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Pamela N. Phan

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ENRICHING THE LAND OR THE POLITICAL ELITE? LESSONS FROM CHINA ON DEMOCRATIZATION OF THE URBAN RENEWAL PROCESS

Pamela N. Phan[†]

Abstract: As China in the twenty-first century rushes ahead in its quest to become more developed and cosmopolitan, the poor are increasingly cast as outsiders to the nation's new social contract and urban development politics. Nowhere is the contrast between China's urban rich and rural poor as stark as on the land itself. In cities throughout China, land continues to be taken away from the collective and placed into the hands of an increasingly rich and powerful elite. As a new society built upon urban poverty, exclusion, and inequality emerges, and the gap between rich and poor widens, the new political order must wrestle with questions of how to balance the interests of government regulators, business elite and the average citizen, while minimizing social tensions arising over land disputes. Current reforms ignore the real issues—which include the need for the governing regime to define and recognize the property rights of the individual. By clinging to the political rhetoric of demolition and renewal in the “public interest,” paving the way for corrupt officials and land-hungry developers to render thousands homeless and landless, China's government continues to operate urban renewal as a “top-down” process. This Article focuses on the current state of economic development in China, and the crisis in governance that it has created, questioning whether increased urbanization necessarily signifies progress in an environment in which the voices of a significant fraction of the population are left out.

I. INTRODUCTION

In late February 2003, residents of an economic and technological development zone in Wuhan, China, received notification from the local street committee that they would be evicted and their homes demolished.¹ By September 2003, failing to reach an agreement on the resettlement and compensation terms, the local residents' committee proceeded with forced

[†] Yale-China Legal Education Fellow and Visiting Scholar at Wuhan University School of Law, 2004-2005, and Northwest University of Politics and Law, 2005. The Yale-China Association (“Yale-China”) is a nonprofit, nongovernmental organization that contributes to the development of education in and about China. While closely affiliated with the Yale community, Yale-China is separately incorporated and administered from Yale University. All observations and analyses are the author's own and by no means reflect the views of Yale-China or its affiliates. The inspiration for this Article grew out of the author's work and assistance handling cases through the general legal clinic at Wuhan University and the public interest legal clinic at Northwest University. The content has benefited greatly from discussions with faculty and students at both institutions, who dedicated their time and interest to the human rights and property courses taught by the author.

¹ See Xingzheng Qisuzhuang [Administrative Bill of Complaint] (Apr. 26, 2004) (on file with Journal) [hereinafter Bill of Complaint]. For reasons of confidentiality, details related to client and property location names have been omitted.

eviction, cutting off such basic necessities as water and electricity.² Two months later, the street committee, together with the city planning and land administration bureau, arrived onsite to forcibly and violently remove all residents, leaving dozens of families homeless, landless and without compensation for their seized property.³ The residents took their complaints to the central government in Beijing, but were placed under house arrest and sent back to Wuhan, devoid of compensation or any resolution at all.⁴

This is a story that has replayed itself over and over again, in numerous and varied regions all throughout the People's Republic of China ("China" or "PRC"). As China continues to grow economically at an average annual rate of about ten percent, and rapid urbanization is leading to larger cities,⁵ multiplying development zones⁶ and more opulent commercial malls and multiplexes, the poor are increasingly cast as outsiders to the nation's new social contract and urban development politics.

Nowhere is the contrast between China's urban rich and rural poor as stark as on the land itself. In city after city, local government has asserted its power of eminent domain to take land away from the common collective and place it into the hands of an increasingly rich and powerful elite.⁷ The result has been the emergence of a new society built upon urban poverty, exclusion and inequality. The challenge faced by the Chinese leadership in this new society is to appropriately balance the interests of government regulators, business elite and the average citizen, while minimizing social tensions arising over land disputes. The more opulent the house that China builds, the more imperative the need for its leadership to focus on laying this crucial foundation.

China is certainly not the only country in the twenty-first century to have bulldozed its way toward becoming ever more developed and

² See *id.*

³ See *id.*

⁴ See Wuhan, Falü Zhensuo [Notes of the Author] (Apr. 8, 2004) (on file with *Journal*) (taken during a meeting with clients at Wuhan University Center for Protection of Rights of Disadvantaged Citizens in Wuhan, China) [hereinafter Spring Notes].

⁵ See Tingwei Zhang, *Urban Development and a Socialist Pro-Growth Coalition in Shanghai*, 37 URBAN AFFAIRS REV. 475, 480-81 (2002) [hereinafter Zhang, *Urban Development*] (showing an increase in the urban population to account for a total thirty-four percent of the overall population, as well as an increase in the number of cities, from 381 in 1987 to 668 in 1998).

⁶ The Ministry of Land and Resources ("MLR") quoted a total of 6866 development zones in China by the end of July 2004. See Zhao Xiaojian, *New Policy Tackles Land Management Bottleneck*, available at http://www.caijing.com.cn/english/2004/041101/041101new_policy.htm (last visited June 8, 2005) [hereinafter *New Policy*]. These cities, or sections of cities, grew out of the Chinese central government's attempt to turn what used to be countryside and farmland into areas for urban and industrial growth.

⁷ See, e.g., discussion *infra* Part III (providing several such case studies).

cosmopolitan.⁸ The story of forced eviction and seizure of land has been scripted into the development of many urban, cosmopolitan societies worldwide, including that of the United States.⁹ In fact, currently pending before the U.S. Supreme Court is a case in which the residents of the Fort Trumbull neighborhood of New London, Connecticut—much like the Wuhan residents—are being evicted in part to make way for a high-technology research and development project.¹⁰ In October 2000, after months of unsuccessful negotiations with a number of the residents, the city council authorized the responsible development corporation to use the power of eminent domain to acquire their properties.¹¹ In November 2000, the development corporation filed condemnation proceedings, and the residents have fought back by bringing an action to challenge the condemnations.¹²

Cities all over the world, despite being at different stages of development, are in this way building and rebuilding themselves in the new millennium. In focusing on China's current state of economic development and the crisis in governance that has been created, this Article questions whether increased urbanization necessarily signifies progress in an environment in which the voices of a significant fraction of the population are left out. It proposes that land is a site of contestation over economic, social and cultural rights—not only in China, but everywhere from the United States to the nations of Africa. In doing so, it seeks to emphasize that each and every nation, whether developing or developed, has much to learn from the battles being fought over land elsewhere.

Part II of this Article provides some background on the existing Chinese property regime, including Chinese legal jurisprudence on the notion of property rights and from where those rights are derived. After examining the administrative maze and complex cast of characters that plague the governing system, this Article moves on in Part III to evaluate China's approach to reform of its property rights infrastructure. This is

⁸ As recently as late last year, in the already "developed" nation of France, the redesign of public space and remaking of the old Les Halles district in Paris similarly brought to light the fragility of the urban renewal process. See generally Eric Pape, *France: Paris Rising*, NEWSWEEK, Aug. 16, 2004, available at <http://www.msnbc.msn.com/id/5635502/site/newsweek/> (last visited June 8, 2005). Multiple competing interests hung in the balance, and Parisian Mayor Bertrand Delanoë was careful to build his ambitions for the city on the grassroots support and consensus he sought out in advance. See *id.*

⁹ Architectural history and urban planning scholars have noted the inequalities in the U.S. urban renewal process during the 1950s and 1960s. For a comparative analysis, see generally Yan Zhang & Ke Fang, *Is History Repeating Itself? From Urban Renewal in the United States to Inner-City Redevelopment in China*, 23 J. PLANNING EDUC. & RESEARCH 286 (2004).

¹⁰ See *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004), cert. granted, 125 S. Ct. 27 (U.S. Sept. 28, 2004) (No. 04-108).

¹¹ *Id.* at 510-11.

¹² *Id.* at 511.

accomplished through an examination of three separate studies of conflict and crisis over land—and the rush of reform measures meant to deal with each. In Part IV, this Article then argues that current reforms ignore the real issues—which include the need for the governing regime to define and recognize the property rights of the individual. By clinging to the political rhetoric of demolition and renewal in the “public interest,” thereby paving the way for corrupt government officials and land-hungry developers to render thousands homeless and landless, China’s government continues to operate urban renewal as a “top-down” process. The result has been a wave of mass riots and social unrest that have at their root dissatisfaction with the very process.

As tensions escalate and the governing leadership searches for “quick fixes” to the surge of protests and grievances over land seizures and forced evictions, there is an urgent need for a new property rights regime built on the potential for democratization of China’s urban renewal process. Part V proposes that true reform should focus less on outcome-based solutions and more on organizational-based solutions, helping to establish a process that is more transparent, consistent, and equitably applied. Ultimately, this Article hopes to propose a new model of governance that is more than just a “quick fix” and helps to reaffirm what is truly meant by the “public interest” and participatory democracy.

II. INTRODUCTION TO THE CHINESE PROPERTY REGIME

To understand the context within which conflict over land has erupted in China, it is important to understand the ways in which land has traditionally been valued and land ownership regarded. In 2004, the Chinese government passed amendments to the Constitution introducing not only newly established property rights, but also the protection of human rights and social security rights.¹³ Upon initial impression, such legal reform might be read to afford a greater guarantee of protection to the poor and disadvantaged in society. Read against the backdrop of property rights jurisprudence under the Chinese Communist Party (the “Party” or “CCP”), however, it leaves unanswered the question whether these rights can be realistically enforced in a manner consistent with the governing ideology.

¹³ See, e.g., ZHONGHUA RENMIN GONGHEGUO XIANFA XIUZHENGAN [AMENDMENTS TO THE PRC CONSTITUTION] art. 10 (providing for compensation in the event that land is expropriated), art. 13 (protecting private property, but conditioning the right of citizens to own and inherit private property on applicable law and confirming that private property may be expropriated by the State), art. 14 (adding specific language endorsing the concept that the State should establish a social security system), and art. 33 (adding the general concept that the state protects human rights) (2004).

A. *The Significance of Land and Land Use Rights*

1. *Whose Land Is It Anyway? State as Landowner vs. State as Agent*

In a society such as China's, built upon Marxist doctrine,¹⁴ the means of production must be controlled by the State in order for society as a whole to achieve the ideals of communism.¹⁵ The Marxist vision is that the communist party, which functions as the vanguard of the working class, will help lead the masses toward a socialist society in which private ownership of the means of production is abolished and the economically and politically dominant thus cease to oppress the working majority.¹⁶ State control over land, which is not only a factor of production, but also a critical natural resource, is particularly crucial to the success of this socialist revolution.¹⁷ This is the case because "[n]othing is . . . so closely connected with the word property as land, especially so in China, with its large peasant population."¹⁸

Original Marxist doctrine holds that land is not a commodity and that it has no exchange value because it exists naturally and is not the product of labor.¹⁹ In keeping with such doctrine, the Chinese government initially maintained rigid control over land and avoided assuming the status of landowner by leasing it out.²⁰ Land policy established that the State and the Party would instead act as guardians over the general populace, holding the means of production in trust, on behalf of the masses, and protecting them from exploitation by the landowning class.²¹

The Chinese leadership eventually reinterpreted Marx's writings during the 1980s, recognizing that urban land can in fact have exchange value arising from transformation of its use in an urban economy.²² As long as land had value, the State could grant rights in exchange for payment equal to the value of the transformed land. Even though such a reading of Marx commodified use rights in the land, it did not commodify the land

¹⁴ See ZHONGHUA RENMIN GONGHEGUO XIANFA [PRC CONSTITUTION] prmb., para. 7 (1982) (incorporating Marxism-Leninism as one of the nation's guiding ideologies) [hereinafter XIANFA].

¹⁵ See Jonas Alsen, *An Introduction to Chinese Property Law*, 20 MD. J. INT'L L. & TRADE 1, 2 (1996).

¹⁶ ALBERT H.Y. CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 6 (3d. ed. 2004).

¹⁷ See Alsen, *supra* note 15, at 8.

¹⁸ See *id.* at 18.

¹⁹ See Mark T. Kremzner, *Managing Urban Land in China: The Emerging Legal Framework and its Role in Development*, 7 PAC. RIM L. & POL'Y J. 611, 622 (1998).

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 622-623 (citing Qi Mingshen, *Dui Chengshi Tudi Shangpin De Zhiyi* [Doubts Concerning Urban Land as a Commodity], 61 JIANGNAN LUNTAN [JIANGNAN TRIBUNE] 4 (1985)).

itself and ensured that land ownership technically remained with the people—thus keeping true to the tenets of Marxist ideology.

One Vietnamese legal scholar has noted that land use rights in this way “rescue[d] millions of Chinese and Vietnamese from hunger,” while “enabl[ing] private property right[s] [in] land, without political and social unrest as it may follow in implementing the privatization program advised . . . in Russia.”²³ Chinese arguments against establishment of a more delineated property regime have similarly rested on the failed experiences of the post-Soviet economies.²⁴ In countries such as China and Vietnam, “where the doctrine [of] ‘ownership of the whole people’ cannot disappear easily,”²⁵ scholars maintain that the contracting out of private property rights “may be one of the most efficient ways to diversify ownership in [the] means of production”²⁶—in a way that allows for smoother transition from planned to market economy than was seen in the former Soviet states.

2. *What Lies Beneath: Property Protection under Chinese Law*

When the Party, led by Deng Xiaoping, adopted the 1982 Constitution in order to lay a framework for modernization, it chose to explicitly emphasize the goals of production and economic development.²⁷ The 1982 Constitution has thus been labeled a “programmatically Constitution,” because it defines a mission for the State and its citizens through which China may be transformed into a strong and prosperous, culturally advanced, democratic socialist nation.²⁸ The development of each city is expected to conform to a long-term comprehensive physical plan²⁹ that comports with the

²³ See Nghia D. Pham, *The Long March Toward Private Property Right in Vietnam: A Legal, Cultural and Political Approach* 10 (2004) (unpublished manuscript, on file with *Pacific Rim Law & Policy Journal*).

²⁴ CONGRESSIONAL-EXECUTIVE COMMISSION ON CHINA, ROUNDTABLE ON PROPERTY SEIZURES IN CHINA: POLITICS, LAW, AND PROTEST (June 21, 2004) (statement of Professor Jacque deLisle, University of Pennsylvania Law School) [hereinafter deLisle].

²⁵ See Pham, *supra* note 23, at 23.

²⁶ *Id.*

²⁷ See Alsen, *supra* note 15, at 5. See also OUTLINES OF THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA 6-7 (Zhang Fusen & Hu Zejun eds., 2004) (noting that the 1982 Constitution was designed “[t]o adapt to the tremendous changes of the country in its political, economic, social and cultural life brought about by the reform and opening-up policy”); CHEN, *supra* note 16, at 36 (citing to the focus at the National Conference on Political-Legal Work in July 1982 on contributing to economic development and socialist modernization).

²⁸ See Alsen, *supra* note 15, at 4.

²⁹ Municipal governments are required to formulate two types of urban plans that “scientifically forecast local needs.” See Kremzner, *supra* note 19, at 644. The first is the “comprehensive city plan” (*chengshi zongti guihua*), typically set for ten to twenty years and addressing zoning, land use layout,

production and economic development aims established by the central government.³⁰

True modernization, however, posits that free markets are necessary to optimize efficiency in resource allocation, while governments tend only to interfere with this process.³¹ China's challenge has been to reconcile this commonly held vision of "modernization" with its own belief that developing states need to "intervene more strenuously in order to ensure rapid industrialization and catch up with the advanced economies."³² State intervention remains pervasive in China, particularly given the successful models established by Singapore and Hong Kong (in which land use was closely controlled to guide urban growth), as well as Taiwan (in which the government has actively requisitioned and encouraged transformation of land from agricultural to industrial purposes).³³

The notion of property rights thus exists in Chapter 1 of the Chinese Constitution,³⁴ but only as a part of the nation's general governing principles.³⁵ In that chapter, it remains clear that the State may "in the public interest" (*weile gonggong liyi*) take over land for use in accordance with law.³⁶ This provision was amended only last year to incorporate language echoing the Fifth Amendment of the U.S. Constitution and provide for compensation in the event of a taking.³⁷ However, Article 51 of Chapter 2 imposes the obligation not to infringe upon the interests of the State, society or collective, or the rights of other citizens, in the exercise of

construction standards, transportation systems and green space. *Id.* The second is a "detailed city plan" (*chengshi xiangxi guihua*), re-established every several years and addressing building heights, density limits, construction standards and the other particulars of development projects. *Id.* The comprehensive city plan must be coordinated with several other land management plans approved by higher-level authorities, including the national land plan (*guotu guihua*), regional plan (*quyu*), waterway and lowland plan (*jianghe liuyu guihua*) and the comprehensive land utilization plan (*tudi liyong zongti guihua*, also discussed *infra* Part III). See Zhonghua Renmin Gongheguo Chengshi Guihuafa [PRC Urban Planning Law] (promulgated Dec. 26, 1989, effective Apr. 1, 1990), art. 7, available at <http://www.law110.com/law/country/1007.htm> (last visited June 8, 2005). Once these high-level authorities have approved the comprehensive city plan, and the municipal people's government has approved the detailed city plan, all land within the municipality must be used accordingly. See Kremzner, *supra* note 19, at 644.

³⁰ The central government's current urbanization policy, for example, seeks to minimize the growth of large urban areas and facilitate "appropriate development" of medium and small cities. See Kremzner, *supra* note 19, at 645. Individual city plans have thus shifted accordingly.

³¹ See Kremzner, *supra* note 19, at 613.

³² *Id.* at 617.

³³ *Id.*

³⁴ See XIANFA, art. 10-13.

³⁵ The concept of property rights is notably absent from Chapter 2, which lays out fundamental rights and duties. *Id.*

³⁶ See *id.* art. 10.

³⁷ Even after the recent amendments, the Constitution still fails to set a standard or any guidance on the amount of such compensation. For a more detailed analysis of the 2004 amendments and underlying issues, see *infra* Part III.

individual rights. Read against Article 53, which calls for the protection of State property, this provision seems to uphold the dominance of State and collective interests over individual interests in the area of property ownership.

Indeed, the basis of the PRC economic system remains socialist public ownership of the means of production, which may take shape in either “ownership by the whole people” (*quanmin suoyouzh*) or “laboring masses’ collective ownership” (*laodong qunzhong jiti suoyouzh*).³⁸ The State-operated economy, which corresponds to the system of ownership by the whole people, is dominant in the urban areas of the country, while the “socialist laboring masses’ collective ownership economy” is dominant in the rural areas.³⁹ With respect to land, private property rights exist only to the extent that the State or collective has granted or allocated land to private actors for use.

In China’s rural areas, land owned by the peasant collectives may be allocated to individual households for both farming and residential purposes.⁴⁰ Rural resident rights, however, are derivative and recognized merely as “contracting to operate” rights (*chengbao jingying quan*), limited to a term of thirty years.⁴¹ Individual households may register certification of such rights with the Ministry of Agriculture,⁴² but cannot register ownership of their houses or other buildings on the land.⁴³

In China’s urban areas, land apportionment is administered generally through the State Land Administration Bureau (“SLAB”), the government entity responsible for formulating national policies and regulations with respect to land conservation, development and use. The State may allocate

³⁸ See CHEN, *supra* note 16, at 57 (citing to Article 6 of the Chinese Constitution).

³⁹ See *id.* (citing to Articles 7 and 8 of the Chinese Constitution).

⁴⁰ See *Zhonghua Renmin Gongheguo Nongcun Tudi Chengbaofa* [PRC Rural Land Contracting Law] (adopted Aug. 29, 2002 by Standing Committee of the NPC, effective Mar. 1, 2003), available at <http://www.law110.com/law/country/1012.htm> (last visited June 8, 2005). Article 5 states that “members of rural collective economic entities have the right to contract rural land that is allocated through contracting by their own rural collective economic entity.”

⁴¹ See *id.* art. 20.

⁴² *Zhonghua Renmin Gongheguo Nongcun Tudi Chengbao Jingyingquan Zheng Guanli Banfa* [PRC Measures for the Administration of the Certificates of the Right to Contracted Management of Rural Land] (issued by the Ministry of Agriculture on Dec. 1, 2003, effective Jan. 1, 2004), available at <http://www.law110.com/law/nonglin/239021.htm> (last visited June 8, 2005).

⁴³ Registration of the certificates evidencing an individual’s rights in the land is required to create a property interest. *Zhonghua Renmin Gongheguo Tudi Guanlifa* [PRC Land Management Law] (adopted on June 25, 1986 by the NPC) art. 13, translated at <http://english.sohu.com/2004/07/04/80/article220848071.shtml> (last visited June 8, 2005) [hereinafter Land Management Law]; *Zhonghua Renmin Gongheguo Tudi Guanlifa Shishi Tiaoli* [PRC Implementing Regulations] (issued by the State Council on Dec. 24, 1998, effective Jan. 1, 1999, superceding Jan. 4, 1991, version) art. 3, available at <http://www.law110.com/law/guowuyuan/2011.htm> (last visited June 8, 2005) [hereinafter Management Regulations].

without consideration (*huabo*) the equivalent of “land use rights” (*tudi shiyongquyan*),⁴⁴ which carry no time limits on them, but can be revoked by the State as necessary or required.⁴⁵ Since 1949, real property in urban areas has been predominantly managed by State-owned enterprises (“SOEs”), or “work units” (*danwei*),⁴⁶ to which the government allocated land free of charge in accordance with economic plans drawn by the Economic Planning Commission.⁴⁷

Urban land use rights may alternatively be granted as a type of leasehold for compensation (*youchang churang*).⁴⁸ The land-use fee is determined through auction, tender, or agreement and then paid to SLAB in exchange for a land-use certificate (*tudi shiyongzheng*).⁴⁹ The State promises not to recover land-use rights from the land user before the expiration of a seventy-year term, but may expropriate the land “under special circumstances and in light of social and public interests.”⁵⁰ After this seventy-year term expires, the land, including all buildings on it, automatically reverts to the State without need for compensation.⁵¹

B. Economic Reform and Decentralization of Land Management

1. Setting the Stage for a Land Grab

By the mid-1980s, a number of factors,⁵² including the rise of the real estate market and an increased focus among Party leaders on foreign investment, pushed the central government to effectively sanction and codify land use rights through a series of liberalizing reforms. The National People’s Congress (“NPC”)⁵³ amended the Constitution in 1988 to read:

⁴⁴ Land Management Law, *supra* note 43, art. 54.

⁴⁵ See Alsen, *supra* note 15, at 20.

⁴⁶ *Id.* at 18, 20.

⁴⁷ See Kremzner, *supra* note 19, at 619.

⁴⁸ Land Management Law, *supra* note 43, art. 54.

⁴⁹ See Zhonghua Renmin Gongheguo Chengzhen Guoyou Tudi Shiyongquan Churang he Zhuanrang Zanzing Tiaoli [PRC Provisional Regulations Concerning the Grant and Assignment of the Assignment and Transfer of the Right to Use State-Owned Land in Urban Areas] (issued on May 19, 1990 by the State Council) art. 16, available at <http://www.law110.com/law/guowuyuan/2015.htm> (last visited June 8, 2005).

⁵⁰ *Id.* art. 42 (providing for compensation on the basis of the number of years left in the contract and the extent to which the land has been developed).

⁵¹ See Zhonghua Renmin Gongheguo Chengshi Fangdichan Guanlifa [PRC Urban Real Estate Management Law] (adopted by the NPC Jan. 1, 1995) art. 21, available at <http://www.law110.com/law/country/1011.htm> (last visited June 8, 2005).

⁵² For a more detailed discussion, see Kremzner, *supra* note 19, at 622-25.

⁵³ Under the Chinese Constitution, the National People’s Congress is the highest organ of State power, responsible for exercising the legislative power of the State. XIANFA, *supra* note 14, art. 58.

“the right to use land may be transferred according to law.”⁵⁴ Soon thereafter, it revised Article 2 of the Land Management Law (“LML”) to read: “the right to use State owned or collectively owned land may be assigned pursuant to the law.”⁵⁵

Even before these formal amendments were made, the first transfers of land use rights had already taken place in 1987, in the Shenzhen Special Economic Zone.⁵⁶ Realizing the success of the Shenzhen model, the central government created additional legislation providing for the cultivation of economic and technological development zones (“ETDZs”), which could enjoy greater flexibility on the duration of grant terms, streamlined procedures and conditions for assignment of property interests and, in some cases, reduced grant fees.⁵⁷ By 1993, ETDZs had proliferated throughout China, particularly in the coastal provinces.⁵⁸ County and municipal governments were so eager to draw foreign investors that some even set up ETDZs without proper authorization.⁵⁹

The stage was thus set for a land grab that continues today. As the public sector increasingly lost control over resource allocation and found it necessary to turn to non-public sectors in order to secure economic development,⁶⁰ China in effect “modernized,” with land management becoming increasingly decentralized. Beginning in the 1980s, the central government reduced its investment in local projects, leaving local governments responsible for—and in control of—both development funds and land use decisions.⁶¹ Local governments scrambled to develop more diversified investment mechanisms to fund their projects, relying on a

⁵⁴ *Id.* art. 10.

⁵⁵ See Land Management Law, *supra* note 43, ch. 1, art. 2.

⁵⁶ See Alsen, *supra* note 15, at 19.

⁵⁷ See Kremzner, *supra* note 19, at 638.

⁵⁸ *Id.*

⁵⁹ *Id.* The Ministry of Land and Resources (“MLR”) quashed over 2600 illegal economic development zones in 2003 alone. See Jia Hepeng, *Nation’s Land Management System under Reform*, CHINA BUSINESS WEEKLY, Jan. 6, 2004, available at http://www.chinadaily.com/cn/en/doc/2004-01/06/content_297063.htm (last visited June 8, 2005).

⁶⁰ One Chinese legal scholar notes that the non-public sector accounted for only 9.4% of industrial output in 1960, but this number rose to 21.5% in 1979 and 71.8% in 1998. See Cao Siyuan, *Siyuan Caichan Baohu Yu Minying Qiye Chengzhang—Xuexi Xianfa Xiuzhengan de Sidian Tihui* [Private Property Protection and Development of the Non-Public Sector: Four Lessons from the Experience of Constitutional Amendment], sec. 1, para. 3, available at <http://www.caosy.com/siyuan/view.asp?id=124> (last visited June 8, 2005). Another points to the fact that at least forty percent of the nation’s economic activities are now in the hands of non-public sectors. See Zhang, *Urban Development*, *supra* note 5, at 479 (citing 1999 figures from the China Statistics Bureau).

⁶¹ See Tingwei Zhang, *Decentralization, Localization, and the Emergence of Quasi-Participatory Decision-Making Structure in Urban Development in Shanghai*, 7 INT’L PLANNING STUDIES 303, 305 (2002) [hereinafter Zhang, *Decentralization*].

combination of local loans, municipal bonds and foreign investment.⁶² At the same time, local agencies such as planning and land bureaus (*guihua tudi jianshe guanli ju*) found themselves able to wield newfound power over land use, utilizing it as a commodity to leverage land supply and demand based on market principles.⁶³

Decentralization in China has ultimately turned out quite chaotic, as both local government and interest groups, including SOEs and commercial developers, compete to make a profit from development projects. The economics and politics of decentralization have created an incentive scheme that compels urban growth and development of land, regardless of actual need.⁶⁴ Recent statistics show that as of September 2004, a total of 97,480,000 square meters of property lay idle in China, 57,360,000 of which is residential property.⁶⁵ However, as much as twenty-five to fifty percent of local revenues in some cities continue to be derived from land-generated income.⁶⁶

Cities and individual districts within cities engage in "fierce competition" over domestic and foreign investment.⁶⁷ One scholar of urban planning has commented: "As a city expands, so too does the political power base of municipal Party secretaries and city mayors."⁶⁸ This scholar notes that since 1992, two former deputy mayors of Shanghai have been

⁶² *Id.* See also Howard W. French, *New Boomtowns Change Path of China's Growth*, N.Y. TIMES, July 28, 2004, available at LEXIS, News Library, ALLNWS File.

⁶³ See Zhang, *Decentralization*, *supra* note 61, at 307. With the shift in focus on housing as a "welfare good" of the mid-1980s to a booming market in which State-owned work units, such as ministries and agencies, were given the authority to control their own revenue and budget, the aims of these agencies shifted. Able to afford market prices, work units at first purchased real estate in order to distribute housing to their own employees at subsidized prices. See Zhang & Fang, *supra* note 9, at 290. "Lured by higher returns," many subsequently invested their funds in real estate development projects that would turn a profit. See Zhang, *Decentralization*, *supra* note 61, at 309.

⁶⁴ *Id.* at 307. In an effort to re-centralize control over land management to counter local land abuses, the MLR recently announced that it is embarking on the largest national land survey in Chinese history, in order to assess land resources and arable land loss. See Fan Lixiang, *Guotu Ziyuan Bu Cha Jiadi, Zhongyang Difang Fendan Diaocha Zijin [MLR Launches National Land Survey, Central and Local Governments Share Responsibility for Surveying Funds]*, 21ST CENTURY BUSINESS HERALD, Feb. 28, 2005, available at <http://www.nanfangdaily.com.cn/fj/20050228/zj/200502280123.asp> (last visited June 8, 2005).

⁶⁵ See Fangwu Xianzhi Ying Zheng *Budongchan Shui [Immoveable Property Tax Should Be Levied on Idle Housing Properties]*, THE BEIJING NEWS, Mar. 7, 2005, available at <http://www.thebeijingnews.com/news/2005/0307/05@0255332.html> (last visited June 8, 2005).

⁶⁶ See Zhang & Fang, *supra* note 9, at 290.

⁶⁷ See Kremzner, *supra* note 19, at 649-650. After decentralization, district governments can now collect revenue from district-owned enterprises and share tax revenues with the municipal government. See Zhang, *Decentralization*, *supra* note 61, at 310. To compete, district governments have taken advantage of the authority that they now share with municipal planning bureaus on matters of land use, design review and other planning controls, to make their own districts more attractive to business investment. *Id.* at 311. For more on the role that district governments play in the eviction and demolition process, see *infra* Part II.B.2.

⁶⁸ See Zhang, *Urban Development*, *supra* note 5, at 487.

promoted to national ranks—in large part as a result of the economic success of their city. Local officials, judged by economic measures, such as how many jobs they create or how many buildings they develop, are thus “trying the same formula: manufacturing and export zones, research parks and self-styled Silicon Valleys.”⁶⁹ Such development is seen as the quick road to growth of both the city and its leaders’ political influence. With land-use grants involving such large sums of money and influence—and administered by such poorly paid civil servants—the specter of a land grab has thus loomed large in cities throughout China.⁷⁰

2. *The Administrative Maze of Competing Interests*

The social cost of the urban land grab that is occurring throughout China has been widespread displacement of resident communities in both cities and immediately-adjacent rural areas. Beijing has acknowledged that since 1991, 400,000 households have been relocated.⁷¹ Officials expect to relocate another 6000 in anticipation of the construction of Olympics venues designed to hold the 2008 games.⁷² Shanghai similarly reported more than 1.5 million displaced residents between 1991 and 1997—a figure amounting in recent years to one out of every six city dwellers.⁷³ An additional 760,000 residents are expected to be moved from the city’s outer ring road by 2010, when Shanghai is scheduled to hold the World Expo.⁷⁴

In the ancient capital of Xi’an, a total of 170,000 residents living in the areas surrounded by the historical city wall will be moved out by 2020, to advance the Municipal Urban Planning Bureau’s ambitious new plan for better protection of the city’s ancient heritage.⁷⁵ This number represents forty percent of the existing 420,000 population living within the enclosure.⁷⁶ Despite the insistence by local planning officials that

⁶⁹ See French, *supra* note 62.

⁷⁰ See Alsen, *supra* note 15, at 19.

⁷¹ See *Beijing Denies Reports on Large-Scale Evictions*, CHINA DAILY, Mar. 11, 2004, http://www.chinadaily.com.cn/english/doc/2004-03/11/content_313640.htm (last visited June 8, 2005). While Miao Leru, director of the Beijing Municipal Administration of State Land, Resources and Housing, insisted at a press conference that the relocated households have benefited from increased housing area after resettlement by the government, statistics continue to show that four out of every 1000 cases of demolition is forced. *Id.*

⁷² *Id.*

⁷³ See Zhang, *Urban Development*, *supra* note 5, at 488 (citing 1997 statistics from the Shanghai Social Science Institute).

⁷⁴ See Eva Woo, *Shanghai to Move 760,000 Residents from Inner-City Area*, SOUTH CHINA MORNING POST, Nov. 18, 2004, available at LEXIS, Nexis Library, ALLNWS File.

⁷⁵ See Ma Lie, *Xi’an Plans to Better Protect Ancient Walled Center*, CHINA DAILY, Nov. 3, 2004, http://www.chinadaily.com.cn/english/doc/2004-11/03/content_388092.htm (last visited June 8, 2005).

⁷⁶ *Id.*

residents' living conditions will be greatly improved and that Xi'an will become "an international modern metropolis featuring both ancient culture and modern civilization,"⁷⁷ residents have accused the government of forcing them off the land solely to profit from the sale of the land to developers.⁷⁸

The pairing of local government with business interest groups such as real estate developers creates "pro-growth coalitions,"⁷⁹ which in fact pose a significant threat to resident rights. Developers unwilling to negotiate and deal with local residents' collectives⁸⁰ are able to manipulate the mechanism of land administration and rely on government clout to achieve their aims. The mechanism of land management in China fails residents mainly because it is convoluted, lacks transparency, and involves a dozen different, competing State agencies, all motivated to prioritize only their own short-term gains.

The municipal governments and SOEs that drive development decisions, for example, often possess profit-making interests aligned with the non-public sector, rather than the local communities they serve.⁸¹ The district governments responsible for land preparation for leasing are even more ambivalent in their allegiances. While district officials must report to the district People's Congress,⁸² Congressional representatives are elected

⁷⁷ See *China to Evict 170,000 Residents from Ancient City of Xian*, AGENCE FRANCE-PRESSE (Beijing), Nov. 3, 2004, available at LEXIS, Nexis Library, ALLNWS File..

⁷⁸ *Id.*

⁷⁹ This term has its origins in the study of urban planning and urban regime theory. Developed during the 1970s and early 1980s, this theory presumes that the division between State and marketplace in liberal democratic societies will tend to result in the government's lack of authority and resources to govern, which in turn creates an incentive for informal arrangements to be made between the public and non-public sectors. See Zhang, *Urban Development*, *supra* note 5, at 475-76. As a byproduct of such a coalition, the State continues to exercise direct power over others on political issues, but loses its power on economic issues. *Id.* at 477.

⁸⁰ In rural areas, peasant collectives do have the opportunity to interface with the State on behalf of individuals and households, in the event of a requisition. This is done through the mechanism of a village committee. See Peter Ho, *Who Owns China's Land? Policies, Property Rights, and Deliberate Institutional Ambiguity*, 177 CHINA Q. 394, 397-401 (2001). This Article focuses mainly on mechanisms and issues encountered during the urban renewal process and therefore discusses in *infra* Part III.B the situation encountered by rural residents only to the extent that they live in suburban areas immediately impacted by urban development. For more detailed discussions of rural takings and farmers' land rights generally, including the history and changing nature of such rights, see Brian Schwarzwald et al., *An Update on China's Rural Land Tenure System Reforms: Analysis and Recommendations Based on a Seventeen-Province Survey*, 16 COLUM. J. ASIAN L. 1, 141-225 (2003); Kari Madrene Larson, Comment, *A Lesson in Ingenuity: Chinese Farmers, the State, and the Reclamation of Farmland for Most Any Use*, 7 PAC. RIM L. & POL'Y J. 831 (1998).

⁸¹ See Zhang, *Urban Development*, *supra* note 5, at 485.

⁸² The Party is set up in every work unit at the local level, through municipal and provincial party congresses. See THOMAS CHIU ET AL., *LEGAL SYSTEMS OF THE PRC* 43 (1991). The National Party Congress presides over lower units.

by district residents only in theory and are in reality nominated by municipal governments.⁸³ Moreover, in recent years district governments have developed their own, unique interests, joining pro-growth coalitions and partnering with commercial developers in a number of profit-making business ventures.⁸⁴

Local street committees (*jiedao banshichu*) do not exist to protect the interests of residents, either. They must report to, and technically operate under, the supervision of the Committee of Resident Representatives ("CRR" or *jumin daibiao dahui*), a body comprised of ordinary citizens.⁸⁵ However, the street committee actually functions as the local representative of the district government, its tasks defined by both the municipal and district leadership.⁸⁶ Although street committees are not directly involved in the real estate business, they may form partnerships with various development companies, taking on responsibility for securing land acquisition and displacing residents.⁸⁷ In addition, the revenue from local businesses is used to pay bonuses to street committee staff and may sometimes exceed the salary they receive from the district government, influencing their incentives in ways antagonistic to local residents.⁸⁸

The only party that may be said to work in the interest of residents is the residents committee ("RC," *jumin weiyuanhui* or *juweihui*), officially regarded as a residents' organization.⁸⁹ In practice, however, the RC also functions as an extended administrative body at the lowest level⁹⁰ and acts as an agent for the developer during the planning and relocation process.⁹¹

⁸³ See Zhang, *Decentralization*, *supra* note 61, at 311.

⁸⁴ Local official involvement varies from investing in the development projects to running the companies performing demolition or profiting from the fees associated with the process of eviction and demolition. See CONGRESSIONAL-EXECUTIVE COMMISSION ON CHINA, ROUNDTABLE ON PROPERTY SEIZURES IN CHINA: POLITICS, LAW, AND PROTEST, *supra* note 24 (statement of Sara M. Davis, Researcher, Asia Division, Human Rights Watch). Such involvement is often conducted under the guise of a different name, since the central government bans administrative bodies from engaging in business transactions. See Zhang, *Urban Development*, *supra* note 5, at 486. One Chinese urban development scholar notes that development agencies in fact owe their origins to various construction agency branches of the municipal or district government, such as the Property Management Bureau (*fangguan ju*) or Urban Construction Commission (*chengshi jianshe weiyuanhui*, or *jian wei*). Daniel Abramson, "Marketization" and *Institutions in Chinese Inner-City Neighborhood Redevelopment: A Commentary on "Beijing's Old and Dilapidated Housing Renewal"* by Lü Junhua, 14 CITIES 71, 73 (1997).

⁸⁵ See Zhang, *Decentralization*, *supra* note 61, at 317.

⁸⁶ *Id.* at 312. While district governments focus on economic development, street committees tend to manage services for the community. *Id.* at 312-13.

⁸⁷ *Id.* at 316. For this reason, both the street committee and the city planning and land administration bureau were named as defendants in the case cited in Part I.

⁸⁸ *Id.* at 315.

⁸⁹ *Id.* at 309.

⁹⁰ *Id.*

⁹¹ See Abramson, *supra* note 84, at 73.

Neither the RC nor the CRR, to which street committees must report, truly enjoys any significant influence over the process. As a result, the mechanism for land management in China is heavily biased toward the government and, through pro-growth coalitions, the business elite.

One positive development has been the rise in recent years in the popularity and number of homeowners' associations (*yezhu weiyuanhui*; also known as "property owners associations."⁹² But while seen by some as one trend toward a more participatory decision-making structure,⁹³ the reality is that coalition building by residents remains weak and ineffective. While discussions on the status and scope of property owners associations have made their way into deliberations on the draft Property Law to be finalized in June 2005, Chinese law currently fails to recognize the authority of such entities.⁹⁴ Residents thus continue to lack effective means with which to counter the political clout of the pro-growth coalitions, and as a result, governments and businesses leverage power imbalances to their interest, consistently at the cost of the local communities.⁹⁵

III. RESPONSES TO A FLAWED INFRASTRUCTURE MERELY HELP PATCH THE FAÇADE

The new social contract that has been formed as a result of marketization and decentralization has created a gap between pro-growth coalitions and local communities, with respect to the access to benefits enjoyed by each. In recent years, social unrest has been fueled by this very division between those seen as participants and those who are merely outsiders to China's new social contract.⁹⁶ Reforms have been aimed at easing the unrest created by rapid urbanization, particularly through

⁹² Such associations are more common in cities where housing reform has led to increased home ownership. Studies have thus tended to focus on property owners association activities in Shanghai, where the home ownership rate has reached sixty-three percent. See Zhang, *Decentralization*, *supra* note 61, at 317. There, property owner associations have taken on significant responsibilities to ensure the smooth operation of urban development projects in local neighborhoods, challenging and competing with equivalent government functionaries. *Id.* at 318-319. In a survey of 1500 residential communities in Beijing, 45.5% were found to possess property owner associations. See *Wuquan Fa Liu Yue Zai Ci Shenyi* [Deliberations on Property Law Continue in June], THE BEIJING NEWS, Mar. 2, 2005, available at <http://www.thebeijingnews.com/news/2005/0302/05@005816.html> (last visited June 8, 2005) [hereinafter *Property Law*].

⁹³ See Zhang, *Decentralization*, *supra* note 61, at 319. One Beijing resident comments: "A lack of homeowners associations means that homeowners lose their power to participate in the administration of the residential community." See *Property Law*, *supra* note 92.

⁹⁴ See *Property Law*, *supra* note 92.

⁹⁵ See generally Zhang, *Urban Development*, *supra* note 5.

⁹⁶ See ROBERTO M. UNGER, *DEMOCRACY REALIZED: THE PROGRESSIVE ALTERNATIVE* 108 (1998).

increased protection of farmers' interests.⁹⁷ The following section outlines the substantial inequalities that continue to exist and are hidden beneath new and enhanced legal provision for formal equality.

A. *Resort to Punitive Measures in Hunan Province*

Chinese legal scholars note that in 2003, with China's average per person GDP exceeding U.S. \$1000 for the first time, the country entered into a period of rapid urbanization in which cities needed to expand and land became "the main source of local government's finances."⁹⁸ Despite central government efforts to strengthen marketization,⁹⁹ local authorities have continued to assign redevelopment projects exclusively to local SOEs, in exchange for delivery of social services.¹⁰⁰ SOEs thus exercise a land monopoly that allows them to turn land over to other developers for a profit, without engaging in any genuine development.¹⁰¹

Capitalizing on the lack of accountability at the local level, developers "overturn zoning and building codes with skillful arguments and, quite often bribes, turning inner-city redevelopment into a process of 'speculation, private deals and corruption.'"¹⁰² This corruption is evidenced by figures produced by the government itself, as well as a number of high-profile cases reported in both the domestic and international media. In Guangzhou, for example, the municipal government reported a 1993 land leasing revenue figure that, based on market price, was merely one-sixth of what should have been collected.¹⁰³ At the NPC convened in March 2004,¹⁰⁴ delegate Hu Yamei presented a document entitled "Special Revelation," reporting that

⁹⁷ See *New Policy*, *supra* note 6, para. 5.

⁹⁸ See Zhao Ling, *Significant Shift in Focus of Peasants' Rights Activism—An Interview with Rural Development Research Yu Jianrong of the Chinese Academy of Social Sciences*, NANFANG ZHOUMO [SOUTHERN WEEKEND], Sept. 3, 2004, at Pt. II, available at <http://www.chinaelections.org/en/readnews.asp?newsid={A0B4FFF9-1F57-460D-BBB3-824B59420C2F}&classid=17&classname=Villages> (last visited June 8, 2005).

⁹⁹ The MLR declared in December 2003 that personnel in local land management departments would be directly controlled by provincial governments instead of local governments. See Jia, *supra* note 59. The purpose was to prevent local officials from interfering with the ratification of land transactions and place control into the hands of more objective provincial governments, unable to participate in land transactions. *Id.*

¹⁰⁰ See Zhang & Fang, *supra* note 9, at 291.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ See Zhang, *Decentralization*, *supra* note 61, at 308.

¹⁰⁴ The NPC convenes for a plenary session only once each year. See TAO-TAI HSIA & CONSTANCE AXINN JOHNSON, *LAW MAKING IN THE PEOPLE'S REPUBLIC OF CHINA: TERMS, PROCEDURES, HIERARCHY, AND INTERPRETATION* 1, 4 (1986).

138.72 billion *renminbi* (roughly U.S. \$16.64 billion)¹⁰⁵ in public money had disappeared into the private coffers of developers and corrupt officials between 1990 and 1998.

One particularly notable case from 2004 involved the illegal eviction of local residents in Jiahe County, located in the central inland province of Hunan. In late April 2004, Li Huiming was one of many Jiahe residents whose home was forcibly dismantled.¹⁰⁶ When a houseguest insisted that the police arriving to assist in the eviction should instead help to protect private property, Li, the houseguest and another resident were all detained and accused of “violence to resist law enforcement” and “interfering in public affairs.”¹⁰⁷ Released one month later, the men eventually took their case to a team of Tsinghua University lawyers in Beijing.¹⁰⁸

The *Jiahe* case raised a number of pressing issues, including: (1) whether the county had misused its administrative power in violation of the Constitution; (2) whether compensation for eviction was too low; and (3) whether a deal struck between local government and developer to build the Zhuquan Department Store had actually motivated the evictions and could justifiably be seen as “a project that will serve local people and the long-term development of the county.”¹⁰⁹ After receiving growing complaints from locals, the Ministry of Construction sent an investigation team to Jiahe County to work jointly with the Hunan provincial government in investigating the matter.¹¹⁰

State-owned news agencies, including China Central Television and Xinhua, later reported that the local government had “illegally supported the evictions,”¹¹¹ removing and resettling to distant suburbs a total of eleven households. The investigation found that local officials had issued authorizing documentation, including land-use and other certificates, despite the absence of this new project in official city plans and the failure of the developer to pay relevant land use fees.¹¹² The price at which developers

¹⁰⁵ See Zhang & Fang, *supra* note 9, at 296-297 n.37. U.S. \$1 is equivalent to 8.3 *renminbi*. The quoted figure includes 58.67 billion *renminbi* that should have been paid in compensation for relocation, 36.60 billion for demolition and 43.45 billion as the difference between market price and what developers actually paid. *Id.*

¹⁰⁶ See Fu Jing, *Gov't Pays Residents for Wrongful Arrest*, CHINA DAILY, June 3, 2004, available at http://www.chinadaily.com.cn/english/doc/2004-06/03/content_335955.htm (last visited June 8, 2005).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² See Hunan Sheng, *Jianshebu Yansu Chachu Jiahe Weifa Qiangzhi Chaiqian Anjian [Solemn Investigation by Hunan Province and Ministry of Construction Reveals Jiahe Case of Illegally Forced Eviction and Demolition]*, XINHUA NET (Beijing), June 4, 2004, available at <http://news.sohu.com/2004/06/>

purchased the land was reported to be a mere 1.3% of its actual market value.¹¹³

In the wake of the *Jiahe* case, Jiahe County Party Committee Secretary Zhou Yuwa and County Magistrate Li Shidong were removed from their posts, while several other leading county officials were seriously reprimanded.¹¹⁴ Upon appeal of his administrative suit against the government, Li Huiming was awarded 665,888 *renminbi*, 600,000 of which was designed to compensate him for emotional harm suffered¹¹⁵—in effect treating the local government as tortfeasor. Several months later, the Supreme People's Procuratorate¹¹⁶ announced a new campaign to curtail human rights abuses, particularly in four focal categories that included land requisition (*zhengyong*)¹¹⁷ and forced eviction (*qiangzhi chaiqian*).¹¹⁸ In a sign that concern over land abuses had reached even the upper echelons of the Party, on October 13, 2004, Premier Wen Jiabao chaired a meeting of the State Council,¹¹⁹ through which the Council came to a decision "so as to further reform and tighten the management of land."¹²⁰

A number of measures were subsequently issued to deal with the problems of corruption and land speculation made apparent by the *Jiahe* case. Article 24 of an October 21 State Council decision (the "October Decision"),¹²¹ for example, calls on local governments to not only levy fines

04/40/news220394073.shtml (last visited June 8, 2005) [hereinafter *Jiahe Investigation*].

¹¹³ See Fu, *supra* note 106.

¹¹⁴ See *Jiahe Investigation*, *supra* note 112.

¹¹⁵ See *Jiahe Shijian Yi Chaiqian Huzhuang Gao Xian Fangchan Guanli Ju An Kaiting Shenpan* [Trial Commences on the Case of a Victim of Demolition and Relocation Against the County Property Management Bureau], XINHUA NET (Changsha), Sept. 7, 2004, available at <http://news.sohu.com/20040907/n221927092.shtml> (last visited June 8, 2005).

¹¹⁶ Article 130 of the Chinese Constitution provides that the central government will establish a Supreme People's Procuratorate and local people's procuratorates at each at each level of the governmental structure. XIANFA, art. 130. The people's procuratorates are state organs for legal supervision, simultaneously acting as prosecutor in all criminal cases, while supervising the courts to make sure that they have adhered to the correct procedure.

¹¹⁷ All uses of the term "requisition" refer to seizure of farmland, as opposed to urban land for eviction and demolition purposes.

¹¹⁸ See Li Pengxiang & Yang Weihai, *Si Lei Duzhi Qinquan Anjian Jiangbei Zhongdian Miaozhun* [Four Categories of Cases in Breach and Violation of Rights Become Focal Point], XINHUA NEWS AGENCY, Sept. 29, 2004, available at http://www.gmw.cn/content/2004-09/29/content_109050.htm (last visited June 8, 2005).

¹¹⁹ Article 85 of the Chinese Constitution provides that the State Council shall serve as the executive body of the NPC. XIANFA, art. 85. In addition to being the highest executive organ of State power and the highest organ of State administration, it has been noted that it is the constitutional organ most closely affiliated with the Party. See Marc Rosenberg, *The Chinese Legal System Made Easy: A Survey of the Structure of Government, Creation of Legislation, and the Judicial System Under the Constitution and Major Statutes of the People's Republic of China*, 9 U. MIAMI INT'L & COMP. L. REV. 225, 233 (2000).

¹²⁰ See *Gov't Tightens Arable Land Management*, XINHUA NET (Beijing), Oct. 13, 2004, available at http://news.xinhuanet.com/english/2004-10/13/content_206924.htm (last visited June 8, 2005).

¹²¹ The State Council has relatively broad legislative powers, including adoption of administrative

for illegal buildings and structures, but also requisition and demolish them (for compensation) and recover the land-acquisition fees required by law.¹²² However, the language in Article 24 leaves crucial matters open to interpretation, including when a development project may be found to contravene a city plan or violate land law and regulations.

The circular jointly issued in December 2004 (the “December Circular”) by the Finance Ministry, Ministry of Land and Resources (“MLR”) and People’s Bank reflects solutions that are a bit less harsh, but deal more directly with the wrongdoings of government officials like those in Jiahe.¹²³ With respect to land approved between 2003 and April 2004 for new construction, if requisite land-use fees have not been paid, the next senior level of government is to set a timeline for rectification and payment in arrears, during which period land management bureaus may not requisition and transform from agricultural to industrial purposes any additional land.¹²⁴ Land management and finance departments are also to establish a system by which land-use fees must be paid first, before land is distributed, and then directly deposited into the State treasury before being allocated on a thirty to seventy percent basis to the central government and the locality, respectively.¹²⁵ Additionally, with respect to new projects, land management bureaus are not to issue authorizing documents until land use fees are in fact paid.¹²⁶

These legal provisions do not effectively deal with transactions and monies swapped two, three, or several years ago, however. It remains to be seen how they will affect land deals in the future, but their overall effect may be to re-centralize a previously decentralized property rights regime and chill potential investment. Furthermore, by focusing on the issue of whether fees have been paid, they leave aside the more important issues of

measures (*xingzheng cuoshi*, or *banfa*), enactment of administrative rules and regulations (*xingzheng fagui*, or *tiaoli*) and issuance of decisions (*jueding*) and orders (*mingling*) in accordance with the Constitution and statutes. XIANFA, art. 89(1). It is empowered to draw up plans for economic and social development, and to organize, coordinate and administer social production and economic development. *Id.* art. 89(5).

¹²² Guowuyuan Guanyu Shenhua Gaige Yange Tudi Guanli de Jueding [State Council Decision Concerning In-Depth Reform and Tightening Up of Land Management] (issued Oct. 21, 2004) art. 24, available at <http://www.law110.com/law/guowuyuan/2159.htm> (last visited June 8, 2005) [hereinafter October Decision].

¹²³ See generally Caizhengbu, Guotu Ziyuanbu, Zhongguo Renmin Yinhang Guanyu Jinyibu Jiaqiang Xinzeng Jianshe Yongdi Tudi Youchang Shiyongfei Zhengshou Shiyong Guanli de Tongzhi [Finance Ministry, Ministry of Land and Resources and People’s Bank Circular on Strengthening Management of the Collection and Use of Land Use Fees Owed on Land Used for New Construction] (issued Dec. 6, 2004, effective Jan. 1, 2005), available at http://www.mlr.gov.cn/pub/gtzyb/zwgk/ggtg/t20041206_52367.htm (last visited June 8, 2005).

¹²⁴ *Id.* art. 2.

¹²⁵ *Id.* art. 3(1)-(2).

¹²⁶ *Id.* art. 3(2).

how much, and to whom, and thus do not effectively alter the incentives of the local bureaucrats benefiting from such deals.

The real, underlying issues, unresolved by these reform measures, are hinted at in a recent editorial report from the province-wide conference held on June 22, 2004, in Changsha, to debrief the matter. Provincial leaders severely criticized the Jiahe municipal government and local developer for substituting market forces with administrative discretion and legal process with their own official directive.¹²⁷ Since then, the city of Shanghai has gone further, to announce that anyone found forcibly removing residents to make way for infrastructure of commercial construction projects (as was the case in Jiahe) could face criminal penalties in the future.¹²⁸

What would be more effective than imposing additional regulations on developers, or punishing one level of government and then shifting control to another, is a reformed process in which government officials are incentivized to administer rights in land in accordance with law, in the interest of the people, and in a way that simultaneously aligns with their own interests. As long as the short-term benefits that derive from illegal land transfers and corruption continue to inure to the vast majority of government regulators who are guilty of such misconduct, cases similar to *Jiahe* will continue to transpire.

B. *Lack of Compensation and Process in Beijing and Guangzhou*

One continuing reason for the widespread land corruption has been that cities boasting industrial or commercial facilities which succeed in attracting foreign investment and generating new jobs are allowed to expand and convert agricultural land to urban use.¹²⁹ Although Articles 43 and 63 of the LML restrict the State's ability to use rural land for construction or nonagricultural use without approval, such approval is not difficult to obtain. The State first requisitions the land to make it State-owned and can obtain permission to do so from the municipal or county government branch of SLAB.¹³⁰ SLAB is expected, in theory, to consider whether the project will have net socioeconomic benefit for the surrounding area and whether there

¹²⁷ See Qu Jintie, *Hunan Yaoqiu Lingdao Ganbu Yao Jiqu Jiahe Shijian Jiaoxunmo Lanyong Quanli* [Hunan Demands that Party Leaders Draw Lessons from the Abuse of Power in Jiahe] CHANGSHA WAN BAO, June 23, 2004, available at <http://news.sohu.com/2004/06/23/02/news220670211.shtml> (last visited June 8, 2005).

¹²⁸ See 'Barbaric' Relocation Outlawed, CHINA DAILY, Mar. 8, 2005, available at http://www.china-daily.com.cn/english/doc/2005-03/08/content_422825.htm (last visited June 8, 2005).

¹²⁹ See Kremzner, *supra* note 19, at 648.

¹³⁰ Governments subordinate to the provincial-level government do not have the power to approve reallocation of land use. See *New Policy*, *supra* note 6.

are adequate supplies of arable land for local food needs.¹³¹ In reality, however, authorization is given freely, and the result has led to alarm at the top levels over China's rapid loss of arable land and the resulting threat to the nation's food supplies.¹³²

Last year in Beijing, the *New York Times* reported a case in which Zhang Yuchen, a former senior official in the municipal construction bureau, had secured rights to a sprawling parcel of wheat fields, on which he built his luxury, dream chateau.¹³³ The land had previously been farmed by a collective of Yangge Village peasants. When officials of the Changping District in Beijing agreed to let Zhang develop the land, the peasants' understanding was that the requisitioned area would be converted from farmland to a conservation zone, and that Zhang could only lease out land on the condition that it would remain mostly green space.¹³⁴ Zhang promised younger, abler peasants that they would be able to find employment on the newly developed estate, while the elderly were assured a U.S. \$45 monthly stipend.¹³⁵

Changping District eventually made the chateau a part of its annual plan (*niandu jihua*).¹³⁶ Local leaders were to take the fees paid by Zhang to start companies, the shares in which would be distributed to all who had farmed the land.¹³⁷ But Yangge residents now claim that no shares were ever issued and that no companies exist¹³⁸—a story that is less than surprising given the context in which it arises. Previously stakeholders in the land and its conversion, the peasants ultimately had their interests severed from the ongoing development of the land.

According to researchers at the Chinese Academy of Social Sciences ("CASS") in Beijing, approximately 66.3 million people employed in agriculture lost their land between 1990 and 2002,¹³⁹ a number expected to eventually rise above 100 million.¹⁴⁰ A recent editorial in *China Daily*

¹³¹ Kremzner, *supra* note 19, at 646-47.

¹³² See Jim Yardley, *Farmers Being Moved Aside By China's Real Estate Boom*, N.Y. TIMES, Dec. 8, 2004, at 1, available at LEXIS, Nexis Library, ALLNWS File.

¹³³ See generally Joseph Kahn, *China's Elite Learn to Flaunt It While the Landless Weep*, N.Y. TIMES, Dec. 25, 2004, at 1, available at LEXIS, Nexis Library, ALLNWS File.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* Each year, municipal governments prepare an "annual land use plan for construction" (*niandu jianshe yongdi jihua*), which is submitted to the State Planning Commission and made a part of the "national economic and social development plans" (*guomin jingji he shehui fazhan jihua*). See Kremzner, *supra* note 19, at 646.

¹³⁷ See Kahn, *supra* note 133.

¹³⁸ *Id.*

¹³⁹ See Zhao, *supra* note 98, pt. II.

¹⁴⁰ See Yardley, *supra* note 132.

noted that 166,000 to 200,000 hectares of land are needed for urban construction each year, and that this figure translates into the loss of land for 2.5 to 3 million farmers per year.¹⁴¹ In addition, the MLR recently disclosed that Chinese peasants are owed more than 15 billion *renminbi* in unpaid compensation for land requisitions¹⁴² and that it disciplined officials involved in about 168,000 illegal land deals in 2003.¹⁴³ Other government statistics reflect that during the first part of 2004, 46,900 cases of illegal land activities impacted rural areas.¹⁴⁴

Multiple provisions written into the October Decision do reflect an attempt to control the problems presented by the *Yangge* case. For example, projects altering what had originally been set forth in the locality's comprehensive land utilization plan (*tudi liyong zongti guihua*)¹⁴⁵ must first be submitted for approval.¹⁴⁶ Localities not already providing for specific transfer and development of arable land in their plans may not receive subsequent permission to do so, and those in arrears on land requisition compensation at the end of 2004 may not add land to their existing quotas for 2005.¹⁴⁷

Moreover, recognizing that farmland is fundamental to safeguarding China's ability to feed its people, the October Decision also urges that any revisions made to comprehensive plans must maintain the existing level of "basic farmland" (*jiben nongtian*), prohibiting development and conversion of such land into "agricultural industrial installations" or "modern agricultural parks."¹⁴⁸ To deal with those localities that have attempted to exploit loopholes in the land law, Article 10 further forbids cities from

¹⁴¹ See *Protecting Farmers' Interests*, CHINA DAILY, Feb. 23, 2005, available at http://www.chinadaily.com.cn/english/doc/2005-02/23/content_418654.htm (last visited June 8, 2005).

¹⁴² See Shi Ting, *New Policies to Ease Pain of Land Loss*, SOUTH CHINA MORNING POST, Nov. 16, 2004, available at LEXIS, News Library. On March 7, 2005, Vice Minister Li Yuan of Land and Resources reported that the central government has now cleared up 17.5 billion *renminbi* (U.S. \$2 billion) of defaulted payment to farmers and taken over 12.3 billion *renminbi* (some U.S. \$1.5 billion) owed by local governments. See *China Cuts Development Zones by 70 Pct in 2004*, XINHUA NET (Beijing), Mar. 7, 2005, available at http://news.xinhuanet.com/english/2005-03/07/content_2662322.htm (last visited June 8, 2005).

¹⁴³ See Edward Cody, *China's Land Grabs Raise Specter of Popular Unrest*, WASH. POST, Oct. 5, 2004, at A1, available at LEXIS, Nexis Library, ALLNWS File.

¹⁴⁴ See Zhao, *supra* note 98, pt. I.

¹⁴⁵ The comprehensive land utilization plan prepared by each level of government must be approved by the next higher level of government before being implemented. See Land Management Law, *supra* note 43, art. 15. SLAB prepares the comprehensive land utilization plan at the national level and plays a key role at lower levels of government. See Kremzner, *supra* note 19, at 645. These plans are designed to balance agricultural and non-agricultural land uses and guide the overall course and direction of urban development. *Id.*

¹⁴⁶ See October Decision, *supra* note 122, art. 6.

¹⁴⁷ *Id.* art. 8.

¹⁴⁸ See *id.* art. 11.

requisitioning collectively owned land without authorization by making peasants into urban residents¹⁴⁹—and thus nullifying the collective.

Such reforms have not been enough to appease peasants who rely on the land not only as their home, but also as their source of livelihood. Of 60,000 news pieces studied by CASS between August 2003 and June 2004, the number one subject of concern among peasants shifted from the crisis in taxation of the mid-1980s and 1990s to the crisis over land management.¹⁵⁰ Land disputes triggered eighty-seven out of 130 cases of rural disturbances in 2004—a figure reflecting the move of peasant activism from tax disputes to property rights, according to Professor Yu Jianrong, a rural development researcher at CASS.¹⁵¹ Another figure reported by the Party-controlled *Outlook* magazine shows that more than three million participants were involved in approximately 58,000 protests across China during 2003 alone, a fifteen percent increase from 2002.¹⁵²

For the central government, curbing such unrest is a matter crucial to Party survival. In a survey conducted by the Party's Central Committee¹⁵³ in November 2004, the widening income gap ranked as the greatest concern among Party officials, mainly because of its ability to stir social unrest.¹⁵⁴ When 50,000 to 60,000 protested over the relocation of 100,000 residents to make way for the Pubugou Dam in Hanyuan County, Sichuan Province, the central government immediately dispatched 6000 soldiers from the People's Armed Police,¹⁵⁵ as well as a work team led by State Council Executive Deputy Secretary General Wang Yang to pacify the protesters.¹⁵⁶ In a sign of apparent helplessness, the government even mandated a nationwide media blackout.¹⁵⁷

¹⁴⁹ *Id.* art 10. This practice may be based on the loophole in Article 2(5) of the Management Regulations, which states that collectively-owned land becomes urban land when all of the residents of the collective become urban residents.

¹⁵⁰ *Id.* Peasants' taxes accounted for only 1.9% of news stories during this time period. *Id.*

¹⁵¹ *Id.*

¹⁵² See *Dam Project Sparks Rights*, *TAIPEI TIMES*, Nov. 7, 2004, at 4, available at <http://www.taipeitimes.com/News/world/archives/2004/11/07/2003210020> (last visited June 8, 2005) [hereinafter *Dam Project*].

¹⁵³ The Central Committee's primary task is to elect the Politburo, a group of about twenty representatives charged with meeting weekly to discuss the daily running of the country. See Rosenberg, *supra* note 119, at 228.

¹⁵⁴ See Kahn, *supra* note 133.

¹⁵⁵ See *Dam Project*, *supra* note 152.

¹⁵⁶ See CONGRESSIONAL-EXECUTIVE COMMISSION ON CHINA: VIRTUAL ACADEMY, MASSIVE PROTESTS ERUPT IN SICHUAN, PROTESTORS BRIEFLY DETAIN PROVINCIAL PARTY SECRETARY (Nov. 19, 2004), available at <http://www.cecc.gov/pages/virtualAcad/index.phpd?showsingel=3105> (last visited June 8, 2005).

¹⁵⁷ See *Dam Project*, *supra* note 152. An earlier circular issued by the State Council has provided the means for a media clamp-down on stories related to demolition and relocation. It encourages local governments to "[p]ersist in the correct guidance of public opinion and give full play to media

Measures such as the October Decision reflect the mounting concern over land disputes impacting rural residents. Both domestic and international media tend to label these disputes “tireless campaign[s] for higher compensation,”¹⁵⁸ but the fury often escalates over matters other than compensation. Officials confiscate land “in the name of the public interest,” without even considering what the public’s interests may be, exploiting provisions in Chinese law that allow them to dictate both the definition of “public interest,” as well as the amount of compensation.¹⁵⁹ The issue for many is not just the payout, but the rhetoric and process used to justify seizure of property from rural and urban residents alike.¹⁶⁰

Indeed, it is not only rural residents whose anger is mounting. In Guangdong Province, for example, provincial Party Secretary Zhang Dejiang endorsed Xiao Guwei, an island in the Pearl River off Guangzhou, as the site for his U.S. \$2.4 billion pet project, a school campus to be called “University Town.”¹⁶¹ Roughly 10,000 farmers were forced to relocate between October 2003 and 2004, but more affluent urban residents felt the impact as well.¹⁶² Liang Xufeng, a successful landscaper, came home from a business trip with his wife to find that his house had already been destroyed by police and demolition crews during his absence.¹⁶³ Echoing the complaints of others, he claimed that the U.S. \$280,000 offered in compensation was only a fraction of the market value of his house.¹⁶⁴ Another resident, art professor Chu Jiaquan, who joined neighbors in a continuing public relations and court battle against the government, insisted, “It’s not the money. It’s the way they treat us.”¹⁶⁵

It is not uncommon for residents like those in Guangzhou to receive notice just days before the government expects to move them out.¹⁶⁶ The

supervision,” emphasizing “social stability” and the need to guard against “inducing and intensifying contradictions.” Guowuyuan Bangongting Guanyu Kongzhi Chengzhen Fangwu Chaiqian Guimo Yange Chaiqian Guanli de Tongzhi [State Council Circular on Controlling the Scope of Housing Demolition and Relocation in Cities and Towns and Tightening Up Demolition and Relocation Management] (issued June 6, 2004, effective Oct. 2004) art. 10, available at <http://www.law110.com/law/guowuyuan/2152.htm> (last visited June 8, 2005).

¹⁵⁸ See Kahn, *supra* note 133.

¹⁵⁹ See Cody, *supra* note 143.

¹⁶⁰ The CASS study shows that of all written appeals sent to authorities regarding land disputes, thirty-three percent concerned land disputes in which compensation was seen as too low, while twenty-three percent concerned those in which land was illegally or forcefully confiscated. See Zhao, *supra* note 98, pt. 1.

¹⁶¹ See Cody, *supra* note 143.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ See Sara Meg Davis & Lin Hai, *Demolished: Forced Evictions and the Tenants' Rights Movement*

law does not require that they be consulted or notified about development projects on their land and varies greatly regarding how much, and how far in advance, information about the potential eviction should be provided.¹⁶⁷ MLR measures requiring public announcement of the terms of requisition fail to specify even that the announcement be made in advance of the requisition.¹⁶⁸ Similarly, State Council regulations provide only that the plans, details and timing of urban development projects should be publicly announced, without providing for a minimum time period between announcement and actual eviction and demolition.¹⁶⁹

To ease the transition, certain administrative regulations provide that collectives and individual farmers may raise objections over resettlement and compensation (*buchang anzhi*) terms and request a hearing within ten days of the announcement.¹⁷⁰ In urban areas, local governments are merely obligated to notify residents prior to approval or alteration of the relevant eviction or demolition plan.¹⁷¹ The Ministry of Construction has also pushed for prior appraisal, based on market price, of the buildings to be demolished.¹⁷² However, whether in the countryside or in the big cities, the decision to requisition and evict is rarely subject either to public scrutiny or participation. Before they have had an opportunity to voice their grievances, those displaced have often already lost their homes and livelihood and face an uphill battle in getting compensation for their losses.

in China, 16 HUMAN RIGHTS WATCH No. 4 (C), 12 (2004).

¹⁶⁷ See *id.* at 12-13.

¹⁶⁸ See Zhengyong Tudi Gonggao Banfa [Measures on Public Announcement of Land Requisition] (issued on Oct. 22, 2001 by the MLR, effective Jan. 1, 2002) art. 10, available at http://www.agri.gov.cn/zcfg/t20030624_94279.htm (last visited June 8, 2005) [hereinafter Zhengyong Banfa].

¹⁶⁹ See Chengshi Fangwu Chaqian Guanli Tiaoli [Administrative Regulations on Urban House Demolition and Relocation] (issued on June 13, 2001 by the State Council, effective Nov. 1, 2001, superceding Mar. 22, 1991 version) art. 8, available at <http://www.law110.com/law/guowuyuan/2055.htm> (last visited June 8, 2005) [hereinafter Chengshi Tiaoli].

¹⁷⁰ Zhengyong Banfa, art. 9. See also Guotu Ziyuan Tingzheng Guiding [Provisions on Land and Resources Hearings] (issued on Feb. 10, 2004 by the MLR, effective May 1, 2004), available at <http://www.law110.com/law/tudi/12179.htm> (last visited June 8, 2005).

¹⁷¹ See Guanyu Renzhen Zuohao Chengzhen Fangwu Gongzuo Weihe Shehui Wending de Jinji Tongzhi [Urgent Circular Concerning Better Implementation of Urban Development to Protect Societal Stability] (issued on Sept. 19, 2003 by the State Council), available at <http://www.law110.com/law/guowuyuan/2115.htm> (last visited June 8, 2005).

¹⁷² See Chengshi Fangwu Chaqian Jiage Zhidao Yijian [Opinion Guiding Urban Demolition and Relocation Compensation] (issued on Dec. 1, 2003 by the Ministry of Construction, effective Jan. 1, 2004), available at <http://www.law110.com/law/jianshe/2406.htm> (last visited June 8, 2005). In rural areas, compensation is "six to ten times the average annual output value of the requisitioned land for the three years preceding such requisition," plus the amount calculated by the provincial land administration bureau for "attachments and young crops." See Land Management Law, art. 47. In addition, the government should calculate a resettlement subsidy based on the average amount of land requisitioned per person, with a minimum amount of four to six times the average annual output value of each unit of land for the three years preceding the requisition. *Id.*

C. *Lack of Recourse in Liaoning Province*

The particular set of obstacles faced by a group of peasants from a suburban district of Shenyang, in the northern province of Liaoning, has been followed with some interest by the State media. The group's troubles began in late 2001, when the State Council approved Shenyang's request to requisition their land for municipal construction.¹⁷³ Notice was issued in January 2002 by the Liaoning provincial government, informing the peasants that a total of 284,723 hectares would be requisitioned.¹⁷⁴ Dissatisfied with the resettlement and compensation terms announced in March, the peasants complained to the village committee, which told them that it did not have authority over compensation rates.¹⁷⁵

Led by Shi Hongxue, the group then went to the district government, which directed them to the Yuhong District office of Shenyang's Planning, Land and Resources Bureau.¹⁷⁶ Bureau officials ignored the peasants' demands and instead instructed them on March 22 to vacate their land, organizing a forced eviction on March 26.¹⁷⁷ The peasants struck back with an administrative lawsuit brought before the Yuhong District People's Court, which refused to exercise jurisdiction over the compensation matter, although it did rule that the bureau had proceeded illegally with eviction.¹⁷⁸

Pursuant to procedures set forth in the Implementing Regulations under the LML ("Management Regulations"),¹⁷⁹ the group appealed in January 2003 to the Liaoning Provincial People's Government.¹⁸⁰ After the provincial government's Legal Office said that it could not judge the case, and that the appropriate agency to do so would be the Liaoning Provincial Land and Resources Bureau ("LRB"), the group went to the Liaoning LRB.¹⁸¹ There, they hit another roadblock: at first, they were advised that they again had gone to the wrong body for resolution; then, in December

¹⁷³ See Fan Hongping, *Shenyang Qi Tudi Chengbaozhe Zhuang Gao Guotu Ziyuan Bu Baisu* [Seven Shenyang Peasants Lose Suit against Ministry of Land and Resources], ZHONGGUO FAYUAN WANG [CHINA COURT NET], Dec. 9, 2004, available at <http://www.chinacourt.org/public/detail.php?id=142221> (last visited June 8, 2005).

¹⁷⁴ *Id.*

¹⁷⁵ See Li Shen & Wang Ruyue, *Ministry Sued by Frustrated Farmers*, Oct. 29, 2004, available at http://service.china.org.cn/link/wcm/Show_Text?info_id=110688&p_qry=Land (last visited June 8, 2005).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ Article 25 states that "In the event of dispute over the standard of compensation . . . it shall be ruled upon by the people's government approving the requisition and land use." Management Regulations, art. 25.

¹⁸⁰ See Fan, *supra* note 173.

¹⁸¹ *Id.*

2003, they were told that the compensation terms were supported by the authorizing documentation.¹⁸²

At this point, attorney Lu Guang joined in the efforts and questioned the legal validity of "Approval No. 559," the MLR document authorizing requisition and construction.¹⁸³ With his assistance, the group sent a request to the MLR in December 2003 to invalidate the Liaoning LRB's position, followed by a personal visit to the ministry to petition their grievances (*shangfang*).¹⁸⁴ The bureau initially insisted that it could not rule on behalf of the provincial government on the matter, and then, upon the group's appeal for reconsideration, announced in July 2004 its support for the Liaoning LRB's decision.¹⁸⁵ In August, the peasants filed a suit against the MLR in the First Intermediate People's Court in Beijing, arguing that the MLR had exceeded the scope of its authority in issuing Approval No. 559, thus violating the group's rights.¹⁸⁶

The First Intermediate People's Court issued a very narrow ruling on the case, reasoning in circular fashion that: State law provides for State Council approval of a city's annual plan, subsequent to which the MLR may authorize individual applications for land use and construction; thus the MLR was empowered to issue Approval No. 559, because State law allows it to do so.¹⁸⁷ This decision demonstrated the Court's refusal to review the MLR's actions for potential error or abuse—either disregarding as irrelevant, or taking as given, the legitimacy of the agency's decision.

The *Shenyang* case raises issues clearly unresolved by the reforms of the October Decision and December Circular. Initially approved in 2001, the development project was not challenged due to a failure to pay land-use fees or conform to land law or policy. Instead, the case highlights the confusion and inconsistencies inherent in the mechanism of Chinese land management, shuttling the aggrieved from local government office to courthouse to agency, and then back again.¹⁸⁸ More importantly, like so

¹⁸² This included the second version of Shenyang's 2001 annual city plan, approved by the State Council, and an MLR document (559 Hao "Guanyu Shenyangshi Chengshi Jianshe Nongyongdi Zhuanyong he Tudi Zhengyong de Pifu" [Approval No. 559 "Concerning Review of Shenyang City's Application for Requisition and Transformation of Agricultural Land for Municipal Construction"]) approving the requisition and transformation of the peasants' land for non-agricultural purposes. *Id.*

¹⁸³ See Li, *supra* note 175.

¹⁸⁴ *Id.*

¹⁸⁵ See Fan, *supra* note 173.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ In a similar case brought by a group of 150 peasants from Hongqiao village in Jiangsu province, the aggrieved first made a personal visit in May 2004 to the MLR to petition their grievances and then sent the agency a request for administrative reconsideration. In March, the Beijing No. 1 Intermediate People's Court ruled in their favor and ordered the MLR to review its prior approval of the local government's

many other cases of land dispute, what transpired in Shenyang reveals a general reluctance by Chinese courts to exercise jurisdiction (*li'an*) over such matters due to pressures from local officials.¹⁸⁹

Indeed, figures show that only 3948 cases involving real estate disputes were handled by Beijing courts in 2003,¹⁹⁰ while an overwhelming 18,620 complaints were filed directly with the Ministry of Construction in the first half of 2004 alone.¹⁹¹ A study of 20,000 letters to media outlets included those written by 720 peasants who had traveled to Beijing to directly petition authorities.¹⁹² While complaints to government agencies and media outlets have become increasingly important as alternative channels for openly airing grievances,¹⁹³ Beijing has attempted to stop the process of petitioning altogether,¹⁹⁴ and ordered a ban on news reports regarding farmland requisitions.¹⁹⁵

In place of such alternatives, new procedures allow for parties unable to reach agreement on resettlement and compensation terms to apply for

decision to requisition the farmers' land. However, commentary on this case points out that the court failed to actually invalidate the MLR's original decision to approve the land requisition, meaning that the peasants might end up on a similar journey as their Liaoning counterparts. For additional information related to the Jiangsu case, see Wang Yang, *150 Ming Wuxi Nongmin Gao Guotu Ziyuann Bu An Zuo Kaiting* [Trial of 150 Wuxi Peasants Versus MLR Opens Yesterday], XINHUA NET, Jan. 25, 2005, available at <http://www.chinacourt.org/public/detail.php?id=148046> (last visited June 8, 2005).

¹⁸⁹ The Chinese judicial process allows local Party committees to decide which cases are heard by the courts. See Davis & Lin Hai, *supra* note 167, at 17.

¹⁹⁰ See *China Mulls Property Law to Secure Ownership*, CHINA DAILY, Oct. 23, 2004, § 2, available at http://www2.chinadaily.com.cn/english/doc/2004-10/23/content_385045.htm (last visited June 8, 2005) [hereinafter *Secure Ownership*].

¹⁹¹ As of June 22, 2004, this figure had already exceeded the 18,071 complaints filed during all of 2003. *Jianshebu: Jinnian Shangbannian Zhengdi Chaiqian Shangfang Chaoguo Qunian Zongliang* [Ministry of Construction: Petitions Over Requisition and Demolition in the First Half of the Year Surpass Total Figures From Last Year], BEIJING NEWS, July 5, 2004, available at <http://www.people.com.cn/GB/guandian/2618209.html> (last visited June 8, 2005). According to Deputy Minister Fu Wenjia, the 2004 figure includes more than 3000 individual complaints, representing 5397 people, and more than 900 group complaints, representing 13,223 people. *Id.*

¹⁹² Zhao, *supra* note 98, pt. I. Hundreds of desperate peasants carry their receipts, legal rulings, and even medical records to Beijing each year. See Yardley, *supra* note 132, sec. 3. The system of "petitioning" has its roots in hundreds of years of Chinese tradition, which allowed local peasants to go to the capital to seek audience with the emperor's court. See *id.*; Robert J. Saiget, *Chinese Finding It Harder to Find Justice, Despite Human Rights Guarantee*, AGENCE FRANCE-PRESSE (Beijing), Apr. 15, 2004, available at LEXIS, News Library.

¹⁹³ Saiget, *supra* note 192. One petitioner noted: "You have to stay in Beijing to complain because there are so many ministries and departments. You can complain at the State Council, Supreme People's Court . . . National People's Congress and the Supreme People's Procuratorate." *Id.*

¹⁹⁴ In March 2004, NPC Chairman Wu Bangguo ordered local governments to stop petitioners from going to the capital and mandated that local complaints bureaus handle the issues instead. See *id.*

¹⁹⁵ Beijing's publicity department has ordered media organizations to cease reporting on cases of farmland acquisition by local officials. Josephine Ma, *Reporting of Farmland Seizures Outlawed: Sources Say Media Crackdown Extends to Coverage of Outspoken Economist*, SOUTH CHINA MORNING POST, Oct. 7, 2004, available at <http://www.scmp.com> (last visited June 8, 2005).

administrative adjudication.¹⁹⁶ However, the adjudication focuses only on the terms, rather than the actual validity of the requisition or eviction, and is conducted by the same local bureau that authorized the action in the first place.¹⁹⁷ Given these conflicts of interest, the new rules will prove ineffectual unless the entire process can be taken out of the hands of agencies with vested interests adverse to the complainants' interests.¹⁹⁸ The need for displaced residents "to take their problems to court instead of taking them to the streets" cannot be realized absent a court system and mechanisms for alternative dispute resolution, which can be strengthened and made more independent.¹⁹⁹

IV. DIGGING DEEPER: A RIGHTS-BASED FRAMEWORK FOR CHINA'S NEW HOUSE

To return to the question posed in Part II, it appears crucial at this point to ask whether newly promoted property rights can realistically be enforced against the backdrop of China's governing ideology. China scholar Michael Dowdle notes:

Compared with mature legal systems, China's legal system is significantly less transparent, predictable, and consistent; does not offer the same quality of protections for economic, constitutional, and human rights; and does not exercise the same quality of influence over other political (and private) actors. 'Rule of law' might be regarded simply as an adjective indicating the presence of some or all of these systemic abilities. And if this is the case, then it is clear that China does not enjoy rule of law.²⁰⁰

But even as the Chinese appear to demonstrate such ambivalence toward the rule of law in practice,²⁰¹ their leadership adamantly proclaims support for

¹⁹⁶ See Chengshi Fangwu Chaiqian Xingzheng Caijue Gongzuo Guicheng [Administrative Adjudication of Urban Housing Demolition and Relocation] (issued on Dec. 30, 2003 by the Ministry of Construction, effective Mar. 1, 2004), available at <http://big5.china.com.cn/chinese/PI-c/472789.htm> (last visited June 8, 2005).

¹⁹⁷ *Id.* arts. 2-3.

¹⁹⁸ See Davis & Lin Hai, *supra* note 167, at 35.

¹⁹⁹ Press Release, Human Rights Watch, China: Forced Evictions Spur Protests (Mar. 25, 2004), available at <http://hrw.org/english/docs/2004/03/22/china8159.htm> (last visited June 8, 2005).

²⁰⁰ Michael W. Dowdle, *Heretical Laments: China and the Fallacies of 'Rule of Law,'* 11 CULTURAL DYNAMICS 287, 301 (1999).

²⁰¹ *Id.* (citing William P. Alford, *A Second Great Wall? China's Post-Cultural Revolution Project of*

the supremacy of law in theory.²⁰²

This section argues that significant principles of Western liberalism, including those relating to human rights and limitations on the power of government, do in fact exist in Chinese legal and political consciousness. But in chasing after modernity and modeling its legal reform efforts predominantly after the experience of the Americans, China's greatest failure has been its disregard of some of the crucial assumptions—and framework—upon which the American rights infrastructure was built.

A. *Reaffirming Human Rights in a Global World Order*

Since reform and liberalization (*gaige kaifang*) in 1978, China has been on an accelerated path toward economic development. With the private sector accounting for roughly three-quarters of employment, two-thirds of GDP and one-half of residential and industrial property value,²⁰³ it is difficult to argue that the nation will be in “transition” forever. While a malleable property rights regime works, and is acceptable, for transitional economies, there is a “need [for] laws and institutions appropriate for the post-transition economic order.”²⁰⁴ China legal scholars have recognized this urgency, emphasizing that greater protection of private property helps contribute to the national economy by making transactions more transparent and dissemination of information more open, thereby instilling confidence in both investors and consumers.²⁰⁵

Land is unique as a form of private property, arguably functioning as a commodity not only relied upon by the individual, but also utilized for the public good and benefit of the State. Ideally, an economically powerful State would raise both the profit level for commercial interests and the basic standard of living for common citizens. But while the governing property regime allows private enterprise to take part in the business of marketizing China, it has excluded the average individual from the process.²⁰⁶

A system of land management that vests property rights in the hands of the economic, and thus political, elite seems contrary to fundamental principles underlying much of Western liberal thinking. John Locke's

Legal Construction, 11 CULTURAL DYNAMICS 193 (1999)).

²⁰² *Id.*; see also CHEN, *supra* note 16, at 3.

²⁰³ See Alsen, *supra* note 15, at 3.

²⁰⁴ deLisle, *supra* note 24, at 6.

²⁰⁵ See *Secure Ownership*, *supra* note 190 (quoting BaoYujun, Chairman of the Beijing-based Institution on the Promotion of Private Economy, and Renmin University Professor Wang Liming, one of the leading authors of the draft property law expected to be approved in 2005).

²⁰⁶ See, e.g., discussion *supra* Part II.B.2 & III (providing numerous examples of individual residents struggling to exercise leverage against the government and developers).

description of property as predating sovereign power plays a central role in the West.²⁰⁷ Under traditional Lockean theory, private property rights can only be exercised “where there is enough and as good left in common for others.”²⁰⁸

In addition, under the international human rights regime, certain fundamental rights are meant to govern universally and keep in check potential State overreaching.²⁰⁹ The United Nations Committee on Economic, Social and Cultural Rights, entrusted with authoritatively interpreting the International Covenant on Economic, Social and Cultural Rights, defines “forced eviction” as “the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.”²¹⁰ China, having ratified the covenant on June 27, 2001, is bound by the understanding that forced eviction is “prima facie incompatible” with the covenant’s requirements.²¹¹

Recent Chinese constitutional and legislative texts, books, articles and official propaganda materials do affirm the significance of key principles of Western liberalism.²¹² They include language about human rights, about the state as a product of a social contract (in the sense that the authority and legitimacy of government is derived from the consent of the governed), and about the need for governmental power to be regulated, limited and controlled by law so as to minimize abuse of power or invasion of citizens’ rights.²¹³ In theory, then, China seems to be moving beyond the realization that property rights are crucial only to economic development, and to some extent recognizing that human rights are fundamental to social development.

The traditional Western—and American—concept of safeguarding life and liberty, as well as property, has thus become a part of China’s more recent rights discourse, with influential legal scholars insisting on the

²⁰⁷ See James S. Burling, *Private Property Rights and the Environment After Palazzalo*, 30 B.C. ENVTL. AFF. L. REV. 1, 3-5, 40, 51, 62 (2002).

²⁰⁸ JOHN LOCKE, *The Second Treatise of Civil Government* § 27, at 134, in TWO TREATISES OF GOVERNMENT (Thomas I. Cook ed., Hafner Publishing Co. 1947) (1690).

²⁰⁹ See, e.g., *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. Doc A/810, arts. 3 (providing for security of person), 12 (prohibiting arbitrary interference with home), 13 (providing for freedom of movement and residence), 17 (establishing property ownership and protection guarantees), 25 (establishing a basic standard for adequate housing) (1948). The United Nations High Commissioner for Human Rights notes that all of the preceding are implicated in cases of forced eviction. See U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS, FORCED EVICTIONS AND HUMAN RIGHTS, U.N.H.C.R. Fact Sheet No. 25 (1996), available at <http://www.unhcr.ch/html/menu6/2/fs25.htm> (last visited June 8, 2005).

²¹⁰ See *Implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment No. 7*, U.N. ESCOR, 16th Sess., ¶ 4, U.N. Doc. E/C.12/1997/4 (1997).

²¹¹ See *id.*

²¹² See CHEN, *supra* note 16, at 3.

²¹³ *Id.*

significance of all three key civil rights in reform efforts.²¹⁴ A few go even further, to claim that the right to property is the most sacred of the three, and that security over one's property is a prerequisite to ensuring security over one's person.²¹⁵ A recent Chinese editorial quotes from the discourse in the West to point out that even the poorest should be able to oppose the authority of the sovereign while in his own home: "Wind can come in, rain can come in, whereas only the king cannot come in."²¹⁶

Human rights have in this way been promoted from "a concept formerly criticized in China to a constitutional law concept,"²¹⁷ bringing to a head debates about private property and recent discussions related to constitutional reform. Critics at the grassroots level and in senior levels of government now openly debate the degree to which China's Constitution does, or should, protect property,²¹⁸ but notably do so by dressing up their arguments in language that is characteristically Chinese. They are able to argue that the protection of private property is necessary, only to the extent that it relates to the interests of the "whole people."²¹⁹

By insisting that the poor also stand to benefit from protection of private property and arguing that acknowledgment of this fact will help to mitigate the tensions between rich and poor,²²⁰ critics have effectively played into the fears and concerns of the highest-level leadership. What is needed to transform the theory behind the new rights discourse into actual practical safeguards is just this type of recognition that respect for the private property rights of the individual is in keeping both with the Party's efforts to maintain social stability—and thus legitimacy—and with its attempt to gain recognition as a rule-of-law state (*fazhi guojia*) on the international scene.

²¹⁴ Liao Weihua, *Wuquanfa Caoan You Xiwang Sanshen Tongguo* [Hope for Passage of Property Law Draft at Third Session [of NPC]], BEIJING NEWS, Oct. 24, 2004, at A-2.

²¹⁵ See Cao, *supra* note 60, sec. 3, para. 2; Zhu Sipei, *Shuping: Wuquanfa Shi Baohu Sichan De Xianzheng Xuyao* [Editorial: Property Law a Necessity for Protection of Private Property in a Constitutional Government], ZHENGYI WANG [JUSTICE NET], Oct. 27, 2004, available at <http://www.jcrb.com/zyw/n406/ca308898.htm> (last visited June 8, 2005).

²¹⁶ *Id.*

²¹⁷ Cao, *supra* note 60, sec. 3, para. 1.

²¹⁸ These critics point to articles 10 (addressing reallocation of property rights), 13 (protection of the rights of individuals to income, savings, residence and inheritance) and 39 (prohibiting illegal search or entry). See Davis & Lin Hai, *supra* note 167, at 32.

²¹⁹ See Cao, *supra* note 60, sec. 3, para. 2.

²²⁰ *Id.*

B. The Compensation Quandary

At a recent lecture on constitutional studies, President Xiao Yang of the Supreme People's Court, China's highest judicial organ, commented that courts should prevent infringement of citizens' legal property rights and provide for "proper and reasonable compensations."²²¹ The frenzy over determining the right measure of compensation echoes similar efforts in the United States designed to provide a mechanism for alleviating the public anger that arises over land abuses.²²² Yet while the Fifth Amendment to the U.S. Constitution mandates "just compensation" guided by a measure of market value,²²³ China's constitutional equivalent leaves the amount of compensation for government seizure of land undefined.²²⁴ Absent benchmarks, litigation over compensation terms has become a chaotic endeavor—as in the *Shenyang* case.²²⁵

There is legitimacy to the argument that "[in a] country without [a] clear private property concept, where rights are not well granted *ex ante*, it is not unusual that people have to fight for actual control over the property, *ex post*."²²⁶ Pending resolution of a land dispute in China, one cannot get a judicial injunction to prevent the planned demolition.²²⁷ Because demolition may proceed even before lawsuits have been decided, the ability to seize and demolish the property does not become a point of contention. Actual control over the property is effectively conceded to the government, and the "fight" by default focuses heavily on determination of the compensation terms, *ex post facto*.

It is important to recognize that *ex post* measures are, in general, less effective than *ex ante* ones and, in China, misguided in their objectives.²²⁸

²²¹ *Courts Urged to Protect Citizens' Property Rights*, XINHUA, June 19, 2004, available at http://english.com.cn/200406/19/eng20040619_146855.html (last visited June 8, 2005). Development companies have preferred to compensate urban residents and resettle them into suburban areas, rather than rehouse them at subsidized prices in their original inner-city neighborhoods. Junhua Lü, *Beijing's Old and Dilapidated Housing Renewal*, 14 CITIES 59, 68 (Daniel B. Abramson trans., 1996). However, compensation has become a flashpoint, as property values rise in the areas from which residents are typically being resettled. See Davis & Lin Hai, *supra* note 167, at 15.

²²² According to urban planning scholars, only one-half of all people displaced from their homes and neighborhoods received relocation payment during the urban renewal period of the 1950s and 1960s in America. See Zhang & Fang, *supra* note 9, at 289.

²²³ See *Olson v. United States*, 292 U.S. 246, 255 (1934) (holding that "[j]ust compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined").

²²⁴ Even after the March 2004 amendments, Articles 10 and 13 of the Chinese Constitution merely read that the State "shall pay compensation." XIANFA, *supra* note 14, arts. 10, 13.

²²⁵ See *supra* Part III.C.

²²⁶ See Pham, *supra* note 23, at 9.

²²⁷ See Management Regulations, *supra* note 43, art. 16.

²²⁸ Counsel for the petitioners in this year's *Kelo v. City of New London* case before the Supreme

Compensation, as currently calculated, is both too harsh and not harsh enough.²²⁹ In a best-case scenario, Chinese courts scrutinize these cases based on a “regulator-as-tortfeasor” model, in which property owners are viewed as injured parties whose interests have been harmed by the government.²³⁰ Undue attention is paid to extreme cases of wrongdoing, and select government representatives are punished in widely publicized anti-corruption campaigns.²³¹ In the United States, property owners have been shown to “make excessive investment or inappropriate land use decisions when they are fully compensated.”²³² Wherever applied, the model appears to distort the relevant incentive structure.

At the other end of things, while “recompense” may be great in China, actual “compensation” is rarely so. Those who are wronged may enjoy the satisfaction of seeing their wrongdoers publicly chastised, but the tangible fruit of their victory is limited to a market-value standard failing to take into account the real worth of the land. Whether in the United States or in China, compensation is more often designed to take into account the current value of the property, rather than its value after development is complete.²³³ But this type of standard, when applied in China, ignores the huge land subsidy received by developers. By allocating land free of charge and recognizing rights only in its usage, the Chinese government has allowed for a payout rate that is merely nominal and easily afforded by developers able to turn a huge profit in an overheated economy.

Focusing on an *ex post* compensation scheme has helped pave the way for government to seize and clear land “in the name of the public interest,”

Court argued: “When all of the crucial determinations that will give rise to public benefit or private advantage can be made *after* the condemnations take place, then the possibilities for abuse multiply exponentially.” Brief for Appellant at 46, *Kelo v. City of New London*, 125 S. Ct. 1241 (1986) (No. 04-108) [hereinafter *Kelo App. Brief*].

²²⁹ In urban areas, the standard for compensation set by the State Council is calculated based on the full market value of properties, plus an (unspecified) amount for business loss in case of non-residential properties. See Chengshi Tiaoli, *supra* note 169, art. 24.

²³⁰ See JAMES BOYD & TIMOTHY J. BRENNAN, PLURALISM AND REGULATORY FAILURE: WHEN SHOULD TAKINGS TRIGGER COMPENSATION? 6-7 (1996) (explaining the regulator-as-tortfeasor model).

²³¹ See, e.g., *supra* Part III.A for a discussion of the *Jiahe* case.

²³² BOYD & BRENNAN, *supra* note 230, at 7.

²³³ Supreme Court Justice Anthony Kennedy was in fact quick to remind counsel for the respondents in *Kelo v. City of New London* that “[it is] a fundamental of [American] condemnation law that you cannot value the property being taken based on what it’s going to be worth after the project.” Transcript at 50, *Kelo v. City of New London*, 125 S. Ct. 1241 (1986) (No. 04-108) [hereinafter *Kelo Transcript*]. Monetary damages awarded for constitutional violations of either the Due Process Clause or Takings Clause are legal remedies, not equitable ones. See *Teamsters v. Terry*, 494 U.S. 558, 570 (1990) (quoting from *Curtis v. Loether*, 415 U.S. 189, 196 (1974) to state that “[g]enerally, an action for money damages was ‘the traditional form of relief offered in the courts of law’”); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 710 (1999). As such, they take into account what the owner has lost, and not what the taker has gained. *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910).

while allowing for large-scale commercial development that profits just a few.²³⁴ Because compensation is designed to pay off private citizens for government actions assumed to be legitimate and within the government's power,²³⁵ it offers no effective solution to situations in which government takings are made in error or public use is merely incidental to private (e.g., development company) gain.²³⁶

As development companies opt to compensate and resettle residents into China's suburban areas, rather than re-house them at subsidized prices in their original inner-city neighborhoods, "the city's poorest residents can only afford to move out farther and farther from the city center[, while] only the most privileged can live [there]."²³⁷ The Chinese government in effect subsidizes the rich at a price that does not factor in the social costs borne by the poor. Regardless of the amount received, compensation fails to take into account the inability of evicted residents to afford rising property values where they previously lived or find employment where they must now resettle.²³⁸ Faced with a similar battle over land in hot pursuit by development companies, displaced residents in the United States pushed Supreme Court Justice Antonin Scalia to ask whether taking property from somebody who does not want to sell it counts for nothing.²³⁹

C. *The Political Rhetoric of Building in the "Public Interest"*

In China, as in the United States, the refusal to sell is not only a holdout for more money, but perhaps the sole means through which the economically and politically disadvantaged can carve out a space for themselves, in a world of competing interests.²⁴⁰ Courts in the United

²³⁴ In New York, for example, the government used the power of eminent domain to seize and clear the Columbus Circle area, even though only two percent was taken up by slums. See Zhang & Fang, *supra* note 9, at 288. In Los Angeles, officials bulldozed a 315-acre tract of land planned for public housing, only to use it later for a stadium owned and erected by the Los Angeles Dodgers baseball team. See *id.*

²³⁵ This point is discussed in greater detail *infra* Part IV.C.

²³⁶ The issue of how to adequately measure compensation where property has been taken from one private actor and transferred to another came up repeatedly during oral arguments in *Kelo v. City of New London*. See Kelo Transcript, *supra* note 233, at 22-23, 45.

²³⁷ Lü, *supra* note 221, at 68.

²³⁸ See Davis & Lin Hai, *supra* note 167, at 15; CONGRESSIONAL-EXECUTIVE COMMISSION ON CHINA, ROUNDTABLE ON PROPERTY SEIZURES IN CHINA: POLITICS, LAW, AND PROTEST, app. A (June 21, 2004) (prepared statement of Patrick Randolph, Professor, University of Missouri, Kansas City, School of Law) [hereinafter Randolph].

²³⁹ See Kelo Transcript, *supra* note 233, at 39.

²⁴⁰ See *id.* at 40-41. There are admittedly a number of residents, referred to by the Chinese as "nail households" (*dingzi hu*), who stubbornly remain in their homes simply to hold out for better compensation. See Abramson, *supra* note 84, at 73. However, the existence of these holdouts by no means indicates that

States have attempted to arm the poor and disadvantaged with two weapons: "Weapon one is . . . compensation. And weapon two is [the ability to] put [government] to a test of being reasonable."²⁴¹ In other words, American courts are empowered to award monetary damages in the event that they authorize condemnation to proceed, or they may prevent the condemnation from proceeding if the government has failed to show a reasonable foundation for its taking.²⁴²

Of course, "[w]hen [the United States] needed revitalized cities and gentrification of the slums, we didn't stand too hard on Constitutional principles, and this in a society that has limited government as a basic principle."²⁴³ As a product of political liberalism in the wake of the New Deal, the federal government intervened extensively in the economy and passed legislation such as the Housing Act of 1949 (the "1949 Housing Act"), embracing the belief that it must take on responsibility for addressing social problems that plagued the nation.²⁴⁴ The U.S. Supreme Court certainly played its own role in "rubber-stamp[ing] the notion that condemnation, redevelopment and resale to private developers is a legitimate response to the problem of decaying central cities."²⁴⁵

However, urban renewal in the United States took place within the framework of a mature capitalist society, in which public and private sectors were well-delineated.²⁴⁶ "[N]eighborhood activism created a new 'political space' which allowed, and sometimes forced, urban politicians and administrators to interact with new contenders of power."²⁴⁷ The 1954 Amendments were thus passed five years after launching Title I of the 1949 Housing Act, to respond to deficiencies in the bulldozer approach and require local citizen participation in the development and execution of urban renewal.²⁴⁸

Urban renewal in the United States also proceeded in the context of a mature representative democracy. As pointed out by counsel for the petitioners in *Kelo v. City of New London*, the Connecticut case mentioned in Part I,

all who oppose eviction have done so for bargaining's sake.

²⁴¹ See *Kelo* Transcript, *supra* note 233, at 41.

²⁴² The Supreme Court is of the view that the judiciary may intervene in government takings for public use, where the public use is "palpably without reasonable foundation." See *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241 (1984).

²⁴³ Randolph, *supra* note 238.

²⁴⁴ Zhang & Fang, *supra* note 9, at 292.

²⁴⁵ *Id.* (citing to *Berman v. Parker*, 348 U.S. 26 (1954)).

²⁴⁶ *Id.* at 293.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

When state and municipal officials make economic or social policy decisions [in the United States], the people whom those officials represent have the opportunity to voice their opinions on those decisions at the next election. So if the choice is disagreeable to enough people, the consequences of that disagreement will become evident through the political process.²⁴⁹

It is only on the basis of this underlying assumption that U.S. courts have thus tended to “rubber-stamp” use of the eminent domain power and deferred heavily to the legislature when it comes to condemnation for public use.²⁵⁰ This is in keeping with the general view that the legislature is “the appropriate representative body through which the public makes democratic choices among alternative solutions to social and economic problems.”²⁵¹ In a recent case involving both due process and takings challenges to the Coal Industry Retiree Health Benefit Act,²⁵² Supreme Court Justice Breyer therefore argued that the language of the Fifth Amendment’s Takings Clause²⁵³ suggests that “at the heart of the Clause lies a concern, not with preventing arbitrary or unfair government action, but with providing compensation for *legitimate* government action that takes ‘private property’ to serve the ‘public’ good.”²⁵⁴

U.S. case law at present steers clear of establishing a means-ends test akin to that under the Fifth Amendment’s Due Process Clause,²⁵⁵ often avoiding the question of whether the “means” resorted to in government takings substantially advance a legitimate public “end.” Illegitimate takings conducted in bad faith are typically invalidated under the Due Process Clause, rather than compensated under the Takings Clause.²⁵⁶ This

²⁴⁹ Brief for Respondent at 21, *Kelo v. City of New London*, 125 S. Ct. 1241 (1986) (No. 04-108) [hereinafter *Kelo* Resp. Brief].

²⁵⁰ The Supreme Court has itself insisted the role of the judiciary “in reviewing a legislature’s judgment of what constitutes a public use, even when the eminent domain power is equated with the police power . . . is . . . extremely narrow . . .” (internal quotation marks omitted). *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240 (1984).

²⁵¹ *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981).

²⁵² See *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998).

²⁵³ The Takings Clause follows the Due Process Clause and states: “nor shall private property be taken for public use without just compensation.” U.S. CONST. amend. V.

²⁵⁴ *Eastern Enterprises*, 524 U.S. at 554 (Breyer, J., dissenting) (emphasis added).

²⁵⁵ This clause states that “[n]o person shall be . . . deprived of life, liberty, or property without due process of law.” U.S. CONST. amend. V.

²⁵⁶ More recently, the Supreme Court in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.* declined to rule definitively on whether the means-ends test is appropriate under a Takings Clause analysis. See 526 U.S. 687 (1999). Although the Court appeared to base its ruling on a theory that the City of Monterey failed to “substantially advance a legitimate public purpose,” commentators argue that this

is because “the notion that government errors can be challenged under the Takings Clause . . . threatens to sweep away longstanding government immunity rules . . . and seriously interfere with elected officials’ good faith efforts to mediate competing social interests in the use and control of property.”²⁵⁷

When applied to the China scenario, it becomes apparent that these dichotomies in the American system are simply nonexistent in China. U.S. takings law assumes that separate provision for evaluating whether due process was taken into consideration already exists elsewhere. In cases where the government has failed to ensure due process to those affected, the American Constitution provides for a process of *ex ante* invalidation that has no equivalent in Chinese law.²⁵⁸

In addition, the U.S. federal government’s attempt to attract private investment in its urban renewal program ultimately failed.²⁵⁹ Without pro-growth coalitions of the type seen in China, the American government’s interests have not run quite so counter to the public’s interests. By contrast, the distinction between private and public is too often ambiguous in China, with local State-owned enterprises or other government-affiliated companies orchestrating the urban redevelopment process and shutting out community players.²⁶⁰

Without checks and balances of the type that exist in the United States, it is misguided to rely on the principles and language of the Takings Clause to resolve the conflicts brought about by government requisition and condemnation in China. The American model is inappropriate not in its theoretical ideals, but in its application to the Chinese system. It simply assumes an underlying governmental structure and property infrastructure different from the ones currently existing in China.

The absence of representative government prevents the will of the popular majority from being expressed through legislation, and the last-recourse nature of the courts makes it difficult to enforce constitutional

should not be seen as contradicting the views of the five Justices who had disavowed the means-ends test in *Eastern Enterprises*. See John D. Echeverria, *Symposium: When Does Retroactivity Cross the Line?: Winstar, Eastern Enterprises and Beyond: Takings and Errors*, 51 ALA. L. REV. 1047, 1070-1071 (2000). The *Monterey* court had to determine whether the government action was “tortious and unlawful,” in order to rule on a completely different question—whether the claim was analogous to a common law tort claim and thus properly tried to a jury. *Id.* Moreover, even those justices failing to question the role of the means-ends test in *Eastern Enterprises* did so in *Monterey*. See Timothy J. Dowling, *On History, Taking Jurisprudence, and Palazzolo: A Reply to James Burling*, 30 ENVTL. AFF. L. REV. 65, 75 n.61-62 (2002).

²⁵⁷ Echeverria, *supra* note 257, at 1049.

²⁵⁸ See *supra* Part IV.B.

²⁵⁹ See Zhang & Fang, *supra* note 9, at 291.

²⁶⁰ See, e.g., *supra* Part II.B.2.

rights protecting the expression of those functioning at the margins. With only the State possessing the entire “bundle” of property rights (*suoyouquan*) on behalf of the Chinese people, it becomes necessary to establish better mechanisms for holding local officials accountable and empowering local communities.²⁶¹ China must construct a model that rests upon its own unique culture and traditions, and in doing so, it may provide valuable lessons from which the United States can draw.

V. PARTICIPATORY DECISION-MAKING AND DEMOCRATIZATION OF A FLAWED PROCESS

Michael Dowdle posits that the appropriate mechanisms might not have to do with the rule-of-law schemata conceptualized by the Western world. Rather,

[t]he mere fact that China is deficient in some particular aspect of its legal system, even one commonly associated with acknowledged rule-of-law systems, is of little significance unless it can be shown that that aspect would either promote social coordination or help realize social justice in China.²⁶²

This final section turns to the very argument that Chinese regulators may “do better to focus primarily on developing more robust social networks rather than on developing stronger rule-of-law institutions,” in order to achieve the dual aims of promoting social coordination and helping to realize social justice.²⁶³ It further seeks to explore how such a development tactic might be feasibly accomplished.

A. *A Space for Imagination: New Models of Governance*

Studies show that in China, displaced residents complain most, not about the *ends* of displacement, but about its *process*.²⁶⁴ Even when displaced residents are complaining about compensation itself, they are

²⁶¹ As one Chinese legal scholar notes, there have been efforts to manage land better, strictly control confiscation of land, raise compensation and improve the social conditions of landless peasants, but “the first task of reformers should be to clarify peasants’ rights, [and t]he nation’s laws should be used to give the land back to peasants.” Zhao, *supra* note 98, pt. III (quoting CASS Professor Yu Jianrong).

²⁶² Dowdle, *supra* note 200, at 302.

²⁶³ *Id.*

²⁶⁴ See, e.g., discussion *supra* Part III.B.; Cody, *supra* note 143 (noting concern by displaced Guangzhou residents over the way in which they were treated).

frequently complaining about the fact that they were forced—sometimes against their will—to become parties to compensation agreements, which set forth standards arbitrarily imposed by the central and municipal governments.²⁶⁵ Rather than continuing to perfect “outcome-based” tools correcting for unbalanced political influence, it may be more crucial for China to strengthen “organizational-based” rules, impacting the ability of pro-growth coalitions to leverage such influence.²⁶⁶ In this way, land reform may better allow for administration of new laws and regulations, without need for coercion.

Part IV.C. of this Article raised the specter that “[t]he judiciary’s role as the ‘least dangerous branch’ makes it ill-suited for serving as the *principal* defender of social justice.”²⁶⁷ Rule of law devices tend to promote social justice through judicial protection of human rights, economic rights, constitutional rights and due process, as well as judicial review of administrative behavior.²⁶⁸ But such judicial mechanisms “are better seen as supplements to other, more fundamental, means of generating social order.”²⁶⁹

Moreover, law itself is not the only means through which codes of conduct can be standardized and rationalized, and this helps to promote greater social coordination.²⁷⁰ Particularly in small-world environments, “the disciplining force of reiterated transactions can sometimes be so strong as to eliminate any need for formal legal regulation.”²⁷¹ In addition to developing more effective rule-of-law institutions in pursuit of this end, government regulators are therefore well-advised to “encourag[e] the development of small-world networks that link all the actors in the environment, a model of regulation sometimes referred to as ‘corporatism’ or ‘neo-corporatism.’”²⁷²

A powerful example of successful corporatist or corporatist-like regulatory schemes in the United States can be found in the extensive writings of Columbia Law School professors Michael Dorf and Charles

²⁶⁵ Zhang, *Urban Development*, *supra* note 5, at 496.

²⁶⁶ Boyd & Brennan, *supra* note 230, at 10.

²⁶⁷ Dowdle, *supra* note 200, at 307 (emphasis in original).

²⁶⁸ *See id.*

²⁶⁹ *Id.*

²⁷⁰ Dowdle cites to the discussion by Max Weber and others of such other devices as legal consistency, rationalized laws and regulatory jurisdictions, transparency, and public accountability. *Id.* at 302.

²⁷¹ *Id.* at 303.

²⁷² *Id.* Present-day use of these terms refers to regulatory environments in which the State serves as an intermediary between diverse, bargaining interests by reducing transaction costs. *See id.* at 309-310 n.9.

Sabel.²⁷³ Their model of “democratic experimentalism” is a “postmodern” approach to the expansive modern regulatory state,²⁷⁴ and promotes social networks over formal, bureaucratized structures, primarily through the combining of decentralization and mutual monitoring to form a vision of “directly deliberate polyarchy.”²⁷⁵ The process proposed is “direct,” “deliberative” and a “polyarchy” because it is meant not only to empower citizens by giving them a voice in decision-making, but also to recognize the plurality of voices in the process of government deliberation generally.²⁷⁶

This experimentalist vision rests upon the notion that there is a cooperative element to today’s new corporate structure, one in which the close integration of all actors helps to eliminate problems of hold-up through a richer exchange of information.²⁷⁷ Toyota Motor Corporation, for example, was able to manufacture its optimal car through a production process beyond the control of any individual group, but which depended upon each group pursuing the optimal solution for its own component of the car.²⁷⁸ Local, “tacit” knowledge of those down on the shop floor thus complemented the decisions made by those in management, serving as the foundation for the optimal product.²⁷⁹

Thus, when transferred to the public sphere, this suggests that decisions made by means of reasoning through discussion may be even more effective than those made by a mere count of the votes, because they take into consideration the tacit knowledge of local communities. Like the components of an automobile, social problems are interlinked in complex ways, calling for a transfer of experimentalist principles to the public sector in such a way as to keep regulation of society and the economy attuned to the needs of its citizen users.

²⁷³ See *id.* at 303.

²⁷⁴ See Randall Peerenboom, *Globalization, Path Dependency and the Limits of Law: Administrative Law Reform and Rule of Law in the People’s Republic of China*, 19 BERKELEY J. INT’L L. 161, 253 (2001).

²⁷⁵ See Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 316-322 (1998). This approach to government deregulation is inspired by Japanese industrial management techniques, and thus takes lessons from corporate management to help reconstruct government administration efforts. *Id.* at 286.

²⁷⁶ *Id.* at 320.

²⁷⁷ Dorf and Sabel refer to Mary P. Follet, who emphasized early on that, “[y]ou cannot establish democratic control by legislation . . . ; there is only one way to get democratic control—by people learning how to evolve *collective* ideas.” See *id.* at 415 n.468 (quoting MARY P. FOLLETT, *THE NEW STATE* 159 (1918) (emphasis added)).

²⁷⁸ For an account of this process, see Allen Ward et al., *The Second Toyota Paradox: How Delaying Decisions Can Make Better Cars Faster*, SLOAN MGMT. REV. 43, 43-61 (1995).

²⁷⁹ *Id.* at 267.

B. *An Experimentalist Vision for Re-Aligning Pro-Growth Coalitions*

It has been difficult for displaced residents like the ones in the *Shenyang* case to go to court and insist on direct enforcement of their property rights. The ideological dilemma plaguing China today is that enforcing property rights of the type recognized in the United States in effect provides for “natural restitution” of land.²⁸⁰ In other words, wholesale adoption of the U.S. system would force China to recognize more than just use rights, but also rights in the land itself. In turn, this would require the governing regime to collapse and streamline the “bundle of rights,” and pave the way for individuals to request return of property nationalized by the State.²⁸¹ Such a path toward privatization of land would call into question the very Marxist roots underlying Chinese society and Party legitimacy.

A shift in reform efforts, to focus on the core of the Party’s mandate—service in the interest of the people—would not undermine the rights movement. To the contrary, rights are significant precisely because they allow individuals to participate and associate in the deliberative process. Under a republican theory, which formed the basis of the American Revolution and Lockean liberalism:

[T]he power to take property for public use rests, not on the government’s right to exact support from subjects without their consent, but instead on the rights of all the people in the society. The majority may rightfully do only what the people can rightfully do unanimously.²⁸²

Shifting the focus of reform to incorporate a stronger theory of agency into eminent domain jurisprudence would reaffirm the relevance of the “whole people,” while at the same time allowing the Party to effectively recapture legitimacy and quell the social unrest stirred by recent public land scandals. What this new theory requires is a strengthening of land administration to distinguish between government acting in the public interest, to carry out its police powers, versus government acting in self-interest, to profit from back-door transactions. Only where the government is genuinely acting in the public interest should it enjoy the powers and immunities inherent in its sovereignty.

²⁸⁰ See Pham, *supra* note 23, at 12 n.33 and accompanying text.

²⁸¹ *Id.*

²⁸² Timothy Sandefur, *A Natural Rights Perspective on Eminent Domain in California: A Rationale for Meaningful Judicial Scrutiny of “Public Use,”* 32 SW. U. L. REV. 569, 584 (2003).

By focusing on outcome-based solutions (essentially the model of compensatory takings provided by the United States), the reform effort in China has left out due process considerations not provided for elsewhere in the property framework. A government-as-agent theory of reform would respect the rights of the average citizen, borrowing from the law on corporations to build transparency and accountability into the process of land administration. This model provides for a process of monitoring and access to records, which would hold regulators accountable as fiduciaries of the people.²⁸³ In addition, it recognizes that local communities are also stakeholders in development projects, soliciting their feedback and authorization on actions taken by the government officials who serve as their agents.²⁸⁴ As in any corporation, a fiduciary with a vested interest in the transaction awaiting approval would have to recuse himself from the ultimate decision approving or denying that transaction.

This model is consistent with Party notions of the leadership as the vanguard of the people and is to some extent already being implemented on a limited basis in China. Gang Zanchun, director of the Legal Affairs Department of SLAB, relates that his agency broke through a deadlock on proposed regulations regarding the requisition of rural land by publishing the full draft for public comment and conducting seminars with local peasants.²⁸⁵ SLAB bureaucrats ultimately took into account the peasants' desire to establish clear and detailed rules in the drafting of the regulations, in place of provisions allowing for broad discretion.²⁸⁶

While such willingness to factor in citizen perspectives may be rare, and the norm is that "drafters, despite extensive solicitation for public comment and consultation, may decide not to take the comments on

²⁸³ In the case cited in the introduction, Connecticut law mandated that multiple and specific details be provided in the development plan, including a statement of the number of jobs to be created, a marketability plan, a financing plan, an administrative plan, and a finding that the plan will contribute to the economic welfare of the municipality and the state. Kelo Resp. Brief, *supra* note 249, at 43. Such requirements seem to lend transparency and provide potential benchmarks for measuring whether the plan would actually be in the public interest.

²⁸⁴ Upon initial approval by the city council, the development company in the Connecticut case began a series of neighborhood meetings to educate the residents about the development process. *See id.* at 4. It issued notice through newspaper advertisements, direct mail and public announcements at city council meetings, to encourage residence attendance and participation. *See id.* A total of six neighborhood meetings were held between April and October 1998, and a subsequent environmental impact evaluation was completed only after a mandatory forty-five-day public comment period. *See id.* at 4-6.

²⁸⁵ Peter Howard Come, *Creation and Application of Law in the PRC*, 50 AM. J. COMP. L. 369, 387 (2002) (citing Gang Zanchun, Remarks at the Conference on Implications for Chinese Administrative Law of China's Accession to the WTO, China National School of Administration and the Asia Foundation (July 27-29, 2001)).

²⁸⁶ *Id.*

board,”²⁸⁷ there is potential for this to change with increased codification of the concept of citizen participation by right. The city of Qingdao, in Shandong Province, recently took an unprecedented step toward this goal in passing a circular that requires developers to reach agreement with at least ninety-five percent of affected residents in order to obtain a demolition and construction permit.²⁸⁸ Such legislation reflects growing recognition of the significance of obtaining advance approval (*shouken*²⁸⁹) from those affected, as an *ex ante* solution to the problems faced.

Urban planning experts have pointed to other successful experimental efforts, including a project in the southern seaport city of Quanzhou, in Fujian Province, in which resident involvement was incorporated into the earliest stages of the neighborhood planning processes for both city-center historic preservation and public space upgrading.²⁹⁰ This project culminated in several weeks of community planning workshops, a public exhibition of separate interest group visions for development, and a conference on “Democratization of the Urban Planning Decision-making Process.”²⁹¹ One reason local communities were brought into the Quanzhou development process was that planning professionals had expressed a desire to incorporate the character of the local community into their designs.²⁹²

Municipal authorities have also called on professionals to consult on district plans that they regard as contrary to the interests of the city or to the preferences of the municipal government.²⁹³ One such professional has argued that these expert consultants function as an intervening party to the pro-growth coalition, and are better suited to represent the interests of the community, because they are themselves urban residents of various professions.²⁹⁴ By allowing the decisions made by expert consultants to at times overrule those made by districts, SOEs or street committees,²⁹⁵ this

²⁸⁷ *Id.*

²⁸⁸ See *Qingdao Shi Dui Chengshi Fangwu Chaiqian Jinxing Yanghe Guanli* [City of Qingdao Embarks on Strict Campaign of Administration over Urban Housing Demolition], THE BEIJING NEWS, available at <http://www.thebeijingnews.com/news/2005/0310/06@010845.html> (last visited June 8, 2005).

²⁸⁹ See *id.*

²⁹⁰ See Daniel Abramson, Planning for Community and Planning with Community in China: Lessons from Quanzhou, Thoughts on Beijing, Remarks at Harvard-MIT Symposium on Planning for Continuity and Change in Urban China (Apr. 24, 2004), available at <http://courses.washington.edu/quanzhou> (last visited June 8, 2005).

²⁹¹ *Id.*

²⁹² See Daniel Abramson, Michael Leaf & Tan Ying, *Social Research and the Localization of Chinese Urban Planning Practice: Some Ideas from Quanzhou, Fujian*, in THE NEW CHINESE CITY: GLOBALIZATION AND MARKET REFORM 167 (John Logal ed. 2002).

²⁹³ See Zhang, *Decentralization*, *supra* note 61, at 319.

²⁹⁴ See *id.* at 319-320.

²⁹⁵ *Id.* at 319.

process builds in an extra layer of monitoring over those parties with otherwise partial interests.

The Quanzhou project provides an excellent model for other Chinese cities. There, local officials established a plan of action and then consulted service providers (the urban development experts) on both its design and implementation.²⁹⁶ In true democratic experimentalist fashion, the service providers solicited feedback from affected citizens, thus linking the officials with knowledge from the community. Thereafter, they engaged in a process of “simultaneous engineering,” through which they were able to continuously propose changes to the provisional design based on their newfound experiences and needs. “Benchmarking” occurred along each step of the way and entailed pooling of information from the experiment itself with information from similar experiments.²⁹⁷ The final steps in the process were error correction and “learning by monitoring.”²⁹⁸

This is not meant to imply that democratic experimentalism has now become the postmodern solution to administering the property market in a China still chasing after modernization. At present, the pro-growth coalition still overshadows the other two components of the development quadrant, which consists of government, developer, expert consultants and common citizens.²⁹⁹ Expert consulting, limited to individual development projects rather than comprehensive development strategies³⁰⁰ and called upon only on occasion, still appears to operate only at the margins. More importantly, the key to effective citizen participation is a revitalization of the community unit, which has unfortunately been weighed down by history and politics, and is thus fraught with its own challenges.³⁰¹

²⁹⁶ For a more detailed discussion of how the Quanzhou project proceeded, see Abramson et al., *supra* note 292.

²⁹⁷ See *id.* at 287.

²⁹⁸ *Id.*

²⁹⁹ See generally Zhang, *Urban Development*, *supra* note 5.

³⁰⁰ Zhang, *Decentralization*, *supra* note 61, at 320.

³⁰¹ David Westendorff, who consults for the Ford Foundation and has been involved in its work in Quanzhou, posits that one reason resident committees have suffered from low levels of legitimacy may be because of the past involvement of community groups in repressive functions. See DAVID WESTENDORFF, UNITED NATIONS, RESEARCH INSTITUTE FOR SOCIAL DEVELOPMENT, UNEASY PARTNERSHIPS BETWEEN CITY HALL AND CITIZENS (1998), available at <http://www.unhabitat.org/istanbul+5/pe30.htm> (last visited June 8, 2005).

C. *An Experimentalist Vision for Democratizing the Urban Renewal Process*

The pivotal question in China really becomes whether the community unit can be utilized effectively enough to give meaning to due process, as envisioned by theorists of democratic experimentalism. One China scholar has questioned whether the ideals of the theory can be reconciled with the Chinese system of democratic centralism, in which the center makes the final decision and maintains tight control over a fledgling civil society.³⁰² Furthermore, continuous re-engineering and questioning of the existing structure “co-exists uneasily with the more dogmatic aspect of socialism that insists on a single scientifically correct solution and unification of thought around the Party line.”³⁰³

Democratic experimentalism does not seem quite so contrary to the Party's general approach, when viewed in tandem with the central government's current practice of engaging in incremental reform. At present, it is not unusual for specific localities “earmarked for reform” to pass regulations without an equivalent at the national level, meant to serve as “models” for broader reform should they prove successful.³⁰⁴ In the past, Shenzhen functioned as such a “first step” testing ground for laws adopted from the Hong Kong legal system.³⁰⁵ Currently, a favored location for the testing of legislation is Shanghai,³⁰⁶ and municipal governments elsewhere typically benchmark their own attempts at reform against examples from the Shanghai experience.

Shanghai reflects an increasingly urbanized China, in which the homeowner rate is high and municipal housing departments, stretched for resources and unable to compete, must often leave the business of housing services to the property owners themselves.³⁰⁷ It is a realistic model of reform developed on China's own soil, and convincingly argues for enhancement of due process and reaffirmation of the public interest in urban planning. One researcher from the anthropology department at Sun Yat-sen University in Guangzhou conducted a study that revealed that the heightened consciousness that so often gives rise to broader social movement already exists among urban residents in Shanghai: “Faced with a wide range of growing problems such as pollution, forced resettlement, and land

³⁰² See Peerenboom, *supra* note 274, at 255-256.

³⁰³ *Id.* at 256.

³⁰⁴ Corne, *supra* note 285, at 425.

³⁰⁵ *Id.*

³⁰⁶ *Id.* at 426.

³⁰⁷ See Zhang, *Decentralization*, *supra* note 61, at 317-18.

confiscation, [they] not only complain to the local government but also get organized and take collective actions to defend their residential rights."³⁰⁸

The study further shows that the measured success of residents in Shanghai's Green Garden New Village in protecting their own interests had much to do with the ability to align with nongovernmental parties and form a rights-based coalition.³⁰⁹ This rights-based coalition counter-balanced the pro-growth coalition formed by capitalist developers and technocratic government, without seeking to overturn and replace the latter.³¹⁰ Instead, the work of the rights-based coalition linked directly to that of the pro-growth coalition—namely through the relationship linking residents, as common citizens, to government, as representative of the people.³¹¹ Just as important as the alliances they formed with nongovernmental parties, then, was the nexus residents re-established between themselves and the government.

When first confronted in 1993 by a real estate developer's plans to build in the middle of their community park, Green Garden's residents capitalized on the government's recent efforts to promote legal reform and the rule of law, arguing that:

The land belongs to the [S]tate. But the representative of the [S]tate is not the government but the law. Law stipulates that the using right of green land belongs to the home owners and not to the Street [Committee]. So the government's action violates the law. It does not serve the people We are the people, and we stand on the side of the [S]tate. We . . . are not against the [S]tate, but just protecting our interest (*bu fandui guojia, zhi baohu ziji de liyi*).³¹²

This type of residential rights discourse brought to light conflicts inherent in the chaotic bureaucratic structure of land administration, making apparent the differing objectives of local government agencies such as the Urban Construction Committee (focused on the district's economic growth) and the Bureau of Urban Planning (focused on environmental protection). It questioned whether government actions in support of the developer were

³⁰⁸ Jiangang Zhu, *Not Against the State, Just Protecting the Residents' Interests: A Residents' Movement in a Shanghai Neighborhood*, 5 PERSPECTIVES 25 (2004), available at http://www.oycf.org/perspectives/26_093004/4_Zhu_Jiangang_shanghai.pdf (last visited June 8, 2005).

³⁰⁹ *Id.* at 26.

³¹⁰ *Id.* at 38.

³¹¹ *Id.*

³¹² *Id.* at 34.

truly “representative of the [S]tate”³¹³ and, combined with complaints to Beijing and the media, cast the local residents into the sympathetic role of victims suffering illegal confiscation.

The most ingenious element of this residential rights discourse was its incorporation of an “authentication strategy” (*jiao zhen*), aimed at holding government and officials to full compliance with laws and regulations, even in the face of their failure to enforce such laws.³¹⁴ By appealing to the Constitution’s stipulation that “all power belongs to the people,” for example, and insisting that the government should respect the wishes of residents because they are “the people,” the engineers of this strategy made it difficult for the government to refuse their complaints directly.³¹⁵ By doing so, the government would have blatantly expressed a disregard for its own obligation to the masses.

Green Garden residents were careful not to hold officials culpable for the conflict, leaving developers as their main target of grievance. As a result, “at most [the conflict would] be regarded as a ‘conflict between an enterprise and the masses’ (*chang-qun maodun*), not as a political conflict between the people and the [S]tate.”³¹⁶ By creating this marked delineation between the government, on one hand as protector of the people, and the developer, on the other hand as wrongdoer, Green Garden residents helped disincentivize the typically quasi-public nature of government-developer alliances. Officials were able to redeem themselves without answering to media scrutiny or criminal sanction and could work on the side of the residents to reach an outcome more equitably balanced, because it now aligned government interests with the public interest.³¹⁷

A case such as Green Garden ultimately met with only limited success,³¹⁸ indicating that “bottom-up” movements, initiated and driven largely by local residents, continue to face difficulties—even in Shanghai. Although they involve greater community input than the more passive process of conducting opinion surveys, or soliciting public comment, they do not constitute meaningful public participation, because they are conducted only on informal, and often isolated, bases. Legal mechanisms that formally institutionalize participation need to supplement such efforts and be incorporated into urban planning statutes for these grassroots

³¹³ *Id.* at 30, 36.

³¹⁴ *Id.* at 30.

³¹⁵ *Id.*

³¹⁶ *Id.* at 31.

³¹⁷ *See id.* at 32-35.

³¹⁸ *See generally id.* (tracing the various successes, as well as failures, of the Green Garden residents).

movements to truly succeed.³¹⁹ China's recent reforms have been a step in the right direction, but still fail to provide meaningful avenues for challenging plans that seem to be contrary to the public interest.

The real key may be in statutes such as the one enacted by Shanghai in 1997, which prescribes that homeowners should be represented by their own committees, rather than relying on quasi-public residents committees, in negotiations with development companies.³²⁰ Such legislation is organizational-based and lays the foundation upon which residents may launch the fight for their rights. By empowering residents to choose representatives accountable to their own local communities, rather than to the local government, this type of legislation helps to ensure that ownership and possession of property actually mean something to residents—and will not just disappear with one swing of the almighty bulldozer.

VI. CONCLUSION

The Wuhan residents who took their complaints to the central government in Beijing were placed under house arrest as part of a desperate sweep of petitioners flocking to the capital every year around the October 1 National Day, commemorating the liberation and transfer of modern China into communist hands.³²¹ Much like the Jiahe residents, these countryside residents eventually took their case far away, to university-based legal aid lawyers who would be more likely and better equipped than other practitioners to help their clients in a fight for social justice.³²² During meetings, they pressed not only for a level of compensation more just and reasonable than the nominal amounts they were forced to accept, but also for a declaration from the court that the process of eviction and demolition had been conducted illegally.³²³

The World Bank's policy on involuntary resettlement demands that in projects requiring eviction, "[d]isplaced persons should be meaningfully consulted and should have opportunities to participate in planning and implementing resettlement programs."³²⁴ The mechanism of land

³¹⁹ See WESTENDORFF, *supra* note 301.

³²⁰ See Zhu, *supra* note 308, at 28.

³²¹ See Spring Notes, *supra* note 4.

³²² For more discussion of this topic, see Pamela N. Phan, *Clinical Legal Education in China: In Pursuit of a Culture of Law and a Mission of Social Justice*, 9 YALE HUM. RTS. & DEV. L.J. (forthcoming Summer 2005).

³²³ Ultimately, the complaint that they filed omits a request for compensation and asks only for reimbursement of court fees, along with a declaration by the court that the eviction and demolition were conducted unlawfully. See Bill of Complaint, *supra* note 1.

³²⁴ See Davis & Lin Hai, *supra* note 167, at 38 (citing to World Bank Operational Policy on

management in China remains vulnerable to the trappings of quasi-public alliances, which distort the priorities of local officials and align them with commercial developers rather than the public they are charged with serving. The result has been rampant corruption, leading to public outrage and unrest. Recent reform measures adopted in response to these problems have failed to, and in some cases exacerbate, the underlying tensions, without recognizing what the World Bank made apparent in its policy.

Effective reform needs to reaffirm what is meant by the “public interest” and the government’s role in serving that public interest. It should incorporate community participation into the process of urban renewal and enable residents to engage the government in a residential rights discourse when the process falters. Only by default should reform efforts focus on compensation for forced evictions, as the means for redistributing justice. Such an outcome-based solution to the problem of a weak property rights infrastructure merely patches the façade, without reinforcing the foundation upon which China’s continued growth rests.

In reforming property rights and the mechanism of land management, it may take continual adjustment, in the tradition of democratic experimentalism, to truly revitalize local communities and bring civil rights awareness to the average citizen (*tigao gongmin yishi*). China does not benefit from a vibrant civil society and is instead burdened by a Cultural Revolution history of lawlessness through collective action, which creates lingering skepticism about the collective’s motivation and capacity for representing individual interests. Moreover, in deregulating, the central government has created an administrative apparatus that discounts market mechanisms, even as the nation as a whole moves toward marketization. Local officials continue to enjoy immunity for wrongdoing by quasi-public entities, while simultaneously claiming credit for urban renewal projects within their jurisdiction. Under these circumstances, it becomes doubly hard for trust and awareness to be built.

The lessons learned from China are lessons that apply widely, to teach about the inadequacy of postmodern responses to the modern regulatory state. As states and the business of development grow, they tend to grow on the backs of the poor and the marginalized. In evaluating a society’s commitment to democratic institutions, one must question whether the advantages of developing the local economy or renewing the urban community necessarily trickle down to operate in the interests of the public-at-large. As pointed out in briefs currently being reviewed by the U.S.

Supreme Court, the use of eminent domain for economic development runs the risk of collapsing public use into private takings—particularly where it fails to consider the interests of the individual property owners.³²⁵ If the dangers are ignored, and the tools simultaneously provided by legislatures and the courts prove ineffective, “[t]he rich may not inherit the earth, but they most assuredly will inherit the means to acquire any part of it they desire.”³²⁶

Property law scholars have noted that property is not about relationships of people to things—it is about relationships among people with respect to things.³²⁷ Wherever it is that the battle for land is being fought, and the right to economic and social liberties being contested, rights over property must continue to honor what is rightfully possessed by the individual—and keep out even the king.

³²⁵ See *Kelo* App. Brief, *supra* note 228, at 17.

³²⁶ *Id.*

³²⁷ See, e.g., RESTATEMENT OF PROPERTY ch. 1, introductory note (1936) (using this definition of property).