers or governments might contemplate. In order to address the overly broad scope of 'public interest', the State Council announced on January 21<sup>st</sup>, 2011, the *Regulation on the Expropriation of Buildings on State-owned Land and Compensation*.<sup>233</sup>

These regulations attempt to respond to land-related mass incidents and disputes by clearly setting out stricter procedural requirements during the expropriation process as well as providing

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<sup>231</sup> *Property Law*, *supra* note 6, arts 42 and 148 set out the requirements for rural and urban land expropriation, respectively.

<sup>232</sup> US Const amend V.

<sup>233</sup> *Regulation on the Expropriation of Buildings on State-owned Land and Compensation*, 2011, online: Lawinfochina

<<http://www.lawinfochina.com/display.aspx?id=8580&lib=law&SearchKeyword=Regulation%20on%20the%20Expropriation%20of%20Buildings&SearchCKeyword>>.

some examples of types of construction that satisfy the ‘public interest’ definition. The regulations list national defence, energy, transportation, health, education and low-income housing as some public interest purposes that would sufficiently justify the decision to expropriate private property.<sup>234</sup> While the stated examples help to show what is included within the public interest definition, it much more unclear about what is excluded. Particularly, people want to know whether development for largely commercial purposes would *fail* the public interest test, something that legislators seem to want to avoid addressing directly.

It is also important to note that the 2011 regulations only apply to urban land and not rural land. Legislators are, as of the time of this writing, revising draft regulations concerning rural expropriation.<sup>235</sup> The public interest requirement in the context of China’s rural land scheme poses additional challenges. As argued by Eva Pils, limiting the definition of public interest can only reduce the scope of land expropriations on the ground where there is an alternative way for developers get land use rights.<sup>236</sup> In rural areas, where non-commercial uses are prohibited, there simply is no other feasible way aside from expropriation and conversion for private development to occur. Therefore, a stricter public interest requirement may be overborne by economic necessity in those rural areas. A focus on the public interest requirement without reform of the broader rural property rights system faces the danger of being counterproductive to, ironically, the public interest.

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<sup>234</sup> *Ibid* at art 8.

<sup>235</sup> See Bao Daozu, “Rural forced demolition rules being developed” *China Daily* (24 January 2011), online: China Daily <[http://www.chinadaily.com.cn/bizchina/2011-01/24/content\\_11906795.htm](http://www.chinadaily.com.cn/bizchina/2011-01/24/content_11906795.htm)>.

<sup>236</sup> See Pils, “Contending conceptions”, *supra* note 141 at 9.

It is clear however that Chinese legislators need to be looking into ways of curbing the near-unlimited discretion of local governments to approve redevelopment plans and order existing occupants off their land. A public interest test with teeth is only one of the policy instruments that may help with this. Another possible method is to open the expropriation process to judicial scrutiny through different paths. On April 10<sup>th</sup>, 2012, the Supreme People's Court issued a judicial interpretation of the 2011 *Regulation on the Expropriation of Buildings on State-owned Land and Compensation*.<sup>237</sup> The interpretation specifies three paths by which local courts may reject government housing demolition requests: (1) unfair compensation, (2) illegality of expropriation itself, (3) violation of law in the expropriation process.<sup>238</sup> By specifying legal grounds through which the expropriation and demolition decision itself can be challenged, the Supreme People's Court is, at the very least, providing a stronger rhetorical basis for Courts to act as a gatekeeper for illegal and manifestly unfair land expropriation cases. Whether the Courts will use this gatekeeper power more frequently and whether these decisions will be enforced are another matter altogether.

## Conclusions

In the early years of the People's Republic of China, the country's peasants were given an opportunity to take back control of their land and under contemporary rhetoric, release the productive forces of the countryside from the control of capitalist oppressors. Peasants were

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<sup>237</sup> *SPC Expropriation Opinion*, *supra* note 178

<sup>238</sup> *Ibid*, art 26.

given individual plots of land with broad property rights, as well as Certificates of Land and House Ownership. Many of them thrived under this short-lived land regime.

Some 60 years later, in a strange twist of fate, these Chinese peasants once again find themselves in a situation where their land remains under the control of oppressors and the threat systemic exploitation. However this time, the oppression is done under the pretenses of a land tenure system that is theoretically supposed to protect them. The phrase “socialist ownership, capitalist expropriation”, appropriately sums up the situation that many rural Chinese landholders face in an era of rapid economic development and social change.

Facing the prospects of losing their land for a pittance, having their homes and villages forcibly demolished and lacking meaningful judicial and administrative avenues to pursue recourse, more and more victims of unfair land expropriation are taking to extreme measures in order to voice their grievances. The Wukan protests of 2011, in which a Guangdong village rose up and expelled local police and Party officials for expropriating their land without just compensation, provides a warning of what a well-organized village resistance might be capable of.<sup>239</sup> In addition, the subsequent outpour of sympathy by Chinese netizens provides insight into how the public views the current land expropriation process. Facing a growing number of mass incidents related to land disputes, the political demand for reform is palpable.

On the other side of the expropriation process, debt-laden local governments are becoming increasingly reliant on land sales and related fees to fund their administrations. Guan Qingyou of

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<sup>239</sup> See Ananth Krishnan, “A unique protest in China” *The Hindu* (15 December 2011), online: The Hindu <<http://www.thehindu.com/news/international/article2715292.ece>>.

Tsinghua University estimates that in 2010, land sales compromised 74 percent of local government revenue, up from merely 10 percent in the late 1990s.<sup>240</sup> Increasing reliance on land sales by governments, combined with increasing discontent among evictees is creating a ticking time bomb in China's social fabric. This means that the newly appointed Xi Jinping-Li Keqiang administration cannot rest on their laurels and must put land reform at the top of their priority list as soon as possible. This administration will need the foresight to envision a comprehensive institutional reform, the courage to stick with the reform process when it runs into obstacles, as well as the patience to experiment with different policy alternatives and iterate when specific results do not conform to expectations.

This article has attempted to deconstruct some of the root causes of current land grievances in China by situating the increasing number of related mass incidents within a set of complex and interrelated factors. The author finds this approach more beneficial and revealing than the oversimplified but attractive narrative of heartless private developers, corrupt governments and incompetent courts colluding to steal land from China's most vulnerable. Though certainly there is an 'air of reality' to this narrative, the truth is more nuanced and solutions must therefore be correspondingly thoughtful. Any successful comprehensive land reform strategy must, among other things, address the rural-urban divide in both the LUR scheme as well as the *hukou* system, be sensitive to the ability of farmers to transfer their lands and use them as collateral, find alternative strategies of food security and alternative revenue streams for local governments, better align incentive structures for government officials, and clear the way for the judiciary to uphold both the letter and the spirit of the law governing expropriations.

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<sup>240</sup> See Rabinovitch, *supra* note 113.

Fortunately, China is not in a situation where the government is unwilling to cooperate with reform efforts. Many officials, academics and NGOs are diligently working on ways to alleviate land related injustices. The policy experiments briefly described in this paper are only the tip of the iceberg in terms of ideas that are being thrown around as potential solutions. The next logical step would be to aggregate many of these piecemeal solutions into a comprehensive land reform strategy that can be better understood by the various stakeholder groups involved. At stake is not only the livelihood of the millions of Chinese who are facing expropriation now, but also the countless millions who will undoubtedly be affected in the future.