

EXPANDING THE GAP: HOW THE RURAL PROPERTY SYSTEM EXACERBATES CHINA'S URBAN-RURAL GAP

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Agriculture differs from both pastoralism and industry. Farmers are necessarily connected to the land, whereas herdsmen drift about, following the water and the grass, and are forever unsettled. Industrial workers may choose where they live, and they may move without difficulty; but farmers cannot move their land or the crops they grow. Always waiting for their crops to mature, those old farmers seem to have planted half their own bodies into the soil.

- Fei Xiaotong¹

I. INTRODUCTION

There is a certain amount of romanticism attached to the Chinese peasantry. Few objects are more “Chinese” than a scroll painting of sun-darkened men and women with pointed straw hats tied to their heads working the rice fields beneath towering granite mountains. In addition to its simple serenity, there is also a calm consistency to this image, summarized in the following quotation:

More people have lived in China than anywhere else. Upwards of 10 billion human beings have moved across her good earth; nowhere else have so many people lived so intimately with nature. A thousand generations have left their indelible impression on soil and topography, so that scarcely a square foot of earth remains unmodified by man. ... Few landscapes are more human.²

Though the importance of the peasantry to Chinese history is beyond dispute, the focus of the modernization process that propelled China’s miraculous economic growth has been the industrialized cities. As a result, the average Chinese rural household today makes less than one-third of the average urban family, and the gap is widening.³ Chinese Communist Party (CCP) leaders fear that a further increase in this gap could lead to social instability and potentially jeopardize their ability to

¹ FEI XIAOTONG, FROM THE SOIL: THE FOUNDATIONS OF CHINESE SOCIETY 38-39 (Gary G. Hamilton & Wang Zheng trans., 1992).

² GEORGE CRESSEY, LAND OF THE FIVE HUNDRED MILLION 1 (1955).

³ Dexter Roberts, *China’s Widening Income Gap*, BUSINESS WEEK, Feb. 16, 2007, at http://www.businessweek.com/globalbiz/content/feb2007/gb20070216_056285.htm.

control the country in the current unitary fashion. This is of such a concern to the Party that it made the promotion of modern agriculture and the improvement of the position of peasants the focus of its 2007 Number One Document.⁴

There are many reasons for the wealth gap between China's peasants and city-dwellers. This paper asserts that one of the main reasons this gap persists and continues to widen is China's system of property laws, especially those that specifically govern rural real estate. The principal problem with the current rural property system is that it is a hybrid system – a mix of China's socialist past with significant changes toward a market-based future. This system marginalizes China's farmers by creating insecurities in their legal rights to operate rural land and by systematically undervaluing that land. As a result, Chinese peasants are deprived of both the protections and incentives necessary to invest in ways that will increase productivity and incomes, and are also prevented from capturing the value created by China's overall economic success.

This paper is divided into three main sections, and begins by looking at the history of land ownership and use rights in China, especially since the foundation of the People's Republic of China in 1949. This background information is important in understanding the cultural and political-ideological contexts responsible for the socialist tendencies of the current system. The second section reviews the relevant Chinese laws that form the legal framework of the current rural property system. The third section specifically addresses how the current system results in insecure and undervalued property rights for the Chinese peasantry and how those problems limit the ability of the peasantry to share in China's economic success.

II. THEORETICAL AND HISTORICAL BACKGROUND OF CHINA'S RURAL PROPERTY SYSTEM

To the extent that the problems for China's peasants stem from a hybrid system blending aspects of both socialist and capitalist systems, a review of recent Chinese history and socialist theory is important in understanding the socialist features of that system. Within the past century, China's rural property system has undergone two enormous ideological shifts. The first shift was from a feudal farming system –

⁴ The Number One Document is released by central government leadership at the beginning of every year highlighting those areas on which it wants lower governments to focus their attention. See *Focuses of this Year's No. 1 Document*, PEOPLE'S DAILY ONLINE, Jan. 31, 2007, at http://english.people.com.cn/200701/31/eng20070131_346440.html.

where a small percentage of landowners became very wealthy and the rest scraped by on insufficient and rented land – to a communist system that, though it lessened inequalities, failed to bring economic prosperity. The second shift was from the inefficient communist system to the current hybrid system that rewards farmers for production efficiencies but often prevents them from obtaining the tools necessary to maximize production and compete in China's modern economy.

A. *The Peasants and Land in Traditional China*

Few countries have as long and rich an agrarian culture as China's. Throughout Chinese history, the peasant class has constituted approximately eighty percent of China's total population.⁵ Possibly because of the enormity of their numbers, imperial interference was minimal in the lives of most Chinese peasants, as articulated by the common expression, "Heaven is high and the emperor is far away."⁶ Because governmental interference in the agricultural economy was minimal, peasants were generally free to grow, harvest and sell their crops in whatever manner they deemed appropriate. Under such a system, the major limitation upon a family's ability to become rich was the amount of land they held. As with most agrarian societies, farmland was the single most important strategic material resource in imperial China,⁷ and nothing more directly impacted individual wealth than the size of real property holdings.

Within greater Chinese society, the peasants were the most highly regarded of all the commoners,⁸ and Chinese society may be the only one that does not use the term *peasant* with a notion of contempt.⁹ This,

⁵ RICHARD SMITH, CHINA'S CULTURAL HERITAGE: THE QING DYNASTY, 1644-1912 75 (2d ed. 1994). Recent statistics indicate, however, that the number of China's rural inhabitants has been steadily declining; whereas in 1978 82.08% of the population lived in the countryside, in 2004 only 58.24% did. However, this smaller proportion still constitutes 757 million people, or two and a half times the population of the United States. NATIONAL BUREAU OF STATISTICS OF CHINA, CHINA STATISTICAL YEARBOOK 2005 4.1, available at <http://www.stats.gov.cn/tjsj/ndsj/2005/indexeh.htm> [hereinafter STATISTICAL YEARBOOK].

⁶ SMITH, *supra* note 5, at 47.

⁷ NORMAN STOCKMAN, UNDERSTANDING CHINESE SOCIETY 179 (2000).

⁸ Chinese society was generally bifurcated among the scholars (师, those who had passed the imperial exam), and commoners, who themselves were ranked by (1) peasants (农), (2) artisans (工) and (3) merchants (商). The landed gentry occupied a somewhat ambiguous position between scholars and common peasants. Though most scholars lived in the countryside and many were indeed landlords, most landlords had not passed the imperial exam and were simply rich peasants. SMITH, *supra* note 5, at 75.

⁹ *Id.* at 13.

however, did not mean that peasant life was easy. The large number of peasants and the general shortage of capital meant both rent and debt were expensive – rural interest often approached forty percent annually¹⁰ – while even those whose landholdings were sufficient to avoid renting worked tirelessly just to survive. For the overwhelming majority of peasants, there was no chance of social mobility and little hope of significant economic improvement, even from generation to generation.

Despite the wide gap between the elite and the commoners, the lack of social mobility and the general absence of central control over provincial affairs, imperial China remained stable. Friction between peasants and the social elite varied considerably according to time and place, but the two groups usually maintained a functional relationship.¹¹ However, during periods of dynastic decline tensions generally became their strongest, and the decline of the Qing dynasty was no exception.¹²

B. The Chinese Revolution

The fall of the Qing dynasty in 1911 marked the collapse of three thousand years of political tradition in China. The enormous power vacuum left by the Qing collapse took nearly forty years to fill, and during that time different political ideologies flooded the country. Eventually, the ideas of Karl Marx as applied by Mao Zedong and the Communist Party garnered enough support from the Chinese masses to rise above all other candidates. Following the ascension of the CCP and the creation of the People's Republic of China in 1949, China began a period of ideological experimentalism, during which Chinese leaders tried a number of methods to apply Marxism to China. Most of these experiments failed spectacularly, affecting the lives of hundreds of millions of Chinese, including and especially China's massive peasantry.

1. Traditional Marxism

Marxism is based on the idea that “the history of all hitherto existing society is the history of class struggles.”¹³ These struggles cause society to progress in accordance with fixed laws through a series of inevitable phases: from primitive communism to serfdom, and then to

¹⁰ *Id.* at 78.

¹¹ *Id.* at 100.

¹² *Id.* at 99-100.

¹³ KARL MARX & FRIEDRICH ENGELS, THE MANIFESTO OF THE COMMUNIST PARTY (1848), available at <http://www.anu.edu.au/polsci/marx/classics/manifesto.html>.

feudalism, capitalism, socialism and finally communism. Advancement from one phase to the next occurs when conflicts within the established order cause its downfall and establish the next phase with its accompanying conflict. For example, Marx claimed that capitalism emerged when feudal serfs garnered enough power to overthrow their exploiters, the landed gentry, and dispel feudalism. These empowered serfs then formed the bourgeoisie class of the new capitalist society and began to use their newfound power to exploit the proletariat. Marx holds this cycle of revolution will eventually break with the establishment of communism, a stateless utopia in which land and capital are collectively owned by a society free of class divisions.¹⁴

Formulated in the midst of capitalist Europe, Marxist theory focused on the exploitation of the proletariat by the bourgeoisie. It held that such exploitation would end only after the proletariat took control of the means of production, thus denying capitalists of their powerbase. Further, Marxists hold that following the move to socialism all means of production within society would be controlled by the state and that private ownership of these means had to be abolished so that they would not be utilized to enrich a few at the expense of the masses. Public ownership over the means of production is an essential component of Marxist thought as it ensures against further exploitation by the bourgeoisie.¹⁵

Despite Marx's disclaimers concerning the applicability of his theory to Asian cultures,¹⁶ Marxism was welcomed by many within China, and the Chinese Communist Party was formed in 1921. Because of the differences between China and Europe addressed by Marx, there quickly arose ideological differences within the Party over how Marxism should be applied to China.¹⁷ One of those groups was spearheaded by a charismatic young peasant named Mao Zedong.

¹⁴ CHRIS ROHMANN, *A WORLD OF IDEAS: A DICTIONARY OF IMPORTANT THEORIES, CONCEPTS, BELIEFS AND THINKERS* 250 (1999).

¹⁵ Jonas Alsén, *An Introduction to Chinese Property Law*, 20 MD. J. INT'L L. & TRADE 1, 20 (1996).

¹⁶ Marx further denied that his historical analysis could be generalized globally. His writings mentioned an "Asiatic mode of production" that, because of differing material conditions in Asia and Europe, rendered his European model and the idea of dialectic materialism inapplicable to the Far East. One of the material conditions that Marx believed most distinguished Asia from Europe was the lack of private property rights in land that he supposed existed in Asia. See STOCKMAN, *supra* note 7, at 26, 29.

¹⁷ *Id.* at 26.

2. Maoism

Mao Zedong was born in 1893 to a rich peasant family in Hunan province. He converted to the tenets of Marxism while working as a clerk at the Beijing University library.¹⁸ He successfully rode out several internal power struggles within the Party, and by 1934 had risen to a position of *de facto* preeminence – a position he would maintain until his death in 1976.

One of the reasons Mao was able to dominate the CCP was the practical appeal of his application of Marxist ideology. Coming from a peasant heritage himself, Mao was keenly aware of the concerns and needs of the eighty percent of the Chinese population engaged in agriculture, and viewed the peasant question as central to the success of the Chinese revolution.¹⁹ Classical Marxism believed that the urban centers of a society represented the march of progress – particularly in the move from capitalism to socialism – and that social and ideological differences between urban and rural should be overcome through the urbanization of the countryside.²⁰ In applying Marxism to agrarian China, Mao turned the classical Marxist urban-rural relationship on its head by focusing revolutionary efforts on the peasants. Though largely involuntary in the beginning,²¹ rural support proved crucial to the Communists in their civil war against the Kuomintang (KMT).

The KMT began fleeing to Taiwan during the summer of 1949, and on October 1 of that year, the People's Republic of China (PRC) was established under the leadership of Mao and the Communist Party. During the civil war, the Communists promised distributions of land to the peasants, and after coming to power the Party immediately began to make good on that promise. Mao's adaptation of Marxism initially focused on breaking the dominance of the landlord class in the countryside and relieving rural poverty.²² The Party categorized the rural population into various classes and identified landlords as enemies of the people and the Chinese revolution. The Party confiscated landlord holdings and distributed them to the peasants, utilizing teams of students and peasant in the process. To increase the gravity of the social lessons

¹⁸ JUNE TEUFEL DREYER, CHINA'S POLITICAL SYSTEM 64 (3d ed. 2000).

¹⁹ *Id.* at 136.

²⁰ STOCKMAN, *supra* note 7, at 51.

²¹ Though Mao was inclined to include the peasants from early on, it was not until the Kuomintang abandoned the United Front against the Japanese in 1927 that the Party was forced to flee to the countryside where it earnestly began to forge ideological bonds with the Chinese peasants. *Id.*

²² *Id.* at 128.

and emphasize the power of the Party and the peasant masses, land reforms were carried out in a confrontational and violent manner.²³

Though land redistribution effectively gave private land to the Chinese peasants, the holdings it created were small and economically inefficient, creating previously non-existent social frictions between the peasants and food shortages within the cities.²⁴ To deal with these problems and begin the path toward its Marxist goals, the Party pressured peasants to collectivize their land holdings. Starting in 1951, peasants were encouraged to form mutual aid teams (MATs), small groups of peasants that assisted each other by exchanging farming tools, draft animals and labor.²⁵ Though peasants had been engaging in similar exchanges for some time on temporary bases, under state direction these arrangements were made more permanent and increased in size.²⁶ As MATs proved effective at increasing productivity, Mao and the Party took a further step towards socialism by creating lower-level agricultural producers' cooperatives (APCs). Each cooperative was composed of approximately thirty-five households, with members pooling land, animals and various farm implements.²⁷ Though farmers were permitted to retain title to their lands and small plots for private use, many were unhappy with the arrangement and put forth considerable resistance. The Party was pleased with the results, however, and in 1956 decided to enter into higher-level APCs. These new units averaged about 160 households each, and peasants that entered into them gave up title to land and all other principal means of production.²⁸ Not surprisingly, the higher-level APCs met even greater resistance from the peasants, and many farmers who had only recently realized their dreams of owning land felt betrayed by the Party.²⁹ Nonetheless, by the end of 1956 almost ninety percent of the PRC's cooperatives were of the higher-level nature.

²³ *Id.* at 129. Many landlords were publicly punished and even executed in retaliation for centuries of exploitation, and the surviving families of those landlords were branded as enemies of the revolution and forced to carry their "bad class" status.

²⁴ DREYER, *supra* note 18, at 137.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* Compensation was calculated by taking the APCs' aggregate earnings, subtracting taxes and an amount put into reserve and welfare funds for the cooperative, and allocating the remaining amount among the peasants based upon the number of work points each accumulated. Aggregate earnings included both those raised from agricultural production as well as sideline production, the latter including such activities as making and selling handicrafts and other goods. An individual's work points were calculated according to the difficulty of the task they performed and the number of days spent performing that task.

²⁸ Small lots for personal use were still permitted.

²⁹ *Id.*

3. The Great Leap Forward & The Cultural Revolution

In early 1958, Mao and the CCP had to decide whether to continue their march up “the ladder to communist paradise” or listen to the many peasants who were upset about losing title to their land.³⁰ In April 1958, the Party organized an experimental model commune in Henan province as a means of testing Mao’s agrarian Marxist ideas. Just five months later, China’s leadership declared the experiment a success and instructed that the Henan example be replicated throughout all of China. So began the Great Leap Forward.

The Great Leap Forward was Mao’s belief that, for China to achieve communism, it would have to break out of Marx’s predicted stages of history and pursue its own path.³¹ He argued that China should move directly from its feudalist state to a capitalist one, “leaping” over the stage of capitalism in the process. Doing so meant organizing society into giant communes of approximately five thousand households each, where all would contribute to the commune according the best of his or her ability and receive food and all the basic necessities of life in return. Though the Great Leap Forward marked a departure from the tenets of classical Marxism, it remained true to general Marxist principles by rejecting material incentives as stimuli for production and labor efficiency, instead focusing on need-based remuneration. For the peasants, this meant both the point system as well as the private plots were done away with. Some cadres took the direction to eliminate private property even further by stripping peasants of such personal items as wristwatches, alarm clocks and cookware.³²

The Great Leap Forward was generally an economic disaster. It failed largely because much of its focus was on industrial advancement and production, and agricultural production simply could not keep pace. This problem was exacerbated by bad weather and political

³⁰ *Id.* at 139. It is interesting to note that the CCP was faced with the decision of whether to press forward with its communist ideology or grant individual rights so early in its history.

³¹ STUART SCHRAM, CHAIRMAN MAO TALKS TO THE PEOPLE: TALKS AND LETTERS: 1956-1971 231 (1974). Assumedly, the predicted stages that Mao was referring to were those iterated by Marx, and given Marx’s view of the Asiatic mode of production, there is an argument that Marx would have agreed with Mao’s decision to depart from the traditional Marxist path.

³² DREYER, *supra* note 18, at 139. The expropriation of cookware meant that all commune residents would have to eat in communal dining halls instead of their homes; through such means the commune attempted to supplant the family – the last remaining obstacle between the Party and the individual – as the basic unit of society. Such confiscated cookware was often melted down into chunks of utterly useless metal in the infamous backyard blast furnaces established in many communes.

improprieties,³³ leading to the death of over thirty million people from human-induced famines and social chaos.³⁴ Following the failures of the Great Leap Forward, Mao withdrew from leadership for a season, during which time many of the Party's most unpopular actions were undone, including the restoration of personal private property rights. Before long, some within the Party became concerned that China was departing too far from Marxist and Maoist ideas, and there arose a split between those deemed "Experts" (*i.e.*, technocrats) and those that were "Red" (*i.e.*, Marxist purists). Mao seized the opportunity to return to power.

Intra-Party strife soon spread outside of the government and some citizens began using art and the media to subtly criticize Mao, the Great Leap Forward, and his political methods.³⁵ Mao and his wife Jiang Qing retaliated by instigating attacks against Mao's critics in the national media and calling for greater socialist education across society. Jiang found an ally in university students who began protesting against moderates within the Party, and after Mao challenged the students to start a revolution they organized themselves into militant groups, calling themselves Red Guards. The next decade, the Cultural Revolution, was rife with violence and political chaos as competing groups fought to outdo each other in their ideological zeal. Happily for the peasants, most of the fighting between Red Guard units was confined to China's urban areas, sparing the peasants of the Revolution's most horrifying aspects. Nonetheless, the impact of the Cultural Revolution on the countryside was significant.³⁶

³³ Local leadership felt obligated to report communal successes, leading to competition between commune reports and significant inflation in those reports. When the amount of taxes collected could not match the inflated numbers of the reports, Mao increased pressure on the cadres who often resorted to violent means in extracting product from the farmers. Starving peasants were often forced to feed grain to their pigs and plow under their crops while the government exported huge amount of food to the Soviet Union.

³⁴ JASPER BECKER, *HUNGRY GHOSTS: MAO'S SECRET FAMINE* 270 (1996).

³⁵ The most famous of these critiques, and the one that most upset Mao and Jiang Qing, was a play by Wu Han titled *Hai Rui Dismissed from Office*. The story was about a Ming advisor who gave good but critical advice to a bad emperor and was fired for it. Most who saw the play readily identified Hai Rui as representing Peng Dehuai, an advisor who was purged from the Party for doubting reported successes during the Great Leap Forward.

³⁶ Once Mao realized that the zeal of the Red Guards placed them beyond even his control, he defused their energy by sending them "up to the mountains and down to the countryside" (上山下乡) to "learn from the peasants." Mao still maintained his belief that the peasants would be the ones to lead China toward communism, and hoped that this program would help bridge the cultural and economic gap between China's urban and rural citizens, uniting China in its socialist direction. Though successful in calming the violent youth movements, the cultural aspects of the program generally backfired as many urban youth were horrified by the countryside's filth and poverty. Many peasants also resented the pampered and high-minded urbanites, and in the end stereotypes were reinforced as frequently as they were alleviated. See STOCKMAN, *supra* note 7, at 56.

C. *Deng's Reforms*

The Cultural Revolution ended in 1976 when Mao Zedong passed away. His successor, Hua Guofeng, a compromise between the Experts and the Reds, could never gain the full support of either side, leading to a power vacuum that Deng Xiaoping was able to exploit. Deng was every bit the pragmatist that Mao was not. Though his Four Cardinal Principles³⁷ revered Mao and the socialist path, Deng left no doubt that he considered improving the economy paramount to doctrinal adherence. In December 1978, he made famous the Four Modernizations, calling for modernizations to agriculture, industry, technology and national defense,³⁸ thus ushering in a new economic order for the Chinese people.

Deng began the modernization of China with the agricultural sector. He began by announcing that peasant teams were henceforth only required to sell specified amounts of their crops and products to the government at state-set prices; anything raised or produced above those quotas could be either consumed by the teams or sold on the free market.³⁹ In 1979, the Party introduced the Household Responsibility System (HRS), reinstating the household as the unit of accounting rather than the team. Under the HRS, individual households contracted with the collectives – the legal owners of the land – for the right to farm a certain amount of land, and in return agreed to deliver a certain portion of their crops to the collective as rent.⁴⁰ HRS contracts were originally for durations of three years, but in 1984 to encourage greater investment in agriculture, the Party extended the terms to fifteen years and allowed inheritance of the land for the duration of the contract.⁴¹

During the first few years following Deng's reforms, increases in production were modest. One reason is that the introduction of the HRS raised the problem of partitioning the use rights for the land, animals and

³⁷ Deng's Four Cardinal Principles, introduced in 1979, were:

1. the principle of upholding the socialist path;
2. the principle of upholding the people's democratic dictatorship;
3. the principle of upholding the leadership of the Communist Party of China; and
4. the principle of upholding Marxist-Leninist-Mao Zedong thought.

³⁸ DREYER, *supra* note 18, at 145. Actually, the Four Modernizations were originally introduced by Zhou Enlai during his last public speech in January 1975, though they received little fanfare at the time. The original order of the Four Modernizations as presented by Deng had industry first (with heavy industry receiving priority over light industry), and agriculture second. By March 1979 Deng had altered the order to place agriculture first.

³⁹ *Id.* In effect, the work teams were given property rights over all production above state quotas.

⁴⁰ STOCKMAN, *supra* note 7, at 137.

⁴¹ Alsén, *supra* note 15, at 57.

other equipment that had been owned collectively. Farmland proved especially difficult in this respect because, though division of land based upon acreage is a fairly straightforward process, achieving an equitable distribution of land quality is more difficult.⁴² Nonetheless, by 1981 a combination of government reassurance and improved weather ushered in a period of rapid growth in Chinese agriculture.⁴³

With agricultural reforms underway, Deng turned his attention to industry, the second of the Four Modernizations. Similar to his liberalization of agriculture, Deng's reforms to the industrial sector focused largely on altering the incentive structure and introducing market elements to make state-owned enterprises (SOEs) operated more like privately held corporations. Reforming the SOEs directly impacted the peasants in at least two significant ways. First, when the communes and brigades were dissolved as part of Deng's reforms, managerial responsibilities over their industrial functions fell into the hands of township and village governments. Many local governments chose to maintain these town and village enterprises (TVEs), and, without central planning dictating what they must produce, many successfully expanded operations. By the early 1990s, there were more than one million TVEs across rural China, accounting for nearly one fourth of the country's industrial employment.⁴⁴

The expansion of industry into the countryside has been a mixed blessing for the peasants, however, as reforms have made industrial development much more lucrative than agriculture. During the 1980s, many local leaders devoted agricultural resources to industrial development, drove local governments into bankruptcy in their attempts to fund industrial projects, imposed new kinds of taxes upon the peasantry, and used valuable farmland for industrial purposes. By 1991, although the population in the countryside had increased, the amount of arable land had decreased from 1949 amounts, creating an excess of 150 million workers.⁴⁵

By the end of Deng's reforms, the situation in the Chinese countryside was significantly better than it had been at any time under Mao. As a result of the reforms, the peasantry was again permitted to operate by households, make their own farming decisions, and operate on lands over which they held exclusive use rights. However, by 1995 the

⁴² It was not uncommon for those who felt cheated in terms of land quality to sabotage the crops of those they felt had received better. See DREYER, *supra* note 18, at 146.

⁴³ *Id.*

⁴⁴ STOCKMAN, *supra* note 7, at 138.

⁴⁵ DREYER, *supra* note 18, at 154.

per capita annual net income of rural households remained less than RMB1600⁴⁶ (less than US\$200), and the combination of shrinking amounts of arable land and excess workers severely limited the ability of the peasants to participate equally in China's economic advancement. More importantly for the purposes of this paper, Deng had greatly altered the socialist system he inherited from Mao by reintroducing capitalist principles into various facets of the economy.

III. THE LAW OF CHINA'S CURRENT RURAL PROPERTY SYSTEM

In addition to modernizing China generally, Deng Xiaoping went to great strides to establish the rule of law. For Party moderates hoping to establish social and economic order, creating a system of written laws was a means of distinguishing their system from the Cultural Revolution's lawlessness. Since then, law has gradually increased in importance to Chinese leadership, and whereas those who advocated the rule of law during the Cultural Revolution were considered counterrevolutionaries, today China considers itself a rule-of-law country.⁴⁷

This section will focus on those laws that directly impact the land use rights of China's peasants. For purposes of understanding and analyzing the law as it is recorded in the Chinese legal code, with the exception of its discussion of the Chinese constitution, this section generally will not consider the real-life application and execution of the law in Chinese society today; the actual effect the laws discussed in this section have upon the Chinese peasantry will be discussed in the next section. Dividing the law as it is written from the law as it is applied into separate sections highlights two observations concerning the rural property system: first, there are significant disparities between the written law and the actual situation in rural China; and second, those disparities generally impact the peasants negatively.

A. *The Constitution*

One of Deng's first acts in reforming the legal system was enacting a new constitution in 1978. Though this version of the

⁴⁶ STATISTICAL YEARBOOK, *supra* note 5, at 10-2.

⁴⁷ "The People's Republic of China practices ruling the country in accordance with the law[.]" 宪法 [Constitution] Art. 5 (1999).

constitution⁴⁸ looked back heavily to the 1954 Constitution, it recognized the view of Party moderates that the rule of law was necessary to put off the problems of the Cultural Revolution. Once Deng's economic reforms were established and operative, the Party drafted a new constitution, known as the 1982 Constitution,⁴⁹ which remains in effect to this date. Since its enactment, the 1982 Constitution has been amended four times,⁵⁰ most recently in 2004.

Contrary to the constitutions of most Western countries, the Constitution's effect upon the lives of Chinese citizens is minimal. Whereas Western legal systems create constitutions in order to organize the government and set limits upon state actions, a communist constitution is a tool for Party rule and intended more as an assessment of current legal and political conditions, or as a statement of policy goals.⁵¹ Due to these fundamentally different approaches, the effect of the Chinese Constitution upon both the people of China and the Chinese government is quite different than the corresponding effects of the U.S. Constitution. First, the Chinese Constitution provides no legal right of action to citizens against either the government or other individuals.⁵² Those wishing to bring a claim based upon the Constitution may only do so if the National People's Congress (NPC) has enacted a law codifying that constitutional principle. In such cases, the cause of action lies in the law, and not the Constitution. Second, those who draft the laws are not necessarily limited by the Constitution in what they may or may not legislate. Though this has the drawback of providing the Party unfettered discretion when regulating society, it also creates an opening for those wishing to reform China through the legal system.⁵³

⁴⁸ The PRC has had four constitutions: 1954, 1975, 1978 and 1982.

⁴⁹ The 1982 Constitution was adopted on December 4, 1984.

⁵⁰ Amending the constitutions requires approval by two thirds of the National People's Congress. Adopting a statute or resolution requires a simply majority approval by the same body. 宪法 [Constitution] Art. 64 (1982).

⁵¹ Alsén, *supra* note 15, at 7.

⁵² In 2001, the Supreme People's Court (SPC), China's highest court, ruled in favor of Qi Yuling, a woman whose name and identification had been used by the defendant to enroll in a university and, and cited her "basic right to receive education according to the Constitution" in their brief opinion. This decision was followed less than a month later by an editorial by Huang Songyou, Chief of the SPC's No. 1 Civil Division, arguing for greater rights under the Constitution. However, to date this is the only instance of the SPC citing the Constitution in a ruling, and all other attempts by litigants to sue under the Constitution have failed, leading one to conclude that Party leadership quickly curtailed attempts to expand the judiciary's power through the establishment of constitutional rights.

⁵³ A common strategy for reform-minded legal scholars has been to simply ignore the constitution when drafting new laws. Once the reformed legal system is in place, then the constitution becomes a "dead letter" and will either be amended to reflect the reforms, or replaced with a new constitution, perhaps more closely resembling Western constitutional practices. Alsén, *supra* note 15, at 27.

Despite the limitations of the Constitution within the Chinese legal system, there are several reasons why it is a logical place to start when analyzing Chinese law. First, the document itself states that “no law or administrative or local rules and regulations shall contravene [it].”⁵⁴ Second, even though it does not limit government actions particularly well, it is the leadership’s assessment of the country’s legal situation and a statement of its policy goals, and thus helps establish principles through which to interpret other laws. Finally, as China’s legal system develops, the role of the Constitution will likely become more like that of constitutions in countries with developed legal systems, and thus will become increasingly important.

There are a number of provisions within China’s Constitution touching upon land. One of the most basic principles established in the Constitution is in Article Six, which states that “[t]he basis of the socialist economic system of the [PRC] is socialist public ownership of the means of production, namely, ownership by the whole people and collective ownership by the working people.” As a part of the 1999 Amendment, a second paragraph was added: “During the primary stage of socialism, the State adheres to the basic economic system with the public ownership remaining dominant and diverse sectors of the economy developing side by side.” This amendment is significant because it introduces the concept of “the primary stage of capitalism,” which holds that, before true Marxist socialism can be achieved, China must endure a period of limited private ownership. Though Party leadership adamantly claims that such an adaptation remains true to socialist ideology,⁵⁵ it could also be viewed as an attempt to both allow private ownership to spur economic growth and maintain ideological consistency.⁵⁶ Nonetheless, this new paragraph is important because it explicitly permits some private ownership within the predominantly socialist economic system.

The principles of land ownership in China are established in Article Ten, which divides all land into two categories: land in the cities, and land in the rural and suburban areas. Urban land is owned by the state, and rural and suburban lands are generally owned by collectives, but may be owned by the state pursuant to law. Prior to 2004, the third paragraph stated that “[t]he State may, in the public interest, requisition

⁵⁴ 宪法 [Constitution] Art. 5 (1982). Where reference to specific articles of the Constitution or statutes is clear within the text of this section, footnotes are omitted.

⁵⁵ President Jiang Zemin, Address at the 15th National Congress of the Communist Party of China (Sep. 12, 1997) (transcript on file with the author).

⁵⁶ See Benjamin W. James & Travis Sevy, *Marxism with Chinese Characteristics* (Apr. 5, 2004) (unpublished paper, Brigham Young University) (available at <http://benjames.atspace.com/Writings/chinamarxism.htm>).

land for its use in accordance with the law.” In 2004, however, the NPC added that the state “shall make compensation for the land expropriated or requisitioned.” The fourth paragraph also guarantees the right of those with contracts for land use to transfer their contracts by lawful means.

Article Eight deals with agriculture generally, and establishes the Household Responsibility System discussed earlier. The HRS outlined in this article creates “rural collective economic organizations” to serve as the source of collective ownership in the countryside. These collectives practice the “double-tier management system” – the two tiers composed of collective and private ownership. Collective ownership, or the “cooperative economy,” includes what is generally considered the “means of production” in accordance with Article Six, and encompasses the broad categories of production, supply and marketing, credit, and consumers’ cooperatives. This cooperative economy also includes the non-agricultural goods and services furnished by the TVEs. The private ownership tier of Article Eight allows members of the collectives to farm allotted farmlands, engage in “household sideline production,” and to raise privately owned livestock.

As part of the 2004 Amendments, the government also significantly strengthened Article Thirteen, which concerns protecting private property. Whereas prior to 2004 this article only protected the “right of citizens to own [and inherit] lawfully earned income, savings, houses and other lawful property,” Chinese citizens now have an “inviolable” right to private property. Furthermore, the qualifications concerning earning the property lawfully were removed, and language guaranteeing compensation from the state whenever property is expropriated or requisitioned was added.⁵⁷ These changes were necessary in order to pass the newly enacted Property Law, which is discussed in detail in Subsection D of this section.

Other articles⁵⁸ in the Constitution indirectly affect the property rights of the Chinese peasantry, but for purposes of this paper the above survey is sufficient. As mentioned earlier, because the Chinese Constitution does not give rise to a cause of action for Chinese citizens and because its ability to limit government action is limited, the Chinese rely upon subsequent legislation to specifically guide their actions. We now consider the three laws that most directly impact the lives of Chinese peasants.

⁵⁷ During the debates prior to the 2004 Amendment, it had been proposed to require “just compensation” in the event of an expropriation or requisition, but that language was eventually left out.

⁵⁸ The PRC Constitution has 137 articles.

B. *Land Administration Law*

The Land Administration Law of the PRC⁵⁹ (LAL) was adopted on August 29, 1998 and revised in August 2004. Its stated purposes are “strengthening the administration of land, safeguarding the socialist public ownership of land, protecting and developing land resources, ensuring a rational use of and giving a real protection to cultivated land to promote sustainable development of the socialist economy.”⁶⁰ It draws upon many principles from within the Constitution, and gives legal effect to many of the clauses previously discussed.

The right of the state to expropriate and requisition land “for public interests” is established very early in the LAL.⁶¹ Similar to the Constitution, the LAL requires the state to compensate “accordingly” when it chooses to take land from individuals and non-state entities, and such takings may only be done “for public interests.”

The LAL distinguishes three different types of land in Article Four: land for farm use, land for construction use, and land unused. Each of these titles connotes a notion of exclusivity, and Article Four goes on to state that the “[l]and should be used strictly in line with the purposes of land use defined in the general plan for the utilization of the land whether by units or individuals.” In other words, one can only construct a building or structure upon land that has been designated for construction use within the general utilization plan – doing otherwise is a violation of the law. Though this may seem overly intrusive, it should be noted that in most cases the limits of Article Four are no stricter than American zoning and land use laws.⁶²

Land ownership and usage rights are addressed in Chapter Two of the LAL. Identical to the Constitution, Article Eight reiterates that urban land is owned by the state, and that rural and suburban lands are “collectively owned by peasants.” It is worth stressing that these two potential owners are exhaustive – all land in China is either owned by the state or by collectives.

⁵⁹ 中华人民共和国土地管理法 [Land Administration Law of the People's Republic of China] (promulgated by the Standing Comm. of the Nat'l People's Cong., Aug. 28, 2004, effective Jan. 1, 1999), translated in CHINALAWINFO (LEXIS) PRCLEG 3673 [hereinafter Land Administration Law].

⁶⁰ *Id.* Art. 1.

⁶¹ *Id.* Art. 2.

⁶² Patrick A. Randolph, Ownership with Chinese Characteristics: Private Property Rights and Land Reform in the PRC, Written Statement to the Congressional-Executive Commission on China Issues Roundtable (Feb. 3, 2003), available at <http://www.cecc.gov/pages/roundtables/020303/randolph.php>.

Article Fourteen begins to tie together some of the general provisions of the LAL with the principle of collective ownership. Because peasants cannot own the land individually, if they desire to use land to the exclusion of other individuals they must contract with the collectives, the land's legal owners. Article Fourteen allows the collectives to lease their land to individual peasants for a term of thirty years, and requires that such lease contracts be written down and specify the land use rights of the contracting peasants. Farmers who have entered into contracts with the collectives are limited in their use of the land to those purposes expressly allowed by the lease. Should a farmer desire to alter his land use rights during the term of contract, such adjustments must be approved by a variety of governmental bodies, including two thirds of the villagers' congress or representatives.⁶³

In Chapter Three, provincial and local governments are charged with the responsibility of developing general plans for land use.⁶⁴ Those plans must not conflict with the national economic, social and environmental goals of the central government, and must be approved by the State Council.⁶⁵ Specifically, the general plans of the provinces, autonomous regions and municipalities – the three types of governmental bodies directly under the central government – must ensure that the total amount of cultivated land subject to their plan is not reduced.⁶⁶ This requirement illustrates the priority Chinese leadership gives to preserving the country's farmland and protecting the livelihood of the peasantry. This sentiment is also demonstrated in the title of Chapter Four – “Protection of Cultivated Land.”⁶⁷ Article Thirty-One of that chapter begins: “The State protects the cultivated land and strictly controls the conversion of cultivated land into non-cultivated land.” The method used to protect cultivated lands is called “reclaiming the same amount of land occupied” and holds that when a “unit” (单位)⁶⁸ occupies cultivated land for non-agricultural construction, in addition to paying compensation, that unit must also “[reclaim] the same amount of land in the same quality as

⁶³ Thus, if a change in circumstances renders current land use unprofitable, those that have angered local officials may be stuck with a useless plot of land and rent payments.

⁶⁴ Land Administration Law, *supra* note 59, Art. 17.

⁶⁵ The State Council is China's massive administrative body, composed of numerous state agencies and headed by the president. The State Council traditionally has been very powerful in its influence over the NPC in drafting and approving legislation.

⁶⁶ Land Administration Law, *supra* note 59, Art. 18.

⁶⁷ The title of Chapter Five, the chapter dealing with land for construction, uses less ideological language: “Land for Construction Purposes.”

⁶⁸ Generally a company or some other entity focused on generating profits.

that occupied.”⁶⁹ If a unit is unable to reclaim the same amount of land occupied, they must pay a “land reclamation fee.”⁷⁰

Article Thirty-Four of the same chapter further refines the principles of protecting the countryside. Within the set of lands deemed “cultivated” (耕地) is a subset labeled “basic farmland” (基本农田). Article Thirty-Four defines basic farmland to include land used for growing grain, cotton and oil-bearing crops, land with good water conservancy, vegetable production bases, plots used for research and teaching, and other lands designated as basic farmland by the State Council. All governmental bodies directly under the central government must ensure that eighty percent of the cultivated land within their administrative areas is utilized as basic farmland.

Matters of expropriation and compensation are part of the chapter dealing with land for construction purposes. Article Forty-Five states that the State Council must approve three types of expropriation: (1) basic farmland, (2) cultivated land, other than basic farmland, exceeding thirty-five hectares, and (3) other lands exceeding seventy hectares. All other expropriations must be approved at the provincial level and submitted to the State Council for recording. Compensation fees for the expropriation of land are given in Article Forty-Seven, and include land compensation fees, resettlement fees and compensation for attachments to or green crops on the land. The calculations for these fees are based largely upon the average output value of the land, with significant discretion given to provincial authorities. As the legal owners of the land, rural collective economic organizations receive the land compensation fees and disburse them to members as they deem appropriate. The collectives, however, are required to publicize to their members the amount they receive in compensation fees and the use to which that money is put.⁷¹

C. *Law on the Contracting of Rural Land*

The Law of the PRC on the Contracting of Rural Land⁷² (CRL) was adopted on August 29, 2002 and became effective March 1 of the following year. Article One of the CRL states that it was passed for the

⁶⁹ Land Administration Law, *supra* note 59, Art. 31.

⁷⁰ Arjun Subrahmanyam, *Land Use in China: The Impact of the Economic Revolution*, CHINA L. & PRAC., Nov. 2004, at 24, 27.

⁷¹ Land Administration Law, *supra* note 59, Art. 49.

⁷² 中华人民共和国农村土地承包法 [Law of the People's Republic of China on the Contracting of Rural Land] (promulgated by the Standing Comm. of the Nat'l People's Cong., Aug. 29, 2002, effective Mar. 1, 2003), *translated in* CHINALAWINFO (LEXIS) PRCLEG 2433 [hereinafter Law on the Contracting of Rural Land].

purpose of “stabilizing and perfecting the two-level operation system,” the two levels being individual households operating under the principles of the household responsibility system and the unified management of the collectives. The same article also states its purpose to be “protecting the legal rights and interests of the parties of the contracting of rural land, so as to improve the development of agriculture and the rural economy and stabilize the rural areas.”⁷³

General principles of the CRL are established in Chapter One, and include that the “State protects the long-term stability of the relationships of the contracting of rural land,” and part of that “protection” is a prohibition on selling or purchasing rural land.⁷⁴ The CRL explicitly reiterates that the contract is by nature a lease, not a sale or purchase, and that ownership of the land itself remains with the collective.⁷⁵ Though peasants are not allowed to purchase or sell rural land, they may transfer their land use rights to other parties.⁷⁶ The CRL also forbids using rural land for any non-agricultural construction without approval and “encourages” peasants and the collectives to invest in the land to improve its production capabilities.⁷⁷

Chapter Two, entitled “Contracting by Households,” is divided into five sections, and provides the meat of the CRL. It begins by stating the rights and obligations of the “party that lets the contract” (*i.e.*, the landlord-collectives) and the “contract-undertaking party” (*i.e.*, the tenant-farmers). The main right of the collectives is “supervising the contract-undertaking party to rationally use and protect the land according to the agreed purpose of use specified in the contract.”⁷⁸ Collectives are also responsible for supplying the farmers with the “services of production, technology and information according to the agreement concluded in the contract,” and for implementing the general plans for land use of local governments through leasing to the peasants.⁷⁹ Farmers have the right to use the land and enjoy the profits and interests generated from that use, and have the “decision-making power to organize production operations and dispose [of their] products” as they deem

⁷³ It is interesting to note that Article One twice uses the word “stabilize” (稳定) when outlining its purposes, indicating the emphasis the Party puts in maintaining social order and stability, as well as a recognition that discontent among the peasantry could significant destabilize the country.

⁷⁴ Law on the Contracting of Rural Land, *supra* note 72, Art. 4.

⁷⁵ *Id.* Art. 3; *id.* Art. 4.

⁷⁶ *Id.* Art. 10.

⁷⁷ *Id.* Art. 8.

⁷⁸ *Id.* Art. 13.

⁷⁹ *Id.* Art. 14.

appropriate.⁸⁰ The CRL also gives the peasants the “right to the compensation for the contracted land if such land is lawfully requisitioned, or used for non-agricultural construction.”⁸¹ In addition to paying their rent, farmers are also obligated to protect and rationally use the land.⁸²

Section Three of Chapter Two outlines the technical details of the contracts. It echoes the LAL in requiring that the duration of lease contracts for cultivated land is thirty years.⁸³ The CRL states that the two contracting parties should enter into a written agreement, including (1) the names of the contracting parties, (2) a description of the land, (3) the duration of the contract,⁸⁴ including specific dates, (4) for what purpose the contracted land may be employed, (5) the specific rights and obligations of the contracting parties, and (6) liability for breaching the contract.⁸⁵ Article Twenty-Three states that the tenant-peasants should receive a certificate from the landlord-collective, certifying that they have the right to the land, and Article Twenty-Five provides that “[n]o state organ or the functionaries thereof may, by taking advantage of their functions and powers, interfere with the contract of rural land, modification of the contract, or rescission of the contract.”

Section Four is titled “Protection of the Right to Operate Contracted Land”, but is a source of significant controversy and abuse. Article Twenty-Seven begins with the statement that, “[w]ithin the duration of the contract, the party that lets the contract shall not readjust the contracted land.” However, the next paragraph gives an exception to this rule, and allows for readjustments if it is necessary because of special events, provided that the readjustment is approved by two thirds of the members of the village assembly. Article Twenty-Six is also cause for some debate as it limits the mobility of farmers by stating that, if they chose to relocate to the city and as a result lose their status as agricultural households,⁸⁶ their leased lands go back to the cooperatives. Although Section Five of Chapter Two grants the right of peasants to sublease their

⁸⁰ *Id.* Art. 16.

⁸¹ *Id.* Art. 16.

⁸² *Id.* Art. 17.

⁸³ *Id.* Art. 20.

⁸⁴ While Article Twenty specifies that contracts for cultivated land – the variety of land at the heart of this article – shall be for a thirty-year period, contracts over other types of rural lands can be for longer, such as grasslands (thirty to fifty years) and forest lands (thirty to seventy years).

⁸⁵ Law on the Contracting of Rural Land, *supra* note 72, Art. 21.

⁸⁶ The language in the statute is “转为非农业户口的 [transfer to non-agricultural residence].” Article Twenty-Six also clarifies that the status of the entire family (全家) must become non-agricultural before the household may lose its contract. Assumedly then, a father could leave the village and work in a nearby city without jeopardizing his family’s land use rights.

contracts to other parties, the agricultural household requirement of Article Twenty-Six severely limits the activities that subleasing peasant families can undertake. Article Twenty-Six also stipulates that, if the contract is terminated prior to the end of its term, either through a readjustment or by the peasants giving their rights back to the collectives, the peasants should receive compensation for any improvements made to the land's production capabilities.

In summary, the LAL and the RCL together form the foundation of the current legal regime governing the use of China's rural lands. All land in China is either urban or rural, and all of China's rural land is owned by the rural collective economic organizations. Under the household responsibility system, these peasant cooperatives collectively own and operate the general means of production, and also enjoy the power to enter into agreements to lease the land to individual peasant households for thirty-year periods. Those lease agreements must be made in writing, and specify the purposes for which the land may be used; rural land may never be used for non-agricultural construction. Collectives may readjust these contracts in the case of special events, and the state can expropriate or requisition land for public interests, provided that proper procedures are followed in both instances. If land is leased to a peasant household at the time of expropriation, part of that money should go to the household; otherwise, it goes to the collectives.

D. Property Law

As a part of its effort to develop a comprehensive civil code, the Chinese government passed a new Property Law⁸⁷ in March 2007. The Property Law has a unique history among Chinese legislation in that it required amendments to the Constitution,⁸⁸ its draft was submitted to the public for comment,⁸⁹ it was hotly debated among scholars and other

⁸⁷ 中华人民共和国物权法 [Property Law of the People's Republic of China] (promulgated by the Standing Comm. of the Nat'l People's Cong., Mar. 16, 2007, scheduled to take effect Oct. 1, 1997), available at <http://www.npc.gov.cn/zgrdw/common/zw.jsp?label=WXZLK&id=362678&pdm=110124> [hereinafter Property Law].

⁸⁸ Prior to the 2004 Amendments, constitutional protection of private property was weak. In 2004, Article Thirteen was changed to hold that "Citizens' lawful private property is inviolable" and the "State . . . protects the rights of citizens to private property." It was not until the changes were made that Chinese leadership could draft a property law that both protected private property rights and was constitutional.

⁸⁹ In an unusual move, upon completing its initial reading and amendments to the draft Property Law, the Standing Committee of the National People's Congress (NPCSC) published the draft and solicited comments from interested parties. Much to the surprise of the NPCSC, in forty days, a total of 11,543 opinions were collected. See *Background: Key Events in China's Marathon*

interested parties, including many who were quite critical of Party leadership,⁹⁰ and it was read seven times⁹¹ by the Standing Committee of the National People's Congress. However, similar to most laws presented to the NPC for consideration, ninety eight percent of the voting delegates elected to approve the bill.⁹²

The new Property Law, scheduled to take effect on October 1, 2007, is viewed by many within China and the Western media as deviating from traditional socialist ideology and propelling China further down the path toward a legal system patterned after capitalist notions. One of the most significant aspects of the Property Law is that it grants to state-owned, group-owned and private-owned property the same degree of legal protection.⁹³ This marks a significant departure from traditional Marxist theory, which holds that the state should control the means of production to prevent individuals from exploiting each other. Ironically, in order to finally bring the law before the NPC for a vote, the Party had to essentially shut down the debate it began when it made the draft law public, including the silencing of devout communists who strongly oppose leveling the protections given to personal and state-owned properties.⁹⁴ Such action seems to indicate that Party leadership puts economic progress and the welfare of the middle and upper classes above ideological adherence.

Though the provisions of the new Property Law establish and solidify many gains for those holding urban land use rights, the advances for China's peasants are more modest. In fact, perhaps one of the most striking aspects of the new law is that despite the large amount of controversy it has created, it does very little to change the conditions of

Property Law Legislation, PEOPLE'S DAILY ONLINE, Oct. 28, 2006, at http://english.people.com.cn/200610/28/eng20061028_315861.html.

⁹⁰ The most outspoken critic of the new law was Gong Xiantian, a Beijing University law professor, who posted an open letter on the Internet in which he argued that the draft property law fails to adequately protect state assets and, if promulgated, would severely undermine the ideological authority of the Party. His argument was based largely upon the Marxist notion that state ownership of the means of production is necessary in order to preserve equality of labor. He accused the legal experts who drafted the law of "copy[ing] capitalist civil law like slaves" while offering equal protection to "a rich man's car and a beggar man's stick."

⁹¹ This is two more reviews than any other legislation has seen. *Draft Property Law Equally Protects Private, Public Ownership*, PEOPLE'S DAILY ONLINE, Dec. 30, 2006, at http://english.people.com.cn/200612/30/eng20061230_337129.html.

⁹² 2,799 members voted for the Property Law, 52 voted against its passage, and 37 abstained from voting. See *Landmark Property Law Adopted*, CHINA DAILY, Mar. 16, 2007, at http://www.chinadaily.com.cn/bizchina/2007-03/16/content_829663.htm.

⁹³ Property Law, *supra* note 87, Art. 4.

⁹⁴ Edward Cody, *China's Lawmakers Approve Measure to Protect Private Property Rights*, WASH. POST, Mar. 17, 2007, at A10.

the peasants. Of the 247 articles contained in the new law, only one chapter consisting of eleven articles directly deals with the governing of farmland, and several of those articles simply refer readers to the Law on the Contracting of Rural Land or other laws already in effect.

Chapter Eleven is titled "The Right to Operate Contracted Land" and deals with the management of non-urban lands, especially those under the Household Responsibility System. Article 124, the first article under Chapter Eleven, reiterates that rural lands are governed by rural collective economic organizations, that the HRS forms the base of the rural economy, and endorses the two-level operation system mentioned in Article One of the CRL.⁹⁵

One highly symbolic change made by the new law is the term it uses to identify contracting farmers. Under the CRL and previous laws, contracting peasants had generally been identified simply as "the contract-undertaking party" (承包方). The new Property Law, however, uses a more respectful phrase, which can be translated as "the one holding the right to operate the contracted land" (土地承包经营权人). This new title given to the contracting peasants seems especially generous when compared with that of "the contract-letting party" (发包人), which essentially remains the same as before. Though this may be little more than semantics, the new phraseology seems to emphasize that the peasants are not merely individuals who have entered into ordinary business contracts, but rather are the holders of rights that are granted and protected by the law.

The most significant provision for Chinese peasants is in Article 126, which begins by reaffirming that the contracting period for cultivated lands is thirty years. The article continues, however, by stating that once the contracting period has been completed "the one holding the right to operate the contracted land may continue the contract according to the relevant national rules." It is not clear to which "relevant national rules" the article is alluding, as the notion that contractual rights are renewable has not previously been codified.⁹⁶ The wording of the statute is somewhat vague and leaves open the question of whether this means

⁹⁵ The two levels are the individual households operating under the principles of the household responsibility system and the unified management of the collectives.

⁹⁶ One possible reason for this codification is that, previously, it was not necessary. The Household Responsibility System was introduced in 1979, and the original term of contracts was increased from three years to fifteen years in 1984, and then to thirty years under the Land Administration Law that went into effect in 1999. With the thirtieth anniversary of the HRS approaching, a number of contracts for rural land use were set to expire starting in 2009. Apparently, rather than choosing to increase the duration of the contracting term as it had in the past, Chinese leadership has opted to encourage continued use.

that peasants may simply continue to occupy their contracted plot of land for an indefinite period of time, or whether peasants will be expected to enter into new thirty-year contracts with the collectives – future legislation will be required to resolve this uncertainty and provide the aforementioned national rules. Regardless of how these issues are resolved, the fact that, upon the expiration of a contract, peasants will not simply turn their land back over to the collectives to be distributed in a manner determined solely by the collectives increases peasant security in their contracted lands, and similarly increases the likelihood they will make long-term investments in those lands.

The rest of Chapter Eleven reiterates rules and principles that are addressed in greater detail in the LAL and CRL, and thus add little to the body of law currently governing rural lands. Many of these reiterations, however, are likely meant to remind local officials of policies that are frequently neglected. By restating that the collectives cannot make adjustments to the land or contracts already entered into⁹⁷ or take land back from contracting peasants,⁹⁸ and by reminding the collectives that they are to report their financial dealings to the rest of the members⁹⁹ and are strictly forbidden from appropriating funds from the collectives,¹⁰⁰ it is possible that Party leadership is intending to send a stern message to local leaders. This is important because it demonstrates an understanding among Chinese leadership that there are significant flaws with the current system and, if left unchecked, these flaws could have enormous ramifications on the lives of the peasants, the power of the Chinese Communist Party, and the future of China. It is to these problems we now turn our attention.

IV. THE PROBLEMS WITH CHINA'S CURRENT RURAL PROPERTY SYSTEM

Having set forth the major legal components of the current rural property system, this paper now turns its attention to the application of those laws. The fact that there are problems in the Chinese rural property system is not surprising, and given the cultural and political-ideological background discussed in Section II, many of the problems faced by today's Chinese peasantry are, if not forgivable, at least understandable.

⁹⁷ Property Law, *supra* note 87, Art. 130.

⁹⁸ *Id.* Art. 131.

⁹⁹ *Id.* Art. 62.

¹⁰⁰ *Id.* Art. 63. This article explicitly states that, if those in positions of responsibility within the collective or village appropriate funds, the peasants may seek redress from the courts.

Moreover, in all fairness to China and its leaders, by largely putting off China's communist history and permitting market forces to have a stronger pull in the agricultural sector, the changes that have taken place are responsible for bringing hundreds of millions of Chinese peasants out of poverty.¹⁰¹

However, major problems persist today, and China's peasants view cultural baggage and recent improvements as decreasingly sufficient excuses.¹⁰² As farmers see their urban counterparts accumulating new wealth at a historic pace, they increasingly want their share of China's economic miracle. Increasingly, Chinese peasants view China's rural property system as one of the major factors preventing them from improving their financial status.¹⁰³ This section will discuss the aspects of the system that inhibit the Chinese countryside from greater economic development by focusing on the ways in which the system fails to secure land use rights and undervalues the rural land.

A. *The Insecurity of Land Use Rights*

The first fundamental problem with the current rural land system is that it fails to protect sufficiently the land use rights purchased by peasants. In evaluating this concern, it is important to note the distinction between protecting land use rights and protecting land ownership. To a certain degree, there is little distinction between the two because a right to land ownership is nothing more than the permanent establishment of land use rights – the only difference is the period of time over which the right can be held. If this is so, then a system that fails to adequately protect temporary land use rights cannot be remedied by simply making those rights permanent; the systemic problems are more fundamental than the period of ownership over the usage rights. By analogy, if an individual is

¹⁰¹ See Subrahmanyam, *supra* note 70, at 24, citing Stern. Stern estimates that the number of poor Chinese peasants stood at 250 million in 1978, before Deng's reforms. By 1999, those numbers had fallen to either 34 million (using the Chinese government's poverty standard of less than approximately US\$0.70 per day) or 98 million (using the World Bank standard for poverty set at US\$1 per day). Of course, the counter to those lauding the Chinese government for their poverty-reducing policies is that, were it not for the disastrous policies of that same CCP, the 1979 numbers would be nowhere near as bad as they were.

¹⁰² According to China's Public Security Ministry, in 2005 there were 87,000 major protest incidents. These numbers are an increase from 74,000 the year before and only 11,000 ten years earlier. The majority of these protests involved workers upset about unpaid wages and farmers protesting land seizures. Roberts, *supra* note 3.

¹⁰³ According to Yu Jianrong, a leading Chinese social scientist, property rights have displaced tax burdens as the primary focus of peasant activism. See CONGRESSIONAL-EXECUTIVE COMMISSION ON CHINA, 2004 ANNUAL REPORT 94 (2004).

driving a car on an icy road, whether her car is rented, leased, or purchased is irrelevant to the risk of being on the road.

On the other hand, there is generally a direct correlation between the length of time for which use rights are valid and the security of those rights. The main difference between permanent ownership and a temporary use right is not the period of time for which the use right is enforceable, but rather the hierarchy of rights vis-à-vis other parties. When leasing their rights to lessees, owners almost always hold enough rights so as not to jeopardize their permanent ownership of the property, making the rights of the lessee subordinate to their rights as owners. Furthermore, while it is true that owners can contract to give away all their ownership rights for a period of time in exchange for valuable consideration, the reliability of those agreements are only as good as the state's ability and willingness to enforce them. Thus, for the Chinese peasantry not permitted to own the land they work, the insecurity of their land use rights stems from three concerns: (1) systemic hazards to their rights, (2) rights withheld by the owners of the land during the contracting process, and (3) problems that arise from contracting with the state itself,¹⁰⁴ the party ultimately responsible for enforcing the contract.

1. Systemic Hazards to Ownership Rights

The systemic hazards in this section refer to the icy road conditions in the analogy above. They are those conditions that threaten the ability of one owning a use right to exercise that right at any moment in time as well as into the future, regardless of whether the use right is a temporary lease or permanent ownership.

The greatest systemic hazard to the ownership rights of the Chinese peasants is the constant threat of government takings. The right of the government to expropriate or requisition land for its use is established in Article Ten of the PRC Constitution and preserved in Article Two of the Land Administration Law and Article Forty-Two of the new Property Law. The only limitation put upon the state is that such takings must be "in the public interest" (为了公共利益).¹⁰⁵ This requirement, though only slightly different in wording than the "public

¹⁰⁴ Though it is true that rural land is technically owned by peasant cooperatives and not the state (see Constitution *supra* note 54, Art. 10), in reality, peasant cooperatives are led by local government leaders acting under the color of the state. More importantly, the same government that exercises control over the peasant cooperatives also has control over the local police and judiciary.

¹⁰⁵ Constitution *supra* note 54, Art. 10

use” requirement of the U.S. Constitution,¹⁰⁶ has by no means created the protections for individual property rights found in American law. One reason is that as a civil law jurisdiction, the Chinese legal system cannot rely upon the development of case law to create a workable legal definition of the public interest. Rather, Chinese courts must wait for the legislature to codify a definition of the public interest, something they have yet to do.¹⁰⁷

A second reason China’s takings doctrine has yet to develop any real protections for its citizens lies in the lack of checks and balances within the government.¹⁰⁸ In the United States, should the government fail to provide sufficient due process to property rights owners, those whose rights have been violated may appeal the government’s decision to courts capable of invalidating the taking. The Chinese legal system has no equivalent appellate process, largely because the Chinese courts lack meaningful independence. Were a Chinese citizen to file suit against local government officials questioning whether an expropriation is truly in the public interest, in all likelihood the judge hearing the case would have been hired and paid by local officials; those same local officials sitting as defendants would have the power to promote, demote, or even fire the judge. In short, the chance of justice being administered in accordance with the law, even if there was a clear understanding of what the law of the public interest was, would be small. Further, in the event a judge was bold enough to rule against the local government, any hope of justice would also require local enforcement officers to carry out the order against the government that has the same power over them that it wields over the judiciary.

A final reason that a limitation to the government’s power to expropriate land contracted to private persons has yet to develop in China has to do with an ideological dilemma plaguing the country. At current, China can grant land use rights to individuals without significantly violating the basic Marxist tenets of public ownership over the means of production because the government technically maintains ownership. Thus, everything the government does concerning the land should by definition be for the interest of the public. However, subjecting the state to a “public interest” requirement introduces the possibility that some

¹⁰⁶ “[No] private property [may] be taken for public use, without just compensation.” U.S. CONST. Amend. V.

¹⁰⁷ Subrahmanyam, *supra* note 70, at 28. The new Property Law, though using the term “public interest” three times, including once within the context of setting the parameters of a permitted governmental taking, also fails to define the term.

¹⁰⁸ Pamela N. Phan, *Enriching the Land or the Political Elite? Lessons from China on Democratization of the Urban Renewal Process*, 14 PAC. RIM L. & POL’Y J. 607, 644 (2005).

expropriations might be in the public's disinterest. In order for the public interest clause to have any efficacy, it must first be possible for the state to take land use rights from individuals in a manner that violates the public interest, and under Marxist theory such a taking is not possible.

In addition to expropriations, another systemic hazard to rural land use rights is the failure of landowners to give proper documentation concerning use right agreements. As discussed above, Article Twenty-One of the Law on the Contracting of Rural Land states that a land use contract should be in written form and contain certain fundamental information, and Article Twenty-Three states that contracting peasants should receive a certificate identifying their right to operate contracted land from the cooperative, and that this certificate should be registered with the local government. The desired effect of requiring a written contract and certificate is to give the government certainty as to land use right ownership, and to provide peasants with a sense of security that no one else will be able to successfully claim use rights over their contracted lands. However, according to surveys conducted by the Rural Development Institute (RDI), only one out of ten Chinese farmers has even a single compliant contract or certificate.¹⁰⁹ Because of the security they provide, peasants with documented land rights are more likely to use capital for long-term investments in their land than those lacking such documentation.¹¹⁰ Were local governments to do a better job of simply complying with the requirements of the CRL, it would provide the peasants with greater security in their land, and would lead to increased long-term investments of capital in and greater production from those lands.

2. Ownership Rights Withheld During the Contracting Process

Another reason why the land use rights of China's peasants are insecure is that many of the rights that flow naturally from possessing land in fee simple are not transmitted to peasant-tenants in the contracting process. These rights may not be conveyed either because the peasant cooperatives themselves do not own the rights and such rights are not theirs to include in lease agreements, or because an act of legislation makes the transmission illegal. In addition, because the rural land use

¹⁰⁹ Zhu Keliang & Roy Prosterman, *From Land Rights to Economic Boom*, CHINA BUS. REV., July-Aug. 2006, at 44, 48, available at http://www.rdiland.org/RESEARCH/Research_Publications.html.

¹¹⁰ RDI's data suggests that in China, certificates are more effective than no documentation in providing this security, contracts are more effective than certificates, both are more effective than either alone, and compliant certificates or contracts are more effective than noncompliant ones. *Id.*

contracts are not form contracts, there is a certain amount of negotiating that takes place between the collective-owners and the peasant-tenants and, unless the transmission of a right is required by law, the collectives may withhold other rights from the peasants.

The most significant right not contracted to peasant-tenants is the right to use the land for unlimited purposes. This right is not conferred because the cooperatives themselves lack this right, and because the CRL requires the cooperatives to limit those rights contracted to the peasants. Land use rights of the collectives themselves, though on a permanent ownership basis, are restricted by the Land Administration Law to farm use.¹¹¹ Thus, the right to use contracted land for purposes other than farming is simply not the collectives' to give. The ramifications of not allowing rural lands to be used for purposes potentially more lucrative than farming are enormous; they create large disparities between the value of rural and urban lands because only holders of urban land carry the right to use the land for commercial development.¹¹² The CRL further requires that all land use contracts state the contracted land's designated use.¹¹³ Because the law already prohibits collectively owned lands from being used for non-agricultural purposes, the uses contemplated by this requirement are for specific types of agricultural projects. Article Eighteen of the CRL further requires that those agricultural projects first must be approved by at least two thirds of the members of either the village assembly or villager representatives. Thus, even within the realm of agricultural uses, the collectives do not permit the peasants to use the land for whatever purpose they deem most economically enticing.

Another right not contracted to the peasants because it is not given by the state to the collectives is the simple right to sell or purchase land. The transferability of this right is at the very heart of the difference between the Marxist view of land rights and that of that of non-socialists. Currently there are few individuals within the Chinese government advocating such a drastic reform, as it would require a massive overhaul of China's economic system. Even the most vocal advocates of reform during the debates surrounding the new Property Law rarely, if ever, entertained the idea of permitting individual land ownership in the countryside.

Other rights should be included in the list of rights not contracted to the peasants, such as the right to relocate to the city without forfeiting one's land use contract, and the right to use the land in a manner that is

¹¹¹ Land Administration Law, *supra* note 59, Art. 4.

¹¹² See the next subsection for further discussion of this important subject.

¹¹³ Law on the Contracting of Rural Land, *supra* note 72, Art. 21.

not “rational.” For purposes of this paper, however, the important issue is that all such denials of rights concerning the lands upon which peasants rely for their livelihoods serve to decrease the security of their right to use the land for maximum financial benefit.

3. Problems of Contracting with the Protector of Rights

Insecurity in land use rights also exists in the Chinese system because there is no neutral third party to enforce agreements. If contracting parties were free to violate the agreements they have entered into without any concern of reprisal, very few parties would enter into contracts. An essential part of an efficient economy is the presence of a neutral third party available to either enforce the terms of the contract or to ensure justice when a contract has been violated. In most modern societies, this role is filled by the state through the judicial process. The problem for China’s peasants, however, is that their contracts for land use rights are entered into with the state, and should the state violate its contract with the peasants their only option for justice is an appeal to the very party that violated their rights in the first place. As discussed above in the context of attempts to nullify unjust expropriations, this problem is greatly compounded for China’s farmers by the lack of any meaningful separation of powers between local governments and the judiciary.

Though there are numerous ways in which the state-run cooperatives might violate their contracts with the Chinese peasants, the greatest source of peasant insecurity derives from takings. This paper has already discussed that one significant source of peasant insecurity is that the idea of “public use” in relation to expropriations is both undefined and questionable as to its ideological legitimacy under a nominally Marxist system, and as a result taking nullifications are generally not available. But following the 2004 amendments, the Constitution also requires that the state “shall make compensation for the land expropriated or requisitioned.”¹¹⁴ Because the same party that violated the land use contract and triggered compensation in the first place is the same party that administers the giving of that compensation, it is not surprising that peasants often end up receiving significantly less compensation than they

¹¹⁴ Constitution, *supra* note 54, Art. 10 (2004). Also note that the Article Forty-Nine of the draft property law carried with it this requirement, but did so with a little more specificity: “Compensation [for an expropriation or requisition] shall be given in accordance with national regulations; if there are no governing national regulations, reasonable compensation shall be given.” (translated by the author, Chinese version available at http://chinalawinfo.com/fldt/flzt_article.asp?id={470308BC-8545-47EA-9301-D3C82FF22E44}.)

would under more market-based conditions. According to the RDI survey, in only twenty two percent of all land takings were farmers actually consulted about their compensation, and nearly two thirds of those surveyed responded that the amount of compensation promised was inadequate.¹¹⁵

Compensation for expropriations is governed by Article Forty-Seven of the LAL, which divides compensation fees into three types: compensation for land, compensation for resettlement, and compensation for attachments and young crops. To determine the land compensation fee, the average output value of the three years preceding the expropriation is multiplied by a number between six and ten, as determined by the provincial government. The resettlement fee is four to six times the three-year average output per person. The attachment and green crop compensation is set by provincial laws, which must uphold Article Twenty-Six of the CRL requiring that, if the contract ends prior to the originally contracted period, any improvements made to the production capability of the contracted land should be correspondingly compensated.

Surprisingly, Article Forty-Seven compensation requirements do not consider the actual value of the land itself when determining compensatory amounts. For example, if a plot of land does not have particularly good crop-growing soil but is nonetheless in a pristine location for non-agricultural purposes, though the land might not be able to generate large amounts of revenue when used for agriculture, it could be sold to a commercial developer for a large amount of money. Under the Article Forty-Seven regime, however, the peasant's compensation, should the land be expropriated, will be based solely on that land's agricultural production potential, which in this case would be minimal. Were the cooperative then to requisition the land by converting it from rural to urban land and lease that land to a commercial developer, it would realize substantial profits. One study found that, of the revenue generated from such takings and requisitionings, only between five and ten percent went to the farmers, while the rest ended up in government coffers and the pockets of local leaders.¹¹⁶ In areas close to major urban centers, the proportion of generated revenues that makes its way back to the peasants is far less.¹¹⁷ Further, in accordance with the implementing

¹¹⁵ Zhu & Prosterman, *supra* note 109, at 47.

¹¹⁶ Subrahmanyam, *supra* note 70, at 26.

¹¹⁷ *Id.* Li Ping of the Rural Development Institute explains: "Compensation is at most seventeen times the yield of the land (one year yield as compensation for standing crops, six to ten time the yield as compensation for loss of land, plus four to six times the yield as the resettlement subsidy). Currently, the annual yield of the best farmland, in places like the Pearl River delta where two crops

regulations of the LAL, the collectives retain the compensation fee for land loss.¹¹⁸

The general inadequacy of compensatory amounts is compounded by the fact that often not even those inadequate amounts find their way to the peasants. The RDI survey reported that, in about one-third of the cases in which cash compensation was promised, the money was never delivered.¹¹⁹ Currently, there is no clear way for peasants who have not received their compensation fees to seek redress at the local level,¹²⁰ and appeals to higher levels are difficult, expensive, and often equally futile.

Provisions contained in the new Property Law are designed to relieve some of the problems with the current compensation system. In addition to requiring compensation for land, resettlement and attachments, Article Forty-Two requires that the expropriating body arrange to cover the social security costs and ensure the livelihood of the peasant family whose land use rights have been expropriated. The same article also requires that the legal interests of the peasants be protected throughout the process. While these new requirements are no doubt meant to increase the cost of expropriating land contracted to the peasants and augment the amount of recovery given to the farmers, for the very reasons discussed in this subsection there is serious doubt whether a system incapable of paying a straightforward relocation cost will be able to ensure the livelihood of peasants whose lands were just taken.

To a large extent, the problems of adequate compensation can be explained as nothing more than the withholding of ownership rights during the contracting process. In other words, because the farming contracts are for specific land use rights only, it would not make sense for the peasants to be compensated based on a value that contemplates use rights that the peasants do not own. If the peasants are only paying for the right to grow watermelons on a certain plot of land, why should their compensation have anything to do with the land's value for building high-rise apartment buildings? Valid as this argument is, it neglects the fact that rural lands are not owned and leased to farmers by profit-minded

of grain per year are possible, is about RMB1000 per *mu*. So the total compensation would be RMB17,000. Local governments can sell the use rights to this land at such a high price as to render this amount absurd. In suburban Beijing, for example, the current land price is close to RMB one million per *mu*."

¹¹⁸ *Id.*

¹¹⁹ Zhu & Prosterman, *supra* note 109, at 47.

¹²⁰ Subrahmanyam, *supra* note 70, at 27. Further, Article Sixty-Three of the new Property Law states that, should members of collective economic organizations, village assemblies or village representatives make a decision to encroach on the legal rights of the collective, members of the collective may ask the People's Court to rescind that decision.

entities; rather, the rural land is in theory owned by the peasants for the benefit of the peasants. Should a land use contract be breached so that the right to use the land can be contracted to a party willing to pay significantly more, the peasants, and not the state, should be the group that benefits from the extra revenue.

B. The Undervaluation of Rural Land

The second primary problem with the Chinese rural land system is that it undervalues rural land. This undervaluation mainly results from the combined operation of two different systems. The first is China's hybrid system, which has reference to the fact that socialist public ownership remains for land, while private individuals may enjoy private ownership over other means of production.¹²¹ The second is the dualist system, which establishes large differences in the ways in which rural and urban lands can be utilized. The effect of these two systems is the severe undervaluation of rural land, a problem that keeps the peasants dependent upon and at the will of the state while also excluding them from China's miraculous economic growth.

1. The Hybrid System

One of the fundamental tenets of Marxism is that the state should own the means of production in order to prevent capitalist individuals from using these means to exploit the masses. During periods in which Marxism has gained momentum, one of the first private rights to be surrendered was the right of private property, especially if that property is considered a means of production. Article Six of China's Constitution affirms that China operates a socialist economic system, which it defines as "socialist public ownership of the means of production." But as a result of the 1999 Amendment, "diverse sectors of the economy" – meaning private ownership over some means of production – operate "side by side" the socialist system.

Even during the height of the Great Leap Forward when some communes attempted to socialize items such as cooking utensils, no society of significance has attempted to socialize *all* personal property; doing so would create enormous economic inefficiencies and it is hard to

¹²¹ Eva Pils, "So Who Got Rich First?" The Current Property Law Debate in China 22 (Nov. 2006) (unpublished paper, on file with the author).

imagine any society remaining economically viable for long.¹²² The question in building a socialist society is where to draw the line between those items that individuals will be permitted to maintain some personal property rights over, and those items that are so vital to economic production as to make private ownership of them forbidden.

When Deng Xiaoping and other reformers came to power in the late 1970s, they recognized that forbidding ownership over all means of production was neither efficient nor practical, and they slowly began to loosen private ownership restrictions. As the Chinese economy has grown in size, breadth and sophistication, ownership rights over means of production have also expanded. Today, the owner of a private factory owns the property rights to the building, the machines, equipment and the raw materials utilized in the manufacturing process. The only thing that the factory owner does not own is the land, which, as non-agricultural land, is owned by the state. To this factory owner, the fact that he does not own his land is of little significance. Because he can lease the land for a period of forty to seventy years,¹²³ he need not be concerned that the lease will be too short for him to recover his investment. Even more significantly, the ability of the factory to be profitable has very little to do with the tract of land he leases – land for construction purposes is generally fungible. Further, should the factory owner decide to shift production from one item to another, there will likely be nothing in his lease agreement preventing him from doing so. Should the owner decide to get out of manufacturing altogether in a few years, his lease likely will not prevent him from transferring his rights to use the property to most other parties, even those not wishing to engage in the same business as him. In short, the factory owner's ability to exploit his capital in a way that maximizes his economic gain is not inhibited by the fact that he cannot own land. He has sufficient ownership over the capital he needs to compete in the free market.

For Chinese peasants, however, the rural land system significantly limits their economic potential. Unlike manufacturers, land is the single most important means of production for farmers because, if they have no

¹²² Such a society would certainly fall prey to the so-called Tragedy of the Commons. See Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

¹²³ Time limits for urban land use rights differ according to the purpose of the use, including forty years for general commercial purposes, fifty years for industrial purposes and seventy years for residential purposes. See 中华人民共和国城镇国有土地使用权出让和转让暂行条例 [Interim Regulations of the People's Republic of China Concerning the Assignment and Transfer of the Right to the Use of State-owned Land in the Urban Areas], Art. 12 (promulgated by the State Council and effective May 19, 1990), available at <http://english.peopledaily.com.cn/data/laws/detail.php?id=444>.

land, they have absolutely no way to earn an income. To farmers, land is not nearly as fungible as it is to those engaged in other industries, because successful farming requires both good soil and proximity to water. Even if moving costs are properly compensated, a farmer who is forced to move from a plot of cultivated land to a plot the exact size but of a lower quality gives up significantly more than his industrial counterpart. Further, because land use is contracted for a specific purpose, Chinese farmers have significantly less flexibility adjusting to economic shifts. Finally, should a peasant farmer desire to give up his land use rights and transfer them to another individual, the range of individuals to which they can transfer their specific rights is limited to those willing to engage in the exact same work they are leaving behind, eliminating all potential to capture anything above the appreciation of their use rights.

In conclusion, the hybrid system has the effect of limiting the Chinese peasants in their economic potential, thus excluding them from the enormous growth that China's marketization has brought about.¹²⁴ While other sectors of the Chinese economy enjoy the privatization of the means of production key to their business operations, the peasants are severely hindered because land, the means of production most vital to their operations, remains publicly owned.

2. The Dualist System

The dualist system creates significant distinctions in the manner in which urban and rural lands can be used. As elaborated upon in Section III of this paper, Chinese law grants ownership of urban land to the state while rural land is owned by peasant cooperatives.¹²⁵ Further, the LAL draws the distinction between "land for farm use" and "land for construction use."¹²⁶ Article Forty-Three of the LAL ties these two bifurcations together by stating that, with the exception of constructing peasant houses and township enterprises, only land owned by the state may be used for the purposes of construction. Given that China is the most populous country in the history of the world, a policy prohibiting the use of arable land for construction seems like common sense. However, the way in which this distinction plays out in the lives of China's peasantry, especially those near the country's urban centers, is especially unfavorable to their economic interests.

¹²⁴ Phan, *supra* note 108, at 636.

¹²⁵ Constitution, *supra* note 54, Art. 10.

¹²⁶ *Id.* Art. 4

The problems of the dualist system stem from the fact that, in a system where individuals cannot purchase land outright but can only purchase land use rights, the value of that land will be determined largely by the use rights available for that land. This differs significantly from an open real estate market where, so long as the purchaser adheres to local zoning restrictions and covenants that might run with the land, he or she is generally free to use the purchased land for whatever purpose they consider economically practical. As a result, in an open market, land use restrictions generally have little impact upon the land's value. Under China's dualist system, however, use rights are paramount, and two otherwise equivalent tracts of land might have very different values based upon their available use rights.

Not surprisingly then, land that is owned by the peasant cooperatives and thus permitted to be used for agricultural purposes only is less valuable than it would be if that land were owned by the state and non-agricultural construction was permitted. As a result, any time land is requisitioned (*i.e.*, converted from rural to urban land), significant value is created. For example, the best farmland currently yields approximately RMB1000 per *mu*¹²⁷ per year, meaning that the actual value of a land use right to engage in agricultural activity on that *mu* for thirty years would be a figure less than RMB30,000.¹²⁸ However, the current price of a seventy-year non-agricultural land use right in suburban Beijing is nearly RMB one million per *mu*.¹²⁹ If one figures the value of that same tract of agricultural land for the seventy-year period to be approximately RMB50,000,¹³⁰ then the simple act of removing the restriction on non-agricultural construction increases the value of the land twenty-fold. Given the extremely divergent values of land created by the dualist system, the important remaining questions are (1) when should a requisition take place and who should make that determination, and (2) who should receive the enormous increase in value created by the requisition?

The question of when a requisition should take place is answered by the PRC Constitution, and repeated in the Land Administration Law,

¹²⁷ One *mu* (亩) = 0.000257 square miles, or 7170 square feet (approximately the size of the grassy part of a baseball diamond's infield).

¹²⁸ The value of the land cannot be RMB30,000 because if it was no one would agree to that amount given that other costs, such as equipment, fertilizer and labor, are also required in order to yield RMB1000 each year.

¹²⁹ Subrahmanyam, *supra* note 70, at 26.

¹³⁰ This is a somewhat generous estimate, given that the maximum production over that period of time would be RMB70,000, and the cost of RMB50,000 does not include the cost of such other means of production as seeds, water supply, draft animals or machinery.

as whenever the “public interest” dictates. Because there is currently no useful definition of what constitutes the public interest, the Chinese peasants are essentially at the mercy of local officials in terms of subjecting their contracted lands to requisitions. Local officials are somewhat constrained by the law in that the total amount of amount of land utilized as basic farmland within a provincial administrative area cannot dip below eighty percent,¹³¹ certain expropriations must be approved by the State Council,¹³² and, under the principle of reclaiming the same amount of land occupied, those that occupy requisitioned land are responsible for creating the same amount of farmland as was requisitioned.¹³³ However, though some protections exist, enforcement remains a significant difficulty.¹³⁴ In the end, requisitions often take place whenever local officials decide they should. As the value of urban land continues to increase, and as local authorities attempt to compensate for the decrease in funding caused by recent efforts to decrease the tax burdens upon the peasantry, instances of requisitions have increased significantly.¹³⁵

This leads to the question of who should receive the large increase in value resulting from the requisitionings. Under the current Chinese rural land system, the increase in value is almost entirely enjoyed by local government and their officials. As discussed earlier, the LAL establishes compensation for the taking of rural land based solely upon the output value of the land,¹³⁶ a calculation which is far below the amount of money the state will receive from selling the rights to non-agricultural developers. Local officials need only pay compensation to the peasant collective landowners and sell the rights to developers to realize a handsome profit. Under general principles of property law, this result seems to make sense because it was the state that caused the increase in value by deciding to requisition the land. The other parties involved in the takings transaction, namely the peasant cooperatives and the peasant households, were powerless to create this value. If the goal of compensation is to place the original owner whose rights have been violated in the same pecuniary position that they would have been in had the requisition not occurred,

¹³¹ Land Administration Law, *supra* note 59, Art. 34.

¹³² *Id.* Art. 45.

¹³³ *Id.* Art. 31.

¹³⁴ Subrahmanyam, *supra* note 70, at 25.

¹³⁵ Over the past decade, the frequency of governmental taking of farmland for non-agricultural use has increased more than fifteen-fold. Zhu & Prosterman, *supra* note 109, at 47.

¹³⁶ Land Administration Law, *supra* note 59, Art. 47.

there should be nothing wrong with the state maintaining the lion's share of the increase in value.

The more fundamental question is whether the goal of compensation should be to simply put all parties in the position they would be in but for the taking. If the compensation paid by the state were based not upon the production output of the requisitioned land, but upon the newly-created value of the land following the requisition, in effect giving the increase in value created by the requisitioning to the peasant collectives, it would serve several purposes. First, it would significantly help to alleviate the current disparities in wealth between the urban and rural populations. Since the country has expressed repeatedly that decreasing the rural-urban wealth disparity is a top priority, it seems counterproductive to give the creation of significant amounts of new wealth to urban governments. Were this new wealth to go to the collectives to be distributed among the peasants, it would improve the economic situation of many. But rather than alleviating the current problems, the present system exacerbates them.

Second, if the increase in value went to the peasants, it would serve as a mechanism for enforcing the public interest requirement of the new Property Law, the LAL and the Constitution. One of the troubles of the current system is that the central authorities are having a difficult time policing local governments and enforcing the limitations of China's takings law. This is because currently local governments stand to make enormous gains from requisitioning rural lands, and thus whatever legal risks they encounter by violating takings laws are mitigated by the potential profits. If this upside was largely eliminated and profits given instead to the peasant collectives, the risks of violating the law would prove much more significant to local officials contemplating a taking. At that point, contemplation of whether a requisition truly was in the public interest would become paramount to potential economic gains.

Third, if the new wealth created by requisitions were given to the peasant collectives, it would bring stability to a countryside about which China's leaders are increasingly concerned. A significant cause of the protests that have spread across China's countryside in recent years is anger over requisitions and the manner in which they allow corrupt officials to become rich while depriving their peasant constituents of the land they need to eke out a living. If the newly created wealth was given to the peasant collectives instead of local governments, this would get rid of the impetus for a large portion of the strife between local peasants and their governments.

However, the proposal to give the created wealth to the peasant collectives will only be effective in easing the unrest of the peasants if the

peasants themselves are given greater control over the cooperatives. At present, the operation of the collectives is much more aligned with the structure of a state-owned enterprise than an actual co-op, and much of the income received from the cooperatives ends up in the coffers of local governments. For reforms to the requisitioning process to be effective in improving the lives of the peasants, it is vital that the interests of the collectives and the peasants be better aligned. The best way to coordinate this alignment is by increasing the ownership rights and the voices of individual peasant households in the cooperatives.

V. CONCLUSION

As has been demonstrated by the history, laws and analysis presented in this paper, the current rural property system presents China with a number of conflicts. The first conflict is the fundamental disagreement between the two ideological camps competing for the future of China. On the one hand are those desiring to embrace the ideas of capitalism, the free exchange of goods and services within the country, and the corresponding increase in personal property rights, including rights over real property. These reformers see that the vast majority of the world around them has embraced capitalism and that China's reluctance to do so threatens to keep her from reaching her full potential. Opposing these reformers are those who want to preserve China's socialist tradition and the gains in economic equality made since 1949, including collective ownership over the means of production. The traditionalists see the exploitation of the working class and the great economic injustices related to capitalist growth, and feel that China should be leery of any wholesale embrace of capitalism. They are also concerned that the further China goes down the capitalist road, the harder it will become to justify the complete political control exercised by the Chinese Communist Party at the present.

The second conflict is between the local and central governments. It is one thing to draft a law that sufficiently allocates risks and responsibilities between affected parties with the amount of threat necessary to see that the law is followed. But it is one thing more to have the law carried out by local officials in the manner in which it was drafted. The unfortunate result of this conflict for Chinese peasants is that it leaves them exposed to the whims of local leaders who may chose to follow either the national regulations to achieve the results flowing therefrom, or to take a different path of their own choosing. For the peasants, adherence to laws and regulations is often a game between them and their local leaders, played out as "heads I win, tails you lose." When the

effects of China's quasi-market economy result in aligning the interests of local leaders and business against the farmers, their situation is especially grim. As Chinese society and economy become increasingly sophisticated, the amount of discretion delegated to local officials is only likely to increase.

A third conflict lies between efficiency and practicality. Such conflicts are common in China, and arise when economically efficient market-based policies would lead to otherwise unfavorable results. For example, if China were to grant property rights over the land to the peasants, it is reasonable to expect that this would result in an enormous transfer of land from farmers to developers who are willing to pay much more for the land than the peasantry could hope to recover from their farming operations. Though this would be efficient by allocating scarce resources to those who can put them to the best economic use, until market equilibrium is reached, China would see a dangerous reduction in its crop production. This dilemma poses significant problems for China and its quest to become a major force in the global economy as inefficiencies drag on the economy and prevent maximum growth. But at the same time, China is not a profit-driven company focused on its bottom line, but a country that should have as its focus the general well-being of its people. As China grows and becomes more complex, future conflicts between efficiency and practicality will likely prove increasingly difficult to spot and even harder to resolve.

While it is true that all countries and societies face internal conflicts that must be solved on a regular basis, the majority of those decisions, while significant to those directly affected, are generally not the type of decisions that could alter a country's course. China, however, perhaps more than any other country in the world today, is at a crossroads in its history, and the manner in which China solves the conflicts and issues addressed in this paper, along with the myriad of others it currently faces, will determine China's future. If she chooses wisely, there is little doubt that China has the potential to become a political, economic and military superpower. Poor decisions, however, could derail the country's progress and put the welfare of one-fifth of the world's population in jeopardy. With the majority of the country's population engaged in agriculture, China's current rural property regime must be improved so as to give security to the peasants in their land rights and to maintain the value of rural lands.

