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A LESSON IN INGENUITY: CHINESE FARMERS, THE STATE, AND THE RECLAMATION OF FARMLAND FOR MOST ANY USE

Kari Madrene Larson

Abstract: Since 1978, China has achieved significant improvements in the rural sector through the adoption of the *baogan daohu* system, which effectively dismantled the communal farming system and created individual family farms. However, meaningful measures must be taken to ensure that farmers have continued use of their farmland and that illegal land reclamation by local governments is halted. Because farmers' rights are not clearly articulated and cannot be readily enforced, local governments appear to be beyond central government control. Furthermore, due to the state's right to reclaim land under any logic, farmers' rights may ultimately be non-existent. Though developing a meaningful system of dispute resolution and enforcement in rural China will be difficult and require systematic changes in the relationship between the central and local governments, ignoring the rising problems could prove disastrous. The underlying conflict between central and local governments and state and Party policies must be resolved in order for Chinese farming to truly operate "according to the law."

I. INTRODUCTION

Chinese farmers¹ face the daunting task of feeding twenty-two percent of the global population on only nine percent of the world's arable land.² Their ability to do so will affect both social stability in the countryside and China's ability to compete internationally in the twenty-first century.

Despite their importance to China's future, Chinese farmers are in a precarious position due to their lack of legal rights³ and the ineffective control by the central government over local government officials.⁴ Farmers in China do not own their land; rather, under the Constitution of the People's Republic of China, the state owns all land.⁵ Consequently, the state grants farmers land

¹ Historically, farmers in China have been referred to as "peasants," but this Comment adopts the more impartial term "farmer." See generally KATE XIAO ZHOU, *HOW THE FARMERS CHANGED CHINA* 26-27 (1996).

² Roy L. Prosterman et al., *Can China Feed Itself?* SCI. AM., Nov. 1996, at 90.

³ See *infra* notes 94-120, and 157-162 and accompanying text.

⁴ See *infra* notes 163-203 and accompanying text.

⁵ ZHONG HUA REN MIN GONG HE GUO XIAN FA [THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA], Ch. 1 art. 10 (amended 1993), translated in THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA (Legislative Affairs Commission ed., 1993) [hereinafter P.R.C. CONST.]. Although the state owns all land, property is governed under a dual system of rural and urban land, with different rights and governing systems for each. Zhong Hua Ren Min Gong He Guo T'u Ti Fa [Land Administration Law of

use rights, and farmers agree to deliver a quota of specified crops to the state.⁶ This grant or contract is the complete source of farmers' land rights.

Valid land use contracts must be in writing,⁷ but few Chinese farmers have written land contracts in their possession.⁸ While possession of a written contract permits a farmer to assert rights embodied within the contract,⁹ lack of a written contract leaves a farmer with few legal rights, if any.¹⁰ Even with a contract, however, farmers may have to resort to extra-legal remedies in vindicating violations of their contractual rights.¹¹

Despite official thirty-year farming grants,¹² local officials cannot be relied upon to ensure farmers of their rights. Instead, local officials are known to reclaim farmland and sell or lease it to investors for illegal purposes such as development of golf courses and high-class apartments.¹³ When illegal land reclamation occurs, farmers have few options. First, they can attempt to solve the problem by negotiating with local officials.¹⁴ Unfortunately, this may not be successful because these are generally the same officials who illegally took their land in the first place.¹⁵ Second, aggrieved farmers can file a claim in the People's Court.¹⁶ But, there is a striking absence of courts in rural China, as well as a scarcity of lawyers, thus making it difficult to file a suit.¹⁷ In addition, were a farmer to receive a favorable judgement, the government entity needed to enforce the judgment would be the very same entity that violated the farmer's rights.¹⁸

the People's Republic of China], arts. 6-9 (1987), translated in THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA (Legislative Affairs Commission ed., 1987-1989) [hereinafter P.R.C. LAND LAW].

⁶ ZHOU, *supra* note 1, 57-58.

⁷ See *infra* note 64 and accompanying text.

⁸ ROY L. PROSTERMAN ET AL., RURAL DEVELOPMENT INSTITUTE REPORTS ON FOREIGN AID AND DEVELOPMENT # 85: REFORMING CHINA'S RURAL LAND SYSTEM: A FIELD REPORT 17 (1994).

⁹ P.R.C. LAND LAW art. 12.

¹⁰ *Id.*

¹¹ See *infra* notes 204-217 and accompanying text.

¹² China: Official Says It's Important to Keep Farmland System Stable, CHINA BUS. INFO. NETWORK, Apr. 29, 1997, available in LEXIS, News Library, Allnews File.

¹³ Patrick E. Tyler, *Nature and Economic Boom Devouring China's Farmland*, N.Y. TIMES, Mar. 27, 1994, § 1, at 1; Premier Li Peng Calls for Protection of Cultivated Land, XINHUA NEWS AGENCY, Jun. 25, 1996, available in LEXIS, News Library, Asiapc File.

¹⁴ Zhong Hua Ren Min Gong He Guo Nung Yeh Fa [Agriculture Law of the People's Republic of China], Ch.VIII art. 61 (1993), translated in THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA (Legislative Affairs Commission ed., 1993) [hereinafter AG. LAW]; see *infra* note 172 and accompanying text.

¹⁵ See *infra* notes 176-182 and accompanying text.

¹⁶ See *infra* note 172 and accompanying text.

¹⁷ DAVID ZWEIG, FREEING CHINA'S FARMERS: RURAL RESTRUCTURING IN THE REFORM ERA 155 n.25, 158-60 (1997).

¹⁸ *Id.* at 228.

In addition to these problems, farmers face added problems when the land is legally reclaimed.¹⁹ If farmland is taken in compliance with the law, then farmers have no right whatsoever to contest either the validity of the taking or the amount of compensation.²⁰ Because compensation is often missing or inadequate, farmers are left without land and without other means of support.²¹

This Comment addresses the current problems plaguing China's rural land regime. In particular, this Comment analyzes the eminent domain scheme as it exists in the law as well as how it is implemented in the countryside. The first section details developments in the property regime in the twentieth century. The second section describes the current system, how it developed, and how it works. The third section examines the relationship between the law and its implementation, paying particular attention to problems of coordination between central government policies and local government action. The final section suggests potential changes that could solve these problems, and concludes that successful solutions to these problems can only be reached through consideration of both the social and political context of rural China.

II. BACKGROUND

A. *A Brief History of Property Rights and Chinese Farming*

Chinese farmers are not unfamiliar with shifting property rights and land reform.²² Their recent history has been one of redistribution, collectivization, and decollectivization, with the state continuously "owning" the land.²³

¹⁹ P.R.C. CONST. art 10; P.R.C. LAND LAW arts. 21-36.

²⁰ The relevant statute states in part: "When the state requisitions land for construction, the units whose land is requisitioned should subordinate their wishes to the needs of the state and shall not obstruct the requisition." P.R.C. LAND LAW art. 23.

²¹ PROSTERMAN ET AL., *supra* note 8, at 23.

²² *Id.* at 3.

²³ Prior to the Chinese Communist Party ("CCP") coming to power in 1949, rural Chinese farmed independent farms, which they either owned or were owned by wealthy landlords. Shortly after the CCP rose to power in 1949, policies were implemented which effectively tied the farmers to their land and curtailed any mobility. In the late 1950s, all farmland was collectivized into huge farms. Then, starting in the late 1970s, land was decollectivized and returned to individual farming households. ZHOU, *supra* note 6, at 2-4; KENNETH LIEBERTHAL, GOVERNING CHINA: FROM REVOLUTION THROUGH REFORM 39-56, 147-48 (1995).

Prior to the Communist revolution in 1949, Chinese farmers ran independent farms, or, if poor, cultivated land owned by wealthy landlords.²⁴ Shortly after the revolution, the government confiscated land owned by landlords and rich farmers and divided it among all farmers on an egalitarian basis²⁵ under the Land Reform Act of 1950.²⁶ The state used persuasion, intimidation, and confiscation in implementing the Act, and redistributed the land and imprisoned and killed numerous landlords in the process.²⁷

During the 1950s, farming and land rights continued to evolve. In 1955, China implemented the *hukou* system or "resident permits," which denied farmers the right to purchase grain in cities, in essence requiring them to stay on their farms or starve.²⁸ At the same time, China began to collectivize agriculture. In 1956 and 1957, the state consolidated single family farms into agricultural collectives.²⁹ Land was forcibly surrendered without compensation, and farmers retained only small plots for private use.³⁰ Collectivization culminated in 1958 with the Great Leap Forward,³¹ when the state merged the collectives, including the individual family plots, into larger communes with an average size of approximately 4,000 families.³² Under this collective system, farmers worked in socialist cooperatives of 200-300 households and virtually all farm animals and implements became the property of the collective.³³

Communal farming's effect on agricultural production was disastrous. The decline in production was substantial, contributing to one of the worst

²⁴ LIEBERTHAL, *supra* note 23, at 15-17.

²⁵ CAMBRIDGE ENCYCLOPEDIA OF CHINA 54-55, 105-06 (Brian Hook ed., 1991). Land reform was a high priority under the communist regime for a number of reasons. Disproportionate land ownership was viewed as a source of social injustice. Land reform was also viewed as a way to gain and maintain the vast following of the rural population and strengthen the authority of the new regime. *Id.*

²⁶ "The land ownership system of feudal exploitation by the landlord class shall be abolished, and the system of peasant land ownership shall be carried into effect in order to set free the rural productive forces, develop agricultural production, and pave the way for the industrialization of the new China." Zhong Hua Ren Min Gong He Guo Nong Ye Gai Ge Fa [The Agrarian Reform Law of the People's Republic of China] (1950), translated in GOVERNMENT AND POLITICS IN REVOLUTIONARY CHINA: SELECTED DOCUMENTS, 1949-1979, 11 (Harold C. Hinton ed., 1982).

²⁷ CAMBRIDGE ENCYCLOPEDIA OF CHINA, *supra* note 25, at 105.

²⁸ ZWEIG, *supra* note 17, at 5.

²⁹ MARK SELDEN, THE POLITICAL ECONOMY OF CHINESE DEVELOPMENT 187, 190 (1993).

³⁰ PROSTERMAN ET AL., *supra* note 8, at 4.

³¹ SELDEN, *supra* note 29, at 13-15. The Great Leap Forward was a series of policy initiatives directed at achieving rapid economic and social progress, but which ultimately resulted in the death of millions of rural Chinese. LIEBERTHAL, *supra* note 23, at 102-08.

³² PROSTERMAN ET AL., *supra* note 8, at 4-5.

³³ CAMBRIDGE ENCYCLOPEDIA OF CHINA, *supra* note 25, at 54.

famines in the twentieth century.³⁴ The per capita food energy availability decreased from over 2100 calories in the mid 1950s to only 1500 calories at the height of the famine in 1960.³⁵ And, estimates on the number of deaths due to starvation range from fifteen million to forty million.³⁶

After the Great Leap famine, the government made adjustments in property distribution, commune size and administrative structure.³⁷ The collectives dissolved and the basic unit for production decreased in size to approximately 20-30 households.³⁸ Individual households were again permitted to farm small plots for personal use in addition to their required labor contributions to the production teams.³⁹ The administrative structure was decentralized.⁴⁰ Administrative obligations previously met by the vast collectives were now delegated to smaller communes.⁴¹ Although the Cultural Revolution, beginning in 1966, again marked a period of radical policy changes,⁴² it did not affect agricultural production in a way reminiscent of the Great Leap.⁴³ Farming continued through the 1970s under the collective model, albeit on a smaller scale.⁴⁴

*B. Farmers and Property Rights Today: "It is very easy to tell green onions from tofu"*⁴⁵

The current property regime in rural China represents a significant break from the collectivization schemes of the 1950s through the 1970s.

³⁴ See LIEBERTHAL, *supra* note 23, at 102-11; ZHOU, *supra* note 1, at 3.

³⁵ In addition, these figures are national averages and do not reflect the disparity between urban and rural grain supply. The famine hit hardest in the rural areas. Basil Ashton et al., *Famine in China: 1958-61*, 10 POPULATION & DEV. REV. 622-23 (1984).

³⁶ ZHOU, *supra* note 1, at 3.

³⁷ *Id.* at 48-53.

³⁸ CAMBRIDGE ENCYCLOPEDIA OF CHINA, *supra* note 25, at 54.

³⁹ ZHOU, *supra* note 1, at 48-49.

⁴⁰ For an excellent discussion of the rise and fall of collectivism in Chinese Agriculture, see EDWARD FRIEDMAN ET AL., CHINESE VILLAGE, SOCIALIST STATE (1991).

⁴¹ ZHOU, *supra* note 1, at 46-53.

⁴² SELDEN, *supra* note 29, at 14. The Cultural Revolution occurred from 1966 through the mid 1970s, and was intended to make political, administrative and social changes both in rural and urban areas of China. It was marked by extreme violence and terror, and resulted in many deaths and ruined lives. LIEBERTHAL, *supra* note 23, at 111-18.

⁴³ ZHOU, *supra* note 1, at 46-53.

⁴⁴ *Id.*

⁴⁵ This is a common saying in Tongxin village meaning that under the *baogan daohu* system, the rights, roles and responsibilities of the individual, the collective and the state are distinctly defined. *Id.* at 58.

Under the *baogan daohu* (household responsibility) system,⁴⁶ which came into place in the late 1970s, farmers still do not own their farm land, but do have far more control over the land than previous generations.⁴⁷ In effect, the *baogan daohu* system has broken the collective farms into individual family farms.⁴⁸

1. *The Baogan Daohu System*

The distinguishing feature of the *baogan daohu* system is that the primary unit of accounting and production is the household.⁴⁹ The enactment of the *baogan daohu* system divided farmland among individual households in exchange for the household's agreement to fulfill certain obligations previously the responsibility of production teams.⁵⁰ Under the system, farmers pay taxes, turn over production quotas, and contribute money to their villages to cover administrative expenses.⁵¹ After these requirements are met, farmers are free to decide what to do with their remaining produce.⁵²

The four main elements of the *baogan daohu* system are as follows: (1) individual households receive land grants based upon family size; (2) under the grant, the farming household attains the right to farm the land for a specified period of years; (3) households rather than production teams make land use decisions; and (4) actual ownership of the land remains in the hands of the collectives.⁵³

Farmers have far greater autonomy under the *baogan daohu* system compared to collective farming, primarily because farmers have control over agricultural production.⁵⁴ Farmers are permitted to make independent planting and farm management decisions.⁵⁵ They can plant what they want,

⁴⁶ *Baogan daohu* (or *baochan daohu*) means contracting responsibility to the household. *Id.* at 2-3.

⁴⁷ *Id.* at 58-60.

⁴⁸ See *infra* notes 49-52 and accompanying text.

⁴⁹ ZWEIG, *supra* note 17, at 56.

⁵⁰ The production team was the unit of organization for farm labor under collectivized farming. *Id.*

⁵¹ *Id.* The collective is thus reduced to the role of providing technical assistance and selling or supplying seed, fertilizer and other farm supplies to the households. Farmers in turn pay the collective certain "dues" or fees which contribute to the collective's public welfare fund, the public capital accumulation fund, and sometimes a "management fee" (*guanli fei*), which covers miscellaneous collective expenses such as subsidies for local cadres. Phyllis L. Chang, *Deciding Disputes: Factors That Guide Chinese Courts in the Adjudication of Rural Responsibility Contract Disputes*, 52 L. & CONTEMP. PROBS. 101, 103 (1989).

⁵² Chang, *supra* note 51, at 103-04.

⁵³ PROSTERMAN ET AL., *supra* note 8, at 7. Currently the grant period is thirty years. *Id.* at 8.

⁵⁴ ZHOU, *supra* note 1, at 76-81.

⁵⁵ *Id.*

choose their own methods of fertilization, and can sell their products wherever they want.⁵⁶ While almost all farmers must deliver a quota of specified crops to the state, this requirement does not intrude into independent management ability because farmers may purchase the required quota crops on the market and then turn them over to the state.⁵⁷

a. *Statutory rights*

While there is no law specifically governing the *baogan daohu* system, provisions within the Land Administration Law and the Agricultural Law address different aspects of the system.⁵⁸ Farmers contract state owned land.⁵⁹ While written contracts provide farmers with legal protection when terms are violated,⁶⁰ neither the Land Administration Law nor the Agricultural Law provide remedies for farmers without written contracts.

The plain language of the Agricultural Law requires parties to "conclude an agricultural contract to define the rights and duties of both parties."⁶¹ Furthermore, while the Land Administration Law provides for a property recording system, only collectives record rural land holdings, not individual households.⁶² This practice indicates that the only record of a farmer's rights exists within the contract.

b. *Contractual rights*

Because the provisions contained in both the Land Administration Law and the Agricultural Law lack specificity, parties use contracts to clarify both rights and obligations.⁶³ The Agricultural Law not only provides and protects contract rights but it also requires that "[t]he party awarding the contract and the contractor shall conclude an agricultural contract to define the rights and

⁵⁶ *Id.*

⁵⁷ *Id.* For example, if a farmer is required to provide the state with a specific quantity of grain, but a different crop would be more lucrative, that farmer may grow the more lucrative crop and use the proceeds to purchase sufficient grain to satisfy his quota requirement.

⁵⁸ P.R.C. LAND LAW; AG. LAW. See *infra* notes 59-70 and accompanying text.

⁵⁹ The Land Law provides in part: "Land owned by collectives and state owned land used by units under ownership by the whole people or under collective ownership may be operated under a contract by collectives or individuals for agricultural, forestry, livestock and fishery production." P.R.C. LAND LAW art. 12.

⁶⁰ The Land Law further provides: "Collectives or individuals that contract to operate land shall have the obligation to protect such land and make rational use of it according to the uses provided for by the contract. The right to operate land under contract shall be protected by law." *Id.*

⁶¹ AG. LAW art. 12.

⁶² P.R.C. LAND LAW art. 9.

⁶³ See *infra* note 94, for an example of an actual contract used by a farm household.

duties of both parties.”⁶⁴ Under these contracts, farmers can decide matters relating to production and operation.⁶⁵ Farmers must still satisfy the state crop quota, but once they do so, they can sell their remaining produce on the market.⁶⁶ They also must fulfill additional duties agreed to in the contracts.⁶⁷

The Agricultural Law also provides that contractors may subcontract the land or transfer the rights and duties of the contract to a third party.⁶⁸ These contractors have renewal priority, and may transfer contract rights at death.⁶⁹ In addition, farmers can contract outside of these provisions to include greater or lesser rights or duties.⁷⁰

2. *Development of the Baogan Daohu System*

The development of the *baogan daohu* system began the decollectivization of the Chinese countryside.⁷¹ While the official government policy prior to 1983 clearly favored the preservation of the collective production system,⁷² independent farmers initiated the *baogan daohu* system in various regions of the country.⁷³ Farmers secretly contracted

⁶⁴ “Lands, mountains, grasslands, unreclaimed lands, beaches and water surfaces owned by collectives or the State and exploited by agricultural economic collectives, may be contracted to individuals or collectives for agricultural production ... [t]he right of individuals or collectives to undertake operation by contract shall be protected by law.” AG. LAW art. 12.

⁶⁵ *Id.* art. 13.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* art. 12.

⁷¹ ZWEIG, *supra* note 17, at 12.

⁷² ZHOU, *supra* note 1, at 69; Cheng Yuk-Shing & Tsang Shu-Ki, *Agricultural Land Reform in a Mixed System: The Chinese Experience of 1984-1994*, CHINA INFO., Winter 1995-1996, at 46.

⁷³ The most well known incident where the *baogan daohu* system was secretly adopted took place in the spring of 1978 in Fengyang County of Anhui Province. In Fengyang County, Party leadership fully supported small-group farming, but not individual family farming. Eighteen households were permitted by local cadres to farm independent of the collective under the *baogan daohu* system, and those households agreed to take care of all dependents of the cadres in the event that the arrangement were found out and the cadres were arrested. The oath is as follows:

The contracting of production to individual households is to be kept strictly secret and not divulged to any outsider.

When the grain is harvested, the amount to be rendered to the state will be rendered to the state, and the amount to be rendered to the collective will be rendered to the collective. Should there be a large amount of grain, more should be contributed to the state, with no one shirking.

with local officials in order to farm individual plots of land.⁷⁴ Though such actions were forbidden by the central government, the benefits of independent compared to collective farming were so attractive that farmers were willing to disobey the government.⁷⁵ In fact, so many farmers were willing to disobey authorities that the aggregate effect went beyond the expectation and control of the central government.⁷⁶

Although *baogan daohu* was initially discouraged, the government eventually accepted and took credit for the reforms.⁷⁷ This policy change was due in part to China's inability to feed itself under the communal system.⁷⁸ Recognizing that agricultural outputs increased significantly in regions where the *baogan daohu* system was in use, a 1980 meeting of governors formally adopted the system for use in poor and mountainous areas.⁷⁹ By 1983, ninety-three percent of production teams had adopted the *baogan daohu* system.⁸⁰ Unable to ignore both the increases in production and the improvements in living conditions for farmers working under the system, the central government formally acknowledged the system in 1983.⁸¹

3. *Baogan Daohu's Effect on Property Rights*

The manner in which the *baogan daohu* system developed has major implications for China's future stability in agricultural production. First, because the policy started at a grassroots level, no law existed ensuring adequate

Should they [the cadres] come to grief because we are contracting production to individual households, we are willing to raise the children of village cadres until they are eighteen years of age.

JOSEPH FEWSMITH, *DILEMMAS OF REFORM IN CHINA: POLITICAL CONFLICT AND ECONOMIC DEBATE* 28 (1994).

⁷⁴ ZHOU, *supra* note 1, at 53-60.

⁷⁵ *Id.*

⁷⁶ Yuk-Shing & Shu-Ki, *supra* note 72, at 47; ZHOU, *supra* note 1, at 53-71. Zhou, who conducted a great deal of field research in rural China, notes an Anhui farmers' saying: "*Baochan daohu* is like a chicken pest. When one family's chicken catches the disease, the whole village catches it. When one village has it, the whole country will be infected." *Id.* at 56.

⁷⁷ Yuk-Shing & Shu-Ki, *supra* note 72, at 47.

⁷⁸ In 1978, approximately two-fifths of China's urban population depended on imported grain. R.D. Hill, *Upland Development Policy in the People's Republic of China*, *LAND USE POL'Y*, Jan. 8, 1994, at 11.

⁷⁹ ZHOU, *supra* note 1, at 67.

⁸⁰ PROSTERMAN ET AL., *supra* note 8, at 7.

⁸¹ ZHOU, *supra* note 1, at 69.

protection of farmers' rights.⁸² Farmers were secretly contracting with local officials, while the central government was issuing policy that made these actions illegal.⁸³ Farmers acted at their peril, and suffered the risks of their actions.⁸⁴ Although actual contracts may have been used prior to the central government's formal adoption of *baogan daohu*, these contracts were not enforceable because they were illegal.

When the central government did finally permit farmers to contract, formal guidelines indicating what rights and obligations the contracts could create were absent.⁸⁵ In addition, no comprehensive plan existed to provide redress when a breach occurred.⁸⁶ This problem of poorly defined rights and methods of redress has continued to plague the *baogan daohu* system.⁸⁷

Whether China can adequately address farmers' problems may have dire consequences for the stability of the rural sector. Farmers defied central government policy by secretly adopting the *baogan daohu* system in an attempt to escape the extreme poverty and poor living conditions associated with communal farming.⁸⁸ Because the *baogan daohu* system effectively ended the communal farming system,⁸⁹ farmers are completely dependent upon their ability to farm their household's plot of land for their livelihood. Since farmers are willing to defy central policy if their needs are unmet, it is imperative that central and local governments work together to adequately meet farmers' needs. Failure to do so may result in social and political instability in the country-side.⁹⁰

C. *Cracks in the Current System*

Although the *baogan daohu* system has been effective in increasing agricultural production and is popular among farmers, flaws exist in the

⁸² The extra-legal nature of *baogan daohu*'s development meant implicitly that no laws existed governing its use. See notes 71-76 and accompanying text.

⁸³ ZHOU, *supra* note 1, at 53-71.

⁸⁴ *Id.*

⁸⁵ The Land Law was enacted in 1987, and the Agricultural Law was enacted in 1993. See *supra* notes 5, 14.

⁸⁶ *Id.*

⁸⁷ While the Land Law and the Agricultural Law do address aspects of the *baogan daohu* system, these laws are neither comprehensive in scope nor uniformly observed. See *supra* notes 58-70 and accompanying text; *infra* notes 94-120 and accompanying text.

⁸⁸ ZHOU, *supra* note 1, 53-60.

⁸⁹ ZWEIG, *supra* note 17, at 12.

⁹⁰ *Four Still Held After Peasant Riot Over Land Compensation*, S. CHINA MORNING POST, Apr. 17, 1994, available in LEXIS, News Library, SCMP File; Peter Goodspeed, *China's Peasants Get Restless: Rural Protests Send Shock Waves Through Beijing's Urbanized Elite*, TORONTO STAR, July 11, 1993, available in 1993 WL 7266180.

system. The first shortcoming entails the sporadic written documentation of land use agreements between farmers and the local government.⁹¹ The second weakness involves security of tenure issues related to readjustment of contract land.⁹² The third problem relates to the practice of redistribution of land based on changes in family size.⁹³

1. *Lack of Written Contracts*

Recent fieldwork conducted in six regions of China revealed that only two out of 54 households have written land contracts.⁹⁴ The majority of

⁹¹ See *infra* notes 94-97 and accompanying text.

⁹² See *infra* notes 99-107 and accompanying text.

⁹³ See *infra* notes 109-120 and accompanying text.

⁹⁴ PROSTERMAN ET AL., *supra* note 8, at 17. The first land contract the authors viewed was the following contract which came from a document called the "Agricultural Contract Book." Party A was the production team and Party B was the head of the farm household. Article One enumerated the rights and obligations of the production team. ("mu" is a unit measure of land)

Party A contracts __ mu [a number] to Party B. Party A has ownership of the land.

Party A has the right to monitor Party B's operation, the right to collect collective contributions, and the right to request voluntary labor.

On behalf of the state, Party A will sign a purchasing grain and cotton contract with Party B.

Party A must promote the Communist Party's policies, provide services to Party B, and mediate disputes over land and irrigation. Party A allows Party B to transfer the use rights of arable land within state policy and related regulations.

Party A must protect Party B's right to farming and other legitimate revenue practices. Party A cannot collect money from Party B without legitimate reason, and the total of collections cannot exceed five percent of net income.

Article Two contained the rights and obligations of Party B (the farmer):

Party B has the right to freely manage contracted land according to state regulations, policies, and laws and according to market needs. Party B has the right to a preferable price policy.

Party B has the right to refuse collective contributions and voluntary work which are beyond regulations.

Party B must complete all of the quota and agricultural tax.

Party B cannot leave land wasted, build a tomb, remove soil, or build a house or brickyard on the contracted land. Party B must protect the irrigation system and other public facilities within the contracted land.

Id. at 18-19. Article Three stated that the contract was effective upon the signatures of both parties, but the contract was unsigned. Article Three also contained dispute resolution methods. Article Four

farmers claimed to have never received a contract.⁹⁵ Other farmers believed they had a contract but were unable to locate it.⁹⁶ Additionally, two farmers claimed to have destroyed their contracts after local officials violated the contract terms.⁹⁷ This lack of documentation has important ramifications for farmers who seek redress for alleged violations of their perceived rights.⁹⁸

2. *Short-Term Use Rights*

Even farmers with contracts have uncertain duration terms. Initially, during the early years of the *baogan daohu* system, the state granted land to households for a period of three years or less.⁹⁹ In 1984, the Communist Party Central Committee urged local officials to adopt longer terms:

[Officials should] prolong the time period of the contracted land, encourage the peasants to increase their investment, to foster the fertility of the soil, and practice intensive operation. Projects with a long production cycle such as fruit trees, or of a development nature, such as woods and forests, denuded hill, and waste land, should have a longer contract period.¹⁰⁰

Long term use rights are especially important for tree crops or where private investment in irrigation is required.¹⁰¹ In order for farmers to make long term investments in crops such as rubber or litchi, land rights must be secure.¹⁰²

In 1993, the central government further promoted extension of land use rights to terms of thirty years.¹⁰³ Longer land use rights were not promulgated as law but suggested as practice, and thus are entirely unenforceable.¹⁰⁴ In 1994, the Governor of Anhui¹⁰⁵ declared that farmers

contained more signature lines and those were blank. The contract did not contain a description of the land nor was there any provision to record the length of tenure. *Id.* at 18-19.

⁹⁵ *Id.* at 17.

⁹⁶ *Id.* at 18. Although farmers were unable to produce writings representing their rights in the land, most were able to produce documents containing information about taxes and production quotas. *Id.* at 18, n. 33.

⁹⁷ *Id.* at 18.

⁹⁸ See *supra* notes 63-70 and accompanying text, and *infra* notes 171-217 and accompanying text.

⁹⁹ *Id.* at 8.

¹⁰⁰ *Id.*

¹⁰¹ Under Chinese growing conditions, *Hevea* rubber is tappable after the fifth year of growth, and Litchi nuts (*Nephelium litchi*) show best results seven to ten years after planting. Hill, *supra* note 78, at 11.

¹⁰² D. GALE JOHNSON, CHINA'S RURAL AND AGRICULTURAL REFORMS: SUCCESSES AND FAILURES, (1996), available at <<http://www.adelaide.edu.au>>.

¹⁰³ PROSTERMAN ET AL., *supra* note 8, at 21.

¹⁰⁴ *Id.*

should receive an extension of use rights to thirty years upon the expiration of fifteen year contracts.¹⁰⁶ Although this may be the official policy of the region, over half of the residents of Anhui surveyed were not aware of the length of time of their use rights.¹⁰⁷ And, one Ministry of Agriculture official, speaking on behalf of the central government, worried that most new land contracts are being signed for periods of ten, five, or even fewer years, instead of the desired thirty year contract.¹⁰⁸

3. *Redistribution or Readjustments*

Often, local governments redistribute land holdings among local farmers to reflect changes in household size.¹⁰⁹ Because villages control land allocation, and initially ensured egalitarian distribution among households based upon family size and land quality, the villages have continued to adjust land holdings when family size or composition changes due to births, deaths, marriages, and other such events.¹¹⁰

Land adjustments occur on two scales, small and large adjustments.¹¹¹ Small adjustments are made to retain the egalitarian allocation of land when family sizes change.¹¹² Where family size increases or decreases, farm size will increase or decrease respectively, and if household size remains constant, so too will farm size.¹¹³ On the other hand, big adjustments alter all land holdings of every individual household within a village, whether there have been changes within the household or not.¹¹⁴ The village management takes back all farmland, and farming households receive completely different land.¹¹⁵

Although central government policy, announced in 1993, would have "frozen" all agricultural land holdings for thirty years regardless of household

¹⁰⁵ Anhui is the province where the *baogan daohu* system originated. ZHOU, *supra* note 1, at 55.

¹⁰⁶ PROSTERMAN ET AL., *supra* note 8, at 21.

¹⁰⁷ *Id.*

¹⁰⁸ Chen Chunmei, *China: Farmers Renew Contracts for Land*, CHINA DAILY, May 26, 1997, available in LEXIS, News Library, Asiapc File.

¹⁰⁹ Because land is often redistributed on a "per capita" basis, the practice is perceived as egalitarian and does not meet with the same level of resistance as arbitrary or illegal takings. James Kai-sing Kung & Shouying Liu, *Farmers' Preferences Regarding Ownership and Land Tenure in Post-Mao China: Unexpected Evidence From Eight Counties*, 38 CHINA J. 32, 33-35 (1997).

¹¹⁰ PROSTERMAN ET AL., *supra* note 8, at 22.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

demographic change,¹¹⁶ this policy has not been realized in practice.¹¹⁷ Instead, farmers have insecure land rights based on contracts lasting for ten, five or even fewer years, and land holdings continue to be adjusted when household demographics change.¹¹⁸ This insecurity results in a lack of incentive to invest in farm capital.¹¹⁹ Instead of investing in land improvements, farmers primarily invest savings in housing, non-farm enterprises, bank deposits and grain stocks.¹²⁰

III. TAKINGS: FARMERS IN A PRECARIOUS POSITION

Although poorly defined contract rights, insecurity of tenure, and redistribution issues all contribute to a farmer's sense of insecurity, the problem of both legal and illegal reclamation of farmland in rural China is the most important problem with the *baogan daohu* system. The state has the ultimate right to reclaim land for its own use, and the land holder has no right to contest either the validity of the use or the level or absence of compensation paid.¹²¹

A. *Why a Standard for Takings is Important*

The doctrine of eminent domain in Western jurisprudence dictates that the state has the right to take privately held land for legitimate public purposes.¹²² The notable difference between Chinese and Western notions of eminent domain is that under the Western perspective, persons deprived of their property have a right to contest both the validity of the state purpose, as well as the justness of the compensation paid.¹²³ Both of these features, as well as the right to contest them, are important to the legitimacy of government action. Because Chinese farmers do not have the right to contest either the public use or the level of compensation for confiscated land, the oversight present in Western eminent domain schemes is absent in China. Where the government is not required to account to the people, it is then in a status above the law.

¹¹⁶ See *supra* note 12 and accompanying text.

¹¹⁷ Kung & Liu, *supra* note 109, at 54.

¹¹⁸ *Id.*

¹¹⁹ JOHNSON, *supra* note 102, at 11.

¹²⁰ *Id.*

¹²¹ See *infra* notes 159-162 and accompanying text.

¹²² William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 556-57 (1972).

¹²³ Compare *id.* with *supra* notes 127-212 and accompanying text.

B. *Western Standard*

A Western standard of eminent domain provides a property holder with the right to contest both the "justness" of the compensation and the use to which their land is being put.¹²⁴ Although most claims alleging non-public use may meet with little success,¹²⁵ litigants can successfully claim that the level of compensation they have received is not just.¹²⁶ The right to contest both the validity of the public purpose and the level of compensation paid serves a valuable purpose. It provides legitimacy to state action, as well as a measurable limit as to how far that action can go.

C. *Chinese Standard*

Farmers in China experience takings or reclamation by the state both according to the law and in violation of the law.¹²⁷ Importantly, farmers cannot contest a legitimate reclamation of their land.¹²⁸ By comparison, when state or local officials illegally reclaim land, or unlawfully withhold compensation, farmers can contest state action, yet this right is limited by both the lack of legal resources and the legal system itself.¹²⁹ Illegally reclaimed land results in the conversion of sizable amounts of farmland to non-agricultural use.¹³⁰ The loss of farmland in China raises alarm with the central government,¹³¹ and around the world.¹³²

¹²⁴ See generally Stoebeck, *supra* note 122.

¹²⁵ The United States Supreme Court has curtailed litigants' ability to contest public use: "[W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241 (1984).

¹²⁶ The right to just compensation is fundamental, and the right to contest is implicit to this concept: "The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness, as it does from technical concepts of property law." *Almota Farmers Elevator & Warehouse v. United States*, 409 U.S. 470, 478 (1972), *citing* *United States v. Commodities Trading Corp.*, 339 U.S. 121 (1950); *United States v. Fuller*, 409 U.S. 488 (1973).

¹²⁷ Villagers were relocated for the construction of the Three Gorges Dam project, losing their farms and forced to live on a government stipend of \$7 per month. "It came as an order from the leaders. We had to obey. I didn't really want to move; most of the people didn't want to move. But we had no choice." Dele Olojede, *The Dam is Cast on the Yangtze*, *NEWSDAY*, Nov. 9, 1997, available in LEXIS, News Library, Asiapc File. Compare legal land reclamation with illegal reclamations by local government officials for sale to wealthy investors for illegal development, Tyler, *supra* note 13.

¹²⁸ P.R.C. LAND LAW art. 23.

¹²⁹ *Id.* arts. 43-53; *infra* notes 171-203 and accompanying text.

¹³⁰ *China Issues Grain Policy Paper Setting Out Agricultural Strategy for Next 35 Years*, BBC Summary of World Broadcasts, Oct. 26, 1996, available in LEXIS News Library, Asiapc File.

¹³¹ *China Increasing Protection of Cultivated Land*, XINHUA NEWS AGENCY, May 19, 1997, available in LEXIS, News Library, Asiapc File.

1. *Legal Takings*

The valid purposes for which the state can requisition land are limited to economic and cultural reasons, national defense and public works.¹³³ Farmers are rarely consulted when requisition occurs, and they generally feel powerless to prevent the occurrence.¹³⁴ Although parties reclaiming land must adequately compensate farmers under the Land Administration Law,¹³⁵ farmers rarely receive adequate compensation for either the loss of their use rights or for any improvements they may have made.¹³⁶

a. *What the Land Administration Law requires*

The Land Administration Law specifies procedures for legitimate reclamation and "adequate" compensation.¹³⁷ Allowable use of confiscated land by the state is limited to "economic, cultural or national defense construction projects, and for initiating public works."¹³⁸ The formal procedure for reclamation of land for such purposes is general and sparse: the "construction unit" applies to the land administration department at the county level,¹³⁹ and upon approval, the land administration department reassigns the land.¹⁴⁰ The procedure neither requires nor permits involvement of the landholding party.

Units acquiring requisitioned land must pay land compensation and resettlement subsidies to the collective unit.¹⁴¹ When cultivated land is requisitioned, compensation is supposed to be "three to six times the average annual output value of the requisitioned land for the three years preceding such requisition."¹⁴² The law also requires compensation for "attachments and young crops," which the land administration department at the provincial level calculates.¹⁴³

¹³² Prosterman et al., *supra* note 2.

¹³³ P.R.C. LAND LAW art. 21.

¹³⁴ Prosterman et al., *supra* note 2, at 94.

¹³⁵ P.R.C. LAND LAW arts. 27-31.

¹³⁶ Prosterman et al., *supra* note 2, at 94.

¹³⁷ P.R.C. LAND LAW arts. 23, 27-31.

¹³⁸ *Id.* arts. 21, 23.

¹³⁹ The construction unit applies by "presenting a project plan description or other documents of approval issued by the competent authority under the State Council or a local people's government at or above the county level, according to the procedures specified for state capital construction." *Id.* art. 23.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* arts. 27, 28.

¹⁴² *Id.* art. 27.

¹⁴³ *Id.*

In addition to requiring land compensation payments, the Land Administration Law also requires the payment of resettlement subsidies.¹⁴⁴ These subsidies are based on the average amount of land requisitioned per person, with a minimum amount of two to three times the average annual output value of each unit of land for the three years preceding the requisition.¹⁴⁵

Although the Land Administration Law appears to provide generous compensation and resettlement subsidies to farmers losing their land, in fact, this is not true.¹⁴⁶ Compensation and resettlement subsidies are to be paid directly to the collective unit.¹⁴⁷ The funds are to benefit the collective unit as a whole, and individual farm households should only receive direct compensation for attachments and young crops.¹⁴⁸

The Land Administration Law also addresses issues of non-compliance by local governments, but these regulations likewise go unheeded.¹⁴⁹ When local officials reclaim land with fraudulent approval or no approval at all, those involved will be subject to liability.¹⁵⁰ Liability will be charged when the state oversteps the Land Administration Law guidelines, when bribery occurs, or when compensation or resettlement subsidies do not reach the intended beneficiary.¹⁵¹ The land administration department at or above the county level enforces these provisions, or an injured party may file a suit directly in People's Court.¹⁵²

However, these legislated solutions are ineffective in dealing with takings incidents in rural China.¹⁵³ Fifty-four percent of farmers surveyed in villages throughout China were aware of specific takings of agricultural land in their

¹⁴⁴ *Id.* art. 28.

¹⁴⁵ *Id.*

¹⁴⁶ The Land Administration Law provides in pertinent part:

All kinds of compensation and resettlement subsidies paid for requisitioned land on account of state construction, *except for the compensation for individually owned attachments or young crops on the requisitioned land which shall be paid to such individuals*, shall be used by the units being requisitioned to develop production, to provide employment for the extra labour force due to requisition of the land and as living subsidies for people who cannot be employed; such funds shall not be used for other purposes and shall not be appropriated by any unit or individual.

Id. art. 30 (italics added).

¹⁴⁷ *Id.*

¹⁴⁸ And, by implication, the limited right to contest level of compensation and subsidy payment is vested in the collective unit, not the individual household. *Id.* art. 29.

¹⁴⁹ *Id.* arts. 43-53.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* art. 53.

¹⁵³ See *infra* notes 164-207 and accompanying text.

villages.¹⁵⁴ Of those takings, significant compensation was granted for only six farm households.¹⁵⁵ Farmers generally had no say in the takings process.¹⁵⁶

b. Farmers' rights under the Land Administration Law

Simply put, farmers have limited rights under the Land Administration Law. When the state reclaims land, farmers have no right to contest the state's justification.¹⁵⁷ This absence of recourse is particularly problematic given the high level of corruption at the local level.¹⁵⁸ Additionally, Chinese farmers cannot contest the level of compensation they receive.¹⁵⁹ Farmers are unable to directly contest the adequacy of their compensation,¹⁶⁰ and when it is illegally diverted or withheld, they do not have a direct cause of action.¹⁶¹ Instead, the collective unit must bring a claim on the farmers' behalf. Because local governments are plagued by corruption,¹⁶² lack of a direct cause of action is a serious problem for farmers.

Without an enforceable right to contest the takings or the level of compensation paid, farmers may perceive even legal state reclamation of farm land as illegitimate.

2. Illegal Takings and the Rule of Law

The ability of central government policies to prevent conversion of farmland to non-farm purposes is further frustrated by the combination of widespread corruption and ineffective control over local governments.¹⁶³ Local officials often receive large sums of money for permitting land to be used for non-agricultural purposes.¹⁶⁴ In addition, the central government has

¹⁵⁴ PROSTERMAN ET AL., *supra* note 8, at 23.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ P.R.C. LAND LAW art. 23.

¹⁵⁸ Louis Putterman, *The Role of Ownership and Property Rights in China's Economic Transition*, 144 CHINA Q. 1047, 1052 (1995).

¹⁵⁹ P.R.C. LAND LAW art. 23.

¹⁶⁰ See *supra* note 148.

¹⁶¹ P.R.C. LAND LAW art. 49.

¹⁶² *Environment: Millions of Lives are Uprooted in Mass Migration*, INDEPENDENT (London), Nov. 8, 1997, available in LEXIS, News Library, Allnews File.

¹⁶³ Putterman, *supra* note 158.

¹⁶⁴ See Tyler, *supra* note 13. [H]uge profits from land sales tend to overwhelm any fear of the central Government. With the prospect of millions of dollars in profits on even a small plot of land, developers and corrupt officials are often willing to take the risk of ignoring instructions from Beijing."

been unable to assert sufficient control over local governments: "The greatest obstacle to the present decentralization in China lies in the ambiguity on the part of the government about the definition of authority."¹⁶⁵ The nature of power and authority, and by implication, legitimacy, is not defined by law.¹⁶⁶ Instead, Chinese law is an instrument of Party politics to be interpreted by the National People's Congress.¹⁶⁷ Laws can be rendered ineffective by Party directives, and local government legitimacy is not a result of adherence to law but rather compliance with Communist Party policy.¹⁶⁸

Lack of central control over local governments is magnified by corruption at the local level.¹⁶⁹ Local governments take advantage of the opportunities that decentralization brings, loosely interpreting existing law, or in the extreme, manipulating power for their own advantage and personal gain.¹⁷⁰

a. *Solving problems without the courts*

Most Chinese legislation provides a mechanism for attempting to resolve disputes with the local level of government prior to initiating

Philip Shenon, *Good Earth is Squandered. Who'll Feed China?*, N.Y. TIMES, Sept. 21, 1994, available in LEXIS, News Library, Allnews File.

¹⁶⁵ Wang Xi, Comment, *The Problem of Decentralization in China*, in ECONOMIC REFORM IN CHINA: PROBLEMS AND PROSPECTS 239, at 242 (James A. Dorn & Wang Xi eds., 1990)

¹⁶⁶ *Id.* China's decentralization is plagued by problems due to the structure of the political system.

[W]ith respect to administration, power is subdivided between the central government and local governments, and between the government administrators and enterprises. On the other hand, the Party organizations on different levels, which parallel the corresponding levels of administration and enterprises, are still centrally controlled from the top to the bottom.

Id. at 243. State policy and Party policy co-exist: boundaries are often blurred and courts are not always clear whether they are relying on state or Party policy in making decisions. Chang, *supra* note 51, at 107 n. 18.

¹⁶⁷ Carol A. G. Jones, *Capitalism, Globalization and the Rule of Law: An Alternative Trajectory of Legal Change in China*, SOC. & LEGAL STUD., June 1994, at 208. A professor at Beijing University, Zhou Wangsheng, commented on recent improvements in this area: "There is a common saying that the NPC (National People's Congress) is a rubber stamp. But this image has been undergoing some change. It has changed from a low quality rubber stamp to a good quality rubber stamp." James Kyng, *In Congress: Perhaps Some Surprises: China's Rubber-Stamp Body May Have Bounce*, SEATTLE POST-INTELLIGENCER, Mar. 4, 1998, at A2.

¹⁶⁸ Jones, *supra* note 167.

¹⁶⁹ Peter Goodspeed, *Corruption a Fact of Life in the "New China,"* TORONTO STAR, Aug. 1, 1993, available at 1993 WL 7269876. During 1996, more than 65,400 Chinese officials were convicted of bribery, favoritism and "malfeasance." *China to Establish Agency to Combat Corruption Within Government*, BNA INT'L BUS. & FIN. DAILY, May 8, 1997, available in LEXIS, News Library, BNA File.

¹⁷⁰ Jones, *supra* note 167.

litigation.¹⁷¹ While this may be good in theory, it is not so effective in practice. Under Article 13 of the Land Administration Law, the basic tenet requires parties to first negotiate disputes prior to any court action.¹⁷² The Land Administration Law provides that “[o]wnership of land and right to the use of land shall be protected by law. No unit or individual shall infringe upon such ownership and right.”¹⁷³ When disputes arise, they “shall be solved through consultation between the parties. If no agreement can be reached through consultation, they shall be decided by the people’s government.”¹⁷⁴ Importantly, the people’s government at or above the county level decides disputes arising between units of government, whereas disputes in which one of the parties is an individual are to be decided at the township or county level.¹⁷⁵

Negotiating with the local government, however, is often not very useful to the farmer because the party at the local level of government with whom the farmer must meet is also generally the party that violated the farmer’s rights under the contract.¹⁷⁶ One occurrence of informal politics undermining control of the central government took place in Tangquan Township, Wujiang County between 1985 and 1987.¹⁷⁷ In that instance, officials responsible for administering the Land Law yielded to pressures of friends, family, and colleagues, by permitting farmland to be appropriated for housing construction under the pretext of “town development.”¹⁷⁸ Farmers were furious,¹⁷⁹ yet the only recourse available was to send letters and photographs to provincial, city and county governments.¹⁸⁰ County government officials unsuccessfully requested town officials to investigate, so the matter was effectively dropped.¹⁸¹ This incident illustrates the fact that while the county is able to control

¹⁷¹ ZWEIG, *supra* note 17, at 158-60.

¹⁷² P.R.C. LAND LAW art. 13.

¹⁷³ *Id.* art. 11.

¹⁷⁴ *Id.* art. 13.

¹⁷⁵ *Id.*

¹⁷⁶ ZWEIG, *supra* note 17, at 228.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

very large scale developments, activity at the local level is often beyond the reach of the law.¹⁸²

b. The Chinese legal system

Once a farmer has exhausted his remedies achievable through negotiations with local government officials, his next step is to file a claim in the People's Court.¹⁸³ But this solution is not realistic either. The legal system in rural China is not very effective, as there are few courts, few lawyers, and essentially limited accessibility to either.¹⁸⁴

Farmers have little access to the court system, and even so, access is no guarantee of adjudication on the merits or a fair trial.¹⁸⁵ Under the Constitution, courts are independent,¹⁸⁶ but in reality, they are "weak institutions under heavy influence from Party and regional interests."¹⁸⁷ The Vice President of the People's Supreme Court recently noted that taking local authorities to court has always been difficult for farmers.¹⁸⁸ Applications to file writs are routinely turned down, and lower courts often make excuses in order to reject or delay farmers' lawsuits.¹⁸⁹ When a dispute does reach the court, the rights and obligations enumerated within the contract are not the major issues.¹⁹⁰ Instead, determinations are made according to Party policy, which by implication means that the rights under the contract are not controlling.¹⁹¹

Moreover, there are very few lawyers in rural China.¹⁹² After the development of the People's Republic of China in 1949, many lawyers were killed, imprisoned, removed from office, or chose not to practice

¹⁸² *Id.* Cadres can also take a farmer's land for personal use, and similarly, the farmer has little recourse. But, wealthier rural residents often have significant resources with which to confront cadre authority. *Id.* at 242.

¹⁸³ P.R.C. LAND LAW art. 13.

¹⁸⁴ Interview with Steve Dickinson, Affiliate Assistant Professor, University of Washington; Director of Corporate Operations for Michiels International, Inc., in Seattle, Wash. (Dec. 5, 1997) [hereinafter Dickinson Interview].

¹⁸⁵ ZWEIG, *supra* note 17, at 177.

¹⁸⁶ P.R.C. CONST. art 126.

¹⁸⁷ Jonas Alsen, *An Introduction to Chinese Property Law*, 20 MD. J. INT'L L. & TRADE 18 (1996).

¹⁸⁸ *PRC: Law Courts Must Protect Legal Rights of Farmers*, available in World News Connection (visited Feb. 6, 1998) <<http://wnc.fedworld.gov>>.

¹⁸⁹ *Id.*

¹⁹⁰ ZWEIG, *supra* note 17, at 177.

¹⁹¹ *Id.*

¹⁹² Dickinson Interview, *supra* note 184.

law.¹⁹³ Between 1957 and 1958, the state shut down all law schools, and in 1959, closed the Justice Ministry.¹⁹⁴ During the Cultural Revolution, legal workers were among the first people to be sent to the countryside for "re-education," and the law schools were again closed in 1966 and did not reopen until 1977.¹⁹⁵ These events resulted in an extreme shortage of trained lawyers, which is especially acute in rural areas.¹⁹⁶

c. *Enforcement of judgments in rural China*

If a farmer is fortunate enough to receive a judgment in his favor, he then must bear the burden of attempting to enforce that judgment.¹⁹⁷ Generally, local police or branches of the military are unwilling to assist with enforcement, thus the farmer must attempt to assert his judgment without outside assistance.¹⁹⁸ Without means to enforce a judgment, the judgment is without great value.

The largest obstacle to providing a means for enforcement of judgments is the organization of the system itself.¹⁹⁹ Courts and judges depend upon local governments for their jobs and their finances.²⁰⁰ For example, when executing a judgment against a local enterprise, a judge in Fujian found his daughter transferred to a remote rural outpost by her employer (the county).²⁰¹ Without the necessary separation of powers and influence between local government and local courts, the task of enforcing judgments will be formidable at best.

Although the central government is aware of this problem and is reputedly working to strengthen the legal branch of the government, this charge is no easy task. The size and diversity of the regions are daunting, and the strength of the regions is growing rapidly:²⁰² "[I]t has become harder to enforce the will of the central government than at any other time since the revolution, [and] it will take a long time before the courts, especially outside

¹⁹³ Alsen, *supra* note 187, at 16.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*; ZWEIG, *supra* note 17, at 155.

¹⁹⁷ Donald C. Clarke, *The Execution of Civil Judgments in China*, 141 CHINA Q. 65 (1995).

¹⁹⁸ *Id.* at 71-72. Even in instances of local officials using "force" to settle lawsuits, courts are still unable to provide assistance, as local officials far out-power the courts in resources. Alsen, *supra* note 187, at 18.

¹⁹⁹ See generally Clarke, *supra* note 197.

²⁰⁰ *Id.* at 71.

²⁰¹ *Id.*

²⁰² Alsen, *supra* note 187, at 19.

the biggest metropolitan areas, can be relied on as competent, powerful and impartial decision makers.²⁰³

d. *Extra-legal resolution methods: guanxi, bribery, clans, secret societies, gangsters, violence and revolution*

Because farmers lack adequate resources for solving their legal problems, they may resort to age-old social mechanisms for solving problems within the village.²⁰⁴ Rural China has long been governed by a system of control based upon ritual, tradition, and family relationships as opposed to control based upon the law and the legal system.²⁰⁵ This system of control is also referred to as *guanxi*, or "rule of relationships," as opposed to "rule of law."²⁰⁶

Where legal methods of dispute resolution are not successful, peasants have been willing to resort to more drastic measures. The following story serves as an illustration of the extent to which farmers will go when their demands are unmet.²⁰⁷ In the 1970s, a language school purchased land to build a back road.²⁰⁸ After some years had passed, the nearby commune presented the school with a bill, on the grounds that the purchase price was too low, too much land was taken, and that both water run-off and excess shade resulted from the construction of the school, diminishing farm production.²⁰⁹ The school refused to pay, and the farmers dumped garbage at the back entrance.²¹⁰ The school continued to stall, so the farmers blocked the sewers.²¹¹ After this move, the school then began to negotiate.²¹²

While the above example may appear as a relic of bygone days, in fact, the number of disputes in rural areas is growing.²¹³ The growth in disputes has been attributed to the social, political and moral complexity resulting from

²⁰³ *Id.*

²⁰⁴ ZHOU, *supra* note 1, at 12-17. A motto of rural "purchasing agents" who were especially adept at procuring scarce raw materials is as follows: "endure numerous hardships; cross one thousand mountains and ten thousand streams; speak one thousand dialects and ten thousand words; and use one thousand means and ten thousand schemes." *Id.* at 113.

²⁰⁵ FEI XIAOTONG, FROM THE SOIL: THE FOUNDATIONS OF CHINESE SOCIETY 101-107 (Gary G. Hamilton & Wang Zheng trans., 1992).

²⁰⁶ Jones, *supra* note 167 at 197.

²⁰⁷ SELDEN, *supra* note 29, at 200.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *A Few Observations on Some Problems of Comprehensive Control of Public Order and Security in Rural Areas*, available in World News Connection (visited Feb. 6, 1998) <<http://wnc.fedworld.gov>>.

recent reforms, as well as ignorance or aversion to use of the legal system to resolve disputes.²¹⁴ In addition, the inability of the central government to coordinate local action has permitted a breakdown in social order and enabled the growth of criminal activity.²¹⁵ Because disputes often affect major interests and rights of the parties involved, the disputes have led to “armed clashes, which again end up in such criminal acts as bodily injury, murder, arson, sabotage of production, and serious disruption of public order.”²¹⁶

Many attribute the development of the *baogan daohu* system to farmers’ willingness to engage in illegal methods of solving problems.²¹⁷ This willingness should serve as a reminder that unless the government will provide necessary solutions, farmers may decide to adjust the system once again.

D. *What China Needs*

A potential solution to the problems affecting Chinese farmers is to create an objective means of dispute resolution and a connected system of enforcement. This solution takes into account the legal implications for farmers’ rights because it provides an avenue of redress that makes those rights meaningful. This solution is also mindful of the context in which the law operates in rural China, because the objective means of dispute resolution and subsequent enforcement of these decisions would be sufficiently removed from the influence of local officials.

Critical to the success of this proposal are two requirements. First, farmers’ rights under their contracts must be clearly articulated and made systematic. This objective would require not only developing a comprehensive document to be used in land transactions, but also mandating its use. Second, and most importantly, the state’s eminent domain powers should be restricted to takings for the limited purpose of “public use,” and a party suffering from an illegal or under-compensated land reclamation should have the opportunity to challenge directly that state action. The ability to bring individual claims rather than to rely on the collective unit to protect

²¹⁴ *Id.*

²¹⁵ *Id.* “Crimes that have rarely been seen in the past ... all have now also become occasional occurrences, and all those popularly referred to as ‘train robbers and highway bandits,’ ‘cross-river dragons,’ ‘local snakes,’ and ‘crafty old rats’ are going about their misdeeds with extreme insolence.” *Id.*

²¹⁶ *Id.*

²¹⁷ See *supra* notes 71-90 and accompanying text.

farmers' rights will help ensure that the state and its local representatives abide by the same law they use to assert their power.

1. *A Right to Contest, Both Legal and Illegal Takings*

When farmland is reclaimed by the state, either legally or illegally, farmers should have the right to contest whether the state's justification meets the "purpose" requirement under the Land Administration Law,²¹⁸ and whether the amount of compensation paid for the land is sufficient. Farmers should have an individual right of action under the compensation provisions, and not have to rely on the collective unit to assert their rights.²¹⁹ In addition, the Land Administration Law should provide farmers with a right to directly contest any illegal withholding or diverting of compensation by local government officials.

Chinese farmers should also be granted the right to contest the purpose of the takings. Although the permitted purposes within the Land Administration Law are very broad,²²⁰ the addition of a right to contest would be meaningful. It would help ensure the government's legitimacy and authority.

2. *An Impartial and Meaningful Way to Contest Illegal Reclamation*

In order to create a meaningful dispute resolution mechanism in the countryside, China must do two things. First, farmers must receive access to neutral and fair adjudication. To accomplish this, either the existing judicial system can be altered or independent tribunals can be created to specifically hear agricultural contract disputes. If the existing system is to be effectively altered, issues of access to legal resources, and corrupt local officials, must be addressed.²²¹

Second, in order for dispute resolution to function effectively, farmers must be aware of their legal rights, and be able to assert them. This awareness can be accomplished through a combination of education and access to legal resources. The land administration department can take an active role in education, focusing on the purpose and value of land contracts. The land administration should draft a standard-form contract to be used for

²¹⁸ See *supra* note 138 and accompanying text.

²¹⁹ See *supra* notes 157-162 and accompanying text.

²²⁰ See *supra* note 138 and accompanying text.

²²¹ The specific details of how to reform a corrupt judicial system are beyond the scope of this Comment.

all land use agreements throughout China. The department should also design a procedure for local officials to follow when entering contracts with farmers which identifies and clarifies rights and responsibilities. Ideally, farmers should have access to lawyers, but given the extreme shortage of lawyers in China,²²² this is not realistic. Although the central government is hopeful that the number of lawyers will grow, this increase will probably not be felt in the countryside.²²³

Instead, the government must take a proactive role in ensuring that legal access is available to all Chinese farmers. Both the creation of neutral and fair dispute resolution mechanisms and the education of farmers regarding their legal rights will increase farmers' willingness to seek out "legal" solutions to their contractual problems.²²⁴

3. *A Means of Enforcing Judgments*

In order to encourage farmers to seek out "legal" solutions to their contractual problems, judgments must be enforceable. Without means to enforce a judgment, the judgment is without great value. This is a serious and difficult problem because implicit in its solution is a significant change in China's system of governance. The problem results from the absence of separation of powers between local officials and local courts, and the significant influence local officials have in the administration of government in rural China.²²⁵ This obstacle is complicated by the problems of decentralization that China has been unable to effectively solve. The central government cannot control local government action, and the Party controls the state, which precludes true adherence to a rule of law.

While specific recommendations could be made regarding enforcement options, these would not be realistic until the countryside can adhere to the

²²² See *supra* notes 192-196 and accompanying text.

²²³ *Report Says Citizens' Legal Protection Increasing*, available in World News Connection (visited Feb. 6, 1998) <<http://wnc.fedworld.gov>>; *China Needs a Large Number of Legal Professionals*, available in World News Connection (visited Feb. 6, 1998) <<http://wnc.fedworld.gov>>.

²²⁴ In fact, the increasing reliance or acceptability of "legal" dispute resolution is on the rise in China, and this can be attributed to a growing awareness of the law. *Report Says Citizens' Legal Protection Increasing*, available in World News Connection (visited Feb. 6, 1998) <<http://wnc.fedworld.gov>>. One of the most popular new TV shows, Court Fax, offers live transmissions of cases being tried in intermediate courts, and hundreds of Chinese news sources offer legal affairs columns. "Awareness of the law has increased remarkably and the notion that "one can protect his or her rights and interests by resorting to the law" is becoming widely accepted." *PRC: Law Courts Must Protect Legal Rights of Farmers*, available in World News Connection (visited Feb. 6, 1998) <<http://wnc.fedworld.gov>>.

²²⁵ See *supra* notes 197-203 and accompanying text.

“rule of law.” However, hope remains. In fact, recent attempts at establishing local elections may have significant success in establishing order in rural China.²²⁶ Although the central government may be unable to control local officials, that doesn’t preclude farmers from asserting a legitimate, organized front. The threat of losing office may be significant impetus for local officials to follow the central government policies requiring increased protection of farmers’ rights.

IV. CONCLUSION

Resolving issues of tenure security for farmers in rural China has major implications for agricultural production and social stability in rural China and the rest of the world. The central government must take meaningful measures to ensure tenure security for farmers and end illegal government land reclamation, in order to sustain the significant improvements in the rural sector achieved through the adoption of the *baogan daohu* system. As previously suggested, farmers’ rights must be clearly articulated and made enforceable. This will involve coordinating local and central government action. Though developing a meaningful system of dispute resolution and enforcement in rural China will be difficult and require systematic changes in the relationship between the central and local governments, ignoring the rising problems could prove disastrous. The underlying conflict between central and local governments and state and Party policies must be resolved in order for Chinese farming to truly operate “according to the law.”

²²⁶ *The Most Extensive Practice of Socialist Democracy*, available in World News Connection (visited Feb. 6, 1998) <<http://wnc.fedworld.gov>>. Officials are otherwise appointed.

