

**The London School of Economics and Political  
Science**

**Property Rights, Governance and Socio-Economic  
Transformation: The Revival of Private Property  
and its Limits in Post-Mao China**

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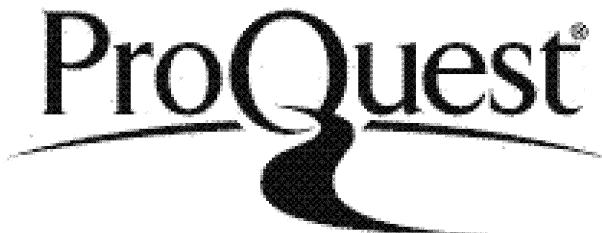
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## **Declaration**

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## Abstract

This thesis examines the nature of property rights in historical and contemporary China. The principal question addressed in the study is: what is the nature and significance of the re-emergence of private property in the context of rapid socio-economic change in post-Mao China? In examining this issue the dissertation looks beyond established dichotomies in Chinese law such as 'public versus private', and explores the manner in which the Chinese define ownership and leave the boundaries between the public and the private in property rights unclear.

This study concludes that while there is a limited move towards the recognition of private property in real estate in contemporary China, ownership in the law, and ownership as understood and practised socially, often diverge significantly. Since the late Qing, 'modernist' law and entrenched social practice have often opposed each other. In contrast to the official, and indeed legal, support for *unitary* and *exclusive* property rights, the reality of the property regime (from late imperial China to the present) has seen the *fragmentation* of property rights.

The reasons for the contradiction between the legal and the social understanding of property rights include tensions between economic reform and ideological commitment to socialism, and blurred boundaries between formal and informal institutions in post-Mao China. 'Modern' conceptions and theories of property rights emerged in the context of nation-building from the late Qing onwards, and unitary and exclusive property rights were considered as 'badges' of modernity. These conceptions and theories served (and still serve) the purposes of control and governance but were, and still are, often resisted in social practice and popular thinking, leading to alienation and conflict. As such, the nature of private property and its social and political implications provide an important vehicle for analysing the changing nature of modern China.

**To My Parents and Wei**

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## **List of Abbreviations**

ADR	Alternative Dispute Resolution
ALC	Administrative Litigation Cases
ALL	Administrative Litigation Law
BGB	The <i>Bürgerliches Gesetzbuch</i>
CASS	The Chinese Academy of Social Sciences
CCPCC	The Chinese People's Consultative Conference
CEO	Chief Executive Officer
CSO	Civil Society Organisations
CPC	The Communist Party of China
EEFSU	The Eastern Europe and Former Soviet Union
FDI	Foreign Direct Investment
GBCL	The General Principles of the Civil Law
GDP	The Gross Domestic Product
GNP	The Gross National Product
HRS	The Household Responsibility System
ICCPR	The International Covenant on Civil and Political Rights
ICESCR	The International Covenant on Economic, Social and Cultural Rights
LAC	The Legislative Affairs Committee
LAL	The Land Administration Law
LLC	Limited Liability Companies
LUR	Land Use Rights
MBO	Management Buyouts
MC	The Ministry of Construction
MLR	The Ministry of Land and Resources
NAO	The National Audit Office
NDRC	The National Development and Reform Commission
NPC	National People's Congress
PRC	People's Republic of China
SASAC	The State-Owned Assets Supervision and Administration Commission
SBLA	The State Bureau of Land Administration
SEZ	Special Economic Zones
SHC	Shareholding Companies
SME	Small and Medium Sized Enterprises
SOE	The State-Owned Enterprises
TVE	The Township and Village Enterprises
UN	United Nations
USSR	The Union of Soviet Socialist Republics
WTO	World Trade Union

## Contents

Abstract .....	3
Acknowledgements .....	5
List of Abbreviations.....	6
Contents.....	7
<b>Chapter 1: Introduction .....</b>	<b>1 0</b>
1. Introduction .....	1 0
2. Brief reflections on Western discourses on Chinese law.....	1 3
3. Discourses, research sources and methods.....	1 5
4. Theoretical Perspectives.....	2 1
5. The public-private distinction, property rights and state-making: a historical background .....	2 5
5.1. Pre-1949 China.....	2 7
5.2. Mao and Now .....	3 0
<b>Chapter 2: Property and Property Rights in Historical Context: Late Imperial and Republican China.....</b>	<b>3 3</b>
1. Introduction.....	3 3
2. Understanding civil 'law' in Qing and Republican China.....	3 4
3. The socio-economic conditions in late imperial China .....	3 9
3.1. The growth of commerce in the Ming (1368-1644).....	4 0
3.2. Self and 'non-organisational' ( <i>wu zuzhi</i> 无组织) society.....	4 1
3.3. Inheritance, household division and lineage property .....	4 3
3.4. Population growth and landownership .....	4 7
3.5. Rural-urban uniformity and mobility .....	4 9
4. Fragmentation of the land tenure system .....	5 2
4.1. <i>Yongdian</i> (Permanent tenancy).....	5 2
4.2. Topsoil rights ( <i>tianmianquan</i> 田面权) .....	5 3
4.3. <i>Yongdianquan</i> (the rights to permanent tenancy) in Republican China .....	5 6
5. Conclusion.....	6 1
<b>Chapter 3: Property Law Reform and the Revival of 'the Private' in Law in Post-Mao China.....</b>	<b>6 3</b>
1. Introduction.....	6 3
2. The background of property law reform in the post-Mao era .....	6 7
2.1. The historical context—codification in the Qing and the Republic .....	6 7
2.2 The emergence of the private sector and the diversification of ownership .....	6 9
2.3. The civil law framework before the 2007 Property Law came into effect .....	7 3
2.4. The drafting of property law.....	7 5
3. Debates over property law.....	7 6
3.1. Debates over the status of property law in the proposed Civil Code (minfa dian 民法典) in China.....	7 6
3.2 Substantive debates .....	7 9
4. Conclusion.....	9 0

## **Chapter 4: The Transformation of Collective Ownership in Rural China: Governing Farmers under Collective Ownership ..... 9 2**

1. Introduction.....	9 2
2. Rural governance in traditional China and its transformation.....	9 6
2.1. ‘Large community’ vs. ‘small community’: centralization vs. kinship .....	9 6
2.2. Landholding, taxation and middlemen.....	9 8
3. Collectivisation (1949-1978).....	1 0 0
3.1. The land reform ( <i>tugai</i> ) .....	1 0 0
3.2. Formation of People’s Communes .....	1 0 3
4. Decollectivisation.....	1 0 5
4.1. The emergence of land use rights in post-Mao China .....	1 0 5
4.2. Grassroots initiatives: ‘minor property rights’ apartments .....	1 0 8
5. Reorganisation of rural China and governing farmers in post-Mao China: neo-collectivism and post-collectivism.....	1 1 2
5.1. Governing farmers under collective ownership and its problems .....	1 1 2
5.2. TVEs and variations of collective ownership.....	1 1 5
5.3. New collectivism and Post-collectivism? Huaxi Village and Nanjie Village. ....	1 1 8
6. Conclusion.....	1 2 1

## **Chapter 5: The Transformation of State Ownership in Market Reform: Privatisation of the SOEs? ..... 1 2 3**

1. Introduction.....	1 2 3
2. Economic reforms stalled between the plan and the market .....	1 2 7
2.1. The relationship between the plan and the market .....	1 2 7
2.2. The SOE reform in the 1980s versus in the 1990s .....	1 3 1
2.3. The debates on the restructuring of SOEs .....	1 3 9
3. The central-local relationship: ‘market-thwarting federalism’ .....	1 4 2
4. Conclusion.....	1 5 0

## **Chapter 6: Emerging Private Ownership in Urban China: the Meaning of Private Property in the Property Market ..... 1 5 2**

1. Introduction.....	1 5 2
2. The emergence of the rural-urban divide and the state housing allocation system ...	1 5 5
3. The emergence of urban property markets .....	1 5 7
3.1. The dual-track land use rights allocation system.....	1 5 7
3.2. The governance complexes in post-1978 China.....	1 5 9
3.3. The black market.....	1 6 5
4. Spatial, social and political transformations.....	1 6 9
4.1. Spatial transformation .....	1 6 9
4.2. Social transformation .....	1 7 0
4.3. Political transformation .....	1 7 4
5. Conclusion.....	1 7 7

## **Chapter 7: Changing State-Society Relations: Land Disputes, Conflict and Resistance in Rural and Urban China ..... 1 8 0**

1. Introduction.....	1 8 0
2. Vulnerable property rights: land requisition and forced eviction .....	1 8 2

2.1. Land acquisition and compulsory requisition of LURs.....	1 8 4
2.2. Forced eviction and housing demolition .....	1 8 6
3. Access to justice .....	1 9 1
3.1. Administrative adjudication and reconsideration .....	1 9 1
3.2. Administrative litigation and mediation .....	1 9 2
4. Disputes, conflict and resistance in relation to land in post-Mao China .....	1 9 6
4.1. Shengyou attack in Dingzhou.....	1 9 6
4.2. Housing demolition in Beijing: the vanished <i>hutong</i> .....	1 9 8
4.3. The case of Hunan Jiahe housing demolition.....	2 0 1
4.4. The case of 'the most stubborn house owner' .....	2 0 3
5. The transformation of the role of government .....	2 0 6
6. The associational dimension .....	2 1 0
7. Conclusion.....	2 1 3
<b>Chapter 8: Conclusions: Private Property and China—the Trajectory of Change.....</b>	<b>2 1 5</b>
1. Defining property in China .....	2 1 5
2. Political implications of the revival of private property.....	2 2 0
3. Private property and China in the future .....	2 2 5
<b>Postscript: New Changes to Rural Land Use Rights and the Rural-Urban Divide.....</b>	<b>2 3 1</b>
<b>Appendix: Chinese Laws and Regulations Pertaining to Property in Post-Mao China.....</b>	<b>2 3 6</b>
<b>Glossary of Chinese terms used in the text.....</b>	<b>2 3 8</b>
<b>Bibliography.....</b>	<b>2 5 0</b>

## Chapter 1: Introduction

### 1. Introduction

This thesis examines the nature of property rights in historical and contemporary China. The principal question addressed in the study is: what is the nature and significance of the re-emergence of private property (private property in 'land' in particular) in the context of rapid socio-economic change in post-Mao China? The specific questions that this study deals with are: what does ownership mean in present-day China? What are the boundaries between the public (*gong* 公) and the private (*si* 私) in property rights?<sup>1</sup> And how are such boundaries being drawn in relation to governance and socio-economic conditions in post-Mao China? This thesis should be of interest to the audience in the field of Chinese law and politics, socio-legal studies, and law and development. The present chapter lays out the research question, the hypotheses, relevant themes in the literature, sources and methods, and the thesis structure.

The legal reforms in the late Qing dynasty (1840-1911) and Republican China (1911-1949) introduced many aspects of the Civil Law system to China from Germany, via Japan. The Civil Code formulated by the Guomindang in 1929-1931 was based on the German law framework, but this code was abolished in 1949. Between 1949 and 1978, the means of production in the Chinese central planned economy was based on the former Soviet model, that is, public ownership (including state and collective ownership), while private ownership was virtually abandoned.<sup>2</sup>

<sup>1</sup> Although ownership is the focus of this study, this study does not suppose that the public/private distinction is just limited to ownership. This distinction also includes, for example, state intervention in people's lives as opposed to the emergence of the 'private sphere' as demonstrated and analysed by Yan Yunxiang and other scholars. See e.g., Yan Yunxiang, *Private Life under Socialism: Love, Intimacy, and Family Change since the Great Leap Famine* (Stanford: Stanford University Press, 1996). But property perhaps provides the most significant instantiation of the new private in China.

<sup>2</sup> Private ownership was not formally abolished in 1949, and a mixed economy was adopted between 1949 and 1956 as a prelude to nationalisation of private capital. Whether nor not a complete system of public ownership was established is unclear. For example, Article 11 of the 1954 Constitution recognised private property: 'the State protects the right of citizens to own lawfully-earned incomes,

It should be noted that after the collapse of the relationship between the Soviet Union and China in the late 1950s, China began to seek and emphasise indigenous legal resources such as mediation (*tiaojie*<sup>3</sup> 调解), although the Soviet legacy did persist.

In the Mao era (1949-1978), the conception of ownership in China was overwhelmingly influenced by former Soviet jurisprudence. Ownership was regarded as indivisible and absolute. Public and collective interests were superior to individual interests; acquisition and management of property was under an overarching administrative fiat.<sup>4</sup> Although civil law-making in the post-1978 era returned to the German Civil Law framework, a clear boundary between public ownership and private ownership still existed in law, and a tri-ownership system including state ownership, collective ownership and private ownership has evolved and persisted.

The Property Law (2007) provides equal protection for public property and private property for the first time since 1949, but there is much debate over whether private property should be given the same status as public property. Property law reform and revival of 'the private' in law in post-Mao China should be understood in the context of socio-economic transformation.<sup>5</sup>

Since Deng's economic reforms commenced in 1978, the trend has been towards decollectivisation. In light of the changes in the property regime, since 1978, after almost three decades in which private property was abolished, 'a revival' of private

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savings, houses and other means of life'. Article 12 of the 1954 Constitution provides: 'the State protects the right of citizens to inherit private property according to law'. See the English version of the 1954 Constitution, in Albert P. Blaustein, ed., *Fundamental Legal Documents of Communist China* (South Hackensack, New Jersey: Fred B. Rothman & Co., 1962). The content of Article 11 of the 1954 Constitution was restated in Article 9 of the 1975 Constitution, but 'the right to inherit private property' was abandoned in the 1975 Constitution.

<sup>3</sup> In this thesis, the Pinyin (拼音) system has been used in the romanisation of Mandarin, including Chinese names. The Pinyin system is different from the Wade-Giles (now Taiwanese) system. Chinese names are cited in their Chinese order: family name comes first, followed by given name.

<sup>4</sup> See Pitman Potter, 'Globalization and Economic Regulation in China: Selective Adaptation of Globalized Norms and Practices', *Washington University Global Studies Law Review* 2, no. 119 (2003), 126-127.

<sup>5</sup> The term 'transition' implies a clear trend and a foreseeable outcome. For example, Athar Hussain argues that 'the term "transition" embodied the hope that the economies in question would become well-functioning market economies in the foreseeable future'. See Athar Hussain, *Lessons of the Transition for Understanding the Function of Markets* (2003), paper for the ADB (Vietnam) project on Making Markets Work for the Poor. 'Transformation' is used in this thesis rather than 'transition' to keep the analysis neutral and to leave the question of how much change open.

property has been set in motion by market reform in three ownership sectors, conceptualised in the PRC as relatively distinct: through the processes of dismantling rural communes, the permitting of private enterprises, the reform of state-owned enterprises (SOEs), and the emergence of urban property markets. Along with these processes, the status of private ownership has been gradually recognised by law.

Yet in contrast to the relatively neat distinction between public and private ownership defined in law, the forms of property in reality are not so clear cut. Absolute ownership has been fragmented into the ‘contractual management rights’ (*chengbao jingying quan* 承包经营权) of collectively owned rural land, the ‘enterprise management rights’ (*qiye jingying quan* 企业经营权) of state-owned enterprises (SOEs), the ‘land use rights’ (LURs) (*tudi shiyong quan* 土地使用权) of state-owned urban land and so on. However, this process of property rights fragmentation is one of decollectivisation without the rise of individualism. Instead, decollectivisation has given rise to hybrid forms of property, and it is now difficult to draw clear boundaries between the public and the private in property rights. The gap between the legal definition of ownership and the social reality of ownership poses important questions: what do ‘the public’ and ‘the private’ in property rights really mean in light of ownership in modern China? Can we draw a clear line between the public and private in property rights? In the profound socio-economic transformation, identities and boundaries are being dismantled and reconfigured. Exploring the nature of ‘the public’ and ‘the private’ in China cannot avoid defining ‘the social’.

The thesis is divided into eight parts. The first part is this introductory chapter that is intended to fulfil three tasks: to make clear the method in this work; to clarify the theoretical perspectives adopted in this study; and to provide some historical background to the distinction between the public and private in traditional, Maoist and post-Mao China. Chapter Two explores property and property rights in their

historical and cultural contexts, and the focus is on late imperial<sup>6</sup> and Republican China. Chapter Three looks at property law reform and current property law in China. Chapter Three gives readers especially those not familiar with Chinese property law reform and the property law system a clear view of the legal definition of ownership. Chapter Four explores the transformation of collective ownership in rural China. Chapter Five deals with the change of state ownership in market reform. Chapters Four and Five explore the in-depth reasons for property law reform. Moreover, comparing Chapter Three with Chapters Four and Five will highlight the fact that the legal understanding of property rights and property rights as understood and practised in society often diverge significantly. Chapter Six looks at emerging private ownership in urban China and the urban property market. Chapter Seven explores land disputes and conflicts in both urban and rural China. The conclusion (Chapter Eight) summarises the findings of this research, and makes some predictions about the future of private property in China and how private property in the future will affect China's ongoing transformation. The postscript analyses recent changes to the rural land system and the urban-rural divide.

## **2. Brief reflections on Western discourses on Chinese law**

Although a comparative approach is adopted throughout this thesis, this research is not an exercise in comparative law: this is a dissertation about China and about how China has selectively and unevenly readmitted some ideas of private property into different parts of its landscape in the post-1978 era. Here it is worthwhile to reflect briefly upon 'Western' discourses on Chinese law.

Albeit holding different points of view on Chinese law, one of the methods that such studies of Chinese law share is drawing comparisons between China and 'the West'.

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<sup>6</sup> In this thesis, late imperial China refers to the late Yuan, Ming, and Qing. The main focus is on the Ming and the Qing.

Over the centuries, some influential social thinkers – from Weber to contemporary legal thinkers such as Unger<sup>7</sup> in the West have addressed the nature of the Chinese legal tradition. They regard Chinese law as a victim of ‘Oriental Despotism’ by using the Western/European standards, for example, the modernity-tradition dichotomy and ‘rationality’ as the criteria. They argue that Chinese law does not measure up to the Western ideal of law, nor does it guarantee civil liberties and individual rights.

Current legal experts or the ‘law-and-society’ scholars (for example, Lubman or Peerenboom) on Chinese law now tend to look beyond legal rules and legal institutions when observing Chinese law.<sup>8</sup> Lubman argues that ‘the legal bird [in China] remains in its own cage’, and China does not yet have a well-functioning legal system.<sup>9</sup> Lubman has correctly pointed out the link between law and the role of the Party-state, in which Party control serves as the cage for the Chinese legal system. Peerenboom’s view on Chinese law is more optimistic. He argues that although there have been many problems with the Chinese legal system, China is moving towards a ‘thin’ version of the rule of law.<sup>10</sup> These scholars do stress the relation between law and society. However, they still counterpose China to ‘the West’ and adopt a limited approach—‘understanding China through Chinese law’.<sup>11</sup> They tend to judge Chinese law by the expectations of Americans especially foreign investors in China. For example, Lubman adopts a functionalist approach for studying Chinese law. He looks for the functions of legal institutions while neglecting both informal institutions and socio-economic conditions that affect how law really works in China. Moreover, assuming that the transformation of China is a linear historical process,

<sup>7</sup> See e.g., Roberto Mangabeira Unger, *Law in Modern Society: Toward a Criticism of Social Theory* (New York: Free Press, 1976); Max Weber, *The Religion of China: Confucianism and Taoism*, trans. Hans H. Gerth (Glencoe: Free Press, 1951).

<sup>8</sup> See e.g., Stanley Lubman, ed., *China’s Legal Systems* (Oxford: Oxford University Press, 1996); Stanley Lubman, *Bird in a Cage: Legal Reforms in China after Mao* (Stanford: Stanford University Press, 1999); Stanley Lubman [et al], ed., *Enlarging the Law in China: State, Society, and Possibilities for Justice* (Stanford: Stanford University Press, 2005); Randall Peerenboom, *China’s Long March toward Rule of Law* (Cambridge: Cambridge University Press, 2002).

<sup>9</sup> See Lubman, *Bird in a Cage*, 2.

<sup>10</sup> See generally Peerenboom, *China’s Long March toward Rule of Law*.

<sup>11</sup> For example, Lubman argues that his work ‘seeks to enhance Western understanding of China by studying its contemporary legal institutions’. See Lubman, *Bird in the Cage*, 1.

Lubman uses dichotomies such as tradition versus modernity, and China versus the West when making the comparison.<sup>12</sup>

Potter reviews various perspectives on the role of law in China.<sup>13</sup> By emphasising 'institutional capacity' and 'local legal culture' when addressing the question of Chinese law, Potter argues that the Chinese legal regime (for example, property law) needs to be understood 'by reference to a dynamic of selective adaptation of norms associated with globalization'.<sup>14</sup> But Potter still uses the Western standards to judge Chinese law, and expects that in the long run, Chinese law should match expectations about 'compliance with WTO and other norms of globalization'.<sup>15</sup> To some extent, Potter's analysis has polarised China and 'the West', the local and the global. Moreover, although Potter has analysed the institutional sphere such as governance of China,<sup>16</sup> he sees legal reform in China as a 'top-down' project, while neglecting the grassroots initiatives and their implications for legal transformations in China.

### **3. Discourses, research sources and methods**

In this study greatest attention is devoted to post-Mao China, although late imperial, Republican, and Mao's China have also been discussed. Post-Mao China has been emphasised because as socialism is still predominant, at least at the ideological level, post-Mao China is often counterposed to capitalist countries in the West.

Communism was meant to involve the supersession of private property and the

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<sup>12</sup> For example, Lubman argues that 'Contemporary Chinese legal institutions must be understood against a background of traditions and ways of thought that long antedate the People's Republic and markedly differ from their Western counterparts'. See *ibid*, 11.

<sup>13</sup> See e.g., Pitman B. Potter, 'Legal Reform in China—Institutions, Culture and Selective Adaptation', *Law & Social Inquiry* 2, no. 4 (2004): 465-495.

<sup>14</sup> See Pitman B. Potter, *The Chinese Legal System: Globalization and Local Legal Culture* (London: Routledge, 2001); Pitman B. Potter, 'Globalization and Economic Regulation in China: Selective Adaptation of Globalized Norms and Practices'; Pitman B. Potter, 'Legal Reform in China—Institutions, Culture and Selective Adaptation'; Pitman B. Potter, 'Selective Adaptation and Institutional Capacity: Perspectives on Human Rights in China', *International Journal* 61, no. 2 (2006): 389-407.

<sup>15</sup> Potter, 'Globalization and Economic Regulation in China': 150.

<sup>16</sup> See e.g., Pitman B. Potter, 'Governance of China's Periphery: Balancing Local Autonomy and National Polity', *Columbia Journal of Asian Law* 19, no. 1 (2005): 293-322.

organisation of social life in communal terms. Yet the revival of private property seems to have diverted post-Mao China from its commitment to socialism, and this trajectory of change provides an important perspective to examine what China is or is becoming. Land ownership has been selected as the focus of this study because it is a sensitive and critical issue especially in transforming countries such as China.<sup>17</sup> Land ownership is attached to ideology, and is one of the most important criteria to draw the lines between capitalism and socialism.

There is a large literature on the transformation of property rights and the re-emergence of private property in post-Mao China. Some studies have concentrated on Civil Law and property law reform in post-Mao China.<sup>18</sup> Some studies have looked at the transformation of property rights in the context of economic reform,<sup>19</sup> especially in the state-owned sector.<sup>20</sup> Some economists have also devoted themselves to the analysis of the 'Chinese style of privatisation'.<sup>21</sup> Some works have examined how changing institutions shape property rights in rural China.<sup>22</sup> Some studies have explored emerging private ownership in the urban property market.<sup>23</sup> Some works have examined the consequence of the revival of private business and

<sup>17</sup> See Peter Ho, 'Contesting Rural Spaces: Land Disputes, Customary Tenure and the State in China', in *Chinese Society: Change, Conflict and Resistance*, 2<sup>nd</sup> edition, ed. Elizabeth Perry and Mark Selden (London: Routledge, 2003), 93.

<sup>18</sup> See e.g., Chen Jianfu, *From Administrative Authorisation to Private Law: A Comparative Perspective of the Developing Civil Law in the People's Republic of China* (Dordrecht; London: Martinus Nijhoff, 1995c); Frank Xianfeng Huang, 'The Path to Clarity: Development of Property Rights in China', *Columbia Journal of Asian Law* 17, no. 2 (2004): 191-223. On literature in Chinese, see Chapter Three on property law reform in detail.

<sup>19</sup> See e.g., Jean C. Oi and Andrew G. Walder, eds. *Property Rights and Economic Reform in China* (Stanford, Calif.: Stanford University Press, 1999).

<sup>20</sup> See e.g., Shahid Yusuf, Kaoru Nabeshima, and Dwight H. Perkins, *Under New Ownership: Privatizing China's State-Owned Enterprises* (Washington: World Bank, 2006c).

<sup>21</sup> See e.g., Cao Yuanzheng, Qian Yingyi and Barry R. Weingast, 'From Federalism, Chinese Style to Privatization, Chinese Style', *Economic of Transition* 7, no. 1 (1999): 103-131; Jeffrey Sachs, Wing Thye Woo, and Yang Xiaokai, 'Economic Reform and Constitutional Transition', *CID Working Papers*, no. 43 (2000).

<sup>22</sup> See e.g., Jay Chih-Jou Chen, *Transforming Rural China: How Local Institutions Shape Property Rights in Rural China* (New York: Routledge, 2004); Peter Ho, 'Who Owns China's Land? Policies, Property Rights and Deliberate Institution Ambiguity', *The China Quarterly*, no. 166 (2001): 394-421; Hsing You-tien, 'Broking Power and Property in China's Townships', *The Pacific Review* 19, no. 1 (2006): 103-124.

<sup>23</sup> See e.g., Ding Chengri and Song Yan eds., *Emerging Land and Housing Markets in China* (Cambridge, Mass.: Lincoln Institute of Land Policy, 2005c); Li Ling Hin, *Urban Land Reform in Shanghai* (Hong Kong: Hong Kong University Press, 1996).

its political implications.<sup>24</sup> But reforms in the three sectors—the collective sector, the state-owned sector and the private sector—are not separate but related issues. Although there have been extensive studies that focus on each aspect of the transformation of property rights and the revival of private property, there has been a lack of a systematic and integrated study which grasps the overall picture. This thesis is intended to fill this gap in the existing literature.

The main research approach employed in this study is socio-legal. This approach emphasises that property rights,<sup>25</sup> governance and socio-economic conditions are closely linked. Governance is defined as ‘the totality of processes and arrangements, both formal and informal, by which power and public authority are distributed and regulated’.<sup>26</sup> The study of governance has two aspects: the study of formal political institutions including the government and the judiciary at central and local levels; and the study of informal institutions, for example, ‘patron-clientelism and networks’.<sup>27</sup> In the examination of governance in China, this study focuses on the relationship between two levels of political power and public authority—central (Beijing) and local government (province/municipality, city at the prefectural level, county and city at the county level, and township/district).<sup>28</sup> Although villages are

<sup>24</sup> See e.g., Bruce J. Dickson, *Red Capitalist in China: The Chinese Communist Party, Private Entrepreneurs, and Political Change* (Cambridge: Cambridge University Press, 2002); Jonathan Unger, ‘“Bridges”: Private Business, The Chinese Government and the Rise of New Associations’, *The China Quarterly*, no. 147 (Sep., 1996): 795-819.

<sup>25</sup> On the definition of ownership and property rights in law, see Chapter Three.

<sup>26</sup> Jude Howell, ‘Governance Matters: Key Challenges and Emerging Tendencies’, in *Governance in China*, ed. Jude Howell (Lanham, MD: Rowman & Littlefield Publishers, 2003), 2.

<sup>27</sup> See *ibid*, 2.

<sup>28</sup> Below the central government, the provincial level consists of 22 provinces (*sheng* 省), five autonomous regions (*zizhi qu* 自治区), four municipalities (*zhixia shi* 直辖市) of Beijing, Shanghai, Tianjin, and Chongqing, and two special administrative regions (*tebie xingzheng qu* 特别行政区) of Hong Kong and Macau. The prefectural level consists of prefectures (*di* 地), autonomous prefectures (*zizhi zhou* 自治州), and prefecture-level cities (*diji shi* 地级市), and leagues (*meng* 盟). The county level includes counties (*xian* 县), autonomous counties (*zizhi xian* 自治县), county-level cities (*xianji shi* 县级市), and districts (*qu* 区) in urban areas. Townships (*xiangzhen* 乡镇) in rural areas are at the lowest level of local governments. The grassroots level comprises of village committees (*cunmin weiyuanhui* 村民委员会) in rural areas and neighbourhood committees (*jumin weiyuanhui* 居民委员会) in urban areas. Village committees and neighbourhood committees are ‘self-governing mass organizations at the grassroots level’ (*jiceng quanzhong zizhixing zuzhi* 基层群众自治性组织), according to Article 111 of the 2004 Constitution. Also see Kellee S. Tsai, ‘Off Balance: The Unintended Consequences of Fiscal Federalism in China’, *Journal of Chinese Political Science* 9, no.

not considered a formal part of local governments, villages are also objects of study at the local level. This study illustrates how different forms of property and property rights have been shaped by governance. The ambiguity of property rights in China has been largely due to the complexity of governance.

Governance and socio-economic conditions are interrelated and interact on each other; both affect property rights. Governance and socio-economic conditions are both in dynamic change. This study finds that there is usually a gap between formal institutions and socio-economic conditions: the modification of formal institutions often lags behind changes in socio-economic conditions; socio-economic conditions generate informal institutions (for example, customary and informal land use), some of which stand in sharp contrast to formal political institutions and laws. In the context of post-Mao China, one of the important reasons for this is the tension between economic reform and the socialist legacy. The ambiguity of property rights in China is due largely to this tension. Moreover, there are grey areas that cross over the boundaries between formal and informal institutions, legal and extralegal property rights. This gap has been made use of by local officials and entrepreneurs.

Throughout the study a comparative approach is also adopted, but China and the West should not be treated as polar opposites. First, we need to examine the very meaning of 'China'.<sup>29</sup> We need to note how large and varied China remains. The

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<sup>29</sup> (2004): 4.

<sup>29</sup> See e.g., Kerry Brown, *Struggling Giant: China in the 21<sup>st</sup> Century* (London: Anthem Press, 2007), Chapter 2.

In *Translucent Mirror*, Pamela Crossley argues that the Qing conquest represents a dramatic turn in the governance of China. The mechanism of Qing governance was an emperorship, which could rule a domain in parts. One of the questions Qing governance provoked was how to define 'China' and the 'Chinese'. Pamela Crossley summarises the Qing regime in the eighteenth century as follows:

In the eighteenth century, the Qing reached its height of political control (over Manchuria, Mongolia, Chinese Turkestan, Tibet, and China, as well as the states recognizing Qing superiority in the system of court visitation, sometimes called the "tributary system"); of economic power (ensnaring Europe in an unbalanced trade relationship based on Qing exports of tea, porcelain, silk, and other goods); and of military expansion (with ongoing campaigns in Southeast Asia as well as suppression of disaffected groups—whether "ethnically" or socially defined—within the empire). This golden age was represented in the rule of the Qianlong emperor, the most "Confucian," "sinified," or simply grandest of the Qing rulers. After his abdication in 1796 and death in 1799, the empire went into a "decline," during which it became vulnerable to the

variations of localities are manifested in China's geography, dialects, ethnic differences, political cultures, and so on. Therefore, to study China, the choice is usually between a macro-study of the system or the structure of the whole country and a micro-study of a locality (for example, a province, a city or a village, usually through fieldwork). The problem with the study of a specific locality is that a conclusion to a study that is relevant or useful for a locality (for example, Henan province) is not necessarily relevant or useful for another (for example, Hunan province).

Secondly, China, at least since market reform and 'opening-up' commenced in 1978, is no longer a closed society largely shut off from most of the outside world.<sup>30</sup> Post-Mao China has been transformed into a society that communicates and interacts with the outside world. It is thus necessary to rethink the dichotomy of global versus local: 'global' and 'local' perspectives do not stand in sharp contrast; rather, they interact with each other.<sup>31</sup>

Thirdly, the countries in the capitalist West are of course not homogenous. For example, law in 'the West' includes both common law and Civil Law traditions; we also need to distinguish the American and the Western European patterns of state-building and their relationships to social change. Similarly, China is an example of 'the non-West', but it cannot represent the totality. Categories such as 'the West' and 'the non-West' are therefore problematic, and are avoided wherever possible in the present study.<sup>32</sup>

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expansionist, colonialist, and imperialist actions of Europe, the United States, and eventually Japan.

Pamela Kyle Crossley, *A Translucent Mirror: History and Identity in Qing Imperial Ideology* (Berkeley, Calif.: University of California Press, 2002), 3.

<sup>30</sup> See W. T. Murphy, 'Durkheim in China', in *Law and Sociology*, ed., Michael Freeman (Oxford: Oxford University Press, 2006), 108-118.

<sup>31</sup> See Sari Wastell, 'Presuming Scale, Making Diversity', *Critique of Anthropology* 21, no. 2 (2001): 185.

<sup>32</sup> Quotation marks are used when referring to these categories.

This research is based on primary and secondary sources, drawing on both English and Chinese language materials. Secondary sources are the major source due to the nature of this study, that is, a macro-study of the whole system. These secondary sources are available in textbooks, academic journals, reports by international organisations, public lectures, electronic databases, online resources and newspaper reports. Newspaper reports provide a valuable source of information on current cases in relation to property rights as understood and practiced in social reality, involving the enforcement of property right, land disputes and the role of local governments. Moreover, as practices vary in different localities, newspaper reports provide a wide coverage of different areas of China, and this is helpful for us to grasp the broad picture.

Although no fieldwork that uses surveys and questionnaires in a specific locality has been undertaken, primary sources have also been collected from interviews with Chinese government officials, judges, lawyers, retired cadres, enterprise employees, laid-off workers, farmers, and entrepreneurs. Primary sources also involve discussion with Chinese academics, and visits to villages, enterprises and chambers of commerce. I did an internship at the Higher-Level People's Court in Henan Province between August 2003 and October 2003. I worked with judges in a civil chamber (*minting* 民庭) where cases in relation to property and rural land disputes were dealt with. I audited trials and discussions of the collegiate bench (*heyi ting* 合议庭). I also carried out a two-week study of cases relating to property and land disputes at the same civil chamber in March 2006. The experiences of internship and study in the court provide materials on the sources of property disputes, dispute resolution and judicial practice.

As socialism is still the predominant ideology in China, both intended and unintended bias resulting from ideological viewpoints can be found in some Chinese literature. Media outside China also has some biased reporting due to the hostility towards socialism. The problems with accuracy and reliability of sources cannot be

easily overcome, but this study tries to draw on a wide range of literature, and does not confine itself to a few sources or any ideological orientation. Moreover, analysis of secondary sources is combined and compared with primary sources in order to achieve a relatively objective and impartial assessment. Primary sources have corroborated the choices of secondary sources. In terms of statistics, the data in this thesis is drawn from statistics released by the Chinese government and international organisations. But we should note that China is not a completely open society. The Chinese media are under control of the Party-state, and the reliability of polling and statistics is questionable. This clearly adds difficulties to this library-based study, and becomes one of the weaknesses of the sources collected for this study.

#### 4. Theoretical Perspectives

Currently, controversies in China surrounding the revival of private property and its implications for what modern China is or is becoming can be grouped into three camps. The first is liberalism (*ziyou zhuyi* 自由主义) or neo-liberalism<sup>33</sup> (*xin ziyou zhuyi* 新自由主义) that regards free markets, individual liberty and private property rights protected by ‘the rule of law’ as the *sine qua non* for sustained economic growth. Neo-liberalists have been largely influenced by the writings of Ronald Coase in which ‘transaction costs’ are the key to understanding of economic institutions.<sup>34</sup> The second is the so-called ‘new left’<sup>35</sup> (*xin zuopai* 新左派) who cherish some ill-defined new collectivism and warn against the dangers of diminishing

<sup>33</sup> This side is influenced by mainstream economists in the West who interpret their mission as promoting ‘neo-classical’ ideas, including those of Ronald Coase and Richard Posner. Also see F. A. Hayek, *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (London: Routledge & Kegan Paul, 1982). For the analysis on Chinese neo-liberalists see e.g. Wang Hui, *China’s New Order: Society, Politics, and Economy in Transition*, ed. Theodore Huters (Cambridge, Mass.: Harvard University Press, 2003).

<sup>34</sup> See e.g., R. H. Coase, ‘The Nature of the Firm’, *Economica* 4, no. 16 (1937): 386-405; R. H. Coase, ‘The Problem of Social Cost’, *Journal of Law and Economics* (Oct. 1960): 1-44.

<sup>35</sup> The new-left in China is an ideological tendency in opposition to capitalism that first arose in the mid-1990s. It criticises the problems faced by China during its modernisation such as inequality and the widening gap between the rich and the poor. On the new-left see Wang Hui, ‘Contemporary Chinese Thought and the Question of Modernity’, in *Whither China: Intellectual Politics in Contemporary China*, ed., Zhang Xudong (Durham: Duke University Press, 2001), 161-198; Zheng Yongnian, *Discovering Chinese Nationalism in China: Modernization and International Relations* (Cambridge; New York: Cambridge University Press, 1999), 52-69.

state-ownership and encroachments upon social equality. The third tendency is the rise of so-called ‘post-neo-Confucianism’ (*hou xinxue* 后新儒学), ‘which in some cases has informed the attitudes’ of [so-called] “authoritarian pragmatists”<sup>36</sup>. Both post-neo-Confucianism and the new-left share a common attitude towards highlighting the role of the state and of corporatism as well as cherishing the past (for example, the possibility of a synthesis of socialism and Confucianism).

These three camps are all within the narratives of ‘linear History’.<sup>37</sup> The transformation of China has been assumed to be an evolutionary process: the past has been packaged into ‘feudalism’, the present into ‘socialism’ (with Chinese characteristics), and the future perhaps into ‘capitalism’, although China ‘lacks the institutional apparatus that has accompanied the consolidation of capitalism in the West’.<sup>38</sup> In addition, the transformation of China’s property regime has become a historical analysis emphasising ‘discontinuity’ and transition to ‘modernity’ (for example, nation-building).

Yet in fact there was as much discontinuity as continuity in Chinese history;<sup>39</sup> clarifying this point is important for an examination of the transformation of private property and revival of private property in post-Mao China. Examples in late imperial China include the Yuan-Ming-Qing transitions, and recent examples involve the turbulences in Maoist China, as well as Deng’s reforms that jettison the ‘class struggle’ in the Mao era. The Ming (AD 1368-1644) expelled the Yuan (AD 1271-1368), and then the governance of the Ming was displaced by the rule of the Qing. The question of the Qing emperorship is how the Qing emperors then governed a multi-national and multicultural empire? Some works challenge the

<sup>36</sup> See Geremie Barmé, *In the Red: On Contemporary Chinese Culture* (New York: Columbia University Press, 1999), 4.

<sup>37</sup> History with a capital *H* emphasises the linear model of Enlightenment History. See Prasenjit Duara, *Rescuing History from the Nation: Questioning Narratives of Modern China* (Chicago: University of Chicago Press, 1995), 4.

<sup>38</sup> W. T. Murphy, ‘China’s Laws and Flaws’, *Modern Law Review* 70, no. 6 (2007): 1008.

<sup>39</sup> This is the method by which Professor Tim Murphy approaches Chinese history. See e.g., *ibid*: 1008-1022.

‘sinicisation model’ because these works reveal that the Manchu were conscious of their separate ethnicity.<sup>40</sup> One of the Manchu’s important and innovative institutions was the bannermen system.<sup>41</sup> The Qing divided civil and military functions along (partially) ethnic lines through the bannermen system,<sup>42</sup> particularly in the Qianlong court (AD 1736-1795).

All governments and conquest regimes in particular need ideologies.<sup>43</sup> Continuity and discontinuity have also been seen in these governmental ideologies. For example, there was continuity in legal thought in historical China, and the continuity was manifested in the dynastic legal codes from the Tang to the Qing. The first great Chinese code was enacted in AD 654 during the Tang dynasty. The subsequent great codes of the Song (AD 960-1279), Yuan and Ming followed the model of the Tang great code, and the Qing rulers began to re-edit the Ming code in 1646 and expanded it. The final form was renamed as Da Qing Lü Li (大清律例 The Great Qing Code with Substatutes) in 1740.<sup>44</sup> Yet the Qing governmental system and its ideology were rather different from that of the Ming. For the Qing emperors, the question was how to escape from the predicament of being regarded as an alien people and how to manage the ‘forced integration of Chinese [*hua* 华] and barbarians [*yi* 夷].<sup>45</sup> In the Qianlong emperorship, when ‘the ideological relationship between the ruler and the ruled completed another turn’,<sup>46</sup> cultural difference (in which race determined

<sup>40</sup> See e.g., Evelyn Rawski, *The Last Emperors: A Social History of Qing Imperial Institutions* (Berkeley: University of California Press, 1998); Pamela Kyle Crossley, *Orphan Warriors: Three Manchu Generations and the End of the Qing World* (Princeton, N. J.: Princeton University Press, 1990c); Crossley, *A Translucent Mirror*.

<sup>41</sup> See the banner system in detail in Section 3.4 of Chapter Two.

<sup>42</sup> According to Crossley, when the ‘Eight Banners’ (*baqi* 八旗) began to form after 1601, Manchus, Mongol, and Chinese-martial were incorporated into the banners, and this classification was according to ‘race’ and ‘with little reference to ancestors’. See Crossley, *Orphan Warriors*, 5.

<sup>43</sup> According to Crossley, ‘ideology’ is ‘the tendency of an individual or group to organize its sensations, or knowledge, in particular ways and to attempt to express the resulting ideas’. See the analysis on the difference between ‘philosophy’ and ‘ideology’ in Crossley, *A Translucent Mirror*, 225.

<sup>44</sup> See e.g., Fu Bingchang’s introduction in Hsia Ching-lin, James L. E. Chow, and Chang Yukon, *The Civil Code of the Republic of China* (Shanghai: Kelly & Walsh, 1930), ix; Derk Bodde and Clarence Morris, *Law in Imperial China: Exemplified by 190 Ch’ing Dynasty Cases* (Cambridge, Mass.: Harvard University Press, 1967), 5-63.

<sup>45</sup> See Crossley, *A Tranlucent Mirror*, 247.

<sup>46</sup> *ibid.*, 2.

culture) and ‘proof of universal competence’ were important.<sup>47</sup> Ironically, the Manchu ethnic consciousness was reinforced during the Republican revolution and afterwards in opposition to Manchu rule.<sup>48</sup>

Similarly, continuity and discontinuity can also be found in political institutions. The Qing’s bureaucracy laid the foundation for China’s process of political modernisation,<sup>49</sup> and the modernisation of the Chinese government began with the late Qing reforms and persisted through the Republican period and onwards.<sup>50</sup> Both continuity and discontinuity in political institutions can be seen in Republican, Mao and post-Mao China, and this will be examined in detail in various chapters of this thesis. More discussion will be devoted to post-Mao China.

With regard to the distinction between the public and the private, there is as much continuity as discontinuity. Brown has argued that observers on China are divided into two camps. One camp believes that China has not been much affected by outside influence in the last century; nothing from outside can take root without being modified (for example, Marxism-Leninism is labelled as Marxism-Leninism with Chinese characteristics in China), and the borrowing of foreign law is also injected into Party policy considerations. Others regard China as ‘a complicated empty space highly receptive to external influence’.<sup>51</sup> My study agrees with the first camp. There are mechanisms and institutions in China to modify Western influence, and one example is that the founders of the PRC absorbed a certain amount of Western rhetoric in creating their revolutionary discourses. To the extent the kind of discourses is still alive in the official rhetoric of the CPC in the post-1978 era. Thus, it is useful to explore the public/private distinction in Chinese thought and the space it made available for the creation of the revolutionary discourse and the reform

<sup>47</sup> See *ibid*, 270.

<sup>48</sup> Crossley, *Orphan Warriors*, 5.

<sup>49</sup> See Thomas A. Metzger, *The Internal Organization of Ch'ing Bureaucracy: Legal, Normative, and Communication Aspects* (Cambridge, Mass.: Harvard University Press, 1973), 1.

<sup>50</sup> See Duara, *Rescuing History from the Nation*, 96.

<sup>51</sup> See Brown, *Struggling Giant*, 98.

discourse. This examination helps us to clarify certain aspects of the recent history of post-1978 China and the selective re-admission of private property into the socio-economic framework in the name of reform and opening-up. Governmental distinctions between city and countryside and between the public and private (for example, private and state-owned enterprises, public and private property rights), and how these distinctions have evolved and changed during the history of post-1949 China, also tell us something about Chinese ideas of rulership or 'the role of the state'. The transformation of the public/private distinction in property rights also contributes to our broader and comparative understanding of property law. It is thus necessary to give an historical account of the Chinese public/private distinction with special reference to ownership in the following section of this chapter.

Under the theoretical scheme of analysing China's transformation, in which there is as much continuity and discontinuity, the hypotheses of this research are: if property rights were not clear cut in imperial China because of the blurred distinction between the public and the private, present-day China should also see the same fragmentation of property rights, despite ruptures and revolutions especially during the Maoist era. On the other hand, the nature of property rights may not remain unchanged in post-Mao China because of the socialist legacy and the injected new elements such as market forces and foreign legal institutions into the socialist property system. It is thus worth examining the changing nature of property rights in post-Mao China, and the manner in which the legal and governmental systems deal with this issue. In order to test these hypotheses, we also need to explore the rapid change in socio-economic conditions.

## **5. The public-private distinction, property rights and state-making: a historical background**

Before introducing the public-private distinction in both historical and modern China, it is necessary to have a brief review of private property in 'the West'. If 'the West'

has a general prevailing theory of private property, it is often traced back to John Locke and labelled ‘possessive individualism’. In ‘the West’, there are many other theories of private property: property as expectation according to Bentham, property as mediation to recognition according to Hegel, the economic analysis of property and so on. However, the question about ‘private’ property in modern world is how ‘private’ and how tied to ‘individuals’ private property is.<sup>52</sup> For example, the idea of ‘private property’ has been challenged by the rise of joint ventures, cultural property and the shift from ‘ownership’ to ‘access’.<sup>53</sup> There are many critiques about ‘possessive individualism’ in the modern world. For example, Arendt has labelled Locke’s ‘possessive individualism’ as ‘the modern equation of property and wealth on one side and propertylessness and poverty on the other’.<sup>54</sup> Murphy, Roberts, and Flessas argue that ‘whatever our ideological commitments, [we need to] look beyond individualism’.<sup>55</sup> Pottage borrows Arendt’s distinction between wealth and property, and argues that private property becomes ‘the much more modern problem of the accumulation and regulation of private and social wealth, or the political ordering of the social’.<sup>56</sup> Alan Ryan also argues that ‘property rights are nowadays important because they are *rights* rather than because they are *property rights*’.<sup>57</sup> In the Chinese context, concepts and connotations of private property and the private sphere keep changing, and are different from the ‘Western’ discourses.

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<sup>52</sup> W. T. Murphy, Simon Roberts, and Tatiana Flessas, *Understanding Property Law*, 4ed. (London: Sweet & Maxwell, 2004), 22.

<sup>53</sup> See e.g., Jeremy Rifkin, *The Age of Access: The New Culture of Hypercapitalism, Where All of Life Is a Paid-for Experience* (New York: J.P. Tarcher/Putnam, 2000c).

<sup>54</sup> Hannah Arendt, *The Human Condition*, 2ed. (Chicago: University of Chicago Press, 1998), 61. Arendt argues that: ‘...wealth and property, far from being the same, are of an entirely different nature. Originally, property meant no more or less than to have one’s location in a particular part of the world and therefore to belong to the body politics, that is, to be head of one of the families which together constituted the public realm’.

<sup>55</sup> See Murphy, Roberts, and Flessas, *Understanding Property Law*, 16.

<sup>56</sup> Alain Pottage, ‘Property: Re-Appropriating Hegel’, *The Modern Law Review* 53, no.2 (1990): 259.

<sup>57</sup> Alan Ryan, *Property and Political Theory* (Oxford: Blackwell, 1984), 192. Italics are in the original.

### 5.1. Pre-1949 China

The term ‘the private’ has differing connotations in English and in Chinese.<sup>58</sup> In English, the private refers to the ‘personal, individual, and independent’ as opposed to the public. This is what underpins the notion of ‘private property’ and the theory of private property that is usually taken to start with Locke. In Chinese the nearest Chinese equivalent to the word private is *si*. *Si* refers to *zisi* (selfish 自私) and often implies something shameful and illegitimate.<sup>59</sup> This usage of *zisi* could trace its origin back to Huang Zongxi’s writings<sup>60</sup> in the late Ming and early Qing. *Zisi* was inferior to *gong* (public), which means altruism, justice and fairness. *Si* was always negative, while *gong* was emphasised as a moral ideal.<sup>61</sup> But although *gong* is the best equivalent in Chinese to ‘the public sphere’, elite and mass participation, such as it was, in local public affairs in the late Qing and Republican China<sup>62</sup> did not equal the existence of the public sphere.

The Chinese *locus classicus* of the distinction between ‘public’ and ‘private’ is found in the Confucian *Book of Poetry*’s (*shijing* 诗经) ‘may it first rain on our public fields, and then upon our private’ (*yu wo gongtian, sui ji wosi* 雨我公田, 遂及我私),<sup>63</sup> or in Mencius’ (*mengzi* 孟子) ‘and not till the public work is finished, may they presume to attend to their private affairs’ (*gongshi bi ranhou ganzhi sishi* 公事毕, 然后敢治私事).<sup>64</sup> The moral ideal of Confucianism is ‘great altruism without selfishness’ (*dagong wusi* 大公无私). In these Confucian writings, *gong* (public sphere) is nearly equivalent to *guo* (国), the emperor’s family and the throne, and

<sup>58</sup> See Philip C. C. Huang, ‘Biculturalism in Modern China and in Chinese Studies’, *Modern China* 26, no. 1 (2000): 4.

<sup>59</sup> See ibid: 5; *Xiandai Hanyu Cidian [Modern Chinese Dictionary]* (Beijing: Shanwu Yinshuguan, 1991), 1030.

<sup>60</sup> See Huang Zongxi’s ‘Yuanjun’ [On rulership], in Huang Zongxi, *Mingyi Daifanglu [Waiting for the Dawn: A Plan for the Prince]* (Beijing: Guji Chubanshe, 1955 [1662]).

<sup>61</sup> See Huang, Biculturalism in Modern China and in Chinese Studies’, 5; *Xiandai Hanyu Cidian [Modern Chinese Dictionary]*, 386.

<sup>62</sup> See e.g., William T. Rowe, *Hankow: Conflict and Community in a Chinese City, 1796-1895* (Stanford: Stanford University Press, 1989); David Strand, *Rickshaw Beijing: City People and Politics in the 1920s* (Berkeley: University of California University Press, 1989).

<sup>63</sup> *Shijing-Xiaoya-Datian [Book of Poetry-Book of Odes-Farm Work]*, 《诗经·小雅·大田》

<sup>64</sup> Mengzi-Teng Weng Gong Shang [Mencius-Teng Weng Gong I], 《孟子·滕文公上》, quoted in Metzger, *The Internal Organization of Ch’ing Bureaucracy*, 281.

with complex bureaucracy,<sup>65</sup> while *si* (private sphere) is similar to *min* (the people 民).<sup>66</sup> *Gong* is superior to *si*. Nevertheless, the boundaries between *gong* and *si* were vague in traditional China. As Elman puts it ‘where gentry associations based on nonkinship ties were defined as “private” [*si*]...social organizations based on descent were perceived as “public” [*gong*]’.<sup>67</sup>

*Guo* does not deliver the same meanings as nation or state. The private (*si*) usually refers to kinship, not the individual.<sup>68</sup> ‘The great rule of all by one emperor’ (*dayitong* 大一统) meant that China lacked the kind of civility and the division between public and private which took root in the West especially in the Civil Law tradition.<sup>69</sup>

The transition from ‘under heaven’ (*tianxia* 天下) to ‘the nation’ (*guojia* 国家)<sup>70</sup> encapsulates much of the intellectual history of modern China,<sup>71</sup> especially since the first Opium War (1839-1842). In the early twentieth century, the narratives of History and a new series of vocabularies such as feudalism (*fengjian* 封建), nation (*guojia* 国家), revolution (*geming* 革命) and rights (*quanli* 权利) entered into the Chinese lexicon, especially through the intellectual discourses imported from Japan.<sup>72</sup> The emergence of ‘rights’ in China was also a ‘translingual practice’ according to Lydia Liu: right (*quanli*) was used to translate ‘rights’ as early as the 1860s as a result of what might be termed ‘a round-trip diffusion’ of the Japanese *kenri* by Chinese

<sup>65</sup> See e.g., Ray Huang, *1587, a Year of No Significance: The Ming Dynasty in Decline* (New Haven: Yale University Press, 1981c).

<sup>66</sup> See Metzger, *The Internal Organization of Ch'ing Bureaucracy*, 281.

<sup>67</sup> See Benjamin A. Elman, *Classicism, Politics, and Kinship: The Ch'ang-Chou School of New Text Confucianism in Late Imperial China* (Berkeley: University of California Press, 1990c), 34.

<sup>68</sup> Liang Shuming, *Zhongguo Wenhua Yaoyi* [Gist of Chinese Culture] (Shanghai: Xuelin Chubanche, 1986), 162-188.

<sup>69</sup> In the common law systems this distinction has also remained fluid.

<sup>70</sup> See Joseph R. Levenson, *Confucian China and Its Modern Fate* (London: Routledge, 2005), 98-104.

<sup>71</sup> *ibid*, 103. In the late 19<sup>th</sup> century Chinese intellectuals like Liang Qichao applied social Darwinism in Chinese political discourses, and introduced the ideas of ‘race’ and ‘ethnicity’ to Chinese people. By using *hanzu* (汉族), the nation is ‘imagined’ by Chinese as a ‘Han lineage’. This could also be seen in the revolutionary discourses of Sun Yat-sen, founder of the Republican China. See Rawski, *The Last Emperors*, 2.

<sup>72</sup> Duara, *Rescuing History from the Nation*, 5.

scholars visiting and returning from Japan.<sup>73</sup> ‘The translation purged the classical Chinese term of its negative connotations associated with “power”, “money” and “privilege”’.<sup>74</sup>

Social Darwinism gave Chinese intellectuals opportunities to imagine Chinese history as an evolutionary progress towards a strong nation-state, while the past was labelled (and written off) as ‘feudalism’. However, the nation itself is ‘a highly contested phenomenon’,<sup>75</sup> and it belongs to the realm of ‘imagined communities’,<sup>76</sup> to borrow Anderson’s useful term. The narratives of History became even odder when the narratives of both ‘statist nationalism’ and a ‘*fengjian* (feudalism)<sup>77</sup>—civil society’ hybrid were joined together and entered the discourses of modernisation.<sup>78</sup> According to Duara, the ‘*fengjian*—civil society’ hybrid was against the background that in ‘a revival of interest in civil society’, many scholars attempt to take the idea of civil society out of its modern Western context and place it in the context of Chinese history.<sup>79</sup> This hybrid emerged in the late Ming and early Qing when gentry power in localities got consolidated, and served as a constraint and a critique of imperial power.<sup>80</sup> The *fengjian* system was supported as *gong* because the *fengjian* system could back up self-government and local autonomy, whereas the centralised imperial power was criticised as *si*.<sup>81</sup> In the case of the *fengjian*—civil society hybrid narrative, the modern is obsessed with the past—the Zhou feudal institutions.<sup>82</sup> However, the narratives of the *fengjian*—civil society hybrid which served as the

<sup>73</sup> Lydia H. Liu, *Translingual Practice: Literature, National Culture, and Translated Modernity—China, 1900-1937* (Stanford, Calif.: Stanford University Press, 1995c), 279.

<sup>74</sup> *ibid*, 280.

<sup>75</sup> Duara, *Rescuing History from the Nation*, 3.

<sup>76</sup> Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso, 1991).

<sup>77</sup> On ‘feudalism’ in relation to the public and the private see e.g., Duara, *Rescuing History from the Nation*, 147-175; Philip A. Kuhn, ‘Local Self-Government under the Republic: Problems of Control, Autonomy, and Mobilization’, in *Conflict and Control in Late Imperial China*, ed. Frederic Wakeman Jr and Carolyn Grant (Berkeley: University of California Press, 1975), 257-298; Min Tu-ki, *National Polity and Local Power: The Transformation of Late Imperial China*, ed. Philip A. Kuhn and Timothy Brook (Boston, Mass.: Harvard University and the Harvard-Yenching Institute, 1989), 89-136.

<sup>78</sup> Duara, *Rescuing History from the Nation*, 161.

<sup>79</sup> *ibid*, 147.

<sup>80</sup> *ibid*, 153.

<sup>81</sup> See Min, *National Polity and Local Power*, 89.

<sup>82</sup> *ibid*, 90.

counter-narrative of nationalism overlooked the complexity of China's governance system—the tensions and interactions between the central government and local governments, and imagined nationalisms could be easily offset by equally imagined localisms.

Duara argues that if History is the condition on which modernity is possible, 'the nation-state is the agency, the subject of History which will realize modernity',<sup>83</sup> and yet, as the subject of History, the nation-state is 'never able to completely bridge the aporia between the past and the present'.<sup>84</sup> Duara therefore proposes a method of historical narrative out of both constructionism (regarding the past as largely invented and imagined) and linear History. History-writing which serves the nation should be resisted.<sup>85</sup>

## 5.2. Mao and Now

In traditional China no clear legal and administrative distinction was drawn between cities and the countryside, even though symbolically or spatially the super status of the cities might be marked by surrounding city walls.<sup>86</sup> Urbanisation and the formation of 'modern' cities in Republican China undermined such uniformity and gave birth to the urban-rural divide. The gap between the urban and the rural has become even wider in the post-1949 era. Mao's revolutionary rhetoric was pro-village and anti-city, because the rural area in Southern China (for example, Jiangxi and Fujian) was his early revolutionary base. But in the post-1949 era, industrialisation was set, in emulation of the USSR, as the priority in state policy and state-building. The development of the city thereafter proceeded at the expense of the countryside, and the household registration system (*hukou zhidu* 户籍制度)<sup>87</sup> made

<sup>83</sup> Duara, *Rescuing History from the Nation*, 20.

<sup>84</sup> *ibid*, 29.

<sup>85</sup> See generally *ibid*.

<sup>86</sup> On rural-urban uniformity in traditional China see e.g., F. W. Mote, 'The Transformation of Nanking, 1350-1400', in *The City in Late Imperial China*, ed. G. William Skinner (Stanford: Stanford University Press, 1977), 101-154.

<sup>87</sup> Shortly after the free mobility at the beginning of the new regime, the rigid household system was established in 1958. Mobility was prohibited, especially the mobility from the rural to the urban areas.

the gap between the rural and the urban even wider. In parallel with consolidation of the rural-urban divide, the private sphere was contracted by the expansion of state intervention.

Notions of property consolidated in the Ming and Qing codes provide the backdrop for the Maoist definition of landlordism. Maoist rhetoric also absorbed Marxism to explain the historical development of Chinese society in terms of Marxist periodisation and the theory of ‘class struggle’.<sup>88</sup> The definitions of ‘landlord’ and ‘capitalist’ were examples of Mao’s governance technique—‘making the past serve the present and foreign things serve China’.<sup>89</sup> All rural landowners were put into the category of ‘landlords’ (*dizhu* 地主) irrespective of the quantity and quality of the land they owned; urban business owners were categorised as ‘capitalists’ (*zibenjia* 资本家) and ‘petty proprietors’ (*xiao yezhu* 小业主). Both landlordism and capitalism were classified as private and evil.

Deng’s reform was based on Maoism but also registered a change of direction from Maoism. ‘The private’ has been gradually readmitted into the socio-economic framework, and the state has steadily retreated from the social welfare provision system that was led by the state during the Maoist era.<sup>90</sup> In the post-1978 era, the long process of drafting a new property law (*wuquanfa* 物权法) for China took place against the backdrop of the development of the private sector and legislating to promote a ‘market economy’.<sup>91</sup> The 1988 Constitution was amended to allow the

<sup>88</sup> See e.g., Mao Zedong, ‘Hunan Nongmin Yundong Kaocha Baogao [Report on an Investigation of the Peasant Movement in Hunan]’, ‘Zhongguo Gejieji de Fenxi [Analysis of the Classes in Chinese Society]’, in Mao Zedong Xuanji Diyijuan [*Selected Works of Mao Zedong Vol. I*] (Beijing: Remin Chubanche, 1961 [March 1927]).

<sup>89</sup> In a letter written to the Central Conservatoire in February 1964, Mao Zedong declared that in the realm of culture, China has to ‘make the past serve the present and foreign things serve China’ (*gu wei jin yong, yang wei zhong yong* 古为今用, 洋为中用). Also see Geremie Barmé, ‘History for the Masses’, in *Using the Past to Serve the Present: Historiography and Politics in Contemporary China*, 260–286, ed. Jonathan Unger (Armonk, N. Y.: M. E. Sharpe, 1993c).

<sup>90</sup> Here is the question is how to fill the gap left by the state-led provision system. We could look at the revival of charity and charitable bodies in post-Mao China and the ‘internationalisation’ of charitable efforts in the 2008 Sichuan earthquake disaster. This would be another interesting research topic in the future.

<sup>91</sup> See Donald C. Clarke, ‘Legislating for a Market Economy in China’, *The China Quarterly*, no. 191

transfer of land use rights, and the Provisional Regulation on the Grant and Transfer of Use Rights in Urban Land (1990) paved the way for the commodification of urban land. The Property Law came into effect in 2007;<sup>92</sup> ownership is defined there as an absolute and supreme right.<sup>93</sup> In formal, legal terms there is now a clear demarcation between state ownership, collective ownership and private ownership.

Yet the boundaries between the public and the private in reality are blurred in the complex relationship between central government and local government. Viewed in the light of Chinese history, the centre has had to deal with various ‘agents’ or ‘middlemen’, especially local governments, and the tensions between the central and the local are even more obvious in the post-1978 era. The authority of the Party-state and the centralised control of Beijing have been weakened by marketisation, and economic power has been decentralised to local governments.<sup>94</sup> The relationship between central and local government and its impact on property and governance will be examined in detail in the various chapters of this thesis.

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(2007): 567-585.

<sup>92</sup> The property law was promulgated by the National People’s Congress (NPC) on 16 March 2007, and implemented on 1 October 2007.

<sup>93</sup> This conception of ownership is based on the German Civil Law and adheres to the socialist principles.

<sup>94</sup> See Merle Goldman and Roderick MacFarquhar, ‘Dynamic Economy, Declining Party-State’, in *The Paradox of China’s Post-Mao Reform*, ed. Merle Goldman and Roderick MacFarquhar (Cambridge, Mass.: Harvard University Press, 1999), 17.

## Chapter 2: Property and Property Rights in Historical Context: Late Imperial and Republican China

### 1. Introduction

Most contemporary legal reformers in China confine themselves to the framework of Civil Law when they address questions arising from the property law reform (from 1998 onwards in particular).<sup>1</sup> This chapter challenges this approach by exploring property and property rights in their historical context, and argues that the unitary and exclusive property rights systems, imported during the late Qing and early Republican China from countries in the continent, were not driven by indigenous causes springing from Chinese society. Focusing on the fragmentation of the land tenure system<sup>2</sup> in late imperial China, the aim of this chapter is not to fit the practice of fragmented landownership into the category of 'property rights', but to put fragmented landownership into its historical context and explore the emergence and nature of both the fragmented entities and the category of property rights itself.<sup>3</sup>

Late imperial China is quite an important period in China's transformation: it is often said by Chinese intellectuals that China's backward 'feudal' (*fengjian* 封建) or 'semi-feudal' (*ban fengjian* 半封建) past was challenged by Western-style modernisation in this period.<sup>4</sup> Various kinds of theories seek to explain the unprecedented social transformation in late imperial China, for example, 'despotism',

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<sup>1</sup> See Chapter Three in detail. The drafting of a property law was put on the working agenda of the Legislative Affairs Committee (LAC) of the National People's Congress in 1998.

<sup>2</sup> In both historical and contemporary China, land is the most important form of property. 'Tenure' refers to the relationship whereby a tenant 'holds' land of a lord at the time of Norman Conquest, and it could not be transposed to the description of the Chinese land system, which is not based on feudalism. I use tenure here because it emphasises 'holding' as opposed to 'owning' and 'a social fact' as opposed to 'a legal concept'. Therefore the term 'tenure' helps me to demonstrate the property relations in late imperial China; these property relations departed from *dominium* in civil law but to some extent resembled some aspects of the common law practice. On feudal tenure see e.g., J. H. Baker, *An Introduction to English Legal History* 4ed. (London: Butterworths, 2002), 223-243.

<sup>3</sup> On this approach see Alain Pottage, 'Introduction: The Fabrication of Persons and Things', in *Law, Anthropology and the Constitution of the Social: Making Persons and Things*, ed. Alain Pottage and Martha Mundy (Cambridge: Cambridge University Press, 2004), 3.

<sup>4</sup> Peter C. Perdue, 'Constructing Chinese Property Rights: East and West', in *Constituting Modernity: Private Property in the East and West*, ed. Huri Islamoglu (London: I. B. Tauris, 2004), 39.

‘the ultrastable structure of Chinese society’,<sup>5</sup> ‘budding capitalism’, ‘civil society’, and ‘the third realm’. In the legal field, introduction of many aspects of continental Civil Law to China is considered one of the key elements constituting ‘modernity’ of China. However we need to question: does the transformation in late imperial China imply ‘the triumph of a universal project of modernity in China’? What role has ‘the past’ played and might yet play in the configuration of norms and orders?<sup>6</sup>

In terms of the property regime in late imperial China, there are also different schools of thoughts: one relies on the theory of ‘Oriental despotism’,<sup>7</sup> rather than on empirical research, the other presumes ‘a *laissez-faire* state’ and draws upon detailed examinations of archival sources in Chinese, especially land contracts and legal cases regarding land tenure. However, the social complexity in late imperial China cannot be fully captured by these two abstract models.<sup>8</sup> In this chapter, the focus is on Qing and Republican China.<sup>9</sup>

## 2. Understanding civil ‘law’ in Qing and Republican China

In order to understand property and property rights in Qing and Republican China, it is necessary to look at civil ‘law’ in Qing and Republican China first. Civil translates as *minshi* (民事) in Chinese, literally ‘people’s matters’. The group of laws that might be called ‘civil law’ in the Qing primarily concerned household and marriage (*huhun* 戶婚), and also land and real estate (*tiantu* 田土), as well as money and debt (*qianzhi* 錢債). Such matters were often considered ‘minor things’ (*xishi* 细事) in the Qing law.<sup>10</sup> Specifically speaking, *huhun* refers to household, marriage, family

<sup>5</sup> See generally Jin Guantao and Liu Qingfeng, *Xingsheng yu Weiji: Lun Zhongguo Fengjian Shehui de Chao Wending Jiegou* [The Cycle of Growth and Decline—On the Ultrastable Structure of Chinese Feudal Society] (Changsha: Hunan Renmin Chubanshe, 1984).

<sup>6</sup> See Liang Zhiping, ‘Tradition and Change: Law and Order in a Pluralist Landscape’, *Cultural Dynamics* 11, no. 2 (1999): 215.

<sup>7</sup> See generally Karl Wittfogel, *Oriental Despotism: A Comparative Study of Total Power* (New Haven: Yale University Press, 1957).

<sup>8</sup> See Perdue, ‘Constructing Chinese Property Rights’, 36-37.

<sup>9</sup> Property in the Maoist era will be discussed in Chapter Five.

<sup>10</sup> See Kathryn Bernhardt and Philip C. C. Huang, ‘Civil Law in Qing and Republican China: The Issues’, in *Civil Law in Qing and Republican China*, ed. Kathryn Bernhardt and Philip C. C. Huang

division and inheritance,<sup>11</sup> *tiantu* refers to land and houses, and *qianzhi* refers to money, contract and debt. The Republican Civil Code very much bears the imprint of the Qing code,<sup>12</sup> including firstly a section of general principles, and then four sections in respect to obligation, ownership, family, and inheritance.<sup>13</sup>

Past scholarship before the 1980s on Chinese law assumed that the law in the Qing and the Republic dealt with few civil matters. Drawing on a casebook of the Qing highest-level court decisions named *Xing'an Huilan* (刑案汇览, The Conspectus of Penal Cases)<sup>14</sup> and combining original cases with translations, commentary and extracts, Bodde and Morris argue that there was little civil law in the Qing.<sup>15</sup>

The penal emphasis of this law, for example, meant that matters of a civil nature were either ignored by it [the Qing legal system] entirely (for example, contracts), or were given only limited treatment within its penal format (for example, property rights, inheritance, marriage).<sup>16</sup>

Most Western scholars hold the same argument as that of Bodde and Morris.<sup>17</sup> The research of Bodde and Morris was based on penal cases tried in the highest court in the Qing. These cases, however, are not sufficient to summarise the actual operations of the judicial process, nor can they capture the whole picture of the Qing legal system.<sup>18</sup> There were not many civil cases shown up at the highest courts, instead, civil cases were handled by local magistrates.<sup>19</sup> Among the scholarship before the

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((Stanford: Stanford University Press, 1994), 1.

<sup>11</sup> Family division and inheritance will be explained in Section 3.3 of this chapter.

<sup>12</sup> On the Qing code, see e.g., *The Great Qing Code*, trans. William C. Jones (Oxford: Clarendon Press, 1993).

<sup>13</sup> See Bernhardt and Huang, 'Civil Law in Qing and Republican China', 1.

<sup>14</sup> *Xing'an Huilan* has 152 volumes, including more than 7600 penal cases from 1736 to 1885.

<sup>15</sup> Derk Bodde and Clarence Morris, *Law in Imperial China: Exemplified by 190 Ch'ing Dynasty Cases* (Cambridge, Mass.: Harvard University Press, 1967).

<sup>16</sup> Bodde and Morris, *Law in Imperial China*, 4. This point of view is partial if we compare it with the work of Madeleine Zelin, Jonathan K. Ocko, and Robert Gardella, eds., *Contract and Property in Early Modern China* (Stanford, Calif: Stanford University Press, 2004). This book contains detailed study of the role of contracts and property rights in economic transactions in late imperial China.

<sup>17</sup> There are exceptions. For example, David C. Buxbaum, 'Some Aspects of Civil Procedure and Practice at the Trial Level in Tanshui and Hsinchu from 1789 to 1895', *Journal of Asian Studies* 30, no. 2 (1971): 255-279. Buxbaum draws on the archives of the Danshui Xinzhu court and argues that many civil cases were actually dealt with in the local court and in a way different from penal cases.

<sup>18</sup> See Perdue, 'Constructing Chinese Property Rights', 53.

<sup>19</sup> See e.g., Bernhardt and Huang, 'Civil Law in Qing and Republican China', 2.

1980s, although some Chinese and Japanese scholars paid more attention to the civil matters in imperial Chinese law,<sup>20</sup> they could not capture the whole picture about how courts actually handled civil matters, owing to the lack of court records.<sup>21</sup>

The opening of local archives in China to Western scholars in the 1980s has provided an opportunity for scholars to reexamine assumptions about civil law in Qing and Republican China as well as access to documents never before seen.<sup>22</sup> Among the documents newly available, we find survey reports of custom, unofficial contracts, and official archival documents.<sup>23</sup> Many of the documents (for example, the studies of archive documents and legal practice) challenge earlier assumptions that the formal court system of the Qing dealt with few civil matters.<sup>24</sup> For example, the Danshui-Xinzhu archive evidence suggests that 'civil cases formed a major part of the caseload of local courts'.<sup>25</sup> The same situation persisted into the Republic, where most of the cases were with a concern of land transactions, contracts, debt, marriage, and inheritance. In addition, ordinary people even farmers and the urban poor had access to civil litigations.<sup>26</sup>

Yet these empirical findings seem to further complicate our understanding of civil 'law' and problematise the complex relationship between code and practice in the Qing and the Republic. Although civil matters did constitute much of the caseload in local courts, it was found that not all the case files included conclusive verdicts,

<sup>20</sup> On these works, see e.g., Dai Yanhui, *Zhongguo Fazhi Shi* [History of the Chinese Legal System] (Taipei: Sanmin Shuju, 1966).

<sup>21</sup> See Bernhardt and Huang, 'Civil Law in Qing and Republican China', 3.

<sup>22</sup> See e.g., Philip C. C. Huang, 'County Archives and the Study of Local Social History: Report on a Year's Research in China', in *Modern China* 8, no. 1 (1982): 133-143; Philip C. C. Huang, *The Peasant Economy and Social Change in North China* (Stanford, Calif.: Stanford University Press, 1985); Madeleine Zelin, 'The Rights of Tenants in Mid-Qing Sichuan: A Study of Land-Related Lawsuits in the Baxian Archives', *Journal of Asian Studies* 45, no. 3 (1986): 499-526.

<sup>23</sup> See Liang Zhiping, *Qingdai Xiguanfa: Shehui yu Guojia* [Customary Law in the Qing: Society and the State] (Beijing: Zhongguo Zhengfa Daxue Chubanshe, 1996), 45. On the study of 'customary law', see Liang Zhiping's work on customary law in the Qing above. On the study of land contracts, see Yang Guozhen, *Mingqing Tudi Qiyue Wenshu Yanjiu* [The Research of Land Titles and Contracts in the Ming and Qing] (Beijing: Renmin Chubanshe, 1988). On the archive research see Philip Huang's empirical work on civil justice in Qing and Republican China.

<sup>24</sup> Bernhardt and Huang, 'Civil Law in Qing and Republican China', 4.

<sup>25</sup> *ibid.*, 4.

<sup>26</sup> *ibid.*, 5.

namely, ‘court verdicts’ or ‘court decisions’ (*tangyu* 堂谕).<sup>27</sup> This may suggest that in order to justify judicial decisions the court shifted responsibility for finding a resolution to other informal methods, among which embrace ‘three factors-written law, broad cultural norms, and local customs’.<sup>28</sup> Moreover, inquiry into the civil law in the Qing requires going beyond codified law to examine both litigation and the court’s procedures, which were qualitatively different from those pertaining to penal cases.

Focusing on the study of legal practice and going beyond the dichotomy of state versus society, Philip Huang, a leading authority in this area, proposes ‘the third realm’ model primarily for the study of civil justice in the Qing. In Huang’s model, the entire justice system of the Qing and the Republic was composed of three parts: the formal realm represented by court adjudication, the informal realm represented by ‘community and kin mediation’, and a ‘third realm’ between the two, where the formal and the informal interacted with each other. Accordingly, most cases were settled in the middle stage of a lawsuit.<sup>29</sup> Huang terms the processes of resolution and settlement during the middle stage of a lawsuit as ‘the third realm of the Qing justice system’.<sup>30</sup>

Although Huang’s ‘third realm’ model has made a significant contribution to the research into the Qing law and civil justice in China, and although it aims to go beyond the dichotomy of state versus society, the model still falls within the framework based on a clear division between formal justice and informal justice.<sup>31</sup>

<sup>27</sup> Mark A. Allee, ‘Code, Culture, and Custom: Foundations of Civil Case Verdicts in a Nineteenth-Century County Court’, in *Civil Law in Qing and Republican China*, ed., Kathryn Bernhardt and Philip C. C. Huang (Stanford: Stanford University Press, 1994), 124.

<sup>28</sup> *ibid.*

<sup>29</sup> See Philip C. C. Huang, ‘Between Informal Mediation and Formal Adjudication: The Third Realm of Qing Justice’, *Modern China* 19, no. 3 (1993b): 251-298.

<sup>30</sup> See Philip C. C. Huang, *Civil Justice in China: Representation and Practice in the Qing* (Stanford: Stanford University Press, 1996), 110-137.

<sup>31</sup> Huang modified his arguments in the book of 2001 on civil law in Qing and Republican China, and he put more weight on confrontation and accommodation of state law and customary practices and did not confine himself to the formal/informal model. See Philip C. C. Huang, *Code, Custom and Legal Practice in China: The Qing and the Republic Compared* (Stanford: Stanford University Press, 2001).

The formal/informal justice system is not unique in China, and ‘the third realm’ of the civil justice system can also be found in the West (for example, the development of ADR<sup>32</sup>). Moreover, when Huang argues that ‘we must try to take into account the fundamental substantive difference between mediation and adjudication’,<sup>33</sup> he actually emphasises a strict distinction between court adjudication and civil mediation, and this puts his argument within the same dichotomy of state versus society while ignoring the interrelationship between the different realms. In terms of the relationship between code, culture and custom, Mark Allee’s point of view may be more comprehensive: magistrates in the Qing court, he says:

did not pick and choose from among three rigidly defined and exclusive modes of reasoning out their decisions; in good Confucian fashion they probably conceived their task as an attempt to *harmonize* and *reconcile* the three perspectives [of code, culture, and custom].<sup>34</sup>

Furthermore, when looking at the issues of law and custom in Qing and Republican China, we need to avoid equating custom with ‘customary law’ (*xiguan fa* 习惯法). We may even ask: is there a customary *law*? In the realm of custom and the so-called customary law, Huang has already noted some problems with this equation. He criticises Chen and Mayer’s studies of customary law and economic growth in the Qing,<sup>35</sup> and argues that ‘the assumption that custom is or ought to be the source of all law, implicit to the Anglo-American tradition of common law, should not be projected onto China’.<sup>36</sup> Chen and Myers’s premise ignores ‘state suppressions of

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<sup>32</sup> Alternative Dispute Resolution.

<sup>33</sup> Philip C. C. Huang, ‘Court Mediation in China, Past and Present’, *Modern China* 32, no. 3 (2006): 276.

<sup>34</sup> Mark A. Allee, ‘Code, Culture, and Custom’, 125. Italics are added. On how magistrates dealt with civil matters, also see Liang Linxia, *Delivering Justice in Qing China: Civil Trials in the Magistrate’s Court* (Oxford: Oxford University Press, 2007). On Chinese legal tradition, see e.g., Geoffrey MacCormack, *The Spirit of Traditional Chinese Law* (Athens, Ga.; London: University of Georgia Press, 1996b). But this book focuses on imperial Chinese penal law rather than civil law.

<sup>35</sup> The point taken by Chen and Myers was that Qing was a *laissez-faire* state, and the Qing’s economic growth was upheld by the organisational foundations provided by customary law. See Chen Chang Fu-mei and Ramon H. Myers, ‘Customary Law and the Economic Growth of China During the Ch’ing Period, Part 1’, *Qingshi Wenti* 3, no. 5 (1976): 1-32; Chen Chang Fu-mei and Ramon H. Myers, ‘Customary law and the Economic Growth of China During the Ch’ing Period, Part 2’, *Qingshi Wenti* 3, no. 10 (1978): 4-27.

<sup>36</sup> Philip C. C. Huang, *Code, Custom and Legal Practice in China*, 5.

custom and popular practice' and puts too much stress on the autonomy and authority of the Qing custom.<sup>37</sup> But the distinction between state law and custom does not mean that state law and custom stand in sharp contrast to each other.<sup>38</sup> I would like to expand this dimension of the relationship between state law and custom further by examining governance and the land tenure system in late imperial China.

### 3. The socio-economic conditions in late imperial China

To deal with the fragmentation of the land tenure system in late imperial China, we need to distinguish between the institutions of *yongdian* (permanent tenancy<sup>39</sup> 永佃), *yitian erzhu* (two lords to one field 一田二主), and *yongdianquan* (the rights to a permanent tenancy 永佃权) with regard to property in land. *Yongdian* and *yitianerzhu* were customary practices, while *yongdianquan* was mainly a legislative creature that emerged from the late Qing legal reforms and developed with the introduction of Civil Law from Germany, via Japan to China, although it also combined some customary elements of *yongdian*. It is misleading to try to explain the customary practices in the Qing and the Republic simply by using the legal categories created by the legal reforms in the late Qing and the Republic. Thus, I would like to approach this question from a perspective that takes account of socio-economic conditions in late imperial China (from the 16<sup>th</sup> century to 1911). There are numerous reasons that could contribute to the emergence of permanent tenancy. In terms of the socio-economic conditions, I focus on the growth of commerce and the appearance

<sup>37</sup> See *ibid.*

<sup>38</sup> Other works include, for example, Liang Zhiping's 1996 study of 'Customary Law' in the Qing. Huang's criticism on Liang's study is that this study does not give enough weight on state law and the interaction between state law and custom: '[Liang]'s underlying message seems to be a political one: to find in customary law spaces for (Anglo-American style?) political pluralism, against absolutist state power. Though I share Liang's political sympathies, I think he is mistaken to force such an equation between the two legal traditions'. Huang, *Code, Custom and Legal Practice in China*, 5.

<sup>39</sup> A tenancy is 'the exchange of a right to receive payment of rent for a right to exclusive possession'. See W. T. Murphy, Simon Roberts, and Tatiana Flessas, *Understanding Property Law* 4ed. (London: Sweet & Maxwell, 2004), 77.

*Yongdian* means permanent tenancy, and it was also called *changgeng* (long-time cultivation 長耕), *yongzu* (long-time rent 永租). See Yang, Mingqing Tudi Qiyue Wenshu Yanjiu [*the Research of Land Titles and Contracts in the Ming and Qing*] (Beijing: Renmin Chubanshe, 1988), 93; Liang, *Qingdai Xiguanfa* [*Customary Law in the Qing*], 82.

of the fixed rent, inheritance and family division, and on demographic change and the population pressure with respect to governance, as well as rural-urban uniformity and mobility.

### **3.1. The growth of commerce in the Ming (1368-1644)**

Commerce developed fast in the Ming, however it is misleading to label this development as ‘budding capitalism’. The economy was urban-centred in the Song (AD960-1279), but this urban-centred economic structure was largely destroyed during the Mongol conquest and the Yuan reign (AD1271-1368).<sup>40</sup> With the founding of the Ming dynasty, the institutional focus turned away from an urban centred economy toward a rural centred economy. It also should be pointed out that the political and economic centres have already been split apart in China since the Sui (AD581-618) and Tang (AD618-907) dynasties.<sup>41</sup>

Possibly less confusion might have arisen to examine the land tenure in Ming and Qing China, if we get clear about the issue of ‘feudalism’ first. This misunderstanding of labelling the Ming’s commercial growth as ‘budding capitalism’ is based on the assumption that the Ming was a feudal society, which encompasses the ‘historical inevitability’ of class struggle within it.<sup>42</sup> In fact ‘feudalism’ in China began in the Zhou (around BC1066-BC256), where there was a strict distinction between nobleman and the common people, and aristocrats controlled political power.<sup>43</sup> But feudalism declined in the Qin (BC221-BC206) and Han (BC202-AD220) dynasties when political power was centralised. The effect of Confucianism was also an important attribute to the decline of the aristocracy.

<sup>40</sup> On merchant associations in the Yuan see Elizabeth Endicott-West, ‘Merchant Associations in Yuan China: The Ortoy’, *Asia Major* 2, no. 2 (1989): 127-154.

<sup>41</sup> See He Qinglian, *Renkou, Zhongguo de Xuanjian [Population: The Sword over Chinese Head]* (Chengdu: Sichuan Renmin Chubanshe, 1988), 16. We can see that in contemporary China, Beijing mainly serves as a political centre, and Shanghai is mainly an economic centre.

<sup>42</sup> See Ray Huang, *Taxation and Government Finance in Sixteenth-Century China* (Cambridge: Cambridge University Press, 1974), 311.

<sup>43</sup> See Liang Qichao, *History of Chinese Political Thought During the Early Tsin Period*, trans. Chen L. T. (London: K. Paul, Trench, Trubner, 1930), 160.

Although Confucian himself was born from low origin, he acknowledged his origin publicly, and achieved high official post through his ability.<sup>44</sup>

When the Ming emperor further consolidated the centralisation of power, there was no accommodation of the feudal institutions. In order to ensure that land became the primary source of state revenue, emperors in the early Ming split up large landholdings and conducted cadastral surveys.<sup>45</sup> Through these measures the landholdings of landlords in the Ming (and in the Qing) generally remained small.<sup>46</sup> However, it usually happened that when new dynasties were founded, the central government had the power to restore small landholdings; in the periods of dynastic decline, small landholdings were replaced with large landholdings, and land was often monopolised by royal family members and large landlords, posing challenges to the authority of the central government.<sup>47</sup> The same situation happened in the late Ming, where the measures of maintaining small landholdings could not sustain, and a large amount of land was thus monopolised.<sup>48</sup> To explore the reasons for this needs to take account of ‘the lack of organisations’ in both the political and the economic institutions in the late imperial China’s governance system.

### 3.2. Self and ‘non-organisational’ (*wu zuzhi* 无组织) society

The history of Europe since the 14<sup>th</sup> and 15<sup>th</sup> centuries has been marked by a gradual development of nationalism.<sup>49</sup> By contrast, the Chinese people in imperial China did not prioritise the nation as the highest form of social organisations, and ‘the Chinese

<sup>44</sup> ibid.

<sup>45</sup> See Jonathan K. Ocko, ‘The Missing Metaphor: Applying Western Legal Scholarship to the Study of Contract and Property in Early Modern China’, in *Contract and Property in Early Modern China*, ed., Madeleine Zelin, Jonathan K. Ocko, and Robert Gardella (2004), 178.

<sup>46</sup> See Martin Heijdra, ‘The Socio-Economic Development of Rural China During the Ming’, in *The Cambridge History of China, Vol. 8, the Ming Dynasty, 1368-1644, Part II*, ed. Denis Twitchett and Frederick W. Mote (Cambridge: Cambridge University Press, 1998), 525; Liang Shuming, *Zhongguo Wenhua Yaoyi [Gist of Chinese Culture]* (Shanghai: Xuelin Chubanche, 1986), 149, 173.

<sup>47</sup> See Huang, *The Peasant Economy and Social Change in North China*, 86.

<sup>48</sup> The Ming land consisted of private land (*min tian* 民田), official land (*guan tian* 官田), the land belonging to imperial estates (*huang zhuang* 皇庄), and the land of a military colony (*tun tian* 屯田). Land monopoly was usually through the expansion of official land and imperial estates.

<sup>49</sup> On nationalism, see e.g., Ernest Gellner, *Nations and Nationalism* 2ed. (Oxford: Blackwell, 2006 [1983]), 1.

people in the past has not been a nation'.<sup>50</sup> For traditional China, there were no class divisions and class struggles of the kind formed in modern Chinese revolutionary thought.<sup>51</sup>

The structure of society in imperial China stood in sharp contrast to that of the Western society. According to Fei Xiaotong, the structure of Chinese society could be characterised as 'the differential mode of association' (*chaxu geju* 差序格局):<sup>52</sup> Chinese society was composed not of discrete organisations but of overlapping networks of people linked together through social relationships such as kinship, and different networks spread out from each individual's personal connections. In Fei's observations of traditional rural China, society was 'egocentric' and people were 'selfish', differing from Western society that is generally characterised as 'individualistic'.<sup>53</sup>

The problem defined by this kind of selfishness is thus actually one of how to draw the line between the group and the individual, between others and our own selves. How this line has been drawn in China traditionally is obviously different from the way it is drawn in the West.<sup>54</sup>

It is also an oversimplification to say that Chinese society was collectivist, because it is not group-oriented. Chinese society lacked (and still lacks) social organisations that can transcend personal relations, and there was only an abstract entity the 'all-encompassing *tianxia*' (everything under heaven 天下).<sup>55</sup> But in 'a loosely organised rural society... it was not easy to find an all-encompassing ethical concept'.<sup>56</sup> This is one of the most important reasons behind the chaos and ruptures that have occurred throughout Chinese history.<sup>57</sup> The Confucian ideology was

<sup>50</sup> Liang, *History of Chinese Political Thought During the Early Tsin Period*, 7.

<sup>51</sup> See Liang, *Zhongguo Wenhua Yaoyi* [Gist of Chinese Culture], 142-154.

<sup>52</sup> Fei Xiaotong, *From the Soil, the Foundations of Chinese Society: A Translation of Fei Xiaotong's Xiangtu Zhongguo*, trans. Gary G. Hamilton and Wang Zheng (Berkeley: University of California Press, 1992c), 11; Liang, *Zhongguo Wenhua Yaoyi* [Gist of Chinese Culture].

<sup>53</sup> Whether Western society is individualist is open to debate.

<sup>54</sup> Fei, *From the Soil*, 61.

<sup>55</sup> *ibid.*, 76.

<sup>56</sup> *ibid.*, 75.

<sup>57</sup> On this theme, see e.g., Jin Guantao and Liu Qingfeng, *Xingsheng yu Weiji* [the Cycle of Growth

crystallised in kinship, which could be regarded as a miniature version of the governance system in imperial China:

In Chinese society, the most important relationship—kinship—is similar to the concentric circles formed when a stone is thrown into a lake. Kinship is a social relationship formed through marriage and reproduction. The networks woven by marriage and reproduction can be extended to embrace countless numbers of people—in the past, present and future.<sup>58</sup>

### **3.3. Inheritance, household division and lineage property**

Inheritance is an important issue in the examination of property and property rights. Inheritance in late imperial China should be understood by taking household division and succession in the sense of continuing the ancestral line into account. Although the Qing code emphasised ‘living together and sharing household property together’ (*tongju gongcai* 同居共财) and people were prohibited from separating household and dividing family property (*bieji yicai* 别籍异财) when their parents were still alive,<sup>59</sup> customary practices prevailed that even if the elder was still alive, fathers could divide the household assets equally among his sons. In this case, inheritance (*jicheng* 继承) in imperial China is better termed ‘household division’ (*fenjia* 分家).<sup>60</sup>

From the Tang and the Song onwards in imperial China, equal division of household assets among the sons of a family became one of the basic principles of inheritance, as opposed to the imitable inheritance, and primogeniture by which the eldest son inherited the entire estate in particular, among certain strata of the English landed

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*and Decline].*

<sup>58</sup> Fei, *From the Soil*, 76.

<sup>59</sup> See Article 87, *The Great Qing Code*, trans. William C. Jones (Oxford: Clarendon Press, 1993). This is one of the Ten Great Wrongs—lack of filial piety.

<sup>60</sup> See Dai, *Zhongguo Fazhi Shi* [History of the Chinese Legal System], 266-267. On extended treatment of household division in traditional China, also see e.g., Myron L. Cohen, *House United, House Divided: The Chinese Family in Taiwan* (New York: Columbia University Press, 1976); David Wakefield, *Fenjia: Household Division and Inheritance in Qing and Republican China* (Honolulu: University of Hawaii Press, 1998).

classes in the past.<sup>61</sup> In the Qing Dynasty, the equal-male-division of household property (*zhuzi junfen* 诸子均分) had been recognised both legally and socially.<sup>62</sup>

Although equal division among the sons was the rule, living parents still continued to receive support. At the time of division, if any sibling remained unmarried, a son was entitled to marriage expenses and a daughter was entitled to a dowry. In addition, we should take variations of locality into account: for example, in some places the eldest sons or grandsons received extra property.<sup>63</sup> In terms of women's property,<sup>64</sup> women did have control over individual, conjugal, and family property (for example, the dowry,<sup>65</sup> the conjugal fund, and widow's property), but the significance of that power should not be exaggerated.<sup>66</sup> On the one hand, it could be argued that women did not have complete 'individual property rights', because women were not permitted to dispose of their property freely. For example, in terms of the property left to a widow without sons, whether or not the widow could take charge of the property depended on 'her maintenance of chastity'. If the widow remarried, her deceased husband's property as well as her dowry would be disposed of at discretion of the deceased husband's family (Substatute 78-2).<sup>67</sup> On the other hand, it could be argued that, paradoxically, it was only women who could have individual property rights, because men's property was integrated to the whole family property.

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<sup>61</sup> See the analysis of wives and dependent children in the primogeniture regime in Murphy, Roberts, and Flessas, *Understanding Property Law*, 88.

<sup>62</sup> On eldest son's share, see e.g., Henry McAleavy, 'Varieties of Hu'o'ng-Hoa (香火): A Problem of Vietnamese Law', *Bulletin of the School of Oriental and African Studies* 21, no. 1/3 (1958): 608-619.

<sup>63</sup> See David Wakefield, *Fenjia*, 1-2.

<sup>64</sup> It should be pointed out that the Qing's marriage policy was different from that of the Ming. For example, in the Qing, marriage policy 'amounted to political endogamy', and intermarriage with the conquered Chinese population and their descendants was prohibited. See Evelyn Rawski, *The Last Emperors: A Social History of Qing Imperial Institutions* (Berkeley: University of California Press, 1998), 127-159. On women's property in the Qing, also see Kathryn Bernhardt, *Women and Property in China: 960-1949* (Stanford, Calif.: Stanford University Press, 1999).

<sup>65</sup> Here dowry (*jiazhuang* 嫁妆) refers to the property which a bride brings to her groom in marriage, it does not refer to the mediaeval rules in England in which a widow to be entitled to a life interest in one third of her husband's freeholds after his death.

<sup>66</sup> See Wakefield, *Fenjia*, 203-205.

<sup>67</sup> See Philip C. C. Huang, 'Codified Law and Magisterial Adjudication in the Qing', in *Civil Law in Qing and Republican China*, ed., Kathryn Bernhard and Philip C. C. Huang (Stanford: Stanford University Press, 1994), 167.

As Kathryn Bernhardt argues, household division should be understood in the context of succession in the sense of continuing the ancestral line.<sup>68</sup> In the household section (*hulü* 戶律) of the Ming and Qing codes, numerous substatutes<sup>69</sup> aimed at settling disputes over succession and household division. The Qing code provides ‘establishing a son of the official wife [as one’s successor] contrary to the law’ (Article 78).<sup>70</sup> In terms of choosing a successor in this case, to establish a successor among the sons of one’s brothers was the first resort, then to more distant relations. If there were still no eligible successors available, someone of the same surname would also be considered.<sup>71</sup> In the Qing period, the court stressed the prohibition of succession by one of different surname (*luanzong* 亂宗) in banner households. Substatute 78-4<sup>72</sup> stipulated that an adopted son with a different surname did not have the same legal status as a successor. The adopted son might be entitled to some property, but could not succeed to the ancestral line, nor inherited the family property.<sup>73</sup>

Although succession in the sense of continuing the ancestral line was a priority in inheritance and family division, the fact that ‘wealth never survives more than three generations’ could not be easily avoided after equal-male-division. Large lineage or family estate was thus split up. Typical examples were Huizhou (in Anhui) and Fujian, where the economy prospered, but family firms did not grow large but rather small.<sup>74</sup> Nevertheless, there were some measures to keep large family estates intact.<sup>75</sup>

<sup>68</sup> Bernhardt, *Women and Property in China*, 11. According to Bernhardt, litigation over inheritance in imperial China was mainly over succession in the sense of continuing the ancestral line not household division. See *ibid*, 3.

<sup>69</sup> Substatutes will be examined in detail in Section 4.3 of this chapter.

<sup>70</sup> *The Great Qing Code*, 106.

<sup>71</sup> See Huang, ‘Codified Law and Magisterial Adjudication in the Qing’, 167.

<sup>72</sup> References to the Qing code is to the compilation by Xue Yunsheng, *Du Li Cun Yi Chong Kan Ben Vol. 5 [a Typeset Edition of the Concentration on Doubtful Matters While Perusing the Substatutes]*, ed. Huang Jingjia (Taibei: Chengwen Chubanshe, 1970 [1905]).

<sup>73</sup> See Huang, ‘Codified Law and Magisterial Adjudication in the Qing’, 167.

<sup>74</sup> See He, *Renkou [Population]*, 182.

<sup>75</sup> We can compare these measures in China with those in England. For example, settlement was a device for wealthy landed families in 17<sup>th</sup>–19<sup>th</sup> England to maintain their family estate intact.

Lineage property was one of the devices that could diminish the effects of the partible inheritance system and protect family property from fragmentation and sale. Families that could trace their descent back to a common ancestor grew into powerful lineages. The lineages compiled written genealogies (*jiapu* 家谱) and held collective rituals to strengthen the links between members. Lineages also constructed ancestral halls (*citang* 祠堂). Both ancestral halls and genealogies demonstrated the wealth and power of the lineage.<sup>76</sup> Many lineages held commonly owned lineage properties (*zuchan* 族产). In practice, half or more of the land in a village was tied up in indivisible lineage estates.<sup>77</sup>

There were many kinds of lineage properties, here I focus on two kinds of real properties: ancestral estates (*zuchan* 祖产) and scholar estates (*xuetian* 学田).<sup>78</sup> Ancestral estates were established in perpetuity and they were inalienable, thus they were an important source of rental land. The rental income from ancestral estates provided for the offerings of the estate's founding ancestor, and the remainder was shared among the descendants of the founding or the focal ancestors (this does mean that they could dispose of their shares freely).<sup>79</sup> The estate was usually managed by the member who had most experience and economic influence. Sharing the ancestral estate, having its membership, and controlling the estate were important not only in the economic sense but also in the political sense.<sup>80</sup> Scholar estates were preserved for the education of candidates in the lineage and prepared them for civil examinations in order to foster their examination success. Unlike ancestral estates

<sup>76</sup> See Helen F. Siu, *Agents and Victims in South China: Accomplices in Rural Revolution* (London: Yale University Press, 1989), 4-5.

<sup>77</sup> See Rubie S. Watson, 'Corporate Property and Local Leadership in the Pearl River Delta, 1898-1941', in *Chinese Local Elites and Patterns of Dominance*, ed. Joseph W. Esherick and Mary Backus Rankin (Berkeley: Oxford University of California Press, 1990), 241.

<sup>78</sup> It is also interesting to compare ancestral estates and scholar estates with the trust in common law. But I have reservations to use 'the trust' to describe lineage property in late imperial China, because the institution in Chinese rural society did not equate the institution in common law. Also I use 'lineage property' rather than 'corporate property'.

<sup>79</sup> See Watson, 'Corporate Property and Local Leadership in Pearl River Delta, 1898-1941', 243.

<sup>80</sup> *ibid*, 244.

that could bring rents, scholar estates were investment for the future and could bring the lineage prospective income.<sup>81</sup>

### 3.4. Population growth and landownership

In this section, I would like to stress the issue of 'population boom', which is an important perspective to explain a wide range of social and economic phenomena, especially the change to landownership in both the Ming and the Qing. Population grew fast in the Ming owing to the emancipation of labour. Agricultural labours in the Ming were once composed of farmers who had personalistic dependence on landlords, slavery and a few farmer proprietors.<sup>82</sup> But labour had been emancipated since the sixteenth century.<sup>83</sup> Farmers were gradually freed from their personalistic dependence on landlords and transformed into farmer proprietors after the Qing conquest, because in the early Qing, a lot of free labourers were needed to cultivate and develop wasteland after the long-time wars.<sup>84</sup> Due to the deepening of commercialisation and urbanisation in the Yangzi River Delta (especially the south of the Yangzi River)<sup>85</sup> in the Qing, personalistic ties of farmers with landlords were replaced with contractual relationship.<sup>86</sup>

In terms of the emancipation of labour, the exception was unfree workers most of whom were bannermen.<sup>87</sup> Bannermen were concentrated in garrison compounds (for

<sup>81</sup> See He, *Renkou [Population]*, 182.

<sup>82</sup> See Wu Tingyu, *Zhongguo Lidai Tudi Zhidu Shigang [the History of Land Institutions in China]* (Jilin: Jilin Daxue Chubanshe, 1987), 220.

<sup>83</sup> Philip A. Kuhn, *Soulstealers: The Chinese Sorcery Scare of 1768* (Cambridge, Mass.: Harvard University Press, 1990), 34.

<sup>84</sup> See Wu, *Zhongguo Lidai Tudi Zhidu Shigang [the History of Land Institutions in China]*, 239-250.

<sup>85</sup> In Chinese, the south of the Yangzi River is called Jiangnan (江南), Jiangnan generally refers to the lower Yangzi Delta or the region of Taihu Lake (taihu 太湖).

<sup>86</sup> See Kathryn Bernhardt, *Rent, Taxes, and Peasant Resistance: The Lower Yangzi Region, 1840-1950* (Stanford: Stanford University Press, 1992), 7.

<sup>87</sup> The Qing governmental system was different from that of the Ming. There are debates about whether the Qing rulers were 'sinicised'. Opponents to the 'sinicisation model' argue that the Qing emperorship represents a creative adaptation to problems of rulership. See Rawski, *The Last Emperors*, 302; Pamela Kyle Crossley, *A Translucent Mirror: History and Identity in Qing Imperial Ideology* (Berkeley, Calif.: University of California Press, 2002). One of the important and innovative institutions of the Qing was the bannermen system, through which the Qing divided civil and military functions along (partially) ethnic lines. Also see Pamela Kyle Crossley, *Orphan Warriors: Three Manchu Generations and the End of the Qing World* (Princeton, N. J.: Princeton University Press,

example, in Manchuria, North China and along the Grand Canal)<sup>88</sup> and were not freemen.<sup>89</sup> Bannermen were granted bannerland (*qitian* 旗田)<sup>90</sup> as opposed to private land. Local landholding and taxation policies had to be reconstructed in order to support the bannermen, but this reconstruction, in turn, led to a range of financial and social crises.<sup>91</sup> For example, in 'China' bannermen did not engage in agricultural production. The sustenance of these bannermen was composed of land grants and regular stipends of rice and cash.<sup>92</sup> Yet income of bannermen did not increase in proportion with the growth of population. Throughout the eighteenth century, the bannermen gradually lost their privileges and were impoverished and unemployed.<sup>93</sup> The lands of many garrisons were transferred through illegal ways. In the eighteenth century, the lines between bannerland and private land had been blurred; by the end of the Qing, most bannerland had been sold to private owners.<sup>94</sup>

The population already grew fast in the period between the Song and the Ming. In the Ming the Yellow Book (*huangce* 黃冊)<sup>95</sup> was inadequate to reflect the rapidly increased population: the local magistrates were reluctant to report the actual figures, fearing that reporting the increased population would make their regional tax quotas shoot upward accordingly,<sup>96</sup> thus the population was outstripping what was recorded in official documents. By the eighteenth century, the land and head tax (*di-ding* *qian-liang* 地丁钱粮) was the main funding resource of the bureaucracy.<sup>97</sup> In 1713,

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1990c).

<sup>88</sup> The pre-conquest bannermen were left in the Northeast (Laodong and Jilin) and bannermen after the conquest were also in South China, where was the Qing expanded regime. See Crossley, *Orphan Warriors*, 49.

<sup>89</sup> See *ibid*, 49.

<sup>90</sup> Bannerland included imperial land and the land set aside for bannermen.

<sup>91</sup> See Crossley, *Orphan Warriors*, 48.

<sup>92</sup> See *ibid*, 49. Crossley also points out that bannermen in the Northeast were different. They lived in small villages and continued agricultural production.

<sup>93</sup> See Kuhn, *Soulstealers*, 67; Crossley, *Orphan Warriors*, 49; Susan Naquin and Evelyn S. Rawski, *Chinese Society in the Eighteenth Century* (New Haven; London: Yale University Press, 1987), 141.

<sup>94</sup> See Huang, *The Peasant Economy and Social Change in North China*, 98-99; Kuhn, *Soulstealers*, 67.

<sup>95</sup> The Yellow Books are household registers, which showed tax liability for both land tax and labour service.

<sup>96</sup> See Huang, *Taxation and Governmental Finance in Sixteenth-Century Ming China*, 63.

<sup>97</sup> See Madeleine Zelin, *The Magistrate's Tael: Rationalizing Fiscal Reform in Eighteenth-Century Ch'ing China* (Berkeley, Calif.: University of California Press, 1984c), 6.

head and land taxes began to be merged into a single land tax (*tanding rumu* 摊丁入亩), and the land tax became the largest single source of government revenue.<sup>98</sup> The abolition of the head tax further stimulated the population boom. According to Ho Ping-ti, the population of China roughly doubled during the eighteenth century, from around 150 million in 1700 to around 313 million in 1794.<sup>99</sup>

While the population kept increasing, new economic opportunities (for example, new economic and industrial sectors) did not grow in proportion. Overpopulation made families struggle to survive on small parcels of land; dispersion of ownership over land through larger groups of people was thus needed as a response to population pressure. The relation between population growth and the fragmentation of land ownership has also corroborated the view that commercial development is only part and parcel contributing to the fragmentation of land tenure in late imperial China. For example, among the places where permanent tenancy was popular, only Fujian's commerce developed fast.<sup>100</sup> As Kuhn argues, 'commercial growth may have meant, not the prospect of riches or security, but a scant margin of survival in a competitive and crowded society'.<sup>101</sup> As a result of the continuing population boom and diminishing working opportunities, since the Qianlong court, displaced persons<sup>102</sup> (*liumin* 流民, including wandering monks and beggars) had been out of control and had become the usual challenge to the stability of both the government and society.

### 3.5. Rural-urban uniformity and mobility

There was rural-urban legal and administrative uniformity in traditional China, and there was free mobility between the city and the countryside. The role of cities in Chinese traditional cultural life was different from that of Western cities in either premodern Europe or the Renaissance, in which cities generally monopolised cultural

<sup>98</sup> See Naquin and Rawski, *Chinese Society in the Eighteenth Century*, 22.

<sup>99</sup> See Ho Ping-ti, *Studies on the Population of China, 1368-1953* (Cambridge, Mass.: Harvard University Press, 1974 [1959]), 278.

<sup>100</sup> See He, *Renkou [Population]*, 143.

<sup>101</sup> Kuhn, *Soulstealers*, 36.

<sup>102</sup> On the discussion of displaced persons, see He, *Renkou [Population]*, 95-129.

life and performed the function of supporting cultural activities.<sup>103</sup> Traditional Chinese cities did not perform the function of supporting cultural activities independently. For example, a few famous private academies (*shuyuan* 书院) were located in the city, being recipients of government subsidies and functioned as semi-official schools. But many of the *shuyuan* from the Song Dynasty (960-1279) to the Ming Dynasty (1368-1644) were located in villages.<sup>104</sup> Accordingly, publishing activities usually were done in the village. Private libraries and private art collections were often situated in the rural area.<sup>105</sup>

Yet rural gentry tended to move into towns and cities (in the South of the Yangzi River in particular) in the Qing.<sup>106</sup> This trend led to changes in the relationship between landlords and farmers, as well as in the governance of villages. The examination of the fragmented tenure system<sup>107</sup> shows that in the re-1949 China there were no such class contradictions as landlords versus peasants in Mao Zedong's revolutionary rhetoric. Philip Huang's work, for example, shows that '[in North China]...many villages contained no landlords at all. The majority of big landlords in North China were absentee landlords, living in the towns or cities and not in the villages'.<sup>108</sup> The Yangzi delta showed the same scenario that most landlords were in fact 'absentee owners living in town'.<sup>109</sup> Rent and wage labour relations were not often directly between landlords and tenants, but among different agents that collected rents in the middle.<sup>110</sup> Nevertheless, the upper strata living in the urban

<sup>103</sup> See F. W. Mote, 'The Transformation of Nanking, 1350-1400', in *The City in Late Imperial China*, ed., G. William Skinner (Stanford: Stanford University Press, 1977), 118. In terms of Western cities, it is also worth mentioning that royal courts performed the functions such as supporting cultural activities and royal palaces were often in the countryside or were like mini-cities themselves. Versailles is the showcase example. Thanks to Professor Tim Murphy for raising this point.

<sup>104</sup> See Mote, 'The Transformation of Nanking, 1350-1400', 117-118.

<sup>105</sup> See *ibid*, 118.

<sup>106</sup> Wu Tao, 'Zai Cheng yu Zai Xiang: Qingdai Jiangnan Shishen de Shenghuo Kongjian ji dui Xiangcun de Yingxiang [in the City and in the Countryside: the Living Space of the Qing Gentry in the South of the Yangzi River and its Impact on the Countryside]', *Zhongguo Xiangcun Yanjiu [Rural China]* 2 (2003): 34-65.

<sup>107</sup> This will be examined in detail in Section 4 of this chapter.

<sup>108</sup> Philip C. C. Huang, 'Rural Class Struggle in the Chinese Revolution: Representational and Objective Realities from the Land Reform to the Cultural Revolution', *Modern China* 21, no. 1 (1995): 114-115.

<sup>109</sup> See *ibid*, 116.

<sup>110</sup> See *ibid*, 117.

area were only urban sojourners rather than permanent city residents, because their roots and identities were still rural.<sup>111</sup> As Ho Ping-ti argues, by the second half of the imperial era, urban residence and urban-based commercial activity were typical of upwardly-mobile families; however, if these families prospered, they preferred returning to their rural base.<sup>112</sup> This is because their socio-economic base was the countryside, their family tomb and lineage temple also located in the countryside.<sup>113</sup>

Sojourners in the city also formed associations based on the common origin bearing on loyalties to their native-place. As Chinese people always say ‘blood is thicker than water’ (*xue nong yu shui* 血浓于水), literally family relations are more important than any other relations. Native place was (and still is) the tie to keep people close,<sup>114</sup> especially when people moved from the rural to the urban area.<sup>115</sup> The *tong xiang* (the same native-place 同乡) was the bond to hold urban sojourners together, and it was one of the bases to form *guanxi* (social relationship 关系) and to develop trust.<sup>116</sup> Making use of the *tongxiang* bond, the successful urban sojourners, the associations based on the native place, and the rural gentry supported for and benefited from each other. For example, native-place based associations in Beijing and provincial capitals improved the competitive position of candidates in local systems with respect to the imperial examinations and official appointments.<sup>117</sup> However, these associations were not equivalent to ‘the public sphere’. Although *tong* (同) and *gong* (公) in Chinese are equivalent to ‘public’, ‘collective’ and ‘common’ in English, they are not the same. *Tong* and *gong* can be used to define a

<sup>111</sup> See Max Weber, *The City* (Glencoe: Free Press, 1958), 81-82. Cited in Lu Hanchao, *Beyond the Neon Lights: Everyday Shanghai in the Early Twentieth Century* (Berkeley University of California Press, 1999c), 4.

<sup>112</sup> See Ho Ping-ti, *The Ladder of Success in Imperial China: Aspects of Social Mobility, 1368-1911* (New York: Columbia University Press, 1962). Cited in Mote, ‘The Transformation of Nanking, 1350-1400’, 103.

<sup>113</sup> See Lu, *Beyond the Neon Lights*, 4.

<sup>114</sup> Chinese people usually exchange surname and native place when they meet at the first time in order to establish further contacts.

<sup>115</sup> See G. William Skinner, ‘Urban Social Structure in Ch’ing China’, in *The City in Late Imperial China*, ed. G. William Skinner (Stanford, Calif.: Stanford University Press, 1977), 539.

<sup>116</sup> See *ibid*, 541.

<sup>117</sup> See *ibid*.

small group's interest.<sup>118</sup> The native-place bond is one of, although among several, aspects to demonstrate the weak basis for contractual relationships among Chinese people. Traditional Chinese cities lack the sense of 'individualism' and 'civility', let alone 'a public sphere'.<sup>119</sup>

## 4. Fragmentation of the land tenure system

### 4.1. *Yongdian* (Permanent tenancy)

These socio-economic conditions and the governance system laid the background for the emergence of permanent tenancy in the eighteenth century.<sup>120</sup> It is often said that, in North China, farm proprietors (*zigeng nong* 自耕农) were more prevalent than those in the South due to the differences between the requirements for growing wheat and the demands for growing rice.<sup>121</sup> In the South, where the climate was much better than the North, the population boom increased the demand for land, and agriculture was towards intensification and commercialisation. Permanent tenancy was popular.<sup>122</sup>

<sup>118</sup> See Børge Bakken, *The Exemplary Society: Human Improvement, Social Control, and the Dangers of Modernity in China* (Oxford: Oxford University Press, 1999), 31-32.

<sup>119</sup> In the late Qing and the Republic, guilds (*hang* or *hui* 行, 会), trade guildhalls (*hanghui* 行会) and chambers of commerce were founded by merchants and tradesmen. Guilds were founded by the combination of occupational and regional factors. See Yu Zhisen, 'The Relationship of Guilds to Government in the Shanghai and Suzhou Area', in *Guild-Hall and Government: An Exploration of Power, Control and Resistance in Britain and China, Volume I, a Preliminary Study of the Social Organization of Guilds in China*, ed. Brian H. A. Ranson (Hong Kong: Hong Kong Baptist University, 1997), 65. Trade guildhalls were organised by merchants who were not from the same region. See William T. Rowe, *Hankow: Commerce and Society in a Chinese City, 1796-1889* (Stanford: Stanford University Press, 1984). As a result of these developments, some historians have argued that these guilds, trade guildhalls, and chambers of commerce constituted 'the public sphere', which is expressed through the Chinese word *gong* (公). But 'the public sphere' is based on a clear distinction between state and society, and does not capture the complex interaction between the state and society in late imperial China.

<sup>120</sup> Some scholars argue that permanent tenancy emerged as early as the South Song Dynasty (1127-1279). See e.g., Wu, *Zhongguo Lidai Tudi Zhidu Shigang [the History of Land Institutions in China]*, 224; Michael Palmer, 'The Surface-Subsoil Form of Divided Ownership in Late Imperial China: Some Examples from the New Territories of Hong Kong', *Modern Asian Studies* 21, no. 1 (1987): 1-119.

<sup>121</sup> See Heijdra, 'The Socio-Economic Development of Rural China During the Ming', 535.

<sup>122</sup> See *ibid.*

In the South, where the land was intensively cultivated and agricultural risks were fewer, the costs of supervision by the landlords were more expensive, since growing rice was more labour intensive.<sup>123</sup> Permanent tenancy could help landlords avoid the costs of supervision and at the same time provide the incentive for tenants to improve the land and increase its value.<sup>124</sup> Moreover, land was rent-yielding. It was thus favourable to the landlords to charge fixed rents in return for which the tenant could be given a permanent tenancy.<sup>125</sup> A change in landlords could not deprive of the tenants' right to the land (*huandong buhuan dian* 换东不换佃), but there were restrictions on the tenants transferring their rights to others.

Yet in practice more and more rich tenants could transfer their rights to others without the landlord's permission, which was called *siquan xiangshou* (私权相授). This practice was transformed into the practice of 'two lords to one field': the permanent rights to cultivate the land became *de facto* partial ownership over the land—the topsoil rights.<sup>126</sup>

#### 4.2. Topsoil rights (*tianmianquan* 田面权)

'Two lords to one field' (*yitian erzhu* 一田二主) was prevalent in south and southeast China (for example, Jiangsu, Zhejiang, Jiangxi, Anhui, Fujian and Taiwan): the subsoil rights were owned by the landlords, while complete topsoil rights were owned by tenants if they paid a fixed rent to the landlords.<sup>127</sup> Transfer and lease of topsoil rights were allowed. There were several Chinese terms to describe topsoil and subsoil rights, and these terms varied from place to place, sometimes the meanings were entirely opposite even in neighbouring regions.<sup>128</sup> To avoid confusion in understanding of the 'two lords to one field' system, in this chapter the term topsoil

<sup>123</sup> See *ibid*, 526.

<sup>124</sup> See *ibid*.

<sup>125</sup> See *ibid*.

<sup>126</sup> See Yang, *Mingqing Tudi Qiyue Wenshu Yanjiu [the Research of Land Titles and Contracts in the Ming and Qing]*, 100.

<sup>127</sup> Also see Perdue, 'Constructing Chinese Property Rights', 51.

<sup>128</sup> Heijdra, 'The Socio-Economic Development of Rural China During the Ming', 533.

refers to *tianmian* (topsoil or surface soil 田面) or *tianpi* (land skin 田皮), subsoil refers to *tiangen* (land roots 田根) or *tiangu* (land bones 田骨).

The establishment of topsoil rights often led to the selling of these rights by topsoil owners.<sup>129</sup> As topsoil owners did not need to pay taxes and were not controlled by government registers, they could circumvent the involvement of the government when selling topsoil rights. In the transactions, people used unofficial 'white deeds' (*baiqi* 白契, written on plain paper and unstamped) instead of official 'red deeds' (*hongqi* 红契, impressed with an official red seal) issued by the county magistrates.<sup>130</sup>

Multi landownership evolved from permanent tenancy and the 'two lords to one field' later on also continued in Republican China. It was not accidental that the practice of multi landownership was primarily in Fujian, because the land per person ratio there was one of the worst in the empire. Moreover, merchants tended to invest surplus capital in land and real estate rather than local industries.<sup>131</sup> Multi landownership, for example, 'three lords to one field' (*yitian sanzhu* 一田三主) was composed of at least three tiers: small rent landlords (*xiaozuzhu* 小租主), large rent landlords (*dazuzhu* 大租主), and the actual cultivators (*diannong* 佃农).<sup>132</sup> These three levels of participants in the multi landownership were closely linked to the issues concerning tax payment and rent.<sup>133</sup> Small rent landlords were the original landowners, who sold both their rights of collecting rents from the cultivators and the tax obligations to large rent landlords, who then had the rights to collect rents from cultivators and became the taxpayers. Cultivators paid the rents and got the permanent rights to use the land. In some cases, the large rent landlords transmitted

<sup>129</sup> See Huang, *Code, Custom, and Legal Practice in China*, 102.

<sup>130</sup> See Michael Palmer, 'The Surface-Subsoil Form of Divided Ownership in Late Imperial China: Some Examples from the New Territories of Hong Kong', *Modern Asian Studies* 21, no. 1 (1987): 25. On red and white deeds also see Peter C. Perdue, *Exhausting the Earth: State and Peasant in Hunan, 1500-1850* (Cambridge, Mass.: Harvard University Press, 1987), 137.

<sup>131</sup> Heijdra, 'The Socio-Economic Development of Rural China During the Ming', 533.

<sup>132</sup> There were different kinds of multi landownership, and this section focuses on one type.

<sup>133</sup> Heijdra, 'The Socio-Economic Development of Rural China During the Ming', 533.

his tax obligation to a third person by giving him money collected from rents, and this kind of person was called *baidui* (白兑).<sup>134</sup> Rents were often paid by the tenants to the taxpayers via the middleman.<sup>135</sup> The middlemen therefore could manoeuvre between the original landowner and tenants, collecting rents but paying no taxes.<sup>136</sup>

Although the Qing code did not take up the issue of topsoil ownership, the government's hostility toward the practice was expressed through local regulations mainly for the reasons of tax collection and the stable source of revenue. 'Fujian Provincial Regulations' concerned this issue; similar proscriptions were also issued by the provincial authorities in Jiangxi and Jiangsu.<sup>137</sup> According to 'Fujian Provincial Regulations':

Once the topsoil has been purchased by deed, it becomes permanent property. [The topsoil owner] unabashedly delays paying rent, and the land-owner is not able to retract the rented and lease [the land] to another... The landowner is left within unpaid rents year after year, bears the tax burden over and over again, and faces the ruin of the family fortune.<sup>138</sup>

The customary practice of multi landownership in Ming and Qing till Republican China had some similarity with the practice in the Medieval Europe, however they are not the same. The similarity between the two is this: in medieval Europe, 'in theory, under the regime of lordship and vassalage, all land belonged to the Sovereign and everyone else held it conditionally'.<sup>139</sup> Yet, over time, conditional tenure was transformed into outright property.<sup>140</sup>

<sup>134</sup> See Noboru Niida, 'Mingqing Shidai Yitian Erzhu Xiguan Jiqi Chengli [the Emergence of the Customary Practice of the Two Lords to One Field in the Ming and Qing]', in *Riben Xuezhe Yanjiu Zhongguoshi Lunzhu Xuanyi [Translations of Selected Japanese Scholarly Articles on Chinese History, Vol. 8]*, ed. Liu Junwen (Beijing: Zhonghua Shuju, 1992), 414; Heijdra, 'The Socio-Economic Development of Rural China During the Ming', 534.

<sup>135</sup> See Heijdra, 'The Socio-Economic Development of Rural China During the Ming', 534.

<sup>136</sup> *ibid.*, 533.

<sup>137</sup> Yang, *Mingqing Tudi Qiyue Wenshu Yanjiu [the Research of Land Titles and Contracts in the Ming and Qing]*, 114.

<sup>138</sup> *Fujian Shengli [Case Examples of Fujian Province]* (Taipei: Bank of Taiwan, 1964 [1874]), I: 445. Cited in Huang, *Code, Custom and Legal Practice in China*, 107.

<sup>139</sup> Richard Pipes, *Property and Freedom vol.1* (New York: A. A. Knopf: Distributed by Random House, 1999), 106.

<sup>140</sup> See *ibid.*

Yet the difference is that the European practice was based on ‘feudalism’ and the system of lordship and subjection, which were characterised by a unique fusion of sovereignty and ownership. In the most perfectly feudalised England, as Pollock and Maitland puts it, ‘all that we call public law is merged in private law: jurisdiction is property, office is property, the kingship itself is property; the same word *dominium* has to stand now for *ownership* and now for *lordship*’.<sup>141</sup> The feudal lord was both sovereign and landlord to his vassal but he also assumed obligations toward him.<sup>142</sup> It was, in the words of Marc Bloch, ‘reciprocity in unequal obligations’, but ‘the element of mutuality was always present—it was a genuine contract’.<sup>143</sup> This kind of scenario could not be seen in the practice of multi landownership in late imperial China.

#### **4.3. *Yongdianquan* (the rights to permanent tenancy) in Republican China**

I will not go into detailed accounts of legal practice in Qing and the Republican China, but some aspects of legal practice are crucial for our understanding of property and property rights especially the rights to permanent tenancy in Republican China. The Qing law had ‘an epistemological outlook’.<sup>144</sup> Although about 30 to 40 percent of the Qing code was from the Tang code of 653, ‘the other 60 to 70 percent did change or were perhaps Qing’s creations’.<sup>145</sup> The Qing code inherited the legacy of the 1585 edition of the Ming code, in which *lù* (律 statutes) and *li* (例<sup>146</sup> substatutes or codified precedents) were combined for the first time.<sup>147</sup> The 1723-1727 revision of the Qing code compiled the combination of statutes and substatutes into a single

<sup>141</sup> Frederick Pollock and Frederic William Maitland, *The History of English Law: Before the Time of Edward I*, vol.1 (Cambridge: At the University Press, 1898), 230.

<sup>142</sup> See *ibid.*

<sup>143</sup> Marc Bloch, *Feudal Society*, trans. L. A. Manyon, vol. 1 (London: Routledge & Kegan Paul, 1965), 228.

<sup>144</sup> Huang, ‘Civil Adjudication in China, Past and Present’, 138-139.

<sup>145</sup> Bodde and Morris, *Law in Imperial China*, 63. From the fourth Code of 1740 and onwards, there was little change to statutes (*lù*), so ‘the Code’ usually refers to the 1740 version. See Liang, *Delivering Justice in Qing China*, 4.

<sup>146</sup> It is different from *Li* (礼 principles for morality and ceremonial behaviour) exalted by Confucians.

<sup>147</sup> See Bodde and Morris, *Law in Imperial China*, 65.

printed work: in the printed text, *li* were usually based on decisions or interpretations and followed the article of the Code to which they referred.<sup>148</sup> By the end of the Qing dynasty, substatutes replaced the code as the direct basis for most cases.<sup>149</sup> If there were an applicable substatute, it would be applied instead of the statute.<sup>150</sup>

In handling disputes over property in land, local officials tried to harmonise interpersonal relations such as ‘friendly relations’ (*qingyi zhijiao* 情谊之交) and the ‘relationship of master and guest’ (*zhubin zhifen* 主宾之份), and they had to balance state law and social custom.<sup>151</sup> The flexibility and pragmatism as demonstrated in the Qing law were developed in dispute settlement by local magistrates.<sup>152</sup> The legal practice departed from the formalist Civil Law tradition, but was surprisingly close to the common law style. As Huang observes, the Chinese approach to law was ‘from fact to principle back to fact or practice’,<sup>153</sup> and this feature of Chinese legal reasoning as practised in the Qing has persisted through the Republic even to the present.<sup>154</sup>

Yet the legal system in the Qing was challenged by Western imperialism.<sup>155</sup> Japan defeated China in the war of 1894-95. From then on, Chinese statesmen and intellectuals believed that Japan got the superior power because it adopted the legal and political institutions borrowed from the Continental West.<sup>156</sup> The late Qing thus adopted a Civil Law based system because Civil Law was then seen to be modern and in emulation of Japan. Furthermore, ‘extraterritoriality’ (*zhiwai faquan* 治外法权)<sup>157</sup> impaired the sovereignty of China. To overcome the problem of

<sup>148</sup> See *ibid*, 66.

<sup>149</sup> See *The Great Qing Code*, 3.

<sup>150</sup> See Bodde and Morris, *Law in Imperial China*, 66-68.

<sup>151</sup> See Perdue, *Exhausting the Earth*, 136-163.

<sup>152</sup> See Perdue, ‘Constructing Chinese Property Rights’, 51.

<sup>153</sup> Philip C. C. Huang, ‘Civil Adjudication in China, Past and Present’, *Modern China* 32, no. 2 (2006): 135. Also see Philip C. C. Huang, ‘Court Mediation in China, Past and Present’, *Modern China* 32, no. 3 (2006): 275.

<sup>154</sup> See Huang, ‘Court Mediation in China, Past and Present’: 277.

<sup>155</sup> See Huang, ‘Civil Adjudication in China, Past and Present’, 145.

<sup>156</sup> See *ibid*.

<sup>157</sup> Most authors use ‘the problem of extraterritoriality’, but ‘consular jurisdiction’ is more exact. ‘Extraterritoriality’ is the state of being exempt from the jurisdiction of local law under either diplomatic negotiations or unequal treaties. The meaning of extraterritoriality is broader than consular

extraterritoriality, legal reformers in the late Qing turned to Civil Law and they thought Civil Law could push China to its move toward modernisation. Those motivations were also evident in Republican lawmaking.<sup>158</sup>

The Republican Civil Code in 1929-1931 was borrowed from the German and Swiss models, via Japan, and it was based on the continental pattern of Civil Law, rather than the Anglo-American common law model. The concept of ‘unitary and exclusive individual property rights’ based on the German Civil Code’s was adopted by the 1911 draft civil code.<sup>159</sup> This concept of ‘ownership’ was also defined in the first article of ‘General Provisions’ of the chapter on ‘Ownership’ in the final Guomindang 1929-30 version: ‘the owner of a thing has the right, within the limits of the law or ordinances, to use it, to receive its benefits, and to dispose of it freely, and to exclude others from interfering with it’ (Article 765).<sup>160</sup> These legal provisions regarding landownership in Republican civil code stood in sharp contrast to the multi landownership in customary practices.

Yet the dilemma of adopting the imported civil code was the wide gap between the Republican civil code and actual legal practice. For example, the models of the civil codes for the legal reformers in the late Qing and the Republic—the civil laws of the Germany and Japan—did not have the equivalent institution with *yongdian* (permanent tenancy). For the German code, due to the Roman legacy, contained ‘usufructus’: ‘the right to enjoy the property of another and to take the fruits, but not to destroy it, or fundamentally alter its character. It was usually for life, never more,

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jurisdiction. Consular Jurisdiction (*lingshi caipanquan* 领事裁判权) existed in China between 1843 and 1948. It meant that foreign citizens in China were not subject to the jurisdiction of the Qing courts and Qing law and this regime survived into the Republican period. It was this consular jurisdiction which was the great affront to Chinese sovereignty.

<sup>158</sup> See Huang, ‘Civil Adjudication in China, Past and Present’, 146.

<sup>159</sup> See Huang, *Code, Custom and Legal Practice in China*, 108.

<sup>160</sup> See Fu Bingchang and Zhou Dingyu, eds., *Zhonghua Minguo Liufa Liyou Panjie Huibian Xin Liushu* [Compendium of the Six Laws of the Republican of China with Rationales, Judgments, and Explanations], vol. 2 (Taipei: Xinlu Shuju, Minguo 53 [1964]), 412. English translation is based on *The Civil Code of the Republican China*, trans. Hsia Ching-lin, James L. E. Chow, and Chang Yukon (Shanghai: Kelly & Walsh, 1930). Also see Huang, *Code, Custom and Legal Practice in China*, 108.

but sometimes for a fixed term'.<sup>161</sup> For the Japanese code, according to Huang, 'eikosakuken' in Japanese (*yong xiaozuo quan*, 永小作权, right of permanent tenure), similarly, despite the word *ei* (*yong* 永 permanent), was defined with a specific period.<sup>162</sup> Following its models, Article 1089 of the late Qing draft civil code provided that 'the period of continuance of the right of *yongdian* will be no less than 20 years and no more than 50 years', and this provision survived into the 1925-1926 draft (Article 867).<sup>163</sup>

Although there was confrontation between code and custom, the Republican legal reformers could not avoid the accommodation of custom in the code and the continuity of the legal practice from the Qing to the Republic. For example, despite the rejection of the custom of topsoil ownership, the Guomindang lawmakers tried to balance code and custom through a new legal category of *yongdianquan* (the right to a permanent tenancy), which seemed to stand in an intermediate position between *yongdian* in social custom and exclusive ownership defined in the imported law. The term *yongdianquan*, according to Huang, probably intended by Matsuoka Yoshimasa, author of the 'Ownership Rights' book of the 1911 draft, was to serve as the Chinese equivalent to the Japanese word *eikosakuken*.<sup>164</sup> The Guomindang lawmakers chose to use the term *yongdianquan* even in the official English version of the 1920-30 code, rather than to translate it 'permanent tenancy'.<sup>165</sup>

Although codified laws in the late Qing and Republic tried to accommodate customary practices such as topsoil ownership, it was still not clear whether the topsoil was owned or leased. For example, in Article 842<sup>166</sup> of the Guomindang Civil Code, *yongdian* was finally defined: 'Yung-tien [yongdian] is the right to cultivate or to raise

<sup>161</sup> W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian* (Cambridge: At the University Press, 1950), 269.

<sup>162</sup> See Huang, *Code, Custom and Legal Practice in China*, 110.

<sup>163</sup> See *ibid.*

<sup>164</sup> See *ibid.*

<sup>165</sup> See *ibid.*

<sup>166</sup> See Fu and Zhou, eds., *Zhonghua Minguo Liufa Liyou Panjie Huibian Xin Liushu* [Compendium of the Six Laws of the Republican of China with Rationales, Judgments, and Explanations], 450.

livestock permanently on the land of another person by paying a rent'. In addition, *yongdianquan* was classified in the same book as ownership, and was in a separate chapter (Chapter IV) under 'rights over things' (*wuquan* 物权), and the lawmakers held that 'a *yung-tien* [yongdian] holder may transfer his right to another person' (Article 843).<sup>167</sup> All these suggested that *yongdianquan* was not just limited to a lease.<sup>168</sup>

Yet as the late Qing and Republican legal reformers were greatly influenced by the continental Civil Law, they did not intend to make *yongdianquan* permanent as this word literally suggested in Chinese and as the customs practiced in society. As a result, the accommodation of the custom in the code should not be exaggerated. The Republican Civil Code still stuck to the principle of exclusive ownership. Still in Article 842, following 'yung-tien [yongdian] is the right to cultivate or to raise livestock permanently on the land of another person by paying a rent', the provision was 'where a *yung-tien* [yongdian] is created for a definite period of time, it is deemed to be a lease, and the provisions concerning lease shall apply'. This suggested that, the *yongdian* holder, like the lessee under Article 443,<sup>169</sup> was 'not entitled to sublet the things leased to another person without the consent of the lessor'. For instance, the *yongdian* holder cannot lease the land to another person, if the *yongdian* holder acts contrary to the provision of the code, the landlord may revoke the *yongdian* (Article 845, Article 846<sup>170</sup>).<sup>171</sup> These provisions were contrary to the customary practice of 'two lords to one field', in which the topsoil holder could transfer his rights to others freely without the consent of the subsoil holder.

<sup>167</sup> See Fu and Zhou, eds., *Zhonghua Minguo Liufa Liyou Panjie Huibian Xin Liushu* [Compendium of the Six Laws of the Republican of China with Rationales, Judgments, and Explanations], 452.

<sup>168</sup> See Huang, *Code, Custom and Legal Practice in China*, 111.

<sup>169</sup> See Fu and Zhou, eds., *Zhonghua Minguo Liufa Liyou Panjie Huibian Xin Liushu* [Compendium of the Six Laws of the Republican of China with Rationales, Judgments, and Explanations], 252.

<sup>170</sup> On lease, see e.g., Article 458: 'the lessor of an agricultural land may terminate the lease for the purpose of restoring such land for its own cultivation'.

<sup>171</sup> Huang, *Code, Custom and Legal Practice in China*, 112.

The Guomindang legislation saw various attempts to accommodate the custom, but eventually legislators stuck to the unitary and exclusive property rights theory and refused the custom of multi landownership. They could only allow the topsoil ownership within the lease arrangements of *yongdian*.<sup>172</sup> The understanding of the attitude of the Guomingdang legislation towards *yongdian* should be put in a broader context of economic transformation in the twentieth century. As Huang notes, it entailed a fundamental shift in the factors that accounted for land values: 'from mainly labour input to mainly market-price movements'.<sup>173</sup>

## 5. Conclusion

The examination of property and property rights in late imperial China demonstrates that there was no absolute 'private' property existed in late imperial China in the sense of the Civil Law tradition. Rather surprisingly, if we compare the land tenure system and legal practice in late imperial China with those in England, we could find some relevance of common law to China. We can find some similarities between the fragmentation of landownership in late imperial China and feudal tenure in England; between lineage property in late imperial China and strict settlement in England (from seventeenth to nineteenth century), both of which were intended to keep family property in perpetuity; between ancestral property in China and the trust in common law; and the pragmatic approaches towards legal practice (for example, substatutes in the Qing code and precedents in common law). Also significant property law reforms were conducted both in 1929-31 China and in 1925 England. However we should not equate the property regime in China with that in England owing to the differences of the socio-economic conditions and the governance system as discussed above. For example, in China we cannot see the emergence of non-landed wealth and the rising bourgeoisie<sup>174</sup> as the power to push the property law reform.

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<sup>172</sup> See *ibid*, 114.

<sup>173</sup> *ibid*, 118.

<sup>174</sup> See e.g., M. R. Chesterman, 'Family Settlement on Trust: Landowners and the Rising Bourgeoisie', in *Law, Economy and Society, 1750-1914: Essays in the History of English Law*, ed. G. R. Rubin and David Sugarman (Abingdon: Professional Books, 1984), 124-167.

The civil ‘law’ in the Qing does not fit into either the ‘Oriental despotism’ or the ‘liberal, laissez-faire’ model.<sup>175</sup> ‘The Qing code did encompass a substantial body of stipulations about civil matters’,<sup>176</sup> these stipulations, however, were not preconditions for protecting private property rights along the lines of liberalism, but adaptations of governmental practice over time to changing social realities and customs.<sup>177</sup> In terms of the conversion from the Qing code into the Western-modelled Republican Civil Code, it was not the simple and linear historical change from ‘backward feudal law’ to ‘capitalist law’, nor the simple change from ‘the irrational’ to ‘the rational’.<sup>178</sup> Furthermore, neither the binary model of ‘state versus society’ nor the ternary model of ‘state/the third realm/society’ is sufficient to explain the property regime in late imperial China. The property regime in late imperial China is rather a complex network of relations to be examined, with both vertical and horizontal relations cutting across.

The adoption of the civil code by the late Qing and the Republic was largely driven by the desire to overcome the extraterritoriality problem and not really by indigenous causes springing from Chinese society. Under the impulse to purge China of extraterritoriality, the late Qing and the Republic era moved towards adopting a civilian based system because it was then seen to be modern and in emulation of Japan. The research into property and property rights in late imperial China makes us realise the serious oversimplification of the current discourses on the conception of property rights in the property law reform since 1998,<sup>179</sup> and these discourses were confined within the civil law framework. This point will be further developed in Chapter Three.

<sup>175</sup> See Perdue, ‘Constructing Chinese Property Rights’, 35-68.

<sup>176</sup> Huang, ‘Codified Law and Magisterial Adjudication in the Qing’, 176.

<sup>177</sup> See Bernhardt and Huang, ‘Civil Law in Qing and Republican China’, 9.

<sup>178</sup> See Huang, *Code, Custom and Legal Practice in China*, 3.

<sup>179</sup> See Chapter Three on property law reform.

## Chapter 3: Property Law Reform and the Revival of ‘the Private’ in Law in Post-Mao China

### 1. Introduction

Although subject to continuing controversy, a new Chinese property law came into effect on 1 Oct 2007. It provides equal protection for both public and private property for the first time since 1949 (Article 4). This has been regarded as a milestone of the revival of private property in the law. Therefore it is necessary to examine property law reform and the making of property law in the post-1978 era. This chapter examines the evolution of the legal definition of property rights in the post-Mao era, China’s recent movement to formalise its property regime<sup>1</sup> through the making of property law (*wuquanfa* 物权法),<sup>2</sup> and the revival of ‘the private’ in law and its limits.

In the General Principles of the Civil Law (1986),<sup>3</sup> there is no specific definition of *wuquan* (物权, literally property rights over things; *wu* 物<sup>4</sup> means things, particularly tangible things; *quan* 权 means rights); instead the GPCL uses a broad but vague usage ‘ownership and the property rights relevant to ownership’ (*caichan suoyouquan yu caichan suoyouquan youguan de caichanquan* 财产所有权与财产所有权有关的财产权).<sup>5</sup> *Wuquan* is defined in the 2007 Property Law. Although *wuquanfa* is translated into English as property law, *wuquan* refers only to property rights over things rather than a much broader concept of property rights (*caichan*

<sup>1</sup> An important aspect of the English approach of thinking about property is the distinction between rights to land and rights to other things, or between real and personal property (including tangibles and intangibles). See W. T. Murphy, Simon Roberts, and Tatiana Flessas, *Understanding Property Law* 4ed. (London: Sweet & Maxwell, 2004), 56. Chinese property law has a distinction between immoveable (*bu dongchan* 不动产) and moveable property (*dongchan* 动产). See Article 2 of the Property Law (2007). But intangibles, like debts, patents, copyright and trademarks are not subject to Chinese property law, nor are shares in a limited company.

<sup>2</sup> When it is translated into English, *Wuquanfa* is called ‘property law’, but we should note the different conceptions of property between Civil Law and common law. In common law, there is no such a concept as *wuquan*, and property rights in common law does not equal with *wuquan*. *Wuquanfa* is also translated Law on Real Property rights, Law on Real Rights or Law of Things.

<sup>3</sup> *Minfa Tongze* (民法通则) (hereinafter the GPCL).

<sup>4</sup> Article 2 of the Property Law (2007) provides that ‘things’ include immovable and movable property.

<sup>5</sup> The GPCL (1986), Chapter 5, Section 1.

*quan* 财产权).<sup>6</sup> Specifically speaking, *wuquan* (物权) refers to the exclusive rights that directly control specific things. *Wuquan* includes ownership (*suoyou quan* 所有权), usufructuary rights (*yongyi wuquan* 用益物权) and security rights (*danbao wuquan* 担保物权).<sup>7</sup>

Chinese property law is modelled on the Civil Law system (German law in particular), in which the definition of property rights (*Sachenrecht*) is different from that in the common law system.<sup>8</sup> The German Civil Code (The *Bürgerliches Gesetzbuch* or BGB) is a marked feature of the books of *Pandektenrecht* or ‘Pandect law’,<sup>9</sup> which emerged from the university teaching of Roman law.<sup>10</sup> The BGB framework has great influence on the codification of civil law in China.<sup>11</sup> In Roman law, ownership (*dominium*) was strictly regarded as corporeal things.<sup>12</sup> Accordingly, the conception of property rights (*wuquan*) in Chinese property law is significantly influenced by ownership defined in the Romano-German Civil Law.<sup>13</sup>

<sup>6</sup> See Wang Shengming, ‘Woguo de Wuquan Falü Zhidu [Legal Institutions of the Property Regime in China]’, in *Wuquanfa (Cao'an) Cankao [References on the Property Law (Draft)]*, ed. the Legal Affairs Committee of the National People’s Congress (Beijing: Zhongguo Minzhu Fazhi Chubanshe, 2005), 1.

<sup>7</sup> The Property Law (2007), Article 2.

<sup>8</sup> Current debates are also over whether Chinese *wuquanfa* should adopt concepts and principles in the property law based on the common law system rather than those based on the Civil Law system.

<sup>9</sup> *Pandects* is another name for Justinian’s Digest, and the lecture courses devoted to the *Pandects* came to deal with Roman law. See Alan Watson, *The Making of the Civil Law* (Cambridge, Mass.; London: Harvard University Press, 1981), 128.

<sup>10</sup> The BGB is in five books. Book 1, the general part, is divided into seven sections: persons, things, legal transactions, periods of time, prescription, exercise of rights (self-defence and self-help), and the giving of security. Book 2 is the law of obligations, book 3 is the law of things, book 4 is family law, and book 5 is succession. See Watson, *The Making of the Civil Law*, 127.

<sup>11</sup> This influence was also seen in the codification of civil law in late Qing and Republican China. The Civil Code of the Republic China includes Book 1 General Principles, Book 2 Obligation, Book 3 Rights over things. See Hsia Ching-lin, James, L. E. Chow, and Chang Yukon, *The Civil Code of the Republic of China* (Shanghai: Kelly & Walsh, 1930).

<sup>12</sup> See Andrew Borkowski, *Textbook on Roman Law*, 2 ed. (Oxford: Oxford University Press, 1997), 152-153.

<sup>13</sup> ‘Property’ is derived from the Latin *proprius*, and property right is called a right *in rem*. The basic classification of Roman Civil Law was persons (*personae*), things (*res*) and actions (*actiones*). Property and obligations were within the law of things (*res*). In terms of the public/private distinction, there are several categories of property that could not be privately owned, including *res communes* and *res publicae*, the former referred to things common to all men, e.g., the air, the sea, the latter was regarded as ‘public’ things belonging to the state. See Borkowski, *Textbook on Roman Law*, 152-153.

Following its Civil Law models, Chinese property law is different from English property law. While Roman law stresses *dominium* in the idea of ownership, ‘English legislation does not endow ownership with specific characteristics and consequences in the manner of the Civilian codes’.<sup>14</sup> Such institutions of English property law date back to feudal times, when lord-vassal and lord-peasant relations were subjected to royal, feudal and manorial jurisdictions. Under the doctrine of estates, one piece of land can be ‘owned’ by several people at once.<sup>15</sup> English law is thus more interested in title rather than ownership.

In China, the Property Law (2007) is the basic law for clarifying ownership of property, regulating utilisation of property and protecting property rights.<sup>16</sup> The Property Law has been formulated to maintain the basic economic institution and the socialist economic order (Article 1). The drafting of the Property Law was conducted against the background of the emergence and expanding of the private sector as well as the diversification of property rights in China, and there has been a long legislative process in order to restore private property.<sup>17</sup> Take the constitutional amendments for example. Up to 2004, constitutional amendments pertaining to the selective rehabilitation of ‘the private’ included: the acknowledgement of the individual economy (*geti jingji* 个体经济) (1982); the recognition of private economy (*siying jingji* 私营经济) to develop within the limits prescribed by law, and allowance of urban land use rights transfer (1988); the establishment of a ‘socialist market

<sup>14</sup> See Murphy, Roberts, and Flessas, *Understanding Property Law*, 60.

<sup>15</sup> Bryn Perrins, *Understanding Land Law*, 3 ed. (London: Cavendish Publishing Limited, 2000), 43.

<sup>16</sup> See Wang, ‘Woguo de Wuquan Falü Zhidu [Legal Institutions of the Property Regime in China]’, 1.

<sup>17</sup> In December 2002, the draft of the Property Law, proposed as the first section (*bian* 编) of the draft of Chinese Civil Code (*minfadian* 民法典), was submitted to the Ninth Standing Committee of the National People’s Congress (NPC) for the first review. The subsequent 10<sup>th</sup> Standing Committee of the NPC made the draft of the Property Law a high priority of the whole process of the civil code legislation. Up to October 2006, there had been six reviews of the draft of the Property Law, an unprecedented number of reviews in the history of legislation in China. See the report of the sixth review of the draft of the property law, in Zou Shengwen and Zhang Zongtang, ‘Zhongguo Liushen Wuquanfa Cao’an, Chuang Falü Shenyi Cishu Zhizui [China Reviews the Draft of Property Law for the Sixth Time, an Unprecedented Number of Legislative Reviews]’, Xinhua Wang [Xinhua Net], 28 October 2006. In <[http://news.xinhuanet.com/legal/2006-10/28/content\\_5259356.htm](http://news.xinhuanet.com/legal/2006-10/28/content_5259356.htm)> (last visited 27 August 2008).

economy' (1993); the acceptance of the individual and private economy as important components of the socialist market economy (1999); and the recognition of private property (2004).

Although the Property Law has been adopted and passed by the NPC, there was endless debate over the Property Law (2007) during its making process.<sup>18</sup> Apart from the question of how the German model could fit into the Chinese context, debates are also about the conception of *wuquan* and the status of the property law in the whole civil law system in China. Opponents of property law also argue that it contrasts with socialist principles and enlarges the gap between the rich and the poor. Controversies surrounding the 2007 Property Law are continuing: these controversies focus on the giving of equal status to public and private property, and whether property law has a solid constitutional base. These debates will be discussed in Section 3 of this chapter.

How to examine property law reform and revival of 'the private' in the law in the post-Mao era? This chapter tries to jump out of the 'legal box' or the shadow of the law which confines most Chinese property law reformists, and tries to put this question in broader settings of economic reform and political transformation in China. This chapter tries to look beyond the research paradigm that examines the Chinese property law regime only within the framework of German Civil Law. Of course this chapter cannot cover and does not intend to cover all aspects of the property regime in China. Instead, it focuses on the history of Chinese property law-making, legislating to promote a market economy, and the controversies surrounding conceptions such as *wuquan*, ownership and property rights, as well as the debates over both formal and substantive matters in the property law legislation.

<sup>18</sup> The debate over whether China should have property law is extremely heated before the NPC and National Committee of CPPCC Annual Sessions in March 2006. Professor Gong Xiantian at Beijing University submitted a public letter to the Legislative Affairs Committee (LAC) of the NPC in August 2005, and denounced that the draft of the Property Law was unconstitutional and contrary to the socialist principles. This fuelled the debates over the draft of the Property Law and delayed the subsequent drafting and reviewing processes. The draft was not passed by the NPC Standing Committee in 2005 as scheduled due to the hotly debates.

## 2. The background of property law reform in the post-Mao era

Before examining property law reform and the revival of ‘the private’ in law, it is necessary to explore the historical context of the emergence of civil law in late Qing and Republican China. A ‘modern’ Civil Code emerged in the late Qing and the Republic, registering a departure from the legal system in imperial China.

### 2.1. The historical context—codification in the Qing and the Republic<sup>19</sup>

In its legal and political reforms, late Qing China was anxious to emulate Japan’s success in its modernisation programs, one of which was the Japanese legal reform. Japan at that time had already completed civil and commercial codification modelled principally on the German Codes. These works done by Japan provided a wide range of literature and ready-made legislative models for legal reformers in the late Qing. The intellectual background in the late Qing also backed up its legal reform. At that time, hundreds of Chinese, in search of modern knowledge, had gone to Japanese universities, and many of them studied law. The *Da Qing Lü Li* therefore seemed not to be compatible with the new institutions introduced into China from the West, nor was it keeping pace with the development of ‘modern’ thinking of Chinese intellectuals at that time.

In 1904, Shen Jiaben (沈家本) and Wu Tingfang (伍廷芳) were commissioned to compile a commercial code, and the modern Chinese codification began. The first Codification Commission (*Xiuding Falüguan* 修订法律馆) was founded in 1906. In 1907, Shen Jiaben, Yu Liansan (俞廉三), and Ying Rui (英瑞) were appointed directors of the Commission. Staff of the Commission was composed of law students

<sup>19</sup> This section was principally draw on the materials in Fu Bingchang’s introduction in Hsia, Chow, and Chang, *The Civil Code of the Republic of China*, ix-xxii; Liang Huixing, ‘Zhongguo dui Waiguo Minfa de Jishou [Derivation of Chinese Civil Law from Foreign Civil Law]’, *Shandong Daxue Falü Pinglun [Shandong University Law Review]*, no. 00 (2003): 1-13; Liang Huixing, ‘Zhongguo Minfa: Cong Hechu Lai Xiang Hechu Qu? [Chinese Civil Law: Where Does It Come From and Whither Goes It?]’, *Zhongguo Gaige [China Reform]*, no. 28 (2006): 64-67.

returned from Japan, Europe and America, and Mr. Y. M. Matsuoka (松岡义正) was a Japanese adviser. The Codification Commission worked in emulation of Japan, and the new Civil Code deviated from the general structure and principles of traditional Chinese law. A German model of a Civil Code was thus introduced to China, via Japan, and then had a great impact on Chinese legislation. The Codification Commission produced a draft Civil Code in five Books—General Principles, Obligations, Real Rights, Family and Inheritance.<sup>20</sup> The whole work was entitled Draft Civil Code of the Qing Dynasty (*Daqing Minlù Cao'an* 大清民律草案). The Draft Civil Code, especially the books on General Principles, Obligations and Real Rights, as indicated above, was modelled on the Japanese and German Civil Codes.

After the foundation of the Republic and renouncing the throne of the last Qing Emperor (December 1911–February 1912), the Draft Civil Code was re-examined. A Committee for the Compilation of Codes (*Fadian Bianzuan Weiyuanhui* 法典编纂委员会) was formed and commissioned to prepare a new draft. In 1916 the Committee was reorganised and directed by Wang Chonghui (王宠惠). In 1918 the Committee was transformed into the Law Codification Commission (*Xiudìng Falù guan* 修订法律馆).

The Commission first compiled a draft including the General Principles and the Book on Obligations; then a draft on the Law of Things; and finally two drafts on Family Law, as well as a draft on Inheritance. A draft of the Civil Code was finished in 1925. But this code did not have time to take effect, because the Nanjing Nationalist Government led by the Guomindang then replaced the Beijing Government in 1927.

With the establishment of the government based in Nanjing, the duties of the Codification Commission were taken over by the Legislative Yuan (*lifa yuan*, 立法院), the legislative organ of the Government. The Civil Codification Commission,

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<sup>20</sup> Books I, II, and III were printed in 1911, Books IV and V were completed and published later on.

one of the five special commissions<sup>21</sup> for the compilation of the principal codes, consisted of, for example, Fu Bingchang (傅秉常), Chairman; Jiao Yitang (焦易堂); Shi Shangkuan (史尚宽); Wang Chonghui (王宠惠), President of the Judicial Yuan; Mr. G. Padoux (French Minister Plenipotentiary) as advisers. The Commission started reworking the 1925 draft, took into consideration amendments submitted by its members and advisers, and was able to submit to the Li Fa Yuan in April 1929 a remoulded text of Book I. Book I was promulgated on 23<sup>rd</sup> May 1929.<sup>22</sup>

From the above historical context, we could see that the adoption of a Western-style (German style in particular)<sup>23</sup> Civil Code by the late Qing and the Republic was largely driven by the desire to move towards modernisation pushed by political and legal elites, rather than by indigenous causes springing from Chinese society.

## **2.2 The emergence of the private sector and the diversification of ownership**

The Guomindang Civil Code was abolished after the establishment of the PRC. In the period between 1949 and 1978, party policy was the substitute for law, functions of civil courts were limited, and civil cases were largely mediated by Party and government organisations.<sup>24</sup> The laws that were hesitantly created in the 1950s were in favour of criminal law. In the field of civil law, only the Marriage Law and the Land Reform Law were passed in 1950.<sup>25</sup> There were also two abortive drafts of the civil law, one in 1956 (based on the 1922 Soviet civil law) and the other in 1964 (this draft resisted the influence of the USSR because of the tensions between China and the Soviet Union at that time), but both were interrupted due to political movements—the ‘Anti Rightist Movement’ in 1957 and the Cultural Revolution

<sup>21</sup> The Li Fa Yuan established five special Commissions: the Commission on Civil Codification; the Commission on Commercial Codification; the Commission on Land Legislation; the Commission on Labour Laws; and the Commission on Local Administration Laws. This was a code for civil and commercial cases.

<sup>22</sup> The Book on *the General Principles of the Civil Code* came into force on 10<sup>th</sup> October 1929. Books II and III were later completed. Books IV and V were promulgated by the end of 1930.

<sup>23</sup> It also consulted Japanese civil law, Swiss civil law, Soviet civil law and civil law in Thailand.

<sup>24</sup> See Ronald C. Keith, ‘Civil Law and “Civil Society” under a “Socialist Rule of Law”’, in *China’s Struggle for the Rule of Law* (Basingstoke: Macmillan, 1994), 92.

<sup>25</sup> See the history of civil law making in China in e.g., *ibid*, 89-120.

from 1966 to 1976 respectively.<sup>26</sup> China had no formal civil law legislation until the GPCL came into effect in 1986.<sup>27</sup> But provisions pertaining to property are very general in the GPCL as its name ‘general principles’ indicates. In terms of public and private property, the 1982 Constitution promulgated that ‘socialist public property is sacred and inviolable’ (*shensheng buke qinfan* 神圣不可侵犯), but no parallel declaration was provided for private property. It should be noted that the Chinese Constitution is based on the 1936 Soviet Constitution, and there is no such a formal distinction between public law (*gongfa* 公法) and private law (*sifa* 私法) in the Chinese legal system as that in the Civil law system.<sup>28</sup>

Property lawmaking in the post-1978 era was against the background of legislating for a ‘market economy’. The legal status of the private was lowered in both the constitution of 1975 and in 1978, and the private sector was tightly controlled by party policies.<sup>29</sup> Private business in China has revived since the Third Plenum of the CPC’s 11<sup>th</sup> Central Committee Conference in December 1978. The Third Plenum marks the jettisoning of class struggle and the official adoption of economic modernisation and growth as the paramount agenda of the CPC.<sup>30</sup> Since 1978, Deng Xiaoping’s ‘Reform and Opening-up’ policy has launched China into fast paced economic growth and the proliferation of new commercial activities, involving the reform of State-Owned Enterprises (SOEs), the expansion of private business, and the growth of Foreign Direct Investment (FDI).

<sup>26</sup> See Liang Huixing, ‘Zhongguo Minfadian Bianzuan de Jige Wenti [Several Issues Concerning the Compilation of the Civil Code in China], *Shanxi Daxue Xuebao* [Journal of Shanxi University] 25, no. 5 (2003): 13.

<sup>27</sup> Also see the development of civil law in China in Chen Jianfu, *From Administrative Authorisation to Private Law: A Comparative Perspective of the Developing Civil Law in the People’s Republic of China* (Dordrecht; London: Martinus Nijhoff, 1995c).

<sup>28</sup> For example, the property law provides not only private rights but also state rights. See Tong Zhiwei, ‘Wuquanfa (Cao’an) Ruhe Tongguo Xianfa Zhimen [How Could the Property Law (Draft) Pass the Door to the Constitution]’, *Faxue* [Legal Science], no. 2 (2006): 4-23.

<sup>29</sup> See Susan Young, *Private Business and Economic Reform in China* (Armonk, N. Y.: M. E. Sharpe, 1995c), 14.

<sup>30</sup> See *ibid*, 14-15.

In this section, I sketch out how the private sector has been opened up in China and how ‘the private’ has been selectively re-admitted into the socio-economic framework. Broadly speaking, the evolution of central policies in relation to the private economy can be divided into four stages. The first stage covers the years from 1978 to 1984.<sup>31</sup> During this period central authorities readmitted and started to encourage the ‘individual economy’ (*geti jingji* 个体经济),<sup>32</sup> that is, economic activities by self-employed entrepreneurs with fewer than eight employees.<sup>33</sup> Individual economy was labelled a ‘complement’ (*buchong* 补充) to the socialist public economy (Article 11, Constitution). However, this stage did not involve many commitments to the introduction of market institutions. The second stage is 1985-1989. This stage saw the emergence of the private sector with a rise of privately-run and ‘red hat’ enterprises (*hongmaozi qiye* 红帽子企业),<sup>34</sup> that is, enterprises which were established under the labels of SOEs or collective enterprises to disguise their private nature. The 1988 amendment of the Constitution allowed the private economy<sup>35</sup> to exist and develop within the limits prescribed by law (Article 11). The period 1989-1991 represents the third stage, which saw a major setback to private business development and the withdrawing of government support for private

<sup>31</sup> In 1984 urban economic reform was formally launched. Before 1984, it was mainly the agricultural reform; since 1984, the focus has shifted from the agricultural economy to the urban economy. See e.g., Wang Hui, *The Gradual Revolution: China’s Economic Reform Movement* (New Brunswick, N. J.: Transaction, 1994c), 14. It should be noted that in 1981 central control over state enterprise activity, especially over decisions on selling and pricing, was reintroduced. This was due to inflation and labour resistance to employment changes. In order to maintain social and economic stability, the central government decided to bring its reform efforts to a temporary stop. See Martin Hart-Landsberg and Paul Burkett, *China and Socialism: Market Reforms and Class Struggle* (New York: Monthly Review Press, 2005), 43.

<sup>32</sup> Perhaps one of the reasons for promoting the individual economy was the need to increase employment opportunities. Another important reason was to improve living standards in response to consumer demand.

<sup>33</sup> It refers to economic activities by self-employed individual entrepreneurs with fewer than eight employers. This is according to Marx’s writing on ‘rate and amount of surplus value’ in Chapter Nine, Part III of *Capital* Vol.1: ‘the number of employed workers distinguishes small proprietors from capitalists, and is the standard to judge exploitation’. See Karl Marx, *Capital Vol. I* trans. Eden and Cedar Paul, (London: Dent, 1930).

<sup>34</sup> See Donald C. Clarke, ‘Legislating for a Market Economy in China’, *The China Quarterly*, no. 191 (2007): 569.

<sup>35</sup> Private enterprises (*siying qiye* 私营企业), which distinguished themselves from self-employed entrepreneurs (*getihu* 个体户), provide more scope for private entrepreneurs to perform political and economic roles. See Young, *Private Business and Economic Reform in China*, 102-105. Discussion of the initial intentions of the central government to revive the private economy can be found in e.g., Ross Barnaut, ed., *Private Enterprises in China* (Canberra: Asia-Pacific Press, 2001); Young, *Private Business and Economic Reform in China*, 13-31.

business. In this period, central policies tended to restrict the development of private business by imposing strict measures. But this period did not last long; already in May 1990, the Provisional Regulations on the Grant and Transfer of Use Rights in Urban Land paved the way for commodification of housing in urban China. The fourth stage began in 1992. After Deng Xiaoping's 'southern tour', the central government set in motion a new wave of economic reform, giving the private economy unprecedented freedom to develop.<sup>36</sup> This period also saw the removal of the hats of many 'red-hat enterprises'.

Since the corporatisation programme, that is, the 'modern enterprise system' (*xiandai qiye zhidu* 现代企业制度) initiated in 1994, the focus of the SOE reform has been shifted from delegation of decision-making authority to corporate governance and ownership. The 15<sup>th</sup> National Congress of the CPC in 1997 declared further reform of ownership. The report delivered by Jiang Zemin to this congress eulogised 'grasping the large and freeing the small' (*zhuaida fangxiao* 抓大放小) and this was endorsed as the central economic reform strategy. The diversification of ownership in China has taken place against the backdrop of corporatising and restructuring the large SOEs while selling off some small and medium sized SOEs. The post-Mao Chinese economy has become a mixed system with different forms of ownership, including: 'state-owned, collective-owned,<sup>37</sup> private-owned, individual-owned, cooperative or joint-ventured, shareholding, foreign-owned, and others (Hong Kong, Macao, Taiwan and other overseas Chinese invested)'.<sup>38</sup> Moreover, according to a report of the All-China Industrial and Commercial Federation, since the 1990s, there have been new enterprises established by social organisations and investment funds. These investment social and economic entities are neither public nor private. The boundaries between public ownership and private ownership therefore have been

<sup>36</sup> See Zhang Jian, *Government and Market in China: A Local Perspective* (New York: Nova Science, 2004), 101.

<sup>37</sup> Collective-owned enterprises include urban collectives and rural collectives; rural collectives are known as Township-Village Enterprises, or TVEs.

<sup>38</sup> See Guo Sujian, 'The Ownership Reform in China: What Direction and How Far?', *Journal of Contemporary China* 12, no. 36 (2003): 557.

even blurred.<sup>39</sup> Despite the mixed ownership, according to official policy, the direction of this transformation is that public ownership is dominant with state-owned economy controlling the ‘commanding heights’ of the national economy.

In 2001 a speech by President Jiang Zemin on 1 July extended membership of the CPC to owners of private businesses.<sup>40</sup> The boundaries between the public sector and the private sector became fuzzy. One of the driving forces behind this changing environment for private business was the enlargement of the private sector.<sup>41</sup> For example, according to a speech of Huang Mengfu, chairman of the All-China Federation of Industry and Commerce, in 2004, ‘private enterprises contributed over 60 percent to the national economy and employed more than 100 million workers’. Private enterprises now play an equally important role in the national economy as state and foreign-invested enterprises.<sup>42</sup> However, difficulties in balancing the interests between the public and the private sector are manifested in the making of the property law.

### **2.3. The civil law framework before the 2007 Property Law came into effect**

During the past three decades, the formulation of a legal framework has paved the way for the drafting of a property law. First of all, a series of constitutional amendments have laid the constitutional foundation for ‘the revival’ of private property in law: the 1982 Constitution recognised ‘individual economy’ (*geti jingji* 个体经济) (Article 11) and extended protection to ‘lawful’ property (Article 13).<sup>43</sup> The 1988 amendment allowed the private economy (*siying jingji* 私营经济) to develop within the limits prescribed by law (Article 11), and allowed the transfer of

<sup>39</sup> See <[http://www.gzjmw.gov.cn/news/20081022/200810220955546540\\_0.html](http://www.gzjmw.gov.cn/news/20081022/200810220955546540_0.html)> (last visited 9 November 2008).

<sup>40</sup> See the speech made by Jiang Zemin, General Secretary of the Central Committee of the CPC, at the meeting celebrating the Eightieth Anniversary of the Founding of the CPC.

<sup>41</sup> See *People's Republic of China: The Development of Private Enterprises* (Asian Development Bank, 2003). In <[http://www.adb.org/documents/studies/PRC\\_Private\\_Enterprise\\_Development/default.asp#contents](http://www.adb.org/documents/studies/PRC_Private_Enterprise_Development/default.asp#contents)> (last visited 31 January 2006).

<sup>42</sup> See *State and Private Enterprises Enter Integration Era* (Hong Kong Trade Development Council, 2005). In <<http://info.hktdc.com/alert/cba-e0508g-1.htm>> (last visited 31 January 2006).

<sup>43</sup> Article 13 of the Constitution (1982).

urban land use rights (Clause 4 of Article 10). The Constitution was amended again in 1993 to affirm the socialist market economy (*shehui zhuyi shichang jingji* 社会主义市场经济) as the foundation of the economy (Article 15). The 1999 amendments to the Constitution provided that the self-employed, private, and other non-public sectors constituted an important component of the socialist market economy, whose lawful rights and interests would be protected by the State (Article 11). Protection of private property rights was ultimately recognised by the Constitution in March 2004 (Article 13).

Under the overarching constitutional framework, the legal framework concerning property issues consists of three levels. The first level is the GPCL (1986), which is the fundamental piece of legislation for China's civil law system, and the equivalent of the general section of a Civil Code.<sup>44</sup> But the GPCL does not contain detailed rules pertaining to contact, tort and property.

Provisions related to property are dispersed in some independent civil, commercial and property administration laws, which constitute the second level. Independent civil and commercial laws include the Company Law (1994),<sup>45</sup> the Guarantee Law<sup>46</sup> (1995), the Marriage Law<sup>47</sup> (1980, revised 2001), and the Inheritance Law (1985).<sup>48</sup> A Rural Land Contracting Law<sup>49</sup> was also passed in 2002, and has opened room for the commodification of rural land transfer for agricultural purposes. Property administration laws include the Land Administration Law<sup>50</sup> (1986, revised 1988,

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<sup>44</sup> The framework of China's civil law system has been significantly influenced by German Civil Law, and Taiwanese legal scholars have also been influential because they translated and introduced German Civil Law concepts to China. Such Taiwanese scholars include Shi Shangkuan (史尚宽), Zheng Yubo (郑玉波), Wang Zejian (王泽鉴), Huang Maorong (黄茂荣), and Yang Renshou (杨仁寿). They have had a great impact on civil law teaching and research in China.

<sup>45</sup> Gongsi Fa

<sup>46</sup> Danbao Fa, Chapters. 3, 4, 5, 7

<sup>47</sup> Hunyin Fa

<sup>48</sup> Jicheng Fa

<sup>49</sup> Nongcun Tudi Chengbao Fa

<sup>50</sup> Tudi Guanli Fa

1998 and 2004), and the Urban Real Estate Administration Law<sup>51</sup> (1994, amended 2007).

The third level includes provisions in administrative regulations such as ‘the Provisional Regulations on the Grant and Transfer of Use Rights in Urban Land’<sup>52</sup> (1990).<sup>53</sup> But there is still no clear distinction between public law and private law as well as the distinction between property protection and government administration. Following Deng Xiaoping’s Southern Tour in 1992, property lawmaking became an important legislative item, and increased attention has been paid to the transformation of ownership, but the existing legislation was insufficient to deal with these issues. This called for a special code for property.

Yet compared with other civil and commercial laws such as the Contract Law,<sup>54</sup> which has been largely streamlined, there were many barriers to property lawmaking. The primary reason was this: the Contract Law regulates the transfer of commodities, which is linked to socialist *economic* institutions; the property law formalises property rights and defines ownership, which is closely linked to *socialist political* institutions. The making of property law was thus constrained by many political and ideological concerns. We now need to look at the drafting of property law in detail.

## 2.4. The drafting of property law

The 15<sup>th</sup> National Congress of the CPC in 1997 made ‘adjusting and perfecting’ China’s ownership structure (*tiaozheng he wanshan suoyouzhi jiegou* 调整和完善所有制结构) a fundamental strategy of economic reform and economic development.<sup>55</sup>

<sup>51</sup> Chengshi Fangdichan Guanli Fa

<sup>52</sup> Chengzhen Guoyou Tudi Shiyongquan Churang he Zhuanrang Zanxing Tiaoli

<sup>53</sup> Also see this synthesis in Frank Xianfeng Huang, ‘The Path to Clarity: Development of Property Rights in China’, *Columbia Journal of Asian Law* 17, no. 2 (2004): 200.

<sup>54</sup> The Economic Contract Law (*jingji hetongfa* 经济合同法) was adopted in December 1981, but it was intended to regulate relations between SOEs. In March 1999, Chinese contract law has finally been unified by the adoption of the Contract Law (*hetongfa* 合同法), which was the unification of the Economic Contract Law, the Foreign Economic Contract Law (*shewai jingji hetongfa* 涉外经济合同法), and the Technology Contract Law (*jishu hetongfa* 技术合同法).

<sup>55</sup> See Jiang Zemin’s report in ‘Gaoju Deng Xiaoping Lilun Weida Qizhi, Ba Jianshe You Zhongguo

To meet this policy request, shortly after this conference, the drafting of a property law became an important task for the Legislative Affairs Committee (LAC) of the National People's Congress in 1998.<sup>56</sup>

Two teams composed of jurists in civil law were commissioned to draft property law. One team was led by Professor Liang Huixing (梁慧星) at the Chinese Academy of Social Sciences (CASS), and the other was supervised by Professor Wang Liming (王利明) at the People's University (Renmin University). Each team prepared a proposed draft (the CASS draft 社科院建议稿 and the Renmin University draft 人民大学建议稿 respectively), and submitted it to the LAC of the NPC. In 2001, the LAC produced a LAC draft (*zhengqiu yijian gao* 征求意见稿) which was based on the two proposed drafts and then was publicised for comments in 2002.<sup>57</sup>

### 3. Debates over property law

#### 3.1. Debates over the status of property law in the proposed Civil Code (minfadian 民法典) in China

After looking at the background to the draft of property law in China, we shall move to the debates over it. One of the debates about property law is related to the codification of civil law in China—whether the civil code should be modelled on the German Civil Code (The BGB) or the French *Code Civil* (the Napoleonic code).<sup>58</sup>

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Tese de Shehui Zhuyi Shiye Quanmian Tuixiang Ershiyi Shiji [Hold High the Great Banner of Deng Xiaoping Theory for All-Round Advancement of the Cause of Building Socialism with Chinese Characteristics into the Twenty-First Century]', available in <<http://www.china.com.cn/chinese/archive/131781.htm>> (last visited 6 November 2008).

<sup>56</sup> See Wang Liming, ed., *Zhongguo Wuquanfa Cao'an Jianyigaoji Shuoming [Proposed Draft of Chinese Property Law and Explanations]* (Beijing: China Legal Publishing House, 2001).

<sup>57</sup> It should be noted that although this draft was open to ordinary people's comments, in terms of the most important and controversial issues, the Political Bureau of the CPC Central Committee had the final say. This was informed by an interview with a member of the LAC, who was studying at the London School of Economics in 2005. The interview was conducted at the London School of Economics on 12 March 2005. It should also be mentioned that there is another influence from intellectuals in the so-called unofficial think tank (*minjian zhiku* 民间智库), which has currently been ignored compared with the mainstream scholars. Intellectuals in these unofficial think tanks have published extensively and widely about property law reform in China, for example, the analysis of the housing market.

<sup>58</sup> The French *Code Civil* followed the Justinian's *Corpus Juris Civilis*, and is divided into personal status, property, and acquisition of property.

The different models reflect the different status of property law in the proposed civil code. The German model highlights the status of *wuquan* (the rights to things), while the French model stresses the importance of ‘personality’.<sup>59</sup>

In terms of specific structures of the Civil Code, there are also different proposals. A ‘loose and assembled model’ (*songsanshi,lianbangshi* 松散式, 联邦式) is proposed by Fei Zongyi (费宗彝), Jiang Ping (江平), and Wei Yaorong (魏耀荣).<sup>60</sup> This model of the proposed Civil Code is the compilation and synthesis of the existing laws, including the GPCL, the Contract Law, the Guarantee Law, the Inheritance Law, the Marriage Law, and the Property Law in China.<sup>61</sup> Opponents such as Liang Huixing argues that this model indicates the influence of common law, to which he has a negative attitude, because Liang thinks that the imported Civil Law concepts and principles have already been rooted in and integrated into Chinese society.<sup>62</sup> However, without an in-depth analysis, Liang takes for granted that the legislation in the past 100 years (roughly from 1898 to the 1990s) has already taken root in the ‘legal tradition’ of China.<sup>63</sup>

An ‘idealised model’ (*lixiang zhuyi silu* 理想主义思路) is proposed by Xu Guodong (徐国栋).<sup>64</sup> This model traces its origin back to Roman Law, which was divided into *renfa* (law of persons 人法) and *wufa* (law of things 物法). Xu holds that *renfa* is more important than *wufa*. Liang responded to Xu’s proposal that it is no more than

<sup>59</sup> Adopting the French model for the proposed Chinese civil code is also supported by some Chinese scholars, for example, Professor Xu Guodong at the Law School of Xiamen University. He stresses ‘personality’ and law of persons in the civil code legislation. See e.g., Xu Guodong, ‘Minfadian Cao’an de Jiben Jiegou [on the Basic Structure of the Draft of China’s Civil Code]’, *Faxue Yanjiu [CASS Journal of Law]* 1 (2000): 37-55. Xu also stresses the importance of the relationship between *Shimin Shehui* (市民社会 civil society), *Shiminfa* (市民法 Jus civile) and the civil law. See Xu Guodong, ‘Shimin Shehui yu Shimin Fa: Minfa de Tiaozheng Duixiang Yanjiu [Civil Society and Jus Civile: On the Subjects of Civil Law]’, *Faxue Yanjiu [CASS Journal of Law]* 4 (1994): 3-9.

<sup>60</sup> See Liang Huixing, ‘Dangqian Guanyu Minfadian Bianzuan de Santiao Silu [Three Current Thoughts on the Codification of Civil Law]’, *Lishi Shijie [Lawyer World]*, no. 4 (2003): 4-8.

<sup>61</sup> See *ibid*, 4.

<sup>62</sup> See *ibid*, 5.

<sup>63</sup> See Liang Huixing, ‘Songsanshi Huibianshi de Minfadian Bushihe Zhongguo Guoqing [A Loose and Assembled Civil Code is Improper to the Situation of China]’, *Zhengfa Luntan [Tribune of Political Science and law]* 1 (2003): 9-14.

<sup>64</sup> See Liang, ‘Dangqian Guanyu Minfadian Bianzuan de Santiao Silu [Three Current Thoughts on the Codification of Civil Law]’.

the order of the presentation of the law of persons and the law of things in the Civil Code, and is a futile question of which came first, the chicken or the egg.<sup>65</sup>

Instead of the two models above, Liang provides the ‘pragmatic model’ (*xianshizhuyi silu* 现实主义思路), and emphasises ‘logic’ (*luoji xing* 逻辑性) and ‘systematisation’ (*tixi xing* 体系性) in his proposal.<sup>66</sup> This model is based on the *Pandects* system and the German Civil Code that encompasses five books. Moreover, Liang argues that Chinese Civil Code should adopt the combination of civil and commercial law (*minshang heyi* 民商合一),<sup>67</sup> and the structure of five books (*bian* 编), and there should be no special book provided for the right of personality (*renge quan* 人格权).<sup>68</sup>

These debates over the codification of the proposed Civil Code and the status of property law in the Civil Code in China are not only different opinions on the structure of the Civil Code (for example, the presentation of the law of persons and the law of things) but also different points of view among Chinese scholars about the relationship between persons and things. The dilemma here is due largely to their conception of *wuquan* as property rights over *youtiwu* (corporeal or tangible things),<sup>69</sup> which is not capable to deal with the fragmentation of property rights in the post-1978 era. Another problem with their arguments is that Chinese scholars talk

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<sup>65</sup> See *ibid*, 6.

<sup>66</sup> See *ibid*.

<sup>67</sup> This is the same as the Civil Code of the Republic of China, which was enlarged to a *Civil* and *Commercial* Code. The legislators of the Republican Civil Code held that the distinction between Civil and Commercial law in the continental European countries was due to historical reasons such as the existence of a merchant class with its own custom. But no such causes existed in China. Although the Chinese merchants did combine into guilds and chambers of commerce for the protection of their interests, they did not form a class of their own. See Fu Bingchang’s introduction to Hsia, Chow, and Change, *The Civil Code of the Republic of China*, xvi-xvii.

<sup>68</sup> Liang also proposes that based on the German model, the Civil Code in China should contain seven sections: general principles, *wuquan* (real property rights), general principles on obligation (*zhaiquan*), contract, tort, relatives (*qinshu quan*), and inheritance. Also see Wang Liming, ‘Guanyu Woguo Minfadian Tixi Goujian de Wenti [on Several Basic Issues of the System Construction of the Civil Code in China]’, *Faxue [Law Science]*, no. 1 (2003): 30-39. Wang also highlights the importance of property rights over personality.

<sup>69</sup> Liang Huixing and Wang Liming share the same opinion that the Intellectual Property Law should not be included in the proposed Civil Code. There is ongoing debate between Liang Huixing and Zheng Chengsi over the issue of Intellectual Property.

only about the *law*, in particular the laws within the German law legacy, but ignore the Chinese social reality.<sup>70</sup> They have not given much weight to the relationship between law and society. Following the German model, Chinese property law stresses the ‘*thing ness*’<sup>71</sup> of the conception of property and property rights, which can be clearly identified in both the formal and substantive debates over property lawmaking.

### 3.2 Substantive debates

#### 3.2.1. *wuquan*, ownership, and property rights

##### 3.2.1.1. Ownership (*suoyou quan* 所有权) and property rights (*caichan quan* 财产权, or *chan quan* 产权)

Apart from the difficulties in defining ‘rights’ and ‘property rights’ *per se*, the choice of usages pertaining to property rights in the lexicon of Chinese property law is not just a legal question, but involves political concerns. Before the drafting of property law was embarked on in 1998, a series of concepts pertaining to property were used in jurists’ debates in the 1980s and 1990s.<sup>72</sup> In 1979, by confirming the central government policy of separating government administration from state enterprises (*zhengqi fenkai* 政企分开), ‘autonomous operational and management rights’ (*jingying guanli zizhuquan* 经营管理自主权) first appeared in the State Council ‘Regulations Concerning the Further Expansion of the Autonomous Operational and Management Rights of State Enterprises’ (1979),<sup>73</sup> and the concept of state enterprises’ ‘operational rights’ (*jingying quan* 经营权) was subsequently included in Article 16 of the 1982 Constitution and in Article 82 of the 1986 GPCL.<sup>74</sup> On the one hand, ‘ownership’ (*suoyou quan* 所有权) was provided in Article 71 of the GPCL, referring to the rights to possess, use, benefit from and dispose of one’s own

<sup>70</sup> Although they claim that they have paid much attention to social reality in their writings.

<sup>71</sup> I borrowed this term from C. M. Hann, ‘Introduction: The Embeddedness of Property’, in *Property Relations: Renewing the Anthropological Tradition*, ed. C. M. Hann (New York: Cambridge University Press, 1998), 8.

<sup>72</sup> See Ronald C. Keith and Lin Zhiqiu, *Law and Justice in China’s New Marketplace* (New York: Palgrave, 2001), 139. Keith and Lin give a comprehensive analysis of concepts related to property and ownership, see *ibid*, 138-177.

<sup>73</sup> Guanyu Kuoda Guoying Qiye Jingying Guanli Zizhuquan de Ruogan Guiding. This regulation has been ineffective since 6 October 2001.

<sup>74</sup> See Keith and Lin, *Law and Justice in China’s New Marketplace*, 140.

property. On the other hand, ‘property rights’ (*caichan quan* 财产权) were broadly and vaguely defined in Section 1, Chapter 5 of the GPCL.<sup>75</sup> As state enterprises wanted to further strengthen their status such as a ‘legal person’, ‘ownership rights of a legal person’ (*faren suoyou quan* 法人所有权) were emphasised in many legal conferences.<sup>76</sup> However, instead of ‘ownership rights of a legal person’ ‘property rights of a legal person’ (*faren chanquan* 法人产权) appeared in the 1993 Decision of the third Plenum of the 14<sup>th</sup> National Congress of the CPC,<sup>77</sup> and then was incorporated into Article 4 of the Company Law.<sup>78</sup> There are delicate meanings behind these wordings.

Property rights (*chanquan* 产权) are more widely used than ownership (*suoyou quan* 所有权). It should be pointed out here that property rights can be translated both *caichanquan* (财产权) and *chanquan* in Chinese. Although in most cases, *caichanquan* and *chanquan* are used interchangeably,<sup>79</sup> *caichanquan* is much used in the legal context, while *chanquan* is more widely used in economic scholarship—largely influenced by the writings of Ronald Coase arguing that ‘transaction costs’ are the key to the understanding of economic institutions. The concept of *chanquan* in post-Mao China emerged in the process of the SOE reform and is closely linked to resource allocation. The development of the conception of *chanquan* could be divided into four stages, involving freeing the control over SOEs by government and granting more autonomy to enterprises (1978- 1984); the separation of ownership and management rights (1984-1993), clarifying property rights (1993-2003), and establishing ‘a modern property rights system’

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<sup>75</sup> See *ibid.*

<sup>76</sup> See *ibid.*

<sup>77</sup> The 1993 Decision requires to establish a modern enterprise system with clear property rights, clarified rights and responsibilities, separation between the government and the enterprise, and scientific management (建立产权清晰, 权责明确, 政企分开, 管理科学的现代企业制度). ‘Establishing and improving the modern property rights system’ (建立现代产权制度) is also provided by the 2003 Decision of the third Plenum of the 16<sup>th</sup> National Congress of the CPC in the ‘Decision of the Central Committee of the CPC on Some Issues Concerning Improvement of the Socialist Market Economy’.

<sup>78</sup> Keith and Lin, *Law and Justice in China’s New Marketplace*, 140.

<sup>79</sup> Here again we come across the difficulty in analysing issues in China by using English translations.

(2003-present).<sup>80</sup> In terms of disposal of properties, *chanquan* are actually lesser rights than ownership, and their essentially economic dimension shields them from sensitive political controversy. *Chanquan* is also more widely used in daily life. For example, when ordinary people discuss the real estate market, they use *chanquan* more frequently. But the connotation of *chanquan* is narrower than *caichanquan*, because *caichanquan* includes property rights pertaining to person or personality (*renshen quan* 人身权) in marriage and labour law, and these rights concerning personality are beyond the scope of Chinese property law.

Apart from the vagueness of these concepts due to the translation from Chinese to English,<sup>81</sup> we shall ask the question: what are the implications for the distinctions between ‘management rights’, ‘ownership’, ‘property rights’, ‘ownership rights of a legal person’, and ‘property rights of a legal person’? One answer to this question is that ‘the post-Mao regime has been successful in avoiding the politically explosive question of formal ownership without undermining the functionally capitalist character of the reformed economic system’.<sup>82</sup> Keith and Lin also argue that these concepts indicate the endeavours (including legal and governmental) to deal with the diversified rights of the state, the collective and the individual,<sup>83</sup> no matter whether these projects have been successful or not.

These concepts relating to ownership remain intricate and opaque. The difficulties in defining ownership in China also lie in the fact that by following the Civil Law tradition and adopting a unitary ownership concept, while lacking the doctrines of tenure and estates in English land law, it is hard to define the terms, conditions, extent and duration of an owner’s interest in Chinese property law.

<sup>80</sup> See Lin Faxin, ‘“Chanquan” Gainian de Faxue Sikao [a Legal Reflection on the Conception of “Chanquan”]’, in *Wuquanfa Bijiao Yanjiu [a Comparative Study of the Property Law]*, ed., You Quanrong (Beijing: Renmin Fayuan Chubanshe, 2004), 82.

<sup>81</sup> For example, the Chinese terms *chanquan* and *caichanquan* could be both translated property rights in English, but they vary in substance and scope in Chinese.

<sup>82</sup> Maurice Meisner, *The Deng Xiaoping Era: An Inquiry into the Fate of Chinese Socialism, 1978-1994* (New York: Hill and Wang, 1996), 513.

<sup>83</sup> Keith and Lin, *Law and Justice in China’s New Marketplace*, 142.

### 3.2.1.2. *Wuquan* (real property rights) and *Jura in re aliena* (other real property rights 他物权)

Economic reform has generated changes in existing social groups and the emergence of new identities, with a new constellation of social interests created. These groups (for example, reform decision makers and other governmental officials, managers of SOEs, private entrepreneurs) in turn have an important impact on the course of the reform.<sup>84</sup> However, as Wang Hui argues, market reform is 'a long-term investment entailing risk and an uneven distribution of the benefits'.<sup>85</sup> The problem of property lawmaking is how should the Property Law deal with these decentralised interests and *de facto* property rights generated in market reform?

Although there were debates on the conception of *wuquan* in drafting property law, Wang Liming's opinion on *wuquan* is the dominant discourse. He holds that *wuquan* is a good vehicle to address the conception of ownership and other property rights, and has been integrated into the Chinese civil law system. Wang argues that *wuquan* can distinguish tangible property rights from intangible property rights. *wuquan* is also compatible with the level of development of the legal system in China and the quality of the legal profession. Therefore the basic principle of property law should be *yiwu yiquan* (one right over one thing, or one thing could establish only one right, 一物一权).<sup>86</sup> Wang further argues that the adoption of 'property rights' (*caichanquan*) will transform Chinese civil law into the common law model, which does not fit into Chinese reality. The main reason given by Wang is this: property rights in common law include both tangible rights and intangible rights, and property

<sup>84</sup> See Gordon White, *Riding the Tiger: The Politics of Economic Reform in Post-Mao China* (Stanford: Stanford University Press, 1993), 198.

<sup>85</sup> Wang, *The Gradual Revolution*, 4.

<sup>86</sup> See e.g., Wang Liming, 'Wuquan Gainian zai Tantao [Another Examination of the Concept of Real Property Rights]', *Zhejiang Shehui Kexue [Zhejiang Social Sciences]* 2 (2002): 82-90; Wang Liming, 'Wuquan Lifa Ruogan Wenti Xin Sikao [New Thoughts on Several Issues of the Legislation of Property Law]', *Faxue [Law Science]*, no. 7 (2004): 78-89. We can compare Wang's arguments with those of Zheng Chengsi. Zheng holds that the draft of *wuquanfa* should adopt a much broader concept of property rights (*caichan quan*). See Zheng Chengsi and Huang Hui, 'Faguo Minfadian Zhongde Caichanquan Gainian yu Woguo de Lifa Xuanze [the Concept of Property Rights in the French Civil Law and the Legislative Choice of China]', *Zhishi Chanquan [Intellectual Property]* 3 (2002): 9-11.

rights are different from *wuquan*.<sup>87</sup> However, it is not easy for the unitary and exclusive conception of *wuquan* to deal with the diversified and fragmented property rights in China, for example, the relationship between ownership and lesser rights. In order to solve this question, while labelling ownership *zihuquan* (自物权), Chinese scholars have introduced *Jura in re aliena* (other real property rights, or *ta wuquan* 他物权 in Chinese), particularly the usufruct (*yongyi wuquan* 用益物权) to handle these questions. This approach resembles the practice of Civil Law, but differs from the Common Law practice:

In Roman law, title and ownership were not distinguished. Rather, ownership and lesser rights were clearly differentiated. Separate remedies were available for the assertion before a tribunal of what were considered to be qualitatively different kinds of claims. The fulcrum of the English system of remedies is possession rather than ownership. In terms of the conceptual structure of English property law, the distinction between “true ownership” and merely possessory title is, at core, the difference between an earlier and a later taking of possession.<sup>88</sup>

*Jura in re aliena* (especially *usufruct*) is important in Chinese property lawmaking, because it is one of the approaches by which Chinese scholars and lawmakers ‘propertise’<sup>89</sup> the decentralised and fragmented lesser interests that have been set in motion by market reform.<sup>90</sup> Article 40 in Chapter 4 of the Property Law (2007) divides property rights into three types: ownership, use rights/usufruct, and security rights. In terms of usufruct and landownership, the decentralised interests pertaining to land are mainly categorised as the ‘land use rights’ (*tudi shiyong quan* 土地使用权) of state-owned urban land,<sup>91</sup> and the ‘contractual management rights’ (*chengbao*

<sup>87</sup> See Wang, ‘Wuquan Gainian zai Tantao [Another Examination of the Concept of Real Property Rights]’.

<sup>88</sup> Murphy, Roberts, and Flessas, *Understanding Property Law*, 61.

<sup>89</sup> This is not a real English word, so quotation marks are used.

<sup>90</sup> Also see e.g., Yang Lixin, ‘Tawuquan de Lishi Yanjin he Woguo Tawuquan Zhidu de Chongxin Gouzao [the History of Jura in Re Alienae and the Restructuring Ownership Structure in China]’, 2002. In <<http://www.yanglx.com/dispnews.asp?id=88>> (last visited 30 August 2008); Gao Fuping, ‘Tudi Shiyongquan Keti Lun: Woguo Budongchan Wuquan Zhidu Sheji de Jiben Shexiang [the Objects of Land Use Rights: The Planned Structure of Property Rights over Real Property]’, *Faxue [Law Science]*, no. 11 (2001): 44-51. Gao Fuping is the professor of Law at East China University of Politics and law in Shanghai, and he has published extensively in the area of the usufruct.

<sup>91</sup> The Constitution (1982, amended in 1988, 1993, 1999, 2004), Article 10.

*jingyingquan* 承包经营权) of collectively owned rural land,<sup>92</sup> as well as other use rights of rural land for residential<sup>93</sup> and construction purposes.<sup>94</sup>

Yet there are many controversies surrounding the usufruct. One of the debates is whether ‘state-owned enterprise property rights’ (*guoyou qiye caichan quan* 国有企业财产权) should be incorporated into usufruct, or it should be put into another category such as property rights of legal persons.<sup>95</sup> Professor Liang’s drafting team believed that after corporatisation of the SOEs during the reform, the relationship between the state and SOEs, subjected to the Company Law, should be categorised as a relationship between shareholders and corporations,<sup>96</sup> that is, the state has shares while the enterprise enjoys ‘property rights of a legal person’ (法人产权).<sup>97</sup> By contrast, in the Renmin University Draft of the Property Law led by Wang Liming, ‘state-owned enterprise property rights’ were defined a special type of the usufruct. But one of the paradoxes of defining ‘state-owned enterprise property rights’ in the Property Law is that some parts of assets of a company (especially SHEs) are from investment of shareholders, including intellectual property (for example, Articles 24 and 27 of the Company Law). These intangibles are clearly beyond the scope of Chinese property law. The Property Law (2007) seems to have corresponded with Professor Liang’s opinion,<sup>98</sup> and there is no special provision for ‘state-owned enterprise property rights’ as one kind of other real property rights (*Jura in re aliena*).

<sup>92</sup> The GPCL (1986), Article 80; The Property Law (2007), Chapter 11. The debate surrounding the contractual management rights of collectively owned rural land is also over whether these rights should be characterised as *wuquan* (real property rights 物权) or *zhaiquan* (obligation 债权). Also some Chinese scholars do not distinguish debt from obligation.

<sup>93</sup> The Property Law (2007), Chapter 13.

<sup>94</sup> The Property Law (2007), Chapter 12.

<sup>95</sup> Liu Jingwei, ‘Zhongguo Dalu de Wuquan Lifa Jiqi Ruogan Wenti Tantao [the Property Law-Making in Mainland China and an Analysis of Several Issues]’, in Wuquanfa Bijiao Yanjiu [a Comparative Study of the Property Law], ed. You Quanrong (Beijing: Renmin Fayuan Chubanshe, 2004), 6-8.

<sup>96</sup> The Company Law (1994), Article 4.

<sup>97</sup> See Liang Huixing, ‘Zhiding Zhongguo Wuquanfa de Ruogan Jiben Wenti [Several Basic Issues in Drafting of the Property Law in China], *Faxue Yanjiu [Legal Research]*, no. 4 (2000): 7.

<sup>98</sup> On the discussion between Liang and Wang on the matter of the property relationship between the state and SOEs, also see Huang, ‘The Path to Clarity’, 208.

Some scholars also question the applicability of usufruct to deal with the land use rights of state-owned land and the ‘contractual management rights’ of collectively owned rural land.<sup>99</sup> They argue that, in the Chinese context, both ‘the state’ and ‘the collective’ are abstract entities constructed by law, and property in land held by these entities cannot be directly transferred in the market, which is at odds with the essence of market reform. Thus land use rights need to be further ‘propertised’ (*caichan hua* 财产化).<sup>100</sup> These concerns direct the attention of Chinese scholars to English property law, where land ownership is much more dispersed and fragmented than in many countries on the continent. These scholars’ advice is that ‘estate’ should be introduced into Chinese property law as the mechanism to deal with lesser property rights in land.<sup>101</sup> However, estate is a very complex element in the English property law system, as it originated from the feudal system, evolved with the practice of inheritance and the tax system, and now is closely linked to the institution of the Trust. Moreover, after the 1925 Property Legislation, the language of ‘estates’ was abandoned, lesser freehold estates (life estates, entail) and all future estates (remainders, reversions) can exist only in equity behind a trust, and entails are abolished for the future by the Trusts of Land and Appointment of Trustees Act 1996.<sup>102</sup> Therefore the applicability of estate to the Chinese context needs to be tested further.

### **3.2.2. The debates over clarifying property rights—efficiency and equality**

The long process of drafting property law in China took place against the background of the development of ‘a market economy’. It was hoped by Chinese legislators that the clarification of property rights through legislation could help promote economic

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<sup>99</sup> See e.g., Gao, ‘Tudi Shiyongquan Keti Lun: Woguo Budongchan Wuquan Zhidu Sheji de Jiben Shexiang [the Objects of Land Use Rights: The Planned Structure of Property Rights over Real Property]’.

<sup>100</sup> See *ibid*, 44.

<sup>101</sup> See *ibid*, 47-49. In England before 1926, the legal fee simple could be split into a number of lesser estates, which could be possessed at different times. The doctrine of estates ‘enabled owners of property to create a whole series of successive interests in the same piece of land’. See Murphy, Roberts, and Flessas, *Understanding Property Law*, 77.

<sup>102</sup> See *ibid*, 92, 229-231.

growth. Against this backdrop, property law legislation prioritises ‘efficiency’ over ‘equality’. However, efficiency and equality are not easily balanced.

Within the neoclassical economics framework, clearly defined property rights are essential for the well-functioned market. Yet in the Chinese context, there are many cases that pose a challenge to the neoclassical framework. Take the township and village enterprises (TVEs)<sup>103</sup> for example. TVEs developed fast with remarkable performance in the 1980s. However, the problem with the ownership of TVEs was the degree of the local government’s role in the appointment of TVE managers as well as its direct involvement in the management of TVEs. Moreover, most cases in practice suggest that local governments were the *de facto* owner of TVEs.<sup>104</sup> Therefore the question is why, given the usual emphasis by economists on the importance of clarifying private property rights for incentives, Chinese TVEs as ‘vaguely defined cooperatives with weak or poorly developed property rights’ were so successful?<sup>105</sup>

In response to the question raised above, some scholars argue that whether China’s economic growth depends on or requires the clarity of property rights is highly questionable. For example some emphasise cultural elements, and suggest that economic growth in rural China is based on its *cooperative culture* that does not necessarily require the clarity of property rights.<sup>106</sup> Some focus on the political context, and advocate that the shifting of political and rent-seeking power to local governments, legal persons and individuals has created ‘*de facto* private property rights’.<sup>107</sup> While these *de facto* property rights are not easy to be systematically

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<sup>103</sup> TVEs are collective-owned enterprise located in townships or villages. Many TVEs are located in urban areas. They are called TVEs simply because they are supervised by rural township or village governments and the majority of their employees are registered as rural labourers.

<sup>104</sup> See Martin L. Weitzman and Xu Chenggang, ‘Chinese Township-Village Enterprises as Vaguely Cooperatives’, *Journal of Comparative Economics* 18 (1994): 128.

<sup>105</sup> See *ibid*: 124, 142.

<sup>106</sup> See e.g., *ibid*.

<sup>107</sup> See Huang, ‘The Path to Clarity’, 195.

legalised, they are supported by *local state corporatism*<sup>108</sup> and informal social networks (for example, *guanxi* 关系).<sup>109</sup> Others stress the central government's role in the allocation of economic resources and its link with economic growth.<sup>110</sup> The implications of these arguments are that we should look beyond the legal framework, and explore the property regime in China through socio-economic transformation and governance.

Against the backdrop of prioritising 'efficiency', the Property Law (2007) largely ignores 'equality', and it does not change the legal and governmental rural-urban divide (*chengxiang eryuanzhi* 城乡二元制), nor the dual land ownership system. Urban land is state owned, while rural land is collectively owned; in the primary property market, the state (represented by city governments in most cases) can acquire rural land collectively owned by villagers (represented by collective economic organisations and village committees) but not vice versa. City and county governments can therefore sell land use rights to property developers through auction, tender or negotiation. By contrast, while rural land is collectively owned, farmers cannot dispose of their land freely and are vulnerable to compulsory land acquisition. The unequal land ownership will be further discussed in Chapters Four, Six and Seven.

### **3.2.3. Tri-ownership and equal protection of public and private ownership**

Equal protection of state, collective and private property, one of the most important principles of the Property Law (Article 4), is considered a milestone towards the road of the rule of law. However, as this principle contravenes the socialist doctrine that 'public property is sacred and inviolable', the debates over the equal protection of

<sup>108</sup> Jean C. Oi, *Rural China Takes Off: The Institutional Foundations of Economic Reform* (Berkeley: University of California Press, 1999), 11.

<sup>109</sup> See Jean C. Oi and Andrew G. Walder, eds., *Property Rights and Economic Reform in China* (Stanford, Calif.: Stanford University Press, 1999).

<sup>110</sup> See e.g., Huang Yasheng, *Inflation and Investment Controls in China: The Political Economy of Central-Local Relations During the Reform Era* (New York: Cambridge University Press, 1996).

public and private ownership<sup>111</sup> were very fierce during the legislation process of the Property Law. The debates focused on whether there should be a tri-ownership system by using the taxonomy of state, collective and private ownership, and whether there should be unified protection for public and private ownership. Liang Huixing believes that the ‘sanctity of public ownership’ principle (for example, the Constitution, Article 12; the GPCL, Article 73) as adopted in the current legal system is a relic of the planned economy and outdated former Soviet civil law theories.<sup>112</sup> Liang argues that the sanctity principle prioritises public property while ignoring private property.<sup>113</sup> The sanctity principle of public ownership therefore should be replaced by ‘the principle of unified protection of all lawful properties’ (*hefa caichan yiti baohu yuanze* 合法财产一体保护原则).<sup>114</sup> Based on the unified protection principle, Liang argues that ownership is a civil right (*minshi quanli* 民事权利) and there is no need to continue the traditional GPCL taxonomy of state ownership, collective ownership and individual ownership,<sup>115</sup> which is based on the status of their holders. Instead, his proposed draft uses a taxonomy including landownership (*tudi suoyouquan* 土地所有权), mineral ownership (*kuangcang suoyouquan* 矿藏所有权) and public property (*gongyouwu* 公有物).<sup>116</sup>

Wang Liming disagrees with Liang’s proposal. Wang believes that *wuquanfa* should reflect the nature of the ‘ownership system’ (*suoyouzhi* 所有制), which is a mixed system with dominant public ownership in China.<sup>117</sup> Wang argues that tri-ownership

<sup>111</sup> See the analysis of this question in Huang, ‘The Path to Clarity’, 204-206.

<sup>112</sup> See Liang Huixing, ‘Zhongguo Wuquanfa de Qicao [Drafting of Law of Real Rights in China]’, *Shanxi Daxue Xuebao [Journal of Shanxi University]* 25, no. 2 (2002), 25. See the same argument of Chen Huabin at the CASS, in Chen Huabin, ‘Several Thoughts of the Legislation on Real Rights in Our Country [Dui Woguo Wuquan Lifa de Ruogan Xin Sikao]’, *Jinling Falu Pinglun [Jinling Law Review]*, no. 1 (2005): 14.

<sup>113</sup> See Liang, ‘Zhongguo Wuquanfa de Qicao [Drafting of Law of Real Rights in China]’, 25.

<sup>114</sup> See Liang Huixing, ‘Wuquanfa de Lifa Sikao [a Legislative Reflection on the Law of Real Right]’, *Jiangxi Caijing Daxue Xuebao [Journal of Jiangxi University of Finance and Economics]*, no. 1 (2001): 43.

<sup>115</sup> See Liang Huixing, ed., *Zhongguo Wuquanfa Canan (Jianyi Gao) [Proposed Draft of China’s Law on Real Property Rights]* (Beijing: China Social Science Documents Press, 2000).

<sup>116</sup> See Liang, ‘Zhongguo Wuquanfa de Qicao [Drafting of Law of Real Rights in China]’, 26; Liang, ed., *Zhongguo Wuquanfa Cao’an (Jianyi Gao) [Proposed Draft of China’s New Law on Real Property Rights]*.

<sup>117</sup> See Wang, ‘Wuquan Lifa Ruogan Wenti Xin Sikao [New Thoughts on Several Issues of the

is a proper reflection of the Chinese ownership system.<sup>118</sup> In the proposed draft of the Property Law led by Wang, state ownership, collective ownership, individual ownership and ownership by social and religious organisations are separately provided for. Moreover, Wang insists that state ownership should enjoy special protection (*guoyou caichan teshu baohui zhidu* 国有财产特殊保护制度) under several circumstances.<sup>119</sup>

At the core of the debates between Liang and Wang is whether ownership should be formulated as an economic institution (*jingji zhidu* 经济制度) or a social institution (*shehui zhidu* 社会制度). The LAC draft circulating for comments and the Property Law (2007) balanced the views in both proposed drafts. While keeping the traditional GPCL taxonomy of state ownership, collective ownership and private ownership, the LAC draft and the Property Law (2007) provide equal protection for state ownership, collective ownership and private ownership.<sup>120</sup>

Yet there are still two major problems with the tri-ownership system and equal protection for public and private property that have not been resolved. The first problem is that tri-ownership is not capable of dealing with the fragmentation of ownership, and this will be examined respectively in the chapters on state, collective and private ownership. The second problem is the relationship between property law and the Constitution<sup>121</sup> as well as socialist principles,<sup>122</sup> and this is the underlying reason for the problematic relationship between public and private property.

‘Emphasis on public ownership of the means of production and distribution is always taken together as the central theoretical distinction between the socialist and

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Legislation of the Property Law], 84; Wang, ed., *Zhongguo Wuquanfa Cao'an Jianyi Gao ji Shuoming* [Proposed Draft of Chinese Property Law and Explanations].

<sup>118</sup> See Wang, ‘Wuquan Lifa Ruogan Wenti Xin Sikao [New Thoughts on Several Issues of the Legislation of the Property Law]’, 84.

<sup>119</sup> See Renming Daxue draft, Articles 44, 112, 120.

<sup>120</sup> See Liang, ‘Zhongguo Wuquanfa de Qicao [Drafting of Law of Real Rights in China]’.

<sup>121</sup> Tong, ‘Wuquanfa (Cao'an) Ruhe Tongguo Xianfa Zhimen [How Could the Property Law (Draft) Pass the Door to the Constitution]’, 4-23. Han Dayuan, ‘You Wuquanfa Cao'an de Zhenglun Xiangdao de Ruogan Xianfa Wenti [Some Constitutional Questions in the Debate over Wuquanfa (Draft)]’, *Faxue* [Law Science], no. 3 (2006): 24-32.

<sup>122</sup> The 1982 Constitution is based on 1936 Soviet Constitution.

capitalist systems'.<sup>123</sup> How property law treats public and private ownership is thus easily linked to whether property law is unconstitutional (*weixian* 违宪)<sup>124</sup> or contrary to the socialist principles. In terms of the paradox of 'an authoritarian state fostering a free-market economy while espousing socialism',<sup>125</sup> some scholars from the New Left wing do have reservations about providing 'sanctity of private property' in the Constitution,<sup>126</sup> and they also highlight the importance of communal property.<sup>127</sup> However, the question is: are there clear boundaries between public and private law in reality?<sup>128</sup> Land acquisition in relation to the vaguely defined 'public interest' is an example to explore this question further (see Chapter Seven in particular).

#### 4. Conclusion

The process of property lawmaking in post-Mao China involved endeavours to 'propertise' the fragmented property rights that emerged in the process of economic reform; during these processes, private property has been gradually recognised by the law. However, there are still residual categories<sup>129</sup> that are difficult to define or 'legalise' in a systematic way. Therefore there are variations, tensions and intricacies in terms of different forms of ownership in reality. In terms of the limitation of the rehabilitation of 'the private' in the law, we need to take account of the broader context of economic reform from 1978 onwards when examining property law reform and property lawmaking. Economic reform is pragmatic and directed by the 'facts' as such facts seemed at the time without clear guidelines or legal rules, which,

<sup>123</sup> Ronald C. Keith, *China's Struggle for the Rule of Law*, 121.

<sup>124</sup> See e.g., Gong Xiantian's public letter to the LAC.

<sup>125</sup> See the interview with Wang Hui in Pankaj Mishra, 'China's New Leftist', *The New York Times*, 15 October 2006.

<sup>126</sup> See e.g., Cui Zhiyuan, 'Caichanquan yu Xianfa zhi Guanxi de Bijiao Yanjiu [a Comparative Study of the Relationship between Property Rights and the Constitution]', *Dushu [Reading]*, no. 4 (2003).

<sup>127</sup> See Mishra, 'China's New Leftist'.

<sup>128</sup> This is one of the themes in this thesis.

<sup>129</sup> Such categories include, for example, 'minor property right apartments' that are built on collectively-owned rural land, and will be analysed in Chapter Four.

usually, lagged behind the pace of economic reform. Moreover, the boundaries between the public sphere and the private sphere are blurred. A lot of grey areas have been thus produced, among which there are policy-made products waiting to be legalised. In such a context, there is often a gap between ownership defined in law and ownership as understood and practised in society, and property lawmaking often lags behind social change.

The bottleneck of property lawmaking is the undifferentiated relationship between law and politics, as well as the constraints posed by socialist ideology. Another dilemma of property law in China is how to conceive the 'tradition' of property law. For example, the conception of *wuquan*, as formulated by German Civil Law, was introduced to China, via Japan in the late Qing. Can we now take for granted that the *wuquan* has taken root into Chinese legal tradition? Rather than getting stuck in the contrasts between the German model and Chinese social complexity, it is more important to explore how the Chinese define ownership, draw and redraw the boundaries between the public and the private in context of dynamic governance and changing socio-economic conditions. Chapters Four and Five wish to elaborate these issues.

## **Chapter 4: The Transformation of Collective Ownership in Rural China: Governing Farmers under Collective Ownership**

### **1. Introduction**

The revival of private property started from the rural area marked by the introduction of the household responsibility system (HRS). However, there has been an odd phenomenon involved in the transformation of collective ownership and the re-emergence of private property in rural China. In theory, the collapse of collectivism should pave the way for the emergence of private ownership. But in the wake of dismantling rural communes in China, private ownership has not been granted to Chinese farmers;<sup>1</sup> instead, collective ownership has been maintained. This odd phenomenon invites an examination of the socio-legal roots of collective ownership in China. Collective ownership in rural China and its transformation in Maoist, Deng, and post-Deng China thus deserve in-depth analysis. Looking beyond dichotomies such as tradition versus modernity, past versus future, and rural versus urban that were often embedded in the examination of Chinese rural transformation,<sup>2</sup> this chapter examines the blurring boundaries between public and private, and between rural and urban. This chapter further explores how this examination sheds light on in-depth questions of the continuities and discontinuities in governing farmers under collective ownership in Maoist and post-Mao China, as well as what kinds of authority and power are involved in the change of rural China (for example, the shift from the plan to the market).

The legal and administrative urban-rural distinction was entrenched in the Maoist era. Although economic reform commenced in the rural area in the late 1970s, since 1984, the focus of the reform shifted from the rural economy to the urban economy, and

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<sup>1</sup> I use farmers rather than peasants in this chapter. ‘Farmers’ is the ordinary term used to describe people in the Chinese countryside, while ‘peasants’ (as opposed to landlords) emphasises the feudal mode of production in the Marxist sense.

<sup>2</sup> Within such boundary thinking, rural society in the pre-1949 era is labelled as ‘feudalism’, while decollectivisation of rural society in the post-1978 era is seen as a step towards capitalism. However, the transformation of rural China is far more complex and intricate.

rural development and urban development then proceeded in an uneven and unbalanced way. Yet in post-Deng China, as cities expand into their rural peripheries, legal and administrative distinctions between the urban and the rural become blurred.<sup>3</sup> For example, in the area of the real estate market, a *de facto* property market is emerging in the rural area with affordable prices under the label of ‘minor property rights’ (*xiao chanquan* 小产权) or ‘township property rights’ (*xiang chanquan* 乡产权). Such real estate market contravenes the ‘formal’, ‘written’ law, and this issue will be explained in detail in Section 4.2 of the chapter.

Here it is necessary to define the scope of this chapter. There is a huge amount of literature on the study of both ‘traditional’ and ‘modern’ rural China, and it is not easy and unnecessary to provide a comprehensive list here. This chapter cannot and does not intend to cover all aspects of the transformation of rural China, but focuses on collective ownership and governing farmers in China.<sup>4</sup>

Different from either ‘the commons’ or ‘common property’<sup>5</sup> in the Western discourses on communal resources, collective ownership is mainly a fabrication of Chinese law and politics that marks a departure from customary landholding in late imperial China as examined in Chapter Two. In 1958, rural landownership was formally taken away from farmers and put into the category of collective ownership. Although in the early 1980s the communes were dismantled and the household

<sup>3</sup> The blurred urban-rural divide is manifested on, for example, migrant workers who work legally or illegally in urban areas. On this see e.g., Rachel Murphy, *How Migrant Labor Is Changing Rural China* (Cambridge: Cambridge Press, 2002).

<sup>4</sup> On the study of rural China from the perspective of ownership and governance, see e.g., Benjamin James, ‘Expanding the Gap: How the Rural Property System Exacerbate China’s Urban-Rural Gap’, *Columbia Journal of Asian Law* 20, no. 2 (2007): 451-491; Frank Xianfeng Huang, ‘The Path to Clarity: Development of Property Rights in China’, *Columbia Journal of Asian Law* 17, no. 2 (2004): 191-223; Jean C. Oi, *Rural China Takes Off: The Institutional Foundations of Economic Reform* (Berkeley: University of California Press, 1999); Jean C. Oi and Andrew G. Walder, eds., *Property Rights and Economic Reform in China* (Stanford, Calif.: Stanford University Press, 1999); Chih-Jou Jay Chen, *Transforming Rural China: How Local Institutions Shape Property Rights in Rural China* (New York: Routledge, 2004).

<sup>5</sup> See e.g., Garrett Hardin, ‘The Tragedy of the Commons’, *Science* 162, no. 3859 (1968): 1243-1248; Michael A. Heller, ‘The Tragedy of the Anticommons: Property in the Transition from Marx to Markets’, *Harvard Law Review* 11, no. 3 (1998): 621-688; Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge: Cambridge University Press, 1990).

responsibility system was adopted in which farmers were allocated plots to farm, collective ownership of rural land was maintained. Farmers have been prohibited from using the land for mortgages or selling the land in the market. Moreover, in China's property regime, public ownership (including state ownership and collective ownership<sup>6</sup>) and private ownership are often regarded as polar opposites. The Property Law (*wuquanfa* 物权法), which came into effect on 1 Oct 2007, reinforced this system of tri-ownership.<sup>7</sup> However, it is unclear who owns rural land in China: farmers themselves, collective economic organisations, or local governments. Moreover, rural land has been misappropriated by various 'middlemen' or 'agents'.<sup>8</sup>

In order to capture the complexity of collective ownership, we need to understand collective ownership in its socio-political context, and this chapter focuses on middlemen or agents in the Chinese governance system and how such middlemen affect collective ownership. Middlemen or agents refer to the groups of 'Janus-faced' people serving both as a part of the state machinery and as a part of rural society. Specifically, the middlemen in imperial China refers to clerks and runners<sup>9</sup> in the

<sup>6</sup> The Constitution (2004), Article 10: 'Land in the rural and suburban areas is owned by collectives except for those portions which belong to the state in accordance with the law; house sites and private plots of cropland and hilly land are also owned by collectives'. The Land Administration Law (2004), Article 9 defines collective ownership in the same way as Article 10 of the Constitution.

<sup>7</sup> See the Property Law (2007), Chapter 5.

<sup>8</sup> On the analysis of middlemen or agents in the Chinese governance system, see e.g., Philip A. Kuhn, *Origins of the Modern Chinese State* (Stanford, Calif.: Stanford University Press, 2002); Elizabeth J. Remick, *Building Local States: China During the Republican and Post-Mao Eras* (Cambridge, Mass.: Harvard University Press, 2004c); Helen F. Siu, *Agents and Victims in South China: Accomplices in Rural Revolution* (London: Yale University Press, 1989); Madeleine Zelin, *The Magistrate's Tael: Rationalizing Fiscal Reform in Eighteenth-Century Ch'ing China* (Berkeley, Calif.; London: University of California Press, 1984c).

<sup>9</sup> In imperial China (the Qing Dynasty in particular), clerks referred to *xuli* (胥吏) in *yamen* (衙门), and runners referred to *yayi* (衙役) in *yamen*. Clerks and runners worked under the direct supervision of the county magistrate on the lowest rung of the administration ladder. Yamen clerks were employed for the purposes of 'copying and composing documents, the management of public affairs, and the processing of all legal cases'. (p.35) Runners were responsible for carrying out the majority of all nonclerical administrative tasks and enforcing the state authority at the local level. (p.122), see Bradly W. Reed, *Talons and Teeth: County Clerks and Runners in the Qing Dynasty* (Stanford: Stanford University Press, 2000). Also see e.g., Guo Runtao, *Guanfu, Muyou yu Shusheng: 'Shaoxing Shiye' Yanjiu [Magistrates, Assistants and Scholars—Research on 'Shaoxing Shiye']* (Beijing: Zhongguo Shehui Kexue Chubanshe, 1996); Melissa Macauley, *Social Power and Legal Culture: Litigation Masters in Late Imperial China* (Stanford, Calif.: Stanford University Press, 1998).

local administration system; the local gentry<sup>10</sup> acted as political brokers and took the advantages of the literati culture<sup>11</sup> and their economic power often derived from landholding. The middlemen in the post-revolutionary (post-1949) period refer to rural party cadres and local governments. Middlemen are even more multiple in the post-1978 era, because in this period political and economic power is decentralising, and local governments are gaining more power to control resources. Local governments and local cadres become the *de facto* owners of rural land, and rural landownership is fragmented.

Furthermore, collective ownership in post-Mao China needs to be understood in the context of economic activities by taking account of local diversity. The definition of collective ownership in China neglects local variations and intricacies (for example, in climate, communications, fertility, local traditions, which may make a one-size-fits-all approach inappropriate) in rural China. Subsistence farming is perhaps self-explanatory but production for the market needs markets—so how are these markets organised? Moreover, in ‘modern’ China, what are the ties that bind farmers together? What is the structure of landholding in detail?<sup>12</sup> In the following sections of this chapter, Part Two focuses on rural governance in traditional China; Part Three discusses collectivisation, Part Four analyses decollectivisation; and Part Five explores reorganisation of rural society in post-Mao China.

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<sup>10</sup> Local gentry refers to *shen* (绅) or *xiangshen* (乡绅), See e.g., Wu Han and Fei Xiaotong [et al], *Huangquan yu Shengquan [Imperial Power and Gentry Power]* (Tianjin Renmin Chubanshe, 1988 [1948]).

<sup>11</sup> For example, the Pearl River delta was ‘a literati-mediated political economy’. See Siu, *Agents and Victims in South China*, 8.

<sup>12</sup> These questions were raised in a discussion with Professor Tim Murphy. Further questions are: what are the respective gender roles in relation to agricultural labour and inheritance? Who do farmers sell their surplus to and through what mechanisms? How is transport of produce to local markets arranged? Do farmers share ownership of a truck etc? How are decisions made about what crops to grow or animals to rear? What is the importance of migrant labour in China? Where are the migrants in the cities from? What resources are transferred over time from migrant workers in cities back to their parents or siblings in the countryside? What about the not-infrequent clashes between farmers and police? Although this chapter cannot cover all of these questions, they all deserve careful investigation.

## 2. Rural governance in traditional China and its transformation

Chapter Two has already given a historical background of property and property rights in China. This section deepens the analysis in Chapter Two and focuses on rural governance in traditional China. In traditional China, owing to the large-community political tradition and ‘familism as the essence of Chinese Confucianism’,<sup>13</sup> there were few formal social groups but various middlemen or agents between the family and the state. Nevertheless, certain degree of autonomy and self-governance did exist in traditional China, and this section explores this question in its historical context.

### 2.1. ‘Large community’ vs. ‘small community’: centralization vs. kinship

Throughout Chinese history there have been tensions between the large community (*da gongtongti* 大共同体) and the small community (*xiao gongtongti* 小共同体):<sup>14</sup> kinship as the most powerful small community might produce ‘self-governance’, but the central government tended to break such communities down and diminish their autonomy. Since the early Zhou (1046 BC-256 BC) dynasty, the idea that ‘under Heaven there should be only one ruler’ has been a dominant theme.<sup>15</sup>

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<sup>13</sup> Francis Fukuyama, *Trust: The Social Virtues and the Creation of Prosperity* (London: Hamish Hamilton, 1995), 61.

<sup>14</sup> These two concepts are proposed by Professor Qin Hui at the Department of History Research, Tsinghua University. ‘Large community’ refers to centralisation of government, and ‘small community’ refers to self-governing organisations, for example, kinship and grassroots associations. Qin Hui’s analytical model is derived from the writing of Ferdinand Tönnies—*Community and Civil Society*. See Ferdinand Tönnies, *Community and Civil Society*, trans. José Harris and Margaret Hollis (New York: Cambridge University Press, 2001). Tönnies focuses on a contrast linked to a theory of modernisation between small-scale, kinship and neighbourhood-based ‘communities’ and large-scale competitive market ‘societies’. But in Qin’s works, he points out that Tönnies’ distinction of community and civil society cannot be transposed to the Chinese context. See Qin Hui, ‘Ping Tengnisi “Gongtongti yu Shehui” [Comments on Tönnies’ “Community and Civil Society”]’, *Shuwu*, no.2 (2000). In <<http://www.gongfa.com/gongtongtigh.htm>> (last visited 2 September 2008).

<sup>15</sup> Derk Bodde, ‘The State and Empire of Ch’in’, in *The Cambridge History of China, Vol. 1, the Ch’in and Han Empires, 221 B. C.-A. D. 220*, ed., Denis Twichett and Michael Loewe (Cambridge: Cambridge University Press, 1986), 38. On the reform of Shangyang, also see Zhang Jinfan, Zhang Xipuo and Zeng Xianyi, *Zhongguo Fazhi Shi [The Legal History of China]* (Beijing: Zhongguo Renmin Daxue Chubanshe, 1981), 88-90.

The reform of the Qin political system in the year 356 BC, known as the reform of Shang Yang<sup>16</sup> (*shangyang bianfa* 商鞅变法), was a significant move towards centralising Qin administrative power.<sup>17</sup> In 350 BC, the Qin was divided into counties (*jun* 郡) that were administered by centrally appointed magistrates. In the same year, based on state ownership of land, Shang Yang ‘opened up’ both the longitudinal paths (*qian* 阡) and horizontal paths (*mo* 陌) of the cultivated land. He replaced the well-field system (*jing tian* 井田)<sup>18</sup> by which each household of farmers had fixed landholding with a more flexible system in which the size of land plots varied.<sup>19</sup> This is *shoutian zhi* (the system of granting land by the state 授田制) under the Qin, and has been documented in Qin Bamboo slips at Shuhuidi in Yunmeng County (睡虎地秦简).

During the reform of Shang Yang, the principle of collective responsibility for crime was emphasised. The population was divided into units, and each unit was composed of five or ten families; the wrongdoing of any individual made all members in the unit hold group responsibility.<sup>20</sup> These measures of dividing the population into small units for control purposes laid down the legacy for the *bao jia* (保甲) system,<sup>21</sup> which continued to be used in imperial times and even into Republican China. Moreover, from the Qin unification (221BC) onwards,<sup>22</sup> individual households were transformed into the category of ‘common people listed in the household register’ (*bian hu qi min* 编户齐民),<sup>23</sup> subject to the direct control of the central government. The centralised government, an emblem of the large community, constrained the autonomy of small communities and individuals.

<sup>16</sup> Shang Yang was the leader and designer of the reform.

<sup>17</sup> See Bodde, ‘The State and Empire of Ch’in’, 35.

<sup>18</sup> Cultivated land plots were divided into roughly equal size, and the boundaries between plots resembled the Chinese character 井.

<sup>19</sup> See Bodde, ‘The State and Empire of Ch’in’, 35.

<sup>20</sup> See *ibid*, 36.

<sup>21</sup> Ten family households were organized into a *bao* (保), and 10 *bao* made up a *jia* (甲).

<sup>22</sup> China’s imperial unification in 221 B.C. is a major milestone in history. Also see *Ray Huang, China: A Macro History* (Armonk, N. Y.: M. E. Sharpe, 1997), 32.

<sup>23</sup> See Du Zhengsheng, *Bian Hu Qi Min: Chuantong Zhengzhi Shehui Jiegou zhi Xingcheng* [Common People Listed in the Household Register: the Formation of the Traditional Political Society] (Taibei: Lianjing Chuban Gongs, 1990).

Yet, as Francis Fukuyama argues, ‘strong community can emerge in the absence of a strong state’.<sup>24</sup> Kinship could gain room to develop in the areas where the control of the central government was weak. For example, kinship was vulnerable in the North but strong in South China (for example, the Pearl River Delta). Although lineage-based communities were exclusive, they also linked together and formed a larger community.<sup>25</sup> Lineages performed a number of economic functions and played important roles in rural governance. For example, lineages managed lineage land, raised funds for famine relief, social welfare and education. They also played important roles in dispute resolution within the lineage.<sup>26</sup> Lineage-based communities were important not only in the economic sense but also in the political sense. There were often interactions and tensions between lineages and the central government. When the lineage power began to threaten the power of the centre, the centre then tended to crack down on the power of the lineage. In fact, in the Qianlong court of the Qing, the Guangdong government felt the threats of the powerful lineages to the centre’s control over localities, made several efforts to diminish the power of lineages, but did not succeed.<sup>27</sup>

## 2.2. Landholding, taxation and middlemen

Apart from the perspective of conflicts and interactions between the large community and the small community, when examining governance in traditional China, the aspect of middlemen should also be taken into account. Although the large community is the political tradition, it is necessary to revisit the question: how did

<sup>24</sup> Fukuyama, *Trust*, 29.

<sup>25</sup> Siu, *Agents and Victims in South China*, 5.

<sup>26</sup> On the literature on lineage organization in south eastern China, see e.g., Maurice Freedman, *Chinese Lineage and Society: Fukien and Kwantung* (London: Athlone Press, 1966); Maurice Freedman, *Lineage Organisation in Southeastern China* (London: Athlone Press, 1957); James Watson, ‘Hereditary Tenancy and Corporate Landlordism in Traditional China’, *Modern Asian Studies* 11 (1977): 161-182; James Watson, ‘Chinese Kinship Reconsidered: Anthropological Perspectives on Historical Research’, *The China Quarterly*, no. 92 (1982): 589-672.

<sup>27</sup> Qin Hui, ‘From Traditional Non-Governmental Public Welfare Organizations to Modern “Third Sector”—Several Issues Concerning Comparison of the History of Chinese and Western Public Welfare’, in <<http://www.cydf.cn/gb/conference/speech/paper-e/11.htm>> (last visited 2 September 2007).

the ruler in the centre govern China? Zhu Yuanzhang, the first emperor of the Ming Dynasty (1368-1644), as Siu points out, launched political programs such as restricting mobility through strict household registration, controlling an army and making it directly responsible to the emperor, restraining the commercial sector, monopolising ideology through the foundation of academies with strict curricula, and choosing officials through the civil service examinations.<sup>28</sup>

Cadastral mapping and registration were also important to the emperorship. In the Ming dynasty, two types of registers were used to consolidate the tax system: cadastres (*yulin ce* 魚鱗冊), which recorded the amount and the quality of taxable land, as well as the owners of that land; and household registers or the Yellow Book (*huang ce* 黃冊), which listed details of each household in order to collect land tax and labour service.<sup>29</sup> The tax-collection duty was performed by local headers under the early Ming *lijia* (里甲) system. However, by the sixteenth century, because of commercialisation and a population boom, the link between land ownership and residence had been broken, and both types of register had become unreliable.<sup>30</sup>

In order to control rural society, the imperial state had to work through a complicated web of middlemen. From the mid-Qing period onwards, tax collection depended more heavily on lineages.<sup>31</sup> However, lineages estate managers and gentry leaders usually misused their power (for example, distributing tax burdens unequally) to seek advantages for themselves and their relatives. Taxes due therefore often failed to be collected.<sup>32</sup> Tension concerning tax collection also existed between the central and

<sup>28</sup> See Siu, *Agents and Victims in South China*, 7. Siu points out that ‘there is a remarkable resemblance between Mao’s ideals for the rural commune and Zhu Yuanzhang’s political programs in the early Ming’.

<sup>29</sup> See Kuhn, *Origins of the Modern Chinese State*, 86.

<sup>30</sup> See *ibid*, 86-87.

<sup>31</sup> See Siu, *Agents and Victims in South China*, 6. Also see Ye Xian’en and Tan Dihua, ‘Lun Guangdong Zhujiang Sanjiaozhou de Zutian [on the Ancestral Estates of the Pearl River Delta]’, in *Mingqing Guangdong Shehui Jingji Xingtai Yanjiu [a Study of the Socioeconomic Conditions of Guangdong During the Ming and Qing Dynasties]*, ed., Guangdong Lishi Xuehui (Guangzhou: Guangdong Renmin Chubanshe, 1985a).

<sup>32</sup> See Siu, *Agents and Victims in South China*, 6.

local governments.<sup>33</sup> Portions of revenue which were supposed to hand in to the central government were retained by provinces and counties in order to pay official salaries as well as local administration expenses.<sup>34</sup> Country magistrates also relied on clerks and *yamen* runners to collect tax. As most of the middlemen were often unsalaried by the central government, they were predatory in tax collection.<sup>35</sup>

Eliminating the middlemen problem and establishing ‘the fiscal linkage between land and residence’ were important targets of the Old Regime; they are also agenda items that every Chinese central government has had to confront thereafter.<sup>36</sup> In the late Qing reforms (*xinzheng* 新政) and in the Nationalist regime, such attempts involved extension of local administration in the rural area. For example, after 1928, the Nationalists implemented the *xiangzhen* (township 乡镇) system, by which the state extended its control to the rural area.<sup>37</sup> When Mao Zedong declared that the Old Regime was finally dead, his government faced the same problems of the old regime.<sup>38</sup> Collectivisation to some extent was the endeavour to eliminate middlemen from the tax system as well as the whole governance system.<sup>39</sup>

### 3. Collectivisation (1949-1978)

#### 3.1. The land reform (*tugai*)

The land reform (*tugai* 土改) was the major project launched by the CPC in rural areas during the period after the founding of the PRC 1949-1952:<sup>40</sup> land and other property of landlords (including corporate landlords such as lineages, temples, and monasteries) was confiscated and redistributed so that each household in a rural

<sup>33</sup> See Madeleine Zelin, *The Magistrate's Tael*, 6.

<sup>34</sup> See *ibid.*

<sup>35</sup> See e.g., Kuhn, *Origins of the Modern Chinese State*, 91.

<sup>36</sup> See *ibid.*, 91.

<sup>37</sup> See Prasenjit Duara, *Culture, Power, and the State: Rural North China, 1900-1942* (Stanford, Calif.: Stanford University Press, 1988), 63.

<sup>38</sup> See Kuhn, *Origins of the Modern Chinese State*, especially 80-113.

<sup>39</sup> See generally in *ibid.*

<sup>40</sup> The early land reform was launched by the CPC in 1946 in some liberated areas (*jiefanggu* 解放区), three years before the foundation of the PRC; thorough land reform was conducted after the promulgation of the ‘Law of Land Reform of the People’s Republic of China’ in 1950.

village would have a comparable land holding. The land reform was not particularly socialist; rather it was a project through which the CPC wanted to consolidate its newly established regime and gain support from farmers who constituted most of Chinese population. Land reform therefore was a project of ‘land-to-the-tillers’ (*gengzhe you qitian* 耕者有其田), and this kind of reform was pursued by farmer inciting peasant revolts whenever there was a change in dynasty. In the case of the CPC land reform, each owner-cultivator was responsible for paying the taxes on his or her household’s land. Land taxes were levied at progressive rates, ranging from 3 percent to 42 percent.<sup>41</sup> The land reform policy was set forth in the ‘Law of Land Reform of the People’s Republic of China’,<sup>42</sup> promulgated in 1950, and in Liu Shaoqi’s ‘Report on the Problem of Land Reform’,<sup>43</sup> at the National Committee of the People’s Political Consultative Conference in June of the same year. The land reform gave farmers a sense of security in land; but it was also an extension of government control to the countryside.

Yet land reform was not just a top-down programme propelled by the state, it also sprang from the social conditions prevailing at that time and had met some psychological expectations of farmers. Seeking ‘land-to-tillers’ was not only driven by farmers’ sense of security stemming from private ownership in land, but also, as Lu Huilin points out, the attitudes of farmers towards ‘equalitarianism’ (*pingjun zhuyi* 平均主义). On the one hand, farmers had respect for private property and the boundaries of ownership; on the other hand, they were deeply influenced by an equalitarianism that confused the boundaries of property, in other words, an attitude of *chi dahu* (吃大户<sup>44</sup> literally mass seizure of food from rich households).<sup>45</sup> In

<sup>41</sup> See Audrey Donnithorne, *China’s Economic System* (New York: Praeger, 1967), 338.

<sup>42</sup> *Zhonghua Renmin Gongheguo Tudi Gaige fa* (中华人民共和国土地改革法), promulgated by the central government on 28 June 1950, implemented on 30 June 1950. The formal text was published in People’s Daily, 30 June 1950. The Chinese version is available at <[http://news.xinhuanet.com/ziliao/2004-12/14/content\\_2331893.htm](http://news.xinhuanet.com/ziliao/2004-12/14/content_2331893.htm)> (last visited 2 September 2008)

<sup>43</sup> *Guanyu Tudi Gaige Wenti de Baogao* (关于土地改革问题的报告). The Chinese version of this report is available at <<http://cpc.people.com.cn/GB/69112/73583/73601/74120/5039321.html>> (last visited 2 September 2008).

<sup>44</sup> Zhou Xiaohong, *Chuantong yu Bianqian [Tradition and Transition]* (Beijing: Sanlian Shudian, 1998), cited in Lu Huilin, ‘Geming Qianhou Zhongguo Xiangcun Shehui Fenhua Moshi Jiqi Bianqian:

periods of social unrest, their attitude towards equalitarianism outweighed their respect for private property, but this attitude should not be confused with so-called farmers' consciousness of 'class contradictions' (*jieji douzheng* 阶级斗争).<sup>46</sup> However, during and after the land reform, farmers' equalitarianism gradually transformed into socialist political slogans such as 'class contradictions' and *fanshen* (翻身), which went to play an important role in the formation of collectivisation.<sup>47</sup>

Property rights encoded in the land reform established complete private ownership. Every farmer was equally allocated an amount of private land, enjoying both ownership and use rights. Land could also be freely transferred in the market. Private ownership of land therefore stimulated farmers' enthusiasm for agricultural production. However, the land tenure of small landholdings and private ownership did not last long. In 1953, the CPC initiated its first Five Year Plan (1953-1957), 'socialist transformation' (*shehui zhuyi gaizao* 社会主义改造) and 'industrialisation' (*gongyehua* 工业化) became the key programs and were strongly modelled on the Soviet Union. Farmers were later encouraged to form mutual aid teams (*huzhu zu* 互助组), based on arrangements among several households for sharing labour and means of production. Later still mutual aid teams were transformed into primary cooperatives (*chuji she* 初级社) in autumn 1954,<sup>48</sup> which were based on apportioning of agricultural income from the amount of land that the household owned and on the labour input of that household. During this period, land ownership still belonged to farmers, but use rights were held by primary cooperatives: in other words, rural land was 'privately owned and publicly run' (*siyou gongying* 私有公营). Income distribution was still according to the quantity and quality of farmers' land. In spring 1956, primary cooperatives were updated to advanced cooperatives (*gaoji she* 高级社), the formation of which was beyond the boundaries

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<sup>45</sup> Shequ Yanjiu de Faxian [The Model and Transformation of Rural Social Stratification before and after Revolution: the Findings of Research on Community], *Zhongguo Xiangcun Yanjiu [Rural China]* 1 (2003): 160.

<sup>46</sup> See Lu Huilin, *ibid.*

<sup>47</sup> See *ibid.*, 161-162.

<sup>48</sup> See *ibid.*, 169.

<sup>48</sup> The exact time varied depending on different localities.

of ‘natural’ villages (*ziran cun* 自然村). In rural areas during this period, farmers joined advanced cooperatives by handing in their assets, including land and also large production materials that had been distributed to them in the previous land reform. After being incorporated into advanced cooperatives, farmers could only keep a few ‘private plots’ (*ziliu di* 自留地) to grow subsidiary food such as vegetables and fruits. Except for these private plots, both land ownership and use rights belonged to advanced cooperatives, and rural land was publicly-owned and publicly-run (*gongyou gongying* 公有公营). Public ownership replaced private ownership. Farmers were no longer permitted to be landowners, or even land users, but were transformed into members of cooperatives, that is, employees of advanced cooperatives. Income distribution was implemented through a system of work points (*gongfen* 工分)—according to the socialist principle, income is based on the work done by each person.

The doctrine established in the collectivisation period was that agricultural land should be concentrated into large collective farms in line with Soviet doctrine, because such collective farms were thought to provide better conditions for modernising and planning the agricultural sector than small farms. Against this backdrop, private ownership was weakened, and kinship and its self-governance also went into decline. In the process of collectivisation, the farmer proprietors of North China were more easily collectivised. Most of the resistance to collectivisation happened in south and southeast China, for example, Guangdong and Zhejiang, since kinship there was strong and active.

### 3.2. Formation of People’s Communes

Based on primary and advanced production cooperatives, people’s communes (*renmin gongshe* 人民公社) were formed in 1958. This led to the formation of a collectively owned land system. There are differences between people’s communes and advanced cooperatives. For example, farmers could withdraw from advanced cooperatives, take away his or her properties and get remuneration for his or her

work in the cooperatives. After the formation of people's communes in 1958, farmers were deprived of such 'withdrawal rights'. Public ownership replaced farmer's private ownership over land.<sup>49</sup> Rural land ownership and land use rights were collectivised. In 1962, rural landownership was formally transformed into three-level agricultural collectives each headed by a branch of the Party: production teams (*shengchan xiaodui* 生产小队), production brigades (*shengchan dadui* 生产大队) and people's communes. Based on collective ownership, production and consumption were put under highly centralised and extended state-party control. And yet, free riding continued to plague the efficiency of the communes.<sup>50</sup> For example, in 1958, communal dining halls (*gonggong shitang* 公共食堂) were established in villages, cooking and dining were done in the communal kitchens, and free meals were provided for members 'to eat as much as they wished' no matter how much work they had done. To many farmers at that time, free dining meant communism. However, because of waste and over-consumption, food was quickly exhausted.<sup>51</sup>

The crucial driving forces behind collectivisation were several. Among them, the desire to supply the cities through collecting revenue from farmers, to fund the industrialisation then underway, and to pay the money owed to the USSR were paramount. Collectivisation was accompanied by a substantial decrease in the number and scope of markets and the formation of planned purchase and supply.<sup>52</sup> Both purchase and sales were thus handled by government agencies through 'compulsory procurement and purchase' (*zhengshou zhengguo* 征收征购).<sup>53</sup> Starting in late 1953, farmers were subject to a system of unified procurement and sale of grain. At that time, the state began creating a grain monopoly, and farmers

<sup>49</sup> In 1958, even private plots became public property, but private plots were soon restored in 1959.

<sup>50</sup> On the 'free rider' problem with collective agriculture in China see e.g., Victor Nee, 'The Peasant Household Economy and Decollectivization in China', *Journal of Asian and African Studies* 21, no. 3/4 (1986): 185-203.

<sup>51</sup> See Gene Hsin Chang and Guanzhong James Wen, 'Communal Dining and the Chinese Famine of 1958-1961', *Economic Development and Cultural Change* 46, no. 1 (1997): 1-34.

<sup>52</sup> See Joshua Goldstein, 'Introduction', in *Everyday Modernity in China*, ed. Madeleine Yue Dong and Joshua L. Goldstein (Seattle: University of Washington Press, 2006), 17.

<sup>53</sup> See Kuhn, *Origins of the Modern Chinese State*, 105-106.

were required to sell their ‘surplus’ grain to the state at fixed prices.<sup>54</sup> The grain quotas that farmers had to finish became a great burden, even a disaster for farmers, especially during the Great Leap Forward (*da yuejin* 大跃进), which led to the 1959-61 famine.<sup>55</sup>

The possible exodus of farmers from villages to cities was prohibited by the household registration system, which was formed in the process of collectivisation in 1958. Mobility was prohibited, especially mobility from rural to urban areas. In the meantime, daily necessities, including food, clothing, water, and electricity, were allocated through systems of rationing or coupons based on the household registration system.<sup>56</sup> The abolition of private property and assets after 1956 replaced the rich-poor distinction but ironically created a new urban-rural disparity.<sup>57</sup> The urban-rural disparity is still a root of social inequality.<sup>58</sup>

## 4. Decollectivisation

### 4.1. The emergence of land use rights in post-Mao China

From economic reform commenced in 1978 onwards, the communes began to be dismantled, and collectivised agriculture was gradually abandoned by the introduction of the ‘household responsibility system’.<sup>59</sup> This system was first

<sup>54</sup> See Vivienne Shue, *Peasant China in Transition: The Dynamics of Development toward Socialism, 1949-1956* (Berkeley: University of California Press, 1980), 214-226.

<sup>55</sup> See Jean C. Oi, *State and Peasant in Contemporary China: The Political Economy of Village Government* (Berkeley: University of California Press, 1989c); Yang Dali, *Calamity and Reform in China: State, Rural Society, and Institutional Change since the Great Leap Famine* (Stanford: Stanford University Press, 1996).

<sup>56</sup> See Goldstein, ‘Introduction’, 17.

<sup>57</sup> Dorothy J. Solinger, *Contesting Citizenship in Urban China: Peasant Migrants, the State, and the Logic of the Market* (Berkeley: University of California Press, 1999), 32.

<sup>58</sup> For example, the compensation for personal injuries of urban residents is much higher than that of farmers. See Article 29 of the ‘Interpretation of the Supreme People’s Court on Some Issues Concerning the Application of Law for the Trial of Cases on Compensation for Personal Injury’ [Zuigao Renmin Fayuan Guanyu Shenli Renshen Sunhai Peicheng Anjian Shiyong Falu Ruogan Wenti de Jieshi] (2003). This article mandates a lower rate of compensation for deceased rural *hukou* holders, even if they have been residents in urban areas for many years. For example, in the year of 2006, the gap of the compensation between the urban and rural residents is 160,000 RMB. This interpretation has received a lot criticism, and the Supreme Court is expected to revise this.

<sup>59</sup> On the communes, see e.g., Vivienne Shue, ‘The Fate of the Commune’, *Modern China* 10, no. 3 (1984): 259-283.

initiated in 1978 at Fengyang County in Anhui Province, and expanded on a nationwide scale between 1980 and 1983:<sup>60</sup> the land of collectives was divided up and assigned to individual households. In terms of responsibility land (*zerentian* 责任田), once their grain quota to the state had been fulfilled, farmers owned and could sell the rest of the grain beyond the quota. Farmers thus began to pursue economic goals in the re-emerging market. Farmers were also allowed to have residential plots (*zhaijidi* 宅基地). However, collective ownership has been maintained.<sup>61</sup> In other words, farmers just own use rights of rural land rather than ownership.

Contractual management rights are one kind of land use rights (LURs),<sup>62</sup> and are in the form of contracts for the possession and use of rural land for farming purposes.<sup>63</sup> The original duration increased from 15 years in 1984 to 30 years under the 1998 LAL (Article 14).<sup>64</sup> Now under the Property Law (2007), when the contract expires, the contract may be renewed according to relevant provisions of the state.<sup>65</sup> *De facto* inheritance of responsibility land is allowed within the duration of the contract.<sup>66</sup>

<sup>60</sup> The third Plenum of the 11<sup>th</sup> CPC Central Committee in 1978 did not recognise the household responsibility system. The recognition was given by the No. 1 Document (*yihao wenjian* 一号文件) issued by the CPC Central Committee in the Spring 1982. From 1982 and 1986, each year the CPC Central Committee published its policies on rural reform and economy in the form of the No. 1 document. The initial 15-year contractual period was also confirmed in these five documents. On the Chinese Rural Policy in the late 1980s, see e.g., Flemming Christiansen, 'Stability First! Chinese Rural Policy Issues 1987-1990', in *From Peasant to Entrepreneur: Growth and Change in Rural China*, ed., E. B. Vermeer (Wageningen: PUDOC, 1992), 21-40.

<sup>61</sup> See e.g., the Constitution (2004), Article 10; the Property Law (2007), Chapter 5; the Land Administration Law (2004), Article 2.

<sup>62</sup> After 1988, citizens and legal persons could gain possession and use of land owned by the state or collectives in the forms of contracts, granted (*churang* 出让) LURs, and allocated (*huabo* 划拔) LURs. See William Valletta, 'The Land Administration Law of 1998 and Its Impact on Urban Development', in Ding Chengri and Song Yan, eds., *Emerging Land and Housing Markets in China* (Cambridge, Mass.: Lincoln Institute of Land Policy, 2005c), 62. The emergence of LURs in urban China will be discussed in Chapter Six.

<sup>63</sup> Contracts for occupancy and use are available to peasant families for farming and residential purposes, and LURs for construction purposes (*jiansheyongdi shiyongquan* 建设用地使用权) are available to rural enterprises.

<sup>64</sup> The initial contractual period was 15 years. In 1993 when the contractual period was soon to expire, the CPC central committee called for an extension to 30 years, and this party decision was confirmed in the Land Administration Law (1998).

<sup>65</sup> The Property Law (2007), Article 126.

<sup>66</sup> The contract is signed with the household. Within the duration of the contract, the amount of land will not be changed if the number of people in that household changes. The result is that there is *de facto* inheritance of responsibility land. The point has been confirmed in my discussion with Mrs Zhan, a farmer at Zhengyang, Henan Province on 18 April 2008. But there is gender difference in inheritance, for example, although there are local variations, a household would lose the portion of

LURs of collective rural land include contractual management rights, LURs of rural residential plots, and LURs for construction purposes. Under the Property Law (2007), LURs of collective rural land were put into the category of '*usufruct*' (*yongyi wuquan* 用益物权),<sup>67</sup> which refers to the right to use another's property. Since ownership of agricultural collective land is not transferable, leaseable or mortgageable *per se*, the so-called alienability of rural land actually refers to the transfer of LURs of rural land, which could happen between the state, legal persons and individuals. In terms of transferring contractual management rights, according to the 2002 Land Contracting Law (*tudi chengbaifa* 土地承包法),<sup>68</sup> contracts could be transferred but cannot be mortgaged. A more controversial question is whether or not residential plots and LURs for construction can be transferred or sold. Without approval from the government at the county level, farmers cannot assign cultivated land for residential purposes, and the LURs for residential purposes cannot be transferred.<sup>69</sup> The use of agricultural land is unchangeable;<sup>70</sup> without approval from the people's government at or above the county level, farmers cannot contribute LURs to joint enterprises or joint ventures as investments, or assign LURs to township enterprises.<sup>71</sup>

Many rules in fact have given a range of rent-seeking opportunities for local government officials or under-the-table partnerships between property developers and local officials.<sup>72</sup> In terms of selling LURs for both farming and residential uses,

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land to the married daughter's name when the village committee redivided the land once every few years. See Heather Xiaoquan Zhang, 'Gender Difference in Inheritance Rights: Observations from a Chinese Village', in *Rural Development in Transitional China: The New Agriculture*, ed., Peter Ho, Jacob Eyferth, and Edward B. Vermeer (London: Frank Cass, 2003), 263-267. Zhang examines the interaction of the inheritance regime with both the patriarchal structure and broader socio-economic changes.

<sup>67</sup> See Chapter Three.

<sup>68</sup> Promulgated by the Standing Committee of the NPC on 29 August 2002, implemented on 1 March 2003.

<sup>69</sup> Article 62 of the LAL (2004): 'Reapplication for a house site by a villager in a rural area who has sold or rented out his/her house shall not be approved'.

<sup>70</sup> The LAL (2004), Article 63.

<sup>71</sup> The LAL (2004), Article 60.

<sup>72</sup> Something perhaps similar happened in the UK in the 1970s in cities, for example, John Poulson, a British architect, used bribery to senior politicians. Also see Patrick Dunleavy, *The Politics of Mass*

transactions directly with farmers are illegal and prohibited by a system of land use certificates. Developers must obtain land use certificates from land administrative bureaux at or above city or county level before proceeding with projects.<sup>73</sup> Thus, LURs must be reclaimed by the state first before entering into the market. The Property Law still does not allow mortgaging contractual management rights and the transfer of LURs for residential purposes. The ambiguity of collective ownership is also one of the major sources of land disputes and conflicts in the rural area. This will be examined in Chapter Seven.

#### 4.2. Grassroots initiatives: ‘minor property rights’ apartments

In the rural area, a *de facto* real estate market is emerging with affordable prices in the name of ‘minor property rights’ (*xiaochanquan*, 小产权) or ‘township property rights’ (*xiangchanquan*, 乡产权), which is not a formal legal concept. The so-called minor or township property rights apartments are commodity housing (*shangpinfang*, 商品房)<sup>74</sup> built on rural residential plots. The buyers of these properties cannot get property rights certificates (*chanquan zheng* 产权证), because they are built on collectively owned land which is reserved for residential use by farmers and thus cannot be commodified in the real estate market according to the Land Administration Law (2004) and the Property Law (2007). The buyers can only get certificates issued by village committees to confirm their property rights over the apartment *per se* not the LURs of the land. To some extent, this sort of ‘minor property rights’ equates to ‘non property rights’. When purchasing these properties, buyers cannot use mortgages or apply for bank loans. Yet the market for the ‘minor property rights’ apartments flourishes, because prices are low compared with those in the urban property market.<sup>75</sup>

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*Housing in Britain, 1945-1975* (Oxford: Clarendon, 1981). This book is on the construction of large-scale council housing in Britain in the 1960s.

<sup>73</sup> See Anthony Gar-On Yeh, ‘Dual Land Market and Internal Spatial Structure of Chinese Cities’, in Ding and Song, eds., *Emerging Land and Housing Markets in China*, 40.

<sup>74</sup> Until the early 1990s, urban housing was provided by the state as a social welfare to the public-sector employees. Houses could be swapped but could not be transferred as commodities in the market. See more detail in Chapter Six.

<sup>75</sup> Take Beijing for example: at present, it has been impossible to find an apartment with a price below

Although the ‘minor property rights’ apartments are popular, their legality has been subject to investigation. For example, in the 17th National Land Day campaign,<sup>76</sup> jointly sponsored by the Ministry of Land and Resources and the Beijing municipal government, one of the issues that seized people’s attention was concern about the ‘minor property rights’ apartments. The Ministry of Construction also warned purchasers of the risks involved in buying these apartments. By contrast, township governments clearly acquiesced in the development of the ‘minor property rights’ apartments,<sup>77</sup> which is another illustration of the complex relationship between central and local governments. The ‘minor property rights’ apartments have even been declared illegal. On 11 December 2007, the State Council declared that ‘city and township residents should not purchase the “minor property rights” apartments in the rural area’.<sup>78</sup> The ‘minor property rights’ apartments in some areas were demolished by force.<sup>79</sup> So what will be the fate of this kind of apartments? This question will be further discussed in the postscript on the recent changes to the rural land system and the rural-urban divide.

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10,000yuan/sq m within the second ring road which is near central Beijing, but on the outskirts of Beijing (outside the fifth ring road) like Tongzhou and Shunyi, the price of ‘minor property rights’ apartments is just between 2500 and 4000 yuan/sq m. This means that in Beijing with 300,000 yuan people can buy only a 20-square-meter apartment within the second ring road but a 100-square-meter apartment outside the fifth ring road despite the latter’s vague property rights. See Li Qian, ‘Minor property right’—better than none?’ *China Daily*, 12 July 2007.

<[http://www.chinadaily.com.cn/bizchina/2007-07/11/content\\_6000839.htm](http://www.chinadaily.com.cn/bizchina/2007-07/11/content_6000839.htm)> (last visited 2 September 2008).

<sup>76</sup> The 17<sup>th</sup> national land day is on 25 June 2007.

<sup>77</sup> Township governments do not have the authority to grant land use rights, therefore they cannot profit from collecting LUR transfer fees. By contrast, township governments could get more profits by making use of these grey areas such as the ‘minor property rights apartments’, and compete for more income from land with the superior governments. On the role of township governments, see e.g., Hsing You-tien, ‘Broking Power and Property in China’s Townships’, *The Pacific Review* 19, no. 1 (2006): 103-124.

<sup>78</sup> See Wu Jiandong, ‘Xiaochanquan Fang Bude Mai Bu Yiweizhe Bujiejue Wenti [A Ban on the “Minor Property Rights” Apartments Does Not Mean that the Problem Will Not be Resolved]’, *Nanfang Zhoumo* [South China Weekend], 20 December 2007. In <<http://bj.house.sina.com.cn/dcpl/2007-12-20/1417230527.htm>> (last visited 16 October 2008).

<sup>79</sup> See Ding Rui, ‘Guotu Bu: Yanzhong Weigui de Xiaochanquan Fang Jiangbei Chaichu [The Ministry of Land Resources: Minor Property Rights Apartments that Contravene the Regulations Will be Demolished]’, in *Beijing Shangbao* [Beijing Business Today], 13 December 2007. In <<http://news.hexun.com/2007-12-13/102266679.htm>> (last visited 20 October 2008).

‘Minor property rights’ apartments had existed ‘underground’ for more than 10 years. The central government has issued various regulations concerning them which suggest some uncertainty about how best to deal with them.<sup>80</sup> Chapter 13 of the Property Law deals with the LURs of rural residential plots, but still does not make clear about their transfer. Therefore, the transfer and sale of rural residential plots and the sale and transfer of LURs for construction purposes by farmers (if not reclaimed by the state first) are still banned. Despite this uncertainty, various kinds of experiments of land use rights circulation have been conducted by localities. In 1992, a farmland shareholding system (*tudi gufen zhi* 土地股份制) was trialled in Nanhai, a county level city of Guangdong Province. Land use rights of individual farmers were collectivised by ‘natural’ villages and then by the administrative village to which these villages belonged. The value of farmland was appraised and divided into shares. A shareholding cooperative was thus formed. The farmland was rented out by the cooperative for industrial purposes. Farmers could enjoy the profits of industrialisation according to the shares they had. In this case, the use purpose of agricultural land had been changed through the circulation of land use rights. This system was called the Nanhai model (*nanhai moshi* 南海模式). In 1995, Suzhou in Jiangsu Province was the first to approve the transfer of LURs for construction purposes. Similar experiments were subsequently conducted at Huzhou in Zhejiang Province in 1997, and at Wuhu in Anhui Province in 2000.<sup>81</sup> The practice of Guangdong is notable. In 2005, the Guangdong provincial government announced the promulgation of a law entitled ‘Guangdong Regulations for the Transfer of Land Use Rights of Collectively Owned Land for Construction Purposes’.<sup>82</sup> This was the

<sup>80</sup> In terms of the central government’s policy, in 2004, the State Council published ‘On deepening the reform and tightening the land administration’ (2004, No.28), which stressed that LURs of collectively owned land could be transferred according to law; however, it did not go beyond the limits provided by the LAL and the Guarantee Law (*Danbao Fa* 担保法). The newly published property law is still within the framework of the LAL. See Article 153 of Property law and Article 62 of the LAL.

<sup>81</sup> See Chen Xu, ‘Xiaochanquan Fang Shi Gaige Chiyi Bujue de Chengben [“Minor Property Rights” Apartments Are the Cost of the Hesitation of Reforms]’, Dongfang Zaobao [Oriental Morning Post], 10 July 2007. In <<http://news.sina.com.cn/pl/2007-07-10/135513415529.shtml>> (last visited 04 September 2008).

<sup>82</sup> Guangdong Sheng Jiti Jianshe Yongdi Shiyongquan Liuzhuan Guanli Banfa 广东省集体建设用地使用权流转管理办法.

first time in China that LURs for construction purposes were legalised via provincial-level legislation. It was also a sign of the marketisation of LURs of rural collective construction land.<sup>83</sup> In 2007, Guangdong introduced further reforms permitting rural residential plots to be transferred in the market.<sup>84</sup>

Further local reforms of the rural LURs focus on allowing farmers to contribute rural land contractual management rights as shares to enterprises or joint ventures. The Land Contracting Law and the LAL conflict at this point.<sup>85</sup> Despite these contradictory laws and regulations, on 1 July 2007, Chongqing allowed farmers to contribute LURs to joint enterprises or joint ventures as shares, provided that the use purpose of arable land is not changed. Shanghai's reform is even more extensive: on 2 July 2007, the Shanghai Industrial and Commercial Administration Bureau allowed farmers to use and rent their residential plots to run village inns as so-called 'family farms', which exceeds the limits within which the use purpose of arable land cannot be changed and paves the way for farmers to participate in urbanisation and industrialisation directly.<sup>86</sup> Yet these reforms are clearly against Articles 60 and 63 of the LAL.

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<sup>83</sup> See Tan Jialong, 'Zhongguo Nongcun Tudi Zhidu ji Tudi Liuzhuan de Zhengce Yanbian [The Chinese Rural Land System and Policy Transformation of Land Transfer]', *Zhongguo Jingji Zhoukan* [Chinese Economic Weekly], 29 August 2005. In <[http://www.china.com.cn/zhuanti2005/txt/2005-08/29/content\\_5953496.htm](http://www.china.com.cn/zhuanti2005/txt/2005-08/29/content_5953496.htm)> (last visited 04 September 2008).

<sup>84</sup> See Tan Jialong, 'Guangdong Nirang Nongcun Zhaijidi Shangshi Liuzhuan [Guangdong Plans to Permit Rural Residential Plots to be Transferred in the Market]', *Xinhua wang* [Xinhua Net], 26 June 2007. In <<http://politics.people.com.cn/GB/14562/5912261.html>> (last visited 4 September 2008).

<sup>85</sup> Article 42 of the Land Contracting Law allows farmers to contribute rural land contractual management rights as shares; according to article 60 of the LAL, farmers cannot contribute LURs to joint enterprises or joint ventures as investments, or assign LURs to township enterprises without approval from the government at or above county levels.

<sup>86</sup> See 'Shanghai: Nongmin Zhaijidi Ke Ban "Nongjiale" [Shanghai: Rural Residential Plots Could Run "Family Farms"]', *Xin Nongcun Shangbao* [New Countryside Commerce], in <<http://xncsb.mofcom.gov.cn/listx.asp?id=112335>> (last visited 3 October 2008).

## 5. Reorganisation of rural China and governing farmers in post-Mao China: neo-collectivism and post-collectivism

### 5.1. Governing farmers under collective ownership and its problems

Article 10 of the LAL and Article 60 of the Property Law provide that collectively owned land shall be managed and administered by the village collective economic organisation<sup>87</sup> (*jiti jingji zuzhi* 集体经济组织) or the villagers' committee (*cunmin weiyuanhui* 村民委员会), but villages' groups, the rural self-governing organisations at the basic level, do not hold much power. This situation has been shaped by the transformation of reorganising rural China in the post-1978 era. In the early 1980s, when the communes were dismantled, the production teams at the lowest level of the communes diminished fastest. After the township (*xiangzhen* 乡镇) replaced the commune, the administrative village (*xingzheng cun* 行政村) took the place of the production brigade, and the villagers' group (*cunmin xiaozu* 村民小组) superseded the cooperation team,<sup>88</sup> the villagers' group was weak while power was diverted to the administrative village level and the township level. This kind of arrangement of collective ownership has entered into a paradoxical situation: although the *de jure* owner is the collective, the *de facto* owners (middlemen) are multiple.

Many villages now have direct and competitive elections, a form of direct democracy (*zhijie minzhu* 直接民主) at the grassroots level that was expected to supplement the indirect democracy (*jianjie minzhu* 间接民主) of the People's Congress at the higher levels.<sup>89</sup> However, under the dual authority of Party and government, the Party secretary of the village is still appointed by the higher-level authority of the CPC.

<sup>87</sup> 'The village collective economic organisation' is not clearly defined in law. Article 5 of The Organic Law on the Villagers' Committee of the PRC (1998) (*zhonghua Renmin Gongheguo Cunmin Weiyuanhui Zuzhi Fa* 中华人民共和国村民委员会组织法, promulgated by the Standing Committee of the NPC on 4 November 1998, implemented on 4 November 1998) provides that 'the villagers' committee must respect the power of decision-making of the village collective economic organisation in conducting economic activities according to the law'. In reality, however, a lot of controversies have arisen, for example, whether the villages' committee or the village collective economic organisation should be the subjects of litigation in the cases on disputes over rural landownership.

<sup>88</sup> See Peter Ho, 'Who Owns China's Land? Policies, Property Rights and Deliberate Institutional Ambiguity', *The China Quarterly*, no. 166 (2001): 405.

<sup>89</sup> See Jean C. Oi and Scott Rozelle, 'Elections and Power: The Locus of Decision-Making in Chinese Villages', *The China Quarterly*, no. 162 (2000): 515.

Furthermore the locus of power in villages (for example, in the Party secretary or in the elected head of villagers' committee) varies in different localities depending on the socio-economic conditions of the villages; whether village cadres have power largely depends on whether they have the ability to control and mobilise resources.<sup>90</sup>

The fifth plenum of the 16<sup>th</sup> CPC Central Committee which ended on 11 October 2005 put forward 'Constructing the New Socialist Countryside' (*jianshe shehui zhuyi xin nongcun* 建设社会主义新农村) as the foremost task facing China in the 2006-2010 five year period, aiming to reduce the urban-rural disparity, illegal confiscation of rural land for development projects, unauthorised conversion of agricultural land to industrial projects and so on.<sup>91</sup> Agricultural tax was also abolished in 2006. However, rather than encouraging self-governance of farmers, 'Building the New Socialist Countryside' is a strong state intervention into countryside construction influenced by new-left ideas, and privatising the land has not so far been accepted.

In order to solve the problems with collective ownership, there are two major approaches proposed by Chinese scholars.<sup>92</sup> One is nationalisation of rural land, and this approach is similar to permanent tenancy (*yongdian* 永佃),<sup>93</sup> which was once popular in Qing and Republican China. This approach supports the reclaiming of all the land by the state, and granting permanent land use rights to farmers by the state. But the problem with nationalisation or state ownership is: does government ownership refer to state (Beijing?) ownership or local government ownership? To what extent or in what sense can the state own, if various kinds of agencies or other users can gain access to resources and have the *de facto* power to make decisions on

<sup>90</sup> See Jean C. Oi, *Rural China Takes Off: The Institutional Foundations of Economic Reform* (Berkeley: University of California Press, 1999); Oi and Rozelle, 'Elections and Power': 513-539.

<sup>91</sup> See e.g., Richard McGregor, 'China Launches "New Deal" for Farmers', *Financial Times*, 22 February 2006. In <<http://www.ft.com/cms/s/74029202-a389-11da-83cc-0000779e2340.html>.> (last visited 29 April 2007).

<sup>92</sup> On the summary of different models of land ownership reform suggested by Chinese scholars see e.g., Liu Rongcai, 'Dangqian Zhongguo Nongcun Tudi Suoyouzhi Gaige Moshi Yanjiu Zongshu [A Literature Review of the Research on the Current Rural Land Ownership System Reform in China]', *Shangye Yanjiu [Commercial Research]* 18 (2006): 149-155.

<sup>93</sup> On permanent tenancy, see Section 4.3 of Chapter Two.

how to use resources? The other proposal is privatisation of rural land so-called ‘the third land reform’ (*disanci tudi geming* 第三次土地革命).<sup>94</sup> But China’s rural economy develops under a variety of local institutions (for example, patron-client relations),<sup>95</sup> and the emergence of markets and private ownership does not necessarily lead to the decline of patron-client relations.<sup>96</sup>

The polarisation of nationalisation and privatisation ignores the fact that rural China needs a communal sphere. The flaw of the household responsibility system is that it just grants farmers the tenure of small landholdings similar to what farmers had in the pre-1958 era, but ignores the difference between subsistence farming and farming for the market, as well as between ordinary farming activity and collective or pooled-labour activities (for example, the need to build or repair buildings or fences) in the post-1978 period. Farming for the market needs markets and cooperative working; pooled-labour activities need cooperation between farmers as well.<sup>97</sup> For example, in the village I visited in Henan province in June 2007, there was reciprocity among villagers over time in relation to pooled labour. Household A helped household B last year, household B should help household A this year.<sup>98</sup> Furthermore, when other opportunities exist (for example, working in village enterprises or cities) and may bring more income, farming responsibility land is less attractive for farmers. For instance, given the fact that farming for the market brings less income for farmers<sup>99</sup> than working in cities as a migrant worker,<sup>100</sup> in many

<sup>94</sup> When the People’s Communes were dismantled by the introduction of the household responsibility system in the late 1970s and early 1980s, it was called ‘the second land reform’ as to differ from the land reform during 1949-1952.

<sup>95</sup> Chih-Jou Jay Chen, *Transforming Rural China: How Local Institutions Shape Property Rights in Rural China* (New York: Routledge, 2004), 7. It is worth pointing out that the rural situation varies greatly from region to region. For example, the rich tea farmers in Zhejiang province have three story brick houses, while farmers in Northwest China or remote mountain villages cannot be sheltered from rain. The role and character of local governments also varies a lot from region to region.

<sup>96</sup> See Chen, *Transforming Rural China*, 11.

<sup>97</sup> On the possible common property regime and collective arrangements, see e.g., Richard Sanders, ‘Organic Agriculture in China: Do Property Rights Matter?’, *Journal of Contemporary China* 15, no. 46 (2006): 113-132.

<sup>98</sup> But unlike mutual aid teams in the 1950s, this reciprocity does involve cash payment. On this also see e.g., Scott Wilson, ‘The Cash Nexus and Social Networks: Mutual Aid and Gifts in Contemporary Shanghai Villages’, *The China Journal*, no. 37 (1997): 91-112.

<sup>99</sup> The reason is due largely to the existence of ‘peasant burden’ (*nongmin fudan* 农民负担), for

cases farmers sub-contract their responsibility land to migrant farmers from other poorer rural areas.

Economic activities in the post-Mao era require a communal and cooperative sphere for farmers; this requirement also highlights the importance of self-governance. In fact, the importance of self-governance has already been emphasised by some Chinese scholars, for example, Liang Shuming. Liang worked as the leader in the village reconstruction in the 1930s at Zouping in Shandong Province. He argued that adopting the land-tax system in order to fund local governments was ‘the worst method of all’.<sup>101</sup> The key to Liang’s rural reconstruction was this: ‘it was to be a movement of *society* not only independent of the government bureaucracy, but in some circumstances a movement *against* bureaucracy’.<sup>102</sup> Bureaucratisation such as extending government administration into the lower levels of rural society was not local self-governance.<sup>103</sup> Unless village self-governance was a grassroots and mass mobilisation of farmers by themselves, it would not succeed.<sup>104</sup> Liang Shuming points out that a problem waiting for research and experimentation is how to make the Chinese have self-governed group organisations. Today this question remains unresolved.

## 5.2. TVEs and variations of collective ownership

The question of rural governance in post-Mao China is how to reorganise farmers after the dismantling of communes, especially in the case of the increasing gap

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example, various fines and fees, although agricultural tax was abolished in 2006. On agricultural taxes, see e.g., John James Kennedy, ‘From the Tax-for-Fee Reform to the Abolition of Agricultural Taxes: The Impact on Township Governments in North-West China’, *The China Quarterly*, no. 189 (2007): 43-59; Ray Yep, ‘Can “Tax-for-Fee” Reform Reduce Rural Tension in China? The Process, Progress and Limitations’, *The China Quarterly*, no. 177 (2004): 42-70.

<sup>100</sup> See e.g., Guang Lei and Zheng Lu, ‘Migration as the Second-Best Option: Local Power and Off-Farm Employment’, *The China Quarterly*, no. 181 (2005): 22-45.

<sup>101</sup> See Guy S. Alitto, *The Last Confucian: Liang Shu-Ming and the Chinese Dilemma of Modernity* (Berkeley: University of California Press, 1979), 168.

<sup>102</sup> Quoted in *ibid*, 169. Italics are in original.

<sup>103</sup> See *ibid*.

<sup>104</sup> Liang Shuming, ‘Xiangcuan Jianshe Dayi [Gist of Rural Reconstruction]’, in *Liang Shuming Quanji [Completed Works of Liang Shuming]*, ed. Xueshu Weiyuanhui Zhongguo Wenhua Shuyuan (Jinan: Shandong Renmin Chubanshe, 1989[1936]); Alitto, *The Last Confucian*, 168.

between available arable land and proliferating population that generates ‘surplus’ labour.<sup>105</sup> Collectively managed enterprises (TVEs) were such a mechanism for reorganising farmers. ‘Leaving the soil but not leaving the village, entering into the factories but not entering into cities (*li tu bu li xiang, jin chang bu jin cheng*)’<sup>106</sup> was once used to portray the situation of farmers who worked in the TVEs, and was thought highly to promote the development of small towns (*xiao chengzhen* 小城镇) and welfare of farmers.<sup>107</sup> Through most of the reform era up until the mid-1990s, township and village enterprises grew fast. However, ‘to identify village-owned enterprises as some kind of “collective owned enterprise” with Chinese-socialism characteristics, misleads and oversimplifies’.<sup>108</sup>

There are different explanations of the reasons for the ‘take-off’ of the TVEs. Some focus on the ‘cultural reasons’ and trust.<sup>109</sup> Some emphasise the role of local governments.<sup>110</sup> But the development of TVEs seemed to have owed more to political economy rather than culture.<sup>111</sup> In the 1980s and mid-1990s, setting up TVEs was one of the most important strategies for local governments to explore indigenous resources of their localities, and to mobilise such resources for local economic growth. Against this backdrop, a ‘sunan model’ (*sunan muoshi* 苏南模式)<sup>112</sup> emerged at the Yangtze Delta region in the 1980s and mid-1990s. This model is a mode of rural industrial development that characterised by ‘[the proliferation of] the collective ownership of TVEs, the dominant role of the local government and

<sup>105</sup> See Solinger, *Contesting Citizenship in Urban China*, 154.

<sup>106</sup> 离土不离乡, 进厂不进城.

<sup>107</sup> See e.g., Fei Xiaotong’s article ‘Xiao Chengzhen Zai Tansuo’ [Small Towns, Another Exploration] in Fei Xiaotong, *Fei Xiaotong Xueshu Zixuanji* [Self-Selected Works of Fei Xiaotong] (Beijing: Shifan Daxue Chubanshe, 1992), 205.

<sup>108</sup> Chen, *Transforming Rural China*, 39.

<sup>109</sup> For example, Martin L. Weitzman and Xu Chenggang, ‘Chinese Township-Village Enterprises as Vaguely Defined Cooperatives’, *Journal of Comparative Economics* 18 (1994): 121-145. In terms of trust, there is no trust in systems but just personal trust in China. On personal trust and trust in systems, see e.g., Niklas Luhmann, *Trust and Power* (Chichester: Wiley, 1979).

<sup>110</sup> See e.g., Oi, *Rural China Takes Off*.

<sup>111</sup> In terms of trust, there is no trust in systems but just personal trust in China. On personal trust and trust in systems, see e.g., Niklas Luhmann, *Trust and Power* (Chichester: Wiley, 1979).

<sup>112</sup> Sunan usually refers to Suzhou, Changzhou and Wuxi in Jiangsu province.

party cadres in rural industrialization, and social services provided by local governments'.<sup>113</sup>

Rather than unified collective ownership, there were different forms of hybrid ownership in the TVEs with variations depending on localities. For example, in order to avoid policy risks as private firms and share favourable policies enjoyed by collective firms, in the 1980s many private firms were set up in the name of, or attached to (*guakao* 挂靠), the TVEs. Such enterprises were called 'red-hat enterprises' (*hongmaozi qiye* 红帽子企业). Especially when the control of private firms tightened after 1989, the number of 'red-hat enterprises' increased rapidly. In the mid-1990s, the central government paid attention to this phenomenon and began to get rid of these 'fake' collective enterprises. Owners of these enterprises were also struggling with the choices between enjoying policy favours with vague ownership and clarifying ownership for potential development.<sup>114</sup> However, during the process of cleaning up 'red-hat enterprises', a more puzzling change in the strategy of local governments began in the promoting of the private sector, in which some of the real collectively owned enterprises were sold for private operation,<sup>115</sup> and the procedure of privatisation was not transparent.

Apart from registration as collective enterprises, investment through shareholding is also one of the strategies of private entrepreneurs to break through the ownership constraints and gain more room for development. After the mid-1990s in southern Jiangsu Province and the Pearl River Delta, shareholding cooperatives (*gufen hezuozhi* 股份合作制)<sup>116</sup> appeared to be a major form of the TVEs. Shareholding cooperatives were called 'neither donkey nor horse' (*fei lu fei ma* 非驴非马). The

<sup>113</sup> Chen, *Transforming Rural China*, 33.

<sup>114</sup> On the transformation of 'red-hat enterprises' within the collective sector, see e.g., Wu Xiaobo, *Jidang Sanshidian: Zhongguo Qiye 1978-2008 [Chinese Business 1978-2008]*, vol. 1 (Beijing: Zhongxin Chubanshe, 2008), 235-250.

<sup>115</sup> Oi, *Rural China Takes Off*, 11.

<sup>116</sup> On shareholding cooperatives, see e.g., Edvard B. Vermeer, 'Shareholding Cooperatives: A Property Rights Analysis', in *Property Rights and Economic Reform in China*, ed. Jean C. Oi and Andrew G. Walder (Stanford, Calif.: Stanford University Press, 1999), 123-144.

first shareholding cooperative was set up by 26 farmers with shares amount to 72,000 RMB at a shoe factory in Wenzhou<sup>117</sup> in May 1985. These farmers became both shareholders and employees of that factory, and this cooperative was called ‘a new form of collective economy’.<sup>118</sup> In 1988, a beer factory at Cangnan County at Wenzhou experimented with a shareholding cooperative and designed a rule for its cooperative: ‘15 percent of enterprise assets should be collective and undivided assets owned by enterprise employers’.<sup>119</sup> On the one hand, because of this collective asset, shareholding cooperatives could be labelled as one form of collective ownership and therefore still conform to socialist principles. On the other hand, the shift from a private enterprise to a shareholding cooperative was easy, private enterprises just needed to claim that there were 15 percent of collective assets in that enterprise; conversely, returning to a private enterprise just needed to get rid of these collective assets.<sup>120</sup>

### 5.3. New collectivism and Post-collectivism? Huaxi Village and Nanjie Village

In the industrialisation and marketisation of rural China, there have been two trends—new collectivism (*xin jiti zhuyi* 新集体主义) and post-collectivism (*hou jiti zhuyi* 后集体主义). New collectivism refers to re-collectivisation based on the needs of the market after the disintegration of rural communes, while post-collectivism refers to industrialisation based on collective ownership, which then transforms into ‘clan capitalism’ (*jiazuhua shichang zibenzhuyi* 家族化的市场资本主义).<sup>121</sup> Huaxi Village in Jiangsu Province—the so-called ‘No.1’ (officially

<sup>117</sup> The wenzhou model (*wenzhou moshi* 温州模式) is another mode of rural industrial development. This model encourages private businesses, and promotes rural industrialisation based on marketisation.

<sup>118</sup> See Wu, *Jidang Sanshidian*, 241.

<sup>119</sup> *ibid*, 242.

<sup>120</sup> *ibid*.

<sup>121</sup> See Zhou Yi, *Huaxi Cun: Zhuanxing Jingji Zhongde Hou Jiti Zhuyi* [Huaxi Village: Post-Collectivism in a Transitional Economy] (Hong Kong: Oxford University Press, 2006). On clan capitalism see e.g., Max Boisot and John Child, ‘From Fiefs to Clans and Network Capitalism: Explaining China’s Emerging Economic Order’, *Administratively Science Quarterly* 41, no. 4 (1996): 600-628.

China's wealthiest village) Village in China—illustrates the transformation of post-collectivism.<sup>122</sup>

Huaxi Village stuck to collective ownership as well as socialist ideology while the household responsibility system spread nationwide after 1978. At the same time, Huaxi Village embraced the market and encouraged the development of TVEs. Albeit guided by socialist ideology, the attitudes towards village development were in fact pragmatic. In 1999, Huaxi Village became the first collective that listed shares on the stock market. Farmers in Huaxi have become shareholders. But these farmers have less freedom to spend their money and little cash from their paper assets: 'eighty percent of their annual bonus and 95 percent of their dividend must be reinvested in the commune'.<sup>123</sup>

Huaxi Village is a unity that combines the governance functions of the party, government and the enterprise, and farmers in the village are under dual rule—the village and the TVEs. From the perspective of management control, Huaxi Village has become a family enterprise of Wu Renbao—the former village party secretary who is regarded as the hero of Huaxi's miracle. Wu's son has now replaced him as leader. At least half of the village enterprises (mostly in steel mills and textiles) are run by Wu's children and grandchildren.<sup>124</sup> Huaxi also employs a large number of migrant workers, who do not enjoy the same social welfare benefits as native Huaxi villagers. A 'village membership' (*cunji* 村籍) even emerged for migrant workers to purchase with the price of 100,000 RMB.<sup>125</sup>

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<sup>122</sup> Albeit with variations, other examples are Liuzhuang (刘庄) in Henan Province, Nanjie Cun (南街村) in Henan Province, Da Qiu Zhuang (大邱庄) in Tianjin.

<sup>123</sup> See Jonathan Watts, 'In China's Richest Village, peasants are all shareholders now—by order of the party', *The Guardian* (online), 10 May 2005.

<<http://www.guardian.co.uk/world/2005/may/10/china.jonathanwatts>> (last visited 18 August 2008).

<sup>124</sup> See *ibid*.

<sup>125</sup> See Zhou Yi, 'Xunqiu Zhenghe de Fenhua: Quanli Guanxi de Dute Zuoyong—Laizi H Cun de Yixiang Yanjiu [Differentiation that Seeks Integration: the Special Function of Power Relations—an Empirical Research from H Village]', *Shehuxue Yanjiu [Social Sciences Research]*, no. 5 (2006): 55.

It is difficult to define the nature of these villages like Huaxi. As Wu Xiaobo points out, from the administrative perspective, these villages are the basic administrative units in the state governance system; from the economic perspective, they are profit-making organisations. In these villages, farming becomes less important. Companies belonging to these villages are listed on the stock market, and the village heads or village party secretaries are both administrators of that village and directors of the companies. The families of the village leaders are often the most powerful family in that village, and children of the leaders are the core persons in villages, and could inherit their father's (both administrative and economic) power.<sup>126</sup> It is worthwhile to explore the role of Wu and his family in the village governance, which seems to function along similar lines to that of the gentry in late imperial China. It is also interesting to investigate how such a village, aiming for 'getting rich together', ends up with the differentiation of social strata between village cadres, ordinary villagers and migrant workers in the village.<sup>127</sup>

In terms of new collectivism, it refers to reintroduction of collective farming by some villages after the household responsibility system spread nationwide in the late 1970s. Nanjie Village (*nanjie cun* 南街村) is a famous example. Nanjie Village is located at Linying County of Henan Province, and it was once known as 'the red billionaire village' (*hongse yiyuancun* 红色亿元村) as a model of a communist village.

In 1981, the household responsibility system was introduced to Nanjie Village, but this system did not bring more income to farmers in the village; rather farmers' income was diminishing. Nanjie thus re-collectivised the land and other property of farmers in 1985 and 1986, and has been a showcase of an equal world since then. Apart from collectivisation of the means of production, the means of subsistence were also collectivised. In 1996, Nanjie reconstructed communal dinning halls;<sup>128</sup>

<sup>126</sup> See Wu, *Jidang Sanshidian*, 163.

<sup>127</sup> See generally Zhou Yi, 'Xunqiu Zhenghe de Fenhuai'.

<sup>128</sup> See Xiang Jiquan, *Jiti Jingji Beijing Xiade Xiangcun Zhili* [Rural Governance under Collective Economy] (Wuchang: Huazhong Shifan Daxue Chubanshe, 2002), 116.

there were even attempts to restore the name of People's Communes.<sup>129</sup> On the surface, village enterprises prospered, and farmers enjoyed free food and housing and cradle-to-grave social welfare (except that migrant workers in Nanjie are excluded from social welfare provision).<sup>130</sup> But villagers did not have private property.

Some recent news reports have investigated the truth of Nanjie's legend and found that Nanjie's prosperity heavily relied on the support of administrative power and bank loans, as well as exploiting cheap migrant labour. The legend of Nanjie is now broken. An investigation of its current situation reveals that in fact, since 2004, the collectivist Nanjie Group has been converted into a shareholding system. The village party secretary got nine percent of the stock. Collective property has been quietly privatised into the pockets of village leaders. Now the Nanjie Group is on the edge of bankruptcy (mainly because it cannot get new bank loans).<sup>131</sup> Unlike Huaxi, Nanjie seemed not to have found a way that is committed to market principles.

## 6. Conclusion

This chapter has examined the transformation of private property in rural China. Private property has been selectively granted to farmers since the dismantling of rural communes and the introduction of the household responsibility system in 1978. Along with the revival of private property, there have been a series of changes in the rural area. For example, in post-Deng China, legal distinctions between the urban and the rural, and between the public and the private have blurred. Some grassroots initiatives (for example, 'minor property rights' apartments) did emerge from the under-defined legal and governmental boundaries as attempts of farmers to engage in marketisation.

<sup>129</sup> See *ibid*, 190.

<sup>130</sup> On Nanjie Village, also see Liu Qian, Cunji, Diyuan he Yeyuan—Yige Zhongbu Zhongguo Cunzhang de Shehui Fenceng [Village Membership, Land Power and Professional Relationship—the Social Stratification of a Village in Central China], 2004. In <[http://www.sociology.cass.net.cn/shxw/xcyj/t20040508\\_2089.htm](http://www.sociology.cass.net.cn/shxw/xcyj/t20040508_2089.htm)> (last visited 14 July 2008).

<sup>131</sup> See Shangguan Jiaoming, 'Nanjie Zhenxiang [The Truth of Nanjie Village]', in *South China Post*, 26 February 2008.

Yet we could find that although private property has re-emerged in the rural area, rural land is still owned by collectives rather than farmers. Farmers only enjoy limited land use rights. Collective ownership remains a constraint for farmers to fully engage in and enjoy benefits from marketisation. Moreover, there is no clear distinction between public property and private property in the rural property regime, and the problem of middlemen pervades the rural property regime and the rural governance system: while Beijing may be ‘seeing like a state’,<sup>132</sup> local governments have the ability to mobilise resources and are seeking for their own benefits. The lack of self-governance by farmers and the lack of communal governance of resources still hinder the revival of private property in rural China. The lack of the communal sphere is also one of the reasons that the rights of farmers are vulnerable to the predatory local governments in land seizure.<sup>133</sup>

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<sup>132</sup> James C. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (New Haven: Yale University Press, 1998c).

<sup>133</sup> This issue will be explored in Chapter Seven.

## Chapter 5: The Transformation of State Ownership in Market Reform: Privatisation of the SOEs?

### 1. Introduction

The making of property law in post-Mao China had to deal with the selective recognition of *de facto* property rights emerged during economic reform and the rehabilitation of such property rights in the law.<sup>1</sup> However, there are still dispersed and fragmented property rights that are hard to define in the law. In the area of state ownership, during economic reform especially through the SOE reform, state ownership is no longer absolute and indivisible, and private property has re-emerged. Such fragmentation of state ownership calls for many questions: in which manner have the dispersed property rights generated through the SOE reforms been assigned? What kind of privatisation has been going on? Who are now the owner(s) of state assets? This chapter would like to approach these questions by examining the transformation of state ownership in China.

When the CPC came to power in 1949, they followed a united front (*tongyi zhanxian* 统一战线) strategy to cooperate with a wide range of non-communist groups; private ownership was not immediately abolished. The 1954 Constitution provided a mixed ownership structure including state ownership (*guojia suoyouzhi* 国家所有制),<sup>2</sup> cooperative ownership (*hezuoshe suoyouzhi* 合作社所有制),<sup>3</sup> ownership of individual working people (*geti laodongzhe suoyouzhi* 个体劳动者所有制),<sup>4</sup> and capitalist ownership (*zibenjia suoyouzhi* 资本家所有制)(Article 5). However, the mixed ownership structure in reality was only maintained for a short period. In fact in 1952 the CPC had already launched the ‘Five-anti Campaigns’ (*wufan yundong*

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<sup>1</sup> See Chapter Three.

<sup>2</sup> That is, ownership by the whole people. See Article 5 of the Constitution (1954).

<sup>3</sup> That is, collective ownership by the masses, see Article 5 of the Constitution (1954). Article 7 also provides: ‘cooperative ownership is either socialist, when collectively owned by the working masses, or semi-socialist, when in part collectively owned by the working classes’. English translation is according to Albert P. Blaustein, ed., *Fundamental Legal Documents of Communist China* (South Hackensack, New Jersey: Fred B. Rothman & Co., 1962).

<sup>4</sup> Including farmers and handicraftsmen.

五反运动)<sup>5</sup> against large-scale entrepreneurs; in 1953, the government announced the ‘socialist transformation’ (*shehuizhuyi gaizao* 社会主义改造) that called for eventual supersession of private ownership by public ownership in 1956, with some compensation given to their former private owners.<sup>6</sup> Moreover, provisions regarding the mixed ownership in the 1954 Constitution were virtually abandoned after the CPC launched the ‘Anti Rightist Movement’ (*fanyoupai yundong* 反右派运动)<sup>7</sup> in 1957 and the establishment of ‘People’s Communes’ (*renmin gongshe* 人民公社) in 1958.<sup>8</sup>

Between 1956 and 1978, the central planned economy<sup>9</sup> in the PRC was based on public ownership. The conception of ownership was overwhelmingly influenced by former Soviet jurisprudence, in which ownership was regarded indivisible and absolute. According to the Constitution (1975 and 1978), public ownership in China consisted of state ownership and collective ownership (Articles 6 and 7). Although state-owned assets were supposed to belong to the people as a whole in China, individual interests were subordinate to the overarching public and collective interests.<sup>10</sup> During this period, there were no comprehensive property law, since the Civil Code formulated by the Guomindang in 1929-1931 was abolished in 1949, and no alternatives were promulgated.

State ownership is based on the Soviet version of state ownership—the factory model (socialisation of the means of production). The 1954 Constitution prioritised state

<sup>5</sup> Its main target was ‘the capitalist class’. The targets of the ‘Five Antis’ were: bribery, tax evasion, doing shoddy work and using inferior materials, stealing state property, and stealing state economic information.

<sup>6</sup> See e.g., Roderick MacFarquhar, ed., *The Politics of China: The Eras of Mao and Deng*, 2ed. (Cambridge: Cambridge University Press, 1997), 40-45.

<sup>7</sup> The main targets were intellectuals as well as legal professions. The first wave of attack started immediately after the end of the ‘Hundred Flowers Movement’, which involved pluralism of opinion expression and criticism of the government.

<sup>8</sup> But in reality, whether a complete public ownership system was established is not clear. For example, farmers still kept ‘private plots’ (*ziliu di* 自留地).

<sup>9</sup> In this period the central planned economy was also subject to the effects of decentralisation in localities, and this point will be discussed in Section 3 of this chapter.

<sup>10</sup> See Pitman Potter, ‘Globalization and Economic Regulation in China: Selective Adaptation of Globalized Norms and Practices’, *Washington University Global Studies Law Review* 2, no. 119 (2003): 126-127.

ownership as ‘the leading force in the national economy and the national basis on which the state carries out socialist transformation’ (Article 6). Prioritising state ownership was also in line with the Chinese socio-economic conditions prevailing at that time. In a family-oriented and ‘non-organisational’ society<sup>11</sup> such as China’s, in order to achieve the modernisation project quickly, as Fukuyama argues, the state must step in to help create large-scale businesses ‘through subsidies, guidance, or even outright ownership’; to some extent, ‘state ownership may be the only way for such a society to develop large-scale enterprises’.<sup>12</sup> The result is:

a saddle-shaped distribution of enterprises, with a large number of relatively small family firms at one end of the scale, a small number of large state-owned enterprises at the other, and relatively little in between.<sup>13</sup>

Since 1978, there has been a great change in the public sector. The first round of reforms dismantled rural communes and introduced the household responsibility system to rural China.<sup>14</sup> Special economic zones (SEZs) were established along the coast as the means to attract foreign direct investment (FDI). In the mid-1980s, the focus of the reforms was shifted from rural areas to the sector of the state-owned enterprises (SOEs). For instance, contracts were made between the state and enterprise managers: enterprises were granted more management autonomy, and managers could be rewarded with a portion of the enterprise profits if certain performance targets had been met. Later on, the government began to lease out enterprises in order to improve the efficiency of the enterprises. In 1994, corporatisation of SOEs was embarked on. Since 1997, China has embraced the policy of *zhuada fangxiao* (grasping the large and freeing the small 抓大放小), which entails the corporatisation of the large SOEs while selling the small and medium-sized SOEs (for example, through management buyouts).

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<sup>11</sup> See Section 3.2 of Chapter Two.

<sup>12</sup> See Francis Fukuyama, *Trust: The Social Virtues and the Creation of Prosperity* (London: Hamish Hamilton, 1995), 30, 72.

<sup>13</sup> Ibid, 30.

<sup>14</sup> See Chapter Four.

While market reform has led to the gradual acceptance of commodification (*shangpinhua* 商品化) and corporatisation (*gongsihua* 公司化) as the means to invigorate the economy, privatisation (*siyouhua* 私有化) has not yet been officially recognised. For example, corporatisation focuses on ‘diversification of ownership’, whereas privatisation entails ‘the sale of state-owned assets’,<sup>15</sup> which stands in sharp contrast to the fundamental socialist principles. The alternative term to privatisation is thus transformation of ownership (*gaizhi* 改制) or restructuring (*chongzu* 重组) of SOEs. Yet, the policy of ‘grasping the large and freeing the small’ has triggered the question: has ‘privatisation’ (often described as ‘the Chinese route to privatisation’,<sup>16</sup> or ‘privatisation with Chinese characteristics’) been taking place in China? How to ascertain the nature and process of the reconfiguration of China’s state-owned sector?

It is difficult to assess privatisation in China without taking account of Chinese peculiar political institutions and social conditions. Therefore, we need to investigate what kind of privatisation has been taking place in China, under what conditions and with what limitations, and what are the consequences of ‘privatisation’? In order to explore the nature and process of privatisation taking place in China, this chapter is divided into two parts. The first part focuses on the relationship between the plan and the market. This part also compares the SOE reforms in the 1980s with those in the 1990s, as well as different approaches for reconstructing large SOEs and small and medium SOEs. The second part focuses on the relationship between the central and local governments and their roles in resource control and allocation in China.

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<sup>15</sup> See e.g., Mary M. Shirley, ‘Bureaucrats in Business: The Roles of Privatisation Versus Corporatisation in State-Owned Enterprise Reform’, *World Development* 27, no. 1 (1999): 115; *Bureaucrats in Business: The Economics and Politics of Government Ownership*, ed. World Bank (Washington, D. C.: Oxford University Press for the World Bank, 1995); Qian Yingyi, ‘Enterprise Reform in China: Agency Problems and Political Control’, *Economic of Transition* 4, no. 2 (1996): 427-447.

<sup>16</sup> See Ma Shu Y., ‘The Chinese Route to Privatisation: The Evolution of the Shareholding System Option’, *Asian Survey* 38, no. 4 (1998): 379-397.

## 2. Economic reforms stalled between the plan and the market

### 2.1. The relationship between the plan and the market

The dominant conceptualisation of Chinese reforms is gradualism. The gradualist mode of reforms often stands in sharp contrast with the ‘shock therapy or big bang’ (rapid market liberalisation and mass privatisation) approaches by Eastern Europe and the former Soviet Union (EEFSU) in the early 1990s.<sup>17</sup> In the context of post-Mao China, gradualism refers particularly to ‘the trial-and-error approach’ to the reform programs described by Chinese leaders as ‘crossing a river by groping for stepping stones’ (*mo zhe shitou guo he* 摸着石头过河).<sup>18</sup> However, the questions at issue are: has economic reform in China since 1978 been pursued in a coherent manner, that is, the gradualist model? In addition, in terms of post-Mao China’s reform approaches, do the merits of gradualism really outweigh those of ‘shock therapy’?

In post-Mao China the market cannot easily be divorced from a plan or administrative power. China’s reformers adopted ‘a planned economy as a priority, market regulations as a supplement’ (*jihua jingji wei zhu, shichang tiaojie wei fu* 计划经济为主, 市场调节为辅) at the 12<sup>th</sup> National Congress of the CPC in 1982; ‘a planned commodity economy’ (*you jihua de shangpin jingji* 有计划的商品经济) at the third Plenum of the 12<sup>th</sup> Central Committee of the CPC in October 1984; ‘an economy where the state regulates the market and the market guides the enterprises’ (*guojia tiaojie shichang, shichang yindao qiye* 国家调节市场, 市场引导企业) at the 13<sup>th</sup> National Congress of the CPC in October 1987; ‘an economy with an integration of the planned economy and market regulations’ (*jihua yu shishang tiaojie xiang jiehe* 计划经济与市场调节相结合) at the fourth Plenum of the 13<sup>th</sup>

<sup>17</sup> See the comparison of reforms between China and the EEFSU in Steven M. Goldstein, ‘China in Transition: The Political Foundation of Incremental Reform’, *The China Quarterly*, no. 144 (1995): 1105-1131; Louis Putterman, ‘The Role of Ownership and Property Rights in China’s Economic Transition’, *The China Quarterly*, no. 144 (1995): 1047-1064.

<sup>18</sup> See e.g., Dali L. Yang, *Remaking the Chinese Leviathan: Market Transition and the Politics of Governance in China* (Stanford, Calif: Stanford University Press, 2004), 8.

Central Committee of the CPC in June 1989.<sup>19</sup> The term ‘socialist market economy’ (*shehui zhuyi shichang jingji* 社会主义市场经济) as the reform goal only appeared at the 14<sup>th</sup> Party Congress in 1992. The choices and adoptions of different terms are based on the complex relationship between the plan and the market.

If a planned economy is fully converted into a market economy, the market economy should bear characteristics including: privatisation of SOEs, price liberalisation, and the transfer of economic decision-making power from the government to enterprises and individuals. However, as the market cannot be easily separated from the plan, a dual-track price system emerged in 1985. The ‘state’ (Beijing, a provincial government, or a local government below the provincial level) would keep control over the prices of goods produced and distributed inside the plan through administrative channels, while the ‘market’ could decide the prices of goods produced outside the plan.<sup>20</sup> This is because policy makers had to make sure that state-owned enterprises were able to acquire resources and did not lose the competition with private enterprises, although the centrally planned allocation system was gradually converted to the allocation system according to the needs of the market. The distinction between ‘inside the system’ (*tizhinei* 体制内) and ‘outside the system’ (*tizhiwai* 体制外) also emerged, although it is hard to give a specific definition of this distinction. ‘Inside the system’ could mean inside the plan especially having easy access to resources. Those with the political influence to gain access to goods (people inside the system) bought goods at low state-set prices that could vary across and within provinces and sold those goods at higher prices, and thus made enormous profits. Resources are transferred from the inside system to the outside system by privileges, and great profits are made. This phenomenon is termed *guandao* (官倒), which means officials (usually through companies that were set up and controlled by them) get goods from the inside system to sell them to the outside

<sup>19</sup> On the synthesis of the relationship between the market and the plan, also see Woo Wing Thye, ‘The Real Reasons for China’s Growth’, *The China Journal*, no. 41 (1999): 123.

<sup>20</sup> See Shahid Yusuf, Kaoru Nabeshima, and Dwight H. Perkins, *Under New Ownership: Privatizing China’s State-Owned Enterprises* (Washington: World Bank), 61.

system. The dual-track price system, a unique feature of ‘the dual approach’ (*shuanggui zhi* 双转制) to Chinese economic reform, evolved into rent-seeking that will be discussed in the chapter below.

Apart from the non-separation of the plan and the market, if we compare the reforms in the 1980s and those in the 1990s,<sup>21</sup> we can see that reforms in China since 1978 have not been proceeding in a coherent manner; instead they could be divided into different periods (for example, 1978-1984, 1984-1989, 1989-1992, 1992-present), in which different people have had different gains and losses.<sup>22</sup> Since the mid-1990s, the central government has strengthened its macroeconomic regulation and control (*hongguan tiaokong* 宏观调控, or macro-control)<sup>23</sup> of the economy and rolled back its power over economic decision-making. The path of economic reform has been diverted from the gradualist model since then.

Another question of gradualism is whether it is the main reason that has contributed to China’s economic growth.<sup>24</sup> We should note that the term ‘gradualism’ itself does not just mean ‘piecemeal’ reform but also implies that the elements in the old planned economy are hard to be eliminated, that is to say, the market reform is partial

<sup>21</sup> Many scholars have done this comparison, for example, Huang Yasheng, Ya Dali, He Qinglian. See e.g., He Qinglian and Cheng Xiaonong, eds., *Zhongguo Gaige de Deshi yu Chengbai [the Gains and Losses of China’s Reform]* (Hong Kong: Boda Chubanshe, 2007); Huang Yasheng, *Selling China: Foreign Direct Investment During the Reform Era* (Cambridge: Cambridge University Press, 2003); Yang, *Remaking the Chinese Leviathan*.

<sup>22</sup> See He and Cheng, eds., *Zhongguo Gaige de Deshi yu Chengbai [the Gains and Losses of China’s Reform]*, 155.

<sup>23</sup> In the past three decades of economic reform, macro-control—so-called ‘regulation and rectification’ (*zhili zhengdun* 治理整顿) before the 1990s—has appeared frequently in Chinese policy making. When the economy is overheated and competition for resource is fierce, the central government regulates different enterprises belong to different ownership sectors and reallocates resource among these enterprises through direct government intervention. In the regulation and reallocation, state-owned enterprises, joint-venture enterprises (multi-national enterprises), and private enterprises enjoy different treatment. Macro-control happens every four to six years, and since 1981, each macro-control only claims its start, but never claims its end. See Wu Xiaobo, *Jidang Sanshinian: Zhongguo Qiye 1978-2008 [Chinese Business 1978-2008]*, vol. 2 (Beijing: Zhongxin Chubanshe, 2008), 233, 289. In order to cool down the market, there have been various macro-control measures (for example, tightening tax, loan, and land regulations; controlling market demand and increasing supply).

<sup>24</sup> See the analysis in Jeffrey Sachs, Woo Wing Thye, and Yang Xiaokai, ‘Economic Reforms and Constitutional Transition’, *CID Working Papers*, no. 43 (2000); Woo, ‘The Real Reasons for China’s Growth’.

reform,<sup>25</sup> or market reform without constitutional transition.<sup>26</sup> The state (central and local) still plays an important role in market reform. In terms of the state-market relationship, the ‘distorted market school’<sup>27</sup> has tended to look beyond the short-term benefits of state involvement in the market and ‘highlight the market-distorting aspects of state entrepreneurship’ such as the barriers such state intervention sets up to long-term market reforms.<sup>28</sup> The unrestrained government intervention in the economy is problematic. As Susan Shirk notes,

while local officials draped themselves in the mantle of market reform, what they meant by reform was, in fact, the perpetuation of the hybrid, partially reformed system, not a genuine market economy. They preferred to maintain their ‘quasi-ownership’ rights over local factories and to exploit these rights to collect rents for themselves rather than playing only the role of referee in market competition.<sup>29</sup>

The place where market and power intersect has been the hotbed for rent-seeking.<sup>30</sup> Rent-seeking is also an organisational phenomenon—‘public agencies seeking profits generated by their monopolies over certain resources or power for their own gains’.<sup>31</sup> Indeed, in the context of gradualist reform, rents could be ‘monetised more easily by arbitraging between the market and the plan’,<sup>32</sup> because the market is embedded in political power, and governments act as regulators, investors, and referees.<sup>33</sup>

<sup>25</sup> See He and Cheng, eds., *Zhongguo Gaige de Deshi yu Chengbai [the Gains and Losses of China's Reform]*, 186.

<sup>26</sup> See Saches, Woo, and Yang, ‘Economic Reforms and Constitutional Transition’.

<sup>27</sup> See Yang, *Remaking the Chinese Leviathan*, 11. According to Yang, there are two opposite views on the growing state-market nexus in Chinese reforms: the ‘developmental school’ sees the strong state involvement in China as an important attribute to economic success; while the ‘distorted market school’ holds that ‘bureaucratic entrepreneurialism’ in China has become the main obstacle to the market economy.

<sup>28</sup> See *ibid.*

<sup>29</sup> Susan L. Shirk, *The Political Logic of Economic Reform in China* (Berkeley: University of California Press, 1993), 196.

<sup>30</sup> Compared with ‘corruption’, ‘rent-seeking’ is more neutral and general: rent-seeking ‘de-individualises’ corruption and stresses the systematic dimension of ‘a consequence of regulatory control in the absence of effective means of regulating or controlling the regulators’. See W. T. Murphy, ‘China’s Laws and Flaws’, *The Modern Law Review* 70, no. 6 (2007): 1010.

<sup>31</sup> Liu Xiaobo, ‘From Rank-Seeking to Rent-Seeking: Changing Administrative Ethos and Corruption in Reform China’, *Crime, Law and Social Change* 32, no. 4 (1999): 354.

<sup>32</sup> Andrew H. Wedeman, *From Mao to Market: Rent Seeking, Local Protectionism, and Marketization in China* (Cambridge: Cambridge University Press, 2003), 27.

<sup>33</sup> This point will be examined in detail in Chapters Six and Seven.

Furthermore, ‘the dual approach’ to China’s reform, that is, the unbalanced progress between market reform and political reform, also reveals the dilemma in dealing with the complexity of governance in post-Mao China. In Maoist era, the Party sought self-legitimation through ideology and the monopoly of truth.<sup>34</sup> However, the Party’s self-legitimation was one cause of a tension in legitimacy, because ‘a political system can never create a foundation for itself; it has to come from society’.<sup>35</sup> After the turmoil of the Cultural Revolution, the Party had to restore its legitimacy of governance. In 1978, Deng Xiaoping returned to the leading Party position and the ‘four modernisations’ (*sige xiandaihua* 四个现代化) were endorsed with a focus on the economic sphere, entailing a shift from planned economy to market economy as well as ‘reforms’ and ‘opening-up’. Economic modernisation has served as an important means of rebuilding the legitimacy of governance by the Party-state, and maintaining a commitment to socialism. However, this kind of modernisation emphasises economic growth (without concurrent political reforms) while ignoring equality and transparency in distribution; numbers and statistics<sup>36</sup> (for example, GDP) have been the most important indications to gauge the progress of modernisation and an important criterion for cadre evaluation. The high economic growth seems to have maintained a trade-off between economic reform and political reform, yet the fact that political reform lags far behind economic reform may give birth to a potential legitimacy crisis.

## 2.2. The SOE reform in the 1980s versus in the 1990s

The above section has discussed the relationship between the plan and the market, and this section focuses on another important aspect of economic reform and change in the ownership structure—the SOE reform. SOEs were established by administrative fiat rather than market forces, and their governance systems were

<sup>34</sup> See He Baogang, *The Democratic Implications of Civil Society in China* ( Basingstoke: Macmillan, 1997), 107.

<sup>35</sup> *ibid.*

<sup>36</sup> On the unreliable statistics especially at local levels in China see e.g., Liu, ‘From Rank-Seeking to Rent-Seeking’: 351.

based on a central planned economy. SOEs were supervised by governments at different levels—the central, the province (*sheng* 省), the city (*shi* 市), and the county (*xian* 县).<sup>37</sup> SOEs themselves also held administrative ranks. As Cao, Qian and Weingast point out, most large SOEs were supervised by the central government, and this kind of SOEs was often in monopolistic industries such as telecommunications, railroad transportation, petrol and petrochemicals. Most small and medium SOEs were supervised by local governments at different levels, and this kind of SOEs was often in competitive industries such as textiles and food processing.<sup>38</sup> SOEs also performed social functions such as providing housing, education, medical care, pensions and lifetime employment for their employees. In fact, each SOE was a self-contained community, and some big SOEs even had their own courts, procuratorates, and police. Through the control of SOEs, the government was able to carry out its social objectives, one of which was to provide social security for urban residents as well as govern the urban sector.<sup>39</sup>

China's SOEs were burdened by a mix of productive and social functions, and possessed ill-designed governance structures with vague property rights.<sup>40</sup> Most SOEs were therefore highly inefficient loss-makers. Because of their poor performance, SOEs required more fiscal and quasi-fiscal public subsidies.<sup>41</sup> SOEs thus imposed a huge burden on the government and the entire economy.

Since 1978 the Chinese government has been trying different schemes to revitalise SOEs. The first period, from 1978 through early 1984, saw the reforms that emphasised the agricultural sector, but central planning did not withdraw from the

<sup>37</sup> Township (*xiang* 乡) is one level below county (*xian* 县), and village (*cun* 村) is one level below township, neither the township level nor the village level supervises SOEs. In this chapter, the local refers provincial, city, and county governments.

<sup>38</sup> See Cao Yuanzheng, Qian Yingyi, and Barry R. Weingast, 'From Federalism, Chinese Style to Privatisation, Chinese Style', *Economics of Transition* 7, no.1 (1999): 108.

<sup>39</sup> See Zhao Yaohui, 'The Nature of Chinese State-Owned Enterprises', in *The Reformability of China's State Sector*, ed., Guanzhong James Wen and Xu Dianqing (Singapore; River Edge, N. J.: World Scientific, 1997), 304.

<sup>40</sup> See Harry G. Broadman, *Meeting the Challenge of Chinese Enterprise Reform*, World Bank Discussion Papers (Washington, D. C.: World Bank, 1995), xi.

<sup>41</sup> See *ibid*, xii.

market and the ownership structure was still within the old framework. Since the third plenum of the 13<sup>th</sup> National Congress of the CPC in 1984, the focus of reform has been shifted from the rural sector to the urban sector. The second period thus began in 1984. In this period, inspired by the 'household responsibility system' practised in rural areas, contractual arrangements made between an SOE and its governmental supervisor were introduced to the SOE reforms: such contracts rewarded enterprise managers for certain portions of enterprise profits. In 1988, 'the State-Owned Enterprise law'<sup>42</sup> came into effect to grant the SOEs legal status with the state as the owner (Article 2). The reforms were interrupted by the political turmoil in 1989. Since Deng Xiaoping's tour to China's southern provinces in 1992, the reform efforts have been restored.<sup>43</sup> From 1992-1994, the expansion of managerial autonomy of SOEs was emphasised in order to make enterprises more efficient. Since 1994, reforms have stressed the establishment of 'a modern enterprise system' and the transformation of the ownership system into a mixed structure with a dominant public sector.<sup>44</sup> In this period, the non-public sector has developed rapidly.

Yet there have been many limits of the SOE reform. In the 1980s, resources and assets were still concentrated in the hands of the government, and were redistributed to society according to the rank and status of members. Reform was 'not fully based on market competition but on the bargaining between state agencies'<sup>45</sup> and individual

<sup>42</sup> Quanmin Suoyou zhi Gongye Qiye Fa [the State-Owned Enterprise Law], promulgated by the NPC on 13 April 1988, implemented on 1 August 1988.

<sup>43</sup> This synthesis is based on Yusuf, Nabershima, and Perkins, *Under New Ownership*, 45; Cao Yuanzheng, Qian Yingyi, and Barry R. Weingast, 'From Federalism, Chinese Style to Privatisation, Chinese Style': 103-131; Louis Putterman, 'The Role of Ownership and Property Rights in China's Economic Transition'.

<sup>44</sup> See e.g., Guo Sujian, 'The Ownership Reform in China: What Direction and How Far?', *Journal of Contemporary China* 12, no. 36 (2003): 557.

<sup>45</sup> State agencies in China could be divided into two categories: *jiguan danwei* (机关单位) and *shiye danwei* (事业单位). The former refer to party organisations and governmental departments at both the central and local levels, while the latter include non-profit units that do not perform regulatory functions, for example, newspapers, research institutes, and hospitals. See Lin Yi-min and Zhang Zhanxin, 'Backyard Profit Centers: The Private Assets of Public Agencies', in *Property Rights and Economic Reform in China*, ed. Jean C. Oi and Andrew G. Walder (Stanford, Calif.: Stanford University Press, 1999), 205. In this chapter, state agencies refer to *jiguan danwei*.

managers'.<sup>46</sup> Old elements of a planned economy were maintained in economic reform: certain privileges were granted to cadres and work units (*danwei* 单位) based on their hierarchical status. Higher ranks meant better treatment and more privileges.<sup>47</sup> Rather than egalitarianism, a political and administrative hierarchy based on status pervaded the whole political system.<sup>48</sup> Even most SOEs were assigned certain administrative ranks according to the ranks of their governmental or departmental supervisors. The reallocation of resources according to 'ranks' and the monopoly of resources by privileged groups stimulated 'rent-seeking' behaviour that plagued economic reforms. For example, the side-effect of the SOE 'contract responsibility system' was that it created 'insider control' by which enterprise managers could use their control over the assets of SOEs to seek their own benefits.<sup>49</sup>

Due to the limits of the SOE reform mentioned above, after more than a decade of these reforms, the performance of SOEs remained poor. More extensive reforms of the ownership structure were needed in order to clarify the property rights in SOEs and separate the management of enterprises from government intervention. SOEs underwent further reforms in the 1990s; however the question is are the reforms in the 1990s pursued in the same manner as those in the 1980s?

If China pursued a gradualist and coherent manner throughout its process of reforms, the SOEs should be steadily privatised. Yet, whether the SOEs have been privatised along the lines of gradualism is debatable. As Huang Yasheng points out that privatisation in China seems to have diverted from the gradualist framework, and the gradualist account seems relevant to the reformist policies in the 1980s rather than those in the 1990s.<sup>50</sup> Huang's arguments are based on several empirical

<sup>46</sup> Guo Sujian, 'The Ownership in China': 557.

<sup>47</sup> See Liu, 'From Rank-Seeking to Rent-Seeking': 349.

<sup>48</sup> See *ibid.*

<sup>49</sup> See Cao, Qian and Weingast, 'From Federalism, Chinese Style to Privatization, Chinese Style': 121.

<sup>50</sup> See e.g., Huang Yasheng and Tarun Khanna, 'Can India Overtake China?' *Foreign Policy*, no. 137 (2003): 74-81; Huang Yasheng, 'Did the Chinese Government Pursue a Gradualist Reform Strategy in the 1990s', thematic paper on government, prepared for China Transition Workshop, 15-17 November

inconsistencies with the gradualist framework in his study of reforms in China.<sup>51</sup> first, Chinese leaders in the 1980s worried about the problems with the SOEs such as their incentive mechanisms; however, from the 1990s onwards Chinese leaders just focused on the technical capabilities of the SOEs rather than their incentive structure. Secondly, there were some aspects of both economic and political liberalisation<sup>52</sup> in the 1980s (except for the turmoil in 1989), but the extent of such liberalisation was less in the 1990s. Thirdly, China already implemented substantial privatisation in the 1980s and early 1990s, but did so in ‘a roundabout fashion’ through the specific mechanism of FDI, so called ‘FDI-financed privatisation of SOEs’, in which the transactions were actually acquisition deals.<sup>53</sup> Although FDI has brought positive aspects of ‘the rule of law’ to China, in terms of the roles and effects of FDI, another negative aspect should be considered: by making a partnership with rent-seeking officials, foreign investors are seeking for their own benefits, and loopholes have been made in relevant laws that are beneficial for foreign acquisition. The lawmaking process has become even more complicated.<sup>54</sup>

Apart from Huang’s empirical observations, if we look at Jiang Zemin’s party school speech, which stresses the establishment of a ‘socialist market economy with Chinese characteristics’ (*you zhongguo tese de shehui zhuyi shichang jingji* 有中国特色的社

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2002; Huang Yasheng, ‘Growth Dynamics in China and India: Getting the Story Right’, Public Lecture, the London School of Economics, UK, 11 October 2006.

<sup>51</sup> See e.g., Huang, ‘Why China Will Not Collapse’, *Foreign Policy*, no. 99 (Summer 1995): 54-68; Huang, ‘Did the Chinese Government Pursue a Gradualist Reform Strategy in the 1990s?’, Huang Yasheng and Tarun Khanna, ‘Can India Overtake China?’, Huang Yasheng, *Selling China*.

<sup>52</sup> Liberalisation is one of three focal points (the others being privatisation and stabilisation) of the Washington consensus for economies in transition. Although economic liberalisation is often associated with *privatisation*, the two can be quite separate processes.

<sup>53</sup> See generally, Huang, *Selling China*. The Chinese version of this book is entitled *Gaige Shiqi de Waiguo Zhijie Touzi* [*The Foreign Direct Investment in the Reform Era* 改革时期的外国直接投资], which seems to have avoided the indications of the English title *Selling China*.

<sup>54</sup> See recent cases in Xu Yunqian, ‘Guo Jingyi Luoma, Waizi Bingguo Fagui Shuoyi [The Arrest of Guo Jingyi Poses Doubts on Foreign Acquisition Regulations]’, in <http://business.sohu.com/20080906/n259405974.shtml> (last visited 29 September 2008); Wang Heyan, ‘Another Arrest at the Ministry of Commerce’, *Caijing Magazine*, 28 September 2008, <http://english.caijing.com.cn/2008-09-28/110016811.html> (last visited 29 September 2008). This case involved officials that took charge of drafting laws and regulations for foreign investment at two departments of the Ministry of Commerce, namely the Department of Foreign Investment and the Department of Treaty and Law. These rent-seeking officials formed a partnership with lawyers and foreign investors, and drafted laws and regulations that have been beneficial for foreign enterprises.

会主义市场经济) in 1992,<sup>55</sup> the comprehensive economic reform agenda outlined by Jiang in fact marked a move away from the gradualist model. Compared with the *ad hoc* fashion in the 1980s, Jiang and his colleagues clearly strengthened government macroeconomic regulation and control of Chinese economy.<sup>56</sup>

In November 1993, the decision<sup>57</sup> made by the third Plum of the 14<sup>th</sup> National Congress of the CPC outlined a 50-point agenda for establishing a ‘socialist market economy’, including creating a ‘modern enterprise system’ (*xiandai qiye zhidu* 现代企业制度). Since the corporatisation program initiated in 1994, the focus of the SOEs reform has been shifted from delegation of decision-making authority to corporate governance and ownership. However, it is worth distinguishing the approaches for restructuring large SOEs from those for restructuring small and medium SOEs. In light of large SOEs, in November 1994, 100 large and medium-sized SOEs were selected to be corporatised within two years in the form of limited liability companies (LLCs, *youxian zeren gongsi* 有限责任公司) or shareholding companies (SHCs, *gufen youxian gongsi* 股份有限公司).<sup>58</sup> According to the Company Law that took effect on 1 July 1994, as for a LLC, the shareholder (less than 50) shall be responsible for the company to the extent of the capital contributions they have made; as for a SHC, the shareholders shall be responsible for the company to the extent of the shares they have subscribed for.<sup>59</sup> Later some of these SHCs listed on the Chinese stock exchanges in Shanghai and Shenzhen.

The corporatisation reform also involves the creation of state-owned investors or entities such as state asset administration departments.<sup>60</sup> The state shares in the

<sup>55</sup> Jiang delivered a party school speech before the 14<sup>th</sup> Party Congress, the speech was circulated among central and provincial leaders. This speech also laid the theoretical background for the 14<sup>th</sup> Party Congress in 1992.

<sup>56</sup> See Yang, *Remaking the Chinese Leviathan*, 7-8.

<sup>57</sup> Guanyu Jianli Shehui Zhuyi Shichang Jingji Tizhi Ruogan Wenti de Guiding [The Decision on Issues Concerning the Establishment of a Socialist Market Economic System], available at <<http://www.china.com.cn/chinese/archive/131747.htm>> (last visited 11 September 2008).

<sup>58</sup> See Ma, ‘The Chinese Route to Privatisation: 381.

<sup>59</sup> Gongsifa [The Company Law] of the PRC, Article 3.

<sup>60</sup> Before 2003, there were many state agencies bearing the responsibilities of guiding the SOE reform,

corporatised SOEs are to be allocated to these asset administration entities, which would represent the state owner.<sup>61</sup> LLCs do not issue shares to the public. When a SOE is corporatised as a LLC, it could be a state-controlling LLC, if the state controls more than 50% of the shares; or a wholly state-owned LLC, if the state is the sole investor.<sup>62</sup> By contrast, corporatisation of SOEs into SHCs is through share offers. Shares are issued to the state, enterprises, and individuals. Non-state entities thus can be shareholders. Private individuals can acquire partial ownership of SOEs.<sup>63</sup> However, through various means, ‘the state’ can still retain the control over the ‘commanding heights’ of the national economy. For example, the Party select the senior management of large SOEs. Large SOEs also have direct contact with the decision-making ministries, and managers of the large SOEs could be appointed provincial governors.<sup>64</sup> Corporatisation of large SOEs has not amounted to privatisation. Problems with the shareholding system have been identified. For example, the performance of the listed SOEs in the stock market is poor.<sup>65</sup> The disappointing performance casts doubt on whether the shareholding system with a dominant public shareholder can solve China’s SOEs problem.

In the report delivered by Jiang Zemin at the 15<sup>th</sup> Party Congress in 1997, ‘grasping the large and freeing the small’ (*zhuaida fangxiao* 抓大放小) was endorsed as the centre of the economic reform strategy. ‘Grasping the large’ refers to mergers (*jianbing* 兼并), groupings (*chongzu* 重组) of large SOEs into conglomerates; ‘freeing the small’

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for example, the former State Economic and Trade, the former CPC Enterprise Work Commission, the Ministry of Finance, and the Ministry of Labour and Social Security.

<sup>61</sup> See Lau W. K. ‘15<sup>th</sup> Congresses of the Chinese Communist Party: Milestone in China’s Privatization’, *Capital & Class*, no. 68 (1999): 55.

<sup>62</sup> See Article 5 of *Qiye Guoyou Zichan Fa* [The Law of the State-Owned Assets of Enterprises], promulgated by the Standing Committee of the NPC on 28 October 2008; will take effect on 1 May 2009.

<sup>63</sup> See Ma, ‘The Chinese Route to Privatization’: 379.

<sup>64</sup> Since the 17<sup>th</sup> National Congress of the CPC, many managers of the large SOEs have been appointed provincial leaders. For example, general manager of the FAW (First Automobile Manufacture) Group Corporation, Zhu Yanfeng, has been appointed deputy governor of Jilin Province; director of the Aluminium Corporation of China, Guo Shengkun, has been appointed Party Secretary of Guangxi Province.

<sup>65</sup> See Tian Guoqiang and Liang Hong, ‘What Kind of Privatization?’, in *Dilemmas of Reform in Jiang Zemin’s China*, ed. Andrew J. Nathan, Hong Zhaozui, and Steven R. Smith (Boulder, CO: Lynne Rienner Publishers, 1999), 83-84.

implies that small and medium SOEs can be ‘privatised’, for example, through management buyouts. Most of the schemes in respect to ‘freeing the small’ were initiated and led by local governments,<sup>66</sup> leaving mass lay-off of SOE workers without any guarantee of social welfare. However, the controlling shareholding of the state in large SOEs was maintained. In the same report, Jiang elaborated on the point of mixed ownership by saying: ‘the public economy includes not only the state economy and collective economy, but also the state and collective elements in the sector of mixed ownership’. According to Jiang, the dominant position of public ownership should manifest itself as follows: ‘public assets dominate the total assets of society, and the state-owned economy controls the “commanding heights” of the national economy and plays a leading role in economic development’.<sup>67</sup>

The fact that SOEs are the pillar of the national economy has been reaffirmed in many meetings. In 1998, at the ninth National People’s Congress, Zhu Rongji announced a package of reforms (for example, the reforms of the tax<sup>68</sup> and banking systems) and aimed to strengthen government’s macro-control capacity.<sup>69</sup> A new leadership was selected at the 16<sup>th</sup> National Congress of the CPC in November 2002 and at the 10<sup>th</sup> NPC in March 2003. In the policies set by these meetings and conferences, SOEs still enjoy a superior status in China’s modernisation and industrialisation programs.<sup>70</sup>

In China, the fate of SOEs is in the hands of governments. Take the state asset management system for example. In 2003, authorised by the State Council, the State-Owned Assets Supervision and Administration Commission (SASAC) was

<sup>66</sup> Cao, Qian and Weingast, ‘From Federalism, Chinese Style to Privatization, Chinese Style’: 105.

<sup>67</sup> See Jiang Zemin, ‘Gaoju Deng Xiaoping Lilun Weida Qizhi, ba Jianshe you Zhongguo Tese de Shehui Zhuyi Quanmian Tuixiang Ershiyi Shiji [Hold High the Great Banner of Deng Xiaoping Theory for All-Round Advancement of the Cause of Building Socialism with Chinese Characteristics into the Twenty-First Century]’, (Beijing: Remin Chubanshe, 1997).

<sup>68</sup> The reform of the tax system will be discussed in Section 3 of Chapter Six.

<sup>69</sup> See Tony Saich, *Governance and Politics of China* 2ed. (Basingstoke: Palgrave Macmillan 2004), 81. Also see the discussion on China under reform in 1997-2002 in *ibid*, 80-90.

<sup>70</sup> In fact since 1994, Beijing has invested massively in the state sector, including providing more financial support for existing SOEs and launching new SOEs. SOEs were actually not only maintained but also expanded. See Huang, ‘Can India Overtake China?’, 79.

founded to perform the responsibilities of the investor in the State-owned asset on behalf of the central government (SASAC at provincial and municipal levels are the investor in the state-owned asset on behalf of the provincial and municipal governments). The SASAC combines functions previously performed by a half-dozen regulatory bodies,<sup>71</sup> and guides the SOE reform and the management of SOEs. However, no monitoring and enforcement mechanism (for example, an independent judiciary or independent regulatory body) yet exists other than the government supervisors in China.<sup>72</sup>

### 2.3. The debates on the restructuring of SOEs

In the process of the SOE reform, management buyouts (MBOs)<sup>73</sup> have, in recent years, become a common approach to privatise SOEs in China. MBOs are acquisition of a company in essence, in which the buyers are managers of the acquired company. If the company is publicly owned such as a SOE, MBOs will turn this company into a private one. However, in most MBOs of listed SOEs in China, the process of MBOs is not always transparent. In addition, managers in Chinese SOEs do not have sufficient funds for their purchases, but conspire with bureaucrats to make deals. Especially when the managers of SOEs who are actually governmental officials, MBOs of SOEs are used as a means to 'turn political power into financial capital'.<sup>74</sup> MBOs of SOEs thus have become a hotbed for rent-seeking, leading China's economic reform to 'a market economy under crony capitalism' (*quangui ziben zhuyi* 权贵资本主义).<sup>75</sup> This issue has already seized the attention of many scholars.<sup>76</sup>

<sup>71</sup> See 'SASAC's Responsibilities & Targets', People's Daily, 22 May 2003. In <[http://english.peopledaily.com.cn/200305/22/eng20030522\\_117060.shtml](http://english.peopledaily.com.cn/200305/22/eng20030522_117060.shtml)> (last visited 11 September 2008).

<sup>72</sup> On this, also see Yusuf, Nabershima, and Perkins, *Under New Ownership*, 104.

<sup>73</sup> In Chinese, MBOs are translated 'guanliceng shougou' (管理层收购).

<sup>74</sup> See Kwan Chi Hung, 'The Huge Debate over Privatization and MBOs—Can the Drain on State-Owned Assets Be Justified?', *China in Transition*, 15 September 2004. In <<http://www.rieti.go.jp/en/china/04091501.html>> (last visited 28 May 2006).

<sup>75</sup> See e.g., Wu Jinglian, 'The Road Ahead for Capitalism in China', *The McKinsey Quarterly*, Special Edition (2006): 117-121; Wedeman, *From Mao to Market*, 2-3.

<sup>76</sup> For example, Liang Xianping, Wu Jinglian, Qin Hui, He Qinglian.

Professor Lang Xianping at the Chinese University of Hong Kong has argued that China's privatisation of SOEs through MBOs has undermined state-owned assets, given the lack of a solid legal framework and a transparent mechanism for the reconstruction of SOEs. Especially since 2004, Lang has stirred up a hotly debate over the nature and direction of privatisation in China, especially between Chinese neo-liberalists and the new-left.

Supporters of privatisation base their arguments on the economic analysis of property rights,<sup>77</sup> which attempts to reconcile private ownership and overall efficiency.<sup>78</sup> The discourses of property rights in contemporary China have also been largely influenced by the writings of Ronald Coase in which 'transaction costs' are the key to the understanding of economic institutions.<sup>79</sup> Specification and enforcement of property rights serve to lower transaction costs and make economic development more likely. Privatisation is considered an important means to introduce clearly defined private property rights that are essential for the most efficient use of resources and well-functioning markets.<sup>80</sup>

Yet supporters of privatisation along the lines of neoliberalism do not capture the complexity of China's economic growth. While transformation of ownership is taking place under the slogan of promoting the efficiency of the SOEs, China's economy performance and its relation with clarity of property rights challenge the above premises of the economic theory of property rights. For example, China has achieved economic growth, whereas ownership and property rights remain vaguely defined. Furthermore, the economic analysis of property ignores the diversified

<sup>77</sup> See e.g., Harold Demsetz, 'Toward a Theory of Property Rights', *The American Economic Review* 57, no.2 (1967): 347-359; Richard A. Posner, *Economic Analysis of Law* 2ed. (Boston: Little, Brown, 1977c).

<sup>78</sup> See Alan Ryan, *Property and Political Theory* (Oxford: Blackwell, 1984), 104, 106.

<sup>79</sup> See e.g., R. H. Coase, 'The Nature of the Firm', *Economica* 4, no. 16 (1937): 386-405; R. H. Coase, 'The Problem of Social Cost', *Journal of Law and Economics* (Oct. 1960): 1-44. Coase's thinking is not without its critics, for example, Roberts Ellickson's (1991) study of Shasta, California ranchers points out that Coase adopted the 'legal centralist' view. See Robert C. Ellickson, *Order without Law: How Neighbors Settle Disputes* (London: Harvard University Press, 1991), 4.

<sup>80</sup> See Joshua Getzler, 'Theories of Property and Economic Development', in *Property Problems from Genes to Pension Funds*, ed. J. W. Harris (London, Boston: Kluwer Law International, 1997), 193.

landscape within the field of ownership in China (for example, cooperative companies or firms).<sup>81</sup> Different points of view on the argument that clear definition of property rights can bring about a flourishing market also depend on what we mean by a market.<sup>82</sup> For instance, markets have thrived for centuries in south China—Guangdong, Fujian, where a handshake can seal a deal.<sup>83</sup> Moreover, although privatisation could bring economic liberalisation and modernisation, it does not necessarily go hand in hand with democracy.<sup>84</sup> Efficiency in the economist's sense has nothing to do with social justice.

Sided with Lang, opponents of privatisation argue that state-owned assets have been undermined by privatisation. Although these critics have identified the problems with the ongoing privatisation in China, the real question at issue may not be whether privatisation is a good thing or not, but rather how 'property rights' have been assigned, which is a wider issue of 'social justice'. We need to gauge the degree to which the government (both the central government and local governments) can control resources and decide resource allocation. For example, separation of ownership and management is not as simple as the central government had expected. In the process of marketisation, the authority of the Party-state and the centralised control of Beijing have declined, and the political and economic powers have been gradually converted to local governments.

Despite various measures attempting to strengthen macro-control of the central government, 'hidden privatisation' is undermining absolute state ownership. A casual reading may find it contradicting the above argument that SOEs enjoy a superior status. We need deep scrutiny, and there are two more points deserving in-depth examination. The first one is the nature of private businesses and private entrepreneurs. For example, according to a report of the Private Enterprises Study,

<sup>81</sup> See Chapter Four.

<sup>82</sup> Detailed analysis will be given in Chapter Six.

<sup>83</sup> On the discussion of trust and cooperative relations, also see Diego Gambetta, ed., *Trust: Making and Breaking Cooperative Relations* (Oxford: Basil Blackwell, 1988).

<sup>84</sup> See Fukuyama, *The End of History and the Last Man*, 34.

the percentage of private enterprises owners who were also party members rose from 13.1% in 1993 to 29.9% in 2001.<sup>85</sup> In the year 2001, private entrepreneurs were allowed to join the Party.<sup>86</sup> What does this tell us? The new recruitment policy of the Party was only a confirmation of the fact that many private enterprises had been set up or controlled by party members.<sup>87</sup> The second point is that the so-called ‘absolute’ state ownership has become government agencies’ ownership under the slogan of ‘state ownership’. The central-local relationship therefore deserves in-depth analysis. Section 3 focuses on the decentralisation of state power and the shift in the power of resource allocation by using fiscal decentralisation as the example for explanation.<sup>88</sup>

### **3. The central-local relationship: ‘market-thwarting federalism’<sup>89</sup>**

Viewed in light of both Chinese history and the contemporary Chinese governance system, there are often confrontations and interactions between the central government and its various agents (local governments in particular). How to evaluate the transformation of the central-local relation in the post-1978 era? Like ‘civil society’ and ‘corporatism’, federalism has been widely used to characterise the changes in the Chinese polity.<sup>90</sup> Scholars have described (albeit in different ways) the nature of the decentralisation from the central to local governments in contemporary China as quasi-federal or simply, federal,<sup>91</sup> although the Chinese

<sup>85</sup> See Kwan Chi Hung, ‘Privatization of State-Owned Enterprises Gathering Pace—Whither Chinese Socialism’, *China in Transition*, 26 September 2003. In <<http://www.rieti.go.jp/en/china/03092601.html>> (last visited 28 May 2006).

<sup>86</sup> See Jiang Zemin, ‘Jiang Zemin zai Qingzhu Jiandang Bashi Zhounian de Jianghua [Jiang Zemin’s Speech at the Eightieth Anniversary of the Chinese Communist Party]’, *Renmin Ribao* [People’s Daily], 02 July 2001. In <<http://www.people.com.cn/GB/shizheng/16/20010702/501591.html>> (last visited 20 March 2005).

<sup>87</sup> See Kwan Chi Hung, ‘Privatization of State-Owned Enterprises Gathering Pace—Whither Chinese Socialism’.

<sup>88</sup> For using the fiscal decentralization as a case study-methodology, see generally Nicholas R. Lardy, *Economic Growth and Distribution in China* (Cambridge; New York: Cambridge University Press, 1978).

<sup>89</sup> I borrow this term from Kellee S. Tsai, ‘Off Balance: The Unintended Consequences of Fiscal Federalism in China’, *Journal of Chinese Political Science* 9, no. 2 (2004): 1-26.

<sup>90</sup> See Goldstein, ‘China in Transition’: 1127.

<sup>91</sup> See e.g., Cao, Qian and Weingast, ‘From Federalism, Chinese Style to Privatization, Chinese Style’; Huang Yasheng, *Inflation and Investment Controls in China: The Political Economy of Central-Local Relations During the Reform Era* (New York: Cambridge University Press, 1996); Tsai, ‘Off Balance’: 4.

political system is different from ‘constitutional federalism’, and local governments in China do not have ‘formal political autonomy *vis-à-vis* the centre’.<sup>92</sup>

Some scholars in the scholarship studying federalism in China hold that federalism is market-preserving, and federalism underpins economic growth in China.<sup>93</sup> These scholars also use federalism to gauge privatisation undertaken in China. For example, they argue that ‘federalism, Chinese style, is a key to the understanding of economic and political dynamics underlying privatisation in China... [The Chinese style of privatisation] rests on a Chinese style economic and political foundation of federalism’.<sup>94</sup> However, ‘market-preserving federalism’ does not provide a comprehensive account for the origin, motivations, constraints and consequences of federalism in the Chinese context. For example, they have not taken much account of the broader political framework that is often characterised as ‘socialism with Chinese characteristics’:

it was no longer socialist but was not yet capitalist, and instead stood awkwardly between the old Maoist command economy and the market. Moreover, China’s reformers rejected political reforms. Instead, they implemented a program of decentralization that increased the power of local governments but failed to institutionalize legal structures that would prevent local officials from selectively applying economic regulations.<sup>95</sup>

Although the pre-1978 economy is generally labelled as ‘central-planning’, the presumption that the fiscal system was unitary in the pre-1978 period is an oversimplification. Decentralisation in China has some roots dating back to the 1950s. Unlike the Soviet Union, where the strong vertical administration sidestepped local governments and allocated plans directly to enterprises, ‘the Maoist system

<sup>92</sup> See Tsai, ‘Off Balance’: 4.

<sup>93</sup> See e.g., Qian Yingyi and Barry R. Weingast, ‘China’s Transition to Markets: Market-Preserving Federalism, Chinese Style’, *Journal of Policy Reform* 1 (1996): 149-185; Qian Yingyi and Barry R. Weingast, ‘Federalism as a Commitment to Preserving Market Incentives’, *The Journal of Economic Perspectives* 11, no. 4 (1997): 83-92; Barry R. Weingast, ‘The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development’, *Journal of Law, Economics & Organization* 11, no. 1 (1995): 1-31.

<sup>94</sup> Cao, Qian and Weingast, ‘From Federalism, Chinese Style to Privatization, Chinese Style’: 115, 123.

<sup>95</sup> Wedeman, *From Mao to Market*, 5.

decentralised economic and administrative power to the localities', and most of the reform initiatives were from the 'bottom up'.<sup>96</sup> For example, as Lardy points out, in the latter years of the first Five-Year Plan (1953-1958) a Soviet approach to economic planning had already been modified in China by the introduction of a significant degree of decentralisation in economic planning and management.<sup>97</sup> The power of provinces was expanded, and a large number of industrial and commercial enterprises were transferred to local management.<sup>98</sup> Also at that time the efficiency of vertical administration was constrained by the variations in China's geography, transportation conditions and communications capacity.<sup>99</sup>

Despite the fact that decentralisation in the 1950s did not change the whole central-planned scheme in the pre-1978 era, this kind of decentralisation introduced a certain degree of economic power at the local levels that survived into the 1960s and 1970s, leaving an imprint on the fiscal decentralisation in the post-1978 era. In the early 1980s the embracement of economic development by local officials stemmed directly from two institutional changes: one is decollectivisation and the second is fiscal decentralisation.<sup>100</sup> While the centre has political control over the local through the system of party-sanctioned appointments of officials, its fiscal capacity has been forced into decline. For instance, state revenues dropped from 36 percent of the GDP in 1978 to only 16 percent in 2001.<sup>101</sup>

Prior to 1978, revenue collection and redistribution were highly centralised: local governments handed in most of their revenue to the central government and then the

<sup>96</sup> See Jean C. Oi, 'The Role of the Local State in China's Transitional Economy', *The China Quarterly*, no. 144 (1995): 1134.

<sup>97</sup> See Lardy, *Economic Growth and Distribution in China*, 3-4.

<sup>98</sup> See *ibid*, 33.

<sup>99</sup> See *ibid*, 20.

<sup>100</sup> See Jean C. Oi, *Rural China Takes Off: The Institutional Foundations of Economic Reform* (Berkeley: University of California Press, 1999), 14. The Chinese economic transition—from a planned economy to a market economy—is built on four pillars of reform: price reform, industrial reform, banking and financial sector reform, and the reform of public finance. See Donald J. S. Brean, *Taxation in Modern China* (New York: Routledge, 1998), 2.

<sup>101</sup> See Tony Saich, *Governance and Politics in China* 2ed., 155. Also see Tamar Manuelyan Atinc and Bert Hofman, 'China's Fiscal Deficits, 1986-1995', in *Taxation in Modern China*, ed. Donald J. S. Brean (New York: Routledge, 1998), 31-42.

central government reallocated expenditures to local governments from the national budget.<sup>102</sup> A fiscal reform started in the 1980s, and the old system of ‘eating from one big pot’ (*chi daguofan* 吃大锅饭) was replaced with a revenue-sharing system—the ‘fiscal contracting system’ (*caizheng chengbao zhi* 财政承包制), colloquially referred as ‘eating-in-separate-kitchens’ (*fenzao chifan* 分灶吃饭).<sup>103</sup> As a result of the fiscal reform, revenue was divided into three categories: central revenue, local revenue, and shared revenue. The new revenue-sharing system granted more control power over expenditures and budgets to local governments, and motivated local governments to collect taxes.<sup>104</sup> However, during the 1980s, local governments created a series of local taxes, fines and fees, meanwhile the revenue of the central government was diminishing. As a result, excessive fines and fees charged by local governments have imposed great burden on farmers, giving rise to farmers’ resistance and lawsuits submitted by farmers against local governments.<sup>105</sup>

In order to deal with these problems stemming from the revenue sharing system, in 1994 a tax sharing system (*fenshuizhi* 分税制) took the place of the eating-in-separate-kitchens system, that is, the revenue sharing system, intending to increase the revenue of the central government.<sup>106</sup> This tax sharing system separated national taxes from local taxes, and value added tax was to be shared by the central and local governments. For clarifying the responsibility for tax collection, both a national tax bureau and local tax bureaux were set up accordingly.<sup>107</sup> This reform has posed more constraints on local revenue from taxes. Therefore, the incentives of

<sup>102</sup> See Tsai, ‘Off Balance’: 6.

<sup>103</sup> See ibid. On fiscal reforms, also see e.g., Christine P. W. Wong, Christopher Heady, and Woo Wing Thye, *Fiscal Management and Economic Reform in the People’s Republic of China* (Oxford; New York: Oxford University Press, 1995).

<sup>104</sup> See Tsai, ‘Off Balance’: 6.

<sup>105</sup> See e.g., Thomas P. Bernstein and Lü Xiaobo, *Taxation without Representation in Contemporary Rural China* (Cambridge: Cambridge University Press, 2003); Kevin O’Brien and Li Lianjiang ‘Villagers and Popular Resistance in Contemporary China’, *Modern China* 22, no. 11 (1996): 28-61.

<sup>106</sup> See Tsai, ‘Off Balance’: 7. On the 1994 fiscal problem and tax reform also see e.g., Tsang Shu-ki and Cheng Yuk-shing, ‘China’s Tax Reforms of 1994: Breakthrough or Compromise’, *Asian Survey* 34, no. 9 (1994): 769-788; Zhang Le-Yin, ‘Chinese Central-Provincial Fiscal Relations, Budgetary Decline and the Impact of the 1994 Fiscal Reform: An Evaluation’, *The China Quarterly*, no. 157 (1999): 115-141.

<sup>107</sup> See Cao, Qian and Weingast, ‘From Federalism, Chinese Style to Privatization, Chinese Style’: 116.

local governments to privatise local enterprises have been largely driven by the financial pressures from harder budget constraints. Privatisation of local enterprises can increase revenue of local governments, meanwhile local governments can get rid of the burden of supervising SOEs.

Yet the tax reform did not affect the major revenue sources of local governments, because the tax reform concerned only the official ‘budgetary’ (*yusuannei zjin* 预算内资金) and ‘extra-budgetary’ (*yusanwanai zjin* 预算外资金) accounts.<sup>108</sup> Local governments still have other important revenue sources in the unofficial ‘self-raised’ fund (*zichou zjin* 自筹资金) account which is ‘off-budgetary’.<sup>109</sup> Extra-budgetary funds rely on various fees, local surtaxes, and income from fines. Self-raised funds are collected by local governments without clear restraints on the measures.<sup>110</sup> For example, land tax has become the major ‘extra-budgetary fund’ of local governments, while income from selling land use rights is one of the most important self-raised funds of local governments. Local governments are therefore keen on selling land use rights, and the emerging urban property market has given local government more such opportunities to collect revenue. In the urban property market, the central-local relationship becomes even more complex. The relationship between the tax reform and the urban property market will be discussed in detail in Chapter Six.

In order to better understand the tax reform, it is necessary to outline briefly the monetary and banking systems that are closely linked to the tax system. Local branches of the central bank were once under dual supervision—they were responsible to both the central bank and the local government of the region where they were located.<sup>111</sup> The banking system based on regions was restructured in 1999.

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<sup>108</sup> See *ibid*: 117.

<sup>109</sup> ‘Local off-budget funds +increased local expenditures=>Declining central tax ratios’, see Tsai, ‘Off Balance’: 8.

<sup>110</sup> See Andrew Wademan, ‘Budgets, Extra-Budgets, and Small Treasuries: The Utility of Illegal Monies’, *Journal of Contemporary China* 9, no. 25 (2000): 498.

<sup>111</sup> See Cao, Qian and Weingast, ‘From Federalism, Chinese Style to Privatization, Chinese Style’: 117. On the close relationship between local governments and bank branches, also see Goldstein, ‘China in Transition’: 1120. There is ongoing trend that the centre has been recollecting the

Since then, local bank branches have been supervised only by the central bank.

Nonetheless, local governments still have the power to exert pressures on state banks to extend loans (for example, to SOEs) for considerations of local economic performance and social stability.<sup>112</sup> SOEs have continuing privileged access to bank loans, whereas private enterprises have restrained access to bank credit.<sup>113</sup>

The sharp decline in the ratio of government revenue to the gross national product (GNP) is an illustration of the unintended consequences of the fiscal and tax reforms: the fiscal and financial capacities of the central government have been eroded and local protectionism has been stimulated. As Lardy argues, despite the ongoing trend of decentralisation, the Chinese search for a model for economic reform has focused 'almost exclusively on administrative forms of decentralisation':<sup>114</sup> local leaders clearly prefer 'a decentralisation of administrative powers' that would enhance their power in controlling and mobilising resources rather than 'a market decentralisation' that would reduce such power.<sup>115</sup> As a result of the 'administrative decentralisation', much administrative decision-making power has been shifted from the central government to local government, whereas the scope of market and market activities have been limited. Against this background, local governments have *de facto* ownership over state assets.<sup>116</sup>

In the decentralisation of power from the central government to local governments, the previously assumed 'zero-sum model' of the relationship between the centre and

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administrative power from local governments, for example, in the areas of administration for industry & Commerce, administration of customs, tax, auditing and so on.

<sup>112</sup> See Tsai, 'Off Balance': 16.

<sup>113</sup> See e.g., Huang, *Selling China*; Huang Yasheng and Tarun Khanna, 'Can India Overtake China?'; Kellee S. Tsai, *Back-Alley Banking: Private Enterprises in China* (Ithaca: Cornell University Press, 2002).

<sup>114</sup> See Lardy, *Economic Growth and Distribution in China*, 28.

<sup>115</sup> See *ibid.*

<sup>116</sup> See e.g., Huang, *Inflation and Investment Controls in China*, chapter 2; Huang Yasheng, 'Web of Interests and Patterns of Behavior of Chinese Local Economic Bureaucracies and Enterprises During Reforms', *The China Quarterly*, no. 123 (1990): 413-458; Andrew G. Walder, 'Evolving Property Rights and Their Political Consequences', in *China's Quiet Revolution*, ed. David S. Goodman and Beverley Hooper (Melbourne: Longman Cheshire, 1994), 3-18.

the local is not sufficient anymore.<sup>117</sup> First, local governments have cultivated various kinds of strategies to cope with the central government in decentralisation. In this sense, rather than stimulating the market, ‘federalism’ has also set up barriers to marketisation. For example, local protectionism (*difang baohu zhuyi* 地方保护主义) has emerged during the reforms involving ‘the illicit and irregular use of administrative controls by local governments to interfere with the flow of commodities between localities’.<sup>118</sup> Huang Yasheng also demonstrates that domestic capital mobilising across regions in China is very low.<sup>119</sup> Secondly, some scholars also remind us of the possible check function of local governments. For example, various kinds of reform have conducted across different regions in China. In the wake of the Tiananmen Square crackdown, the centre could not bring these local reforms to a halt and restore the central planning completely, due partly to the resistance of local leaders.<sup>120</sup> Thirdly, regional inequality and variations should also be taken account into examining the transformation of the governance system. In *Beyond Beijing*, Yang Dali argues that in order to understand the dynamics of regional change it is necessary to consider the attitudes of inland provinces and central government separately and in relation to the coastal regions, rather than only through examining the development and behaviour of the coastal regions.

Furthermore, the centre government’s macro-control measures and regulation are in fact an attempt to shift powers from local governments (*difang zhengfu* 地方政府) to various industrial ministries and departments (*buwei* 部委), because China’s bureaucracy is organised in the pattern of the ‘*tiao*’(条)- ‘*kuai*’(块) system. ‘*Tiao*’—vertical branch agencies of the state including industrial ministries or departments (*bumen* 部委)—rely on higher-level political and budgetary support, while ‘*kuai*’—horizontal agents of local governments (*zhengfu* 政府)—generally

<sup>117</sup> See generally, Linda Chelan Li, *Centre and Provinces—China 1978-1993: Power as Non-Zero-Sum* (New York: Oxford University Press, 1998).

<sup>118</sup> Wedeman, *From Mao to Market*, 17.

<sup>119</sup> See Huang, *Selling China*, 66.

<sup>120</sup> See Huang, *Inflation and Investment Controls in China*, 1-2.

depend on local resources.<sup>121</sup> There are often tensions and disputes the *tiao* and the *kuai*, which demonstrate the key competitors for the economic decision-making power: the *tiao* and the *kuai*. For example, in China more than eight *buwei* signed the document of macro-control measures to curb soaring house prices,<sup>122</sup> whereas in the US there is only the Federal Reserve, which plays the major role in the macro-control of the housing market.<sup>123</sup>

In sum, China's economic performance is not due to 'the structural laissez-faire logic of market-preserving federalism', but the local governments' intervention in economy, which is in fact 'the market-thwarting federalism'.<sup>124</sup> Furthermore, reassignment of property rights to local jurisdictions has increased the economic power of local officials, making them look more like 'principals' rather than 'agents' of public assets as compared to their previous status.<sup>125</sup> As Li Yi-min points out, 'a market-like' place has emerged, where the power of controlling and mobilising resources has shifted from the central government to local governments, and state-owned assets are propriated by state agents at different levels for seeking their own benefits.<sup>126</sup>

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<sup>121</sup> See Richard Baum and Alexei Shevchenko, 'The "State of the State"', in *The Paradox of China's Post-Mao Reforms*, ed. Merle Goldman and Roderick MacFaquhar (Cambridge, Mass.: Harvard University Press, 1999), 340.

<sup>122</sup> On the macro-control of China's Housing Prices see 'China's New Macro-Control Measures Expected to Curb Soaring House Prices', People's Daily Online, 22 May 2006. In <[http://english.peopledaily.com.cn/200605/22/eng20060522\\_267532.html](http://english.peopledaily.com.cn/200605/22/eng20060522_267532.html)> (last visited 22 May 2006).

<sup>123</sup> See Qiu Feng, 'Zhongguo Yao Zhemodu Buwei Canyu Hongguan Tiaokong ma? [Does Macro-Control in China Need So Many Industrial Ministries?]', 18 September 2006. In <<http://business.sohu.com/20060918/n245391437.shtml>> (last visited 16 October 2006). The relationship between the dualism of *tiao* versus *kuai* and the urban property market will be explored in Chapter Six.

<sup>124</sup> See Tsai, 'Off Balance', 5.

<sup>125</sup> See Jean C. Oi and Andrew G. Walder, eds., *Property Rights and Economic Reform in China* (Stanford, Calif.: Stanford University Press, 1999).

<sup>126</sup> See Lin Yi-min, *Between Politics and Markets: Firms, Competitions and Institutional Change in Post-Mao China* (Cambridge: Cambridge University Press, 2001), 6; Lin Yi-min and Zhang Zhanxin, 'Backyard Profit Centers: The Private Assets of Public Agencies', 203-225.

## 4. Conclusion

The emergence and maintenance of state ownership in post-Mao China is based on the modernisation and industrialisation program, nation-building, as well as socialist ideology. However, the examination of the fragmentation of state ownership in reality poses challenges to such unitary theory of ownership in present-day China.

On the one hand, private property has revived in economic reform especially the SOE reform; on the other hand the owner(s) of public assets have become even more ambiguous, and this has been demonstrated, for example, in the changing central-local relation and the control and allocation of resources by the central government and local governments.

Moreover, the nature of ‘privatisation’ in China is ambiguous. Privatisation in China has not followed the gradualist model. Since the mid-1990s, the central government has strengthened its macro-control of the economy and tightened policies towards domestic private enterprises, but significant privatisation has been done through FDI and foreign acquisition. As reforms have stalled halfway between the plan and the market,<sup>127</sup> and more and more ‘rents’ have been produced, such privatisation only amounts to ‘hidden privatisation’: the control of public assets has been gradually transferred to the persons or privileged groups who hold political power. Political power has thus been capitalised, and the capitals are inclined to find their way into the hands of those in political power. If capitalism may be said to be emerging in China, it might only amount to ‘crony capitalism’ characterised by rent-seeking and ‘a market economy under crony capitalism’.

The fragmentation of state ownership also challenges the assumption that privatisation is the most efficient way to utilise and manage resources. The deep problems with SOEs are not due to vague property rights nor inefficient corporate governance, but link to unbalanced economic reform and political reform.

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<sup>127</sup> See e.g., Wedeman, *From Mao to Market*, 2-3.

Privatisation should not be just the conversion of public assets to private owners, but also needs a transparent procedure. It is worth examining the political and social frameworks within which private property might make sense. This point will be developed further in Chapter Six on the emerging private ownership in the urban property market.

## **Chapter 6: Emerging Private Ownership in Urban China: the Meaning of Private Property in the Property Market**

### **1. Introduction**

The revival of private property has triggered disputes between different theoretical and political camps in China, especially between Chinese neo-liberalists and the new left.<sup>1</sup> The emergence of the property market in urban China puts the question of China's future in issue: whether China's future is transforming towards capitalism.

For example, although the new left has criticised 'primitive accumulation' and the ills unleashed by capitalism, what they and the neo-liberalists hold in common is the assumption that the revival of private property will lead China to capitalism.

However, is this assumption correct? Seeking a possible answer to this question involves an in-depth analysis of Chinese society. The simple 'ism' debate (that is, socialism versus capitalism) is futile if it is detached from broader settings of culture, society and politics. After examining the revival of private property in both rural China and the SOE reform, this chapter looks at the re-emergence of private property in another important area—the urban property market in post-Mao China. This chapter focuses on the nature of private property from the perspective of the emerging property market and the spatial, legal and political transformations accompanying it in urban China.

In China there has been a long history of 'the culture of poverty',<sup>2</sup> and the private (*si* 私) has long been inferior to the public (*gong* 公). The advent of socialist rule in 1949 brought significant changes to the official conception of property. Between 1956-1978, 'the private' was deemed evil and virtually abolished. Since market reform commenced in 1978, the private sector has re-emerged, and the status of

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<sup>1</sup> On Chinese neo-liberalism and the new left see Chapter One, Section 3.

<sup>2</sup> 'The culture of poverty' is a term borrowed from Oscar Lewis, *Five Families: Mexican Case Studies in the Culture of Poverty* (New York: Basic Books, 1975). In pre-1978 China (rural China in particular), people lived in poverty and infertile environment, and they struggled for basic food and shelter, and lost the ambition for making wealth.

private property has been gradually recognised by the law.<sup>3</sup> For example, the status of private property was acknowledged by the Constitution in 2004, and the Property Law came into effect in 2007, providing equal protection for public and private property. However, the private is still often regarded as a contrast to, or as subordinate to, the public.

Urban land, one of the most important state-owned assets, became leaseable and transferable in the late 1980s through the mechanism of the land use rights (LUR) system, which has separated the ownership and use rights pertaining to urban land.<sup>4</sup> The lease and transfer of LURs have given rise to the emergence of an urban property market, which is regarded as one of the most important indications for the revival of private property in China.

In parallel with changes to the urban land system, the urban housing sector involves many transformations: When the PRC was established in 1949, private ownership was not formally abolished immediately; in the cities, people owned real estate. The 1954 Constitution acknowledged the status of private ownership. However, since the 'socialist transformation' in 1956, private housing had been virtually abandoned during the late 1950s and 1970s.<sup>5</sup> In the 1980s there was a massive construction of public housing and the dominant form was public rental.<sup>6</sup> The housing was built on allocated state-owned land, and work units (*danwei* 单位)<sup>7</sup> or urban Real Estate

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<sup>3</sup> See Chapter Three.

<sup>4</sup> The duration of an LUR varies from 40 to 70 years, depending on the types of land use. In order to acquire LURs, property developers have to develop good relationships with local governments, and so more rent-seeking opportunities have been generated.

<sup>5</sup> In the late 1980s, state policies permitted the original owners and their heirs to claim partial property rights over houses which were once managed by the state, but even today there is not a good mechanism for the original owners and their heirs to claim complete property rights.

<sup>6</sup> See Huang Youqin, 'The Road to Homeownership: A Longitudinal Analysis of Tenure Transition in Urban China (1949-1994)', *International Journal of Urban and Regional Research* 28, no. 4 (2004): 778.

<sup>7</sup> *Danwei* is a special form of social organisations. On *danwei* see e.g., Lü Xiaobo and Elizabeth J. Perry, eds, *Danwei: The Changing Chinese Workplace in Historical and Comparative Perspective* (Armonk, N. Y.: M. E. Shape, 1997c). *Danwei* is powerful in China. For example, Chinese people needed the approval of *danwei* for marriage, and *danwei* is still controlling various aspects of people's daily life nowadays. There are two major views on *danwei*, one is the analogy drawn by Lu Feng between *danwei* and traditional Chinese social structure—the clan. Lu argues that the work-unit is a

Administration Bureaux represented the *de facto* ‘public’ owners. In the late 1980s, based on the LUR system, urban households in China were given the opportunity to purchase their flats or houses for the first time.<sup>8</sup> In March 1998, Premier Zhu Rongji introduced a package of reforms that included terminating housing provision and allocation by work units.<sup>9</sup> The subsequent direction of the housing reform has been to let the individual household purchase the houses, and the private housing market has since been flourishing. In 2000, housing began to be commodified in China.<sup>10</sup> As Huang Youqin points out, a class of homeowners began to emerge.<sup>11</sup> Yet precisely who the owner(s) of urban landed property are remains opaque, because while a LUR system has opened up the use of the state-owned land, the ‘state’<sup>12</sup> maintains its ownership of urban land. Moreover, the extent to which Chinese people ‘own’ their private property (for example, their apartments) is debatable: although urban land has been commodified, it is far from being privatised.

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closed system (the buildings of *danwei* resemble the expanded closed compounds) led by non-contract connections. We could compare Lu Feng’s observation with that of Andrew Walder’s ‘communist neo-traditionalism’, which refers to the special type of authority represented by *danwei*. Although they are two different points of view about the authority of *danwei*, both of them identify the working of *danwei* within tradition. See Lu Feng, ‘Danwei: Yizhong Teshu de Shehui Zuzhi Xingshi [the Work Unit: A Special Form of Social Organization]’, *Zhongguo Shehui Kexue [Chinese Social Sciences]*, no. 1 (1989): 71-88; Lu Feng, ‘The Work Unit: A Unique Form of Social Organization’, in *Streetlife China*, ed. Micahel Dutton (Cambridge: Cambridge University Press, 1998 [1989]), 53-58; Andrew G. Walder, *Communist Neo-Traditionalism: Work and Authority in China Industry* (Berkeley: University of California Press, 1986c).

<sup>8</sup> At that time, there was a need to stimulate the economy, and the real estate market has served as such an engine since then.

<sup>9</sup> During the course of the housing reform until 1998, a new kind of housing (the so-called ‘reform housing’, *fanggaifang* 房改房) emerged. Public housing had been sold, mostly to sitting tenants at discounted prices. Because this housing was built on allocated state-owned land, and LUR transfer fees were not paid, buyers just ‘owned’ the houses themselves. When resale becomes necessary, the work unit had the right of first refusal, and the owner must hand back to the land management bureaux a proportion of the profits made as LUR transfer fees. On this see Wang Ya Ping, ‘Urban Housing Reform and Finance in China: A Case Study of Beijing’, *Urban Affairs Review* 36, no. 5 (2001): 625. According to the new housing policies introduced in 1998, employees should go to the real estate market to purchase their housing; work units should not be involved directly in housing construction and provision, but could provide housing subsidies for their employees. This new policy was in response to the Asian financial crisis, and the government strategy at that time was to expand internal consumption. On Zhu Rongji’s reform package see e.g., David Zweig, ‘China’s Stalled ‘Fifth Wave’: Zhu Rongji’s Reform Package of 1998-2000’, *Asian Survey* 41, no. 2 (2001): 231-247.

<sup>10</sup> On housing commodification see e.g., Zhou Min and John R. Logan, ‘Market Transition and the Commodification of Housing in Urban China’, in *The New Chinese City: Globalization and Market Reform*, ed. John R. Logan, (Oxford: Blackwell Publishers, 2002), 137-152.

<sup>11</sup> Huang Youqin, ‘The Road to Homeownership’: 774.

<sup>12</sup> Here the question is who can represent the state.

The second part of this Chapter discusses the emergence of the rural-urban divide and the state housing allocation system. The third part analyses the emergence of the property market in urban China and explores the nature of private ownership in relation to the complexity of urban governance in post-Mao China. The fourth part analyses the reconfiguration of the spatial, social and political spheres in urban China from the perspective of the revival of private property.

## **2. The emergence of the rural-urban divide and the state housing allocation system**

Urbanisation and the formation of ‘modern’ cities in China from early Republican China (1911-1949) began to smash urban-rural uniformity<sup>13</sup> and gave birth to the urban-rural divide. The gap between the urban and the rural has become even wider in the post-1949 era. The Maoist regime, although it claimed to be pro-village and anti-city, ‘was fundamentally urban after all’.<sup>14</sup> The regime has been deeply alienated from the countryside.<sup>15</sup> Industrialisation was the priority in the making of the modern state, and transferring agricultural resources to the industrial sector accelerated the urban-rural divide. Furthermore, the mobility of rural people to cities is controlled by the state through the household registration system (*hukou zhishu* 户籍制度).<sup>16</sup> The rural-urban divide has given rise to two different land systems—the rural land system and the urban land system.

Before 1978, urban land was not a commodity, and was allocated by administrative methods.<sup>17</sup> The state could grant land use rights to its agencies, for example, governments, SOEs, hospitals, and universities.<sup>18</sup> These state agencies were not just

<sup>13</sup> On urban-rural uniformity, see Chapter Two, Section 3.5.

<sup>14</sup> David Strand, ‘New Chinese Cities’, in *Remaking the Chinese City: Modernity and National Identity, 1900-1950*, ed. Joseph W. Esherick (Honolulu: University of Hawaii Press, 2000c), 223.

<sup>15</sup> See Kate Xiao Zhou, *How the Farmers Changed China: Power of the People* (Boulder, Colo.: Westview Press, 1996), 243-244.

<sup>16</sup> See e.g., Cheng Xuan, ‘Problems of Urbanization under China’s Traditional Economic System’, in *Chinese Urban Reform: What Model Now?* ed. R. Yin-Wang Kwok [et al] (Armonk, N. Y.: M. E. Sharpe, 1990c), 67-68.

<sup>17</sup> Land in cities in pre-1949 China was privately owned.

<sup>18</sup> See e.g., Hsing You-tien, ‘Land and Territorial Politics in Urban China’, *The China Quarterly*, no.

land users, but also held management rights and acted as the *de facto* owners.<sup>19</sup>

Under the PRC between 1949-1978, the local referred to the establishment of the ‘basic units’ (*jiceng danwei* 基层单位).<sup>20</sup> One important means of administrative allocation for urban land was through work units (*danwei* 单位). Until 1999, most of China’s urban residents lived in state-owned housing built and distributed by their public-sector employers,<sup>21</sup> that is, work units.

*Danwei* used their land for building workplaces and providing housing for their employees as social welfare and as a constituent of the wage. *Danwei* such as SOEs were keen to acquire more land; land was given to SOEs but often failed to return back to the state.<sup>22</sup> Moreover, the assumption that housing allocation in Chinese society before 1978 was egalitarian is an illusion. Although the criteria for allocating houses were not based on economic strata, the standards were based on marital status, the length of service, and most importantly, the administrative ranks. Staff with higher ranks enjoyed privileges in housing allocation and distribution, although they lived in the same *danwei* compounds as those with lower ranks. Chinese society was (and still is) a ‘rank-seeking’ society.<sup>23</sup>

As analysed in Chapter Five, as partial market reform has stalled between the plan and the market, a dual-track reform has emerged since 1985, including the ‘dual-track system’ of prices (*jiage shuanggui zhi* 价格双轨制). During economic reform, the power of control and mobilise resources that once enjoyed by the central government has been decentralised and shifted into localities. Against this backdrop, it is not easy to define what the Chinese ‘state’ is and explain how the state works to

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<sup>187</sup> (2006): 579.

<sup>19</sup> See *ibid*: 580.

<sup>20</sup> For example, Street offices (*jiedao banshichu* 街道办事处) and residents communities (*jumin weiyuanhui* 居民委员会). Street offices are the basic level of government in the city; residents communities are self-governing organisations of local residents in the city.

<sup>21</sup> Public-sector employers included government agencies, service units (for example, educational and cultural institutions), large SOEs, and other social organisations affiliated with the government.

<sup>22</sup> See Li Ling Hin, *Urban Land Reform in China* (London: Macmillan, 1999), 32.

<sup>23</sup> See Liu Xiaobo, ‘From Rank-Seeking to Rent-Seeking: Changing Administrative Ethos and Corruption in Reform China’, *Crime, Law and Social Change* 32, no. 4 (1999): 347-370.

govern China and control localities given the vast landscape of China. It is thus necessary to explore the central-local relationship and its impact on property-holding in urban China. The dual-track reform and the changing central-local relation have shaped the urban property market. The land use rights allocation system and the property market that will be discussed in the chapter below are legacies of the partial economic reform.

### **3. The emergence of urban property markets**

#### **3.1. The dual-track land use rights allocation system**

Urbanisation has speeded up since the late 1980s and Deng Xiaoping's southern tour (*nanxun* 南巡) in particular. Rapid urbanisation fuelled the commercial value of urban land in the 1990s. This change called for a new mechanism to improve the market efficiency of the urban land system while maintaining the doctrine of state landownership. It was in response of this challenge that the LUR system emerged. The LUR system, along with the change in housing provision, has led to the formation of urban property markets in China. The LUR system—in emulation of 'legacy' leasehold in Hong Kong—was first developed to attract foreign direct investment (FDI) in order to fund the construction of Special Economic Zones (SEZs) such as Shenzhen.<sup>24</sup> Urban land was leased to foreign investors so that they could access and use the land for a certain period of time.<sup>25</sup> The establishment of the LUR system also served as an engine to boost economic growth; since the mid-1980s, the

<sup>24</sup> Leasing the land in return for cash was the solution to the funding shortage in constructing Shenzhen, but leasing publicly-owned land to 'capitalists' was regarded as a betrayal of the socialist principles. In order to justify the LUR system, cadres and policy makers found a quotation in Lenin's *The State and Revolution* in which Lenin cited Engels' *The Housing Question* (1872): 'the "working people" remain the collective owners of the houses, factories and instruments of labour, and will hardly permit their use, at least during a transitional period, by individuals or associations without compensation for the cost. In the same way, the abolition of property in land is not the abolition of ground rent but its transfer, if in a modified form, to society'. See V. I. Lenin, *The State and Revolution: The Marxist Theory of the State and the Tasks of the Proletariat in the Revolution* (Moscow: Progress Publishers, 1949[1917]), 57.

It is said that at that time every cadre in Shenzhen could recite this quotation. On this see e.g., *Wu Xiaobo, Jidang sanshinian: zhongguo Qqiyie 1978-2008 [Chinese Business 1978-2008, Vol.1]* (Beijing: Zhongxin chubanshe, 2008), 52-53.

<sup>25</sup> See Ding Chengri, 'Land Policy in China: Assessment and Prospects', *Land Use Policy* 20 (2003): 112.

Chinese economy was in need of an engine for growth, and the real property market became such a mechanism.<sup>26</sup> Although there are some similarities between the LUR system and leasehold in the UK or Hong Kong, there are also differences: Chinese landownership is not divided into freehold and leasehold; furthermore, in China ‘the dual land use rights allocation system’ has led to ‘the dual land property market’ as the legacy of the partial market reform. Therefore, the property market is actually a policy market and has been largely politicised. This chapter will explain this in detail below.

The lease of state-owned lands has been legalised since the promulgation of the 1986 Land Administration Law. In April 1988 the Constitution was also amended to provide that ‘the right of land use can be transferred in accordance with the law’ (Clause 4 of Article 10). However, rather than establishing a land use rights system based on market principles, a ‘dual-track’ land use rights allocation system was introduced to assign LURs in urban areas. A dual-track allocation system means that LURs are assigned in two ways: allocation (*huabo* 划拨) and grants (*churang* 出让). Allocation is the transfer of LURs to state owned or non-profit users without either time limits or LUR transfer fees (*tudi chiyongquan churangjin* 土地使用权出让金); grant is the transfer of LURs to commercial users for a fixed period (40 years for commercial purpose, 50 years for industrial purpose and 70 years for residential purpose) in return for LUR transfer fees.<sup>27</sup> Together allocations and grants constitute the ‘primary market’ for LURs. The ‘Provisional Land Regulations’,<sup>28</sup> were enacted by the State Council in May 1990, whereby LURs were separated from ownership and became transferable (for example, sale, rental) in the market by tender (*zhaobiao*

<sup>26</sup> See Wu Fulong and Laurence J. C. Ma, ‘The Chinese City in Transition: Towards Theorizing China’s Urban Restructuring’, in *Restructuring the Chinese City: Changing Society, Economy and Space*, ed. Laurence J. C. Ma and Wu Fulong (New York, N. Y.: Routledge, 2005), 267. However, if the real property market is the major contributor to the GDP in China, we need to be cautious about the high GDP and the potentiality of Chinese economy.

<sup>27</sup> See Samuel P. S. Ho and George C. S. Lin, ‘Emerging Land Markets in Rural and Urban China: Policies and Practices’, *The China Quarterly*, no. 175 (2003): 687.

<sup>28</sup> Chengzhen Guoyou Tudi Shiyongquan Churang he Zhanrang Zanxing Tiaoli [The Provisional Regulations on the Grant and Transfer of Use Rights in Urban China], promulgated by the State Council on 19 May 1990; implemented on 19 May 1990.

招标), auction (*paimai* 拍卖) or negotiation (*xieyi* 协议). LURs can also be mortgaged. The transfer of LURs has, in effect, created a secondary property market. However, in reality, sale by negotiation without a transparent procedure is the most popular way of transferring LURs in the secondary property market.<sup>29</sup>

The Urban Real Estate Administration Law of the PRC was promulgated in 1994 (amended in 2007), for the purpose of administering urban land and real estate in China. It confirms the dual land allocation system and the dual property market. Article 3 of the Real Estate Law decrees that the state shall adopt a paid transfer of LURs system (*guoyou tudi youchang shiyong zhidu* 国有土地有偿使用制度) for the use of state-owned land for a limited period, except where LURs are obtained through the state land allocation system in accordance with this law. Article 12 provides that the grants of LURs could adopt tender, auction, and negotiation. Under the dual allocation system, the property market is largely controlled by administrative power. To explore this issue further, we need to look at the governance complexes in China.

### 3.2. The governance complexes in post-1978 China

#### 3.2.1. Elite dualism<sup>30</sup>

In analysing governance of China, the ‘organisational complexes’<sup>31</sup> in China cannot be ignored. In general, ‘organisational complexes’ includes elite dualism, the ‘bianzhi’ (编制) system, the system of ‘tiao’ (条) and ‘kuai’ (块), the registration (*dengji* 登记) system, and the establishment of Party organs (*dangzuzhi* 党组织) in business associations. These ‘organisational complexes’ are labelled as bearing Chinese characteristics and may seem confusing in the eyes of Western readers. It is worth noting that these are not separate aspects but form a complex web of

<sup>29</sup> See e.g., Ding Chengri and Gerrit Knaap, ‘Urban Land Policy Reform in China’s Transitional Economy’, in Ding Chengri and Song Yan, eds., *Emerging Land and Housing Markets in China* (Cambridge, Mass.: Lincoln Institute of Land Policy, 2005), 22; Li Ling-Hin, *Urban Land Reform in China*, 26.

<sup>30</sup> See Zang Xiaowei, *Elite Dualism and Leadership Selection in China* (New York, London: Routledge Curzon, 2003).

<sup>31</sup> I borrowed the term ‘organizational complex’ from Kenneth W. Foster, ‘Embedded within State Agencies: Business Associations in Yantai’, *The China Journal*, no. 47 (2002): 41.

governance. This section focuses on the *tiao-kuai* system, and briefly analyses elite dualism and the *bianzhi* system.<sup>32</sup>

Elite dualism refers to the undifferentiated Party-state. Although some scholars observe that the leadership transition in the reform has seen some aspects of functional differentiation between the Party and the government,<sup>33</sup> in Chinese reality, it is not easy to draw a sharp line between the Party and the government because of their overlapping structure under the one-party rule. For example, party secretaries are the top honchos in universities, and party secretaries of provinces keep an eye on governors.<sup>34</sup>

### 3.2.2. The ‘*bianzhi*’ system

The analysis of the organisational complexes cannot be detached from the *bianzhi* system, which refers to organisation establishment and staffing: each organisation is allocated a certain personnel quota and relevant official posts.<sup>35</sup> There are two major types of the *bianzhi*—the administrative *bianzhi* (*xingzheng bianzhi* 行政编制) and the ‘public service units’ *bianzhi* (*shiye danwei bianzhi* 事业单位编制). The ‘administrative unit’ (*xingzheng danwei* 行政单位) holds an administrative *bianzhi*. Civil servants (*gongwuyuan* 公务员) who work in administrative units have the administrative *bianzhi* accordingly, their salary is from the fiscal appropriation (*caizheng bokuan* 财政拨款) by the state.

### 3.2.3. The *tiao-kuai* system

The *tiao-kuai* system is an important aspect, because the complexity of the primary property market is due largely to this system. This system combines the vertical administrative line (*tiaotiao* 条条) of government bureaus or ministries with the

<sup>32</sup> The registration system will be discussed in Chapter Seven, Section 6.

<sup>33</sup> See e.g., Zang, *Elite Dualism and Leadership Selection in China*, 11.

<sup>34</sup> Thanks for Professor Tim Murphy to raise this point. Also see W. T. Murphy, ‘China’s Laws and Flaws’, *The Modern Law Review* 70, no. 6 (2007): 1008-1022.

<sup>35</sup> On the *bianzhi* system, also see Foster, ‘Embedded within State Agencies: Business Association in Yantai’, 45-48.

horizontal line (*kuaikuai* 块块), that is, local governments.<sup>36</sup> The *tiao-kuai* system is an important aspect to examine the central-local relation. In the *tiao-kuai* system, state agencies are often subject to ‘dual subordination’, which means that a state agency may be controlled by both a higher-level agency and a local government at the same administrative level.<sup>37</sup> The extent of an agency’s subordination to either the *tiao* or the *kuai* depends on its sources of budget and personnel appointment of ‘the first person in command’ (*yibashou* 一把手, for example, chairman, director). For instance, taxation bureaux and industrial and commercial administration bureaux are subordinate to their vertical higher levels, because their higher levels control their budget and personnel appointment. Another important example is that although the revised 1998 LAL was designed to centralise power in the State Council to enable better management of land, ‘real’ power is dispersed between different levels of government and mobilised in the dynamics of their interactions.<sup>38</sup> For example, at the national level, the Ministry of Construction and the Ministry of Land and Resources<sup>39</sup> under the State Council may coordinate with each other in regulating the property market.<sup>40</sup> At provincial and local levels, however, real estate and land management departments are directly responsible to provincial or local governments.<sup>41</sup> The central Ministries do not have direct control over these local departments, but just provide working guidance. There are often tensions and conflicts between the *tiao* and the *kuai*, which reflect the conflicts between the

<sup>36</sup> See Carolyn Cartier, ‘Scale Relations and China’s Spatial Administrative Hierarchy’, in *Restructuring the Chinese City: Changing Society, Economy and Space*, ed. Laurence J. C. Ma and Wu Fulong (New York, N. Y.: Routledge, 2005), 26.

<sup>37</sup> See *ibid.*

<sup>38</sup> For example, Article 6 of the Real Estate Law defines the functions and powers of government departments at various levels. See Li, *Urban Land Reform in China*, 32.

<sup>39</sup> Now five new ‘super ministries’ have been established, including the conversion of the Ministry of Construction into the Ministry of Housing and Urban-Rural Construction. See ‘China to set up five new “super ministries”’, in <[http://www.chinadaily.com.cn/china/2008npc/2008-03/11/content\\_6526802.htm](http://www.chinadaily.com.cn/china/2008npc/2008-03/11/content_6526802.htm)> (last visited 11 March 2008).

<sup>40</sup> For example, they made regulations to cool down the property market, and to warned the risk of purchasing ‘minor property right apartments’. There are also function overlaps and conflicts between these ministries.

<sup>41</sup> See Li, *Urban Land Reform in China*, 32.

central and the local, *zhengfu* (local governments) and *bumen* (departments or ministries).<sup>42</sup>

The administrative hierarchy at the local level in China is also complicated. Local governments could refer to provincial, city or county governments. This complexity even exists at the city-level *per se*. The ‘city’ in China could mean a directly administered municipality (*zhixiashi* 直辖市) of China, for example, Beijing; a prefecture-level city (*dijishi* 地级市), for example, Zhengzhou (in Henan); or a county-level city (*xianjishi* 县级市), for example, Xinmi (in Zhengzhou). This links to expanding urbanisation, which is mainly through three measures in the process of economic reform—turning prefectures into cities (*di gai shi* 地改市) carried out mainly in the 1980s; replacing counties with cities (*xian gai shi* 县改市) implemented during the early and mid-1990s; and transforming cities and counties into urban districts (*xian shi gai qu* 县市改区) throughout economic reform.<sup>43</sup> These changes in the ‘administrative zoning’ (*xingzheng quhua* 行政区划) are at odd with the three-tier system—provinces, counties and townships—stipulated in Article 30 of the Constitution. These changes also reflect the complex relationship between the central and the local, for example, their competition for the power of policy-making and resource (for example, land) control. For instance, while ‘turning prefectures into cities’ was promoted by Beijing, ‘turning counties into cities’ was propelled by local governments rather than by the central government.<sup>44</sup>

The complexity of governance gives rise to the conflicts between the central government in Beijing and local governments in the provinces and below.<sup>45</sup> One of

<sup>42</sup> On the *tiao-kuai* system, and the disputes between the central and the local, see e.g., Jonathan Unger, ‘The Struggle to Dictate China’s Administration: The Conflicts of Branches vs. Areas vs. Reform’, *Australian Journal of Chinese Affairs*, no. 18 (1987): 15-45; Richard Baum and Alexei Shevchenko, ‘The “State of the State”’, in *The Paradox of China’s Post-Mao Reforms*, ed. Merle Goldman and Roderick MacFaquhar (Cambridge, Mass.: Harvard University Press, 1999), 340-342.

<sup>43</sup> See Chung Jae Ho and Lam Tao-chiu, ‘China’s “City System” in Flux: Explaining Post-Mao Administrative Changes’, *The China Quarterly*, no. 180 (2004): 945-964.

<sup>44</sup> See *ibid.*: 955.

<sup>45</sup> The central government regularly rotates the officials between provinces; the Party secretaries of Beijing and Shanghai have traditionally been members of the Politburo; before taking positions as

the most important reasons for the tensions between central and local governments is competition for financial resources. A tax sharing system (*fenshuizhi* 分税制) was adopted in 1994 in attempts to enhance the revenue of the centre and increase the transparency of tax revenues (at least to Beijing).<sup>46</sup> As a result, central government grants to cities for urban infrastructure have been significantly reduced, local governments need more financial resources to administer the city and finance urban construction, and so they are reluctant to share land revenue with the central government.<sup>47</sup>

Land has become an important source of revenue and the main vehicle for local governments to compete and bargain with the central government in the fiscal and administrative decentralisation.<sup>48</sup> There are many sources of revenue that can be extracted from land, for example, tax. Land-use taxation developed in parallel with the LUR system. The State Council passed the 'Provisional Act of Land-Use Tax on State Owned Urban Land'<sup>49</sup> in 1988. In 1993, the State Council passed the 'Provisional Act of Land Value-added Tax on State-Owned Land'.<sup>50</sup> Both users and transferors of LURs should be taxpayers.<sup>51</sup> However, as value-added tax is one of the shared taxes between the central and local governments, in order to collect more tax revenue, local officials have a range of implements in the name of modernisation,

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provincial governors, many officials have worked extensively in central ministries. See generally Huang Yasheng, *Inflation and Investment Controls in China: The Political Economy of Central Local Relations During the Reform Era* (Cambridge: Cambridge University Press, 1996). Provincial officials' career achievements are assessed by statistics; as a result, 'statistics make officials, and officials make statistics (*shuzi chuguan guanchu shuzi* 数字出官, 官出数字)'. There are central-local conflicts within provinces as well.

<sup>46</sup> See Chapter Five, Section 3.

<sup>47</sup> See Xie Qingshu, A. R. Chanbari Parsa, and Barry Redding, 'The Emergence of the Urban Land Market in China: Evolution, Structure, Constraints and Perspectives', *Urban Studies* 39, no. 8 (2002): 1392.

<sup>48</sup> See Hsing, 'Land and Territorial Politics in Urban China': 576.

<sup>49</sup> Zhonghua Renmin Gongheguo Chengzhen Tudi Shiyongshui Zanxing Tiaoli, 中华人民共和国城镇土地使用税暂行条例, promulgated by the State Council on 27 September 1988, implemented on 1 November 1988; revised version was promulgated by the State Council on 30 December 2006, implemented on 01 January 2007.

<sup>50</sup> Zhonghua Renmin Gongheguo Tudi Zengzhishui Zanxing Tiaoli 中华人民共和国土地增值税暂行条例, promulgated by the State Council on 13 December 1993; implemented on 01 January 1994.

<sup>51</sup> See Ding, 'Land Policy in China: Assessment and Prospects', 113-114.

for example, seizure of farmland and extension of infrastructure in urban expansion, which led to the property market boom.

There are more important sources of revenue that could be extracted from land, which, under the current system, local governments do not have to share with the central government. This is because of the existence of ‘extra-budgetary’ revenue (*yusuanwai zjin* 预算外收入), for example, local taxes and land use rights transfer fees.<sup>52</sup> In addition, the income from selling LURs is the major source of off-budgetary or self-raised revenue (*zichou zjin* 自筹资金) for local governments. Such income from selling LURs has increased rapidly along with the property booms of the 1990s and 2000s.

Apart from the conflicts between central-local governments, there are also conflicts between government departments in land administration. Although the State Council attempts to define the functions of different departments, multiple government departments have been involved in land administration and their functions are overlapping and conflicting.<sup>53</sup> For example, the macro-control measures of the Ministry of Construction (MC) attempted to tight tax, loan, and land regulations, to control market demand and to increase supply of LURs, however, the MC does not have power over regulating banks, finance, and land, let alone tax. If the regulators clash with each other, how could we expect effective regulation? Now five new ‘super ministries’ are to be set up, including the conversion of the MC to the Ministry of Housing and Urban-Rural Construction.<sup>54</sup> Although this change is an attempt to reduce the overlaps between different government department functions, it is still

<sup>52</sup> See e.g., Ho and Lin, ‘Emerging Land Markets in Rural and Urban China’; Hsing You-tien, ‘Brokering Power and Property in China’s Townships’, *The Pacific Review* 19, no.1 (2006): 108.

<sup>53</sup> See e.g., Xie, Parsa, and Redding, ‘The Emergence of the Urban Land Market in China’, 1394-1395. The Ministry of Land and Resources (MLR) administers both urban and rural land. The Ministry of Construction (MC) is in charge of urban construction and real estate administration. However, there is still an overlap of the functions between the two ministries. In addition, the State-owned Assets Supervision and Administration Commission (SASAC) has also got involved in urban land management. On SASAC, see Chapter Five, Section 2.2.

<sup>54</sup> See ‘China to set up five new “super ministries”’, In <[http://www.chinadaily.com.cn/china/2008npc/2008-03/11/content\\_6526802.htm](http://www.chinadaily.com.cn/china/2008npc/2008-03/11/content_6526802.htm)> (last visited 11 March 2008).

hard to clarify the responsibility of each ministry and reduce redundancy in the governmental structure.

### 3.3. The black market

Since the beginning of economic reform, there have been three periods of 'enclosure movement' in China, which happened in the late 1980s, 1992, and 2003.<sup>55</sup> Unlike the English enclosure movement, which was the process of fencing off common land and turning it into private property,<sup>56</sup> enclosure movements in China are usually conducted on the outskirts of cities, which are not common field. The land was enclosed but not fully developed, leaving numerous half-finished buildings colloquially referred as 'rotten-tail buildings' (*lanwei lou* 烂尾楼), and a huge amount of non-performing loans to the banking system, because local governments offer land as collateral for bank loans. The real estate boom has resulted in the economic bubble and corruption, for example, the scandal in Shanghai about the misappropriation of a 1.2 billion social security fund for real estate development.<sup>57</sup> Many officials involved have been tried in court, and the former Party chief in Shanghai has been convicted.<sup>58</sup>

The black market is emerging from the dual-track land use rights allocation system, and the great gap of the prices of LURs between the primary and secondary property market.<sup>59</sup> As analysed above, when the LUR system was introduced, it was hoped

<sup>55</sup> See the discussion on the enclosure movement in the 1990s in e.g., He Qinglian, *Xiandaihua de Xianjing: Dangdai Zhongguo de Jingji Shehui Wenti* [Pitfalls of Modernization: Socioeconomic Problems in Contemporary China] (Beijing: Jinri Zhongguo Chubanshe, 1998), 49-77.

<sup>56</sup> See the discussion on enclosure movement in the West, see e.g., James Boyle, 'The Second Enclosure Movement and the Construction of the Public Domain', *Law and Contemporary Problems* 66 (2003): 33-74.

<sup>57</sup> See Hu Renfeng [et al], 'Shanghai Pension Fund: A Story of Risk', *Caijing Magazine*, 21 August 2006. In <<http://www.chinaelections.net/newsinfo.asp?newsid=80>> (last visited 5 September 2008).

<sup>58</sup> See 'Ex-Shanghai Boss Jailed for Graft', *BBC News*, 11 April 2008. In <<http://news.bbc.co.uk/1/hi/world/asia-pacific/7342062.stm>> (last visited 1 May 2008).

<sup>59</sup> Given the dual land allocation system and dual property market, it is difficult to define what the legal or illegal property market is. The same situation also applies to the rural area as discussed in Chapter Four. For example, the emergence of the 'minor property rights' or 'township property rights' does not have a legal basis, but is emerging fast. Especially under the compulsory requisition of LURs of rural land, which is stipulated in Article 44 of the Property Law, the boundaries between legal/illegal property markets have been blurred. The blurring boundaries between the legal and illegal property markets are also manifested in land disputes and conflicts that will be examined further in

that value of land would be reflected properly through the market. However, a high proportion of land allocation is still carried out on an administrative basis,<sup>60</sup> and only a small portion of land is leased by the state to the users through paid transfer of use rights.<sup>61</sup> This means that local governments actually monopolise the supply of LURs.<sup>62</sup> The LAL (1998) attempts to remove authority that could approve land requisition from local governments below provincial level. However, local governments often exceed their authority to approval land use.<sup>63</sup> Numerous public and private brokers with links with state agencies that have the power to allocate and manage land have arisen to pursue rents generated from the gap which exists between the dual level property markets.

In the black market, hidden LURs transactions mainly take four forms:

1. Land-use rights are indirectly transferred through the sale and purchase of buildings on it; 2. land-use rights are used as a share of investment in joint ventures; 3. land use rights are used as security for borrowing; 4. land-use rights are used to pay debts. Most such transactions involve the SOEs which have access to administrative allocation of land-use rights.<sup>64</sup>

The black market is also manifested in the role of the 'private' property developers. Although there has been a rapid development of private property developers,<sup>65</sup> the question of private property developers is how 'private' they are. Commodification of the public housing provision system has been one of the most important aspects of economic reform, however is it the same as privatisation? The liberal assumption of

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Chapter Seven.

<sup>60</sup> For example, Huabo Tudi Shiyongquan Zanxing Tiaoli [Provisional Regulations on Administratively-Allocated Land use Rights], promulgated by the State Land Administration Bureaux on 8 March 1992; implemented on 8 March 1992.

<sup>61</sup> See Anthony Gar-On Yeh, 'The Dual Land Market and Urban Development in China', in Ding Chengri and Song Yan, eds., *Emerging Land and Housing Markets in China*, 40.

<sup>62</sup> See Anthony Gar-On Yeh, 'Dual Land Market and Internal Spatial Structure of Chinese Cities', in *Restructuring the Chinese City: Changing Society, Economy and Space*, eds. Laurence J. C. Ma and Wu Fulong (New York, N. Y.: Routledge, 2005), 60.

<sup>63</sup> See Xie, Parsa, and Redding, 'The Emergence of the Urban Land Market in China', 1392.

<sup>64</sup> See Zhang Xing Quan, 'Urban Land Reform in China', *Land Use Policy* 14, no. 3 (1997): 196.

<sup>65</sup> There are three kinds of property developers in today's China: state enterprises, private companies and foreign companies (there have been more restrictions on foreign property developing companies since 2006). See Richard Walker and Daniel Buck, 'The Chinese Road: Cities in the Transition to Capitalism', *New Left Review*, no. 46 (2007): 48.

the distinction between public and private cannot be easily transposed to the Chinese context. *Gong* (public) and *si* (private), state and market, are intertwined in the context of the complexity of governance of China. The party-state defines, regulates and directly participates in the market.<sup>66</sup>

The nature of private developers is even more ambiguous given their embeddedness in the Party-state. The development of the private sector has led the Party to link itself to the private sector for its strategies of governance. One strategy is to co-opt the individual 'red capitalists', who demonstrate 'entrepreneurial skills and business success' and exert more impact on the CPC.<sup>67</sup> Co-opting private entrepreneurs has affected the party's recruitment policies,<sup>68</sup> its institutional links, and its ability to monitor and control society.<sup>69</sup> For example, private entrepreneurs are keen on joining the People's Congress and People's Political Consultative Conference, and now are also enjoying greater access to political power. Many private owners become party members. According to a set of statistics released by the Organisation Department of the CPC Central Committee, at the end of 2006, 'more than 2.86 million party members work in privately owned enterprises, including 810,000 running their own business'.<sup>70</sup> Moreover, it is becoming increasingly common for party or governmental officials to set up private businesses by various informal means.<sup>71</sup> Such combination of political power and capital has generated more rent-seeking opportunities for officials. This is one of the reasons why some people are hostile to 'private property' and hold a negative view toward private property.

<sup>66</sup> See e.g., He Shenjing and Wu Fulong, 'Property-Led Redevelopment in Post Reform China: A Case Study of Xintiandi Redevelopment Project in Shanghai', *Journal of Urban Affairs* 27, no. 1 (2005): 1-23; On 'a government for capital', see Walker and Buck, 'The Chinese Road', 61.

<sup>67</sup> See Bruce J. Dickson, *Red Capitalists in China: The Chinese Communist Party, Private Entrepreneurs, and Political Change* (Cambridge: Cambridge University Press, 2002), 4-5.

<sup>68</sup> The membership of the CPC was extended to private entrepreneurs in 2001; and in the 16<sup>th</sup> National Congress of the CPC in 2002 private entrepreneurs and individual entrepreneurs were labelled for the first time as 'Builders of Socialism with Chinese Characteristics' (*you zhongguo tese shehui zhuyi jianshe zhe* 有中国特色社会主义建设者).

<sup>69</sup> See the political influence of red capitalists and business associations in Dickson, *Red Capitalists in China*, 56-85.

<sup>70</sup> See Li Qian, 'Entrepreneurs with a Charitable Heart', *China Daily*, 9 August 2007. In <[http://chinadaily.com.cn/china/2007-08/09/content\\_6019716.htm](http://chinadaily.com.cn/china/2007-08/09/content_6019716.htm)> (last visited 13 August 2007).

<sup>71</sup> See Gordon White, Jude Howell, and Shang Xiaoyuan, *In Search of Civil Society: Market Reform and Social Change in Contemporary China* (New York: Clarendon Press, 1996), 199.

Private property is thought attached to the ‘original sin’ of private entrepreneurs and is a way to legalise their illegal or grey income.

Land-related corruption or rent-seeking cases usually happen at the local level, and are associated with, for example, land approval and bidding processes.<sup>72</sup> In order to eradicate local governments’ income from the real estate market and the transfer of LURs, the central government has made many efforts. For example, the central government has targeted on value added tax, one source of local government revenue that could be extracted from land. The National Development and Reform Commission (NDRC) suggests that, instead of local governments, the central government should collect the value added tax.<sup>73</sup> Targeting the issue that local governments do not keep clear records of how the land use rights transfer fees are collected and used, the National Audit Office (NAO) has started auditing the collection and use of these fees in 10 cities in order to better regulate them.<sup>74</sup>

Apart from the above measures, another target is the banking system. Aiming at local governments and local lenders, the central bank also warned in a report that excessive investment in real estate market and the high concentration of long-term loans have increased the risks of loans turning bad. The central government calls for cooling down over-investment and tightening credit policy.<sup>75</sup> However, given the investment-driven economy and the fact that economic performance is still the main mechanism to assess local officials and decide their political future, it is unclear whether these efforts can achieve their goals. Some risks have already emerged. For example, in May 2008, Shenzhen saw the plummeting house prices from the peak in

<sup>72</sup> See e.g., Ho and Lin, ‘Emerging Land Markets in Rural and Urban China’; Walker and Buck, ‘The Chinese Road’.

<sup>73</sup> See Rong Xiandong, ‘NDRC Suggest Removing Sales of Pre-Owned houses’, China Daily, 24 July 2007. In <[http://www.chinadaily.com.cn/bizchina/2007-07/24/content\\_6001828.htm](http://www.chinadaily.com.cn/bizchina/2007-07/24/content_6001828.htm)> (last visited 06 September 2008).

<sup>74</sup> See Li Fangchao, ‘National Auditor Checking into Land Transfer Fees’, China Daily, 11 July 2007. In <[http://www.chinadaily.com.cn/china/2007-07/11/content\\_5432232.htm](http://www.chinadaily.com.cn/china/2007-07/11/content_5432232.htm)> (last visited 06 September 2008).

<sup>75</sup> See ‘Smaller Banks Warned of Bad Loans’, South China Morning Post, 02 August 2007. <[http://www.chinadaily.com.cn/bizchina/2007-08/02/content\\_6009738.htm](http://www.chinadaily.com.cn/bizchina/2007-08/02/content_6009738.htm)> (last visited 06 September 2008).

2007. Considering the fact that most people finance their house purchase in China through banks, mortgage risks are growing.<sup>76</sup>

## 4. Spatial, social and political transformations

### 4.1. Spatial transformation

The revival of private property in the urban area has given rise to spatial, social and political changes in post-Mao China. This section focuses on the exclusive function of private ownership manifested in the spatial transformation. The spatial sphere of urban China is rapidly being reconfigured by the private ownership of housing, and 'new forms of social inclusion and exclusion' are being produced by the expanding private ownership.<sup>77</sup> The city is being reconstructed through diverse processes and new spatiality is reflected in different forms such as the 'globalised' space (for example, the 2008 Olympic Games Village in Beijing); the space for the elite and the upper social strata (for example, the gated residential compounds for rich and middle strata families, shopping malls full of luxuries); the marginalised space (for example, the migrant enclaves, or 'the village within the city'); the space organised by *tongxiang* (同乡 the same origin) relationships and kinship extended from the rural area (for example, Zhejiang Village in Beijing, Henan Village in Shenzhen).<sup>78</sup> However, public space in the urban area is increasingly limited by these processes of quasi-privatisation.

Among the aspects mentioned above, it is worth studying the emergence of *chengzhong cun* (城中村 village within the city),<sup>79</sup> usually symbolised with the

<sup>76</sup> Hu Yuanyuan, 'Shenzhen Home Buyers Bugged by Mortgage Dilemma', *China Daily*, 4 August 2008. In <[http://www.chinadaily.com.cn/china/2008-08/04/content\\_6900309.htm](http://www.chinadaily.com.cn/china/2008-08/04/content_6900309.htm)> (last visited 6 September 2008).

<sup>77</sup> Zhang Li, 'Spatiality and Urban Citizenship in Late Socialist China', *Popular Culture* 14, no. 2 (2002): 329.

<sup>78</sup> See Laurence J. C. Ma and Wu Fulong, 'Restructuring the Chinese City: Diverse Processes and Reconstituted Spaces', in *Restructuring the Chinese City: Changing Society, Economy and Space*, ed. Laurence J. C. Ma and Wu Fulong (New York, N. Y.: Routledge, 2005), 7.

<sup>79</sup> On *chengzhou cun*, see e.g., Zhang Li, *China's Limited Urbanization: Under Socialism and Beyond* (New York, N. Y.: Nova Science, 2004); Zhang Li, 'Migrant Enclaves and Impacts of Redevelopment Policy in Chinese Cities', in *Restructuring the Chinese City: Changing Society, Economy and Space* ed. Laurence J. C. Ma and Wu Fulong (New York, N. Y.: Routledge, 2005), 243-259; Zhang,

images such as poverty, crimes, and chaos. *Chengzhong cun* are generally located in suburban areas that have been increasingly swallowed up by the rapid urbanisation process.<sup>80</sup> ‘Village within the city’ is more than a semi-undifferentiated urban/rural space: the land in the suburb is mainly for rental, that is, renting their houses or rooms by local people for rural migrants. It is also hard to define the identities of the owners of houses and flats in the village within the city: they live in the city, but are called ‘villagers’; they do not farm, but rely on rents. Although there is ongoing reconstruction of ‘villages within the city’, which means that the property owners can obtain urban household, few measures have done to improve the situation of rural migrants living as tenants in these ‘villages’. The situation of these rural migrants has not been much changed. Rural migrant workers that usually live in *chengzhong cun* are still administratively included in the category of the rural population. They receive no financial support from the state for their housing needs, and they could not afford the property prices that far outweigh their income.<sup>81</sup>

#### 4.2. Social transformation

Chinese culture is now preoccupied with wealth and ‘getting rich’.<sup>82</sup> For example, even the Shaolin Temple (a famous Buddhist temple in Henan Province) has set up a commercial company, where the abbot of the temple is also chairman of the board. Economic reform since 1978 enables Chinese families to accumulate more wealth compared with the pre-reform era, and, since the 1990s, consumerism has arisen and accumulation of wealth has been highlighted.<sup>83</sup> Chinese people now could say

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<sup>80</sup> ‘Spatiality and Urban Citizenship in Late Socialist China’.

<sup>81</sup> New style suburbs along US or UK lines are also emerging, but suburbs in this context of ‘village within the city’ are different.

<sup>82</sup> According to *Economy Daily*, 2 January 2002, the ratio between housing price and annual personal income in Beijing is 31:1, Shanghai 20:1, Guangzhou 21:1, Shenzhen 18:1, Chengdu 12:1, National average 22:1, cited in Zhang, ‘Migrant Enclaves and Impacts of Redevelopment Policy in Chinese Cities’, 247.

<sup>83</sup> See Kerry Brown, *Struggling Giant: China in the 21<sup>st</sup> Century* (London: Anthem Press, 2007), 85.

<sup>84</sup> Between 1978 and 1985, both rural income and rural consumption increased rapidly. The increase of urban income and consumption slowed down through the 1980s; in the 1990s, rural rises slowed, whereas urban rises speeded up. See Linda Chao and Ramon H. Myers, ‘China’s Consumer Revolution: the 1990s and Beyond’, *Journal of Contemporary China* 7, no. 18 (1998): 353-354; Kevin Latham, ‘Introduction: Consumption and Cultural Change in Contemporary China’, in *Consuming China: Approaches to Cultural Change in Contemporary China*, ed. Kevin Latham, Stuart Thompson, and Jakob Klein (London: Routledge, 2006), 1.

farewell to the period during the 1950s-1970s in which people only have three large pieces of private property: bicycle, watch and sewing machine, luxuries at that time. Consumerism has prevailed in Chinese cities, people's self-perceptions, as well as 'social interactions in ways similar to [...] the "mallings" of Hong Kong in the 1960s and 1970s'.<sup>84</sup> Nowadays, shopping malls are filled with luxuries such as Armani, Louis Vuitton, and Dior (Small commodity markets and some wholesale markets are filled with fakes of these luxuries). However, it is unclear what is happening in these luxurious shops, how many luxuries have been consumed, and who are the consumers?

Furthermore, to what extent does consumerism reflect the wealth of ordinary people? Far from being a credit economy, China's economy is still a saving economy and the expenses of education, housing, and medical care are increasing. Ordinary people tend to save rather than consume. This situation also demonstrates the defect in the process of China's privatisation in which social security has been largely ignored. The state has got rid of the burden of social welfare provision, but the empty space it leaves behind has not been filled properly. In fact, the Chinese government is trying to stimulate consumption through a number of schemes, including facilitating access to bank loans.<sup>85</sup> Yet it is doubtful whether these government's efforts have achieved their goals. For example, it is hard for low-income people to get access to bank loans from state-owned banks, and they begin to turn for help to private banks.<sup>86</sup> These small, private banks are developing fast in Zhejiang province, and are regarded as the equivalent to the Grameen bank—'the banks for the poor'. The focus of these banks

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<sup>84</sup> See Latham, 'Introduction: Consumption and Cultural Change in Contemporary China', 2; Lui Tai-lok, 'The Malling of Hong Kong', in *Consuming Hong Kong*, ed. Gordon Mathews and Lui Tai-lok (Hong Kong: Hong Kong University Press, 2001).

<sup>85</sup> See Latham, 'Introduction: Consumption and Cultural Change in Contemporary China', 8.

<sup>86</sup> These banks are also named as private-owned banks or private-governed banks. For example, Zhejiang Tailong Commercial bank is a small Chinese commercial bank in Zhejiang. The bank began as a credit union with the original name Taizhou city Tailong urban credit union. In 2006, it was upgraded to commercial bank named as Zhejiang Tailong Commercial bank. The link to Zhejiang Tailong Commercial bank homepage is: <http://www.tlxys.com/> (last visited 30 April 2007). Also see 'Round of Private Banks Begins', People's Daily, 12 November 2000. In <[http://english.people.com.cn/english/200011/12/eng20001112\\_54928.html](http://english.people.com.cn/english/200011/12/eng20001112_54928.html)> (last visited 30 April 2007).

is on the small and medium sized enterprises (SMEs). Their clients include peasants whose land was confiscated and had to do business as well as laid-offs of the SOEs.

It is difficult to generalise the level of wealth the Chinese people hold, because:

There are the top 100 million, who are the real winners of the reform process over the last three decades. There are the second level wealthy and the 200 million who are doing OK, but have aspirations for something better. Then there are the vast numbers of the rural and urban poor – people who in some areas earn far less than the UN designated one dollar a day to qualify for absolute poverty.<sup>87</sup>

Apart from the difficulty in generalising gains and losses of different strata in China, the rise of consumerism has also given risen to a paradox – since market reform and ‘opening-up’ in 1978, socialism and market, once imagined by Mao as severe contradictions, has been fused together (labelled as Socialism with Chinese characteristics).<sup>88</sup> The boundaries between public property and private property have also been fuzzy.

The division between persons and things is also blurred. Economic reform and consumerism in China have transformed the relationship between persons and things, and have produced new identities and new socio-economic relationships.<sup>89</sup> Social relationships (*guanxi* 关系) are being commodified. Hence it is argued that there are now three economies in China – ‘state redistribution, the commodity, and the gift economies’.<sup>90</sup> ‘Everything and everyone has their price. Souls are nothing more than the basic stock, up one day, down the other – commodified, packaged, abandoned and bought’.<sup>91</sup> Social Darwinism also pervades, people compete for wealth according to the principle of ‘the survival of the fittest’.

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<sup>87</sup> Brown, *Struggling Giant*, 17.

<sup>88</sup> Also see *ibid*, 26.

<sup>89</sup> See Elisabeth J. Croll, ‘Conguring Goods, Identities, and Culture’, in *Consuming China: Approaches to Cultural Change in Contemporary China*, ed. Kevin Latham, Stuart Thompson, and Jakob Klein (London: Routledge, 2006), 22.

<sup>90</sup> See Mayfair Mei-hui Yang, *Gifts, Favors, and Banquets: The Art of Social Relationships in China* (Ithaca, N. Y.: Cornell University Press, 1994), 178.

<sup>91</sup> Brown, *Struggling Giant*, 55.

Mobility from the lower social strata to the upper social strata is becoming more difficult. The in-depth reason rests upon ‘the anomie in the social structure’ and ‘structure strain’ that first put forward by American sociologist Robert Merton. Merton used ‘structure strain’ to illustrate what kind of social structure would under what conditions produce social problems.<sup>92</sup> Some Chinese scholars have applied Merton’s theory and characterised the social structure in China since the mid-1990s as an ‘Inverted T-shaped social structure’ (*dingzixing shehui jiegou* 丁字型社会结构).<sup>93</sup> This structure manifests the social polarisation, that is, the enlarging gap between the rich and the poor, the increasing concentration of wealth into small groups of people, and the small proportion of the middle stratum<sup>94</sup> of society. In China, the Gini Coefficient of the per capita income had reached a level of no less than 0.5 in 2003, with a tendency to go up further.<sup>95</sup> It is also worth emphasising that ‘while the 2003 GDP of China amounted only to US\$1,400 billion, the total wealth of these rich people exceeded US \$ 969 billion’.<sup>96</sup> These statistics or surveys indicate that wealth has been monopolised by groups of privileged people.

‘Inverted T-shaped social structure’ is a barrier to the upward mobility in society. If we compare the social mobility during the 1980s with that in the late 1990s and since the turn of the century, we can see that comparatively the poor had more chances to get rich in the 1980s, but these opportunities were significantly reduced in the late 1990s and onwards.<sup>97</sup> As the opportunities of upward mobility have dropped for the lower social groups, room of the middle stratum is limited and it only constitutes a small proportion of society.<sup>98</sup> Furthermore, property has been equated with wealth.<sup>99</sup>

<sup>92</sup> See Robert K. Merton, ‘Social Structure and Anomie’, *American Sociological Review* 3, no. 5 (1938):672-682.

<sup>93</sup> For example, Li Qiang, ‘“Dingzixing” Shehui Jiegou yu Shehui Jinzhang [“Inverted T-Shaped” Social Structure and Social Strain]’, *Shehui Keixue [Social Sciences]*, no. 2 (2005): 55-73.

<sup>94</sup> I would use stratum rather than class, because ‘the middle class’ does not have a fixed definition in the context of post-Mao China, even in the US or the UK.

<sup>95</sup> See Liang Qing, ‘New Trends in the Changes in Social Stratification in Today’s China’, *Zhongguo Shehui Keixue [Social Sciences in China]* 4 (2005): 124.

<sup>96</sup> *ibid*, 125.

<sup>97</sup> See *ibid*, 128-129.

<sup>98</sup> According to a research on social strata in contemporary China, more than 80% common people are the lower middle stratum and low stratum, and only 12% people are the middle stratum. See Yang Jisheng, *Zhongguo Dangdai Ge Jiecheng Fenxi [An Analysis of the Social Strata in Contemporary*

Poor people are unhappy with rich people, the new left has criticised the process of ‘converting public property to private property’, ‘massive loss of state-owned assets’ and ‘the original sin’ of private entrepreneurs. In addition, the small middle stratum could hardly decrease these social strains. In fact, many so-called Chinese middle class have become ‘house slaves’ (*fangnu* 房奴).<sup>100</sup> The tension between different social strata is one of the important reasons for social instability and social conflicts.<sup>101</sup>

#### 4.3. Political transformation

Emerging private ownership in the urban area perhaps provides the most significant instantiation of the new private sphere in post-Mao China, and now it seems to be an oversimplification to characterise China simply as a totalitarian state. For example, Yan Yunxiang’s ethnographic study (although this study focuses on rural China) explores the rise of private life in post-Mao China.<sup>102</sup> Individuals, at least within the family, can now have autonomy in marriage choice, premarital sex among engaged couples, family planning by choice, and so on. Nevertheless, the development of the private sphere has many constraints and limitations. The state has played a key role in the transformation of private life.<sup>103</sup> In the pre-1949 era, local gentry played an important role in governing rural China. However, in Maoist era the state eliminated the governance of the gentry and became a major force in changing people’s family lives and morality. From the 1950s to the 1970s, patriarchal power was challenged by several generations of young people encouraged and even led by the state.<sup>104</sup> The

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*China] (Gansu: Gansu Renmin Chubanshe, 2006), 345-346.*

<sup>99</sup> For example, terms relating to wealth and high status are often used in the advertisements by property developers such as ‘Luxury’, ‘Wealth’, ‘Palace’, ‘Elite’, while ordinary people have been excluded.

<sup>100</sup> ‘House slave’ refers to people who have to spend a large part of their income on a mortgage. Although they have bought a house or flat, their life is not easy. In order to pay off the mortgage, they dare not spend on entertainment and travel, worry about falling ill and losing jobs.

<sup>101</sup> See more detail in Chapter Seven on land disputes and conflicts.

<sup>102</sup> See Yan Yunxiang, *Private Life under Socialism: Love, Intimacy, and Family Change in a Chinese Village, 1949-1999* (Stanford, Calif.: Stanford University Press, 2003).

<sup>103</sup> *ibid*, 16.

<sup>104</sup> See Yan, *Private Life under Socialism*, 16. On rural life in China, see e.g., Yan Yunxiang, *The Flow of Gifts: Reciprocity and Social Networks in a Chinese Village* (Stanford, C. A.: Stanford University Press, 1996); Deborah Davis and Stevan Harrell, eds., *Chinese Families in the Post-Mao Era* (Berkeley: University of California Press, 1993).

result was that these generations ‘gradually gained more autonomy and independence in their private lives yet became dependents of the collectives and the state in public life’.<sup>105</sup> Later the withdrawal of the state that started in the early 1980s left an empty space of morality and social norms that was soon filled by egoism and ‘the uncivil individualism’.<sup>106</sup> Yan concludes that a growing consciousness of individuality in the sphere of private life has not coordinated with respect for the individual citizen in the public sphere.<sup>107</sup>

We should not exaggerate the political implications of the revival of private property that it would propel democracy. As there are both continuities and discontinuities in the Chinese legal and governmental system, such a revival of private property is bounded by a deep legal and governmental structure that has persisted through late imperial, Republican (1911-1949), Maoist (1949-1978) and post Mao China (1978-present). Traditional China was governed by a ‘Confucian ethics’, and modern China during both the Maoist era and the reform era has seen the re-emergence of tradition as an aspect of the same project of social control.<sup>108</sup> For example Jin Guantao, a leading Chinese social scientist, attributes the sinicisation (*zhongguohua* 中国化)<sup>109</sup> of Marxism to the impact of Confucianism, with the result that Marxism in China became more ethical than scientific, and the distinction between the public and the private was closely linked to the Confucian division between *yi* (righteousness in the moral sense 义) and *li* (profits 利).<sup>110</sup> The rulership of Mao was still a Confucian rulership—‘being an inner sage so as to rule the outside world’ (*neisheng waiwang* 内圣外王).

<sup>105</sup> Yan, *Private Life under Socialism*, 16.

<sup>106</sup> See *ibid.*

<sup>107</sup> *ibid.* 226.

<sup>108</sup> See Børge Bakken, *The Exemplary Society: Human Improvement, Social Control, and the Dangers of Modernity in China* (Oxford: Oxford University Press, 1999), 4.

<sup>109</sup> It may be better translated *hanhua* (汉化).

<sup>110</sup> Jin Guantao, ‘Rujia Wenhua de Shenceng Jiegou dui Makesi Zhuyi Zhongguohua de Yingxiang [the Impact of the In-Depth Structure of Confucianism on Sinisation of Marxism]’, in *Gaobie Zhushen: Cong Sixiang Jiefang dao Wenhua Fansi 1979-1989 [Farewell to the Gods: From Revolution of Thoughts to Reflection on Culture 1979-1989]*, ed. Lin Daoqun (Hong Kong: Niujin Daxue Chubanshe, 1993), 172-187.

The same pattern of rulership has continued in post-Mao China. The central government largely rules by ‘examples’, which have a moral character which is to be imitated.<sup>111</sup> ‘Exemplary society’ is a society ‘with roots [in] and memories [of] the past, as well as one created in the present to realise a future utopia of harmonious modernity’.<sup>112</sup> The Chinese technocracy seeks legitimacy for its governance through ethical solutions as well as the performativity of economic growth, highlighting both ‘stability’ and ‘order’,<sup>113</sup> (for example, the projects of ‘socialism with Chinese characteristics’, ‘construction of a new socialist countryside’, and ‘the harmonious society’). This exemplary society is not so much governed through the imposition of force from the top, but through ‘discipline, education, and morality [which] constitute the three pillars of Chinese society’.<sup>114</sup> Chinese society is governed largely by morality rather than the rule of law.<sup>115</sup> This is one of the important reasons for social conflicts in post-Deng China and the transformation in the role of local government: in the area of land and real estate, local government has formed a partnership with the property developers, and this partnership is competing resources with the people while largely ignoring the laws.<sup>116</sup>

In this exemplary society, there is a need for ‘consent’ to maintain the rule of the technocrats; exemplary society is in opposition to totalitarianism, albeit that ‘the exemplary utopia is about the attempts at total control’.<sup>117</sup> ‘Soft totalitarianism’,<sup>118</sup> rather than ‘totalitarianism’ is much better to characterise the situation in China since the post-1989. As Geremie Barmé observes ‘mainland China enters the phase of “soft” technocratic socialism, the parameters of the cultural Velvet Prison’<sup>119</sup> are

<sup>111</sup> W. T. Murphy, ‘Durkheim in China’, in *Law and Sociology*, ed. Michael Freeman (Oxford: Oxford University Press, 2006), 114.

<sup>112</sup> Bakken, *The Exemplary Society*, 1.

<sup>113</sup> *ibid.* 5-6.

<sup>114</sup> *ibid.* 86. Durkheim is lurking here. See Emile Durkheim, *The Division of Labour in Society*, trans. W. D. Halls, 2ed. (Basingstoke: Macmillan, 1984 [1893]). Also see Murphy, ‘Durkheim in China’.

<sup>115</sup> Bakken, *The Exemplary Society*, 9.

<sup>116</sup> See Chapter Seven.

<sup>117</sup> See Bakken, *The Exemplary Society*, 73.

<sup>118</sup> Geremie Barmé, *In the Red: On Contemporary Chinese Culture* (New York: Columbia University Press, 1999), 10.

<sup>119</sup> Miklos Haraszti, *The Velvet Prison: Artists under State Socialism*, trans. Katalin Landesmann and

being measured out in everyday practice'.<sup>120</sup> The party attempts to define the parameters of rehabilitation and debate 'rather than let the momentum of public, intellectual and academic pressure lead where they might, as was to happen, for example, in the Soviet Union under Gorbachev'.<sup>121</sup> Therefore, 'the ruling ideology has gone through a transformation rather than a collapse, absorbing both communist and capitalist ideas'.<sup>122</sup> In such society, freedom is within a cage: within this cage, you are safe; out of it, you will be in trouble.

## 5. Conclusion

This chapter analyses the emerging property market in China accompanied by the spatial, social and political transformations, and it reflects on the questions about private property in the context of post-Mao China: what do we mean by owning private property? What are the limits of emerging private ownership? In terms of the assumption that private property works in the market, we need to ask: what do we mean by 'market', and what kind of market do we have? Although the LUR system was introduced, which is a big change in the state-owned urban land system, LURs are still allocated administratively to both primary and secondary property markets. State agencies get LURs free or at low prices and without time limits, but 'new economic players' now bid or negotiate for urban LURs for a fixed period,<sup>123</sup> and they have to have a good relationship with state agencies such as local governments. In China, there is no land market, but just a 'real estate' market. Far from a free market, the property market in China has been largely politicised, which is illustrated in the central-local relationship. Furthermore, the ambiguous relationship between

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Stephen Landesmann (New York: Basic Books, 1987).

<sup>120</sup> Barmé, *In the Red*, 386.

<sup>121</sup> See Geremie Barmé, 'History for the Masses', in *Using the Past to Serve the Present: Historiography and Politics in Contemporary China*, ed. Jonathan Unger (Armonk, N. Y.: M. E. Sharpe, 1993c), 261.

<sup>122</sup> Barmé, *In the Red*, 328.

<sup>123</sup> See Ho and Lin, 'Emerging Land Markets in Rural and Urban China': 705.

central government, market and local governments as entrepreneurs has blurred the boundaries between the public and private sectors.<sup>124</sup>

In the past thirty years of economic reform, Chinese policy makers have favoured efficiency rather than equality or fairness. What private property means in the Chinese context is wealth, which echoes Arendt's observation about 'the modern equation of property with wealth'. Given this equation, the accumulation of wealth serves as the justification for expropriation, as Arendt argues: 'for the enormous and still proceeding accumulation of wealth in modern society, which was started by expropriation...'<sup>125</sup> We also need to note the contradiction of the private and the public in both the Chinese political ideology and the debates between the neo-liberalists and the new-left. What at issue in these tensions and debates is not property but rather wealth or the political ordering of social wealth. The zigzag path of the revival of private property in urban China – the conversion of public property to private property but with ambiguous content and nature—shows the urgency to rethink and redefine property in China.

Rather than justifying private property or justifying the justifications, it is more worthwhile to explore the content and nature of private property in China. This also links to a broader question: how we understand the relationship between law and society. In *Eastern and Western Cultures and their Philosophies*, Liang Shuming points out that Western culture has two characteristics which Chinese culture did not have: one is a scientific spirit, and the other is the respect for individuality and the developed public life.<sup>126</sup> Similarly, Western law has the same two dimensions: the scientific dimension and democratic dimension including checks and balance and

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<sup>124</sup> According to the Vice-Chairman of the Standing Committee of NPC-Sheng Huaren's report on the Land Administration Law at the Tenth NPC in 2004, the local government's income from selling land use rights from 2001 to 2003 was Renminbi 910 billion, in 1998 this kind of income was just Renminbi 6.7 billion.

<sup>125</sup> Hannah Arendt, *The Human Condition*, 2ed. (Chicago: University of Chicago Press, 1998), 66.

<sup>126</sup> See Liang Shuming, 'Dongxi Wenhua Jiqi Zhixue [Eastern and Western Culture and Their Philosophies]', in *Liang Shuming Quanji [Completed Works of Liang Shuming]*, ed. Xueshu Weiyuanhui Zhongguo Wenhua Shuyuan (Jinan: Shandong Renmin Chubanshe, 1989 [1922]), 309.

rule of law.<sup>127</sup> It is possible for Chinese legal reform to borrow the scientific dimension from Western law, but to borrow the democratic dimension is difficult. The revival of private property in urban China has been bounded by the Chinese legal and governmental systems as well as socio-economic conditions.

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<sup>127</sup> See *ibid*, 370.

## Chapter 7: Changing State-Society Relations: Land Disputes, Conflict and Resistance in Rural and Urban China

### 1. Introduction

In rural China, the loss of rural land to urban development and commercial and industrial projects (for example, illegal conversion of rural land to urban land)<sup>1</sup> in China demonstrates the tragedy: ‘over the past seven years, China has lost 66,670 square kilometres or about 6.7 million hectares of farmland’, according to the Ministry of Land and Resources in 2006.<sup>2</sup> By contrast, there are booms and bubbles<sup>3</sup> in the property market. All the 40 people on Forbes Asia’s 2007 China Rich List are billionaires; among these 40 richest people, more than a dozen are property developers.<sup>4</sup> Since 2002, disputes and conflict relating to land have become the major subject of farmers’ rights protection, and there has been a significant shift in the focus of farmers’ activism—from conflicts regarding the burden of taxes and fees to land rights protection.<sup>5</sup> In January 2006, the Ministry of Public Security reported 87,000 protests and riots associated with land loss.<sup>6</sup> Farmers are calling for ‘the third

<sup>1</sup> See e.g., Guo Xiaolin, ‘Land Expropriation and Rural Conflicts in China’, *The China Quarterly*, no. 166 (2001): 422-439; Ho, Samuel P. S., and George C. S. Lin, ‘Non-Agricultural Land Use in Post-Reform China’, *The China Quarterly*, no. 179 (2004): 758-781.

<sup>2</sup> ‘China Grapples with Thorny Issue of Rural Land Rights’, *People’s Daily Online*, 1 September 2006. In <[http://english.peopledaily.com.cn/200609/01/eng20060901\\_298824.html](http://english.peopledaily.com.cn/200609/01/eng20060901_298824.html)> (last visited 20 August 2008).

<sup>3</sup> Bubbles in the property market have now emerged as seen in the recent plummeting house prices in Shenzhen in 2008.

<sup>4</sup> See ‘Fubusi Bangdan Jieshi Fangdichan Baoli [Forbes Rich List Reveals Profiteering in the Real Estate Market]’, Xinhua Wang [Xinhua Net], 2 November 2007. In <[http://news.xinhuanet.com/newscenter/2007-11/02/content\\_6999804.htm](http://news.xinhuanet.com/newscenter/2007-11/02/content_6999804.htm)> (last visited 7 August 2008).

<sup>5</sup> See Zhao Ling, ‘Nongmin Weiquan Zhongxin Zhongda Bianhua: Cong Shuifei Zhengyi Dao Tudi Weiquan [A Significant Shift in the Focus of Peasant Activism: From Conflicts Regarding Tax and Fees to Land Rights Protection]’, Nanfang Zhoumo [Southern Weekend], 2 September 2004. In <<http://www.southcn.com/news/china/china05/sannong/snpol/200409020413.htm>> (last visited 15 August 2008). Other issues that could cause social conflicts in rural China include taxation and fees, family planning, and environment contamination. On environmental issues in China see e.g., Peter Ho and Richard Louis Edmonds, ed., *China’s Embedded Activism: Opportunities and Constraints of a Social Movement* (London; New York: Routledge, 2008); Michael Palmer, ‘Towards a Greener China? Accessing Environmental Justice in the People’s Republic of China’, in *Access to Environmental Justice*, ed. A. J. Harding (Dordrecht: Kluwer, 2006), 205-235.

<sup>6</sup> See ‘China Grapples with Thorny Issue of Rural Land Rights’.

land reform', that is, privatisation of rural land by which they could obtain genuine private land rights.<sup>7</sup>

In urban China, many tragedies have also occurred in relation to housing demolition. On 22 August 2003, a man named Weng Biao in Nanjing poured gasoline on himself and set fire to himself at a local housing demolition and relocation office, because this office evicted Weng from his house by force without reasonable compensation and due process.<sup>8</sup> On 9 January 2005, an old couple in Shanghai died in a fire deliberately set by a housing demolition company in order to evict the couple from their home.<sup>9</sup> According to a speech of the Vice Minister of Construction at the National Conference on the Management of Urban Demolition and Relocation in September 2002, in January-August 2002, the Ministry of Construction received 1,730 complaint visits (*shangfang* 上访),<sup>10</sup> 70% of which were related to housing demolition; 123 group visits or petitions (*jiti shangfang* 集体上访), 83.7% of which were associated with housing demolition.<sup>11</sup> Another set of statistics of the Ministry of Construction revealed that in January-July 2002, housing demolition had caused 26 deaths and 16 injuries.<sup>12</sup>

Thus, although the CPC aims to build a 'harmonious society' (*hexie shehui* 和谐社会), there are still tensions and conflict between officials (especially local officials)

<sup>7</sup> See Zhao Xiao, 'Qidong Disanci Tudi Gemin Zhengdang Xishi [It is the Time to Start the Third Land Reform]', *Zhongguo Xinwen Zhoukan* [Chinese News Weekly], 28 December 2007, <<http://news.sina.com.cn/c/2007-12-28/100114621930.shtml>> (last visited 4 August 2008).

<sup>8</sup> See 'Nanjing Chaiqian hu Zifen Shijian Diaocha [An Investigation on An Evictee's Immolation in Nanjing]', *Xinming Zhoukan* [Xinmin Weekly], 1 September 2003. In <<http://news.sohu.com/33/67/news212706733.shtml>> (last visited 12 August 2008).

<sup>9</sup> See 'Shanghai Dongqian Gongsi Zonghuo Shaosi Guxi Fufu: She An Renyuan Quanbu Shouchen [A Demolition company set a fire and killed an old couple in Shanghai: killers have been punished]', *Xinhua Wang* [Xinhua Net], 9 October 2005. In <<http://www.chinacourt.org/public/detail.php?id=180331>> (last visited 12 August 2008).

<sup>10</sup> In China, complaints about injustice are often made through an administrative route known as the petitions or the 'Letter and Visits' (*xinfang* 信访) system. Most government departments are required to set up *xinfang* offices at county level and above to receive and respond to petitions. See e.g., Palmer, 'Toward a Greener China?', 222.

<sup>11</sup> See 'Chaiqian Shinian Bei Xi Ju [Tragedies and Comedies in Ten-Year Housing Demolition]', *Nanfang Zhoumo* [Southern Weekend], 4 September 2003. In <<http://news.sina.com.cn/c/2003-09-04/1131691557s.shtml>> (last visited 12 August 2008).

<sup>12</sup> See *ibid.*

and the people, and there are limited opportunities to alleviate these tensions and conflict. This chapter explores one important aspect of the re-emergence of private property—the changing state-society relations pertaining to land disputes and conflict in post-Mao China.<sup>13</sup> This chapter focuses on the enforceability of property rights under the dual land ownership and the land allocation system.<sup>14</sup> This chapter also examines the roles played in land disputes and social conflict by government (both central and local), the judiciary (for example, local people's court), media and public opinion (*gongzhong yulun* 公众舆论) as well as social organisations, and how land disputes, conflict and the changing state-society relations are closely linked.<sup>15</sup> Part Two of this chapter examines vulnerable property rights from the perspective of land requisition and forced eviction. Part Three examines the lack of opportunities for farmers and urban residents to seek remedies. Part Four analyses four typical cases of land requisition and forced eviction. Parts Five and Six look at the implications of these cases for the changing relation between the state and society in post-Mao China.

## 2. Vulnerable property rights: land requisition and forced eviction

As analysed in previous chapters, the answer to the question about who are the owner(s) of both urban and rural property in land is vague. This is because while

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<sup>13</sup> The previous chapters have analysed the rehabilitation of private property in the law and the revival of private property in both rural and urban China.

<sup>14</sup> See Chapter Four on rural collective ownership and Chapter Six on the emerging urban property market.

<sup>15</sup> On land disputes in historical context, see e.g., Kathryn Bernhardt, *Rent, Taxes, and Peasant Resistance: The Lower Yangzi Region, 1840-1950* (Stanford: Stanford University Press, 1992); Madeleine Zelin, 'The Rights of Tenants in Mid-Qing Sichuan: A Study of Land-Related Lawsuits in the Baxian Archives', *Journal of Asian Studies* 45, no. 3 (1986): 499-526. On land disputes in modern China, see e.g., Guo Xiaolin, 'Land Expropriation and Rural Conflicts in China'; Peter Ho, 'Contesting Rural Spaces: Land Disputes, Customary Tenure and the State in China', in *Chinese Society: Change, Conflict and Resistance*, 2<sup>nd</sup> edition, ed. Elizabeth Perry and Mark Selden, (London: Routledge, 2003), 93-112; Peter Ho, *Institutions in Transition: Land ownership, Property Rights, and Social Conflict in China* (Oxford: Oxford University Press, 2005); Pamela N. Phan, 'Enriching the Land or the Political Elite? Lessons from China on Democratization of the Urban Renewal Process', *Pacific Rim Law & Policy Journal* 14, no. 3 (June 2005): 607-657; Eva Pils, 'Land Disputes, Rights Assertion, and Social Unrest in China: a Case from Sichuan', *Columbia Journal of Asian Law* 19, no.1 (2006): 235-283. On general conflict and resistance in modern China, see e.g., Elizabeth J. Perry and Mark Selden, eds., *Chinese Society: Change, Conflict, and Resistance* (London; New York: Routledge, 2000).

state-owned land can be leased through the LUR system, the ‘state’<sup>16</sup> maintains its ownership of urban land and the ‘collective’ keeps its ownership of rural land (it is unclear who owns rural land in China: farmers themselves, collective economic organisations, or local governments).<sup>17</sup> Under these circumstances, the extent to which the Chinese people ‘own’ their private property is unclear.<sup>18</sup> Land use rights (LURs) are vulnerable to compulsory requisition by the state, and ordinary owners do not have security for their properties. House demolition (*chai qian* 拆迁) in urban China, and land seizure in rural areas, are thus the two major problems that have generated much social unrest and even public riots in contemporary China.

Although equal protection of state, collective and private property is one of the principles of the Property Law (2007) (Article 4), two kinds of unequal ownership exist in the contemporary Chinese land system. Urban land is owned by the state, which can grant and allocate LURs, and local governments therefore can transfer these LURs. By contrast, while rural land is collectively owned, farmers cannot dispose of their land freely and are vulnerable to compulsory land acquisition by the state. In the process of urbanisation and industrialisation, rural land is generating significant profits; however, local governments, officials, and property developers are enjoying these profits, while farmers are often excluded and sometimes exploited. Rather than protecting property rights of farmers and urban residents, the dual land ownership and land allocation system provides a ‘legal’ framework of land requisition and housing demolition. This section focuses on vulnerable property rights in relation to land requisition and forced eviction as one of the major sources of land disputes and conflict.

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<sup>16</sup> Here the question is who can represent the state, the central government or local governments?

<sup>17</sup> On collective ownership over rural land, see Chapter Four.

<sup>18</sup> See especially Chapter Six on the urban property market.

## 2.1. Land acquisition and compulsory requisition of LURs

In Contemporary China, there is a body of law that provides protection for property rights.<sup>19</sup> In the area of procedural laws, the Administration Litigation Law (ALL)<sup>20</sup> is a safeguard protecting ordinary people from the abuse of administrative power.

Article 26 of the ALL specifies that an administrative case may be brought as a 'collective suit' (*gongtong susong* 共同诉讼) where two or more persons share the same cause of action, and their cases can be handled together. The 'collective suit' provides a mechanism for the people to protect their property rights in the form of collective action.

At the international level, China has signed and ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>21</sup> Article 11 of the ICESCR guarantees 'the right of everyone to an adequate standard of living...including adequate food, clothing and housing, and to the continuous improvement of living conditions'. China has also signed the International Covenant on Civil and Political Rights (ICCPR),<sup>22</sup> but not yet ratified the ICCPR.<sup>23</sup>

Yet private property rights are still vulnerable to land acquisition (*tudi zhengshou* 土地征收) and requisition of LURs (*tudi shiyongquan zhengyong* 土地使用权征用). Both the Chinese Constitution<sup>24</sup> and the Land Administration Law (LAL)<sup>25</sup> specify that the state, in the public interest, may lawfully acquire land owned by collectives.

<sup>19</sup> On substantive law, see Chapter Three on property law reform.

<sup>20</sup> Xingzheng Susong Fa, promulgated by the NPC on 4 April 1989 and implemented on 1 October 1990.

<sup>21</sup> Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976. On China's implementation of the ICESCR, see e.g., Leila Choukroune, 'Justiciability of Economic, Social, and Cultural Rights: the UN Committee on Economic, Social and Cultural Rights' Review of China's First Periodic Report on the Implementation of the International Covenant on Economic, Social and Cultural Rights', *Columbia Journal of Asian Law* 19, no.1 (2005): 30-49.

<sup>22</sup> Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A(XXI) of 16 December 1966; entry into force 23 March 1976.

<sup>23</sup> On the ICCPR and China's possible ratification, see e.g., Sun Shixian, 'The Understanding and Interpretation of the ICCPR in the Context of China's Possible Ratification', *Chinese Journal of International Law* 6, no. 1(2007): 17-42.

<sup>24</sup> The Constitution (2004), Article 10(3)

<sup>25</sup> The LAL (2004), Article 2 (4)

This sets the stage for compulsory land acquisition.<sup>26</sup> The LAL states that compensation shall be given in accordance with the original use of the acquired land,<sup>27</sup> and the compensation is through a package that includes compensation for the land, resettlement subsidies and compensation for fixtures (*tudi fuzhuowu* 土地附着物) to, and young or green crops (*qingmiao* 青苗) on, the acquired land. Although Article 42 of the Property Law (2007) expands the scope of compensation to ‘the premiums for social security of the farmers’ in order to guarantee their normal lives and safeguard their lawful rights and interests, the compensation is still not specified to be paid at full market prices. Furthermore, local governments can acquire rural land from farmers at a low price and sell it to property developers at a high price. A great profit thus could be made because of the huge gap between these two different prices.<sup>28</sup>

What the ‘public interest’ (*gonggong liyi* 公共利益) means is very vague in both the Constitution and the Property Law. Moreover, the Supreme People’s Court has not issued any interpretation on the meaning of the ‘public interest’ or ‘public use’.

Mansions, golf courses, and lavish government buildings are being established in the name of the ‘public interest’ at the expense of productive agricultural land.

Governments are ill equipped to address the issues that have emerged from land acquisition and requisition of LURs because their own interests are involved in these issues.<sup>29</sup>

Moreover, because rural land is collectively owned, what farmers actually hold are land use rights. When the state acquires rural land ownership from rural collectives, LURs of farmers are lost accordingly. In practice, land requisition in rural China is

<sup>26</sup> *Zhengshou* is the compulsory acquisition of collective landownership; it is related to but different from *zhengyong*, which is taking of LURs. In this chapter *zhengshou* is translated land acquisition, and *zhengyong* is translated requisition of land use rights; land seizure is a general term that refer to both *zhengshou* and *zhengyong*, as well as illegal conversion of rural land to urban use.

<sup>27</sup> The LAL (2004). Article 47

<sup>28</sup> See Anthony Gar-on Yeh, ‘The Dual Land Market and Urban Development in China’, in Ding Chengri and Song Yan, eds., *Emerging land and Housing Markets in China* (Cambridge, Mass.: Lincoln Institute of Land Policy, 2005c), 43.

<sup>29</sup> This will be discussed in detail in Sections 4 and 5 of this chapter.

requisition of LURs of farmers for purpose of the urban development; land requisition in urban China is through housing demolition and forced eviction, that is, requisition of LURs of urban residents.<sup>30</sup> Compulsory requisition of LURs of (both rural and urban) land is stipulated in Article 44 of the Property Law (2007): 'for the purpose of emergency handling and disaster relief', real and movable properties of institutions or individuals may be reclaimed in line with the procedure and within the authority provided by law. The purpose of requisition of LURs of rural land is different from that of the permanent acquisition of collective ownership—'for the purpose of the public interest'. Moreover, after *zhengyong*, the reclaimed properties are to be returned to the owner. According to Article 42 (3) of the Property Law (2007), when houses and other real properties owned by farmers are acquired, compensation for demolition and resettlement shall be paid, which is more than the compensation for the fixtures on land, as which farmers' houses were once treated. However, like the vague definition of the 'public interest', the definition of 'emergency handling and disaster relief' is still at the discretion of the government. Furthermore, there are no specific provisions for compensation. Apart from the compulsory requisition of LURs, farmers are also vulnerable to the predatory behaviour of local governments and cadres usually associated with illegal conversion of farmland to commercial and industrial projects.<sup>31</sup>

## **2.2. Forced eviction and housing demolition**

Housing demolition usually involves developers, demolition and eviction management departments (affiliated to local land administration bureaux), residents, and a private demolition company (subcontracted by developers).<sup>32</sup> State Council's

<sup>30</sup> Requisition of LURs of urban residents leads to housing demolition, this is according to a principle established in the law that LURs are inseparable from rights in the buildings, colloquially referred as '*fang sui di zou, di sui fang zou*' (房隨地走, 地隨房走). See the Urban Real Estate Administration Law (1994, revised 2007), Article 32; The Guarantee Law (1995), Article 36; The Property Law (2007), Article 182.

<sup>31</sup> See Cai Yongshun, 'Collective Ownership or Cadres' Ownership? The Non-Agricultural Use of Farmland in China', *The China Quarterly*, no. 175 (2003): 662-680.

<sup>32</sup> Sara Meg Davis and Lin Hai, 'Demolished: Forced Evictions and the Tenants' Rights Movement in China'. *Human Rights Watch* 16, no. 4 (March 2004). In <<http://www.hrw.org/reports/2004/china0304/index.htm>> (last visited 08 August 2008).

‘Regulations for Management of Urban Residential Demolition and Eviction’ provides the procedures through which local governments may evict residents’ houses and apartments (2001, hereinafter the 2001 Regulation).<sup>33</sup> *Qiangzhi Chaiqian* (强制拆迁 forced eviction) is provided in Article 17 of this regulation, by which city and county governments can ask relevant departments (often through the demolition and eviction department) to proceed with forced eviction, or the demolition and eviction management department can apply for forced eviction by the people’s court, even when residents (including both homeowners and tenants) refuse reallocation. In reality, there is a lack of compensation, due process and remedies. Forced eviction in most cases has been transformed into violent eviction or savage eviction (*yeman chaiqian* 野蛮拆迁) including cutting off water and electricity, physical harassment and assaults, breaking into properties and arson by using secret societies and thugs.

The 2001 Regulation, as an administrative regulation, goes against provisions of the higher-level laws. For example, the Constitution (amended 2004, Article 13), the Property Law (2007, Articles 42 and 44), and the Urban Real Estate Administration Law (1994, Article 19) stress the ‘public interest’ as the reason for land acquisition and ‘emergency handling and disaster relief’ as the reason for requisition of LURs. But Article 7 of the 2001 Regulation does not specify either the ‘public interest’ or ‘emergency handling and disaster relief’. Requisition of LURs in the 2001 Regulation is in fact the taking of properties through administrative means (*xingzheng shouduan* 行政手段).<sup>34</sup> Furthermore, in the requisition of LURs, the property rights of evictees are often ignored; no negotiation mechanism is provided

<sup>33</sup> *Chengshi Fangwu Chaiqian Guanli Tiaoli* [Regulations for Management of Urban Residential Demolition and Eviction], promulgated by the State Council on 22 March 1991; implemented on 1 June 1991. This regulation was revised and promulgated by the State Council on 6 June 2001, implemented on 1 November 2001. After the implementation of the Property Law (2007), the implementation of provisions in the 2001 Regulation that contradict the Property Law has been terminated. But the Property Law does not specify procedures of housing demolition and leaves empty space in the enforcement of the law. The amendment of the Urban Real Estate Management was adopted by the standing committee of the NPC on 30 August 2007, but the amendment still grants power to the State Council to promulgate regulations concerning housing demolition and compensation standards.

<sup>34</sup> This also goes against *Lifa Fa* [The Legislation Law of the PRC], promulgated by the NPC on 15 March 2000, implemented on 1 July 2000. Article 79 of the Legislation Law provides: ‘National Law has higher authority than administrative regulations...’

between evictees and developers, and between evictees and local governments; compensation standards in most cases are low; there is a lack of judicial remedies, for example, and even if the plaintiff wins the lawsuit, his or her home has already been demolished.

The conflict between regulations and laws such as between the 2001 Regulation and the higher-level laws should be understood in the context of urbanisation and the housing reform. The State Council's 'Regulations for Management of Urban Residential Demolition and Eviction' emerged in 1991 (revised in 2001) and worked as a supplement to the Urban Planning law,<sup>35</sup> in order to promote urban construction and improve the living conditions of the urban residents. But as the pace of housing reform and housing commodification has accelerated since the 1990s, commercial property developers have monopolised housing construction and provision, and have formed a partnership with local governments.<sup>36</sup> As a result, the 2001 regulation seems to have satisfied the needs of commercial developers but ignored the interests of urban residents: developers can apply for housing demolition certificates from local governments; if developers and residents cannot achieve an agreement, local governments will adjudicate whether residents should be relocated; if residents still refuse to relocate, local governments or the court will proceed with forced eviction, even though such forced eviction contravenes the higher-level laws.

In order to examine the clash between different laws and regulations, we also need to take account of the relationship between law and party policy, as well as the relation between the central government and local governments in the process of lawmaking. In China, judicial law making is tightly restricted, and the main source of law is legislation.<sup>37</sup> Legal modernisation was endorsed in 1978 and until 1986 legislative powers had been extended to selected provincial governments and people's

<sup>35</sup> Chengshi Guihua Fa, promulgated on 26 December 1989, implemented on 1 April 1990.

<sup>36</sup> See Chapter Six on the emergence of the urban property market.

<sup>37</sup> Perry Keller, 'Sources of Order in Chinese Law', *American Journal of Comparative Law* 42, no. 4 (1994): 712.

congresses.<sup>38</sup> In addition, a complex hierarchy of law-making power and legislative organs were created as ‘a highly pragmatic response to political and institutional pressures’.<sup>39</sup> As Perry Kelly points out, ‘the Chinese legal order therefore effectively remained split between the formal legal powers of the NPC, which symbolised the unitary nature of the state, and the administrative power of the central and ... [provincial] bureaucracies to issue and enforce normative documents’.<sup>40</sup> Under these circumstances, whether an informal institution is successful or gets legalised largely depends on the attitudes of local governments, which can play roles in either facilitating or obstructing the emergence of informal institutions.<sup>41</sup>

Laws are even ignored by local governments. For example, in March 2004, Article 13 of the Constitution was amended, requiring the government to compensate citizens when their private properties are taken for public use.<sup>42</sup> However, local government (for example, the demolition and eviction management department or office) often sets its own standards for compensation that is very low in most cases.<sup>43</sup> Apart from unfair compensation, there is also lack of consultation and short notice in order to prevent residents allying with each other and taking collective actions (for example, through petition or litigation) against the project. There are few opportunities for ordinary people to negotiate with either the developers or the local government.

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<sup>38</sup> See *Difang Geji Renmin Daibiao Dahui He Difang Geji Renmin Zhengfu Zuzhi Fa* (The Local People’s Congresses and Local People’s Government Organisation Law), promulgated by the NPC on 1 July 1979, amended for the fourth time in 2004; Keller, ‘Sources of Order in Chinese Law’: 713-714.

<sup>39</sup> *ibid*, 714.

<sup>40</sup> Perry Keller, ‘Sources of Order in Chinese Law’, 723. Normative documents refer to ‘*guizhang*’ (规章).

<sup>41</sup> A typical example of the success in individual cooperative housing construction is in Wenzhou, Zhejiang Province, because of the strong business associations, local finance and support from local government in Wenzhou.

<sup>42</sup> Article 13 of the Constitution (amended in 2004) states:

‘The lawful private property of citizens may not be encroached upon.

By law, the state protects citizens’ rights to own private property and the rights to inherit private property.

The state may, for the public interest, acquire or requisition citizen’s private property for public use, and pay compensation in accordance with law’.

<sup>43</sup> Eva Pils, ‘Land Disputes, Rights Assertion, and Social Unrest in China’, 251. The compensation for farmers is even lower than urban residents.

Another example that local governments turn a blind eye to laws is in the area of urban planning. The Urban Planning Law<sup>44</sup> has been largely disregarded by local governments, and housing demolition could be conducted by local governments in the name of urbanisation with few constraints. According to the law (Article 21), provinces should submit their land-use plans to the State Council. A land-use plan at the city or the county level should obtain two levels of approval. First, the plan should be approved by the people's congress at the same administrative level of the city or the county government; and then the plan should get approval from the government at the higher level. But in some cities, normative documents issued by the local government sidestep urban plans set by the State Council.<sup>45</sup> In April 1999, the State Council approved the Outline of National Land Use Plan (1997-2010)<sup>46</sup>, and land use quotas were allocated to local governments. However, the Outline has been set aside by local governments especially some provinces with developed economies. By 2004, Shandong province had used up 80% of its planned land quotas; Zhejiang province exhausted more than 99%; in Zhejiang, land quotas have been bought and sold; in the Pearl River Delta area, there is even no land available to use.<sup>47</sup>

Local regulations and normative documents also contravene international conventions. For example, the 2001 Regulation is in breach of the ICESCR, especially 'the right of adequate housing' (Article 11, Paragraph 1). In the ICESCR and relevant UN documents, 'the right of housing' and human rights are closely

<sup>44</sup> Urban Planning Law (1989) only provides planning for the city and could not keep pace with urban and rural development. Now The Urban and Rural Planning Law (2008) has replaced the Urban Planning Law. The Urban and Rural Planning Law was promulgated on 28 October 2007 and implemented on 1 January 2008.

<sup>45</sup> See Liu Chenglin, 'Informal Rules, Transaction Costs, and the Failure of the "takings" Law in China', *Hastings International & Comparative Law Review* 29, no.1 (2005): 12.

<sup>46</sup> Quanguo Tudi Liyong Zongti GuiHua Gangyao (1997-2010).

<sup>47</sup> Wang Libin, 'Tudi Guihua Genzhe Shui Zai Zou? [Who Decides the Land Use Planning?]', Xinhua Wang [Xinhua Net], 12 May 2004. In <[http://news.xinhuanet.com/house/2004-05/12/content\\_1464972.htm](http://news.xinhuanet.com/house/2004-05/12/content_1464972.htm)> (last visited 18 August 2008). Also see Liu Chenglin, 'Informal Rules, Transaction Costs, and the Failure of the "takings" Law in China', 13.

linked: ‘forced evictions [are a gross] violation of human rights...the right of adequate housing...includes the right to be protected from forced eviction’.<sup>48</sup> Some of the procedural safeguards required by the ICESCR cannot be found in Chinese national laws and local regulations.<sup>49</sup>

### **3. Access to justice**

#### **3.1. Administrative adjudication and reconsideration**

The above section has analysed the flaws and loopholes in the legal framework concerning housing demolition and forced eviction, and the subsequent question is: can people seek remedies and get access to justice when their property rights are infringed upon? According to the 2001 Regulation (Article 16), if evictors and evictees cannot achieve an agreement on compensation and relocation, demolition and eviction management departments may adjudicate (*caijue* 裁决)<sup>50</sup> the disputes between evictors and evictees. When demolition and eviction management departments are the evictees, the disputes will be adjudicated by the people’s court at the same administrative level of the demolition and eviction management department. According to Article 16(2) of the 2001 Regulation, against the decision of adjudication, the unsatisfied party may appeal to the People’s Court. However, housing demolition can continue while the appeal is pending. The Ministry of Construction issued the ‘Procedures for Administrative Adjudication Regarding Urban Housing Demolition’.<sup>51</sup> According to the Procedures, if a large number of residents disagree with the compensation and relocation package, a public hearing should be held before the demolition and eviction management department accept the application for adjudication (Article 7), and evictors are forbidden to use forced

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<sup>48</sup> Office of the High Commissioner for Human Rights, ‘Fact Sheet No. 25, Forced Evictions and Human Rights’. In <<http://www.unhchr.ch/html/menu6/2/fs25.htm#2>> (last visited accessed 12 August 2008).

<sup>49</sup> See Davis and Lin, ‘Demolished’.

<sup>50</sup> Administrative adjudication (*xingzheng caiju* 行政裁决) is the adjudication of disputes between equal civil entities by the administrative authority who administers the disputed issues.

<sup>51</sup> Chengshi Fangwu Chaiqian Xingzheng Caijue Gongzuo Guicheng, promulgated by the Ministry of Construction on 30 December 2003, promulgated on 1 March 2004.

measures in housing demolition such as cutting off water, electricity, gas and heating (Article 24).

According to ‘the Procedures’ mentioned above, if either party (usually the residents) is unsatisfied with the decision of administrative adjudication, the unsatisfied party has two choices to challenge the decision.<sup>52</sup> The first is to apply for administrative reconsideration (*xingzheng fuyi 行政复议*)<sup>53</sup> of the decision. The other is to file suit against the decision in court.<sup>54</sup> Moreover, if residents are not satisfied with the result of administrative reconsideration, they can appeal to the court for administrative litigation (*xingzheng susong 行政诉讼*).<sup>55</sup> But neither administrative adjudication nor administrative reconsideration provides adequate remedies for residents. The disputes over housing demolition and eviction are adjudicated by demolition and relocation management departments in the first place, and these departments often have a close relationship with the evictors. Secondly, the Administrative Reconsideration Law provides that only concrete administrative acts (*juti xingzheng xingwei 具体行政行为*) can be reviewed,<sup>56</sup> which means that the legality of local regulations (for example, the 2001 Regulation) as the basis of housing demolition and forced eviction cannot be challenged.

### 3.2. Administrative litigation and mediation

Administration litigation is a possible channel that ordinary people could seek remedies when their property rights are infringed upon. Administrative litigation is also an important perspective to investigate the reshaped relation between the state and society in post-Mao China. The Administrative Litigation Law (ALL) passed in

<sup>52</sup> See the ‘Procedures for Administrative Adjudication Regarding Urban Housing Demolition’ (hereinafter the Procedures), Article 16.

<sup>53</sup> See Xingzheng Fuyi Fa [The Administrative Reconsideration Law], Articles 12-15, promulgated by the Standing Committee of the NPC on 29 April 1999, implemented on 1 October 1999. Article 12, ‘any applicant, who refuses to accept a specific administrative act of the department under local people’s government at or above the county level may apply for administrative reconsideration to the people’s government at the same level; an applicant may also apply for administrative reconsideration to the competent authority at the next higher level’.

<sup>54</sup> ‘The Procedures’, Article 16.

<sup>55</sup> The Administrative Reconsideration Law (1999), Article 5.

<sup>56</sup> The Administrative Reconsideration Law (1999), Article 7.

April 1989 and implemented in October 1990. It offers ordinary people an important legal instrument to protect themselves from the abuse of state power by government agencies and officials. In the report delivered at the 13<sup>th</sup> National Congress of the CPC in October 1987 by Zhao Ziyang, the CPC General Secretary at that time, proposed the separation of functions between the Party and the state (*dangzheng fenkai* 党政分开) and prioritised the ALL in legislation.<sup>57</sup> In the late 1980s and early 1990s, there was a rapid increase in the number of Administrative Litigation Cases (ALCs).<sup>58</sup> But after 1989, the increase of ALCs slowed down.<sup>59</sup> Most ALCs involved disputes over land use, forestry, urban planning and real estate.<sup>60</sup> The ambiguity of property rights has become a main reason for the people to initiate an administrative litigation. According to the ALL, the courts can only review concrete administrative acts (Article 11). Courts have no power to review 'the appropriateness of an act',<sup>61</sup> nor can courts review laws and local regulations.<sup>62</sup>

In administrative litigation, mediation is prohibited.<sup>63</sup> But now the Chinese judiciary is seeking to divert administrative cases away from litigation: Chinese judicial authorities are now encouraging the use of alternative dispute resolution to resolve administrative litigation cases.<sup>64</sup> Xiao Yang, former president of the Supreme People's Court, in his speech on 29 March 2007<sup>65</sup> stressed the need to adopt new mechanisms to deal with administrative litigation disputes, particularly those relating

<sup>57</sup> See Zhao Ziyang's report in <[http://www1.www.gov.cn/test/2008-07/01/content\\_1032279.htm](http://www1.www.gov.cn/test/2008-07/01/content_1032279.htm)> (last visited 9 October 2008). English version is in Zhao Ziyang, 'Advance Along the Road of Socialism with Chinese Characteristics', *Report Delivered at the Thirteenth National Congress of the CPC on 25 October 1987, in Documents of the Thirteenth National Congress of the Communist Party of China*, 3-77. Beijing: Foreign Language Press, 1987.

<sup>58</sup> See Pei Minxin, 'Citizens v. Mandarins: Administrative Litigation in China', *The China Quarterly*, no. 152 (1997): 836.

<sup>59</sup> See *ibid*, 837.

<sup>60</sup> See *ibid*, 839.

<sup>61</sup> See e.g., Randall Peerenboom, *China's Long March Toward Rule of Law* (Cambridge: Cambridge University Press, 2002), 420. On administrative litigation in China, see *ibid*, 420-424.

<sup>62</sup> Normative documents are not binding the court.

<sup>63</sup> The ALL (1989), Article 50.

<sup>64</sup> On this issue, also see Michael Palmer, 'Compromising Courts and Harmonizing Ideologies: Judicial Mediation in Post-Deng China', in *New Courts in the Asia-Pacific Region*, eds. Andrew Harding and Pip Nicholson (London: Routledge, 2009, forthcoming).

<sup>65</sup> See Xiaoyang's speech at the fifth National Administrative Adjudication Conference on 29 March 2007, in <<http://www.court.gov.cn/news/bulletin/activity/20070330020.htm>> (last visited on 16 August 2008).

to ‘mass administrative disputes’ (*qunti xing xingzheng zhengyi* 群体性行政争议) such as land acquisition and housing demolition. Xiao called for the Supreme Court to issue judicial interpretations on *xietiao* (协调 coordination) and *hejie* (和解 settlement) in order to deal with administrative disputes properly. Moreover, *hejie* is expected to promote the construction of a harmonious society.<sup>66</sup> *Hejie* is mediation in essence, but as Article 50 of the ALL clearly bans mediation in administrative litigation, the use of *xietiao* and *hejia* simply circumvents the provisions of the ALL. Xiao stated:

administrative disputes are contradictions among the people (*renmin neibu maodun* 人民内部矛盾). The reasons that generate administrative disputes are complex, and the situation of each administrative case is different. Therefore, the resolution of administrative litigation cases should adopt multiple mechanisms and means...it is particularly important to adopt coordinated means of *xietiao* to the greatest extent to handle administrative disputes...<sup>67</sup>

In order to introduce mediation to administrative cases, in January 2008, The Supreme People’s Court introduced new rules concerning the withdrawal of administrative suits. By permitting a plaintiff to voluntarily withdraw a lawsuit if the defendant (usually the government agencies) rescinds or changes its administrative conduct. These rules have opened room and provided a legal basis for using *hejie* (settlement) in administrative suits.<sup>68</sup> This is a two-edged sword: on the one hand, more mechanisms are provided to resolve ALCs; on the other hand, it is the effort to divert sensitive cases affecting a lot of people and attracting much social attention

<sup>66</sup> On ‘Constructing a Harmonious Society’, see ‘Zhonggongzhongyang Guanyu Goujian Shehui Zhuyi Hexie Shehui Ruogan Zhongda Wenti de Jueding [Resolutions of the CPC Central Committee on Major Issues Regarding the Building of A Harmonious Socialist Society]’, adopted by the Sixth Plenum of the 16th CPC Central Committee on 11 October 2006.

<sup>67</sup> See Xiaoyang’s speech at the fifth National Administrative Adjudication Conference on 29 March 2007.

<sup>68</sup> Zuigao Renmin Fayuan Guanyu Xingzheng Susong Chesu Ruogan Wenti de Guiding [Supreme People’s Court Rules Concerning Several Issues in the Withdrawal of Administrative Suits], approved by the 1441<sup>st</sup> Meeting of the Adjudication Committee of the Supreme People’s Court, promulgated by the Supreme People’s Court on 1 January 2008, implemented on 1 February 2008. In <[http://www.chinacourt.org/flwk/show.php?file\\_id=124166](http://www.chinacourt.org/flwk/show.php?file_id=124166)> (last visited 16 August 2008). On an explanation of these rules see e.g., Wang Doudou, ‘Xingzheng Susong Xietiao Hejie Youle Falü Yiju [Coordination and Settlement in Administrative Litigation have had legal basis]’, *Fazhi Ribao*, 17 January 2008. In <[http://www.legaldaily.com.cn/bm/2008-01/17/content\\_782925.htm](http://www.legaldaily.com.cn/bm/2008-01/17/content_782925.htm)> (last visited 16 August 2008).

such as land seizure and housing demolition out of the courtroom. The ‘Rules of the Supreme People’s Court on Some Issues Concerning Jurisdiction in Administrative Cases’<sup>69</sup> should also be considered. Article 1 lists a number of situations in which jurisdiction is vested in the Intermediate People’s Court rather than the basic people’s court. These situations include where the defendants are local governments at or above the county level, and a collective suit (*gongtong susong* 共同诉讼<sup>70</sup>) that attracts great social attention.

Introducing mechanisms of mediation to administrative cases attempts to prevent the interference of local government in administrative cases. But if cases are ‘settled’ as in the Rules concerning ‘the withdrawal of the administrative suits’, another door will be opened for local government to put pressure on the case, especially when we take account of the problems of China’s laws and regulations. The crux of China’s legal system is the single ‘political-legal system’ (*zhengfa xitong* 政法系统) which includes not only the courts, but also the political-legal committee of the CPC, procuratorates, police, prison/forced labour system etc.<sup>71</sup> In such a system, any law should accurately reflect the concurrent Party policy. ‘The Supervision Law’ (2006)<sup>72</sup> has not made any difference to this situation. Under the Supervision Law, the Standing Committees of People’s Congresses have the power to supervise the government, people’s courts, and people’s procuratorates, but these congresses are all ‘state organs under the leadership of the CPC’.<sup>73</sup> In this system, the judiciary lacks autonomy, and their rulings are constrained by local party organs (for example, the

<sup>69</sup> *Zuigao Renmin Fayuan Guanyu Xingzheng Anjian Guanxia Ruogan Wenti de Guiding*, promulgated by the Supreme People’s Court 14 January 2008, implemented on 1 February 2008. In <[http://news.xinhuanet.com/legal/2008-01/16/content\\_7432428.htm](http://news.xinhuanet.com/legal/2008-01/16/content_7432428.htm)> (last visited 16 August 2008).

<sup>70</sup> The ALL (1989), Article 26.

<sup>71</sup> On the political-legal system in China see e.g., Murray Scot Tanner, *The Politics of Lawmaking in Post-Mao China: Institutions, Processes, and Democratic Prospects* (Oxford, N.Y.: Clarendon Press, 1999).

<sup>72</sup> *Geji Renmin Daibiao Dahui Changwu Weiyuanhui Jiandu Fa* [The Supervision Law of the Standing Committee of the People’s Congress at Different Levels], promulgated by the standing committee of the NPC on 27 August 2006, implemented on 1 January 2007.

<sup>73</sup> See ‘Keep a Close Watch’, State Council Information Office of the PRC, 1 October 2006, in <<http://www.scio.gov.cn/zgxwybd/en/2006/19/200610/t101717.htm>> (last visited on 18 August 2008).

political-legal committees) and local governments.<sup>74</sup> Judges are on the government payroll, and listed in *bianzhi* (编制)<sup>75</sup> as civil servants.<sup>76</sup>

#### **4. Disputes, conflict and resistance in relation to land in post-Mao China**

As administrative adjudication and reconsideration are unlikely to offer adequate remedies, residents have to pursue either ‘Letters and Visits’ outside the formal legal system or administrative litigation in the court. When the disputes cannot be resolved by either method, conflicts in extreme cases result in deaths and injuries. In this section, four typical cases are chosen to illustrate land disputes and conflict, as well as the broader picture of disputes, conflict and social unrest in post-Mao China.

##### **4.1. Shengyou attack in Dingzhou**

Shengyou is a village south of the Dingzhou City (a city at the county administrative level) in Hebei Province. Over two hundred armed thugs allegedly belonged to secret societies (*hei shehui* 黑社会) and, hired by corrupt local officials, attacked farmers in Shengyou village. These farmers were local residents and resisted requisition of LURs for a state-owned electricity company to build a power plant. Six farmers were killed and at least 100 others were seriously injured.<sup>77</sup>

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<sup>74</sup> The ‘Seed Case’ (*Zhongzi An* 种子案) in Henan is a typical example illustrating the lack of autonomy of the judiciary. In this case, a judge ruled that the regulation promulgated by the Provincial People’s Congress went against the regulation promulgated by the Standing Committee of the NPC, and this judge was removed from her post. On this case, see e.g., Jim Yardley, ‘A Judge Tests China’s Courts, Making History’, *The New York Times*, 28 November 2005. In <[http://www.nytimes.com/2005/11/28/international/asia/28judge.html?pagewanted=1&\\_r=1](http://www.nytimes.com/2005/11/28/international/asia/28judge.html?pagewanted=1&_r=1)> (last visited 15 August 2008).

<sup>75</sup> On the *bianzhi* system see Chapter Six.

<sup>76</sup> It should be noted that most judges in most countries are paid by the government. In Europe (the UK is an exception), judges are rather like civil servants. But Chinese judges are embedded in the one-party system.

<sup>77</sup> Philip P. Pan, ‘Chinese Peasants Attacked in Land Dispute’, *Washington Post*, 15 June 2005. Also see Daniel Griffiths, ‘China Faces Growing Land Disputes’, *BBC News*, <<http://news.bbc.co.uk/2/hi/asia-pacific/4728025.stm>> (last visited 31 July 2008). On reports on Chinese media, see e.g., a special edition in <<http://news.qq.com/zt/2005/hebeideng/index.htm>> (last visited 11 August, 2008).

Campaigns by farmers on the disputed land began in the fall of 2003, when the power plant announced that it would build a facility to store coal ash. Twelve affected villages surrendered their land but farmers in Shengyou did not give up, because they regarded the compensation offered by the company as unreasonable and lower than the national standard for compensation. Farmers also accused corrupt local officials involved in land requisition and demanded full compensation. Farmers were then harassed by Dingzhou police,<sup>78</sup> and assaulted by thugs before the severe final attack. The central and provincial government intervened in the investigation of this attack because of the death and serious injuries of farmers and media publicity.<sup>79</sup>

Issues involved in this case include land requisition with related social unrest, which is a great problem rooted in Chinese society. Rural land has been taken in order to make way for urban expansion and industrialisation (for example, in the name of construction of 'high-tech zones' and factories). For instance, a similar case like the Shengyou attack also happened at Zigong in Sichuan Province.<sup>80</sup> In recent years, more and more farmers have become aware of their property rights, but there have been limited opportunities for them to claim and protect their property rights. Many farmers go to Beijing to file petitions, but are often blocked by checkpoints set up by local officials.<sup>81</sup> Another important issue that should be considered is the transformation of the role and function of the local government and local policing power. Instead of protecting farmers' property rights, the local government proceeded with land requisition by allying with thugs. As a result, farmers had to seek help from international and national media that played an important role in the disclosing of the truth of this attack.

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<sup>78</sup> See Pan, 'Chinese Peasants Attacked in Land Dispute'.

<sup>79</sup> The Party secretary and the city chief of Dingzhou have been removed from their posts, and the party secretary has been sentenced to life imprisonment after the disclosure of the attack. See Wang Jia and Han Pulu, 'Heibei Dingzhou 6.11 Xiji Cunmin Shijian Shimo' [The 6.11 Attack on Villagers in Dingzhou, Hebei Province].

<sup>80</sup> On a comprehensive analysis of the Zigong case, see Pils, 'Land Disputes, Rights Assertion, and Social Unrest in China': 235-283.

<sup>81</sup> See Griffiths, 'China Faces Growing Land Disputes'.

#### 4.2. Housing demolition in Beijing: the vanished *hutong*

In Beijing, housing demolition has often proceeded in the name of 'dilapidated housing renewal' (*weifang gaizao* 危房改造) or 'old city renewal' (*jiucheng gaozao* 旧城改造). From 1991 to 2003, 500,000 households were demolished in Beijing.<sup>82</sup> In the 'old' city of Beijing, there are two kinds of buildings (most of which are *hutong* 胡同 or old style housing) that have become targets of demolition. One kind is the house that was confiscated by the state during the 'socialist transformation' and allocated by the land administration bureaux to ordinary workers and work unit employees; the other is the house that was managed by the state during 1958-1978 and returned to the original owners after 1978.<sup>83</sup> When the house was managed by the state, while private ownership was recognised and property owners could receive a fixed percentage of rental income charged by the state to tenants, the state took control of rent standards and management of private rental housing, and the direct link between landlords and tenants was broken. When the Cultural Revolution started in 1966, state management was terminated, and the remaining private houses were mainly for owner-occupation. During the Cultural Revolution, many owner-occupied houses were even confiscated by Red Guards.<sup>84</sup> Although 'urban land was state owned' was promulgated in Article 10 of the 1982 Constitution, the LURs of these houses (so-called *jingzu fang* 经租房, literally managed and rented houses) still exist. In the late 1980s, state policies permitted the original owners and their heirs to claim partial property rights over houses which were once managed by the state, but even today there is not a good mechanism for the original owners and their heirs to claim complete property rights.

<sup>82</sup> See Wang Jun, 'Beijing Wenbao Qu zhi Huo [The Puzzle of the Protected Historic Zone in Beijing]', *Xinhua She Liaowang Zhoukan* [Xinhua News Agency Outlook Weekly], no. 23 (2007). In <[http://lw.xinhuanet.com/htm/content\\_712.htm](http://lw.xinhuanet.com/htm/content_712.htm)> (last visited 16 August 2008).

<sup>83</sup> After 'socialist transformation' (*shehuizhuyi gaizao* 社会主义改造) in 1956, the housing market was gradually abolished. Except for confiscation of properties owned by war criminals and 'anti-revolutionaries', the transition from private ownership to public ownership was gradual. One example was 'state management and renting' (*guojia jingyingzulin* 国家经营租赁) initiated in 1958. Another was socialist purchase' (*guojia shumai* 国家赎买) of privately owned properties.

<sup>84</sup> See Zhang X Q., 'Chinese Housing Policy 1949-1978: the Development of a Welfare System', *Planning Perspectives*, no. 12 (1997): 433-455; Huang Youqin, 'The Road to Homeownership: a Longitudinal Analysis of Tenure Transition in Urban China (1949-1994)', *International Journal of Urban and Regional Research* 28, no. 4 (2004): 777.

LURs are vulnerable in the process of urban renewal. In Beijing, large-scale dilapidated housing renewal started in the 1980s, although some projects even started as early as the 1950s: at that time from the 1950s to 1980s, all the work was done by the government, including investment, setting compensation standards, and relocation of residents; most residents were re-housed (*huiqian* 回迁) in the original area after the renewal was finished; conflicts in demolition were mainly disputes between family members.<sup>85</sup> However, the situation has been changed by the rapid urban expansion and the joint renewal project conducted by government and commercial developers. According to Article 58 of the Land Administration Law (amended in 2004), the land administration department could take back the LURs of state-owned land in the case of ‘renovating of the old urban area’. By working with the government, urban renewal has become a profitable means for commercial developers to get LURs at low prices. Another way for developers to gain more profits is to lower the cost of demolition. For example, developers try to resettle residents in suburban areas rather than re-house them in the original inner city. In this ‘commercial demolition’ (*shangye chaiqian* 商业拆迁), conflicts between family members in demolition have transformed into disputes and conflicts between residents and commercial developers allied with local governments.<sup>86</sup>

Disputes in relation to housing demolition have increased rapidly in Beijing, but it is not easy for ordinary people to protect their LURs through litigation. The most famous case is a so-called ‘Ten-Thousand-Person Mass Lawsuit’ (*wanren susong* 万人诉讼). In February 2000, 10,357 residents in Beijing filed an administrative suit in the Beijing Municipal Second Intermediate Court. However, the court refused to register this case and did not give any reply. The land administration bureaux, local people’s courts and property developers have formed a solid partnership and shared common interests; one vice-president of a district people’s court was found to be a

<sup>85</sup> ‘Chaiqian Shinian Bei Xi Ju [Tragedies and Comedies in Ten-Year Housing Demolition]’.

<sup>86</sup> See *ibid.*

manager of a housing demolition company at the same time.<sup>87</sup> Initiating administrative litigation by ordinary people is still like ‘throwing an egg against a stone’. Commonly, people’s courts simply do not hear the cases or dismiss the appeals of the plaintiff,<sup>88</sup> which is against the ALL.

Land use rights (LURs) are also vulnerable in local normative documents. For example, a document issued by the Beijing Land Administration Bureau (no. 434) on 21 July 1995 stated: ‘Article 12 of the 1982 Constitution provides that urban land is owned by the state...the state can reclaim land use rights without compensation for the need of city construction...the conclusion is: in the demolition of privately owned houses, compensation is only offered for the house and its fixture, no compensation should be provided for land use rights’.<sup>89</sup> There are also different and unequal treatments for LURs owned by different people. In Beijing, the demolition policies provided that: ‘in terms of the real estate owned by citizens whose administrative rank is above deputy minister, privileged people (for example, senior people in the democratic parties, foreign citizens, and former senior officials of Guomindang), the land use rights need to be assessed and compensated’.<sup>90</sup>

Issues in the Beijing housing demolition include the vulnerable land use rights; the encroachment upon property rights by the partnership between local government, commercial developers, and local people’s courts; flawed normative documents; the difficulties for residents to file an administrative suit. Another important issue is the need to protect the historic old city and the vanishing cultural roots of local residents.

<sup>87</sup> See Guo Yukuan, ‘Jingcheng Chaiqian—Yige Hairen Tingwen de Zhenshi Gushi [Housing Demolition in Beijing, A Real Shocking Story]’, Zhongguo Fangdichanye Lushiwang [Chinese Real Estate Lawyers Website], 1 March 2006. <<http://www.fc70.com/article.aspx?articleid=9322>> (last visited 04 August 2008).

<sup>88</sup> See *ibid*. In 1995, in its no. 106 document, the Higher-Level Beijing Municipal People’s Court provided that ‘suits concerning the decision of demolition, administrative adjudication, relocation and compensation should not be heard’. See Chen Xiao, ‘2003-2007: Chaiqian Xin Bianju [2003-2007: New Trends in Housing Demolition]’, Chinese News Weekly [Zhongguo Xinwen Zhoukan], 30 March 2007. In <<http://news.sina.com.cn/c/2007-03-30/140912655316.shtml>> (last visited 7 April 2007).

<sup>89</sup> Guo Yukuan, ‘Jingcheng Chaiqian’.

<sup>90</sup> *ibid*.

For example, for local residents in Beijing, *hutong* are not just real estate, they are also associated with their family histories, values and memories.<sup>91</sup>

#### **4.3. The case of Hunan Jiahe housing demolition<sup>92</sup>**

In July 2003, the Jiahe County Government sold land to a property developing company (the Zhuquan Real Estate Sales Company) to start building the Zhuquan Commercial Mall (*zhuquan shangmao cheng* 珠泉商贸城), a project that took up 120,000 square meter land in the business district of Jiahe.<sup>93</sup> Although the county government claimed that this would be good for the renewal of the ‘old’ city in the ‘public interest’, existing houses that were built after 2000 had to be demolished, adversely affecting 1,100 households and 7,000 people in Jiahe.

According to a China Central TV’s report, the property developing company obtained a contract before the bidding process at an extremely low price—RMB 30 per square metre. Before the founding of the Zhuquan property developing company on 27 June 2004, the county government already promised to sell the LURs to this not-yet founded company. On 23 July 2004, the company obtained the LURs, but the bidding started one month later in August 2004, and the ‘Zhuquan Real Estate’ was the only one company that took part in the ‘bidding’. The county government and the property developer signed a so-called ‘Yin Yang Contract’ (*yinyang hetong* 阴阳合同)<sup>94</sup> under which the property developers obtained the LURs with an extremely low

<sup>91</sup> See Ian Johnson, *Wild Grass: Three Stories of Changes in Modern China* (London: Penguin Books, 2005c), 87-182.

<sup>92</sup> A series of investigation reports were circulated on the Internet and national newspapers. Luo Changping, the reporter of *Xin jing bao* [Beijing News], was the first to disclose the news to the public. Two major websites in China, Sina.com and Sohu had their special editions of the Jiahe case reports. See e.g., <<http://news.sina.com.cn/z/hnjiahe/index.shtml>> (last visited 11 August 2008). On the Jiahe case, also see e.g., Anne S. Cheung, ‘Public Opinion Supervision—A Case Study of Media Freedom in China’, *Columbia Journal of Asian Law* 20 (2007): 357-384; Liu Chenglin, ‘Informal Rules, Transaction Costs, and the Failure of the “takings” Law in China’: 1-28.

<sup>93</sup> The commercial mall itself took up 8,000 square meters. See ‘Hunan Jiahe Chaiqian Diaocha Er: Yin Yang Hetong [Investigation on Demolition in Jiahe, Hunan Province 2: Yin Yang Contract]’, China Central TV (CCTV), 14 May 2004. In <<http://news.sina.com.cn/c/2004-05-14/11203228616.shtml>> (last visited 11 August 2008).

<sup>94</sup> In Chinese philosophy, Yin (阴) and Yang (阳) mean negative (or feminine) and positive (or masculine) principles in nature. In describing locations, Yin refers to the shadow (the hidden area), while Yang refers to the public area. Here the Yang Contract refers to a contract on the surface, the Yin

price. In the Yin Contract, 70% of the LURs transfer fees (*tudi shiyongquan churang jin* 土地使用权出让金) were even reimbursed to the ‘Zhuquan Real Estate’. As a result, the ‘Zhuquan Real Estate’ got the LURs with a price that only amounted to 1.3% of the actual market value.

At the start of building this commercial project, the Jiahe county government posed big banners saying, ‘those who affect the development [of Jiahe] for a few days will be affected by me [the county government] for a life time’.<sup>95</sup> On 7 August 2003, the county government initiated an administrative order (issued by the county party committee and county government, no. 136) entitled ‘Four Guarantees and Two Stops’ (*si bao liang ting* 四包两停).<sup>96</sup> The order forced civil servants in Jiahe to hold collective responsibility for guaranteeing the completion of the demolition work.<sup>97</sup> This is the manner of holding collective responsibility (*zhulian* 株连) used in the Cultural Revolution. Specifically, these civil servants had to guarantee that their family members or relatives who were affected in demolition and relocation would provide cooperation in assessment of compensation within the provided time; sign the compensation agreement; vacate the property and hand in all relevant documents and certificates; and promise not to file petitions to the higher-level authorities or conduct any collective action.<sup>98</sup> Otherwise the salaries of these civil servants and their jobs would be stopped with the possibility of being dismissed or relocated to remote areas to work. In order to protect their husbands from being dismissed, two sisters had to apply for divorce on the same day.<sup>99</sup>

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Contract refers to a contract that is achieved privately and is not disclosed to the public.

<sup>95</sup> ‘Shui Yinxiang Fazhen Yi Zhenzi, Wo Yingxiang Ta Yi Beizi’ (谁影响发展一阵子，我影响他一辈子), see ‘Hunan Jiahe Chaiqian Diaocha Er [Investigation on Demolition in Jiahe, Hunan Province 2]’.

<sup>96</sup> See ‘Hunan Jiahe Chaiqian zhi Tong [the Sufferings of Housing Demolition in Jiahe, Hunan Province]’, CCTV, 26 May 2004. In <<http://news.sina.com.cn/c/2004-05-26/10553336990.shtml>> (last visited 11 August 2008).

<sup>97</sup> See ‘Hunan Jiahe Chaiqian Diaocha Er [Investigation on Demolition in Jiahe, Hunan Province 2]’.

<sup>98</sup> See ‘Hunuan Jiahe Chaiqian Diaocha: Chaiqian Nenggou Zhulian Jiuza ma? [Investigation on demolition in Jiahe, Hunan Province: Collective Liability among Family Members?]', CCTV, May 14 2008. In <<http://news.sina.com.cn/c/2004-05-14/11113228504.shtml>> (last visited 11 August 2008).

<sup>99</sup> The two sisters were both school teachers, who had to hold collective responsibility. The father of the two sisters did not cooperate in the housing demolition and was not willing to sign the compensation contact. In order to protect their husbands, both were civil servants, the two sisters had

This case shows that local government actively and directly engaged in commercial demolition, forced eviction and relocation under the guise of constructing a ‘public project’ for the ‘public interest’. Local police<sup>100</sup> and local people’s courts<sup>101</sup> were accomplices with local governments. There was severe abuse of power in these forced evictions, and evictees had few ways to access justice. This case also illustrates the vagueness of the ‘public interest’. As a last resort, the residents sought help from the media. Land requisition in Conghui, Guangdong Province, followed a similar pattern.<sup>102</sup>

#### 4.4. The case of ‘the most stubborn house owner’

Shortly after the passing of Property Law (2007) by the NPC, the case of ‘China’s most stubborn house owner’ (literally the nailed down house, *dingzi hu* 钉子户, meaning a stubborn household that is hard to be coerced)<sup>103</sup> in history generated hot debates on enforcement of the property law and protection of property rights.<sup>104</sup>

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to get divorced. But the two sisters were still relocated to remote areas to work. See Luo Changping, ‘Hunan Jiahe Xian Chaiqian Yinfa Yidui Jiemei Tongri Lihun [Demolition in Human Caused Sisters to Petition for Divorce on the Same Day’, Xin Jing Bao [Beijing News], 8 May 2004. In <<http://news.sina.com.cn/c/2004-05-08/03142474910s.shtml>> (last visited 17 August 2008).

<sup>100</sup> Three residents who stayed on the roof of their houses as a sign of protest, were detained and accused of ‘violent resistance of law enforcement’ (*baoli kangfa* 暴力抗法) and ‘obstructing public affairs’ (*fang’ai gongwu* 妨碍公务). See Luo Changping, ‘Hunan Jiahe Xian Chaiqian Yinfa Yidui Jiemei Tongri Lihun [Demolition in Human Caused Sisters to Petition for Divorce on the Same Day’.

<sup>101</sup> Two hundred staff in local people’s court were involved in forced evictions in Jiahe: in 2004, the Country’s People’s Court sent out two hundred police to remove uncooperative residents. See Wang Lin, ‘Hunansheng Jiahexian Qiangzhi Chaiqian Shijian de Sange Yiwen [Three doubts in forced evictions in Jiahe County, Henan Province]’, Beijing News [Xin Jing Bao], 18 May 2004. In <<http://news.sina.com.cn/c/2004-05-18/03092554727s.shtml>> (last visited 11 August 11 2008).

<sup>102</sup> On the housing demolition in Conghua, Guangdong Province, see Zhang Xiaohui, ‘Guangzhou Conghui Baoli Chaiqian Chumu Jingxin, Neicang Juda Jingji Liyi [shocking housing demolition in Guangzhou Conghui, which involved a large amount of economic profits]’. Zhonghua Gongshang Shibao [China Business Weekly], 24 May 2005. In <[http://news.xinhuanet.com/house/2005-05/24/content\\_2994850\\_2.htm](http://news.xinhuanet.com/house/2005-05/24/content_2994850_2.htm)> (last visited 17 August 2008).

<sup>103</sup> The name refers to the local residents who refuse the local government’s order to move out of their homes for settlement. These households are usually forced to be relocated in order to make way for commercial projects and are compensated by property developers or local governments. But usually the compensation is not adequate, and this is the main source of conflicts between the residents and property developers. The residents refuse to move, even though construction is proceeding around their (literally) home. Before this case, ‘*dizi hu*’ was often a negative term referring to the trouble-making person, but in this case, the term delivers positive meaning referring to people who are brave to protect their property rights.

<sup>104</sup> The images and reports of the house were headlines of newspapers, and discussions were flooded Internet chat rooms. For example, see <[http://www.danwei.org/bbs/property\\_rights\\_the\\_coolest\\_na.php](http://www.danwei.org/bbs/property_rights_the_coolest_na.php)> (last visited 8 August 2008). There

Chinese bloggers were the first to spread the news, followed by newspapers and national television. *The New York Times* observed: ‘Wu Ping...[the] 49-year-old restaurant entrepreneur knows how to attract attention—a potent weapon in China’s new media age, in which people try to use public opinion and appeals to the national image to influence the authorities’.<sup>105</sup> This case is seen as an achievement of the supervision by the media and public opinion.

This case was about a couple in Jiulongpo District of Chongqing, Ms Wu Ping and Mr Yang Wu, who refused to move out of their house to make way for a commercial project, even when the construction work was going ahead around their house and developers turned their house into an islet (even after the district court made a judgment of forced eviction). A Chinese flag was on the roof with a hand-painted banner—‘a citizen’s legal property is not to be encroached upon’, according to Article 13 of the 2004 Constitution. The ‘islet’ stood alone in a 20- meter deep man-made pit. Mr Yang had to carry gas to his house, because all utilities were cut off.<sup>106</sup>

This case was seen a milestone in the progress of the Property Law as the first test of the Property Law’s guarantees of private property rights in China.<sup>107</sup> However, this case in reality does not contain novel elements. It is just one of the innumerable cases in which private houses and apartments were demolished by government backed development projects with unfair compensation and forced eviction, giving rise to complaints, resistance and a degree of social chaos. Moreover, the case ended when

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were also different translations regarding the name of this case: apart from ‘the most stubborn house owner’, others include ‘the most uncooperative house owner’, ‘the most coolest’, or ‘the most persistent’, etc.

<sup>105</sup> Howard W. French, ‘Homeowners Stares Down Wreckers, at Least for a While’, *The New York Times*, 27 March 2007. In <<http://www.nytimes.com/2007/03/27/world/asia/27china.html?fta=y>> (last visited 08 August 2008).

<sup>106</sup> See Zheng Zhu, ‘Dingzihu Weihe Zheyang Niu? [Why is the Nail House owner so stubborn?]’, *Zhongguo Xinwen Zhoukan* [Chinese News Weekly], 30 March 2007. In <<http://news.sina.com.cn/c/2007-03-30/140912655314.shtml>> (last visited 11 August 2008).

<sup>107</sup> See Ni Ching-Ching, ‘A Tall Stand for Property Rights in China’, *Los Angeles Times*, 30 March 2007, In <<http://www.latimes.com/news/nationworld/world/la-fg-nailhouse30mar30,1,3954342.story?ctrack=1&cset=true>> (last visited 6 April 2007).

the couple gave up and accepted the compensation offered by the developers through mediation by the court and the local government. The house was then demolished.<sup>108</sup>

The problematic issues in this case lie in, for example, the due process of demolition and the basis of the judgment made by the Jiulongpo district court in Chongqing.

There are obvious contrasts between national legislation and local regulations, between the local judicial authority and protection of civil rights, especially when the district court made the judgment based on the local regulation which is clearly against national legislation (for example, the contrasts between 'Regulations for Management of Urban Residential Demolition and Eviction' issued by the State Council and those of Chongqing Municipality).<sup>109</sup> According to Articles 12, 13 and 58 of the Land Administration Law (LAL), the procedure for demolition should be that the local government requisitions the LURs owned by the former residents and changes the land registration, and then the local government can sell LURs to the developers; developers can then apply for the approval of demolition and then proceed to construction. However, in 'the most stubborn house owner' case, the district government did not requisition the LURs and change land registration before it sold the LURs to developers, and developers conducted demolition without the state-owned land use rights certificate (*guoyou tudi shiyongquan zheng* 国有土地使用权证). Using a metaphor to describe this situation, it was the district government that 'married the daughter twice' (*yi nǚ er jia* 一女二嫁).<sup>110</sup> In this situation, how can the owner of the house claim rights through the Property Law, even though

<sup>108</sup> The result of the story is: albeit with strong resistance, the couple was finally surrendered and accepted the developer's compensation mediated by the court and district government. See Zhang Jialin, "Chongqing Zuiniu Dingzihu Jianzhu" Yi Bei Chai Chu ["The house of the most stubborn house owner" in Chongqing has been demolished]. People.com [Renmin Wang], 2 April 2007. In <<http://society.people.com.cn/GB/1062/5553732.html>> (last visited 11 August 2008).

<sup>109</sup> For example, Article 7 of State Council 'Regulations for Management of Urban Residential Demolition and Eviction' (2001) and Article 10 of Chongqing 'Regulations for Management of Urban Residential Demolition and Eviction' (2003). The latter does not stress the approval documents regarding state-owned land use rights as a condition to proceed with housing demolition.

<sup>110</sup> See Duan Hongqing and Wang Heyan, 'Chongqing Dingzihu Shijian: Meiyou Yingjia de Duizhi [The Case of the Nailed Down House in Chongqing: Confrontation without Winners]'. In *Caijing Magazine*, 2 April 2007, <<http://www.caijing.com.cn/newcn/ruleoflaw/other/2007-04-02/17498.shtml>> (last visited 10 April, 2007).

Article 4 of the Property Law states that ‘private property shall not be infringed upon’? In this case, at least, we do not see much enforceability of the Property Law. Residents could only refer to general principles to claim their rights, but what were the specific mechanisms? For example, it seems that Article 4 of the Property Law is just a repetition of Articles 12 and 13 of the Constitution. Moreover, the fashion of property law reform in China is influenced by the German law tradition that focuses on the legal text and technical methods: property law mainly concerns ‘the technical issues’, while ignoring the social dimension.<sup>111</sup>

## 5. The transformation of the role of government

Why does local government directly and actively participate in land requisition and forced eviction, and in some cases ally with thugs and secret societies? As analysed in Chapters Four and Six, under the dual land ownership and land allocation system, a range of rent-seeking opportunities for local governments and under-the-table partnerships between developers and officials have been formed. In the 1990s, some coastal cities first experimented with *Zhengfu Jingying Chengshi* (政府经营城市),<sup>112</sup> which means local governments run cities in the same way a CEO runs a for-profit company.<sup>113</sup> Local GDP has become a major standard for assessing the ability of local officials. Local officials are enthusiastic about constructing ‘showcase projects’ (*xingxiang gongcheng* 形象工程).<sup>114</sup> These showcase projects often lead to land seizure and housing demolition.

As analysed in Chapter Six, since the tax sharing system, local government’s major source of revenue has shifted from taxation to misappropriating publicly owned assets, that is, selling LURs to commercial developers. The nationwide loss of

<sup>111</sup> I was informed about this concern by Professor Cai Lidong from Law School of Jilin University, in discussion with him at the London School of Economic on 26 April 2007.

<sup>112</sup> Liu Chenglin calls this the GRC doctrine. See Liu, ‘Informal Rules, Transaction Costs and the Failure of Chinese Takings Law’: 7.

<sup>113</sup> On this also see Jean Oi, ‘Fiscal Reform and the Economic Foundations of Local State Corporatism in China’, *World Politics* 45, no. 1 (1992): 99-126.

<sup>114</sup> Liu, ‘Informal Rules, Transaction Costs and the Failure of Chinese Takings Law’: 8.

revenue from the state-owned LURs transfer fees reaches more than ten billions RMB each year.<sup>115</sup> Paid transfer of LURs becomes the basis for partnership between governments and the private sector in China. Developing a good relationship with local government is essential for ‘private’ developers to acquire more LURs, because the primary property market is monopolised by the governments under the leasing system, and what private property developers get is only partial property rights for limited durations.<sup>116</sup> Quite often district governments serve as active collaborators of the private developers, while city governments become authoritative mediators and supervisors.<sup>117</sup>

Yet emphasis on the conflicts between central-local governments does not imply a well-intentioned central government. In fact, both central and local government have created a monopoly over the land supply that is responsible for the difficulties in curbing real estate prices and land seizures. In terms of the central government, it has monopolised the primary property market. Since the 1990s, the central government has centralised the administration of land supply. The land-banking system (*tudi shougou chubei zhidu* 土地收购储备制度) was established in 1996, and the first land-banking agency was founded in Shanghai. The Land consolidation and rehabilitation centre of the Ministry of Land and Resources was established in 1998. Generally speaking, land banking refers to purchasing land and holding it with the intention that selling it in the future will be more profitable than the original payment. In the Chinese context, land banking means that both the central and local

<sup>115</sup> Chen Fang and Zhang Honghe, ‘Guoyou Tudi Churangjin Liushi Baiyi Yishang: Shui Huoli Zuida? [More Than Ten Billion Loss of the State-Owned LURs transfer fee: Who gets most profits?]’, Xinhua Wang [Xinhua Net], 5 August 2004. In <[http://news.xinhuanet.com/newscenter/2004-08/05/content\\_1715703.htm](http://news.xinhuanet.com/newscenter/2004-08/05/content_1715703.htm)> (last visited 11 August 2008).

<sup>116</sup> See Richard Walker and Daniel Buck, ‘The Chinese Road: Cities in the Transition to Capitalism’, *New Left Review*, no. 46 (2007): 39-66.

<sup>117</sup> See He Shenjing and Wu Fulong, ‘Property-Led Redevelopment in Post-Reform China: A Case Study of Xintiandi Redevelopment Project in Shanghai’, *Journal of Urban Affairs* 27, no. 1 (2005): 1-23.

government, by using its public power, reclaims the LURs for their future use. It is a mandatory administrative behaviour,<sup>118</sup> and is not grounded in the law.<sup>119</sup>

In response to 'the Notification on Strengthening the Management of State-Owned Land Assets',<sup>120</sup> (State Council, 2001), land-banking agencies have developed rapidly in localities. When the banking system combines with the dual land allocation system, the central government can monopolise the supply of LURs in the primary property market, while local governments can in fact take over the provisions of LURs in the secondary property market. Local governments especially city governments can get LURs at low prices, but resell LURs at higher prices. 'Low purchase price and high sale price' provides much room for rent-seeking. The role of the government has been transformed into 'scrambling interests with the people' (*yumin zhengli* 与民争利).<sup>121</sup>

Now there have been grassroots initiatives attempting to break up the monopoly of government and commercial developers over the property market. In urban China, housing cooperatives have emerged in Beijing, Wenzhou, Hangzhou, and Chongqing. Each individual participant invests money and forms cooperatives to construct housing rather than relying on commercial property developers. But housing cooperatives have difficulties in getting land and financial support. The first successful cooperative housing project (*hezuo jianfang* 合作建房)<sup>122</sup> was initiated in

<sup>118</sup> See Wang Ling, 'Xianxing Tudi Shougou Chubei Zhidu Buleyu Goujian Hexie Shehui [The Contemporary Land Banking System is Harmful to the Construction of the Harmonious Society]', 17 November 2006. In <<http://www.acla.org.cn/forum/printthread.php?Board=57&main=694265&type=post>> (last visited 31 July 2007).

<sup>119</sup> For example, it is at odds with Article 13 of the Constitution (2004) and Article 8 of the Legislation Law (2000), as well as 'pubic interest' provided in Article 42 of the Property Law (2007).

<sup>120</sup> 'Guowuyuan Guanyu Jiaqiang Guoyou Tudi Zichan Guanli de Tongzhi', available in <<http://www.cas.cn/html/Dir/2001/04/30/5769.htm>> (last visited 26 November 2008).

<sup>121</sup> 'Tudi Chubei Zhidu Zaocheng Gongqiu Jinzheng, Buying Yuming Zhengli [The Land Banking System Has Caused Shortage of Supply and Demand, This System Should Not Scramble Interests with the People]', Xinhua Wang [Xinhua Net], 3 July 2007. In <[http://news.xinhuanet.com/house/2008-07/03/content\\_8478649.htm](http://news.xinhuanet.com/house/2008-07/03/content_8478649.htm)> (last visited 20 August 2008).

<sup>122</sup> This should be distinguished from cooperative housing constructed by work units.

Wenzhou, Zhejiang Province.<sup>123</sup> Compared with the power of the government, ordinary people's power is still rather weak.

Moreover, there is no efficient mechanism to supervise local governments and restrain their abuse of power. The above four cases and examples above show that local People's Congresses play only very limited roles in supervision of land requisition and forced eviction in which civil rights are seriously infringed upon;<sup>124</sup> the media have become alternative channels for the people to express grievances and seek remedies.<sup>125</sup> Mass Media now play a prominent role in supervision of public opinion (*yulun jiandu* 舆论监督), but mass media are still embedded in the institutional framework. For example, one issue of an influential Chinese business magazine—Caijing magazine—was blocked, presumably because it touched on the sensitive continuing controversy surrounding the Property Law.<sup>126</sup> As Anne Cheung points out, privately owned or run newspapers are still not allowed; public opinion supervision should be seen as 'a dynamic, interactive process involving the CCP [CPC].'<sup>127</sup> Coverage of cases involving land requisition and forced eviction is still sensitive and controlled.

Social unrest in post-Mao China and the responses of central and local government are also important to the examination of the changing power structure between central and local government. Decentralisation in China has shifted economic and political power from the central government to local governments, and the abuse of power by local governments and officials is one of the most important sources of disputes and conflicts between the people and officials. But this kind of

<sup>123</sup> See Chen Zhouxi, 'Quanguo Shouli Geren Jizi Jianfang Xiangmu Qidong [The First Individual Cooperative Housing Construction Project Starts]', *Dongfang Zaobao* [Oriental Morning Post], 16 November 2006. In <<http://business.sohu.com/20061116/n246428428.shtml>> (last visited 17 August 2008).

<sup>124</sup> Cai Dingjian, 'Lun Renmin Daibiao Dahui Zhidu de Gaige he Wanshan [On the Reform and Perfection of the People's Congress System]', *Zhengfa Luntan* [Tribune of Political Science and Law] 22, no. 6 (2004): 10.

<sup>125</sup> Phan, 'Enriching the Land or the Political Elite?', 634.

<sup>126</sup> Andrew Batson, Geoffrey A. Fowler and Qin Juying, 'China Magazine is Pulled As Property Law Looms', *The Wall Street Journal*, 9 March 2007.

<sup>127</sup> Anne S. Cheung, 'Public Opinion Supervision—A Case Study of Media Freedom in China': 360.

decentralisation also assists the central government to deal with social unrest.<sup>128</sup> For example, the central government can avoid blame and direct involvement in conflicts, and it can intervene (in some cases together with provincial governments) later in the conflict depending on several conditions and factors such as media exposure, number of participants and results involving death and injury.<sup>129</sup> This is one of the reasons that the party-state can deal with conflict and resistance and manage social stability. Another dimension to examine this governance system is the party-state's co-opting of social organisations. This is discussed in the following section.

## 6. The associational dimension

This section investigate the possible associational channel that people could organise themselves in order to protect their property rights. This issue is of course a big research question and deserves further in-depth study, this section just briefly analyses some key points. The evictees have been aware of their property rights in urban renewal and demolition.<sup>130</sup> For example, evictees have begun to use the Constitution and the Property Law, the authority of which is higher than the 2001 Regulation, to claim and protect their property rights.<sup>131</sup> Thousands of citizens have applied for the constitutional review of the 2001 Regulation regarding local demolition and relocation from the standing committee of the NPC.<sup>132</sup> More and more 'property owners' associations' (*yeyu weiyuanhui* 业主委员会) have emerged. A property owners' association is organised by property owners in the same residential community. The association is a non-governmental organisation that represents the interests of the whole residents in that residential community and supervises the work of the property management company. The association has the

<sup>128</sup> See Cai Yongshun, 'Power Structure and Regime Resilience: Contentious Politics in China', *British Journal of Political Science* 38 (2008): 411-432.

<sup>129</sup> See more detail in *ibid*.

<sup>130</sup> See Chen Xiao, '2003-2007: Chaiqian Xin Bianju [2003-2007: New Trends in Housing Demolition]'.

<sup>131</sup> See *ibid*.

<sup>132</sup> Cai Dingjian, 'Lun Renmin Daibiao Dahui Zhidu de Gaige he Wanshan [On the Reform and Perfection of the People's Congress System]', 10.

power to decide important issues regarding real properties in the residential community, and the power of this association is based on ownership of the real properties. However, the Property Law (2007) has not recognised the authority of the property owners' association as a legal person, the ambiguous legal status of these associations clearly restrains their roles played in property rights protection and relevant litigation.

In order to assess the property owners' activist associations and their embeddedness in the institutional framework, there is a need to sketch out China's associational sphere. It is necessary to define the terms 'social organisations' (*shehui tuanti* or *shetuan* 社会团体, 社团) and 'associations' (*xiehui* 协会). In view of registration, social organisations are divided into 'registration exempted', 'unregistered and registered as companies', and 'registered'. 'Registration exempted' social organisations encompass eight People's Organisations, registration exempted by the State Council, and Inner organisations of the work unit; 'Registered' social organisations (Narrow CSOs) (CSOs is short for Civil Society Organisations include academic groups, commercial associations, professional organisations and united groups).<sup>133</sup>

In terms of the relative autonomy from the Party-state, social organisations can also be classified as 'official' (*guanban* 官办), 'semiofficial' (*banguan* 半官), and 'non-governmental' (*fei zhengfu xing* 非政府性).<sup>134</sup> Official organisations have a close relationship with the Party, and such organisations include the Communist Youth League and the Trade Union Federation. The semiofficial social organisations must be approved by a state agency in charge of that social organisation.<sup>135</sup> The

<sup>133</sup> Chu Songyan, 'The Developing Differences of Civil Society Organisations among Three Provinces—Beijing, Zhejiang and Heilongjiang in China'. Lecture at the London School of Economics, London, UK, 18 February 2005. The term 'social organisations' is more general, and 'the association' is one kind of social organisations. See Kenneth W. Foster, 'Embedded within State Agencies: Business Associations in Yantai', *The China Journal*, no. 47 (Jan., 2002): 41.

<sup>134</sup> See B. Michael Frolic, 'State-Led Civil Society', In *Civil Society in China*, ed. Timothy Brook and B. Michael Frolic (Armonk, N. Y.: M. E. Sharpe, 1997), 62.

<sup>135</sup> See *ibid*, 62.

restructured relationship between the Party/state and society makes the CPC develop links to other organisations, such as United Front Organisations, Labour Unions, and business associations.<sup>136</sup> These organisations allow the party to organise interests emerging in the course of reform.<sup>137</sup>

The registration system (*dengji* 登记) plays an important role in controlling and regulating social organisations. The ‘Regulations on the Registration and Management of Social Organisations’, issued in draft form in 1989 and finalised in 1998, established the corporatist strategy of the CPC.<sup>138</sup> Although neither the Party-state nor the social organisations use the term ‘corporatism’,<sup>139</sup> for describing the links between them, the regulations reveal elements of corporatism: every organisation must register with the government (the bureaux of Civil Affairs) and be sponsored by a state unit or ‘parent’.

The danger for the ‘semiofficial’ associations is that they acquire too much administrative power, which in turn creates much room for rent-seeking. There are many examples of this problem. Some officials from the land administration departments ‘jumped into the sea’ (*xiahai* 下海, resigning from official posts and doing business), and often they could be recruited immediately by property developers on high salaries as consultants or could establish joint ventures with property developers, because these former officials still possessed *guanxi* (关系) in land approval and allocating LURs. Such retired land administration officials can

<sup>136</sup> Business associations have special meaning in English law and they refer to corporations, partnership, and other joint venture. But in China, they refer to a kind of social organisations. Business associations in private sector of China include, for example, the All-China Federation of Industry and Commerce (ACFIC), the Self-Employed Labourers Association (SELA), and the Private Enterprises Association (PEA).

<sup>137</sup> See Samuel P. Huntington, ‘Social and Institutional Dynamics of One-Party Systems’, in *The Dynamics of Established One-Party Systems*, ed. Samuel P. Huntington and Clement H. Moore (New York: Basic books, 1970), 34-36.

<sup>138</sup> See Shehui Tuanti Dengji Guanli Tiaoli [Social Organisation Registration and Management Regulations], promulgated by the State Council on 25 September 1998, implemented on 25 October 1998.

<sup>139</sup> On corporatism, see e.g., Philippe C. Schmitter and Gerhard Lehmbruch, *Trends toward Corporatist Intermediation (Contemporary Political Sociology, Vol. I)* (Beverly Hills; London: Sage publications, 1979); Jonathan Unger, and Anita Chan. ‘China, Corporatism and the East Asian Model’, *Australian Journal of Chinese Affairs*, no. 33 (January 1995): 29-54.

work in the Real Estate Associations, and they are welcomed by property developers as well.

Considering the above constraints posed to the associational sphere, there are and will be many barriers to the development of non-governmental and grassroots organisations such as property owners' associations. The property owners' activism and their associational activities are limited in terms of their embeddedness in the party-state governance system and the apparatus of the Party/state. Moreover, when facing the power of local governments, property owners' associations are in disadvantaged positions. For example, the Property Law does not recognise property owners' associations as legal persons that enjoy rights to sue and arbitrate, and this clearly restrains these associations taking part in collective suits and actions.

## 7. Conclusion

From the examination of the enforceability of property rights, this chapter shows the blurred boundaries between public property and private property, between public power (*gongquan* 公权) and private rights (*siquan* 私权). This chapter also illustrates the differences between legal and social understandings of property rights, between lawfulness and legitimacy, for example in what constitutes adequate compensation. Land requisition and housing demolition have been the focus of this chapter, providing a lens to examine one of the features of private property rights in China, which is vulnerable to state requisition. The revival of private property is limited in terms of the difficulties with the enforcement of private property rights. Land disputes and conflict also reflect the changing relation between the state and society in post-Mao China. Social activism and the emerging civil society are 'embedded'<sup>140</sup> in the institutional framework.

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<sup>140</sup> See generally, Peter Ho, *China's Embedded Activism*.

In market reform, economic growth has been prioritised but social equality has been largely ignored. Farmers are losing their land to urban expansion. In the urban area, the space of the city has been separated: through and after demolition and forced eviction, socially and economically disadvantaged people have been forced to move out of the inner city, while rich and privileged people are moving in. The huge gap between rich and poor is fuelling widespread hostility toward the rich, and this may adversely affect the long-term development of Chinese society and economy.

## Chapter 8: Conclusions: Private Property and China—the Trajectory of Change

### 1. Defining property in China

Thirty years after embarking on a programme of economic reform and attracting Foreign Direct Investment (FDI), property rights (those in real estate in particular) have become a crucial issue in China. Every person in China now dreams of owning his or her real estate and invests most of their savings in real estate. But in present-day China, to what extent do people really own their property—for example, their flats or houses? What does ownership really mean? And why is ownership important for people—is it important because it is closely linked to status, privilege, or wealth? Who has the authority to define ownership? And in which way do the Chinese leadership choose to draw the boundaries between the public and the private in property rights?

Some answers to these questions may be found in the new Property Law. The long process of drafting the property law in China took place against the background of the development of the private sector. The Property Law that came into effect in 2007<sup>1</sup> defines ownership as an absolute and supreme right, and equal protection is provided for public and private property for the first time since 1949. There is also a clear demarcation of state ownership, collective ownership and private ownership in property law.<sup>2</sup> It is hoped by Chinese lawmakers that the greater clarity of property rights through property law legislation will promote the market economy.

Yet many questions about the nature of the property law itself remain unresolved—for example, whether ownership should be an economic institution (*jingji zhidu* 经济制度) or a social institution (*shehui zhidu* 社会制度). Current property law defines ownership as an economic institution, because being regarded as a social

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<sup>1</sup> The Property Law was promulgated by the National People's Congress (NPC) on 16 March 2007, and implemented on 1 October 2007.

<sup>2</sup> See Chapter Three.

institution is closely linked to the sensitive dichotomy of socialism versus capitalism. By defining ownership as just an economic institution, the property law legislation prioritises ‘efficiency’ rather than ‘equality’. However, in China, the assumption that the clarity of property rights is a *sine qua non* of economic growth is highly questionable.

Furthermore, there is often a gap between the legal definition of ownership and ownership as understood and practised in society, and property lawmaking often lags behind social change. There exist variations, tensions and intricacies in terms of different forms of *de facto* ownership. At the same time, the boundaries between public ownership and private ownership are blurred. In contrast to the official, and indeed legal, support for *unitary* and *exclusive* property rights, the reality of the property regime has seen the *fragmentation* of property rights. For example, state-owned assets have been transferred to those who hold political power, local governments have *de facto* control over collectively-owned rural land, and property purchasers have ownership over buildings but not over the land on which their flats and houses are built. The long process of property lawmaking is a process to ‘propertise’ the fragmented rights that emerged in the process of economic reform; however, there are still residual categories<sup>3</sup> that are difficult to define.

The analysis of historical and cultural contexts of property rights demonstrates that no absolute and exclusive ‘private’ property existed in traditional China; the private usually referred to kinship not the individual, and the distinction between the public sphere and the private sphere was also blurred. The examination of property in land in late imperial China shows that private property was inferior to public property and property-holding in land was fragmented. For example, different people could claim ‘ownership’ over both the topsoil and the subsoil of the land. Land was alienable,

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<sup>3</sup> For example, ‘minor property rights apartments’ that are built on collectively-owned rural land. See Chapter 4, Section 4.2.

subject to sale and purchase.<sup>4</sup> The concept of unitary and exclusive property rights only emerged in the Civil Code during the late Qing and the Republic. Under the impulse to purge China of extraterritoriality,<sup>5</sup> the late Qing and the Republic moved towards adopting a Civil Law based system presumably because Civil Law was then seen to be modern and perhaps in emulation of Japan. This Civil Code was not really driven by indigenous causes springing from Chinese society at that time.<sup>6</sup>

Collectivisation (1956-1978) was intended to remove landlords<sup>7</sup> and governance by gentry in rural China, to eliminate private ownership, and to create collective proprietorship by farmers. This was modelled on post-1917 Soviet collectivisation but ignored the differences in natural conditions and governance between the countryside in China and in the USSR. Russian farmers in pre-1917 worked in communes (the *mir* or *obshchina*);<sup>8</sup> whereas China had limited urbanisation and a huge rural area, and farmers were governed by kinship especially in southeast China. The consequences of eliminating private ownership and gentry governance in rural China include the state stepping into the empty space left behind by the rural gentry. But there are so many unavoidable local variations in geography, agricultural products and economic activities in China<sup>9</sup> that the central government is not able to make a comprehensive plan for rural development and direct every aspect of such development.

<sup>4</sup> See Chapter Two on property and property rights in historical context.

<sup>5</sup> See Chapters One and Two. Also see Philip C. C. Huang, 'Civil Adjudication in China, Past and Present', *Modern China* 32, no. 2 (2006): 145-147.

<sup>6</sup> See Chapter Two.

<sup>7</sup> 'Landlordism' was shorthand for something more complicated. For example, James L. Watson argues that 'landlords' were not necessarily individuals; they were landowning 'corporations' embedded in complex lineages. See James Watson, 'Hereditary Tenancy and Corporate Landlordism in Traditional China: A Case Study', *Modern Asian Studies* 11, no. 2 (1977): 161-182; Maurice Freedman, *Chinese Lineage and Society: Fukien and Kwantung* (London: Athlone Press, 1966).

<sup>8</sup> See 'A False Start: The Birth and Early Activities of the People's Commissariat of agriculture, 1917-1920', in James W. Heinzen, *Inventing a Soviet Countryside: State Power and the Transformation of Rural Russia, 1917-1929* (Pittsburgh: University of Pittsburgh Press, 2004c), 11-46.

<sup>9</sup> For example, picking tea in mountainous area in Zhejiang Province involves much manual labour, and this kind of work cannot just be done by a machine; wheat is grown in Northern China and rice is grown in Southern China, and growing rice is more labour intensive.

Private ownership has re-emerged since the economic reforms and decollectivisation were introduced in rural China in 1978. With the introduction of the household responsibility system, the 'private' was selectively granted to farmers, and farmers were given more autonomy. Since 1984, the focus of economic reform has shifted from the rural area to the urban area, and economic reform has seen the selective re-admission of private property into the socio-economic framework in urban China. After the 'southern tour' of Deng Xiaoping in 1992, private enterprises flourished nationwide, and this included taking off the hats of many 'red-hat enterprises'. Since the corporatisation program initiated in 1994, the focus of the SOEs reform has been shifted from delegation of decision-making authority to corporate governance and ownership. The 15th National Congress of the CPC in 1997 declared further reform of ownership. In the report delivered by Jiang Zemin to this congress, 'grasping the large and freeing the small' (*zhuada fangxiao* 抓大放小) was endorsed as the focus of the economic reform strategy. Small and medium sized enterprises were sold to private owners.

However, there are many limits to this revival of private property. For example, in rural China dismantling collectivism did not give rise to individualism. According to Article 39 of Property Law, ownership refers to the rights to possess, use, benefit from and dispose of one's own property. But in terms of the collective ownership of rural land, controversies surround the appropriation and alienability of rural land. Land is the most important social security for farmers but collective ownership of rural land is an incomplete ownership, because farmers cannot dispose of rural land freely. Collective ownership over rural land is vulnerable to both compulsory acquisition by the state and illegal confiscation. Local governments and rent-seeking local officials become the *de facto* owners and farmers are excluded. Furthermore, as farming for the market has developed since 1978, ownership needs to be understood in the context of economic activity, but collective ownership defined in law is not sufficient to explain who owns what in terms of the production, harvest and distribution of agricultural products.

In terms of the transformation of state ownership in urban China, the identity of who can represent the state as the owner of state-owned assets is not clear. As reforms have stuck halfway between the plan and the market, and more and more ‘rents’ have been ‘privatised’, the control of public assets has been gradually transferred to the persons or privileged groups who hold political power. In the era of fiscal and political decentralisation (from 1994 onwards, in particular), the quasi-federal character of local government gives it more power to control and allocate resources, and the owner(s) of public assets have become even more ambiguous.<sup>10</sup>

This ambiguity of private ownership is also demonstrated in the emerging urban property market, which is often regarded as the most important indication of the revival of private property. For example, no one could easily answer the question: what do we mean by owning private property in China? Although the land use rights (LUR) system was introduced, which is a big change to the state-owned urban land system, LURs are still allocated administratively in both primary and secondary property markets.<sup>11</sup> In China, there is no land market, just a ‘real estate’ market, that is, a market only in buildings. Far from being a free market, the property market in China has been largely politicised, which is illustrated in the central-local relationship. Furthermore, the ambiguous relationship between the central government, the market, and local governments as entrepreneurs has blurred the boundaries between the public and private sectors. Private ownership over real estate is only a use right for a fixed period of years (for example, 40 years for commercial property and 70 years for residential property). Although property law does provide the possibility for renewal, it is not very clear who owns what after the expiration of the lease.

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<sup>10</sup> See Chapter Five.

<sup>11</sup> See Chapter Six.

From the examination of ownership and the socio-economic transformation in post-Mao China, we could see that ownership defined in the law and ownership as understood and practised in society often diverge significantly. For example, in contemporary China, there is a clear distinction between public property and private property in the law, but the boundaries between public ownership and private ownership in reality are blurred. The fragmentation of property rights in reality poses challenges to the unitary and exclusive theory of ownership in post-Mao China. Political elites define the conception of ownership in law and the distinction between the public and the private in property rights. These conceptions and distinctions are manifested in the rhetoric of rulers in imperial China, Mao's revolutionary rhetoric and in Deng's reform programme. They served (and still serve) the purposes of control and governance, but are often resisted in social practice and popular thinking, leading to alienation and conflict.<sup>12</sup> The definition and distinction between the public and private in property rights give us a view of Chinese rulership and the role of 'the state', as well as the changing relations between the state and society.

## **2. Political implications of the revival of private property**

The nature of private property and its social and political implications provide an important vehicle for analysing the changing nature of modern China. As a result of the recognition of private property in the law and the formation of the urban property market, more and more capital has flowed into the property market, property developers have prospered and a stratum of property owners is also in the making. But what forces have been unleashed? What are the political implications of the revival of private property in China? Much research has done on the political orientations of the rich social strata or 'the middle classes' and their participation in voluntary organisations.<sup>13</sup> There have been questions about the role of the new rich in society: whether they have political claims and pursue their goals through

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<sup>12</sup> See Chapter Seven.

<sup>13</sup> See e.g., Benjamin L. Read, 'Democratizing the Neighbourhood? New Private Housing and Home-Owner Self-Organization in Urban China', *The China Journal*, no. 49 (2003): 34.

autonomous associations<sup>14</sup> that could form an embryonic civil society, or whether they simply use the current system to further their own interests.<sup>15</sup> The research on civil society is particularly relevant here.

Many scholars have attempted to take the ideas of civil society and the public sphere out of their modern Western context and place them in the context of historical and contemporary China. Some historians have argued about whether civil society emerged against the backdrop of rapid socio-economic transformation in late Qing and Republican China, especially in some cities such as Hankou and Beijing.<sup>16</sup> Some historians have focused on the public sphere in the same period. During this time, various kinds of associations were formed, including guilds (*hang* or *hui* 行, 会) and trade guildhalls (*hanghui* 行会),<sup>17</sup> and, later, larger chambers of commerce were established by separate guilds and trade guildhalls, performing more important public functions.<sup>18</sup> As a result of these developments, some historians have argued that taken together these institutions guilds, trade guildhalls, and chambers of commerce constituted 'the public sphere', which is expressed through the Chinese word *gong* (公). This concept of 'the public sphere' was influenced by the theories of Jürgen Habermas who defined the public sphere as an intermediate realm between the state and society, constituted by public opinion and debates in coffeehouses, salons and newspapers, and so on.<sup>19</sup> In light of the search for civil society and the public sphere in contemporary China, their relationship with democratisation is also

<sup>14</sup> For example, the development of business associations such as local Chambers of Commerce is considered as a further step to remove interference of direct state control from private business. See e.g., Jonathan Unger, '“Bridges”: Private Business, the Chinese Government and the Rise of New Associations', *The China Quarterly*, no. 147 (1996): 795-819.

<sup>15</sup> See Read, 'Democratizing the Neighbourhood?': 35-36.

<sup>16</sup> See e.g., Mary Backus Rankin, *Elite Activism and Political Transformation in China: Zhejiang Province, 1865-1911* (Stanford: Stanford University Press, 1986); William T. Rowe, *Hankow: Commerce and Society in a Chinese City, 1796-1889* (Stanford: Stanford University Press, 1984); David Strand, *Rickshaw Beijing: City People and Politics in the 1920s* (Berkeley: University of California Press, 1989).

<sup>17</sup> See Chapter Two, Section 3.5.

<sup>18</sup> See Bruce J. Dickson, *Red Capitalists in China: The Chinese Communist Party, Private Entrepreneurs, and Political Change* (Cambridge: Cambridge University Press, 2002), 16-17.

<sup>19</sup> See Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, trans. Thomas Burger and Frederick Lawrence (Cambridge: Polity, 1992).

an important issue.<sup>20</sup> However, both ‘civil society’ and ‘the public sphere’ are concepts based on a clear distinction between state and society, thus they do not capture the complex interaction between the state and society in late imperial China.

The concepts of civil society and the public sphere are embedded in European bourgeois society, and cannot be easily transposed to the Chinese context.<sup>21</sup> The divergence of the Chinese practice and the Western model has led scholars to question whether civil society and the public sphere existed and could exist in China.<sup>22</sup> As William Rowe claims, autonomy and state control were not clear cut, and maintaining a balance between these two aspects was actually ‘a process of continual negotiation’.<sup>23</sup> In terms of contemporary China, as Dickson points out, if civil society may be said to be emerging, this kind of civil society is only qualified as ‘nascent’ or ‘embryonic’.<sup>24</sup>

Rather than focusing on the associational sphere as the large literature mentioned above has done, my research looks at some of the foundations of an emergent civil society in China through the case of private property, which historically could be seen as the foundation of the state/civil society schema in the West (for example, in Marx’s thought). The model of civil society is based on a clear distinction between the public and private sector. When the same logic is applied to the legal field, there is a distinction between public and private property. However, the boundaries between the public and the private (for example, in ownership) in the context of

<sup>20</sup> See Dickson, *Red Capitalists in China*, 17. Also see e.g., Heath B. Chamberlain, ‘On the Search for Civil Society in China’, *Modern China* 19, no.2 (1993): 199-215; Thomas B. Gold, ‘The Resurgence of Civil Society in China’, *Journal of Democracy* 1, no.1 (1990): 18-31; He Baogang, *The Democratic Implications of Civil Society in China* (Basingstoke: Macmillan, 1997); Timothy Brook and B. Michael Frolic, ‘The Ambiguous Challenge of Civil Society’, in *Civil Society in China*, ed. Timothy Brook and B. Michael Frolic (Armonk, N. Y.: M. E. Sharpe, 1997), 3-18.

<sup>21</sup> Also see e.g., Brook and Frolic, ‘The Ambiguous Challenge of Civil Society’; Frederic Wakeman, ‘The Civil Society and Public Sphere Debate: Western Reflections on Chinese Political Culture’, *Modern China* 19, no. 2 (1993): 108-138.

<sup>22</sup> See Philip C. C. Huang, ‘“Public Sphere”/“Civil Society” in China? The Third Realm between State and Society’, *Modern China* 19, no. 2 (1993a): 216-240; Wakeman, ‘The Civil Society and Public Sphere Debate’.

<sup>23</sup> William T. Rowe, ‘The Problem of “Civil Society” in Late Imperial China’, *Modern China* 19, no. 2 (1993): 148.

<sup>24</sup> See Dickson, *Red Capitalists in China*, 18.

post-Mao China are blurred. Thus, neither the binary model of 'state versus society' nor the ternary model of 'state/civil society/the individual' is sufficient to explain the dynamic property regime in both historical and contemporary China, for a number of complex and interrelated reasons.

For one thing, the very meaning of the concept of 'private property' is ambiguous. In the past thirty years of economic reform, Chinese policy makers have favoured efficiency rather than equality or fairness. Property is regarded as an instrument to promote economic growth. What private property means in the Chinese context is limited to wealth, that is, the connotation of private property is limited to its economic dimension and its monetary value. Yet accumulation of wealth does not necessarily give rise to private ownership; for example, communism has wealth too, but it is collectively owned. Rather, the accumulation of wealth could serve as the justification for expropriation.<sup>25</sup> For example, the current rent-seeking is accumulation of wealth by privileged people who hold political power and misappropriation of public property. Returning to the contradiction between the private and the public in property rights in both Chinese political ideology and the debates between the neo-liberalists and the new-left, what is at issue in these tensions and debates is the accumulation and allocation of wealth.

In addition, there is a fundamental imbalance between the key terms involved. 'Private property' does not enjoy equal status with 'public property'. For instance, private companies are still excluded from 'strategic sectors' such as telecom services, newspapers, television, publishing, power generation, railways, and petrochemicals. Private firms also run into obstacles when trying to secure financing from a state-dominated banking system. On this issue, Huang Yasheng also points out that SOEs enjoy a superior status due to the 'political pecking order' in which SOEs are

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<sup>25</sup> Hannah Arendt, *The Human Condition*, 2ed. (Chicago: London University of Chicago Press, 1998), 66.

at the highest rung, whereas private enterprises are at the lowest rung.<sup>26</sup> As Yasheng Huang notes, private companies are even treated worse than foreign companies. There are still ideological, structural, and political constraints to the development of the private sector.<sup>27</sup> These constraints were designed to prevent private enterprises from competing with SOEs.<sup>28</sup>

It should also be noted that China has achieved rapid economic growth without a civil society or public sphere. To put it the other way round, civil society or the public sphere does not seem to have been of much importance for economic growth in China. Moreover, the private sector has even formed a partnership with local government.<sup>29</sup> For example, the resurrection of private property is part of the economic reform programme launched in 1978, and 'red capitalists',<sup>30</sup> have been welcomed into the ruling party as part of what it calls Socialism with Chinese characteristics. Business associations such as chambers of commerce are embedded in the Party-state apparatus, and do not enjoy fully-fledged autonomy.

Finally, so far as land in China is concerned, there is not an efficient and transparent conversion mechanism that could transform assets into capital. This is due largely to the dual landownership system and the two-level property markets: urban land is state owned, while rural land is collectively owned; in the primary property market, the state (represented by city governments in most cases) can acquire rural land collectively owned by villagers (represented by collective economic organisations and village committees), but not vice versa. City and county governments can therefore sell land use rights to buyers through auction, tender or negotiation. The transfer of LURs constitutes a secondary property market. Farmers cannot transfer rural land freely and cannot turn rural land into capital, and farmers' property rights

<sup>26</sup> Huang Yasheng, *Selling China: Foreign Direct Investment During the Reform Era* (Cambridge: Cambridge University Press, 2003), 117.

<sup>27</sup> See generally *ibid*, especially 151-204.

<sup>28</sup> See Huang Yasheng, 'Can India Overtake China?', *Foreign Policy*, no. 137 (2003): 76.

<sup>29</sup> See Chapters Six and Seven.

<sup>30</sup> On this issue, also see Dickson, *Red Capitalists in China*.

are vulnerable to land seizure. Urban residents' property rights are also vulnerable to housing demolition and forced eviction.<sup>31</sup>

By contrast, people who hold political power can misappropriate state-owned assets for their own interests. In this sense, political power is turned into capital, and such capital in turn is inclined to find its way into the hands of those in political power. Thus, if capitalism may be said to be emerging in China, this kind of capitalism might only amount to 'crony capitalism' or 'political capitalism' characterised by rent-seeking and 'a market economy under crony capitalism'.<sup>32</sup> We also need to note how state control or governance (whether central or local) affects the distribution and allocation of resources especially at the local level. Thus the examination of the relationship between the centre and localities is important.

### **3. Private property and China in the future**

There is a need to reflect on both economic reform and legal reform in China. The reform is 'groping for stones to cross the river', as Deng Xiaoping called it. This metaphor indicates that economic reform is directed by the ongoing facts without clear guidelines or legal rules, or else that guidelines and legal rules often lag behind the pace of economic reform. It is pragmatic or even opportunistic. Although this attitude towards the reform shields it from the debates over socialism versus capitalism and has opened up much space for the growth of the private sector, China has become a laboratory in which people can take adventures. Economic growth and accumulation of wealth have been highly cherished, while morality and laws have been put aside. Everything in society can be commodified and materialised, but only in China's own terms.

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<sup>31</sup> See Chapter Seven.

<sup>32</sup> See Chapter Five. Also see e.g., Wu Jinglian, 'The Road Ahead for Capitalism in China', *The McKinsey Quarterly*, no. 2006, special edition; Andrew H. Wedeman, *From Mao to Market: Rent Seeking, Local Protectionism, and Marketization in China* (Cambridge: Cambridge University Press, 2003), 2-3.

As opposed to the power of elites that push for economic and legal reforms, the other source of power that is also of importance for reforms—the grassroots initiatives (either individual or communal)—are often ignored. China's economic reform is not just a 'planned and top-down' project directed by Deng Xiaoping who is often regarded as the chief designer of market reform. Similarly, Beijing did not and is not able to conceive a unified and comprehensive plan that oversees every process and aspect of economic reform. The reality has been far more complex and intricate.<sup>33</sup> In fact, many initiatives that have propelled the reforms are from the grassroots.

Yet these grassroots initiatives always run into obstacles to get recognition in the law; in many cases, these initiatives even get suppressed. In the property regime, for example, the rural area has seen the emergence of 'minor property rights' apartments,<sup>34</sup> and the urban area has witnessed individual cooperative housing in attempts to get affordable housing.<sup>35</sup> These grassroots property arrangements contradict the official, written law. 'Extralegal property rights'<sup>36</sup> have emerged in the course of economic reform. One of the difficulties in property lawmaking is how to define these extralegal property rights and how to gradually integrate them into the property law system.

Given the features of economic reform and legal reform in China, the private, informal power from the grassroots has always been the bearer of the risks generated by the reforms. The power from the grassroots breaks through the old planned system, but in the meantime it disobeys the law; or it obeys the law, but does not conform to policy. Power from the grassroots lingers in the grey area between 'the

<sup>33</sup> Also see James Kynge, *China Shakes the World: A Titan's Rise and Troubled Future and the Challenge for America* (Boston: Houghton Mifflin, 2006), 12-14.

<sup>34</sup> Opponents of 'minor property rights' apartments base their arguments mainly on the law, because 'minor property rights' is not a formal legal concept and its legal status is vague. However, should this kind of apartments be banned? Is it possible to legalise these extralegal property rights like 'minor property rights apartments'? On minor property rights apartments, also see Section 4.2 of Chapter Four.

<sup>35</sup> See Chapter Seven, Section 5.

<sup>36</sup> This term is borrowed from Hernando De Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (London: Black Swan, 2001).

legal' and 'the illegal'. The scenario of lawmaking in China shows the pattern that reality pushes the law to reform, and it struggles to strike a balance between party policy and law as well as between central and local law-making. One of the most significant examples of this practice surfaced in 1987, when the Party approved and experimented with the grant of land use rights in selected localities such as Shenzhen, although this practice obviously contravened the Constitution.<sup>37</sup> So could minor property rights apartments be legalised by following the legalisation of land leases in the future? The answer will depend primarily on Party policy rather than further lawmaking or amendments of the law. Moreover, under the 'quasi-federal' structure of government, whether an informal institution is successful or gets legalised is largely due to the attitudes of local governments, which can play roles in either facilitating or obstructing the emergence of informal institutions.<sup>38</sup>

It is also necessary to rethink the nature of private property in post-Mao China. In addition to looking at the legal framework, it is also important to examine the political and social frameworks within which private property might make sense. The economic reform of the past 30 years shows the strong desire of both the government and ordinary people for wealth, and in the pursuit of resources there has been fierce competition between the state-owned sector, the private sector as well as foreign enterprises. In the course of economic reform, privileges based on rank and status have been transformed into capital, and rank and status decide the right to get access to resources and allocate resources. Property therefore is intimately linked to wealth, political power, privileges and status. A modernisation program that emphasises economic growth without concurrent political reform poses limits to the re-emergence of private property in post-Mao China, and the revival of private property is also constrained by socialist ideology. Reforms in the future need to

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<sup>37</sup> The first auction of land use rights was done in Shenzhen on 1 December 1987; four months later, on 12 April 1988 the constitution was amended to allow the transfer of land use rights (Clause 4 of Article 10).

<sup>38</sup> A typical example of the success in individual cooperative housing construction was in Wenzhou, Zhejiang Province, because of the strong business associations, sufficient local finance and support from the local government in Wenzhou.

eliminate ranks and privileges in order to provide an equal and fair environment for the private sector. Attention will also need to be given to the long-term consequences of the current property regime, especially in light of China's current population policies<sup>39</sup> and inheritance law. For example, the Law of Succession (1985)<sup>40</sup> only provides two orders in statutory inheritance (*fading jicheng* 法定继承),<sup>41</sup> and this provision makes it relatively easy for property to fall into a category without a successor or legatee, so that such private property eventually belongs to the state.<sup>42</sup>

Apart from the above, this study also seeks to contribute to our broader and comparative understanding of property and Chinese law. Research into the fragmentation of property and property rights in historical and contemporary China makes us realise the serious oversimplification involved in the current discourses on the conception of property rights in the property law reform, which are based on the Civil Law framework in which a division of the public and the private took root.<sup>43</sup> Furthermore, private property should be defined, at least in China, not only as 'exclusive' ownership but also as the right to get access to resources and share communal resources. This is particularly crucial for rural China that lacks market information, technological support, public service, and social security offered by the state. In the meantime, rural development is also restrained by the urban-rural divide. Establishing a communal sphere is thus a possible way to fill the empty space left by the state-provision system. Of course, achieving this goal needs further political reform involving promotion of self-governance or communal governance of resources, and this would be a large future research topic.

<sup>39</sup> China's population policies are colloquially referred as 'one-child policy', but the 'one-child policy' characterisation is not exact. China's population policies are based on different conditions and local variations. In reality, the average Chinese family today contains 1.8 children.

<sup>40</sup> Promulgated by the NPC on 10 April 1985; implemented on 1 October 1985.

<sup>41</sup> Jicheng Fa [Law of Succession] (1985), Article 10: 'First in order: spouse, children, parents. Second in order: brothers and sisters, paternal grand parents, maternal grandparents'.

<sup>42</sup> Jicheng Fa [Law of Succession] (1985), Article 32: 'An estate which is left with neither a successor nor a legatee shall belong to the state or, where the deceased was a member of an organisation under collective ownership before his or her death, to such an organisation'.

<sup>43</sup> This is the dominant perspective in current Chinese scholarship. For example, Liang Huixing at the CASS provided a model for property law drafting, and his model is based on the Pandectist system and German civil code which encompass five books. See Chapter Three.

The concepts and theories of property rights that emerged from late imperial China onwards developed against the backdrop of modernisation and state-building in China. Unitary and exclusive property rights have been regarded as constitutive of modernity. However, such ‘imagined’ nationalism has overlooked variations between different localities and the complicated relationship between the central government and local governments. The imagined nationalism also ignored the continuities and discontinuities in values and institutions from historical to contemporary China. Capturing the complexity of property rights in China therefore requires a broader picture and analysis of modern Chinese history. We should focus on the manner in which the law has been shaped by both governmental complexity and dynamic socio-economic change.

This study also shows the limitations of the research paradigm (offered in particular by Lubman) ‘understanding China through Chinese law’.<sup>44</sup> As demonstrated in the introduction and the subsequent substantive chapters, the dichotomy of China versus the West is problematic, and there is as much continuity as discontinuity in the transformation of Chinese legal and governmental systems. These observations should be applied to the comparison between Chinese law and ‘Western’ law. In China today the number of laws is dramatic: there are about 300 laws promulgated by the NPC and its Standing Committee; about 800 administrative regulations promulgated by the State Council; and more than 30,000 normative orders and local regulations.<sup>45</sup> In the area of property, there has been a series of laws that protect property rights. However, property rights are fragmented and owners of property remain ambiguous. This research on the property regime in China also challenges liberalism or neo-liberalism that regard private property rights protected by ‘the rule

<sup>44</sup> It is not sufficient to understand China just through Chinese law. Examples include, for example, Stanley Lubman, *Bird in a Cage: Legal Reforms in China after Mao* (Stanford: Stanford University Press, 1999); Randall Peerenboom, *China's Long March toward Rule of Law* (Cambridge: Cambridge University Press, 2002). Although both works give comprehensive review of the Chinese legal framework, both take a relatively narrow view of Chinese law. Also see Chapter 1, Section 2.

<sup>45</sup> This is my calculation according to the Beijing University’s database of Chinese laws and regulations, see <<http://vip.chinalawinfo.com/>> (last visited 21 November 2008).

of law' as the *sine qua non* for sustained economic growth. China has achieved high speed economic growth while property rights remain vaguely defined and weakly enforced. In China, there exists a weak link between economic growth and the clarity of property rights. This research shows that in order to capture the complexity of the property regime, we need to examine 'another art or science'<sup>46</sup> of governance in China.

Rather than overstating the divergence of legal systems between China and 'the West' and confining the examination to the internal workings of legal institutions and their functions, it is better to give attention to the deeper question of how China is governed. Governance comprises not only the formal institutions (for example, legal and political institutions) but also informal institutions (for example, the dynamic central-local relationship, *guanxi* and social networks). We need to look beyond the law, and extend the analysis to the overarching framework under which the law works, including socio-economic conditions, governance of China, and the interactions between these two aspects. A 'law-in-society'<sup>47</sup> approach should be adopted rather than a 'law-and-society' approach. In this way, this study seeks to contribute to our broader and comparative understanding of property and Chinese law.

<sup>46</sup> See e.g., Tim Murphy, 'Durkheim in China', in *Law and Sociology*, ed., Michael Freeman (Oxford: Oxford University Press, 2006), 108-118.

<sup>47</sup> See e.g., Niklas Luhmann, *Law as a Social System*, trans., Klaus A. Ziegert (Oxford: Oxford University Press, 2004); Tim Murphy, *The Oldest Social Science? Configurations of Law and Modernity* (Oxford: Oxford University Press, 1997).

## **Postscript: New Changes to Rural Land Use Rights and the Rural-Urban Divide**

As I was completing this thesis, the third Plenum of the 17<sup>th</sup> CPC Central Committee (hereinafter the Plenum) was held on 9-12 October 2008. The Plenum has set a new round of rural reforms in motion, and has brought new changes to rural land use rights. Here, in the conclusion, it is necessary to analyse these new changes and their implications. Before the analysis, there is a need to introduce some of the background to this Plenum. As discussed in Chapter Four, Xiaogang Village at Fenyang County of Anhui Province is the first place that adopted the household responsibility system (HRS). Through the HRS system, farmers have gained contractual management rights, one important form of land use rights to collectively-owned rural land. But such land use rights are incomplete and limited, and they cannot be freely circulated in the market. There are now differences between subsistence farming and farming for the market, and the latter does need a well-functioning market and cooperative working. The dispersed contractual management rights owned by individual households, however, cannot meet the income and production requirements of farmers in the changing economic context. Moreover, under the current legal system, the protection for farmers' land rights is not sufficient. Land acquisition and land use rights requisition are the only way to let farmers' land use rights enter into the market. This has opened up many rent-seeking opportunities for local governments. Nevertheless, grassroots initiatives by farmers have already broken through the legal and institutional constraints. For example, farmers at Xiaogang Village have now recollectivised their separate land use rights for more efficient use and management of land and in order to gain more money. Farmers have transferred contractual use rights to one commercial company (not set up by farmers) which specialises in agricultural production and management in order to achieve intensive and cooperative farming and management of rural land (*tudi jiyue hua jingying* 土地集约化经营) by which farmers could gain more income. Before the opening up of the Plenum, Hu Jintao, the general secretary of the CPC Central Committee, visited Xiaogang Village. This visit signalled important policy

changes to the rural land system and underscored the importance that the Party has placed on the issue of rural reform.

There are several important aims in the decision (*jueding* 决定)<sup>1</sup> of the Plenum published on 19 Oct 2008 (hereinafter the decision). First, it confirms that contractual management rights of rural land will remain unchanged and stable for a long period (*baochi wending bing changjiu bubian* 保持稳定并长久不变). The decision also permits various means of contractual management rights circulation (*tudi chengbao jingyingquan liuzhuan* 土地承包经营权流转), including subcontracting (*zhuangbao* 转包), leasing (*chuzu* 出租), exchanging (*huhuan* 互换), transferring (*zhuanrang* 转让) and shareholding cooperatives (*gufen hezuo* 股份合作).<sup>2</sup> This decision emphasises that circulation of contractual management rights should not change the nature of rural land ownership and the agricultural purpose of land use. The decision retains the provisions as set in the Land Contracting Law (2002) and the Land Administration Law (2004).<sup>3</sup>

Secondly, the decision aims to improve the system of rural residential plots (*zhaiji di* 宅基地), tighten the management of residential plots, and protect farmers' usufructuary rights (*yongyi wuquan* 用益物权), which is the legal right to possess, use and benefit from property that belongs to another person. Although some people claim that the decision has important implications for the possibility of legalising minor property rights apartments,<sup>4</sup> the stress on farmers' usufructuary rights in this decision is ambiguous. Usufruct is a lesser property right than ownership, and it does

<sup>1</sup> 'Zhonggong Zhongyang Guanyu Tujin Nongcun Gaige Fazhan Ruogan Zhongda Wenti de Jueding [The Decision of the CPC Central Committee on Several Crucial Issues Regarding Rural Reform and Development 中共中央关于推进农村改革发展若干重大问题的决定]', available in <<http://politics.people.com.cn/GB/1026/8194064.html>> (last visited 19 October 2008).

<sup>2</sup> Article 32 of Land Contracting Law (2002) already provides that 'contractual management rights obtained through household contract may, according to law, be circulated by subcontracting, leasing, exchanging and transferring or other means'.

<sup>3</sup> See this prohibition of changing agricultural purposes in contractual management rights circulation in Clause 2 of Article 33 in Land Contracting Law (2002).

<sup>4</sup> Jia Huajie, "Xiao Chanquan Fang Dengdai Diebian [Minor Property Rights Apartments are Waiting for Approval]," in <<http://news.sohu.com/20081010/n259947051.shtml>> (last visited 19 October 2008).

not include the right to dispose of the property. Thus, the decision has not granted farmers the right to dispose of their residential plots freely such as selling them as minor property rights apartments. From this perspective, the decision still limits the circulation of residential plots.<sup>5</sup>

The third aim is to reform the system of land acquisition and land use rights requisition. The decision emphasises that using rural land for construction purposes should clearly define whether it is for the ‘public interest’ or profit-seeking. The decision also calls for reducing the scope of land acquisition and improving the system of compensation.

Fourth, the decision treats rural and urban land use rights for construction purposes (*jianshe yongdi shiyongquan* 建设用地使用权) equally, and aims to gradually set up a unified market for circulation of such land use rights. Apart from rural land use rights for construction purposes, the decision also approves the use of collectively owned rural land in for-profit projects.

The reform is designed to boost rural income and rural productivity, stimulate rural consumption, and diminish the rural-urban divide by gradually abandoning the household registration system. This reform is also regarded as a prelude to the reform of the rural financial system, by, for example, providing loans for farmers. The reform will also bring changes to the relation between the state and farmers, as well as adjustment of interests gained by different groups throughout the economic reform commenced in 1978. However, the effect of the new measures regarding the circulation of contractual management rights is debatable. Some people worry that, without a functioning social security system, loosening the control over the circulation of rural land use rights may make farmers transfer contractual

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<sup>5</sup> On 22 October 2008, the CCP Central Committee declared that “minor property rights” apartments contravened the law, and construction of new apartments should not continue. Although the interests of current purchasers should be protected, the legalisation of the existing apartments is still under review. On this see <http://sc.people.com.cn/news/HTML/2008/10/24/20081024084319.htm> (last visited 24 October 2008).

management rights cheaply to big agricultural conglomerates. The number of landless farmers could increase, and a new form of inequality could thus emerge.

Clarifying the land rights (*quequan* 确权) of farmers is the focus of the new rural reform. However, contractual management rights circulation does not equal privatisation, since collective ownership of rural land is maintained. Moreover, circulation of land use rights has been confined to contractual management rights, and circulation of residential plots and rural land for construction purposes has not yet been clarified. Nor does the new development of the circulation of contractual management rights amount to recognition of a permanent tenancy in which the state nationalises rural land and then grants farmers permanent land use rights. In the decision, contractual management rights will remain unchanged and stable for a long period rather than permanent. The word 'long' (*chang* 长) has been used rather than 'permanent' (*yong* 永). Thus, it is too early to say that the long-term trend of the rural land system will follow the model of (urban) leasehold as practised in the UK.

Although the confirmation of the long period of contractual management rights and the encouragement of various experiments with land use rights circulation could be seen as further steps toward the revival of private property in rural China, the extent and effect of such a revival is a complex issue if we consider the following aspects.

The first question is how the existing legal system will respond to the new policy, and how the amendments to these laws can be made coherent. The changes to the rural land system again demonstrate that legal reform in China still relies on Party policy, and legal reform usually lags behind the policy change. Laws pertaining to property need to conform to Party policy. Such laws involve the Constitution (2004), the Property Law (2007), the Land Administration Law (2004) and so on. Moreover, there are already different experiments with the circulation of land use rights in different localities (see Chapter Four), and the question is how to deal with these local experiments that contravene the existing legal system? It is especially debatable

whether the circulation of rural residential plots such as selling and purchasing minor property rights apartments is constitutional. Article 10 of the Constitution (2004) is ambiguous regarding this issue. Although it provides that 'land use rights could be transferred', the Constitution does not specify the mechanisms for such transfers.

Secondly, how to deal with existing interest groups? Circulation of land use rights will gradually break through the monopoly of local governments over rural land use and management. Land use rights requisition will no longer be the sole means for land use rights to enter into the market. However, whether local governments and officials give up their power of land management through which they have gained a huge profit remains an open question.

Thirdly, how to promote self-governance of farmers? Farmers do need a genuine communal sphere to manage their land use rights; in the meantime, they need a social security system. This is a question of further political and rural governance reform.

Lastly, land ownership in China has its roots in socialist ideology. With the deepening of rural land reform, the difficulty will be handling the tensions between the land system and the socialist legacy. Furthermore, apart from the rural land system, the urban land system is also expecting changes. In the long run, the dual land ownership in China may be transformed, and the process of change is a continuing one. These issues will be the subjects of my future research.

## **Appendix: Chinese Laws and Regulations Pertaining to Property in Post-Mao China\***

### **Constitution**

Constitution 宪法, 1982 (amended 1988, 1993, 1999, 2004)

### **The General Principles of the Civil Law 民法通则, 1986**

### **Civil, Commercial, and Property Administration Laws**

Marriage Law 婚姻法, 1980 (revised 2001)

Inheritance Law 继承法, 1985

Land Administration Law 土地管理法, 1986 (revised 1988, 1998 and 2004)

State-Owned Enterprise Law 全民所有制工业企业法, 1988

Urban Planning Law 城市规划法, 1989

Urban Real Estate Administration Law 城市房地产管理法, 1994 (revised 2007)

Company Law 公司法, 1994

Guarantee Law 担保法, 1995

Contract Law 合同法, 1999

Rural Land Contracting Law 土地承包法, 2002

Property Law 物权法, 2007

Urban and Rural Planning Law 城乡规划法, 2008

### **Administrative Regulations**

Provisional Regulations on the Grant and Transfer of Use Rights in Urban Land 城镇国有土地使用权出让和转让暂行条例, 1990

Provisional Regulations on Administratively-Allocated Land use Rights 划拨土地使用权暂行条例, 1992

Regulations on the Implementation of the Land Administration Law 土地管理法实施细则, 1998

Regulations for Management of Urban Residential Demolition and Eviction 城市房屋拆迁管理条例, 1991 (revised 2001)

### **Other Civil and Commercial Laws on Property**

Law on Chinese-Foreign Equity Joint Ventures 中外合资经营企业法, 1979 (revised 1990, 2001)

Trademark Law 商标法, 1982 (revised 1993, 2001)

Patent Law 专利法, 1984 (revised 1992, 2000)

Law on Foreign-Funded Enterprises 外资企业法, 1986 (revised 2000)

Law on Enterprise Bankruptcy (for trial implementation) 企业破产法(试行), 1986

Law on Chinese-Foreign Contractual Joint Ventures 中外合作经营企业法, 1988 (revised 2000)

Copyright Law 著作权法, 1990 (revised 2001)

\* This list focuses on the laws and regulations that have been referred in this thesis, but includes also several other civil and commercial laws on Property.

Adoption Law 收养法, 1991 (revised 1998)  
Maritime 海商法, 1992  
Anti-Unfair Competition Law 反不正当竞争法, 1993  
Law on Product Quality 产品质量法, 1993 (revised 2000)  
Law on Protection of Consumer Rights and Interests 消费者权益保护法, 1993  
Law on Commercial Banks 商业银行法, 1995 (revised 2003)  
Negotiable Instruments Law 票据法, 1995 (revised 2004)  
Insurance Law 保险法, 1995 (revised 2002)  
Auction Law 拍卖法, 1996 (revised 2004)  
Law on Partnerships 合伙企业法, 1997  
Law on Township Enterprises 乡镇企业法, 1997  
Securities Law 证券法, 1998 (revised 2004)  
Sole Proprietorship Law 个人独资企业法, 1999  
Bidding Law 招标投标法, 1999  
Trust Law 信托法, 2001  
Law on Securities Investment Funds 证券投资基金法, 2003  
Law on Electronic Signature 电子签名法, 2004

## Glossary of Chinese terms used in the text

### B

baidui 白兑

baiqi 白契 white deeds

ban fengjian 半封建 semi feudalism

banguan 半官 semiofficial

baojia 保甲

baoli kangfa 暴力抗法 violent resistance of law enforcement

baqi 八旗 Eight Banners

bian 编 section

bian hu qi min 编户齐民 common people listed in the household register

bianzhi 编制

bieji yicai 别籍异财 separating household registration and dividing family property

buchong 补充 complement

buwei 部委 ministries and departments

### C

caichan hua 财产化 propertise

caichan quan 财产权 property rights

caijue 裁决 adjudicate

caizheng bokuan 财政拨款 fiscal appropriation

caizheng chengbao zhi 财政承包制 the fiscal contracting system

chai qian 拆迁 house demolition

chang geng 长耕 long-time cultivation

chanquan 产权 property rights

chanquan zheng 产权证 property right certificates

chaxu geju 差序格局 the differential mode of association

chengbao jingying quan 承包经营权 contractual management rights

chengxiang eryuanzhi 城乡二元制 the rural-urban divide

chi daguofan 吃大锅饭 eating from one big pot

chi dahu 吃大户 mass seizure of food from rich households

chongzu 重组 restructuring

chuji she 初级社 primary cooperatives

churang 出让 grant

citang 祠堂 ancestral halls

cun 村 village

cunji 村籍 village membership

cunmin huiyi 村民会议 the villages' assembly

cunmin xiaozu 村民小组 the villagers' group

cunmin weiyuanhui 村民委员会 village committees

### D

da gongtongti 大共同体 the large community  
dagong wusi 大公无私 great altruism without selfishness  
Da Qiuzhuang 大邱庄  
Danbao Fa 担保法 Guarantee Law  
danbao wuquan 担保物权 security rights  
dangzuzhi 党组织 Party organs  
danwei 单位 work units  
dangzheng fenkai 党政分开 the separation of functions between the Party and the state  
Daqing Minlù Cao'an 大清民律草案 Draft Civil Code of the Qing Dynasty  
Da Qing Lù Li 大清律例 Great Qing Code with Substatutes  
dayitong 大一统 The great rule of all by one emperor  
da yuejin 大跃进 the Great Leap Forward  
dazuzhu 大租主 large rent landlords  
dengji 登记 registration  
di 地 prefectures  
diannong 佃农 cultivators  
di-ding qian-liang 地丁钱粮 the land and head tax  
difang baochu zhuyi 地方保护主义 local protectionism  
difang zhengfu 地方政府 local governments  
di gai shi 地改市 turning prefectures into cities  
diji shi 地级市 cities at the prefectural level  
dingzi hu 钉子户 the nailed down house  
dingzixing shehui jiegou 丁字型社会结构 'Inverted T-shaped' social structure  
disansi tudi geming 第三次土地革命 the third land reform  
dizhu 地主 landlords

## F

Fadian Bianzuan Weiyuanhui 法典编纂委员会 the Committee for the Compilation of Codes  
fading jicheng 法定继承 statutory inheritance  
fangnu 房奴 house slaves  
fanshen 翻身  
fang'ai gongwu 妨碍公务 obstructing public affairs  
fanyoupai yundong 反右派运动 Anti Rightist Movement  
farenn chanquan 法人产权 property rights of a legal person  
farenn suoyou quan 法人所有权 ownership rights of a legal person  
fei lü fei ma 非驴非马 neither donkey nor horse  
fei zhengfu xing 非政府性 non-governmental  
Fei Zongyi 费宗彝  
fengjian 封建 feudalism  
fenjia 分家 household division  
fenshuizhi 分税制 the tax sharing system  
fenzao chifan 分灶吃饭 eating-in-separate-kitchens  
Fu Bingchang 傅秉常

## G

gaizhi 改制 transformation of ownership

gaoji she 高级社 advanced cooperatives

geming 革命 revolution

getihu 个体户 self-employed entrepreneurs

geti jingji 个体经济 individual economy

geti laodongzhe suoyouzhi 个体劳动者所有制 ownership of individual working people

gengzhe you qitian 耕者有其田 land-to-the-tillers

gong 公 the public

gongfa 公法 public law

gongfen 工分 work points

gonggong liyi 公共利益 the public interest

gonggong shitang 公共食堂 communal dining halls

gongquan 公权 public power

gongshi bi ranhou ganzhi shishi 公事毕, 然后敢治私事 and not till the public work is finished, may they presume to attend to their private affairs

gongsihua 公司化 corporatisation

gongtong susong 共同诉讼 collective suits

gongwuyuan 公务员 civil servants

gongyehua 工业化 industrialisation

gongzhong yulun 公众舆论 public opinion

guanliceng shougou 管理层收购 management buyouts

gufen youxian gongsi 股份有限公司 shareholding companies

guizhang 规章 normative documents

guoyou caichan teshu baohui 国有财产特殊保护 state ownership should enjoy special protection

guoyou tudi shiyongquan zheng 国有土地使用权证 the state-owned land use right certificate

gongyouwu 公有物 public property

gongyou gongying 公有公营 publicly-owned and publicly-run

guakao 挂靠 attached to

guanban 官办 official

guandao 官倒

guan tian 官田 official land

guanxi 关系 social relationship

gufen hezuozhi 股份合作制 shareholding cooperatives

guojia jingyingzulin 国家经营租赁 state management and renting

guojia suoyouzhi 国家所有制 state ownership

gu wei jin yong, yang wei zhong yong 古为今用, 洋为中用 make the past serve the present and foreign things serve China

guo 国 the state

guojia 国家 the nation

guojia shumai 国家赎买 socialist purchase

guojia tiaojie shichang, shichang yindao qiye 国家调节市场, 市场引导企业 an economy where the state regulates the market and the market guides the enterprises  
guoyou qiye caichan quan 国有企业财产权 state-owned enterprise property rights  
guoyou tudi youchang shiyong zhidu 国有土地有偿使用制度 the paid transfer of LURs system

H

hanghui 行会 trade guildhalls  
hefa caichan yiti baohu yuanze 合法财产一体保护原则 the principle of unified protection of all lawful properties  
hejie 和解 settlement  
hei shehui 黑社会 secret societies  
hetongfa 合同法 Contract Law  
hexie shehui 和谐社会 a harmonious society  
hezuojianfang 合作建房 cooperative housing project  
hezuoshe suoyouzhi 合作社所有制 cooperative ownership  
hongguan tiaokong 宏观调控 macroeconomic regulation and control  
hongmaozi qiye 红帽子企业 red-hat enterprises  
hou jiti zhuyi 后集体主义 post-collectivism  
huabo 划拨 allocation  
huangce 黄册 the Yellow Book  
Huang Maorong 黄茂荣  
huang zhuang 皇庄 imperial estates  
huiqian 回迁 re-house  
hulü 户律  
hutong 胡同  
heyi ting 合议庭 collegiate bench  
hongmaozi qiye 红帽子企业 'red hat' enterprises  
hongqi 红契 red deeds  
hongse yiyuancun 红色亿元村 the red billionaire village  
hou xinxuxue 后新儒学 post-neo-Confucianism  
hua 华 Chinese  
huandong buhuan dian 换东不换佃 a change in landlords could not deprive of the tenants' right to the land  
huhun 户婚 household and marriage  
huji zhidu 户籍制度 the household registration system  
huzhu zu 互助组 mutual aid teams

J

jiage shuanggui zhi 价格双轨制 the 'dual-track system' of prices  
jianbing 兼并 mergers  
Jiangnan 江南  
Jiang Ping 江平

jianshe shehui zhuyi xin nongcun 建设社会主义新农村 Constructing the New Socialist Countryside

Jiao Yitang 焦易堂

jiapu 家谱 genealogies

jiazhuang 嫁妆 dowry

jianjie minzhu 间接民主 indirect democracy

jiansheyongdi shiyongquan 建设用地使用权 Land Use Rights for construction purposes

jiazuhua shichang zibenzhuyi 家族化的市场资本主义 clan capitalism

jiceng danwei 基层单位 basic units

jiceng qunzhong zizhixing zuzhi 基层群众自治性组织 self-governing mass organizations at the grassroots level

jicheng 继承 inheritance

jiedao banzhichu 街道办事处 Street offices

jiefangqu 解放区 liberated areas

jieji douzheng 阶级斗争 class contradictions

jiguan danwei 机关单位

jihua jingji wei zhu, shichang tiaojie wei fu 计划经济为主, 市场调节为辅 a planned economy as a priority, market regulations as a supplement

jihua yu shishang tiaojie xiang jiehe 计划经济与市场调节相结合 integration of the planned economy and market regulations

jingji hetongfa 经济合同法 The Economic Contract Law

jingji zhidu 经济制度 an economic institution

jing tian 井田 the well-field system

jingying guanli quan 经营管理权 operational and management rights

jingzu fang 经租房 managed and rented houses

jishu hetongfa 技术合同法 the Technology Contract Law

jiti shangfang 集体上访 group visits or petitions

jiucheng gaozao 旧城改造 old city renewal

jumin weiyuanhui 居民委员会 neighbourhood committees

jun 郡 counties

juti xingzheng xingwei 具体行政行为 concrete administrative acts

K

kuai 块

kuangcang suoyouquan 矿藏所有权 mineral ownership

L

lanwei lou 烂尾楼‘rotten-tail’ buildings

li 例 substatutes or codified precedents

li 利 profits

lianhehui 联合会 federation

Liang Huixing 梁慧星

lifa yuan 立法院 the Legislative Yuan

li jia 里甲

li tu bu li xiang, jin chang bu jin cheng 离土不离乡, 进厂不进城

lingshi caipanquan 领事裁判权 consular jurisdiction

Liuzhuang 刘庄

lixiang zhuyi silu 理想主义思路 an 'idealised model'

lǜ 律 statutes

luanzong 乱宗

luoji xing 逻辑性 logic

## M

meng 盟 leagues

mengzi 孟子 Mencius

Mengzi-Teng Weng Gong Shang 孟子·滕文公上 Mencius-Teng Weng Gong I

min 民 the people

minfadian 民法典 Civil Code

minjian zhiku 民间智库 unofficial think tank

minshang heyi 民商合一 the combination of civil and commercial law

minshi 民事 people's matters

minshi quanli 民事权利 civil right

min tian 民田 private land

minting 民庭 civil chambers

mo 陌 the horizontal paths

mo zhe shitou guo he 摸着石头过河 crossing a river by groping for stepping stones

## N

nanhai moshi 南海模式 the Nanhai model

Nanjie Cun 南街村

nanxun 南巡 Deng Xiaoping's southern tour

neisheng waiwang 内圣外王 being an inner sage so as to rule the outside world

nongmin fudan 农民负担 peasant burden

## P

paimai 拍卖 auction

pingjun zhuyi 平均主义 equalitarianism

## Q

qian 阡 the longitudinal paths

qianzhai 钱债 money and debt

qiangzhi chaiqian 强制拆迁 forced eviction

qingmiao 青苗 green crops

qingyi zhijiao 情谊之交 friendly relations

qitian 旗田 bannerland

qiye 企业 enterprises

qiye jingying quan 企业经营权 enterprise management rights

qu 区 districts

quan 权 rights

quangui ziben zhuyi 权贵资本主义 crony capitalism

quanli 权利 rights

qunti xing xingzheng zhengyi 群体性行政争议 mass administrative disputes

R

renfa 人法 law of persons

renge quan 人格权 the right of personality

Renmin Daxue jianyigao 人民大学建议稿 the Renmin University draft

renmin neibu maodun 人民内部矛盾 contradictions among the people

renmin gongshe 人民公社 people's communes

renshen quan 人身权 the right to person

S

shangfang 上访 complaint visits

shangpinfang 商品房 commodity housing

shangpinhua 商品化 commodification

shangyang bianfa 商鞅变法 the reform of Shang Yang

shangye chaiqian 商业拆迁 commercial demolition

shehui zhidu 社会制度 a social institution

shehui zhuyi gaizao 社会主义改造 the socialist transformation

shehui zhuyi shichang jingji 社会主义市场经济 the socialist market economy

shen 绅 gentry

sheng 省 provinces

shengchan dadui 生产大队 production brigades

shengchan xiaodui 生产小队 production teams

shekeyuan jianyigao 社科院建议稿 the CASS draft

Shen Jiaben 沈家本

shensheng buke qinfan 神圣不可侵犯 socialist public property is sacred and inviolable

shetuan 社团 social organisations

shewai jingji hetongfa 涉外经济合同法 the Foreign Economic Contract Law

shi 市 the city

shijing 诗经 Book of Poetry

Shijing-Xiaoya-Datian 诗经 · 小雅 · 大田 Book of Poetry-Book of Odes-Farm Work

Shimin Shehui 市民社会 civil society

Shiminfa 市民法 Jus civile

Shi Shangkuan 史尚宽

shiye danwei 事业单位

shiye danwei bianzhi 事业单位编制 the 'public service units' bianzhi

shoutian zhi 授田制 the system of granting land by the state

shuanggui zhi 双转制 the dual approach

shuihudi qinjian 睡虎地秦简

shu yuan 书院 academies

shuzi chuguan guanchu shuzi 数字出官, 官出数字 statistics make officials, and officials make statistics  
si 私 the private  
si bao liang ting 四包两停 Four Guarantees and Two Stops  
sige xiandaihua 四个现代化 the 'four modernisations'  
sifa 私法 private law  
siquan 私权 private rights  
siquan xiangshou 私权相授  
siying jingji 私营经济 private economy  
siying qiye 私营企业 Private enterprises  
siyouhua 私有化 privatisation  
siyou gongying 私有公营 privately owned and publicly run  
songsanshi,lianbangshi 松散式, 联邦式 a 'loose and assembled model'  
sunan muoshi 苏南模式 a 'sunan model'  
suoyou quan 所有权 ownership  
suoyouzhi 所有制 the social institution

## T

taihu 太湖 Taihu Lake  
tanding rumu 摊丁入亩  
tangyu 堂谕 court decisions  
ta wuquan 他物权 *Jura in re aliena* (other real property rights)  
tebie xingzheng qu 特别行政区 special administrative regions  
tiangen 田根 land roots  
tiangu 田骨 land bones  
tianmian 田面 topsoil or surface soil  
tianmianquan 田面权 topsoil rights  
tianpi 田皮 land skin  
tiantu 田土 land and real estate  
tiao 条  
tiaojie 调解 mediation  
tianxia 天下 under heaven  
tixi xing 体系性 systematisation  
tizhinei 体制内 inside the system  
tizhiwai 体制外 outside the system  
tong 同  
tongju gongcai 同居共财 living together and sharing household property together  
tongxiang 同乡 the same origin  
tongyi zhanxian 统一战线 a united front  
tudi zhengshou 土地征收 land acquisition  
tudi shougou chubei zhidu 土地收购储备制度 the land-banking system  
tun tian 屯田 the land of a military colony  
tong xiang 同乡 the same native-place  
tudi chengbaofa 土地承包法 The Land Contracting Law

tudi fuzhuowu 土地附着物 fixtures to land  
tudi gufen zhi 土地股份制 a farmland shareholding system  
tudi shiyong quan 土地使用权 land use rights (LURs)  
tudi chiyongquan churangjin 土地使用权出让金 LUR transfer fees  
tudi shiyongquan zhengyong 土地使用权征用 requisition of land use rights  
tudi suoyouquan 土地所有权 landownership  
tugai 土改 the land reform

## W

Waiguo Zhijie Touzi 外国直接投资 Foreign Direct Investment  
wanren susong 万人诉讼 ‘Ten-Thousand-Person Mass Lawsuit’  
Wang Chonghui 王宠惠  
Wang Liming 王利明  
Wang Zejian 王泽鉴  
weifang gaizao 危房改造 dilapidated housing renewal  
weixian 违宪 unconstitutional  
Wei Yaorong 魏耀荣  
wenzhou moshi 温州模式 the wenzhou model  
wu 物 things  
wufa 物法 law of things  
wufan yundong 五反运动 Five-anti Campaigns  
wuquan 物权 rights over things  
wuquanfa 物权法 the Property Law  
Wu Tingfang 伍廷芳  
wu zuzhi 无组织 non-organisational

## X

xian 县 county  
xiandai chanquan zhidu 现代产权制度 the modern property rights system  
xiandai qiyey zhidu 现代企业制度 the modern enterprise system  
xiahai 下海 jumped into the sea  
xiang chanquan 乡产权 township property rights  
xian gai shi 县改市 turning counties into cities  
xianghuo 香火  
xiangshen 乡绅 local gentries  
xiangzhen 乡镇 townships  
xianji shi 县级市 cities at the county level  
xian shi gai qu 县市改区 turning cities and counties into urban districts  
xianshizhuyi silu 现实主义思路 the ‘pragmatic model’  
xiao chanquan 小产权 minor property rights  
xiao chengzhen 小城镇 small towns  
xiao gongtongti 小共同体 the small community  
xiao yezhu 小业主 petty proprietors  
xiao zuzhu 小租主 small rent landlords

xiehui 协会 associations  
xietiao 协调 coordination  
xieyi 协议 negotiation  
xiguan fa 习惯法 customary law  
xin jiti zhuyi 新集体主义 new collectivism  
xinzheng 新政 the late Qing reforms  
xin ziyu zhuyi 新自由主义 neoliberalism  
xin zuopai 新左派 the new left  
Xing'an Huilan 刑案汇览 The Conspectus of Penal Cases  
xingxiang gongcheng 形象工程 showcase projects  
xingzheng 行政 administration  
xingzheng bianzhi 行政编制 the administrative bianzhi  
xingzheng caiju 行政裁决 administrative adjudication  
xingzheng cun 行政村 the administrative village  
xingzheng danwei 行政单位 administrative units  
xingzheng fuyi 行政复议 administrative reconsideration  
xingzheng quhua 行政区划 administrative zoning  
xingzheng shouduan 行政手段 administrative means  
xingzheng susong 行政诉讼 Administration litigation  
xishi 细事 minor things  
Xiuding Falüguan 修订法律馆 Codification Commission  
xue nong yu shui 血浓于水 blood is thicker than water  
xuetian 学田 scholar estates  
Xu Guodong 徐国栋  
xuli 胥吏 clerks  
xuehui 学会 scholarly society

## Y

yamen 衙门  
Yang Renshou 杨仁寿  
yanjiuhui 研究会 research association  
yayi 衙役 runners  
yeman chaiqian 野蛮拆迁 savage eviction  
yezhu weiyuanhui 业主委员会 property owners' associations  
yi 夷 barbarians  
yi 义 righteousness in the moral sense  
yibashou 一把手 the first person in command  
yihao wenjian 一号文件 the No. 1 Document  
yitian erzhu 一田二主 two lords to one field  
yitian sanzhu 一田三主 three lords to one field  
yiwu yiquan 一物一权 one right over one thing  
yong 永 permanent  
yongdian 永佃 permanent tenancy  
yongdianquan 永佃权 the rights to permanent tenancy

youxian zeren gongsi 有限责任公司 limited liability companies  
you zhongguo tese shehui zhuyi jianshe zhe 有中国特色社会主义建设者 Builders of Socialism with Chinese Characteristics  
yong xiaozuo quan 永小作权 right of permanent tenure  
yongyi wuquan 用益物权 usufructuary rights  
yongzu 永租 long-time rent  
you jihua de shangpin jingji 有计划的商品经济 a planned commodity economy  
you zhongguo tese de shehui zhuyi shichang jingji 有中国特色的社会主义市场经济 socialist market economy with Chinese characteristics  
Ying Rui 英瑞  
yi nǚ er jia 一女二嫁 married the daughter twice  
yinyang hetong 阴阳合同 Yin Yang Contract  
yitian erzhu 一田二主 two lords to one field  
Yu Liansan 俞廉三  
yulin ce 鱼鳞册 cadastres  
yulun jiandu 舆论监督 supervision of mass media  
yumin zhengli 与民争利 scrambling interests with the people  
yusuannei zjin 预算内资金 the official budgetary accounts  
yusuanwai shouru 预算外收入 extra-budgetary revenue  
yusuanwai zjin 预算外资金 extra-budgetary accounts  
yu wo gongtian, sui ji wosi 雨我公田, 遂及我私 may it first rain on our public fields, and then upon our private

## Z

zerentian 责任田 responsibility land  
zhaijidi 宅基地 residential plots  
zhaiquan 债权 obligation  
zhaobiao 招标 tender  
zhengfa xitong 政法系统 the single political-legal system  
zhengfu Jingying Chengshi 政府经营城市  
zhengqi fenkai 政企分开 the separation of state administration from state enterprises  
zhengqiu yijian gao 征求意见稿 the LAC draft  
zhengshou zhengguo 征收征购 compulsory procurement and purchase  
Zheng Yubo 郑玉波  
zhijie minzhu 直接民主 direct democracy  
zhili zhengdun 治理整顿 regulation and rectification  
zhiwai faquan 治外法权 extraterritoriality  
zhixia shi 直辖市 municipalities  
zhongguohua 中国化 sinicisation  
Zhongzi An 种子案 The 'Seed Case'  
zhuaida fangxiao 抓大放小 grasping the large and freeing the small  
zhubin zhifen 主宾之份 the relationship of master and guest  
zhulian 株连 collective responsibility  
zhuquan shangmao cheng 珠泉商贸城 the Zhuquan Commercial Mall

zhuzi junfen 诸子均分 the equal-male-division of household property

zibenjia 资本家 capitalists

zibenjia suoyouzhi 资本家所有制 capitalist ownership

zichou zjin 自筹资金 self-raised revenue

zigeng nong 自耕农 farm proprietors

ziliu di 自留地 private plots

ziran cun 自然村 natural villages

zisi 自私 selfish

ziwuquan 自物权

ziyou zhuyi 自由主义 liberalism

zizhi zhou 自治州 autonomous prefectures

zuchan 祖产 ancestral estates

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