Past Is Present: Urban Real Property Rights and Housing Reform in the People's Republic of China

William D. Soileau
PAST IS PRESENT:
URBAN REAL PROPERTY RIGHTS AND HOUSING REFORM IN THE PEOPLE'S REPUBLIC OF CHINA

William D. Soileaut

Abstract: Since the early 1980s China has embarked on an ambitious program of reform in the systems of urban real property rights and allocation. In many respects, these reforms recall the policies of private property rights protection which prevailed in the early post-Liberation period of P.R.C. history, but which were subsequently abandoned in the Great Leap Forward and Cultural Revolution. In the intervening thirty years, however, the system of "public" urban housing ownership and allocation deteriorated to such an extent that no one — neither the state, its agents, nor private individuals — had sufficient incentives to increase or even preserve these resources. Faced with the widespread shortages and allocative crises, the reform leaders have again realized that enforcement of substantial property rights is an essential prerequisite to the investment in and conservation of real property resources.

This Article will utilize an economic theory of property rights to analyze the P.R.C.'s system of urban housing rights as it has evolved from Liberation through the modern reforms. It concludes that although the modern reforms have made major progress toward establishing a more rational system of property rights in urban housing, further progress will require still larger investments of political and economic resources. This is because the modern housing rights reforms imply nothing less than market allocation under the rule of law, while administrative allocation under the rule of local bureaucrats is the norm inherited from the past. In short, the housing reforms are dependent upon parallel reforms across the range of legal-institutional factors impinging on property rights.

CONTENTS

I. INTRODUCTION

II. A MODEL AND THEORY OF PROPERTY RIGHTS
   A. A Legal-Institutional Model of Property Rights
   B. An Economic Theory of Property Rights

III. URBAN REAL PROPERTY RIGHTS IN THE MAOIST PERIOD
   A. Fundamental Principles: The Mixed Ownership System
   B. Public and Private Rights in Real Property
      1. The Confiscation of Private Real Property
      2. Transfer Rights and Registration

† The author is a Seattle attorney and 1994 graduate of the University of Washington School of Law. The author wishes to thank Professor Donald C. Clarke for his insights and guidance, and the comparative law staff at the University of Washington Gallagher Law Library for their assistance in locating sources. Any mistakes or omissions remain the responsibility of the author alone.
3. Lease Relations: Using Rents to Develop Housing
C. Implementation Difficulties and Economic Irrationality
D. The Socialization of Urban Housing Property

IV. THE REFORM ERA: PAST IS PRESENT
A. Market Problems and Rights Solutions
   1. Market Problems
   2. Rights Solutions
B. Overall Property Rights Reforms
   1. Fundamental Principles: The Mixed Ownership System
   2. Civil Status and Operation Rights of Economic Actors
   3. Some Basic Structures of Civil Rights and Liabilities
C. Housing Rights Reforms
   1. The “New” Definition of Ownership
   2. New Entities: Property Development Companies
   3. New and Old Rights in Urban Housing
   4. Public Housing Reforms: Rent Reform and Subsidized Sales

V. CONCLUSION: THE FUTURE OF HOUSING REFORM IS THE FUTURE OF ALL REFORM

I. INTRODUCTION

Since the late 1980s, the government of the People’s Republic of China ("P.R.C.") has embarked upon an ambitious program of reform in the area of urban real property rights law. From the beginning, these legal reforms have existed in order to serve the reform-era imperative of economic development. The purpose of housing reform has been to reverse the irrational patterns of use and allocation, and the accompanying high

---

1 Two distinctions in Chinese real property law largely define the structure of this paper: that between urban and rural land; and that between land and housing. As to the first, China has maintained a fundamental practical and theoretical distinction between urban and rural land since the founding of the P.R.C. Generally, urban land is that within the cities and may also include that in adjacent suburbs, but the basic distinction is that between land used for agricultural production in rural areas, and that used for enterprises, residential housing, offices, common spaces, etc. in urban areas. Because of the different means of production and economic relations characterizing these two broad types of land, two distinct regimes of urban and rural property rights have been maintained throughout the history of the P.R.C. This article will address only P.R.C. law and policy with respect to property rights in urban real property as defined in the relevant legislation.

The second distinction of note is that between urban land and the housing thereupon. This distinction was somewhat important early in the history of the P.R.C., but has taken on central importance in the modern reforms. This article will focus primarily on urban housing policy, but will also necessarily treat urban land insofar as housing rights are intimately connected with rights in the underlying land.
costs to government and society, that were caused by the prior system of state ownership. While this reform process has given rise to significant changes in the laws governing property rights, this paper proposes that these changes and others in the institutional environment must progress much further in order to reverse the excesses of the past and establish a rational, economically efficient system of property rights in urban housing in China.

Scholars have characterized these legal reforms as a move toward the privatization of real property rights, but this characterization proves too much both in historical and conceptual terms. In fact, far from this being the P.R.C.'s first experience with western-style private property rights regimes, private property rights were the official norm immediately after Liberation. Though the early recognition of private property rights eventually gave way to socialization and radicalization in the political turmoil from the Great Leap Forward, this early experience with private property rights provides a rich, if uneven, history of practical and theoretical precedent for the modern reforms. Moreover, the modern reform effort is addressing substantially the same problems that were encountered early and persisted into the modern post-Mao era. Thus, a historical perspective on urban real property rights in the P.R.C. provides essential ground for understanding the current reforms and, in particular, whether the current reforms represent truly unique innovations or merely a return to the failed formulas of the past.

The description of the P.R.C. real property reforms as an exercise in privatization is, conceptually, extremely weak. Property rights are complex phenomena that transcend easy categorization. A number of different rights and duties, for example, may attach to a given piece of real property, and these may or may not combine to constitute formal "ownership."
Moreover, in China different types and degrees of rights may be enjoyed by such diverse "public" entities as the nation as a whole, individual government bureaus or organs, or state-owned enterprises, in addition to private individuals. Finally, property rights have important implications for economic activity which might be missed by focusing on form alone. Thus, while "privatization" may capture the direction of reform in its broadest sense, it does not in itself go very far in describing and relating the actual goals, content and effects of the current or past system of property rights.

The purpose of this paper is to begin to evaluate the reforms now underway in light of the developments in urban real property rights since Liberation in 1949. It will proceed by providing an integrated analysis of the problems faced by Chinese leaders, their goals and objectives, some of the major legal-institutional systems of rights and duties which they fashioned to attain their ends, and the actual results of their efforts. An economic theory of property rights will be utilized to relate the form and substance of property rights to the leaders' goals and the results of their work.

The remainder of this paper is divided into four parts. Part II briefly outlines a model and theory of property rights with which to analyze the past and current systems of property rights in urban housing. Part III will analyze urban housing rights in the pre-reform period, from 1949 until the late 1970s. Part IV will examine the modern reforms in light of past precedent and experience, and in terms of their ability to overcome the difficulties of the past and establish an economically more rational and efficient set of rights in urban housing. Part V offers some concluding thoughts on the future of urban housing reform in China.

II. A MODEL AND THEORY OF PROPERTY RIGHTS

Economic theories of property rights provide a particularly useful vehicle with which to relate the content and results of property rights regimes. Moreover, these theories generate useful hypotheses about the form and substance of a set of efficient rights which will result in the socially optimal utilization of property resources. Because the motivation behind the current housing reforms is fundamentally economic, these theories provide an excellent basis for evaluating both the failure of past property rights regimes and the likely success of the current rationalizing
reforms. However, a definition and model of property rights is also required in order to begin to apply this theory.

An economic analysis of property rights has two basic elements: a model of property rights as legal-institutional phenomena; and a theory identifying the economic functions of property rights and generating hypotheses about optimal property rights for desired economic outcomes. These two tools work together to reveal the economic consequences of specific property rights configurations in different systems. This section will lay out a model and theory, and the following sections will apply the theory to analyze the system of urban real property rights in China.

A. A Legal-Institutional Model of Property Rights

The concept of a right in property has three fundamental elements: identifiable tangible or intangible property objects; legal or economic actors; and rights relationships between actors and property. Objects and rights merge when the term "property" is used to mean a particular right or interest.

The element of rights relationships is perhaps most elusive. Most broadly, a right can be defined as an "individual advantage secured by law — where advantage includes both choices and benefits."

On the other hand, rights can also be characterized negatively in terms of detriments or burdens, for to be constrained or bear some burden is also definitive of relations to property and persons. These reciprocal advantages and burdens may be born both by natural persons and legal persons, and may vary widely in content, format, and enforcement mechanisms.

Hohfeld identified eight "fundamental legal conceptions" as constitutive of rights relations. His analytical vocabulary consists of four positive benefits (claim-right, privilege, power, and immunity), which correlate with four negative burdens (duty, no-right, liability, and disability) in legal relations. While these categories may be neither all-inclusive nor mutually

---


8 Legal persons include a range of enterprises, organizations, and entities empowered to carry out civil acts.

9 Hohfeld seeks to develop a "scheme of 'opposites' and 'correlatives' . . . and then . . . to exemplify their individual scope and application in concrete cases." HOHFELD, supra note 7, at 36. For
exclusive, they at least partially illustrate the fundamental structure of complex property relations. They also illustrate the fundamental economic function of property rights: to structure the legal-institutional costs and benefits associated with property use between economic actors. It remains, however, to put into use Hohfeld’s categories in specific contexts.

Legal-institutional structures shape property relations by specifying which types of actors (natural or legal persons) are competent to enter these rights relations, the substance of the rights and duties of the actors, and the procedural institutional means for specifying, recognizing, exercising and enforcing rights. As to the substance of rights in things, legal scholars often speak of property in terms of “bundles of sticks” or “incidents” of ownership which vary according the things and actors at issue. Honoré identified several incidents of relations to real property common in Western legal systems: the claim-rights to possess, use, manage, and receive income; the powers to transfer, waive, exclude, and abandon; the liberties to consume or destroy; immunity from expropriation; the duty not to use harmfully; and liability for execution to satisfy a court judgment.

Whether or not the possession of any one or a combination of these incidents amounts to “ownership” is beside the point, for correlative powers and duties are involved in any given claim right or liberty. Indeed, this is precisely the point of western property law: to assure, in doctrine and through legal-institutional means, the enforcement of not only the mutual

---

10 Munzer, for one, notes the limitations in Hohfeld’s terminology. Categorical overlap may exist between “no-right” and disability, liability and duty, and power and right. However, even if this terminology is not exhaustive or its categories exclusive, it does help to illuminate the contours of reciprocal benefits and burdens characteristic of rights relationships. See MUNZER, supra note 7, at 19-20.

11 Note, however, that no real attempt is made here to distinguish between procedure and substance, for any procedure is at bottom merely a constellation of substantive rights, and vice versa. Note also that this is the broadest of all possible definitions of the object of property rights analysis. It includes the range of economic actors in society, and any type of property object and relation they can imagine. It includes all types of institutional configurations, rules, powers and practices, whether formal or informal.

12 These incidents were initially defined by Honoré and are summarized in MUNZER, supra note 7, at 22.
rights, but the mutual duties that are equally important to autonomous, profit-maximizing market exchange. The economic theory of property rights teaches that the failure of rights regimes is highly correlated with the failure of markets.

B. An Economic Theory of Property Rights

Western institutional economic theories of property rights concern themselves with the implications of these incidents and institutions for economic behavior. In the barest terms, they are concerned with how rights and institutions structure the costs and benefits of resource utilization, and hence the incentives for both investment and conservation.

This innocent-sounding yet complex idea is easily illustrated by an example from apartment lease relations. Rent relations are comprised of myriad elements: statutory or common law powers of landlord-lessees (presumptively, but not necessarily, the “owner” of the building and/or land) and tenant-lessees to enter contracts at more or less controlled rates and terms; reciprocal substantive duties on the part of the tenant to pay rent and the landlord and tenant to maintain the property; the tenant’s right to exclude the landlord, and the tenant’s inability to sell (or sublease) the property; the power of the landlord to evict the tenant or obtain restitution if the tenant damages the property; and the power or right of the state or its agents to interfere in or prohibit these relations altogether.13

Clearly, several layers of benefits are generated in these transactions to structure economic activity. Some substantive benefits, such as the landlord’s right to receive and power to demand rent, represent an entitlement to immediate economic value in the form of current cash payments. The landlord’s power to sell the property also represents potentially immediate economic value. The importance of these exchanges is quite clear. If the landlord does not receive his claim right (rental payments), he will most likely have no incentive whatsoever to incur the costs of upholding his side of the bargain (maintaining the property). If landlords cannot exercise their claim rights and powers to recoup their investments in the future, they will not construct apartments today or tomorrow.

13 If this last proposition sounds outrageous, read on. The Chinese experience is more complex than this: instead of abolishing rent relations altogether, the state subsumed them within the organs and agents of the state itself, with perverse and disastrous results.
Modern economic theories of property rights analyze legal-institutional rights structures in terms of the way they structure the incentives of property resource use. Their simple but powerful insight is that legal institutions structure the costs and benefits of property use, and that optimal resource use requires the optimization of the benefits and minimization of costs.

Costs have critical roles to play in neo-classical institutional economic theory. First, transaction costs are directly detrimental to individual and societal benefit maximization. The cost of enforcing or exercising rights, whether through registration, licensing, adjudication, administrative appeal, or self help represents constant friction and a disincentive at the margin of value maximizing transactions. The concepts of information, discovery, and policing costs are all imbedded in the broader concept of transaction costs.

Clearly, transaction costs are always positive and may also vary to infinity. Where statutes or other authorities explicitly prohibit some activity, transaction costs increase dramatically — this is why crime still pays. Where no formal rights are recognized, or where rights are unclear or are only weakly protected, both risk and the transaction costs of discovering and securing these benefits increases. The less valuable are claim rights, the less valuable is the property itself as an income producing tool, and the less likely that it will attract voluntary investment. If the cost of vindicating or exercising rights exceeds their marginal returns, the claim will not be exercised, and socially useful activity will be foregone.

Another more slippery concept of neo-classical economics embracing both costs and benefits is the concept of externalities. Put most simply, an externality is any cost or benefit of resource use that is not born by the actors.\textsuperscript{14} The concept of positive externalities is essentially captured by the example of the landlord's claim rights to rent described above. Neoclassical economics simply posits that the costlier it is to internalize benefits from property resources, the less likely it is that the economy will produce optimal investment in those resources. On the cost side of externalities, the archetypical example of a negative externality is pollution — where, for example, a factory freely pumps effluent into a river causing sickness and blight downstream. Here, neoclassical economics merely counsels that

individuals should be made to pay the costs of their externalities in order to encourage the internalizing, and hence minimizing, of costly activities.

Costs also enter into more general conservation arguments via the concept of the soft budget constraint. This concept captures the idea that if enterprises do not pay the costs of their inputs, they will have no incentive to conserve on use or maximize outputs, and will have a basically unlimited demand for inputs. Insofar as renters, for example, do not pay the actual costs of their apartments, they will want to procure as much space as possible regardless of marginal utility to the individual or loss to society. The inability to impose costs on resource users also encourages rent-seeking behavior whereby, instead of investing in wealth maximization by controlling costs and increasing output, actors spend resources in petitioning responsible authorities for favorable treatment vis-à-vis other actors in the economy.

It is possible to specify some general ideal conditions for property rights institutions from these propositions.

First, insofar as property rights represent potential economic value, they should be recognized in as many different forms, "things," and actors as feasible. Thus, as more rights are recognized and mutually beneficial transactions allowed to take place, the more individual and social value is created.

Second, transaction and enforcement costs should be decreased in order to maximize returns on investments. Property rights should be defined in as clear a manner possible in order to reduce information costs. For the same reason, rights should be public, predictable, discoverable, and rather more than less stable. Enforcement and policing costs should also be minimized as much as possible. Effective definition and enforcement of duties, as opposed to rights, also serves to decrease the ability of actors to externalize their own costs and arbitrarily impose them on others.

Modern Western law offers several solutions for these economic rights requirements. Contracts are preferred over direct administrative control, not only because they allow for profit maximizing autonomy, but also

15 For an analysis of soft budget constraints in state-owned enterprises in China, see Donald C. Clarke, What's Law Got to Do with It? Legal Institutions and Economic Reform in China, 10 U.C.L.A. PAC. BASIN L. J. 1, 9-10 (1991) [hereinafter Clarke, What's Law Got to Do with It?].
17 This proposition, like most others here, depends at least in part on the ability to control (and the cost of controlling) negative externalities through the use of regulatory, investigative, recordation, and enforcement systems.
because they generally decrease individual actors' information costs.\textsuperscript{18} The same function is served by generally applicable laws, regulations and regulatory procedures, which aid in the discovery of rights boundaries and the equitable enforcement of rights and duties as defined.

Enforcement costs should also be minimized. Responsible institutions of the state should have sufficient powers, duties, liabilities, and resources (institutional, fiscal, etc.) necessary to facilitate the neutral validation and enforcement of property rights and duties at the least possible cost. Insofar as they are empowered and enabled to enforce relevant land use or other laws, regulatory institutions also provide a means — again, at more or less transactional and information costs — for reducing externalities. And of course, a system of criminal, administrative law or other incentive structures should also hold public actors responsible for faithfully enforcing these generally applicable laws. In sum, what is implied is the rule of law itself, as applied to society through the law and institutions of the state, and also as applied to the state itself and its institutions.

Although it may not be possible to specify the marginal individual or social utility of any given change in rules or administrative resources, it is possible to test the hypothesis that weak rights produce irrational use and allocation by observing patterns of legal-institutional change and correlating these with indicators of economic performance. While subtle variations in rights may be beyond this model, extreme cases of deviation from these standards for rights validation are easily identified.

China's experience presents just such an extreme case, and its experience largely conforms with the theory's most negative implications. The urban housing system in China throughout the Maoist period offers an example of extremely weak property rights, and the results of its policies were precisely as predicted by this theory: weak, volatile property rights and extremely low rent rates throughout the Maoist period led to serious disincentives to investment and conservation, which in turn led to massive housing shortages, disrepair, misuse, and misallocation.

While it is clear that China has changed directions in property rights policy by enacting some laws and reforms, it is much less clear how much real progress has been made in implementing these newly recognized rights. At best, China has made much progress and needs to continue its reforms. At worst, its reform policies may fail if they do not overcome the inertial force of existing institutional resource allocations and rights configurations.

\textsuperscript{18} See Clarke, \textit{What's Law Got to Do with It?}, supra note 15, at 16.
III. URBAN REAL PROPERTY RIGHTS IN THE MAOIST PERIOD

The P.R.C. urban real property system only gradually evolved into the generalized system of weak, decentralized public ownership rights existing at the end of the Maoist period. Far from mandating the nationalization of all urban real property after Liberation, the leadership’s early policies sanctioned and established a mixed system recognizing property rights in private as well as public entities in order to conserve and focus all available resources to solve the significant tasks of urban reconstruction and governance. In urban areas, individual real property ownership actually predominated, but nevertheless coexisted uneasily with increasingly extensive yet poorly defined powers of agents of the state — local government organs, local branches of state industrial-bureaucratic organs, and state-owned enterprises (“SOEs”) — over all types of property.

While pursuing this policy of mixed ownership, the P.R.C. continued to experience problems in efforts to spur reconstruction and curb waste and misuse of all types of property resources. In the turbulent political climate of the late 1950s, calls increased for the destruction of the system of exploitative capitalist ownership and the socialization of urban land and housing along with that in the countryside. Socialization entailed efforts to increase the scope of public ownership by bringing more property under the control of local government, as well as efforts to strengthen governmental control over current public property resources. While socialization did result in an increase in the scope of formal public ownership at the expense of private rights, it only exacerbated the original problems by increasing the amount of property in the already fragmented and unaccountable public property system. The sections below will analyze the early policy principles regarding urban real property rights, specific public and private rights in urban housing, difficulties in implementing these rights regimes, and the process of socialization which ultimately only aggravated these problems.

A. Fundamental Principles: The Mixed Ownership System

While public ownership was sacred in Chinese Communist Party revolutionary doctrine, some of the earliest policy documents from the post-Liberation period announced a strong predisposition toward the protection of private rights in urban real property. The 1949 document Urban Housing
Rent Policy\textsuperscript{19} drew a distinction between urban and rural ownership. It argued that while agrarian private land ownership was backward and feudal because landlords merely exploited peasant labor,\textsuperscript{20} urban housing was capitalist in that it represented an investment of productive capital, and rent, the return on that capital.\textsuperscript{21} On the basis of these distinctions, the article argued that while ownership of rural land could be eliminated, rights in urban housing, at least, should remain during the period of Democratic Socialist development in which it was expected that capitalist elements would persist.\textsuperscript{22}

Thus, the Chinese revolutionaries drew an early distinction between urban and rural land, and expressed an intent to protect, within limits, the formal rights in urban housing. The Urban Housing Rent Policy document, for example, calls for the “confirmation of ownership rights in all housing of most private owners and the protection of their right of proper and legal management.”\textsuperscript{23} Moreover, “protection” was clearly intended to mean protection from the intrusions of public officials as well as other individuals.\textsuperscript{24}

\begin{footnotesize}
\begin{enumerate}
\item Chengshi fangwu fangzu de zhengce [Urban Housing Rent Policy], reprinted in JIEFANG HOU DE SHANGHAI FANGWU ZULIN WENTI [POST-LIBERATION SHANGHAI HOUSING RENTAL PROBLEMS] 3 (Shanghai Times Publishing Editorial Dep’t ed., 1949) [hereinafter SHANGHAI RENT POLICY]. This document stands out among early policy pronouncements for the clarity, force, and lasting appeal of its reasoning. The article’s concept of “using rent to develop housing” (yi zu yang fang), for example, remained persuasive well into the 1950s. See, e.g., Chengshi fuwu bu [Urban Service Bureau], Guanyu jiaqiang chengshi fangwu guanli gongzuo de yijian [Opinion Concerning the Work of Strengthening Urban Housing Management] [hereinafter 1957 Urban Housing Opinion], reprinted in MINFA CANKAO ZILIAO: FANGDICHAN FENCHE [CIVIL LAW REFERENCE MATERIALS: REAL PROPERTY] 21, 26 (Beijing Univ. Law Dep’t, Civil Law Studies Office and Information Office eds., 1980) [hereinafter 1980 CIVIL LAW REFERENCE MATERIALS].
\item SHANGHAI RENT POLICY, supra note 19, at 4.
\item The article cites Marx’s Das Kapital for the proposition that “rent is interest and return from capital investment in housing.” Id. at 4-5.
\item Id. This same policy is reflected vividly in the title of a contemporary article, which declared “Feudal Village Land and Urban Housing are Different: The [Idea of] Redistribution of Urban Housing is Mistaken.” JIEFANG RIBAO [LIBERATION DAILY], Sept. 11, 1949, reprinted in SHANGHAI RENT POLICY, supra note 19, at 12.
\item SHANGHAI RENT POLICY, supra note 18, at 7. The Chinese word jingying is translated here as “management,” but may also be translated as operation or “to operate” in its verb form. The distinction between the right to use or control land and formal ownership is similar in some respects to that maintained under the use rights model adopted in the current reforms. For a discussion of modern land use rights, see infra notes 210-18 and accompanying text.
\item A phrase in the 1950 Zhongnan District provisions closely mirrors language in the Urban Housing Rent Policy document: “The People’s Government protects the lawfully obtained ownership and legal management rights of all citizens ... no organ, military unit, group, or individual may compel the sale, rental, lending, or possession” of privately owned property. Zhongnan qu guanyu chengshi fangchanquan de jixiang yuanze jueding [Decisions in Principle of Zhongnan District on Urban Housing Rights], ch. 1, art. 1 (Dec. 15, 1950, amended Jan. 12, 1953) [hereinafter Zhongnan Provisional Decisions], reprinted in 1 ZHONGHUA RENMIN GONGHEGUO MINFA ZILIAO HUIBIAN [A COLLECTION OF CIVIL LAW MATERIALS OF THE
This general policy of protecting private rights in and ownership of urban real property continued up until the Great Leap Forward.25

The first Constitution26 also provided some qualified recognition and protection for the system of private property ownership. While the official policy called for the control and gradual replacement of capitalist with socialist ownership,27 the 1954 Constitution did recognize the existence of the “capitalist ownership system.”28 This Constitution also expressly provided for the protection of citizens’ ownership rights in personal and real property, including housing,29 and further stipulated that the government would protect citizens’ rights to devise their private assets.30 Nevertheless, private property was subject to confiscation, according to law, in furtherance of national interests.31 Private property rights were also enjoyed subject to the condition that they not harm the national interest.32 Thus, while officially protected, private property rights were not unconditionally recognized as fundamental rights superior to the state’s rights.

Most of the authority of the day was silent on the issue of urban land, but private rights in urban land appear to have persisted along with those in urban housing. Because of the complex relationships involved and the integral connection between housing and land, the issue of urban land was not resolved in favor of either private or public ownership.33 Since there was
no active policy to abolish urban private land holdings and separate them from housing, de facto private ownership in land seems to have simply continued under the guise of private ownership of housing. Furthermore, this phenomenon appears to have persisted at least into the Great Leap period, and probably beyond.  

B. Public and Private Rights in Real Property

Because it wanted to maintain a mixed ownership system, the P.R.C. leadership sought to define and enforce the rights and duties of actors in possession of both public and private property. It largely failed on both counts. Individual owners had significant possessory, registration, and transaction rights, but the administrative and judicial systems necessary to enforce these rights were hardly formed yet. Government enterprises and organs were initially mere caretakers without the power to transfer or convert public property; but they had significant autonomous operation rights in property in their possession, and significant legal and de facto confiscation powers vis-à-vis owners. Because of the weak position of individual owners relative to the state and its agents, and of the state relative to its own agents, no actor in the system had a sufficient right or duty interest in preserving or increasing the value of public or private housing. This situation led to significant disfunction in the area of property allocation and utilization.

For these reasons, for now [urban land] should temporarily be left alone.” Urban Housing Rent Policy, supra note 19, at 4.

This inference is suggested by a comment in a 1958 policy document on the socialization of urban housing. The document suggests that:

While implementing housing reform, if the house and land belong to a single person, the land should be included with the house and should not be handled separately. If the land and the house belong to two different individuals, the house owner should give a portion of his compensation to the land owner.

This implies not only that land was subject to private ownership, but that land could yield benefits in and of itself, independently of any right of private ownership in housing. Id.
1. **The Confiscation of Private Real Property**

Although most private citizens theoretically enjoyed the rights of private property ownership and management, these rights were granted selectively. The confiscation of urban land and housing was a major counterpart to the early policy of protecting private property rights, serving as the primary early source for publicly owned property. Nevertheless, because it was to be carried out only under limited circumstances and by prescribed means, the policy of confiscation still served, in theory at least, to indirectly confirm private property rights. In fact, the confiscatory powers of local state agents soon became a threat to private property rights.

Only a limited range of private property was initially subject to confiscation. Real property belonging to the former Kuomintang ("KMT") officials and abandoned land,\(^{35}\) in particular, was subject to government confiscation. In Shanghai, all real property that was abandoned by KMT officials, all land belonging to "Kuomintang government representative traitors," and all land belonging to absent overseas Chinese was to come under the management of the municipal government.\(^{36}\) The same theme is echoed in Zhongnan District, where all housing belonging to the "counter-revolutionary Kuomintang government," war criminals, KMT counterrevolutionaries, and to "counter-revolutionary bureaucrats" was to be...

---

\(^{35}\) Fairly detailed provisions were promulgated for the confiscation of abandoned land, and not all such land was confiscated permanently. Measures promulgated in Shanghai indicate that unregistered land or that for which an absent owner failed to properly appoint an agent was to be considered abandoned (wuzhu). Shanghaishi renmin zhengfu chuli wuzhu tudi zhanxing banfa [Provisional Measures of Shanghai Municipality on Handling Abandoned Land], art. 2 (Dec. 12, 1949), *reprinted in 1956 CIVIL LAW MATERIALS* (1), supra note 24, at 356. Such land was to come under government substituted management (daiguan) for a period of three years, and could be recovered if the owner presented proper proofs of ownership. *Id.* art. 4. If it was not claimed after this time, such land was to revert to public ownership. *Id.* art. 5.

\(^{36}\) Shanghaishi fangwu dichan guanli zhanxing tiaoli [Provisional Regulations for the Management of Real Property in Shanghai] art. 3 (June 13, 1949), *reprinted in 1956 CIVIL LAW MATERIALS* (1), supra note 24, at 382. "National management" provided for here does imply complete control over resources, so it would seem to result in at least *de facto* temporary government ownership of managed resources. Nevertheless, the Chinese developed a rich vocabulary describing government property takings in the early post-Liberation period. In addition to government substituted management (daiguan) of abandoned property mentioned above, the term *zhengyong* is used for coerced but compensated confiscation, and *musou* is generally used to indicate coerced and uncompensated confiscation. In addition, methods of compulsory sale (*zhenggou*), compulsory rental (*zhengzu*), negotiated purchase (*qiagou*), negotiated rental (*qiazu*) and exchange were also used to acquire needed property. *See* Zhongnanqu chengshi jianshe shiyong tudi zhanxing banfa [Provisional Measures of Zhongnan District for the Use of Land in Urban Construction] ch. 3, art. 10 (Dec. 18, 1951), *reprinted in 1956 CIVIL LAW MATERIALS* (1), supra note 24, at 347 [hereinafter Zhongnan Urban Construction Measures]. These regulations were less clear as to the details of authority and control over property resources under confiscation.
confiscated without compensation. In national legislation, important KMT leaders were named individually as targets for confiscation.

Besides being subject to confiscation for political reasons or because of abandonment, private land of all sorts could also be confiscated for "national construction." Because of the great range of public organizations empowered to confiscate land for national construction and the variety of circumstances under which it could be carried out, this represented both a significant governmental threat to private property rights and important source of "public property" in the early history of the P.R.C.

The process of national construction was both a reflection of existing institutional weakness and a cause further weakening the state's ability to effectively control the public property which it formally claimed. National construction projects included construction for "defense, industrial production facilities, railroads, transportation, hydroelectric projects, urban construction and other economic and cultural" purposes. Moreover, under the National Confiscation Measures, the primary initiative for this type of land acquisition came from the "confiscating units" themselves rather than from the government, although confiscation was to be conducted according to plan and in consultation with responsible government organs. Hence,

---

37 Zhongnan Provisional Decisions, supra note 24, ch. 1, art. 2.
38 The property of the Jiang, Song, Kong, and Chen families, for example, was singled out for confiscation in one central government opinion. See Zhongyang renmin zhengfu zui gao renmin jiancha shu [Central People's Government Supreme People's Procuratorate], Guanyu chuli zhanzui, hanjian, guanliaoziben jia ji fangeming fenzi caichan de chubu yijian [Preliminary Opinion Concerning the Handling of the Assets of War Criminals, Traitors, Bureaucratic Capitalists and Counterrevolutionaries] art. 2 (Oct. 18, 1952), reprinted in 1956 CIVIL LAW MATERIALS (I), supra note 24, at 374.
39 The primary regulations governing this type of governmental property acquisition was a set of national measures promulgated in 1953. See Zhongyang renmin zhengfu zhengwu yuan guanyu guojia jianshe guiyong tudi banfa [Central People's Government Ministry of Governmental Affairs Measures Concerning the (Compensated) Confiscation of Land for National Construction] (Nov. 5, 1953), reprinted in 1956 CIVIL LAW MATERIALS (I), supra note 24, at 337 (hereinafter National Confiscation Measures). These national regulations superseded earlier local legislation regulating the use of land for "urban construction" alone. Id. art. 20. Urban construction was substantially similar to national construction except that it was narrower, being carried out by units under the authority of the municipal as opposed to the national government. See generally Zhongnan Urban Construction Measures, supra note 36, art. 2.
40 All land confiscated for national construction came under the ownership of the national government. National Confiscation Measures, supra note 39, art. 18. Some land, however, such as that occupied only during construction, was only taken temporarily until it was returned to the owner, and was not to come under state ownership. Id. art. 11.
41 Id. art. 2.
42 Confiscating units were to submit a land confiscation plan to, and abide by the standards of, "higher level leading organs" (shangji lingdao jiguan) in obtaining land for national construction. The responsible supervisory organ varied depending on whether the project was national, local, or defense oriented. The confiscation plan was to include provisions related to the scope of the confiscation, the location and quantity of land taken, the number of households and residences affected, methods of compensation,
diverse governmental organizations at different levels were empowered to confiscate land under the guise of national construction. Even more strikingly, they could often exercise independent management over their land resources, making their independence from central control even more complete.

Although the locus of national confiscation was in lower-level enterprises and government organs, individual rights in private property were at least formally protected by the recognition of private rights in the confiscation process. First, private property rights were implicitly recognized in that proofs of ownership were respected in the taking of land, and the original owners had the residual rights in portions of their land not confiscated. In addition, owners were also to receive compensation for their land, even if its use represented only a partial loss for the owner. The amount of compensation was to be arrived at through discussions between the original owner/user and the local people’s government and land management bureau so as to give a “fair and reasonable” price to cover both houses and other

and the disposition of other fixtures affected. National Confiscation Measures, supra note 39, art. 4. Confiscation could be undertaken on a large scale, but the regulations did provide that the taking of a whole village had to be approved by the local People’s Congress. Id. art. 5.

The regulations do not specify exactly who could confiscate land for national construction. The regulations merely indicate that confiscating units (yongdi danwei) should follow the prescribed procedures in consultation with superior units. Id. art. 4 Nevertheless, the variety of units empowered to confiscate land for national construction is suggested by the purposes for which land could be confiscated. Judging from the variety of national construction projects, it appears that military units, state-owned enterprises, municipal government construction departments, schools, and state-run utilities, among others could all acquire land in this manner. See id. art. 2. In addition, earlier regulations provided for a number of different methods of taking land depending on the type of unit involved. In Zhongnan, for example, only military, transportation, water projects and state-owned enterprises could compel the use, sale, lease, exchange or outright confiscation of land, whereas other units had to bargain directly with landowners. Zhongnan Urban Construction Measures, supra note 36, art. 10.

Some organs identified as exercising independent management (zixing guanli) over land resources included, among others, military units, enterprises, banks, railroads, and large schools. 1957 Urban Housing Opinion, supra note 19, at 25. Nevertheless, as indicated earlier, all confiscated land was formally owned by the state, could not be transferred by the unit in possession, and was to be returned to the government after the unit was finished using it. National Confiscation Measures, supra note 39, art. 18.

If the taking was complete, the local people’s government would invalidate the owner’s original proofs (chengzhuang) after giving compensation. If only a partial taking was effected, the government would either alter the existing documents or issue new proofs for the portion remaining in the original owner. National Confiscation Measures, supra note 39, art. 15.

If the owner suffered a loss as a result of surveying and measurement activities in the early stages of a project before formal confiscation, for example, he was to receive appropriate compensation. Id. art. 6. In the case of temporary use in connection with repair or maintenance work, the relevant organs were also authorized to either borrow land from the owner or, more significantly, enter into a contract to temporarily lease the land. Id. art. 11.
fixtures on the land. There were, however, significant limits even where compensated confiscation was provided. Consistent with the ambivalent attitude toward urban land ownership, only the taking of urban housing, and not land, was to be compensated. Likewise, no compensation was provided for land alone or for land not occupied by housing, and where the land and housing were separately owned, landowners were only to receive compensation according to their needs. Neither was compensation provided for the taking of agricultural lands owned by urban landlords. Thus, while private rights in real property continued to be formally recognized under the system of compensated confiscation, not all property rights received protection to the same degree.

In spite of the great number of organizations that could confiscate private land and the variety of purposes for which it could be confiscated, the taking of land for national construction and for political reasons did not result in a rapid or widespread decline in the relative amount of urban private housing. As of 1952, some three years after Liberation, private holdings still accounted for the majority of urban property in large cities. At that time, it was estimated that public land constituted only 15% of the total in Beijing, 10% in Shanghai, 17% in Jinan, 40% in Nanjing, 45% in Taiyuan, and as much as 64% in Dalian. A few years later, statistics indicated that private housing accounted for from 60% to more than 80% of the total in larger cities, and generally over 90% in medium and smaller cities. Though the proportion of public property steadily increased under these

47 Id. art. 17. Although this is a very ambiguous standard, the provision of a "fair and reasonable" price does at least evidence respect for the proposition that urban private property owners should generally be free from unilateral uncompensated governmental confiscation.

48 Id.

49 Id.

50 Id.

51 Nei wu bu [Interior Ministry], Guanyu jiaqiang chengshi gongyoushang de guanli de yijian (caogao) [Opinion on Strengthening the Management of Urban Public Real Property (draft)] (May 24, 1952), reprinted in 1980 CIVIL LAW REFERENCE MATERIALS, supra note 19, at 17, 18-19 [hereinafter Draft Urban Public Property Opinion]. While Chinese statistics are notoriously unreliable, the utility of these figures is not dependent upon their great accuracy. Even allowing for a significant margin of error, the data suggest that private property constituted a substantial portion of the stock of real property in most large cities in the early post-Liberation period.

52 In 1954, it was estimated that private housing constituted 66% of the total in Beijing, 72% in Tianjin, 77% in Shanghai, 88% in Wuhan, and 81% of the total stock in Jinan. In medium and small cities, the ratio of private housing was generally larger, standing at about 95%. Nei wu bu [Interior Ministry], Chengshi siren jiahua qingkuang ji jinhou yijian [Opinion on the Condition of and Future Policy Toward Private Housing] (Aug. 14, 1954), reprinted in 2 ZHONGHUA RENMIN GONGHEGUO MINFA ZILIAO HUIBIAN (SHANG) [A COLLECTION OF CIVIL LAW MATERIALS OF THE PEOPLE'S REPUBLIC OF CHINA, PART I] 438-39 (Beijing Political-Legal Research Institute ed., 1956) [hereinafter 1956 CIVIL LAW MATERIALS (II)].
policies, even as late as 1957 public housing still accounted for only 54% of the total in Beijing. \textsuperscript{53} In fact, though, private rather than public house ownership still predominated in all but a few large cities even at this late date. \textsuperscript{54}

Although confiscation gradually resulted in the growth of the amount of property in the system of public ownership and control, it is not the fact but the method that is most important. Under the confiscatory policies of national construction and urban construction, the locus of "public" ownership rested not only in the abstract nation or even primarily in national or local governments, but most immediately in diverse individual bureaus, military and work units, enterprises, schools and mass organizations which could all acquire and manage real property on their own behalf. The result was to begin weakening the state vis-à-vis both citizens and its agents, and to weaken individuals vis-à-vis agents of the state.

As will be seen below, this diversity and decentralization made it very difficult for the leadership to exercise control over the use and disposition of land in either the public or private property systems. Hence, the leadership struggled throughout the early period to formulate and enforce an optimal set of property rights to meet their goals for the rational development and utilization of housing resources.

2. Transfer Rights and Registration

There is a significant amount of detailed early authority governing the rights of parties to both public and private urban real property relations. Consonant with the distinct nature of these two types of property, different bundles of rights applied to each. The rights under these two systems diverged to the greatest extent in the area of real property transfers (which are critical to profit-maximizing exchanges), while there was substantial similarity in the registration necessary to validate and police those rights.

To begin, it is clear that private landowners, unlike public property, enjoyed significant transfer and use rights, including the ability to rent housing. In Zhongnan, the government was to protect all citizens' lawfully obtained rights of ownership and legal operation rights, including the right to repair, buy and sell, transfer, use, and rent housing. \textsuperscript{55} In addition, early housing regulations also gave private owners the right to independently

\textsuperscript{53} 1957 Urban Housing Opinion, supra note 19, at 22.
\textsuperscript{54} Id.
\textsuperscript{55} Zhongnan Provisional Decisions, supra note 24, ch. 1, art. 1.
mortgage their property.\textsuperscript{56} On the other hand, consistent with its public ownership, units occupying public property could not in general transfer their rights to property in their possession.\textsuperscript{57}

Although they were permitted, private transactions in real property were not conducted completely independently of government supervision. Registration, in particular, was intended to give the government a measure of control over land ownership and transfer validation.\textsuperscript{58} Detailed regulations provided that the parties to a transfer should submit their ownership proofs and transfer contracts to complete registration within a specified time of the transaction.\textsuperscript{59} The regulations also provided for public notice

\textsuperscript{56} The phrase used in the Dongbei regulations is dianya. See Dongbei chengshi fangchan guanli zhanxing tiaoli [Dongbei Provisional Regulations on the Management of Urban Housing], ch. 2, art. 11 (Mar. 28, 1950) [hereinafter Dongbei Provisional Housing Regulations], reprinted in 1956 CIVIL LAW MATERIALS (I), supra note 24, at 389. Dianya is a practice of giving property as security or guaranty for a loan, and in which the mortgagor frequently remains in possession of the property during the duration of the mortgage period, but cannot sell it. This is to be distinguished from the practice of diandang, wherein the owner gives over possession or beneficial use of the property (including the right to rent) for the duration of the mortgage period in exchange for an up-front payment, and redeems the property at the end of the period by returning this sum without interest. See FANGDICHA NFAPA CIDIAN [DICTIONARY OF REAL PROPERTY LAW] 250 (Bin Jinfeng ed., 1992).

\textsuperscript{57} The Zhongnan provisions stipulated that “if they do not need to use [the property], organs, military units, groups and individuals using public housing should return it to the public housing management bureau, and cannot transfer or lease [this property].” Zhongnan Provisional Decisions, supra note 24, ch. 2, art. 6. To the same effect are the Dongbei Public Housing Regulations, which prohibited an even greater range of transfers: “Units having use rights in public housing . . . are strictly forbidden from independently exchanging, transferring, lending, leasing, converting for cash, or [using property for] business investments.” Dongbei chengshi gongyou fangchan guanli zhanxing tiaoli [Provisional Regulation of Dongbei District on Public Housing Management], art. 6 (Aug. 21, 1950), reprinted in 1956 CIVIL LAW MATERIALS (I), supra note 24, at 393 [hereinafter Dongbei Public Housing Regulations].

For slightly more detailed regulations governing transfers of real property, see, e.g., Wuhanshi fangdichan jiaoyi xize [Detailed Regulations of Wuhan Municipality on Real Property Exchange] (July 14, 1951), reprinted in 1956 CIVIL LAW MATERIALS (II), supra note 52, at 136.

\textsuperscript{58} The Dongbei housing regulations, for example, provided that owners of “all private housing should maintain all of their ownership proofs and apply for registration with the local people’s government” in order to receive ownership certificates confirming housing rights. Dongbei Provisional Housing Regulations, supra note 56, art. 3. State organs using public land and housing were also generally required to register the property in their possession. See, e.g., Guangdongsheng renmin weiyuanhui [Guangdong Provincial People’s Congress], Banfa Guangdongsheng fangdichan dengji zhanxing banfa [Provisional Measures of Guangdong Province for the Registration of Real Property], art. 6 (Aug. 26, 1958), reprinted in 1980 CIVIL LAW REFERENCE MATERIALS, supra note 19, at 169.

\textsuperscript{59} The Dongbei regulations originally provided for registration within one month after the transaction. Dongbei Provisional Housing Regulations, supra note 56, art. 12. The Xian regulations required registration applications to be submitted within three months after the transaction. Xianshi fangdichan yizhuan dengji zhanxing banfa [Provisional Measures of Xian Municipality for the Registration of Real Property Transfers], art. 4 (Dec. 28, 1950), reprinted in 1956 CIVIL LAW MATERIALS (I), supra note 24, at 384 [hereinafter Xian Provisional Registration Measures]. The Xian regulations also provide for a nominal registration fee of .004 of the transfer price in the case of sale, mortgage, or gift, and also for the payment of a contract tax in an unspecified amount. Id. arts. 6, 8. Registration after transfer was sufficient because
periods, during which time others could dispute the transfer. Among other matters, provisions were also made for investigation and notice periods to carry out registration where ownership documents were lacking.

In spite of these fairly detailed procedures, as with the policy of collecting rents for public housing, even the bare policy requiring registration of rights in real property only spread gradually from large cities. Indeed, even the most advanced cities in China have only recently begun to develop modern land title registration systems. Given the lack of a functioning real property registration system, it is doubtful that the registration requirements alone served to give local governments significant control over housing transactions, either as to individuals or as to government units in possession of property.

3. Lease Relations: Using Rents to Develop Housing

The early recognition of lease rights was intimately related to the problems experienced in the early period after Liberation. The chaos consequent to the war against Japan and the civil war against the Kuomintang appears to have led to serious degradation and disrepair in urban housing. The leadership sanctioned rental relations in private property largely as a method of encouraging private owners to improve the quality of the housing stock in their possession.

This strategy was primarily put into operation through the policy of “using rent to develop housing.” Under this policy, rent relations were sanctioned and rental income was allowed as a means of encouraging

---

60 This period ran for one month in Xian. Xian Provisional Registration Measures, supra note 59, art. 5.
61 Id. art. 8.
62 See, e.g., Zhongnan Provisional Decisions, supra note 24, ch. 5, art. 1. Under the early Zhongnan regulations, for example, small cities could decide for themselves whether or not to require registration of property rights. Id.
63 See infra notes 289-292 and accompanying text on registration difficulties today.
64 One early report from Hubei indicated that 29% of the housing in the province (10,455 units out of 35,833 total units) was in such a serious state of disrepair as to be uninhabitable. Nei wu bu di zheng si [Interior Ministry Land Policy Dep't], Dui muqian chengshi fangchan wenti de yijian [Opinion on Current Issues in Urban Housing] (Aug. 1950), reprinted in 1980 CIVIL LAW REFERENCE MATERIALS, supra note 19, at 15.
65 The Chinese term translated here is yi zu yang fang. The word yang is usually translated as ‘to cultivate’ or ‘to foster,’ but the word ‘develop’ has been chosen for its better conceptual fit for Western ears. See 1957 Urban Housing Opinion, supra note 18, at 27.
private capitalist investment in the reconstruction of urban housing.\textsuperscript{66} Lease relations were to be structured on the basis of mutually agreeable exchange between individuals, and the parties were to respect and fulfill their duties under freely created lease contracts.\textsuperscript{67} The government’s role in these transactions was limited to assuring that landlords applied rents to necessary housing repairs, protecting urban land resources generally, mediating disputes, and collecting taxes.\textsuperscript{68} Also, over time the government spent substantial resources in attempts to control rental rates so as to spur needed investments in housing without placing undue burdens on workers.\textsuperscript{69}

The same considerations that led the leadership to sanction rent relations in the private sector also formed the basis for their decision to collect rents from occupants of publicly owned housing.\textsuperscript{70} However, there was considerably more initial confusion as to the necessity for public units and residents occupying public housing to pay rent.

There was significant ambivalence on the issue of whether all individuals and public organizations should pay rent for the use of public housing. Early regulations clearly provided that government organs, collective organizations, schools, and individual residents should enter and respect bi-lateral contracts with the local people’s government for the use of public housing.\textsuperscript{71} However, often the same regulations also stipulated that some enterprises and other departments with “specialized housing facilities”

\textsuperscript{66} “In order to make private capitalists willing to invest in the reconstruction of housing, it is necessary to protect housing rights and allow them [to collect] appropriate legal rents.” \textit{Id} at 8. This analysis showed a prescient grasp of economic dynamics, for it predicted that if rent rates were suppressed and property was recklessly confiscated “no one would manage [the property], no one would repair [it], and it will even be recklessly sold or demolished, resulting in there not being enough housing for the people.” \textit{Id}.

\textsuperscript{67} \textit{Id}. at 7.

\textsuperscript{68} \textit{Id}.

\textsuperscript{69} See discussion of rent control \textit{infra} at notes 96-109 and accompanying text.

\textsuperscript{70} “The People’s Government leases this public housing at low rates and uses the proceeds for maintenance and for repair funds. When there are excess funds, these can be used in expanding urban construction.” Urban Housing Rent Policy, \textit{supra} note 19, at 9.

\textsuperscript{71} Dongbei Public Housing Regulations, \textit{supra} note 56, art. 5. Consonant with the idea that these properties ultimately belonged to the state, the regulations also provided that units should return facilities if they were not being used. \textit{Id}. art. 8.

In addition to requiring the payment of rents by governmental and quasi-governmental units occupying public housing, contemporary regulations also provided that individuals living in state housing were to pay rents. This rule and the general policy is enunciated perhaps most forcefully in the Shanghai regulations on public housing: “All those using publicly owned land, whether government organs, social groups, schools, public-private enterprises, shops, or individuals should all enter lease contracts with the housing administration bureau, and such contracts are to be respected by both parties.” Shanghaishi gonggong fangchan zuilin zhanxing banfa [Provisional Measures of Shanghai Municipality for the Rental of Public Housing] art. 3 (Sept. 7, 1950) [hereinafter Shanghai Public Rental Measures], \textit{reprinted in 1956 CIVIL LAW MATERIAL (II), supra} note 52, at 365.
URBAN REAL PROPERTY RIGHTS IN CHINA

could be excepted from this rule and receive housing free of charge as an “investment” from the state. The regulations give no further guidance for determining which types of property and enterprises qualified for this special dispensation. Dongbei Public Housing Regulations, supra note 57, art. 12.

Units with the right of “self-operation” or “self-management” were also exempted from the general requirement of paying rent for the use of public real property.

Nevertheless, by the mid-1950s the policy of collecting rents for the use of public housing was established as the standard, even if it was not always realized. In addition to policy confusion and the decentralization of “public ownership” to lower level units, the scarcity of administrative resources also contributed significantly to difficulties in enforcing the policy of “using rent to develop housing” throughout the early period. Hence, even the policy of charging rent for the use of public housing by clearly included units was not universally implemented many years later.

a. Rent relations

Because of the gradual pace of the nationalization of private holdings in urban housing property, there were significant levels of private leasing

72 The regulations give no further guidance for determining which types of property and enterprises qualified for this special dispensation. Dongbei Public Housing Regulations, supra note 57, art. 12.

73 Although it argues that rent could prevent waste and help develop housing (yi zu yang fang), one 1952 policy document maintains the distinction between enterprise and military units controlling real property individually and other units, and excepts the former from rent payments. See Draft Urban Public Property Opinion, supra note 51, at 20.

74 Both the continued salience of the goal of collecting rent for public housing and the lack of success in realizing this goal are evident in a post-Great Leap Forward State Council opinion which asserted that “all housing, service departments and facilities belonging to enterprises, organs of the state, and schools, should . . . gradually be transferred to the unified management and operation of the People’s Congress and these units should pay fixed rental and government management charges.” Zhonggong zhongyang guowuyuan [Central State Council of the P.R.C.], Guanyu dangqian chengshi gongzuo ruogan wenti de zhishi [Instructions on Some Issues Concerning the Current Work in Urban Areas] (Oct. 6, 1962), reprinted in 1980 CIVIL LAW REFERENCE MATERIALS, supra note 19, at 29.

75 The Draft Urban Public Property Opinion indicated that the policy of collecting rents for public housing could not be implemented nationally at that time (1952) for lack of the necessary municipal administrative structures. Neiwu Bu [Interior Ministry], Guanyu jiaqiang chengshi gongyou fangdichan guanli de yijian [Opinion Concerning the Strengthening of Urban Public Housing Management], reprinted in 1980 CIVIL LAW REFERENCE MATERIALS, supra note 19, at 21.

76 Even as late as 1957, official policy circulars were still calling for the implementation of the policy of “using rents to develop housing”. See, e.g., 1957 Urban Housing Opinion, supra note 19, at 22. Indeed, this policy formulation was even revived as a solution to low rental rates on the eve of the modern reforms. See infra note 341 and accompanying text.
activity in urban areas throughout the earliest period of P.R.C. history. Indeed, until the socialization of urban property in the late 1950s ownership was still quite concentrated, and there were still individual landlords who owned and controlled more than one thousand (1000) units of urban housing. Nevertheless, given the increasing amounts of public housing, the municipal housing management bureaus soon became the single largest “landlords” in urban areas. Thus, it was essential for the leadership to maintain an optimal balance of rights in both public and private lease relations in order to achieve its goal of using rents to foster investments in and assure the preservation of housing resources. This they accomplished at the level of formal legislation, but utterly failed to achieve in practice.

The basic goal of early regulations governing private leasehold relations was the protection of the respective interests of the two parties, and thus the assured protection of the subject property. The detailed rights and duties spelled out in the regulations served to implement this principal. Most fundamentally, private leasehold relations were to be based upon mutually agreeable contracts between the parties in accordance with the principles of mutual benefit, fairness, and reasonableness.

Both lessor and lessee had statutorily specified rights and duties under the lease contract. The lessee, for example, had a duty to pay rent and refrain from damaging the property, and could not transfer the property without the permission of the owner. Neither could the tenant unilaterally

77 In Beijing, there were five individuals who owned over one thousand units of housing in 1957. The individual with the largest holdings owned more than two thousand five hundred units. Zai di er ci quanguo tingjuzhang huiyi shang guanyu chengshi fangchan guanli gongzuo de fayan [Communiqué of the Second National Conference of Department Heads Concerning the Work of Urban Housing Management] (Oct. 28, 1957), reprinted in 1980 CIVIL LAW REFERENCE MATERIALS, supra note 19, at 76, 88 (hereinafter Second Housing Management Conference Report).

78 A great deal of detail was provided about the content of such contracts. Regulations specified the elements to be included in contracts, and the localities also published form contracts. See, e.g., Tianjinshi siren fangchan zulin zuyue zhiyang [Tianjin Municipality Sample Private Housing Lease Contract], reprinted in 1956 CIVIL LAW MATERIALS (II), supra note 52, at 381. See also Fangwu zulin qiyueshu shiyang [Sample Housing Lease Contract], reprinted in 1956 CIVIL LAW MATERIALS, supra note 52, at 413 (providing an example from the city of Changchun).

79 The Dongbei regulations provided that all terms of the contract, including the rental period and rate, could be decided by the parties. Dongbei Provisional Housing Regulations, supra note 56, art. 13. However, other regulations included a rough standard for rental rates in the form of language to the effect that rental rates should not be “too high or too low.” See, e.g., Xiuzheng beijingshi siyou fangchan zulin zhanxing guize [Amended Provisional Regulations of Beijing Municipality on Private Housing Rental] art. 3 (Aug. 17, 1951), reprinted in 1956 CIVIL LAW MATERIALS (II), supra note 52, at 370.

80 Dongbei Provisional Housing Regulations, supra note 56, art. 15. It is clear from other sources, however, that subleases were highly disfavored. The Tianjin regulations, among others, retroactively invalidated all sublease relations. Tianjinshi renmin zhengfu zhenzheng siyou fangwu zulin zhanxing tiaoli [Provisional Regulations of Tianjin Municipality on Private Housing Rental] art. 14 (March 6, 1951),
modify or alter the property. Furthermore, the landlord had the right to retake the property if the tenant failed to pay rent or used the property illegally. The landlord on the other hand, had the primary duty of keeping the property in reasonable repair, and was obligated to give the lessee a right of first refusal if the owner wished to sell or otherwise transfer the land. All of these principals, it should be noted, are compatible with the basic goal of protecting and encouraging investments, by landlord or tenant, in private rental property.

As indicated earlier, the general rule was that all units and individual using publicly owned housing had to pay rent. Leasehold relations in the public realm were for the most part structured quite similarly to those in the private sector, except that the tenant’s duties ran to the local land management bureau or work unit instead of to private individuals. Also, as expected, more of the terms of public leasehold contracts were subject to governmental control.

The regulations on public leaseholds created a fairly comprehensive, if still incomplete, framework for lease relations. As in the private realm, these relations were to be based on contracts which spelled out the rights and duties of both parties. However, both the length of the term and rental amount of public lease contracts could be determined by statute or by the local land management bureau. The tenant’s rights under these contracts could be terminated and the property retaken if he used the property illegally, failed to pay rent, damaged the property and failed to make repairs, or breached any other terms of the contract. Neither could the

---

reprinted in 1956 CIVIL LAW MATERIALS (II), supra note 52, at 373 [hereinafter Tianjin Provisional Rental Regulations].


82 Dongbei Provisional Housing Regulations, supra note 56, art. 18.

83 See, e.g., Tianjin Provisional Rental Regulations, supra note 80, art. 18. If the tenant instead undertook the repair of the premises, he was entitled to deduct his expenses from future rental payments. Id. art. 19.

84 Id. art. 27.

85 See, e.g., Shanghai Public Rental Measures, supra note 71, art. 3.

86 In Shanghai, the statutory lease term for covered properties was one year. Id. art. 8. In addition, rent payments were to be made before the 15th of each month. Id. art. 13.

87 The rental amount in Dongbei was to vary according to the type and use of the property and the area included, and might also be calculated on the basis of the unit’s revenues. Dongbei Public Housing Regulations, supra note 57, art. 14.

88 Shanghai Public Rental Measures, supra note 71, art. 14.
lessee transfer leased property in any manner.  

Also, the government could retake the property for the purpose of making necessary repairs, in which case the original tenant had priority to rent the unit once the repairs were finished.  

The burden of paying for repairs generally varied according to the scale of the work and the allocation of fault for damage to the property, among other factors.  

Finally, the occupant was to obtain permission before making major alterations to the property.  

Again, these formal provisions for public leases are quite similar to those for private rent relations, the primary distinctions between the two being the amount of formal government control over lease terms and the absolute prohibition against transfers of public property. However, with the locus of public ownership largely in diverse work units and in light of the weakness of local government property administrations, it is questionable whether “public” rent relations were in fact substantially more subject to unified government control. The experience with rent control suggests that they were not.

b. Rent control

One area of continuing difficulty in the administration of rent relations was rent control. Although the private leasehold regulations provided that individuals should fix lease terms through mutual agreement, municipal governments maintained formal rights to determine contract price terms through provisions in the regulations stipulating that rental rates should not be “too high or too low” and should accord with municipal government standards.  

The government had this right over public properties both by

---

89 Id. art. 5. The Zhongnan regulations also reinforce the presumption that the prohibition against transfer of public land applied to individuals as well as governmental organs: “Private individuals using public land do so on the basis of leaseholds, they cannot modify any rights in the property.” Zhongnan Urban Construction Measures, supra note 36, art. 7.

90 Dongbei Public Housing Regulations, supra note 56, art. 17.

91 If the tenant was responsible for damage to the property, he had to bear the expense of repairing it. Shanghai Public Rental Measures, supra note 71, arts. 16, 17. All major structural repairs were the responsibility of the local land management bureau. Dongbei Provisional Public Housing Regulations, supra note 56, art. 20. However, the tenant might also be responsible for expenses related to major internal repairs undertaken at his own initiative. Id. art. 21.

92 Units or enterprises initiating larger additions or modifications also had to pay for their own work after obtaining permission from the local land management bureau. Dongbei Public Housing Regulations, supra note 56, at 22.

definition and by fiat. Nevertheless, significant contradictions and tensions in the urban housing system prevented the government from being able to effectively use its formal control over rental rates to foster the preservation and growth of housing stocks.

The central dilemma with respect to rental rates arose from the need to balance the interests of housing owners and managers, on one hand, against those of tenant workers and staff members on the other. If rental rates were too low, there would not be sufficient returns to assure the maintenance and repair of current facilities, much less to build new ones. If rents were set too high, however, workers and staff members in industry and government would be excessively burdened. This dilemma may only have been aggravated over time by the low, stagnant wages of workers in urban areas.

The basic formula for calculating appropriate rental rates was laid out quite early, and evidences both aspects of the tension between lessees and lessors. On the investment side, the 1949 Urban Housing Rent Policy document indicated that an appropriate rent should include a component for depreciation and repair costs, and that the lessor should receive a fair return on his property. On the other hand, the owner’s income was not to exceed an average social return, speculation was forbidden, and the rental rate was not to be too high or too low.

Later, it became obvious that, relative to workers’ and staff salaries, rents could be either too high and too low, but that for the most part they were too low. In some areas, private rental rates were as much as 30% of worker and staff wages, a ratio considered too high. Private rental rates

94 1957 Urban Housing Opinion, supra note 19, at 23.
95 “Real” annual wages (presumably adjusted for inflation) of workers and staff in state owned enterprises were 15% higher in 1978 than in 1952. However, using 1952 as a base, wages actually increased 30% over 1952 during the Great Leap Forward, decreased 1.3% below 1952 levels in the subsequent retrenchment (1962), increased by 21% over 1952 during the height of the Cultural Revolution (1965), and then dropped off to 14% above the 1952 base in 1970 and 13% above the 1952 base in 1975. ZHONGGUO SHEHUI TONGJI ZILIAO [CHINESE SOCIAL STATISTICAL INFORMATION] 67 (State Statistical Bureau, Social Statistics Dep’t ed., 1985) [hereinafter 1983 CHINESE SOCIAL STATISTICS]. These patterns suggest that wages were used as a significant mobilizational tool during these radical periods. This fact makes it highly unlikely that, even if workers and staff had more disposable income, property managers would in practice have been able or inclined to raise rents in step with wages during these periods.
96 Urban Housing Rent Policy, supra note 19, at 7. Later formulations also included elements such as management expenses and land tax. See, e.g., Opinion on Current Issues in Urban Housing, supra note 64, at 15.
97 Opinion on Current Issues in Urban Housing, supra note 64, at 15.
98 The 30% figure is from Guangzhou. Chengshi fuwubu [Urban Service Bureau], Guanyu zhaoji chengshi fangchan gongzuo zuotanhui gei guowuyuan diwu bangongshi de baogao [Report to the Fifth
were generally higher in rapidly developing urban areas, and were higher for new renters than for old.\textsuperscript{99} However, private rental rates were often set too low, as in Xian where they were decreased by 40\% after adjustments by the municipal government.\textsuperscript{100} In some areas, private rents amounted to only 3\% of worker and staff wages after rent reform.\textsuperscript{101} The results of these changes are not surprising in retrospect. In the face of artificially depressed rental rates, private landowners often simply refused to rent their property\textsuperscript{102} or sold it altogether,\textsuperscript{103} and neglected to undertake needed repairs on housing they retained.\textsuperscript{104}

Although there are some reports of public rental rates being too high,\textsuperscript{105} most of the statistics confirm that public rents were too low by far. In some areas, where rents were collected at all they were set as low as only 2.5 to 5\% of worker and staff wages.\textsuperscript{106} These low rates were caused by both popular pressure\textsuperscript{107} and by property managers' overemphasis on not burdening workers.\textsuperscript{108} As a result of these tensions, even in cities where public rents were highest they often were not sufficient even to cover the estimated cost of repairs.\textsuperscript{109}

\textbf{C. Implementation Difficulties and Economic Irrationality}

In spite of the fairly detailed provisions intended to foster harmonious rent and transfer relations and aid the creation of a revenues for investment in housing, the government had great difficulty in administering both the public and private real property systems. After the Great Leap Forward, there was still widespread disrepair in housing, significant housing short-
ages, and the land administration systems in many cities were in disarray. All of these problems were symptoms of the failure to assert government control over public property or assure sufficient rights in private real property resources.

The most fundamental problem in the public realm was that large amounts of publicly owned housing effectively remained outside of the control of local land management organs. One aspect of this problem was the fact that a great deal of ostensibly public property was subject to "self-management" by the units in possession. Likewise, state-owned enterprises, work units, and organizations at all levels could confiscate property and construct housing: indeed, it was they, not state land administration bureaus, who had the resources to do so.

Likewise the central and even local land management organs of the state lacked legal or institutional means to effectively enforce public ownership rights. A host of problems were reported before the Great Leap Forward. One report issued in the mid-1950s outlined some of the main problems, which included: uncertainty as to policy principals and the scope of management; lack of unified management and clarity in administrative relations; lack of national legislation, regulations, and systems; lack of unified standards for housing use; lack of specialized publications and systems for reporting statistics; and a lack of training departments. This situation weakened or even crippled the management of both public and private housing resources in many areas. By virtue of their de facto independence, those using both public and private housing were apparently able to avoid compliance with the leasehold, transfer, and registration regulations outlined above.


13. One late report indicated that management was so chaotic as to be almost non-existent in smaller cities. 1957 Urban Housing Opinion, supra note 19, at 23, 24.

14. In 1964 the Second Urban Work Conference Summary noted that the administrative work of self-administered units was for the most part very weak. It also exhorted those independently managing public property to obey local regulations and accept the leadership and supervision of the municipal governments. Second Urban Work Conference Summary, supra note 111, at 32.
These weak legal-institutional structures led to a host of perverse irregularities in the system of housing administration. The most important result of these problems was the failure to assure the collection of rents. As noted earlier, rent control did not proceed smoothly in the public housing sector, and units and individuals often did not pay rents as required by law. In spite of contracts and regulations to the contrary, lessees of private housing were also often able to avoid paying adequate rents. According to one early report, fully 58% of the households in Tangshan City did not pay any rent whatsoever; and where rents were paid at all, it was often only at significantly depressed rates. Insofar as the non-payment or underpayment of rents deprived lessors (both public and private) of funds necessary for reinvestment, this situation probably contributed significantly to the disrepair and collapse reported in the housing stock.

A host of other economic difficulties were also encountered in the systems of both public and private ownership. The "irrational use," waste and misuse of housing resources were reported to be serious problems flowing from unit selfishness and disregard for regulations. Also, even where rents were collected by government units, these units often misappropriated rental receipts and failed to apply them to needed repairs. There were also irregularities in the rental, transfer, and mortgage of private property, as well as "exploitation" and speculation in the system of private housing. Finally, private property also suffered at the hands of the public

The autonomy and defiance of public property occupants was not merely a result of the Great Leap Forward, as might be assumed from these later reports. As early as 1952, policy documents derided the selfishness of units who exercised de facto ownership over public property and resisted government management procedures. See Draft Urban Public Property Opinion, supra note 51, at 18. The frequent exhortations to bring property into the urban rental system indicate that a great many units and publicly owned properties existed outside of the public rental system altogether. See, e.g., 1964 Public Housing Management Report, supra note 110, at 36.

The frequent exhortations to bring property into the urban rental system indicate that a great many units and publicly owned properties existed outside of the public rental system altogether. See, e.g., 1964 Public Housing Management Report, supra note 110, at 36.

One example of waste was the destruction of housing by enterprises and other units for urban construction, which could result in a net loss of urban housing. Another example of waste and irrational use was the inequitable distribution of housing among different units. Small but politically influential units could control large amounts of housing while large units might have little. Thus, some workers and staff members had inadequate housing while there was in fact excess capacity in other units. Second Housing Management Conference Report, supra note 77, at 79.

1957 Urban Housing Opinion, supra note 19, at 27. See also 1964 Housing Management Report, supra note 110, at 37 (noting that most units had failed to apply rental receipts to housing maintenance, and that in the future they should pay costs to housing management bureaus and not retain rental receipts).

1957 Urban Housing Opinion, supra note 19, at 23.
sector. Government units which were not willing to pay high prices for the use of private property instead illegally coerced owners into selling or renting, presumably at lower than the prescribed rates.\footnote{See, e.g., Draft Urban Public Property Opinion, \textit{supra} note 50, at 18.}

In terms of our model of property rights, this situation represents the extreme breakdown of the legal-institutional means of property rights definition and enforcement. This is a classic agency problem of Socialist economies, wherein no one — individuals or state agents in possession of property, the state generally, or state regulatory or supervisory agents — has sufficient rights or duties necessary to be held accountable for the value of public or private property resources. Our economic theory of property rights predicts market allocation breakdown amid such problems, and this is precisely what happened. The leaders’ solution, however, only aggravated the uncertainty and weak rights causing these difficulties.

\textbf{D. The Socialization of Urban Housing Property}

Frustrated with the slow pace of economic reform and troubled by growing disaffection within the Party and society, the top C.C.P. leadership launched the Great Leap Forward ("G.L.F.") in 1958.\footnote{See FRANZ SCHURMANN, \textit{IDEOLOGY AND ORGANIZATION IN COMMUNIST CHINA} 464, 465 n.107 (1966). The Great Leap Forward was formally initiated at the Second Session of the Eighth Party Congress in May of 1958, but the major elements of the policy were already in place by this time. Mao was by then already dissatisfied with progress in agriculture under the First Five Year Plan, and his dissatisfaction with the bureaucratism and elitism implied by rational planning had already manifest itself in the formulation of the principal policies of the G.L.F.: decentralization of decision making to regions and localities, on one hand, and to Party Committees, on the other; accelerated collectivization of agriculture; and political mobilization and the purge of opponents in the anti-rightist campaigns. \textit{Id.}} The G.L.F. was Mao’s attempt to bypass the capitalist stage of development altogether and move directly from China’s “backward” production system to establish an advanced socialist economic system in the P.R.C. This movement was characterized by the radicalization of politics and production generally, but the most ambitious policy of the G.L.F. was the consolidation of diffuse individual peasant producers into first cooperatives and then larger collectives and communes.\footnote{See \textit{id.} at 474, 485-86.} In the rush to socialization, the system of private peasant land holding established after land reform was largely eradicated as labor and then land were concentrated in ever larger administrative structures in the countryside and agricultural suburbs of urban areas.\footnote{See generally ALAN P. L. LIU, \textit{HOW CHINA IS RULED} 116-29 (1986).}
The socialization of urban private real property had much more modest goals than that of agricultural land. Socialization in urban areas seems to have consisted largely of attempts to solve existing problems in the systems of public and private ownership by increasing the range of urban real property subject to public ownership. However, the further decentralization of control, mass mobilization, and political radicalization which characterized this movement undoubtedly only exacerbated the situation of weak property rights in urban areas.

Calls for the socialization of urban real property in early policy documents were often accompanied by mention of "contradictions" in the early system of urban real property.\(^\text{124}\) The contradiction between private property ownership and socialist construction, for example, was said to make it difficult to foster and rationalize housing utilization, and to cause irregularities in rent relations.\(^\text{125}\) The contradiction between private ownership and socialism was also said to allow selfishness among private landlords, continued disrepair in housing, excessive private rents, and rental conditions harmful to workers and staff.\(^\text{126}\) The contradiction between rapid urban population growth and slow expansion of housing caused shortages in urban housing.\(^\text{127}\) Finally, the housing authorities also perceived a contradiction between the backward housing management system and the requirements of socialist construction.\(^\text{128}\)

Although these phenomena largely correspond with the problems encountered in implementing effective systems of public and private property administration, the conceptualization of these problems in terms of "contradictions" is significant. On one level, this turn of phrase reflects the politicization of property policy dialogue in the context of overall political-ideological radicalization.\(^\text{129}\) However, at a more concrete level, the charac-

\(^{124}\) See, e.g., 1957 Urban Housing Opinion, supra note 19, at 24.
\(^{125}\) Id. at 24.
\(^{126}\) Second Housing Management Conference Report, supra note 77, at 88-89.
\(^{127}\) 1957 Urban Housing Opinion, supra note 19, at 24.
\(^{128}\) Id.
\(^{129}\) The radicalization of political discourse, ideology and policy leading up to the Great Leap Forward centered around Mao Zedong's conception of contradictions in politics, society and production. Mao's dialectical ideology of contradictions and their resolution was primarily embodied in two speeches: "The Ten Great Relationships," delivered in April of 1956, and "On the Question of Correctly Resolving Contradictions among the People," delivered on February 27, 1957. Schurmann explains that "[W]hen a relationship turns into a contradiction, struggle between the two elements of the duality begins. Struggle demands resolution so that a 'unity of opposites' can be produced, as indicated in the prevalent slogan of the Great Leap Forward: Solidarity-Struggle-Solidarity." SCHURMANN, supra note 121, at 102. Schurmann explains that "by 1957 and 1958, when Mao Tse-tung's vision of Chinese society began to unfold, relationships turned into contradictions." Id. at 101.
terization of urban property relations in terms of contradictions also indicates growing frustration over the continuing problems in the system of urban real property, along with a tendency to ascribe these problems to the continued existence of the system of private ownership. These attitudinal changes among elements of the P.R.C. leadership provided the background for increasingly strenuous attacks on the system of urban private property ownership.

The socialization of private urban housing was carried out in two basic stages, each having different objects and scope. First, as early as 1956 some private housing resources were socialized along with the nationalization of private industry. The inaptly named public-private joint management (gongsi heying) movement was directed at capitalist industries, private handicraft industries, and shipping and transportation enterprises, as well as at small vendors, peddlers, and traders. Early directives on nationalization provided that the government should purchase the productive assets of private capitalist enterprises and bring them under public control.

Depending on their scale and connection with production, the housing resources owned by capitalists could be nationalized along with the enterprise. Where the housing and shop were one and the same, or where property directly connected with the enterprise owner’s household were concerned, the entrepreneur was to retain ownership. On the other hand, all other productive property connected with the enterprise as well as rental properties of the entrepreneur were to be turned over to the management and use of the newly nationalized enterprise.

The second stage of housing reform, the socialist reform of urban housing proper, had a much broader impact on private real property ownership than did enterprise nationalization. Under private housing reform policies first announced in 1955, the government sought to both increase administrative controls and accelerate the transition from private to public

132 Id. (citing the 1956 Opinion on Issues Concerning the Socialization of Capitalist Industrial Enterprises).
133 Id. at 27.
134 Id.
ownership of urban housing resources. Nevertheless, these goals were only partially satisfied, as the reforms still left considerable scope for private property ownership and failed to significantly improve existing deficiencies in the administration of housing resources.

The basic element of these socialist reforms was government procurement of all private rental housing above specified limits for individual property owners. Although owners were to retain some property in order to provide for their needs, there was significant variation in the base level (qidian) for property subject to reform. No single authoritative national legislation specified the reform floor, so local governments claimed all rental housing of individuals in excess of as little as 100 meters in some areas, and as much as 500 square meters in others, with most using 150, 200, or 300 square meters as the floor for reform. The basic policy calling for governmental acquisition of private rental property in excess of these limits continued until the beginning of the modern housing reforms in 1982.

All property above these levels entered the system of public ownership and was to come under control of local governments who were then to take responsibility for rentals, repairs, etc. under existing laws governing rent relations in public property. On the other hand, in theory at least,

---

135 The seminal policy document setting out the basic rationale and contours of this policy is a very brief document, stating: "The principal requirement for the socialist reform of urban private housing is the strengthening of national control by first making private housing rentals fully comply with national policy and then gradually reforming [the private] ownership system." See Zhonggong zhongyang shujichu dier bangongshi guanyu muqian chengshi siyou fangchan jiben qingkuang ji jinxing shehuizhuyi gaizao de yijian [Opinion of the Communist Central Secretariat Concerning the Current Basic Situation in Urban Private Housing and the Commencement of Socialist Reform] (1955), reprinted in 1980 CIVIL LAW REFERENCE MATERIALS, supra note 19, at 63.

136 Some documents indicated that, at least in the early stages of reform, landlords with only small holdings should be excluded from reform. See id. at 63-64. Nevertheless, at minimum, landlords were to have the right to retain a house for their own use (zi zhufang). See DICTIONARY OF REAL PROPERTY LAW, supra note 56, at 414.

137 First Housing Conference Report, supra note 34, at 98. Later policy documents suggested that the floor for small cities could be lowered even further to 50 square meters. See Guojia fangchan guanli ju [National Housing Management Dep't], Guanyu siyou chuzu fangwu shehui zhuyi gaizao wenti de baogao [Report Concerning Issues in the Socialist Reform of Private Rental Housing] (Dec. 30, 1963), reprinted in 1980 CIVIL LAW REFERENCE MATERIALS, supra note 19, at 119, 120.

138 See DICTIONARY OF REAL PROPERTY LAW, supra note 56, at 411.

139 This system is referred to as jingzu. Rare exceptions to the policy of full government control under jingzu existed for very large landlords whose property might instead be placed under joint public-private operation (gongsi heying). See Report Concerning Issues in the Socialist Reform of Private Rental Housing, supra note 137, at 120.
private ownership rights in the remaining property were protected, and owners retained the right to lease, sell and mortgage this property subject to substantially the same conditions as those adhering before the reforms. Thus, urban real property rights were formally protected under socialization at least to the extent of property below the reform threshold.

While private property was subject to widespread assimilation into the system of public ownership for the first time under these reforms, socialized property was not to be merely confiscated. Rather than purchasing private rental property outright or offering lump-sum compensation for its confiscation, under the reform policy of "using rent to set rent" (yi zu ding zu) the government actually paid regular rent-like payments to former landlords. These rental payments were based on a percentage of total rental returns calculated to approximate the owner's pre-reform net returns on aggregate rental properties. As with the base level for reform, there was no national standard for rental payments, but most authorities suggested that these payments should be set at from 20% to 40% of the initial pre-reform rental charges.

This remunerative policy was generous if short-lived. Far from working an uncompensated taking of property, this policy could actually represent a windfall of sorts to owners by providing them with a fixed risk-and effort-free income. However, apart from difficulties in implementation to be discussed below, this policy also probably ended too soon to fully compensate many owners. The leadership suspended the policy of paying rent to landlords for socialized rental properties, as well as for properties

---

141 Report Concerning Issues in the Socialist Reform of Private Rental Housing, supra note 136, at 124.
142 DICTIONARY OF REAL PROPERTY LAW, supra note 56, at 413.
143 It is perhaps indicative of the turmoil in policy making of the day that the first authoritative statement on the adoption of this remunerative policy came in a People's Daily interview with an unnamed central government official rather than from a formal regulation or policy document. See Zhongyang zhuguan jiguan fuzhe ren jia siyou chuazu shehui chenghua de tansao [Conversation with a Responsible Central Government Official Concerning Issues in the Socialist Reform of Private Rental Housing], RENMIN RIBAO [PEOPLE'S DAILY], Aug. 6, 1958, reprinted in 1980 CIVIL LAW REFERENCE MATERIALS, supra note 19, at 109. A competing policy that was superseded by the adoption of "using rent to set rent" was that of "using property values to set interest" (yi chanzhi ding xi). Although initially used in some areas, this method of remuneration was disfavored because of the administrative difficulties that it presented. See Summary Report of the First National Real Property Work Conference, supra note, at 100.
144 See, e.g., Report Concerning Issues in the Socialist Reform of Private Rental Housing, supra note 137, at 120.
nationalized along with enterprises, in September 1966. Hence, owners who were under compensated under the policy of "using rent to set rent" could only make claims for sums owing up to October 1966.

The underpayment of remuneration was only one of many problems of socialization which persisted into the modern period. First, it is clear that progress in the reforms was uneven, for by 1964 some cities had still not undertaken housing reform. Thus, substantial amounts of privately owned rental housing remained outside of public ownership even after socialization. Second, reform was often carried out in a very haphazard manner where it was implemented. In some places base levels were set too low, and in others they were done away with altogether so that any and all rental property could be subject to reform. Also, in direct contravention of the clear policy prescription that private housing should be unaffected, many local governments also reformed the private-use housing of landlords and left landlords with too little housing.

Several factors conspired to cause these continuing problems with housing reform. First and foremost, socialization placed greatly increased demands on local public land management organs that were ill-prepared to handle even the minimal pre-socialization levels of public property. The lack of precision in specifying standards for base levels and remuneration undoubtedly created significant uncertainty as to what was to be reformed and in what manner. The use of mobilization campaigns instead of normal policy making channels in a situation of continuing policy fluctuation also destabilized the early system of property rights. Decentralization of

145 CHINESE REAL PROPERTY POLICY, LAW & PRACTICE, supra note 13, at 44.
146 Id. Modern regulations addressing problems left over from the socialization of urban real property fixed the compensation period at five years for owners who received no compensation whatsoever or whose property was only reformed a short while before 1966. Id.
147 One report from 1963 (during the period of retrenchment following the Great Leap Forward) admitted that there were no clear rules on the issue of whether currently unreformed cities should proceed with the acquisition of rental properties. The same report did indicate, however, that resistance from landlords was impeding reform in some areas. See Report Concerning Issues in the Socialist Reform of Private Rental Housing, supra note 137, at 121.
148 One report issued in 1964 (some 6 years after the commencement of socialization) estimated that approximately 70% of private housing had come under the reforms by that time. Guojia fangchan guanli ju [National Housing Management Bureau], Dui guowuyuan pizhuan de “guanyu siyou chuzu fangwu shehuizhuyi gaizao wenti de baogao” de shuo ming [Explanation of the State Council’s “Report Concerning Issues in the Socialist Reform of Private Rental Housing”] (July 15, 1964), reprinted in 1980 CIVIL LAW REFERENCE MATERIALS, supra note 19 at 125, 126.
149 Id. at 127.
150 Id.
151 SCHURMANN, supra note 121, at 464. Mobilization campaigns also had a significant direct impact on the power of municipal administrations ostensibly responsible for housing management. In
control and the concentration of resources in production units through the urban commune movement also probably undermined the leadership’s early efforts to establish a system of unified housing rights and management under local government control.152 Hence, already weak individual property rights were eroded even further in this process.

Although the basic policies of housing socialization continued in effect throughout the Cultural Revolution, most problems encountered during that time were related to the extra-legal acts of rampaging Red Guard factions rather than to attempts at reform.153 During these political struggles intellectuals, overseas Chinese, and individuals belonging to other disfavored groups were publicly humiliated, had their houses raided for “bourgeois” possessions, and were forced out of their private houses and had them confiscated.154 Modern regulations dealing with problems left over from housing reform call for the return of and compensation for housing taken illegally throughout the early period.

Socialization and the chaos of the Cultural Revolution had disastrous results for China’s urban housing system, and the task of the reformers has

particular, the hsia fang (sending down) movement of sending cadres to the countryside undoubtedly decreased the power of the already inadequate housing administrations vis-à-vis occupying units. These movements of intellectuals and cadres to lower levels occurred on a very large scale between both 1957-1958 and 1963-1964.

Administrative decentralization in urban areas during the Great Leap Forward was often carried out through urban communes which, ironically, were apparently first called for by none other than the modern champion of privatization, Deng Xiaoping, in September 1958. Id. at 382. Although urban communization did not progress as rapidly or thoroughly as that in rural areas, where they were established, large factory-centered urban communes took over most of the functions previously exercised by the city administration. Id. at 387-92. Presumably this included housing administration, in which enterprises were already largely independent as to their own facilities; but newly-established communes could also include members beyond the original factory workforce, and could therefore probably serve to remove even more property from the public management system.

For one diplomat’s account of the political intrigues and “revolutionary” activities of the Red Guard groups during this time, see generally JEAN ESMEIN, THE CHINESE CULTURAL REVOLUTION (W. J. F. Jenner trans., 1973).

See CHINESE REAL PROPERTY POLICY, LAW & PRACTICE, supra note 131, at 58, 59 (acknowledging Cultural Revolution-era housing confiscations). One foreign diplomat who witnessed this activity describes how it transpired in Beijing:

All private houses were... seized. In practice, this meant that the owner had to hand over his title deed to the police, who informed him then whether he was allowed to stay in the house or not. If he was lucky he was permitted to stay and assigned one room for every person in the household. The ‘rooms’ of a Chinese house are in general smaller than in Western Europe. Moreover they do not need to be separated by a wall, but a visible beam may serve as the partition between two rooms. In such a case we would speak of one room.

D.W. FOKKEMA, REPORT FROM PEKING 21 (1972).
been to reverse the situation of extremely weak property rights which these events exacerbated. In attempting to do this, the leadership has repudiated the policies of socialization, and instead innovated on the basis of the rights policies enunciated in the early post-Liberation period. Nevertheless, the thirty years of intervening property rights decentralization and degradation has made the reformers’ task a formidable one.

IV. THE REFORM ERA: PAST IS PRESENT

Chinese experience through the Maoist period proved the negative hypothetical expression of our theory: extremely weak property rights resulted, as predicted, in significant under investment in and misallocation of housing resources. The modern reforms provide an opportunity to test the affirmative hypothesis of Western economic theories of property rights: that the strengthening of property rights and duties should encourage exchange, investment, and conservation.

The following sections will examine a sample (admittedly incomplete) of legal-institutional reforms and ask to what extent the P.R.C. has succeeded through these means in increasing the variety, depth, and clarity of property rights in urban housing. Section A. examines the problems of the old system and perceived merits of the new. Section B. examines overall property rights reforms at the level of general principles of constitutional and civil law, as well as some basic structures of civil rights and liabilities particularly germane to property rights. Section C. addresses the housing reforms in detail and with reference to the variety of actors and rights in the urban environment.

This analysis leads to the conclusion that, although significant progress has been made in housing rights reform, the current system still engenders significant irrationality, inequity, and instability with regard to property rights. Furthermore, there is significant interdependence between housing rights reforms and others in the legal-institutional environment, and further progress will require the continued application of significant political and economic resources to overcome the inertia of existing rights configurations in all of these areas.
A. Market Problems and Rights Solutions

1. Market Problems

The modern reforms in the housing system have been intimately related to failures in the early system of urban real property rights. Under the old system of weak lease rights, land was allocated free to units, and house property was uniformly allocated at extremely low rental rates to individuals. These low rental rates meant that rental returns did not cover even the costs of building or maintaining the property. This factor, in turn, discouraged investment in house property by either local governments, individuals, or SOEs. Also, housing allocation decisions were made according to one's place in a given administrative hierarchy rather than actual consumption, need or ability to pay. The socialization and expropriation of private property assured that the vast majority of all urban housing in China would be plagued by these difficulties. Finally the size of this inefficient sector meant that the direct costs of subsidizing housing property were a significant burden on government budgets, even with low levels of government investment in housing resources generally.

The fruits of this system were bitter indeed. Due to the significant disincentives to investment, China faced a huge urban housing shortage on the eve of the reforms. Early in the reform period it was generally estimated that around 30% of urban households had insufficient housing, but estimates in some areas went much higher than this. In the early 1980s,

---

155 For an excellent example of official Chinese thought on the problems of the old system and merits of the new, see generally 'People's Daily' Article Favours Commercialisation of Urban Housing, BBC-Summary of World Broadcasts, Mar. 21, 1985, at FE7905/B11/1, available in LEXIS, ASIAPC Library, CHINA File.

156 Chinese statistics from 1983 indicate that public housing constituted 88.44%, private-use housing 9.36%, and private rental housing 2.2% of total housing at the time. See 1983 CHINESE SOCIAL STATISTICS, supra note 95, at 97 tbl.2.

157 "The state's burden keeps on growing at a rate of 40 billion yuan a year or four times the amount of [total] investment used in Shenzhen's construction." Wang Qingxian & Wang Xiaotong, Housing Reform a 'Historical Necessity which Cannot be Evaded', in BBC-Summary of World Broadcasts, Nov. 22, 1991, at FE/1236/C1/1, available in LEXIS, ASIAPC Library, CHINA File.

158 See, e.g., 'People's Daily' Article Favours Commercialization of Urban Housing, supra note 155 ("At present about one third of urban households are short of housing"). An earlier report published by the State Council estimated the percentage of households facing shortages to be much lower (only 17%), but also illuminated the perverse results of this shortage for the individuals involved. Just over a million households had no housing at all, with husbands and wives living separately or together in dormitories, workshops, warehouses and offices. An even greater number of households (1.3 million), had to share housing with other families and/or had several generations, including grown children, living together. Guowu yuan pizhun guojian wei guanyu jiakuai chengshi zhuzhai jianshe de baogao (State Council
Shanghai reported that 59% of the families in the city were looking for housing, and significant numbers of people in some areas even within Shanghai itself were reported to be living in extremely distressed conditions. Shortage is also reflected in the fact that the floor space per capita for urban residents stood at just over four square meters in the late 1970s.

2. Rights Solutions

The Chinese leadership has self-consciously embraced market principles as a means of remedying the defects of the planned allocation of economic factors. The number of products subject to planned allocation has decreased drastically, and in housing, “commoditization” is the buzzword for market allocation — of both public and private resources — by autonomous, profit-driven exchange. The transformation from plan to market necessarily implies the devolution of control rights over housing to essentially autonomous and profit-oriented, yet regulated, economic users.

Because the Chinese leadership have grasped this connection between market outcomes and market legal-institutional structures, the list of reform policies reads like an institutional economist’s wish list. In the broadest sense, the legal-institutional reforms in housing and in general have had four basic objectives: 1) to increase the total quanta of powers or rights, as well as duties, in actors utilizing economic resources; 2) to increase the range of actors with the capacity to undertake rights and duties in property relations; 3) to increase the range of property objects subject to such rights, and; 4) to assure effective enforcement of rights as constituted in order to reduce enforcement costs and prevent abuse, waste, negative externalities and other market failures.

With respect to housing, each of these goals has been addressed by numerous policies across a wide range of relevant issue areas. Quite

\]

\[\text{159 In Shanghai alone, at least 900 families were said to live in “subhuman” conditions, and as many as 80,000 people lived in “miserable” conditions. CHINA NEWS ANALYSIS, No. 1212, July 31, 1981, at 3-4. Perhaps this represents some improvement, for in 1977 almost a million individuals in Shanghai were reported to have an average living area of under 2 square meters — surely a “miserable” condition. 1978 Report on Speeding Urban Construction, supra note 158, at 355.}
\]

\[\text{160 Urban residents had an average of only 4.4 square meters of space in 1979, compared with 8.4 for peasants. 1983 CHINESE SOCIAL STATISTICS, supra note 95, at 97 tbl.1.}
\]
clearly, the restoration of property rights has implications across almost every legal field, from administrative to zoning law. Thus, the reform policies have been defined and embodied in the reform-era Constitution, General Principles of Civil Law ("G.P.C.L.") and innumerable narrower national, provincial and municipal enactments.

B. Overall Property Rights Reforms

The property law reforms have proceeded along two broad paths. First, these new laws grant enhanced individual substantive and procedural rights with respect to real property through generally applicable constitutional, regulatory, administrative and contract law. While the issue of "ownership" under this system has been muddled pitifully in the process, the increase of substantive rights is itself significant. Merely by clarifying contract and statutory rights, this legislation helps increase security and decrease information costs related to ascertaining and enforcing property rights. These reforms may make it possible to vest individual economic actors with the duty and powers necessary to control and benefit from their use of property. By increasingly providing the powers and duties associated with the transfer of property rights, the leaders also hope to encourage cheaper and more rational exchanges of these enhanced housing resources. This is seen as the chief benefit of commoditization.

This point leads to the second major prong of the property rights reforms. In addition to recognizing enhanced property rights, the government has facilitated the vesting of property rights in increasingly autonomous profit-motivated economic actors. This has been accomplished by recognizing and defining legal personhood and civil capacity in diverse public and quasi-public organizations in society. Both public and private actors are thereby increasingly able to take advantage of the new substantive rights in property.

All of these general policies come together in the area of housing reform, which will be considered in the next part.

---

163 On the debate over ownership in state-owned enterprises, see infra notes 206-09 and accompanying text.
1. Fundamental Principles: The Mixed Ownership System

The national leadership, as the chief beneficiary of the socialist system, has an understandable preference for public ownership. On the other hand, the leadership has also sought to foster marketization by recognizing increasing rights to possess and control public and private property. Thus, the reform era Constitution and General Principles of Civil Law ("G.P.C.L.") define in broad strokes a mixed system of public and private ownership.

The most general description of the system of ownership in the Constitution gives the impression that public ownership by the whole people is the dominant form of property ownership. The Constitution asserts that the socialist system is the basic system of the People's Republic of China, and that this economic system is in turn based on "socialist public ownership" of the means of production. In keeping with the elevated status of public property, Article 12 of the Constitution provides that "the state protects socialist public property." Perhaps understandably given the continued emphasis on public ownership, the 1982 Constitution limits protection of the private economy in much the same way as did earlier constitutions. First, the private economy is characterized as merely a "complement to the socialist public economy" which the state permits to exist but which must "develop in the limits prescribed by law." Private rights appear vulnerable because, while "socialist public property is sacred and inviolable," the Constitution provides that "the state may in the public interest take over land for its use in accordance with the law." Finally, while private property is protected in the Constitution, the provision that the state "protects the right of citizens to own lawfully earned income, savings, houses and other lawful property" is familiar to—even the 1954 Constitution. This phrase does not convey

\[164\] P.R.C. CONST. art. VI.
\[165\] Id. art. XII.
\[166\] P.R.C. CONST. art. XI (amended 1988).
\[167\] P.R.C. CONST. art. XII.
\[168\] Id. art. X. Presumably, private land and collective land in rural areas, and all land in the possession of state-owned enterprises and administrative units, is subject to confiscation under this provision.
\[169\] P.R.C. CONST. of 1954 art. XI.
anything like an inviolable right to ownership in property, but then neither does the U.S. Constitution.\(^{170}\)

The reform Constitution is unkind to private property rights in much more stark ways as well. One provision of the reform Constitution wipes out a whole category of private rights in a single, brief phrase. For the first time, the 1982 Constitution provided formal recognition of the established fact that “land in the cities is owned by the state.”\(^{171}\) Hence, private ownership can only vest in urban housing, not land. Whereas this could be inferred from the early lack of protection for urban land, it was not explicit in earlier law. This factor creates significant difficulties with property interests over the long term.\(^{172}\)

Public ownership also implies the empowerment of public economic production and actors to utilize this property for public benefit. The Constitution as amended in 1993 provides that “the state-owned economy . . . is the leading force in the national economy.”\(^{173}\) Two actors in the state-owned economy are recognized in the Constitution. State-owned enterprises now have the formal right “to operate independently, within the limits prescribed by law.”\(^{174}\) Collectives, likewise formally public organizations,\(^{175}\) have “decision-making power in conducting independent economic activities, on condition that they abide by the relevant laws.”\(^{176}\) Also, the state is said to “protect the lawful rights and interests of the urban and rural economic collectives . . . .”\(^{177}\)

The constitutional status of individual branch organizations or work units of the government is much hazier.\(^{178}\) We know only that “all state

---

\(^{170}\) The U.S. Constitution does not declare any substantive property right to property but, rather, assumes them by merely providing that existing property rights should not be taken for public benefit without compensation, U.S. CONST. amend V., or due process, U.S. CONST. amend XIV. At any rate, the P.R.C. provides neither of these protections.

\(^{171}\) P.R.C. CONST. of 1954 art. X.

\(^{172}\) See infra notes 334-37 and accompanying text on confusion in mortgage rights in land and housing.

\(^{173}\) P.R.C. CONST. art. VII. (amended 1993).

\(^{174}\) P.R.C. CONST. art. XVI.

\(^{175}\) Collectives appear to be public organs by implication from Article VI, which provides that “socialist public ownership” is equivalent to “collective ownership by the working people.” P.R.C. CONST. art. VI. In fact, though, collectives are really quasi-public enterprises established and controlled by local government organs with state resources.

\(^{176}\) P.R.C. CONST. art. XVII (amended 1993).

\(^{177}\) P.R.C. CONST. art. VIII.

\(^{178}\) The failure to account for the existence of administrative agencies is not unique to the P.R.C. Constitution. Neither does the U.S. Constitution account for the “fourth branch of government” and its sometimes massive bureaucracies, complete with legislative, adjudicative, and prosecutorial functions.
organs, the armed forces, all political parties and public organizations . . . must abide by the Constitution and the law."\textsuperscript{179} Nowhere does the Constitution specify the rights of these organs in the significant urban real property resources under their operative management. In fact, though, the Constitution gives no significant guidance as to the rights of private or state-owned enterprises beyond the general statements indicated above. The rights of the various actors in the mixed economy are only specified in detail in more narrow special legislation.

2. **Civil Status and Operation Rights of Economic Actors**

Civil capacity is a fundamental prerequisite to the enjoyment of property rights and subjection to property obligations. Only individuals or organizations that have civil capacity may, in accordance with law, "enjoy civil rights and be obligated to perform civil duties."\textsuperscript{180} Thus, the extension of civil capacity is essential to the extension of rights and duties generally. The G.P.C.L. recognizes civil rights in private natural persons (citizens) and both private and "public" legal persons.\textsuperscript{181}

On the other hand, the ability to control property "in accordance with law" begs the question of what the law is and how it is applied. In China, even private enterprises are subject not primarily to law, but to control by local supervisory organs of the state. Unfortunately, these "responsible organs" have both the will and the means to shield client units from generally applicable regulatory enforcement. Thus, while the extension of civil capacity and formal civil rights is commendable, property rights laws are still subject to veto both by actors in possession of property and their supervisors.

\textit{a. Civil status; private and public}

Though the distinction between public and private property is ultimately too simplistic for most purposes, a focus on public and private actors does serve as a convenient tool with which to begin illuminating the diverse loci of property rights in reform-era China.

\textsuperscript{179} P.R.C. CONST. art. V.
\textsuperscript{180} G.P.C.L. \textit{supra} note 161, art. 9.
\textsuperscript{181} The G.P.C.L. regulates "property relations . . . between subjects of equal status — between citizens, between legal persons, and between citizens and legal persons." G.P.C.L. \textit{supra} note 161, art. 2.
(1) **Private actors**

Individual natural persons (citizens, or *gongmin*), and a variety of organizational legal persons are recognized and protected in the G.P.C.L. All citizens, by definition, have civil capacity from the time of birth, and hence enjoy civil rights in their individual capacity.\(^{182}\) In addition, citizens may join together to share civil rights and duties as common or joint right holders,\(^{183}\) or as "partnerships of individuals" for purposes of conducting business.\(^{184}\)

Another form of private civilian economic entity is the Individual Industrial/Commercial Household ("ICH"), businesses formed mainly in urban areas by individuals and families.\(^{185}\) Neither ICHs nor small private enterprises are provided legal person status in the G.P.C.L., but both nevertheless do have civil capacity.\(^{186}\)

While small private enterprises and households are not given legal person status under the G.P.C.L., this law does recognize enterprise legal-person status in several types of larger-scale enterprises. In particular, the G.P.C.L. provides for legal person status for foreign-invested enterprises such as "Sino-foreign equity joint venture enterprises," "Sino-foreign contractual joint ventures," and "wholly foreign-owned enterprises" established within the P.R.C.\(^{187}\)

More recent local laws have further enabled the formation of large-scale private enterprise legal persons in the form of the limited liability company (*gufen youxian gongsi*). Limited liability companies are essentially promoter-sponsored or floated share corporations having legal person status by definition.\(^{188}\) This is the recommended form of organization for

---

\(^{182}\) *Id.* art. 9.

\(^{183}\) *Id.* art. 78 (co-ownership).

\(^{184}\) The G.P.C.L. art. 30 provides for the establishment of partnerships. This necessarily implies co-ownership of partnership assets, which is provided for in the G.P.C.L. art. 31.

\(^{185}\) *See generally* G.P.C.L., *supra* note 161, arts. 26-29; *see also* Gray & Zheng, *supra* note 161, at 32 n.12.

\(^{186}\) Donald C. Clarke, *Regulation and its Discontents: Economic Law in China*, 28 STAN. J. INT'L L. 283, 304-05 (1992) [hereinafter Clarke, *Economic Law in China*]. Professor Clarke has argued that the principle problem with the lack of legal person status is the exposure to enterprise investor/owners to unlimited liability. However, for purposes of merely illuminating potential loci of property rights, it is immaterial whether private enterprises and ICHs have formal legal status so long as they are able to exercise property rights by virtue of having civil capacity. This they do.


\(^{188}\) *See Provisional Regulations of Shanghai Municipality on Limited Liability Companies*, art. 2 (1992), *translated in* 2 China L. for Foreign Bus.: Special Zones & Cities (CCH Austl.) 91-090 (1993)
Shanghai-organized foreign-invested enterprises. As the name suggests, sponsors and shareholders enjoy limited liability for enterprise debts and acts, thereby solving some of the problems associated with the unlimited liability of small-scale private enterprises. Just as importantly, this form of private enterprise is also a convenient method of vesting public economic resources in autonomous, independent economic actors.

(2) Public actors

State-owned enterprises ("SOEs"), collective enterprises, government agencies and state-sponsored institutions and associations can all have legal personhood, and hence civil capacity. State-owned and collective enterprises which satisfy certain capital, registration, and asset requirements, and who have civil capacity may become enterprise legal persons. In addition, various public and quasi-public institutions and associations can enjoy legal person status. More generally still, all government units with independent funds "enjoy the status of legal person from the day [they are] established." Thus, potentially all self-financed agents of the government have the ability to contract and hold property rights on their own behalf.

One particularly important type of organizational civil transaction is the ability of enterprises (or government organs) to invest resources in the formation of a new economic entity: to reproduce. The G.P.C.L. allows institutions and state-owned enterprises, themselves legal persons, to combine resources to form a "new economic entity that independently assumes

[hereinafter Shanghai Limited Liability Regulations]. These companies must also satisfy threshold tests in areas such as capitalization, (Rmb 5,000,000 for Chinese companies; Rmb 30,000,000 for foreign-invested companies), and establishment requirements. Id. arts. 17, 19-29 (covering application procedures, content of promoters' agreement and articles of association, registration procedures, and a variety of other substantive issues).

Specifically, "shareholders assume an amount of liability equivalent to the amount of shares purchased." Id. art. 2.


Clarke, Economic Law in China, supra note 186, at 303 n.67. Professor Clarke gives as examples of article 50 legal persons "formal governmental units, hospitals, universities, [and] writers' associations."

G.P.C.L., supra note 161, art. 50. The phrase "independent funds" is not defined in the G.P.C.L.
civil liabilities and satisfies the requirements for legal persons.”\footnote{Id. art. 51.} In fact, agents of the government throughout China have participated in (and precipitated) the economic boom by setting up new enterprises with government funds: what could be labeled “state-invested enterprises” (“S.I.E.s”). This is an important innovation, because S.I.E.s allow at least the possibility of vesting property rights in increasingly independent organizations.

Recent innovative company laws have blurred the lines between public and private enterprises even further. Of particular importance is the increasing ability of agents of the state to establish, invest in and own private “limited liability” companies.

The recent Shanghai limited liability company regulations provide that “at least one” of the limited liability company promoters be “an enterprise with legal person status registered in Shanghai Municipality.”\footnote{Shanghai Limited Liability Regulations, supra note 188, art. 14.} Thus, the class of potential promoters includes, in addition to all foreign-invested enterprises, the vast majority of SOEs as well as the S.I.E.s (joint-venture and purely domestic) set up by SOEs, government units, and public institutions alike. The necessary result of this process is the privatization of the loci of rights in public property as resources are shifted to increasingly private enterprises. Whether such private enterprises are truly autonomous or even simply more autonomous than SOEs, however, is not at all clear.

\begin{itemize}
\item \textit{Enterprise operational autonomy}
\end{itemize}

Although SOEs may enjoy the rights of ownership and contract as legal persons, their ability to exercise these rights is still largely defined indirectly through their administrative relationships with organs of the state. These relationships are characterized by varying degrees of both administrative patronage and administrative control, which may result in either excessively weak or strong operation and property rights. In particular, if administrative control extends to issues of real property use and disposition, then formal real property rights granted elsewhere may be circumscribed other than “according to law” as promised by the G.P.C.L. On the other hand, if administrative superiors are able to protect enterprises from the necessity of compliance with generally applicable real property registration or other regulations, then it is possible that enterprises will be able to ignore
these ostensibly generally applicable real property rights provisions and receive enhanced de facto rights: possibly at the expense of other, less politically favored, actors, but certainly at the expense of general applicability, equity, and certainty.

Recent regulations implementing the G.P.C.L.'s right of operative management in SOEs evidence both the administrative patronage and control characteristic of relationships between the state and enterprises. Of central importance in this relationship is the "department in charge" ("DIC") which may, along with other unspecified government organs, supervise enterprise construction plans, appoint and remove factory directors and deputy directors, coordinate relationships with other units, and guide enterprise development planning. On the other hand, local governments and DICs are also to provide these enterprises with various forms of managerial "assistance", and also with fiscal and material resources which are "subject to local planning and control."

As will be seen below, land and housing are in general subject to local planning and control, so that DICs have formal permission to assist in their supply to SOEs. DICs may also interfere in real property use and disposition by virtue of the DIC's control over planning and personnel. Given the community of interest between DICs and their enterprises, however, it is most likely that the former will act to maximize enterprise resources and minimize the impact of laws on the enterprise. As Clarke puts the matter, "[W]hile the DIC has the practical power to enforce state policy, it often lacks the will to do so" because of the bureaucratic identity between DIC and enterprise interests and personnel and the importance of enterprises as a source of income for local government. This situation is aggravated by the fact that no administrative, criminal, or civil law really constrains the DIC itself. Thus, the patronage function of DICs with respect to state-owned enterprises probably predominates.

Other government units in the local milieu generally have the same wide autonomy characteristic of DICs, but just the opposite interests and behavior. Various local government units, armed with the power to with-

---

196 Id. arts. 55, 56.
197 Id. arts. 56, 57.
198 Clarke, What's Law Got to Do with It?, supra note 15, at 70.
199 Id. at 70, 71.
hold necessary resources or licenses and motivated by the desire or necessity to raise revenues, can and do subject enterprises to an astonishing array of illegal and arbitrary exactions.\textsuperscript{200} While these exactions may be significant in and of themselves in terms of enterprise costs, they also have the more general effect of eroding any property rights granted elsewhere in statutory law. Not only do exactions increase the direct monetary costs of exercising property rights, but their unpredictability also undermines the stability and certainty of these property rights, and hence increases associated information and transaction costs.

Although reform-era laws generally grant DICs fewer formal rights of control over various forms of private enterprise and continue to call for the protection of autonomous operation rights in these enterprises, it is doubtful whether the dynamic of patronage and interference has been broken.\textsuperscript{201} On one hand, DICs are still relied upon to supervise and guide even newly-recognized private enterprises.\textsuperscript{202} The same is apparently true even of the new "share-formulated enterprises"\textsuperscript{203} intended to privatize state owned enterprises, as well of all other forms of domestic and foreign-invested enterprise.\textsuperscript{204} No matter the form of organization, the DIC’s basic interests in protecting the enterprise remain the same and, indeed, may even be

\textsuperscript{200} See generally id. at 37-43.
\textsuperscript{201} Two prominent Chinese scholars in the area of enterprise law are adamant about this point:

The actual experience of the reform in recent years shows that though enactments have defined the enterprise's rights, those rights have been curtailed by various levels of local government and supervisory administrative organs. "Loosening control of enterprises in public, tightening control in private" became a commonplace phenomenon. Every government department and "administrative company" has excuses for interfering with and levying exactions on enterprises. The enterprises' property rights have not been realized in practice, nor has their status as legal persons been guaranteed.

Wang Liming & Liu Zhaonian, 	extit{On the Property Rights System of the State Enterprises in China}, LAW & CONTEMP. PROBS, Summer 1989, at 19, 26 (Fu Xiaoshuang & Wu Yanlei trans.).


\textsuperscript{203} Recent trial regulations provide that during examination and approval of these entities, “an industry administration authority shall be decided upon which shall be based on the main operations and business scope of the enterprise, and the authority shall . . . provide services, implement supervision and be responsible for the issuance of documents, [and] organization of meetings . . . according to regulations.” Trial Measures on Share-Formulated Enterprises (May 15, 1992), \textit{translated in} 2 China L. for Foreign Bus.: Bus. Reg. (CCH Austl.) at ¶13-570 (1993). The “industry administration authority” in these Measures appears to be nothing more than a DIC by another name.

\textsuperscript{204} See Clarke, \textit{Economic Law in China}, supra note 186, at 306 n.79 (noting that even wholly foreign-owned enterprises have DICs).
enhanced insofar as the success of their institutional experiments, as well as business results, will come under scrutiny by superiors and peers. On the other hand, other local governments still hold control over licenses and other resources needed by local enterprises, and still undoubtedly covet enterprise exaction revenues. In the absence of any significant overall local administrative reforms, it is doubtful that exactions will cease altogether; although they may be moderated somewhat in the case of "outsider" foreign-invested enterprises more willing and able to resist.

In the final analysis, administrative interference and patronage still present the possibility of significant direct costs and rent-seeking behavior in the exercise of enterprise property rights. This will continue to be true until progress is made in comprehensive administrative reform that will subject DICs to the rule of law they are supposed to uphold.

3. Some Basic Structures of Civil Rights and Liabilities

Civil rights and liabilities are legal-institutional means by which civil actors are at once allowed to benefit from their actions and, on the other hand, made to pay the perceived costs of their actions to society. Because other authors have covered the substantive civil rights and liabilities of small individual and family private enterprises in some detail, the discussion below will focus on the rights of larger-scale enterprise legal persons.

a. Ownership of land via use rights

Ownership is defined in the G.P.C.L. as "an owner's right in accordance with law to possess, use, benefit from, and dispose of his own property." However, the G.P.C.L. and other real property implementing legislation also maintain the fundamental constitutional distinction between urban land and housing ownership. Because land ownership and housing ownership are treated under different systems, extremely complex rights relations develop according to the different types of actors and properties involved. Hence, in China as elsewhere, ownership is necessarily a composite of a range of potentially discrete and severable rights in property. Although the G.P.C.L. falls far short of providing for the complete transfer

---

205 Id. at 303-05.
206 G.P.C.L., supra note 161, art. 71.
of ownership in most public resources, it and other laws make a significant break with the past by sanctioning substantial bundles of rights to real property in different public and private economic actors.

On the face of the G.P.C.L., state-owned enterprises appear to have no independent ownership rights in real property. The state only protects SOEs' right to "operate according to law state property given to it to operate and manage." While this formula appears to fall short of recognizing formal ownership rights in property held by state-owned enterprises, there is great debate in China about the meaning of this term. Some have argued that "operation and management" in fact amount to a property right, while others have maintained that it is merely a conditional right to use public property.

In fact, other laws according to which the right of operation in land is exercised effectively render this debate moot. Any actor "owns" property only to the extent they hold a bundle of specific substantive and procedural rights to utilize and benefit from tangible or intangible goods. In fact, what the G.P.C.L. protects is not the right of state-owned and other enterprise legal persons to own public land in their possession, but to use, benefit from and, increasingly, to transfer that public property.

Today, the "operation and management" of public land resources by a variety of public legal persons is increasingly moderated through a system of contractual, fee-based, transferable land use rights. In the land use rights system developed the past decade, contractual relations have increasingly been allowed to substitute for ill-defined and cumbersome planned

---

207 Id. art. 82.
208 Some Chinese authors have even gone so far as to argue for "converting state ownership to enterprise ownership." For an excellent synopsis of this debate see Edward J. Epstein, The Theoretical System of Property Rights in China's General Principles of Civil Law: Theoretical Controversy in the Drafting Process and Beyond, LAW & CONTEMP. PROBS., Spring 1989, at 177, 193-211. See generally Zhao Zhongfu, Enterprise Legal Persons: Their Important Status in Chinese Civil Law, in LAW & CONTEMP. PROBS., Summer 1989, at 1, 26 (Winston J.S. Zhao trans.).
209 With respect to use rights in land, the G.P.C.L. provides:

State-owned land may be used in accordance with law by state-owned units, or may in accordance with the law be allocated for use by collective units; the state protects the rights of such units to use and benefit from the land; the units which use [the land] are under a duty to manage, protect, and make reasonable use [of the land].

G.P.C.L., supra note 161, art. 80. Note that this use right seems to be potentially extended to all "state-owned units," a wider concept than merely state-owned enterprise legal persons. Thus, it appears that legal personhood is not in fact necessary for state organs to have civil capacity and enjoy rights in public land.
administrative control over land. In this system, applied first to new joint venture enterprises in the Special Economic Zones, local governments give individuals and legal person the right to use land for specified periods of time contingent upon the payment of fees and adherence to contract and statutory conditions on the use right. 211 Because of the limited nature of this privilege, the use right is analogous to a leasehold interest granted by lessor to lessee in the West.

Shortly after this basic rights system was developed, legislation was passed in many areas providing for the transferability of these new use rights in land. 212 Likewise, both the Constitution and the Land Management Law were amended in 1988 to recognize land use rights and use rights transfers. 213

This use rights system is of the utmost importance for several reasons. First the transferability of use rights means that real property users should be able to more cheaply allocate land to its highest use, especially if that use lies with another economic actor. In essence, transferable use rights create value where there was before only surplus land. Although negotiation and bargaining may still be required to secure use rights, 214 as

211 One of the earliest such laws was that from the Dalian S.E.Z. in coastal Liaoning Province. See generally Measures of the Dalian Economic and Technological Development Zone for the Administration of Land Use (1984), Chinalaw Database, No. 227, available in LEXIS, ASIAPC Library, CHINAL File. One of the earliest local laws dealing with land use by Sino-foreign joint ventures in particular came from Ningbo Municipality. See Implementation Measures of Ningbo Municipality for the Administration of Land Use for Sino-Foreign Joint Equity Ventures (1985), Chinalaw Database, No. 291, available in LEXIS, ASIAPC Library, CHINAL File.

212 See generally Kerzner, Commercial Real Estate Laws, supra note 210, at 594-95. One of the first — if not the first — local regulations allowing both the right to use land and to transfer use rights was the 1983 Shenzhen housing regulations. These regulations identified the “house property right” as including the land use right, and provided that the house property right (and hence the land use right) could be transferred. See Regulations of the Shenzhen Special Economic Zone Concerning the Management of Commodity House Property, art. 2 (Nov. 15, 1983), Chinalaw Database, No. 175, available in LEXIS, ASIAPC Library, CHINAL File [hereinafter Shenzhen Commodity Housing Regulations]. The Shenzhen regulations were also extremely innovative in the area of housing rights, and much will be said about them later.


214 Land use rights and transfer regulations initially provided for the grant of use rights only through negotiation with the local land management bureau, but increasingly provided for both tender offers and public auction throughout the 1980s. National legislation now sanctions all three methods of use rights allocation, but “specific processes and procedures for granting land use rights” are to be promulgated by local governments. See Interim Regulations on Urban Land-Use Rights, art. 13 (1990), translated in E. ASIAN EXEC. REP., Aug. 15, 1990, at 23.
compared to administrative allocation according to the plan, independent contract rights at least provide the hope of increased autonomy in decision making and legal grounds for compelling actors to pay for their resource use. Generally applicable regulations and procedures governing city planning, contract approval, fee and other conditions on use rights, registration requirements, and taxation of use rights transfers should also help to increase stability and minimize enforcement, transaction, and information costs to a much greater extent than possible under decentralized and disaggregated direct administrative control. Finally, transferable use rights provide a unique legal mechanism facilitating the passage of control over state-owned real property to increasingly private actors. Hence, the separation of the rights of use and ownership represents a unique opportunity to bring efficiencies to the use of public property, while at the same time satisfying the ideological and practical imperatives of de jure state ownership and control.215

A particularly important feature of these new use rights is the ability of public economic actors to alienate public property. In addition to enjoying increasingly alienable contractual and statutory use rights in public land, state-owned enterprises in some areas are now also authorized to alienate their ownership and use rights in enterprise assets altogether.216 In order to facilitate the formation of joint ventures with foreign-invested private enterprises, Guangzhou now enables “state industrial enterprises” to sell off state property rights “in full or in part.”217 Consistent with the distinction between ownership and use of land, state industrial enterprises may sell land use rights according to local use rights transfer laws, but ownership of the land remains in the state.218 The use of land resources as a commodity is aided by the fact that these use rights are inherently transferable under local

216 Other authors have failed to find a formal right to alienate state-owned enterprise property in the G.P.C.L. See Clarke, Economic Law in China, supra note 186, at 313-14.
217 See Regulations of Guangzhou Municipality on the Sale by Transfer of a Portion of State Industrial Enterprise Property Rights to Foreign Parties, art. 11 (1989), translated in 2 China L. for Foreign Bus.: Special Zones & Cities (CCH Austl.) ¶85-041 (1993). The term “state industrial enterprise” is not defined in these regulations, so it is unclear whether they apply only to S.O.E.s, or also apply to S.I.E.s established by S.O.E.s and government organs. However, it is clear that the regulations are meant to govern transfers of public property by collective enterprises.
This method of transferring of property rights to foreigners is seen as “a means of using foreign capital to introduce advanced technology and equipment and scientific management practices, accelerate the technical transformation of existing enterprises and develop an export-oriented economy.” Id. art. 2.
218 Id. art. 5.
law, but the Guangzhou Enterprise Property Measures also provide explicitly for the transferability of land use rights sold under these regulations.219

Ultimately, then, the ability to transfer public property to private enterprises should result simultaneously in the validation of increasingly secure substantive use rights and the vesting of those rights in increasingly autonomous economic actors, and hence in the enhanced ability of possessing units to capture potential external revenues from urban land.

b. Contract rights

Contracts and generally applicable substantive and procedural laws have been adopted as fundamental structural means of increasing the economic rationality of the system of property rights in China. Contracts, in particular, are intended to provide economic actors with the ability to make independent and binding profit-maximizing decisions with respect to resource use and allocation as required for market production and allocation.220 This ability, however, also depends on the rights structures governing economic actors’ establishment and operation, as well as on narrower rights defined with respect to specific types of property. While enterprise operation rights have been considered above and a discussion of rights in housing property will have to wait for later, it is worthwhile at this point to illuminate the basic structure of contract obligations through which those relations are to be carried out.

Although contracts between SOEs existed in planned production prior to the reform period, these were not enforceable independent agreements between autonomous parties, but were “the continuation of the [State production] plan by other means.”221 Because the plan could not specify all of the details of production and allocation, guided contracts between production units were used to specify the details of the inter-enterprise transfers required to implement the plan. Hence, these contracts were not really freely entered into and, because they existed only in service of the state plan, could not be enforced if to do so would not serve the plan. As a

219 Id. art. 11. The Measures provide that subsequent transfers of land use rights are to be handled according to the Trial Measures of Guangzhou Municipality on the Sale by Transfer and Assignment of Urban State-owned Land.
221 See Clarke, Economic Law in China, supra note 186, at 309.
result, these were not really contracts at all in the Western legal sense, but were merely the embodiment of administrative planning decisions.

While early planning contracts were not "designed to make it easier for the parties to enter into secure and predictable economic relationships of their own choosing," this is precisely the goal of reform-era innovations in contract law. It is less certain whether or to what extent this goal has in fact been achieved merely through the adoption of contract law.

The drafters of the G.P.C.L. viewed the ability to contract as an essential element of the new commodity economy of independent production and exchange according to value. As one Western scholar put it, "the conceptual framework for managing the new system's independent entities is obligation law . . . Once the decision making function is shifted from the planning authority to the independent entity, the basic legal device that will be used will be a contract, not an order." The contract system is intended "to supply effective legal protection to the process of developing horizontal economic ties" throughout the economy. Hence, "contracts with consideration" are the preferred mechanism for exchange between actors even in the different ownership systems.

The general provisions related to contracting in the G.P.C.L. attempt to implement the principles of reciprocity and mutual benefit by providing for binding legal contracts. Toward this end, the G.P.C.L. provides that: "[A] contract is an agreement whereby parties establish, modify, or terminate civil legal relations. Contracts formed in accordance with law are

---

222 Id.
223 The principle evils of the old system of planned production and state ownership are adequately illuminated by one drafter of the G.P.C.L. Under the former system, "state ownership . . . led to the state using administrative methods to interfere willfully in the enterprises' horizontal economic activities, substituting the desires of senior officials or administrative orders for the law of value in commodities exchange." Tong Rou, The General Principles of Civil Law of the P.R.C.: It's Birth, Characteristics, and Role, LAW & CONTEMP. PROBS., Spring 1989, at 151, 171 (Jonathan K. Ocko trans.). The G.P.C.L.'s solution is "to cause [enterprises] to become relatively independent objects, to achieve self control, and to become socialist commodities producers and operators that take responsibilities for gains and losses, that is, in the final analysis to become legal persons that have fixed rights and duties." Id. Clearly contracts are one means of fixing rights and duties, but so too are company laws and laws with respect to particular property resources.
224 William Jones, Sources of Chinese Obligation Law, LAW & CONTEMP. PROBS., Summer 1989, at 70, 73.
225 Tong Rou, supra note 223, at 165.
226 Id. Note also that compulsory planned contracts between S.O.E.s continue in some areas. Tong Rou argues that the new civil law system should also govern these contracts, although it is not clear how compulsion and freedom can be squared in this context. Id. at 160.
protected by law.” The G.P.C.L.’s provision recognizing the equal status of parties to civil activities is also particularly important, as it provides the condition necessary to the enforcement of freely entered contracts with regard only to lawful contractual, as opposed to administrative or political, criteria. The G.P.C.L. itself provides some of these criteria for enforcement: breach or failure to perform a contract gives rise to civil liability; obligations for debts must be satisfied, and payment may be compelled by the People’s Court; the victim of breach may demand performance or compensation of the breaching party; contracts may provide for liquidated damages in case of breach; and parties have a duty to mitigate in case the other party breaches.

The G.P.C.L. also upholds the principles of freedom of contract. An important example of this principle is found in the provision for defaults in case of ambiguity in contract terms. Article 88 provides that “where the terms of a contract . . . are not clear and definite, and these cannot be determined from the content of the agreement through consultations, the following provisions apply . . . .” These defaults make reference to state and enterprise standards for quality and state or market price terms. Freedom of contract in different transactions is also facilitated by the G.P.C.L.’s recognition of the right to enter guarantees and to assign contracts. On the other hand, it is also true that contracts may be voided if they violate state laws or policies.

---

227 G.P.C.L., supra note 161, art. 85. A contract is a specific form of an “obligation”, which is any rights relationship arising either by contract or by operation of law:

An obligation is a relationship of specific rights and duties between parties, arising either from terms of a contract or from a provision of law. The one that enjoys a right is the obligee and the one that bears the duty is the obligor. The obligee has the right to demand that the obligor perform his duty according to the terms of the contract or the provision of law.

Id. art. 84.

228 In discussing equal status of parties, Tong Rou notes: “[Enterprises] ought to regard their opposite as an equal owner or exchanger of commodities, and in obtaining the opposite’s commodities, labor, capital, or technology pay the actual value in money or in other forms of compensation permitted by law.” Tong Rou, supra note 223, at 173-74.

---

229 G.P.C.L., supra note 161, art. 106.
230 Id. art. 108.
231 Id. art. 111.
232 Id. art. 112.
233 Id. art. 114.
234 Id. art. 88.
235 Id. art. 89.
236 Id. art. 91.
In spite of these lofty goals and ambitious provisions, there are several problems with this contract law regime beyond technical questions of formation or liability for breach. First, the G.P.C.L. contains only the most general provisions, leaving a great deal of leeway and uncertainty for the parties. Second, while the G.P.C.L. applies to both natural and legal persons, the Economic Contract Law is also applicable to relations between legal persons. The Economic Contract Law also contains conflicting provisions calling for contract approval and adherence to state plans which are lacking in the G.P.C.L. Third, and even more importantly, it is simply not clear that parties generally conform to the requirements of these laws in practice.

This last point highlights a final and important difficulty with the implementation of these ideals: contract enforcement. There is ample support for the proposition that "[a]ny incentive structure premised on protection of rights and enforcement of law by Chinese courts as currently constituted is problematic." The people's courts are burdened with poorly educated and often corrupt cadres, and even their legally correct decisions are still subject to arbitrary reversal by superiors and local Party committees. In addition, the courts have little power to enforce their judgments, and are especially inadequate where those judgments are adverse to powerful local economic or political interests. All of this makes the courts particularly inapt as a tool for championing the values of voluntariness, equality, and mutual benefit embodied in the G.P.C.L. Indeed, the continued politicization of local economic institutions may render these values themselves largely irrelevant in practice, because no contract could even be formed outside of the context of extra-legal bureaucratic bargaining and manipulation between enterprises, their DICs, and other concerned local government units.

---

237 This is perhaps most true of the catchall provisions that contracts must be in accordance with "social morality" and must not "harm the public interest, undermine the state plan, or disrupt the economic order," and must be in conformity with "state policy" where there is no applicable law. Id. art. 6, 7.
239 See Jones, supra note 224, at 87-88, 90-91.
240 See Clarke, What’s Law Got to Do with It?, supra note 15, at 57.
241 Id. at 57, 58.
c. **Civil liability in bankruptcy**

Debt satisfaction and bankruptcy are singularly important in an economic analysis of property rights, because they in part determine the availability of real property resources for the satisfaction of debts, and hence the ability of shift economic costs to those who cause them. All private natural and enterprise legal persons, state-owned enterprises and collectives may assume debts and hold property rights, and all may also go bankrupt. They do not, however, all go bankrupt equally.

One very basic question in bankruptcy and creditor-debtor law generally is: what assets are available for the satisfaction of debts? This question is important for at least two reasons. First, it determines the amount of property in the bankruptcy estate available to satisfy debts, and hence the degree to which the enterprise can ultimately be made to pay the cost of its borrowing. Secondly, this question is particularly important in China because liquidation may serve as one more means of shifting the locus of state property to privately-owned economic actors.

SOEs and collectives are in theory both potentially subject to liquidation to virtually the same extent. SOEs are liable for civil debts "to the extent of the property the state has given [them] to operate and manage," and collectives and various foreign-invested enterprises "bear civil liability to the extent of the property the enterprise owns." This formula hardly solves the question of what property is subject to liquidation.

There has been considerable debate as to whether all property in the possession of SOEs is subject to liquidation under the "operation and management" theory. Generally, the debate has focused on whether property generally, not any particular property, under the management of SOEs is subject to liquidation. Some have argued that it is. However, in

---

242 The ability to mortgage or otherwise use real property as security/collateral for loans is a closely related topic. See infra notes 320-325 and accompanying text.

243 Article 90 of the G.P.C.L. provides that "a lawful loan relationship is protected by law". Article 1 of the G.P.C.L. stipulates that parties are liable for breach of contract to the extent of loss caused by the breach. G.P.C.L., supra note 161, arts. 90.

244 Id. art. 47.

245 Id. art. 48.

246 Id. Keep in mind the fact that the local partners of these foreign-invested ventures are almost sure to be S.O.E.s, S.I.E.s, or collective enterprise.

247 Clarke, *Economic Law in China*, supra note 186, at 315-16. Professor Clarke contrasts the traditional view, limiting liquidation to liquid assets, with a variety of other views evidencing a willingness to subject incrementally more enterprise assets to liquidation. However, even these more progressive views do not consider the special attributes of real property in bankruptcy.
theory, a system of land use rights coupled with enterprise ownership of structures could answer this question with a definitive “yes”. This could be made possible by defining the liquidation status of these new classes of inherently transferable rights and avoiding the question of broader management rights altogether. Other factors permitting, there is no reason why, in a functioning use rights system, SOEs and other enterprises could not be liable for both wholly-owned separate housing property and real property “owned” in the form of long-term use rights.

The practical problem with the proposition that land use rights are available to satisfy debts is simply that a number of “other factors” are at work in China. One important factor is the willingness of the local land management bureaus to write use rights contracts which do not rule out altogether the transfer of use rights in case of liquidation. It is extremely difficult to insulate enterprise property from liquidation by contract in the U.S., but this surely poses almost no problems in China where the state generally, and powerful local officials in particular, claim ultimate control over the use and disposition of the property.

Where the treatment of SOEs differs to the greatest extent from all other actors (except, perhaps administrative organs) is in the opportunity to avoid liquidation altogether. However, even the difference here is one of degree rather than kind. The trial Enterprise Bankruptcy Law\textsuperscript{248} governs bankruptcy of state-owned enterprises, and provides a number of mammoth exceptions for state-owned enterprises facing the prospect of liquidation. In general, all SOEs which are unable to pay their debts because of poor performance and losses should be declared bankrupt upon application of the creditors.\textsuperscript{249} However, the SOEs exempted from this rule include those that, inter alia, are public enterprises, impact on national interests or people’s livelihoods, have guarantees, or whose DIC prefers reorganization to bankruptcy.\textsuperscript{250} Clearly, these exceptions swallow the rule in one gulp by potentially allowing responsible authorities to exclude from bankruptcy every state-owned enterprise in China.

A close reading of recent bankruptcy law in Shanghai reveals a similar, although much less generous, discretionary loophole in bankruptcies involving Sino-foreign joint ventures and wholly foreign owned enterprises.

\begin{itemize}
\item \textsuperscript{249} Id. art. 3.
\item \textsuperscript{250} Id.
\end{itemize}
The Shanghai liquidation provisions provide for "ordinary liquidation" implemented by the "board of directors or management body" when enterprise assets exceed liabilities.251 Special liquidation," on the other hand, applies when assets fail to cover debts — presumably the usual case. More important is how special liquidation is initiated. Although creditors can petition for special liquidation, it is not the creditors, courts, or the enterprise, but the "original application and approving authority" which "may determine that the enterprise is subject to special liquidation proceedings."252 As with SOEs, here too agents of the state at different levels have discretion in deciding whether to declare firms in their charge bankrupt.253

It is generally unlikely that the benefits of liquidation would outweigh the costs for these agents. Liquidation raises the possibility of having to stop production, distribute enterprise assets, and deal with the problem of displaced workers.254 Also, in the short term at least, bankruptcy may look especially unattractive in light of the fact that it can be avoided by simply withholding permission. Finally, and more broadly, bankruptcy itself will not be rational if it is applied to firms which themselves operate under price controls and other irrationalities.255 As to the first two factors at least, there does not seem to be much difference in the incentives of local government leaders/DICs when facing the liquidation of private or public firms. As a matter of fact, almost none of either have gone bankrupt in China.256


252 Id.

253 For an examination of the difficulties of declaring enterprises bankrupt under the Shenzhen rules, see generally Note, Bankruptcy of Foreign Enterprises in the PRC: An Interpretation of the "Rules Concerning Bankruptcy of Foreign Related Companies in the Shenzhen Special Economic Zone", 4 J. CHINESE L. 277, 289 (1990).

254 On employee welfare in bankruptcy, the national Trial Bankruptcy Law provides that: "The State will use various channels to make appropriate arrangements for the re-employment of the staff and workers of the bankrupt enterprise and will guarantee their basic living requirements in the period prior to their obtaining new employment." Trial Bankruptcy Law, supra note 248, art. 4.

255 "In a society of controlled prices, profits do not mean efficiency and losses do not mean inefficiency" because product prices may be artificially depressed and losses magnified. Clarke, What's Law Got to Do with It?, supra note 15, at 52.

256 By late 1990, only one collective and three state-owned enterprises had been declared bankrupt in China. Interpretation of Shenzhen Bankruptcy Rules, supra note 253, at 292 n.95. By 1994, it was estimated that almost one half of SOEs were operating at a loss, yet it was reported that only 52 had been declared bankrupt, "a tiny number." See The 'Bankruptcy Law' Is Having a Hard Time Taking Even One Single Step, BBC - Summary of World Broadcasts, Nov. 17, 1994, at FB/2155/S1, available in LEXIS, ASIAPC Library, CHINA File.
C. Housing Rights Reforms

Early in the history of the P.R.C., private ownership of housing was ostensibly permitted and protected subject to compliance with generally applicable government regulatory and administrative controls over use and disposition. While these legal and regulatory structures were for the most part destroyed before they were fully implemented, the same basic formula of private property rights is being resurrected to structure housing rights today. An array of new statutes define a growing web of urban house property rights possessed by diverse economic and political actors. Whether this process amounts to "privatization" is debatable, but privatization is not really the goal of these reforms. Rather, it is the value-driven use and exchange through commoditization and marketization of housing that is the goal of reform. The P.R.C. is attempting to prove, with some success, that this is possible without fully alienating ownership in public property.

1. The "new" definition of ownership

Deng Xiaoping put his mark on housing reform very early. In 1980, Deng set the general direction of future housing rights policy with a simple phrase: "urban individual residents can (keyi) purchase houses, they can sell them, and they can also benefit from them." This definition of urban private housing ownership rights has been implemented (and limited) by a number of laws and policies.

The basic structure of the "new" private individual housing rights was set forth in a rudimentary but broad form in the 1983 Urban Private Housing Management Regulations issued by the State Council. This law, as did those immediately after Liberation, has sections covering general principles, ownership rights registration, housing sales, leasing, and agency.

Housing ownership is defined in the 1983 Urban Private Housing Management Regulations, somewhat obtusely, in terms of persons and property. The regulations apply to private housing (si you fangwu) which, it is said, "refers to individually owned or commonly owned private-use or

rental residences and non-residential property.” 259 The state protects ownership rights in private housing property within the bounds of the law, and all units and individuals are prohibited from infringing or harming urban private housing rights. 260 Although this formula nimbly avoids defining its terms, we learn elsewhere that the right of “ownership” to be protected includes the right, as defined by law, to possess, use, benefit from and alienate housing property. 261 Furthermore, these and other regulations make it clear that government units in possession of public property, natural persons, and the range of legal persons may enjoy to varying degrees the rights constituent of housing ownership. 262

The right of ownership as outlined above is defined through the enumeration of duties and privileges in narrower substantive provisions of a variety of laws. As under earlier law, more limited rights relations are also possible, chief among which are the predominant form of urban residential housing right: leasehold interests in public property. Also as under early law, one of the most basic limitations on the housing leasehold and owner-

---

259 Id. art. 2.
260 Id. art. 3.

On the other hand, at least one official authority recognizes that these rights may be enjoyed independently, and for differing, limited durations. If they are, even their separate enjoyment may still be a species of protected “ownership.” See Chengshi siyou fangwu jianzao ji guanli wenti jieda [Explanation of Some Issues in Urban Private Housing Construction and Management] 18 (Urban-Rural Construction and Environment Protection Ministry, Urban Residential Housing Department ed., 1984) [hereinafter Explanation of Housing Issues].

262 The most important early example of this policy with respect to public housing stated that “state organs, state-owned enterprise and work units exercise (xingshi) the rights to possess, use, and alienate (chufen) state-owned housing, but at the same time they have the duty to protect state-owned housing from harm.” 1982 Provisional Recordation Measures, supra note 261, at 682-83.

Regulations promulgated in Tianjin offer a good example of more recent efforts to define units’ rights over public housing resources, and they do so expansively. The purpose of the regulations is to “strengthen urban housing management [and] protect the lawful rights and interests of units in housing,” and they stipulate that units may sell, transfer, rent or otherwise exchange their property subject to registration requirements and penalties for failure to fulfill those requirements. See Tianjini shi danwei zhouyou fangchan guanli banfa de tongzhi [Measures of Tianjin Municipality on the Management of Individual Unit Housing] (Published by the Urban-Rural Construction and Environment Protection Ministry, Nov. 1, 1986) arts. 1, 4, reprinted in ENCYCLOPEDIA OF REFORM, supra note 257, at 133 [hereinafter Tianjin Unit Housing Measures].
ship right is the ability of the state or its agents to confiscate housing property.\textsuperscript{263} While confiscation is still a common condition on all property rights, it is also true that many more actors enjoy broader and generally more secure property rights than previously. The following sections will examine the rights to purchase, register, and mortgage urban real property. These rights will be analyzed with respect to diverse governmental units and natural and legal persons in the urban economy.

2. New Entities: Property Development Companies

Although property development companies were probably already active in some areas, in 1984 they were formally sanctioned by the central government. Their task has been to acquire land use rights, develop and construct housing, and then either sell or rent the property to consumers. The 1984 Development Company Regulations called for the establishment of “more than two” development companies in all medium and large cities in order to encourage competition.\textsuperscript{264}

The range of actors allowed to develop and sell real property include authorized individual SOEs, foreign-invested enterprises and contractual or equity joint ventures — and foreigners and overseas Chinese are particularly encouraged to invest in these projects.\textsuperscript{265} Ownership of the resulting housing property varies according to who provides the necessary investments.\textsuperscript{266} Property development companies (development companies) are an important link in the progression toward the privatization of investment and ownership in newly constructed urban housing. Whether they really function as autonomous, profit-driven actors is, however, doubtful.

\textsuperscript{263} 1983 Urban Private Housing Management Regulations, \textit{supra} note 258, art. 4. This law’s requirement of compensation is consistent with narrower, if only slightly more detailed, legislation concerning the confiscation of urban land. \textit{See}, e.g., \textit{Guojia jianshe zhengyong tudi tiaoli} [Regulations Governing the Confiscation of Land for National Construction] (State Council, May 15, 1982), \textit{reprinted in Explanation of Housing Issues}, \textit{supra} note 261. Localities also have narrower legislation dealing with the confiscation of urban housing and land.


\textsuperscript{265} 1983 Shenzhen Commodity Housing Regulations, \textit{supra} note 212, art. 2.

\textsuperscript{266} \textit{Id.} art. 5. (houses built with “exclusive investment” belongs to the investor; housing built by joint ventures or cooperatives are shared by the parties; housing purchased by natural or legal persons belongs to the person).
The 1984 Development Company Regulations imparted development companies with significant, if conditional, formal autonomy. These regulations defined development companies as "enterprises or units with independent legal person status which exercise independent management, independent accounting, and independent responsibility for profits and losses, and which are economically responsible to the state."267 As for limits on autonomy, it is also true that development company managers are to be appointed by their department in charge, and managers themselves have limited appointment powers within the organization.268

Whether or not there is too much administrative control over land development companies may not be the point. As long as land development companies are encouraged to make profits, the real problem will not be one of stifling administrative control over land development companies. On the contrary, the chief danger may be that departments (or organs) in charge will undertake rent-seeking behavior to protect and benefit the company unfairly instead of playing as equals in the market. That is to say, development companies, through their DICs, may become so autonomous that they are able to evade strict administrative controls on licensing, pricing, operation or land use. On the other hand, it is likely that property development companies will to some extent also be subject to arbitrary administrative exactions along with other SOEs in the locality.

There is some evidence of difficulty in subjecting development companies to administrative and fiscal control. A 1987 notice on financial management of development companies is illuminating. This notice indicated, somewhat redundantly, that development companies should be subject to the management of local DICs with respect to profits.269 It also

---

267 Id. art. 1. Early regulations in Beihai described development in more general, but similar, terms:

[Commercial property development enterprises in compliance with relevant laws have] independent, autonomous operating rights and policy determination rights. The forms of their operation may be flexible and varied, in that agreements may be signed with units or individuals, pooled capital may be used to carry out construction or the enterprise's own funds may be used to undertake construction . . . of buildings for sale or lease.


268 1984 Development Company Measures, supra note 264, art. 16.

269 Guanyu jiajiang chengshi jianshe zonghe kaifa gongse zizhi guanli gongzuo de tongzhi [Notice on Strengthening the Work of Managing the Capitalization of Urban Construction and Development Companies] (Urban-Rural Construction and Environment Protection Ministry, State Industrial
called for immediate investigations into the fitness of all development companies, as indicated by their institutional resources (administrative relations should be definite and complete), capital resources, and technical personnel.\textsuperscript{270} Governments from the province on down were to both set the standards for and carry out these investigations.\textsuperscript{271} One can only presume that these exhortations were necessitated by circumstances.

At any rate, whatever the level of irregularity in this system, it is at least quite clear that innovative property development companies are fully empowered and able to purchase, operate and sell land and housing property, and hence to carry out their primary tasks. These companies also appear to be flourishing in the newly liberalized institutional environment created by the reforms.\textsuperscript{272} Substantive rights in housing are another important aspect of that environment, and will be considered next.

3. \textit{New and Old Rights in Urban Housing}

Three areas of legislation and administration are particularly important from an economic perspective. First, registration and recording measures decrease information and enforcement costs, and therefore preserve resources and investments by aiding in the recognition and exercise of rights and duties. Second, autonomous sale and transfer rights, coupled with reciprocal duties, are particularly important; they allow actors to maximize mutual benefits through the exchange of property. Finally, mortgage rights are another type of rights relationship that are also critical for housing finance and investment. The alienation of contingent rights in housing property the use of the house as collateral to reduce lenders' risks on the loan for the purchase or construction of the property.

The importance of all of these functional relationships has been recognized by the P.R.C. leadership, who have attempted to put in place the legal-institutional structures necessary to their cultivation. Their success has

\textsuperscript{270} Id.
\textsuperscript{271} Id.
\textsuperscript{272} If number is any indication of success, property development companies appear to be faring well. In 1988, Shanghai alone had 62 property development companies. See \textit{Housing Put on Sale at Shanghai Fair}, Xinhua, No. 0128173, Jan. 28, 1988, available in LEXIS, ASIAPC Library, CHINA File. Nationwide, it was reported that there were 3500 real property development companies in 1991. \textit{Reforms Spur Investment in Real Estate Industry}, Xinhua, No. 1215038, Dec. 15, 1991, available in LEXIS, ASIAPC Library, CHINA File.
been admirable, yet uneven. The following section will address each of these three areas in turn.

a. Housing registration

From an economic perspective, registration or recordation of property titles can be extremely valuable as a means of increasing certainty and decreasing transaction and enforcement costs.273 It also is an essential means of governmental supervision over real property resources; an especially important issue for the P.R.C. government which claims ownership of all urban land and a great deal of public housing as well as a high degree of control over diverse transactions in both land and housing. The P.R.C. leadership have thus vigorously sought to expand the legal-institutional systems of real property registration.

At the doctrinal level, the 1983 Urban Private Housing Management Regulations are ambitious. They require all housing owners to register their property as a threshold condition to the recognition of ownership rights, and that any transfer of rights be registered.274 These early national reform regulations did not provide that rights will be void if registration is not carried out, but instead denied the registration required for future transfers or other transactions if property rights are unclear or if any illegality (such as the failure to register) is subsequently discovered.275 Still, other local regulations make it clear that the range of public institutional actors may all register ownership interests in land and housing.276

The same basic rights structure is expressed in more detail in narrower national legislation dealing with housing registration. The 1987 Provisional Housing Ownership Rights Registration Measures apply to urban housing owned by public factories, administrative, military and enterprise units owned by the whole people, as well as to collective, private, and religious groups’ housing property.277 The regulations require all

273 For the arguments of two prominent Chinese scholars to this effect, see Lu Yimin & Wang Jincai, Reforming the Property Title System in China, 1992 JINGJI YANJIU [ECONOMIC STUDIES] No. 29 at 60, translated in JOINT PUBLICATIONS RESEARCH SERVICE: CHINA, No. 29, May 6, 1993, at 14, 15.
275 Id. art. 7.
276 See, e.g., Tianjin Unit Housing Measures, supra note 262, arts. 2, 3.
277 Chengzhen fangwu suoyouquan dengji zhanxing banfa [Provisional Urban Housing Ownership Right Registration Measures] art. 1 (State Council, Apr. 21, 1987) [hereinafter 1987 Provisional Registration Measures], reprinted in COLLECTION OF P.R.C. REAL PROPERTY LAW, supra note 158, at 706.
natural and legal persons to apply, within a limited but unspecified time, to the local land registration organ for an ownership rights certificate. As under the 1983 Urban Private Housing Management Regulations, after the production of appropriate proofs and satisfactory conclusion of an investigation, the local registration organ (dengji jiguan) is to issue ownership or rights certificates appropriate to the type of rights acquired.

Later national and local legislation has clarified some areas of ambiguity in the registration system and increased its reach. For example, the national 1991 Housing Recordation Measures attempt to clarify the effect of registration by providing that the failure to apply for registration where required (original and transactional) will render the rights in question void. These regulations also reaffirm and encourage the registration of public house property by allowing the "comprehensive registration" (zong dengfi) of property administered by housing management bureaus above the county level.

Later policy opinions have continued to encourage registration of housing rights by public entities in particular. One Ministry of Construction opinion urged the resolution of rights disputes and registration of rights in units, local housing management bureaus, and individuals in government housing. It may also be notable — if only for the confusion it engenders — that this opinion does not limit registration to natural or legal persons as did the 1983 Regulations. See Guanyu chengzhen fangwu suoyouquan dengji zhong jige buji zhengcixing wenti de yuanze yijian [Opinion in Principle on Some Policy Questions Concerning Urban Housing Rights Registration] (Ministry of Construction, Nov. 1, 1989), reprinted in COLLECTION OF P.R.C. REAL PROPERTY LAW, supra note 158, at 719-20.

1. 1987 Provisional Registration Measures, supra note 277, art. 3.
2. Id. art. 9. Note, however, that the delay of registration may be permissible if there are undefined "special circumstances." Id. art. 13.
3. See generally id. art. 7 (documents required), art. 6 (investigation and requirement of clear title for registration).
4. Chengshi fangwu changquan chanji guanli zhanxing banfa [Provisional Urban Housing Rights Recordation Measures], art. 18 (Ministry of Construction, Jan. 1, 1991), reprinted in ENCYCLOPEDIA OF REFORM, supra note 257, at 185 [hereinafter 1991 Housing Recordation Measures]. This provision appears to contradict and reverse a 1984 Supreme People's Court decision and the rule under the 1983 Private Housing Management Regulations that the failure to complete transfer registration procedures should not void, but only suspend, the transaction. See DICTIONARY OF REAL PROPERTY LAW, supra note 56, at 265 (private housing purchase and sale procedures).
5. 1991 Housing Recordation Measures, supra note 281, art. 11. It is not at all clear from the regulations exactly what this means, beyond the fact that individuals in the object housing must also register their individual rights. There is, however, no innate conflict in this multiplication of rights, because rights — whether as renter, owner, pledgee, etc. — can be specified in detailed contracts for each individual or unit. See DICTIONARY OF REAL PROPERTY LAW, supra note 56, at 316 (for a very vague definition of comprehensive registration). This need to police a diversity of non-standard contracts rights may, however, increase enforcement and information costs for both owners and housing administration officials.
Also potentially significant and useful (although not novel) is the 1991 Housing Recordation Measures’ explanation of the relationship between land and housing. In particular, the regulations provide that the underlying land use right should (yingdang) be transferred at the same time as the housing right.\textsuperscript{283} As put into operation in Shenzhen, this should mean that apartment house owners also own a proportionate interest in the use right to the land under their buildings.\textsuperscript{284}

To the extent that it is actually practiced by developers who own the land use rights in question, this coupling of land and housing rights could serve to ameliorate somewhat the inherent uncertainty introduced by the separation of ownership in land and housing. It could also provide increased value for long-term investors who are concerned about the disposition of their equity interest if the building is destroyed before expiration of the land use contract. But it would achieve these benefits at the cost of flexibility to property rights owners who may wish to alienate their fractional interest in the land use right.

The 1991 Housing Recordation Measures also contain enhanced enforcement provisions. The regulations provide for administrative penalties for failure to register housing, which were omitted from the 1987 Provisional Registration Regulations, but it is left to municipalities to specify the penalties to be assessed by the local housing administrations.\textsuperscript{285}

\textsuperscript{283} 1991 Housing Recordation Measures, \textit{supra} note 281, art. 6 (transfer generally). \textit{See also} arts. 7 (division), and 8 (mortgage).

\textsuperscript{284} \textit{See} Guanyu jiaqiang shenzhen jingji tequ fangdichan shichang guanli de shixing guiding \textit{[Trial Regulations of the Shenzhen Special Economic Zone on Strengthening the Management of the Real Property Market]}, art. 26 (Shenzhen Municipal People’s Government, July 13, 1989), \textit{in} 3 CHINA L. & PRAC. 51 (author’s translation, Dec. 11, 1989) \textit{[hereinafter 1989 Shenzhen Real Property Regulations]}.

Paradoxically, these regulations offer a definition of this relationship both more precise and more confusing than that in the 1991 Housing Recordation Measures. Article 26 of the 1989 Shenzhen Real Property Regulations states: “If a building is subdivided and rights assigned (fenge zhuanrang), each real property owner possesses (zhanyou) a proportionate percentage of the land use right.” This seems clear enough on its face, and could be easily implemented by granting fractional interests in the land use right. On the whole, however, this section raises more problems than it solves, because it immediately follows with a provision stating that “the use right to the land occupied by the building cannot as a whole be divided” (suo zhanyong de tudi shiyongquan zhengti bu ke fenge). \textit{Id}. If this means that the land use right cannot be subdivided, it contradicts the immediately preceding passage, and if it means that the land use right cannot be separated from the building ownership right, it is redundant.

\textsuperscript{285} 1991 Housing Recordation Measures, \textit{supra} note 281, art. 19. Local housing administrators are empowered to assess penalties for registering unregistrable housing, for the failure to register where required, for forgery of rights certification documents, or for infringement of the provision on comprehensive registration by housing administrations. \textit{Id}.

In Shenzhen, article 48 of the Commercial Premises Administration Regulations provides for fines of up to Rmb 5000 for the unauthorized use of commodity housing. \textit{See} 1989 Shenzhen Real Property Regulations, \textit{supra} note 284, at 66. \textit{See also} Tianjin Unit Housing Measures, \textit{supra} note 262, art. 12.
The 1991 Housing Recordation Measures also provide that housing rights disputes may either be arbitrated before the local housing arbitration organ or submitted for decision to the People's Court. Even more significantly, these regulations provide that individuals dissatisfied with administrative decisions may request reconsideration in accordance with the Administrative Procedure Law or file suit in the People's Court.

Unfortunately, this whole system still has a weak foundation, most obviously because in the area of recordation itself the 1991 Housing Recordation Measures can do little more than specify who has jurisdiction and encourage them to implement the necessary reforms. In fact, most municipalities responsible for registration have never had a functioning modern registration system, and hence lack the expertise and infrastructure necessary for recordation. As recently as 1987 Shenzhen was reported to be beginning a comprehensive land and housing survey. A more general deficiency is apparent in the fact that China's first 130 official real estate appraisers were commissioned in 1993, yet over U.S. $12 billion was invested in Chinese real estate development in 1992. Even more compelling proof of the backwardness of registration is provided by a recent official estimate that more than 80% of all cities had not met plans for real property rights registration and certification.

One result of the underdevelopment of registration law and administration is that registration may often be extremely costly. In many places it

(providing for a fine of 1% of the housing value per month beyond the initial 30-day grace period for registration following the law's promulgation).

286 1991 Housing Recordation Measures, supra note 281, art. 20.
287 Id. art. 13.
288 Id. art. 13.
289 The central government, at least, has been acutely aware of this deficiency for some time. A 1986 report from the ministry responsible for housing reform stated that "since the country's founding, except for a small number of cities, the vast majority of urban areas have not carried out property rights registration and issued [approved] rights certificates." Guanyu kaizhan chengzhen fangchan chanquan dengji, hefa chanquanzheng gongzuode tongzhi [Notice Concerning the Work of Developing Urban Housing Rights Registration and Issuing [Approved] Property Rights Certificates] (Urban-Rural Construction and Environment Protection Bureau, Feb. 5, 1986), reprinted in CHINESE REAL PROPERTY POLICY, LAW & PRACTICE, supra note 131, at 258.
290 Shenzhen to Register Land and Housing, Xinhua, no. 0922042, Sept. 22, 1987, available in LEXIS, ASIAPC Library, CHINA File. It was reported that the housing survey "will involve registering offices and housing of administrative bureaus and enterprises and their funds for housing," and expected that "the survey . . . will lead to a complete commercialization of housing and offices."
292 See COLLECTION OF P.R.C. REAL PROPERTY LAW, supra note 158, at 725. The same notice also urged local leading organs to implement comprehensive registration as soon as possible.
may be very difficult and impossible to effectively and securely register and value housing rights, even if owners wish to do so. Registrants must deal with often corrupt and unresponsive bureaucrats, and the denial of registration could potentially mean the complete invalidation of property rights. Thus, where these cost factors do not actually make registration superfluous to the owner(s), it will only be because the perceived benefits of registration are correspondingly greater.

It is possible to specify with confidence some of the factors which may make registration more valuable to both individual owners of all types and to local governments. First, the opportunity cost of registration to individuals, will increase, and transaction costs and enforcement costs will decrease, as administrative recordation and investigative capacity increases. Registration also creates value for owners as arm's length secondary market transactions increase, and buyers seek a sure, public means of verifying property rights. Finally, insofar as registration is a major point at which local governments extract value from property rights transactions, it will be particularly beneficial when pursued by jurisdictions undertaking the privatization and commoditization of substantive rights which are prerequisites to such transactions.

293 This difficulty may be felt most acutely by foreigners. A study by the Economist Intelligence Unit stated: "Lack of public access to transaction records creates uncertainties in verifying ownership rights. Lack of access to zoning plans, town planning reports and plot ratios are frequent complaints of foreign investors." Economist Intelligence Unit: Business China, Property Law: Ground Rules, Oct. 4, 1993, available in LEXIS, ASIAPC Library, CHINA File.

The transaction costs of rights verification could be significant. Among the assorted documents used to establish ownership rights are maps and descriptions of the property, old property rights transfer contracts and registration certificates, new construction licenses, proof of inheritance, or any other material valuable in establishing ownership rights. See DICTIONARY OF REAL PROPERTY LAW, supra note 56, at 314 (chanji, property recordation). This diversity, as with administrative difficulties generally, is inevitable because China has not had effective registration in the past, and the new system is still in transition and some confusion.

294 Official corruption is widely recognized as a pervasive phenomenon in reform-era China. For a good examination of its manifestations and causes, see generally Helena Kolenda, One Party, Two Systems: Corruption in the People's Republic of China and Attempts to Control It, 4 J. CHINESE L 187 (1990). Corruption is no less prevalent in the area of housing and land use, reflecting the weakness of the basic institutional structures at the local level and continuing ability of cadres to undertake rent-seeking behavior. In the field of housing, corruption is most often reported when officials use their positions and influence with local enterprises and administrations to build housing illegally. One exemplary report noted that "local cadres who build private houses seldom pay land use fees or follow the procedures laid down by state lawmakers for construction and development," and that the large number of cadres (7 out of 10 in one area) building homes at preferential prices "has resulted in entire mansion villages springing up in some places." Officials Accused of Building Houses with Public Funds, Xinhua, Nov. 16, 1988, available in LEXIS, ASIAPC Library, CHINA File.
All of these conditions hold most strongly in the most advanced areas with the fullest legal-institutional reforms (Shanghai, Shenzhen, and other open or experimental cities), but the cumulative benefits under this system are available everywhere the old system is in place. This fact should help significantly in the effort to motivate local governments to experiment with this and other individuating housing rights reforms.

b. Sale and transfer of housing rights

Much as did early post-Liberation urban housing legislation, the reform housing regulations provide that under prescribed conditions housing rights owners may sell, mortgage or otherwise transfer the right to possess, use, and benefit from their housing. The right to sell or alienate property in autonomous profit-driven transactions is particularly important as a prerequisite for the creation of public housing as a commodity and the creation of housing markets. Unfortunately, the new laws impose significant burdens on some of these transfer rights. Also, some of the confusion and uncertainty endemic to registration generally also infects housing sales.

The 1983 Urban Private Housing Management regulations, while allowing housing sales by owners, also purport to control the particulars of every sale of housing rights. These regulations require that all housing sales be approved and registered by the seller and buyer in order to have legal effect. Other provisions prescribe the special conditions for sale of

---

295 Property rights transfer (chanquan zhuanyi) is a generic term encompassing any property rights transaction, including outright purchase and sale, exchange in kind, gift, and inheritance. The discussion below and in following subparts will focus on sale and mortgage of housing.

296 One area of beneficial rights transfers which will not be discussed at length below is that of private leasing. Rental is being discouraged for newly privatized public housing, and far fewer people rent than own private property. See, 1983 CHINESE SOCIAL STATISTICS, supra note 95, at 97 tbl.2 (only 2.2% of workers and staff rented private [individual] housing in 1983). See also, ZHONGGUO SHEHUI TONGJI ZILIAO [CHINESE SOCIAL STATISTICAL INFORMATION] 101, tbl.2 (State Statistical Bureau, Social Statistics Dep't ed., 1990) [hereinafter 1988 CHINESE SOCIAL STATISTICS] (only 2.3% of workers and staff rent private [individual] housing).

Still, rent relations are pervasive in the public sector, and at any rate, all of the reform-era housing rights laws recognized substantially similar rent rights in housing owners of all descriptions. These regulations all include the necessity for contracting, and specify default rights and duties for repairs and payment, termination of the contract and breach, and for disposition of the property by the landlord. See generally, 1983 Urban Private Housing Management Regulations, supra note 258, arts. 15-22.

297 1983 Urban Private Housing Management Regulations, supra note 258, art. 9. Seller and buyer must also both produce documentary proofs in order to gain registration. The seller must produce a ownership rights certificate and personal identification, while the purchaser must provide personal identi-
jointly owned and rental property. Also, the price terms of sales transactions must comply with local standards, and are subject to direct approval by local housing management organs. More puzzling still, organs, associations, military units, SOEs and work units are prohibited under the 1983 regulations from directly or covertly purchasing private housing property unless they face special circumstances and receive approval from the people’s government above county level.

A final restriction in the 1983 Urban Private Housing Management Regulations is also particularly germane (and inappropriate) in light of the ongoing efforts to sell public commodity housing to individuals. These regulations provided that individuals enjoying government, work unit, or enterprise housing subsidies or who purchase or construct housing at reduced prices could only sell the property to the original unit or local housing management bureau. This type of compulsory sale would substantially emasculate the right to sell this property, which is one of the constitutive features of housing ownership under all definitions. Consequently, this policy appears to have been widely abandoned in favor of a formula merely prohibiting housing sales within a specified time period and giving the owning unit a right of first refusal.

While they omit some of these early restrictions, later local legislation retains strong governmental controls in many areas. The Shenzhen regulations offer some examples. The 1989 Shenzhen Real Property Regulations prohibit a wide range of individuals from purchasing commodity residential property (shangpin zhuzhai), including those lacking...
Shenzhen household registration, peasants with land, those who already own or rent commodity housing at subsidized prices, and minors. While foreigners and overseas Chinese may purchase commodity housing, the number of foreign-owned commodity houses may be limited by the Shenzhen Municipal Construction Bureau. The Construction Bureau is also empowered to grant the housing purchase approval which is required for the (necessary) registration of foreigners’ property rights with the Municipal Land Registry.

The 1989 Shenzhen Real Property Regulations also empower the local government to set the prices and profits in real property sales transactions. The price of real property sold for the first time by the government is determined according to a cost-plus formula: cost + planned profit + sales tax. Under privatization, a great deal of house property will be sold for the first time, and this cost-plus formula is very favorable for local government because it allows the municipal government to avoid setting upper limits on its own or its branches’ profits from initial real property sales.

The Shenzhen Real Property Regulations limit profits from secondary land transactions through the application of substantial transfer fees on profits from housing sales. These fees do not limit price, but instead allow the government to fix its profits by providing for a sliding fee scale based on the owner’s net profit. Profit is limited to 300% of the owner’s basis in the land, and the government itself determines the depreciation and other values in the applicable formula. This should allow the municipal government significant flexibility in fixing its profits from aftermarket transactions, just as it does in primary use rights sales by the state.

---

305 1989 Shenzhen Real Property Regulations, supra note 284, art. 36. Household registration is not housing rights registration. It is administrative proof of one’s permission to reside where one does — i.e., at a particular address and/or work unit in the SEZ.

306 The standards for granting this housing purchase permission to foreigners are not specified. Id. art. 40. Registration is required for any and all housing sales, regardless of the actors’ nationalities. See id. arts. 46 (registration of allocated land), 17 (registration in the advance sale of real property), 28 (rights in sales transactions not protected without registration).

307 Id. art. 31 [emphasis supplied].

308 Id. art. 30(iv).

309 The land use rights transfer fee for secondary market transactions varies according to the excess of the current over the previous sale price adjusted for capital improvements and depreciation. Id. The tax varies from 40 to 100% of net profit so determined, and is set at 100% on any value [profit] in excess of 300% of the original sale price. Id. art. 30. The fee derived from this calculation is determined by the Municipal Land Registry, to which the applicant can apply for a reappraisal. Id. art. 32.

310 Note that a profit-maximizing municipality or administration in this situation can increase fees only to a point. If fees drive up marginal costs to a point where they exceed the seller’s opportunity costs, no transaction, no registration and no profits will be forthcoming.
In the final analysis, while these layers of regulations significantly clarify and enable the exercise of urban real property owners’ transfer rights, they also clarify the government’s continuing willingness to burden these rights in order to maintain administrative and fiscal control over housing rights use, transfer, price, and profits. However, if one’s goal is to create property markets, the fact that property sales are booming precisely where these laws and institutions are most developed suggests that they are a significant part of the solution, not the problem. Regulations enabling the advance sale of commodity housing have contributed more directly toward this end in advanced reform areas.

3. Advance sale and mortgage of housing property

Relatively early in the reform period, so called “commodity housing” (shangpin fangwu) constructed by approved real property development companies became the subject of special regulations intended to facilitate the construction and marketization of this housing property. Reform regulations allow property development companies to acquire land use rights, construct housing, and sell housing property (even in advance of its actual construction) or own and rent it as a property manager. Purchasers at both levels are also allowed to use the rights so received as security for loans for the purchase price of the land use or housing ownership rights.

The result is a complex of subtle property rights comprising a nascent system for financing real property development, construction, and purchase through the collateralization of real property rights. Another result is con-
fusion in the developing but still incomplete area of housing conveyance and finance law.

(1) Advance sale

The first regulations permitting both the advanced sale and mortgage of commodity housing were the 1983 Shenzhen Commodity Housing Regulations. As for advanced sale, under these and subsequent regulations a "house property operator" possessing a "Land Use Certificate" and "Housing Construction Permit" can enter into contracts for the advance sale of houses if it meets certain capitalization requirements. In Shenzhen, the proposed advanced sale must be approved by the Municipal Land Registry, and advance sale contracts must be signed indicating the exact location and limits of the housing, price and payment terms, the expected date of completion, and liability for breach, among other matters. Even under these and other enabling regulations, significant questions remain about the actual importance and functioning of these rights among the government organs, development companies, work units, and individuals involved.

There is significant risk here for potential housing purchasers. Under the 1989 Shenzhen Real Property Regulations, for example, if the housing development company fails to receive prior approval for these sales, the advance sale contract could be declared void and the development unit or individual fined by the Municipal Land Registry. No provision is made in these regulations, at least, for restoring the purchaser and mortgagor to their investments if the developer breaches this condition: although they should logically be returned to their pre-contractual positions, especially if the developer is clearly at fault and solvent. Neither is any indication given

---

313 Id. art. 10. Property development companies always acquire land use rights either from the government or work units in possession, and always through the local land administration bureau. Significantly, negotiation, initially the only method of determining purchaser and price, has increasingly been supplemented by the use of tender and auction for property sales in some urban areas. See Land Lease Deals Benefit China's Development, Xinhua, no. 0520031, May 20, 1990, available in LEXIS, ASIAPC Library, CHINA File (stating that about 40% of the land leasing [i.e., land use rights] deals thus far had been conducted through auction or public bidding).

314 1989 Shenzhen Real Property Regulations, supra note 284, art. 17.

315 See 1983 Shenzhen Commodity Housing Regulations, supra note 212, art. 10(4), (requiring that the property operator have 20% of total budget for current stage of construction on deposit with Shenzhen bank before commencing advance sales), art. 10(3) (house property operator must open special account for proceeds of advance sale), art. 11 (contract terms generally).

316 1989 Shenzhen Real Property Regulations, supra note 284, arts. 17, 19.
as to the consequences of defects in contract formation, but even if defects also void these advance sales contracts, general principles of contract law would still seem to allow the possibility of restitution from whichever party is in breach.

Registration responsibilities with respect to the advance sale are divided among purchaser and seller, and this raises interesting questions about the multiplication of rights in these transactions. Within thirty days of entering into a land use contract, the developer must apply for a land use rights certificate from the Municipal land administration. The real property developer is also to undertake the "general registration" of the building, and within thirty days must give notice of the general registration to advance purchasers and enter into "Real Property Assignment Contracts" (fangdichan zhuanrang hetongshu) with these purchasers. The housing purchaser must register his advance purchase with the Shenzhen Municipal Land Registry within fifteen days of the effective dated of the advance sale contract. Finally, within thirty days of the effective date of this transfer contract, "the parties" (dangshi ren) are to register the transfer and receive new Real Property Certificates (fangdichan zheng). The 1989 Shenzhen Real Property Regulations also prohibit advance purchasers from reselling their property before obtaining this Real Property Certificate.

The net result of these transactions is registration of the developer's right to use the underlying land, registration of rights in the building as a whole in housing development companies and/or units, and the registration of individual purchasers' housing property within the building. Also, individual interests may or may not include interests in the building or land use right. This point highlights the potential confusion in this web of rights.

If the individual householder's fractional interest in the land is merely specified in the housing transfer contract and recorded with its registration, convenience is served because no notation need be made on the underlying land use or general building registration records. However, because registration is nine-tenths of ownership under this new system, it is simply not clear that registration of a housing right alone is sufficient to secure land use rights. The same point is true, of course, of individual rights in buildings, structures, fixtures, attachments, common areas or, even more abstractly, building funds.

317 Id. art. 22.
318 Id. art. 23.
319 Id.
Even if contractual or statutory solutions to these complexities are possible, this system of registering advance sales of housing property still fails to fully provide for the condition that each apartment owner in a subdivided building should have a proportionate interest in the underlying land. It also creates a great deal of general confusion about the relationship between the rights and duties created in this series of overlapping registrations. This confusion is multiplied when mortgage rights are added to the mix.

(2) Mortgage of commodity housing

The 1983 Shenzhen Commodity Housing Regulations have the distinction of being the first legislation in the P.R.C. to sanction the mortgage of commodity housing purchased in advance sales. As the details of this practice are worked out over time, this basic approach should provide a powerful means of financing new construction. It will also create new rights, complexity, uncertainty, and opportunities for conflict.

320 See Christopher G. Oechsli, The Developing Law of Mortgages and Secured Transactions in the People's Republic of China, 5 CHINA L. REP. 1, 8 (1988). While this is undoubtedly true of commodity housing, the practice of mortgaging real property has old roots in China which were never completely eradicated by the socialization of urban real property commencing in the mid-1950s. Indeed, it is somewhat ironic that while a great deal of statutory ink has been spent in the reform period defining the basic rights to own, register, and alienate (including mortgage) real property, mortgage rights disputes have remained common fare in the courts throughout.

For examples of mortgage disputes from 1984 to 1989, see ZHONGGUO DALU FAGUI BIAN [COLLECTION OF MAINLAND CHINESE LAW] 160-63 (Chen Changwen ed., Wunan Tushu Chuban Gongsi [Wunan Library Publishing Company], 1992). For even more diverse examples of mortgage policies and disputes, see REAL PROPERTY POLICY, LAW & PRACTICE, supra note 131, at 216-48. A significant proportion of the reported disputes appear to be caused by the absence of specified periods in the original agreements. Confusion around this issue further infects latent disputes over redemption rights.

It is debatable whether a real property mortgage right could be found in the penumbra of the general transfer rights granted in early reform legislation. Notably, though, none of the major reform-era national civil laws or real property laws either explicitly provided for or even mentioned mortgage rights. The word “mortgage” does not appear in any form in the 1982 Provisional Recordation Measures or the 1983 Urban Private Housing Management Regulations. The more comprehensive 1983 regulations mention the registration (and hence recognition) of new construction, construction expansions, sales, purchase, exchange, inheritance, division, and demolition, but not mortgage, of house property. See 1983 Urban Private Housing Management Regulations, supra note 258, art. 7. Neither are mortgage property transactions or rights mentioned in the 1987 Provisional Registration Measures, the G.P.C.L., or even the 1991 Housing Recordation Measures. Nevertheless, as will be seen below, the lack of express national support for mortgage rights has not prevented provincial and municipal governments and banks from recognizing significant mortgage rights in real property.

For comprehensive explanations of many aspects of the traditional pledge rights under diandang and security rights under dianya, see DICTIONARY OF REAL PROPERTY LAW, supra note 56, at 250-61.

Mortgage loan transactions are largely a matter of independent agreement under the early Shenzhen and later regulations.\textsuperscript{321} Mortgage rights and duties are created upon the completion of application formalities at the bank, and the 1983 Shenzhen Commodity Housing Regulations specify the types of terms that should be provided for in the written mortgage agreement.\textsuperscript{322} Significantly, state-owned enterprises, foreign nationals, overseas Chinese, foreign enterprises, cooperatives, or any natural or legal persons investing in Shenzhen house property may own and mortgage commodity housing property.\textsuperscript{323} The regulations promote these transactions by allowing commodity housing to be mortgaged even by purchasers in advanced sales.\textsuperscript{324} It was only later, however, that regulations in the localities expressly permitted the mortgage of land use rights.\textsuperscript{325}

The ability to mortgage commodity housing in advanced sales should in theory be particularly useful as a method of financing new housing purchases, although the process appears backward and raises significant questions. The early Shenzhen regulations provide that in the advance sale of housing the mortgagor (purchaser/debtor) and mortgagee (bank/lender) should first sign a mortgage contract.\textsuperscript{326} The mortgagor then receives a “Housing Property Rights Certificate” from the local housing administration based on his or her “house property contracts.”\textsuperscript{327} Presumably, this certificate will serve as proof of ownership (title), but it is not clear what contracts — land use, housing mortgage, housing purchase, etc. — are required for

\textsuperscript{321} A year and a half after the Shenzhen Commodity Housing Regulations were released, the Beihai Municipal People’s Government also issued commodity housing regulations allowing the mortgage of this type of property. \textit{See} Beihai Property Measures, \textit{supra} note 267, art. 5.

\textsuperscript{322} Shenzhen Commodity Housing Regulations, \textit{supra} note 212, arts. 18 (application procedure), 19 (necessary mortgage contract terms).

\textsuperscript{323} \textit{Id.} arts. 2 & 5 (specifying different loci of ownership of commodity housing rights), and arts 18-26 (on mortgage rights exercised by house property owners).

\textsuperscript{324} \textit{Id.} art. 20. Similar provisions for the mortgage of property for advanced sale are included in the Beihai regulations. \textit{See} Beihai Property Measures, \textit{supra} note 267, art. 19.

\textsuperscript{325} Later Shenzhen regulations reinforced this presumption. For example, Article 24 of the 1989 Shenzhen Real Property Regulations, \textit{supra} note , art. 24, which expressly prohibited the mortgage of land use rights.

Nevertheless, bank mortgage loan regulations have sanctioned the mortgage of land use rights since at least 1988. \textit{See}, e.g., Shanghai Provisional Regulations on RMB Loans Secured by Mortgages, art. 6 (promulgated June 9, 1988 by the People’s Bank of China, Shanghai Branch), \textit{translated in} E. ASIAN EXEC. REP., Sept. 15, 1988, at 24 [hereinafter 1988 Shanghai B.O.C. Mortgage Loan Regulations] (“mortgageable property” includes “buildings and other structures on the land” as well as “land use rights”). These bank regulations also permit mortgage of commodity housing in advance of sale. \textit{Id.} art. 8.

\textsuperscript{326} \textit{See} Shenzhen Commodity Housing Regulations, \textit{supra} note 212, art. 20.

\textsuperscript{327} \textit{Id.} Similarly, the Beihai regulations require a “property owner who has a sales contract and a certificate of property rights” to apply to a Beihai registered bank for a mortgage loan. \textit{See} Beihai Property Measures, \textit{supra} note 267, art. 19.
the grant of the certificate. At any rate, the mortgagor is next to turn over the property rights certificate to the mortgagee "for preservation," and the mortgagee is to make the payments specified in the mortgage contract.328

This arrangement may not look very attractive to potential investors. Its apparent result is to leave the owner with possession of the property and contracts for its purchase and mortgage. The mortgagee, however, holds the ace because he retains the certificate of ownership to the property. In addition, the mortgagor is dependent on the mortgagee to pay the stipulated contract price to the seller: a potential concern in a developing banking and creditor-debtor rights systems. Both of these situations, the fragmentation of ownership proofs and payment responsibilities, create imbalances in the relationship and could spawn confusion and disputes. On the other hand, both parties are surely in a much better initial position acting under these regulations than if they had no contract, registration or recognized rights at all, as was true in the past.

The 1988 Shanghai B.O.C. Mortgage Loan Regulations, while significantly clarifying some areas of substantive mortgage rights, create even more confusion as to how these rights in different property and actors are related. These regulations clarify issues with respect to mortgage ratios,329 mortgage loan contracts,330 possession and use of the property,331 disposition of mortgaged property on breach,332 and liabilities and conditions for breach of contract.333 The Shanghai Regulations also make clear that these rights and liabilities can now be exercised by each property rights holder in these transactions, and herein lies the source of their confusion.

Under the Shanghai Regulations, land use rights, buildings and housing can all be mortgaged by their respective owners, even in advance of construction. These regulations provide that land can be mortgaged on the strength of land use contracts.334 As indicated previously, land use rights can be held by diverse actors, from individuals to government work units: but state-owned enterprises, at least, need permission before mortgaging

328 See Shenzhen Commodity Housing Regulations, supra note 212, art. 20(3). One can only guess from these regulations that the mortgagee is then to pay the seller the contract price, but this will surely be provided for in the mortgage contract itself.
329 See generally 1988 Shanghai B.O.C. Mortgage Loan Regulations, supra note 325, ch. 3.
330 See id. ch. 4.
331 Id. ch. 5.
332 Id. ch. 6 (the conditions for breach include failure to pay the loan principle and interest and the declaration of the mortgagor's bankruptcy or dissolution, art. 26)
333 Id. ch. 7.
334 Id. ch. 2, art. 8.
their fixed assets.\textsuperscript{335} Contractors, on the other hand, can mortgage buildings on the strength of either certificates of building ownership or, in advance of construction, construction contracts.\textsuperscript{336} Finally, individuals can use the pre-sale agreement (advance sale contract) as collateral for loans from local banks.\textsuperscript{337} The result of these layers of rights may be, among other things, to allow the separation of land use rights and housing rights. This would violate a fundamental tenet of Chinese urban real property doctrine, but this fact may not present as much of a problem as the sheer confusion engendered by this system.

Potentially, if the land use right alone is used as collateral and the mortgagor breaches, the bank could foreclose on the land use right alone. Unless a land use mortgage somehow magically (or by rule) concurrently gives rights in buildings, the result is a transfer of a valuable interest in land without the transfer of an interest in the buildings attached thereto. The same result follows if the mortgagee of the building is allowed to take rights in and foreclose on the building alone.

Any foreclosure on interests in the land or building may impact individuals common whole and individual fractional interests in unpredictable ways. Individuals are to own a pro-rata interest in the land use right, yet that land use right as a whole can be mortgaged by developers and presumably foreclosed upon by mortgagee banks. Individuals may also own common rights to the building depending on their purchase contract, yet developers can mortgage buildings in their entirety. It is simply not clear from these regulations how all of these rights are to be accounted for and related.

The only conclusion that can be drawn from this morass is that it looks set to create significant difficulties in future mortgage foreclosures. Only with clearly defined rights and duties spelled out in a series of closely integrated interlocking agreements or statutory provisions will this confusion be rectified. Nevertheless, as in other areas, it is still true that the reforms have served to significantly diversify the scope of real property mortgage rights, the property to which mortgage rights can attach, and the variety of actors empowered to exercise these rights; all of which amounts to further privatization. The reform of public housing has similar goals, and much more explicitly so.

\begin{flushleft}
\textsuperscript{335} Id. ch. 2, art. 9.
\textsuperscript{336} Id. ch. 2, art. 8.
\textsuperscript{337} Id.
\end{flushleft}
4. Public Housing Reforms: Rent Reform and Subsidized Sales

In reform-era China, the state very much wants to sell off public housing (both old and new) to individuals in order to decrease the fiscal burden on the state and its agents. Although the refurbished rights structures outlined above go some way toward encouraging private investment, their mere publication has not been sufficient to significantly encourage individual investment in public housing.

Although it might seem a truism that individuals would rather own their homes than rent them, this is not necessarily so in China. In China after Mao, the fact that the average lessee spent roughly as much of their incomes on newspapers and magazines as on rent meant that individuals have had very little incentive to spend more money in order to purchase existing or new housing.338 Also, given the reports of the general state of disrepair in the housing stock, it would not be surprising if people were unwilling to pay more for roughly the same privilege to live in the same hovel. Finally, the same low wage rates that initially necessitated low rents have also meant that most households could not afford to pay the real costs of their housing even if they wished to purchase it.

The leadership’s solution to these difficulties has been to attempt to couple rent reform with the subsidized sale of housing.

a. Rent reform

Very early in the reform period, when public housing administrations were still in disarray, there was very little that the government could do in the way of rent reform. The national government’s only response to the problem of low rents was to call for the revival of the policy of “using rents to develop housing” (yi zu yang fang).339 This was the policy, adopted in the immediate post-Liberation period but subsequently widely ignored, which called for the collection of rents by government units and enterprises

338 Official statistics estimate that in 1981 average spending on books, newspapers and magazines was .95% of annual wages, while average spending on rent was slightly higher, at 1.39% of annual wages. 1988 CHINESE SOCIAL STATISTICS, supra note 296, at 92.

in amounts which would at least pay the costs of housing. The formula promoted in the early 1980s was substantially the same, and likewise called for rents to include a component for depreciation, repair and management fees, taxes, and interest.

Perhaps in realization that rents could not simply be unilaterally raised without raising wages, all of the subsequent rent reforms have combined city-wide rent increases with some sort of subsidy to compensate for the increase. Rent increases are seen to be essential in motivating people to purchase housing or, failing this, at least to conserve housing and not use more than they need. Subsidies are used to soften the burden of these increases on individuals, but in doing so undermine a basic purpose of the rent increases — to conserve government fiscal resources by shifting housing costs to individuals and enterprises.

In Yantai, the most famous experimental city, rents increased from an average of 0.073 yuan (2 cents) to 1.17 yuan (31.5 cents) per square meter of living space in 1987, and were made to vary by quality, location, and other factors. Here and in other areas, work units or local governments provide a subsidy that is paid to landlords, and hence to workers, in the form of either cash payments or coupons in an amount at or just below the rent increase. These rent increases, as well as the proceeds from housing sales, then serve as one source for housing funds and developments managed by enterprises and municipalities. However, it is also intended that these government subsidies gradually be reduced, leaving units to pick up the difference. Most recently, rent increases and countervailing subsidies have increasingly been supplemented by forced contributions to

---

340 See supra notes 64-75 and accompanying text on the genesis and fate of this policy in the early post-Liberation period.
342 David Holley, Reform Goal: Ending Subsidies; Some Raise Roof as China Raises Rents for Housing, L.A. TIMES, Dec. 8, 1987, at A1 (reporting on the rent increases implemented in Yantai). Most notable among the local plans, because it served as the basic model for others, is that developed and gradually implemented by Yantai Municipality in Shandong Province. See Yantaishi chengzhen zhufang zhidu gaige shixing fangan [Experimental Plan of Yantai Municipality for the Reform of the Urban Residential Housing System] (published by the State Council on July 20, 1987), reprinted in COLLECTION OF P.R.C. REAL PROPERTY LAW, supra note 158, at 855.
work unit housing funds, but these extractions may also be offset by equivalent subsidies.\textsuperscript{345}

There are obvious limits to the effectiveness and appeal of this system. Most clearly, as long as subsidies rise as fast as rent, rent cannot be used as a lever to encourage housing purchases, although the threat of future unsubsidized rent increases may serve to encourage some to purchase housing in advance of further rent reform. Another difficulty is that while this policy avoids shifting costs to individuals, it does so at the cost of enterprises, work units, or local governments who provide the rental subsidies. Because the rent subsidies ultimately come from local governments, only those with sufficient funds are able to implement this policy in its full form.\textsuperscript{346} Perhaps it is for this reason that some governments have begun the reforms in factories which "own the bulk of houses . . . and can afford to carry out the reform."\textsuperscript{347} At any rate, the success of this "beneficial cycle" of increasing rents, funds, investment, and purchases clearly depends upon the wealth of the local governments, enterprises, work units, and individuals involved.

It is perhaps not surprising given these difficulties that the reforms have not generally succeeded in significantly increasing rent rates. What is surprising is that spending on rent has actually decreased as a percentage of total consumption. This is not a good sign for the reforms. Official statistics indicate that average per capita rental expenditures increased from 6.36 yuan per year in 1981 to 7.83 yuan per year in 1988: an increase of almost one-quarter.\textsuperscript{348} However, while rental expenditures accounted for 1.39\% of total household expenditures in 1981, rent accounted for only 0.71\% of household expenditures in 1988: a decrease of almost one-half.\textsuperscript{349} Another indication of continuing low relative rent rates is the fact that in 1991 citizens even in relatively affluent Shanghai still on average spent more than

\textsuperscript{345} \textit{Shanghai People's Congress Approves Housing Reform Scheme}, BBC-Summary of World Broadcasts, Feb. 12, 1991, at FE/0994/B2/1, available in LEXIS, ASIAPC Library, CHINA File. These exactions are generally reported to be assessed at 5\% of the worker's income.

\textsuperscript{346} See \textit{Case Studies in Housing Reform in Townships}, in \textit{JOINT PUBLICATIONS RESEARCH SERVICE: CHINA}, No. 89-005, Jan. 13, 1989, at 26. Smaller cities and townships, in particular, appear less likely to have the funds for significant subsidies.


\textsuperscript{348} 1988 \textit{CHINESE SOCIAL STATISTICS}, supra note 296, at 92 tbl.29.

\textsuperscript{349} \textit{Id.}
twice as much on cigarettes, wine and tea than on rent. If the leaders' goal is to motivate individuals to purchase housing by increasing their rent burdens, they have clearly not yet succeeded.

b. Sales of public housing

While the leadership has been consistently committed to selling public housing to individuals, the same cost considerations evidenced in rent reform have caused vacillation between subsidization and self-sufficiency in housing sales policy. The bare practice of selling public housing to individuals was described in central government documents as a fairly broad experiment quite early in the reform period. While the method of sale in the earliest experiments is unclear, as early as 1982 the State Council approved the experimental subsidized sale of residential housing in four cities. Under these reforms, individuals could pay only one-third of the cost of their apartments in installments over time, and the work unit and local government would pay the balance. However, because these purchases were heavily subsidized, they commonly resulted in "limited ownership" with restrictions on resale and transfer rights.

---

350 See 4 CHINA STAT. MONTHLY 55, 56, (no. 10-11-12 1992) The figure for Beijing, where rents are cheaper and consumable spending higher, is even more astounding. There, individuals spend approximately seven times as much of their incomes on cigarettes, wine and tea than on rent.

351 One early housing conference report indicated that experiments in housing sales were begun by the National Urban Construction Bureau after a 1978 statement by a central government leading cadre calling for the release of private activism to help solve the housing problem. The same report indicated that one 128 cities in 12 provinces and autonomous regions had begun experiments with the private purchase and construction of residences by late 1980. See Guanyu zuzhi chengzhen zhigong, jumin jianzao zhuzhai he guojia xiang siren chushou zhuzhai jingyan jiaoliuhui qingkuang de baogao [Report of the Conference on Experiences in Organizing the Construction of Residences by Workers, Staff, and Residents and the Sale of Housing to Individuals by the State] (published by the State Council on Apr. 10, 1981), reprinted in ENCYCLOPEDIA OF REFORM, supra note 257, at 102.


353 This basic policy was spelled out in the State Council report announcing the beginning of the experimental sales in designated cities. This report stated that "when individuals purchase housing, in general [they] should pay one-third of the sales price, and the other two-thirds should be paid by the constructing unit." Id. If they were state-owned, constructing units could then presumably pass on these expenses to the government.

For some evidence that subsidized sales was in fact the practice in the experiment areas, see China's Housing Management Under Reform, Xinhua, No. 012144, Jan. 28, 1984, available in LEXIS, ASIAPC Library, CHINA File. See also "People's Daily" Article Favours Commercialization of Urban Housing, supra note 155, at FE/7905/B1/1.

354 Holley, supra note 342 (reporting on the purchase of "limited ownership housing" in Yantai).
By the mid-1980s the P.R.C. government began attempts to both limit the practice of subsidized sales and extend housing reform throughout the country. In 1986, the government admitted that it was not saving money because of increasing subsidies and decreasing housing prices, that low rents impeded individuals incentives to purchase housing, and that enterprises did not have the funds available to build subsidized housing.355 Thus, the 1986 Subsidized Sales Notice stated that future sales were generally to take place at full prices unless the unit could afford subsidies.356 This notice also made explicit the limited nature of ownership granted in subsidized sales.357

In responding to the excessively cheap sale (jianjia chushou) of public housing an “emergency notice” promulgated in 1988358 took this policy to more drastic lengths, and hence reversed it. This 1988 Emergency Notice stated that all sales of public housing were to take place at full prices without exception, that subsidized sales with limited property rights were prohibited, and that the sale of housing at any price less than 120 yuan per square meter was also prohibited.359 More ominously for purchasers, the 1988 Emergency Notice stated that the property rights of any housing sold

---


356 Id.

357 It stated that rights in housing already sold with subsidies would be confirmed, but that “it is not permissible to rent or pledge [housing]” and that “if it is necessary to sell or transfer [the], it must be sold or transferred to the original selling unit or to the local real property administration.” Id.


359 1988 Emergency Notice, supra note 358, at 160. These low priced sales appear to be in part the result of property managers' determination that it was better to sell off housing at almost any price rather than to simply continue incurring management and repair costs. See generally Vice-minister: Cheap Home Sales 'Welfare Oriented' not 'Genuine Housing Reform,' BBC-Summary of World Broadcasts, Aug. 8, 1994, at FE/2068/6, available in LEXIS, ASIAPC Library, CHINA File. Another, less benign, cause of excessively cheap sales is the practice by local cadres of arranging preferential purchases of public housing for themselves and their families and friends. So serious is this problem that this was one of the five practices singled out (but little more) in the CCP Central Discipline Inspection Committee’s Third Plenary Session. See Opinions of Discipline Inspection Committee on Ensuring Integrity of Cadres, BBC-Summary of World Broadcasts, May 18, 1994, at FE/2000/G, available in LEXIS, ASIAPC Library, CHINA File.
at depressed prices since the 1986 notice could be stripped or the owner compelled to pay compensation.\textsuperscript{360}

From the latest round of housing reforms, it is clear that, despite its costs, subsidization (with limited rights) will continue to be an enduring aspect of housing sales. While the plan for the expansion of housing reform issued by the State Council in 1988 states that subsidized sales should not continue,\textsuperscript{361} later housing policies have come to equate "standard prices" for housing as prices which include subsidies.\textsuperscript{362}

At any rate, instead of subsidies, the State Council plan encourages units to sell housing to workers and staff who should, preferably, pay the total amount in a lump sum. Purchasers can also, however, pay 30% down and secure bank or unit financing for the remainder of the purchase price, to be paid over varying periods and at appropriate interest rates.\textsuperscript{363} At the same time, experimentation continues in efforts to set up housing funds, specialized development banks, new mechanisms of bank financing, and new means of vesting housing rights in organizations and individuals.\textsuperscript{364}

\textsuperscript{360} Id. It should be noted, however, that this notice contradicted a document issued just six months earlier which, while prohibiting sales at excessively cheap prices nevertheless permitted sales at "preferential prices" (youhuijia). See Guanyu guli zhigong goumai gongyou jiu zhufang yijian [Opinion on Encouraging the Purchase of Existing Housing by Workers and Staff] (State Council Housing System Reform Leading Group, Feb. 25, 1988), reprinted in \textsc{Encyclopedia of Reform}, supra note 257, at 158.

\textsuperscript{361} By far the most comprehensive national statement of the housing reform policy was promulgated by the State Council in 1988; although this, as does much national legislation, appears to be more a distillation of local experience than an innovation of the center. \textsc{See State Council's Plan for Housing Reform in Urban Areas}, BBC-Summary of World Broadcasts, Mar. 25, 1988, at FE/0109/C1/1, \textit{available in LEXIS}, ASIAPC Library, CHINA File. For the original Chinese version of this plan, see Guanyu zai quanguo chengzhen fenqi fenpi tuixing zhufang zhidu gaige de shixing fangan [Provisional Plan for the Phased National Implementation of Urban Housing System Reform] (promulgated by the State Council on Feb. 25, 1988), reprinted in \textsc{Collection of P.R.C. Real Property Law}, supra note 158, at 873 [hereinafter 1988 Housing Reform Plan].

\textsuperscript{362} \textsc{See Major Cities will Take the Lead in Housing Reform}, supra note 300. \textsc{See also Vice-minister Details Measures to Accelerate Urban Housing Reform}, BBC - Summary of World Broadcasts, Feb. 2, 1994, at FE/1911/G, \textit{available in LEXIS}, ASIAPC Library, CHINA File (part of the price "is determined by the amount of housing funds and subsidies in the [enterprise].").

\textsuperscript{363} Interest rates and loan terms are to be determined according to ability to repay, and loan terms should vary according to whether it is old or newly-constructed housing. 1988 Housing Reform Plan, supra note 361, at 880.

\textsuperscript{364} One potentially promising, but probably illusory, form of "private" housing development vehicle is the cooperative, whereby individuals pool their funds to construct new buildings and share in the ownership of the new structure. The first housing cooperative was reported to have completed construction in 1988. However, it is not clear how private citizens could construct an entire building by pooling funds if individuals have difficulty purchasing single apartments even at one-third the true cost. In fact, an early report on the new cooperatives stated that they depend "on individually raised funds with the help of the government or enterprises". \textsc{Co-operatives New Phase in Housing Reform}, BBC-Summary of World Broadcasts, Nov. 15, 1988, at FE/0313/B2/1, \textit{available in LEXIS}, ASIAPC Library, CHINA File. It is
However, cost remains a basic factor in the reforms. Even with long-term loans instead of outright subsidies, these reforms depend on either cheap credit or higher wages, both of which are hard to come by in the best of times, and especially so during government austerity programs. Thus, here as elsewhere, continued progress in privatization and marketization will depend at least in part on institutional and economic factors quite extrinsic to real property rights alone.

V. CONCLUSION: THE FUTURE OF HOUSING REFORM IS THE FUTURE OF ALL REFORM

The main story of this examination has been the Chinese leaders' attempt to vest effective property rights in economic actors so as to spur investment in urban real property and reverse the ill effects of the supply system of housing. Statistical indicators of ownership and investment indicate that these policies have enjoyed some success, but that public ownership and control of urban public housing still predominates by far. However, given the interdependence of housing and property rights reform with other policy areas, a great deal of institutional reform will be required to continue progress toward commoditization, marketization, and privatization.

It is quite clear that private housing has come to constitute a larger, and public housing a smaller, proportion of urban housing. Statistics indicate that private ownership increased from 9.36 to 19.63% of the total from 1983 to 1988. This represents almost a doubling of the share of privately owned urban housing. At the same time, publicly owned housing decreased from 88.44 to 77.72% of the total. Thus, if these statistics are accurate, the increased levels of private ownership are still dwarfed by the continuing

---

365 On the threat to reform generally, see Jeoffrey Crothall, *China Housing Scheme in Danger of Collapse*, S. China Morning Post, Jan. 3, 1990, in Reuter Textline, available in LEXIS, ASIAPC Library, CHINA File. One expert proposed a system for pricing long term loans which would both cover more costs and allow more people to purchase housing. However, the viability of this plan may be undermined by the fact that it required interest rates to remain below two percent. See *Mentality Said to Hinder Housing Reform in China*, Xinhua, No. 1023049, Oct. 23, 1990, available in LEXIS, ASIAPC Library, CHINA File. Clearly, a great deal more than mentality is hindering these reforms.

366 1983 CHINESE SOCIAL STATISTICS, supra note 95, at 97 tbl.2; 1988 CHINESE SOCIAL STATISTICS, supra note 296, at 101 tbl.2.

367 1983 CHINESE SOCIAL STATISTICS, supra note 95, at 97 tbl.2; 1988 CHINESE SOCIAL STATISTICS, supra note 296, at 101 tbl.2.
dominance of the public sector. This is true even though the government has pursued policies of actively creating and protecting property rights and promoting the sale of public housing to individuals.

The foregoing examination has revealed several critical, interrelated sets of difficulties which must be addressed in order to promote future privatizing reforms. Although significant substantive rights reforms have resurrected old and created some new property rights in different actors, it is clear that significant efficiencies can still be gained by reducing the costs of exercising or enjoying those rights.

First, at the level of real property legislation, rules on everything from the definition of “ownership” to the process for registering apartment housing are still extremely ambiguous and difficult to apply, and generally grant insufficient enforcement rights. This not only creates uncertainty and insecurity for individual “owners” and increases their information and enforcement costs, it is also partially responsible for allowing manipulative rent-seeking behavior and illegality on the part of powerful bureaucratic interests.

Second, similar problems also follow from continuing confusion and weakness at the level of real property rights administration and adjudication. The lack of administrative resources, expertise and will allows continuing subversion of registration, investigative, and enforcement mechanisms by local bureaucratic interests. This increases public and private owners’ enforcement costs and allows enterprises, individuals and units in possession of public property to avoid compliance with relevant property rights policies, engage in rent-seeking behavior, and impose externalities on other actors and society at large.

For the immediate term however, the government is most concerned with a much narrower question that largely assumes substantial private property rights: how to construct housing and sell it to individuals without massive subsidies. Thus, a narrower solution than that above is also in order. It appears that the most expedient and effective way to gain the most rapid results in the area of public housing reform — i.e., the sale of public housing new and old — will be to promote and enable mortgage lending and bank financing of housing purchases.

This is the only method which could perform all of the beneficial functions of fully covering costs, effectively vesting ownership and control in individuals, and collateralizing loans, all without the need for massive government subsidies or wage increases for individuals. Longer-term loans
would be particularly useful in this regard insofar as they would allow larger principal payments. Still, even long-term loans will not be affordable at the current low wage rates if interest rates are not held down, and the provision of anything less than market rate credit would still amount to a subsidy. This proposal does, however, have the advantage of falling well within the range of current policy prescriptions.

In the final analysis, however, enhanced mortgage rights only add to the requirements for successful reform. In addition to assuming effective private individual property rights, mortgage lending also assumes banks' freedom from control or coercion by local debtor enterprises or DICs, as well as an accurate means of valuing property for the long term. Thus, the promotion of mortgage lending, as with any other policy, will only be truly successful if there is progress in all areas, including but not limited to substantive rights definitions with regard to all forms of benefits and liabilities, real property registration and regulation, rights enforcement and dispute resolution, company law and regulation, and administrative and/or criminal law effectively governing the behavior of government agents and private actors alike. In short, property rights reform ultimately depends upon the institution of the rule of law in all relations impinging upon the exercise of those rights.

Clearly, a great deal of work remains to be done but, just as clearly, a great amount of progress and experience has already been gained. What is not so certain is whether or when the leadership at different levels and in different areas will have the incentives, will and resources to overcome the inertial drag of existing institutional and economic configurations which, while costly to society at large, may nevertheless continue to benefit those charged with formulating and implementing these reforms.