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WOMEN'S LAND RIGHTS IN RURAL CHINA: TRANSFORMING EXISTING LAWS INTO A SOURCE OF PROPERTY RIGHTS

H. Ray Liaw[†]

Abstract: In the aftermath of legal reforms designed to secure land tenure for farmers, women in rural China lost rights to land at marriage, divorce, and widowhood. Despite a central legal framework that facially protects women's property interests, ambiguity in the property and marriage laws have allowed village leaders to reassert traditional social norms and deny constitutional equal rights guarantees for women. Recent attempts to ameliorate landlessness for women, specifically in the Rural Contract Law and the Property Law, offer little promise of providing a significant solution for rural women. New proposals to mitigate rural women's loss of land rights must be framed in the cultural context of how social relations affect land rights. Legal reforms in rural China should focus on strengthening women's property rights within marriage, as well as securing external rights to property. Women's land tenure would be better protected under a more clearly defined community property regime that recognizes rural land contracts issued both prior to and during marriage as jointly possessed. Such measures would give women access to a legal platform at divorce or widowhood, when they are most likely to experience landlessness.

I. INTRODUCTION

Prior to land reform policies instituted in China during the late 1990s, rural women like Hou Cunli did not anticipate losing land rights upon marriage.¹ After moving to her husband's village at marriage, Hou's natal village redistributed her share of land among other villagers.² Hou's recourse was likely a seemingly endless waiting list for a land share in her new residence.³ Village governments told other women like Zhu Daiyin that land was not given to daughters at all, as they would inevitably marry off to other villages.⁴

These stories are not unique. During the first half of 1999 alone, over 2000 rural women in twenty-two provinces reported loss of land⁵ to the All-

[†] The author would like to thank Emeritus Professor Roy L. Prosterman for his invaluable guidance, and the editors of the *Pacific Rim Law & Policy Journal* for their encouragement. This Comment would not have been possible without the support of the author's family, Joseph Gregory, Isis and Inanna Liaw.

¹ *Rural Women Fight for Their Right to Land*, 26 WIN NEWS, June 30, 2000, available at 2000 WLNR 4369875.

² *Id.*

³ *Id.*

⁴ Anthony Kuhn, *Land Development Engulfs Precious Chinese Farmland*, (NPR radio broadcast October 19, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=6326026> (transcript on file with the *Pacific Rim Law & Policy Journal*).

⁵ Zongmin Li & John Bruce, *Gender, Landlessness and Equity in Rural China*, in DEVELOPMENTAL DILEMMAS: LAND REFORM AND INSTITUTIONAL CHANGE IN CHINA 308, 315 (Peter Ho ed., 2005).

China Women's Federation.⁶ Complaints primarily concerned village governments' refusal to allocate land to women upon marriage into a new village and deprivation of any land upon divorce or widowhood.⁷

While China's recent reforms to strengthen land tenure security hold potential to improve the economic welfare of 850 million rural poor,⁸ the social mores intersecting with these reforms limit women's rights to land. In 1998, China promulgated sweeping changes for farmers via the Land Management Law,⁹ guaranteeing land use contracts for thirty-year terms and greatly limiting the scope of "readjustments"¹⁰ during the interim. Simultaneously, reports emerged that rural women experienced discriminatory treatment in land allocations.¹¹ Field research conducted with women between the ages of eighteen and fifty revealed that those married after 1995, the year when many villages began implementing a no-readjustment policy, were more likely to have no land share.¹² Meanwhile women's economic participation in agriculture increased following implementation of the Household Responsibility System ("HRS")¹³ in the

⁶ The All-China's Women's Federation is a non-governmental organization founded in 1949 in China. The basic function is to represent and safeguard the rights and interests of women by promoting equality between men and women. About All-China Women's Federation, <http://www.women.org.cn/english/english/aboutacwf/mulu.htm> (last visited Oct. 5, 2007).

⁷ Zongmin Li & Bruce, *supra* note 5, at 315.

⁸ See generally, Zhu Keliang & Roy Prosterman, *From Land Rights to Economic Boom*, CHINA BUSINESS REVIEW, July-August 2006, at 44 (arguing that formal land titling would leverage recent legal reforms to boost farmers' income); Roy L. Prosterman & Tim Hanstad, *Land Reform in the Twenty-First Century: New Challenges, New Responses*, 4 SEATTLE J. FOR SOC. JUST. 763 (2006) (discussing the potential benefits of land tenure for the world's rural poor and the future of land reform design).

⁹ Land Administration Law (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 29, 1998, effective Jan. 1, 1999), art. 14, *translated in* ISINOLAW (last visited Aug. 4, 2007) (P.R.C.) [hereinafter Land Management Law]; ROY PROSTERMAN ET AL., RURAL LAND REFORM IN CHINA AND THE 1998 LAND MANAGEMENT LAW 20-22 (Rural Dev. Inst., Reports on Foreign Aid and Development No. 98, 1998).

¹⁰ Land readjustment means that families who experience a decrease in family size must return land shares held by former members to the village collective, while households that increase in size are eligible for additional shares depending on overall availability in the village. Zhibin Lin & Lixin Zhang, *Gender, Land, and Local Heterogeneity*, 15 J. CONTEMP. CHINA 637, 639 n.6 (2006). Two general types of land adjustments exist: "big" or comprehensive readjustments (also known as "reallocations"), which involve an overall change in the landholdings of all households in the village, and "small" or partial readjustments, which involve adding or taking from a household's existing landholding. JENNIFER DUNCAN & LI PING, WOMEN AND LAND TENURE IN CHINA: A STUDY OF WOMEN'S LAND RIGHTS IN DONGFANG COUNTY, HAINAN PROVINCE 17 n.71 (Rural Dev. Inst., Reports on Foreign Aid and Development No. 110, 2001).

¹¹ Zongmin Li & Bruce, *supra* note 5, at 314-15. Complaints received by the All-China Women's Federation document that women in certain regions were allocated an average of fifty to seventy percent of what men held, many women reporting they never received allocations at all.

¹² Zhibin Lin & Lixin Zhang, *supra* note 10, at 640. Results from the survey conducted with 163 women throughout seventeen provinces concluded that of the forty-five women married after 1995, thirty-six had no land, constituting eighty percent of women married after 1995.

¹³ In the mid-1950's, the Communist Party introduced collectivized farming, which illegalized private ownership of farmland and mandated farmers become "working members" on collective farms.

early 1980s.¹⁴ Today, women's relationship to the land is central to rural China's economic welfare.¹⁵

China's legal framework fails to support women's rights to land at marriage, divorce, and widowhood. Despite a constitutional guarantee of gender equality¹⁶ and myriad national laws ostensibly protecting women's right to property, women's status within the family and at the village level has not substantially improved.¹⁷ Virilocal (or patrilocal) residence patterns, whereby a woman becomes part of her husband's household, remain the norm in rural China.¹⁸ A woman's father, husband, or father-in-law serves as de facto head of household.¹⁹ China enacted the 2003 Rural Land Contract Law ("RLCL") in part to remedy women's loss of land by preserving a woman's share of land in her natal village upon marriage or in her marital village upon divorce or widowhood.²⁰ Yet social realities in rural China limit the effectiveness of this provision. Local authorities may no longer take back women's natal land shares, but women hold no practical right to these allocations.²¹

China officially instituted the Household Responsibility System in 1979, where the collective remains the landowner, but contracts out land parcels to individual households for private farming. Zhu Keliang et al., *The Rural Land Question in China: Analysis and Recommendations Based on a Seventeen-Province Survey*, 38 N.Y.U. J. INT'L L. & POL. 761, 769-70 (2006).

¹⁴ Li Zongmin, *Changing Land and Housing Use by Rural Women in Northern China*, in WOMEN'S RIGHTS TO HOUSE AND LAND: CHINA, LAOS, VIETNAM 241, 261 (Irene Tinker & Gale Summerfield eds., 1999).

¹⁵ See Zhao Xiaolu, *Rural Women Left to Hold the Fort at Home*, CHINA DAILY, Dec. 23, 2006, available at http://www.chinadaily.com.cn/china/2006-12/23/content_765876.htm. Bina Agarwal's often cited arguments support why rural Chinese women need land tenure security. First, the welfare argument establishes that women who lose land following divorce or widowhood risk poverty and destitution without access to an agricultural livelihood. Second, the productivity argument recognizes that women in rural China have become more responsible for decision making on the land, and with personal land rights, women will make better decisions to enhance and increase productivity. Third, the equality and empowerment argument contends that equality in land rights will bring about empowerment, both within women's households and in their communities. Zongmin Li & Bruce, *supra* note 5, at 311 (citing from BINA AGARWAL, *A FIELD OF ONE'S OWN: GENDER AND LAND RIGHTS IN SOUTH ASIA* 27-45 (1994)).

¹⁶ XIAN FA [Constitution] art. 48 (1982), translated in ISINOLAW (last visited Aug. 4, 2007) (P.R.C.).

¹⁷ DUNCAN & LI PING, *supra* note 10, at 15; see also Sally Sargeson, *Introduction: Women and Policy and Institutional Change in Rural China*, 15 J. CONTEMP. CHINA 575, 576 (2006) (assessing results of four recent studies on the effects of legal, rural development, and policy reforms on women in China).

¹⁸ Li Weisha, *Changes in Housing Patterns for Rural Chinese Women*, in WOMEN'S RIGHTS TO HOUSE AND LAND: CHINA, LAOS, VIETNAM, *supra* note 14, at 231, 232.

¹⁹ Li Zongmin, *supra* note 14, at 248.

²⁰ Rural Land Contract Law (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 29, 2002, effective Mar. 1, 2003), art. 30, translated in GOV.CN, http://english.gov.cn/laws/2005-10/09/content_75300.htm (last visited Aug. 4, 2007) (P.R.C.) [hereinafter RLCL]; Yang Li & Xi Yin-Sheng, *Married Women's Rights to Land in China's Traditional Farming Areas*, 15 J. CONTEMP. CHINA 621, 624 (2006).

²¹ Yang Li & Xi Yin-Sheng, *supra* note 20, at 629-30.

This Comment assesses the viability of current laws and legal strategies, such as partitioning land, to secure rural women's property rights. Part II discusses how changes in property laws designed to promote economic development in rural China contribute to women's land loss. Part III argues that ambiguities within the Marriage Law,²² the RLCL, and the 2007 Property Law²³ will prevent these laws from serving as vehicles to end women's landlessness. Part IV turns to examples from other developing countries and argues why legal proposals to strengthen women's property rights should be framed in the cultural context of social relations. This section also introduces the social climate in rural China that dictates implementation of law at the local level. It further explains why the RLCL fails to offer immediate relief in the context of rural China. In light of this social climate, Part V concludes that China should adopt a community property regime that legally recognizes land allocated prior to marriage as jointly possessed by both husband and wife. China recognizes property acquired during marriage as jointly possessed, and going one step further would prove a more successful legal platform for advocating women's land tenure in rural China.

II. EVOLVING LAND POLICIES IN RURAL CHINA COMPROMISE WOMEN'S LAND RIGHTS

Women's loss of land rights stems from three major reforms in Chinese land policy since 1950. Women first gained legal rights to land in 1950, just prior to their increased agricultural participation in the collective farming era.²⁴ Thirty years later, women's authority returned to a more traditional role following the shift to household land allocation under the HRS.²⁵ Rural land policy changes in the mid-1990s, which intended to improve land tenure security, failed to account for women's land acquisition and resulted in women's land loss. The following section discusses the broad arc of reforms to land laws vis-à-vis women's land tenure over the past fifty years and the specific impact of the Land Management Law on women's land rights.

²² Amendments to the Marriage Law (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 28, 2001, effective Apr. 28, 2001), *translated in ISINOLAW* (last visited Aug. 4, 2007) (P.R.C.) [hereinafter Marriage Law Amendments].

²³ Property Law (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 16, 2007, effective Oct. 1, 2007), art. 130, *translated in ISINOLAW* (last visited Aug. 4, 2007) (P.R.C.) [hereinafter Property Law].

²⁴ See DUNCAN & LI PING, *supra* note 10, at 12-15.

²⁵ *Id.* at 15-16.

A. *Women Gain Only Limited Land Rights Throughout Collectivized Farming and Implementation of the HRS*

National law in China first introduced equal rights for women in both marriage and property-ownership in the 1950s.²⁶ The notion of equal rights met resistance in rural communities and was resigned to paper.²⁷ Throughout prior generations, customary law both protected and constrained women by limiting their access to agricultural land through fathers or husbands.²⁸ The central government led a campaign throughout the 1950s to mobilize female labor into the agrarian economy, promoting a norm of women laboring as equals to men.²⁹ Collectivization increased the percentage of women working and the amount of time they spent in the fields,³⁰ but women's new roles did not necessarily result in social and cultural gender equality.³¹

Institution of the HRS in 1979 marked the beginning of successful economic reforms for rural farmers.³² Agricultural production increased dramatically under the HRS because individual family farms proved to be a more efficient model than collective farming.³³ This model still exists today, with village collectives holding legal title to all rural land,³⁴ contracting land use rights directly to households for private farming, and allocating parcel size on a per capita basis.³⁵ The return to family farming also changed the balance of power within the family vis-à-vis the land, back to a model in which the father or husband assumes head of household.³⁶ Despite reemergence of traditional family roles, women's involvement in household agriculture increased as nonagricultural industries began pulling men away from daily farming activities.³⁷

²⁶ See TAMARA JACKA, *WOMEN'S WORK IN RURAL CHINA: CHANGE AND CONTINUITY IN AN ERA OF REFORM* 30 (1997) (discussing promulgation of the 1950 Marriage Law and Agrarian Reform Law).

²⁷ *Id.*

²⁸ Irene Tinker, *Women's Empowerment Through Rights to House and Land*, in *WOMEN'S RIGHTS TO HOUSE AND LAND: CHINA, LAOS, VIETNAM*, *supra* note 14, at 9, 9.

²⁹ KAY ANN JOHNSON, *WOMEN, THE FAMILY AND PEASANT REVOLUTION IN CHINA* 158-59 (1983).

³⁰ *Id.* at 162 (citing to Marina Thorborg's study determining an increase in able-bodied women participating in collective labor, from sixty to seventy-five percent in 1956 to between eighty and ninety percent in 1959).

³¹ DUNCAN & LI PING, *supra* note 10, at 15.

³² Zhu Keliang et al., *supra* note 13, at 770.

³³ PROSTERMAN ET AL., *supra* note 9, at 2.

³⁴ Zhu Keliang & Prosterman, *supra* note 8, at 46.

³⁵ Zhu Keliang et al., *supra* note 13, at 769-70.

³⁶ DUNCAN & LI PING, *supra* note 10, at 16.

³⁷ Gale Summerfield, *Gender Equity and Rural Land Reform in China*, in *WOMEN AND GENDER EQUITY IN DEVELOPMENT THEORY AND PRACTICE* 137, 146 (Jane S. Jaquette & Gale Summerfield eds., 2006); Li Zongmin, *supra* note 14, at 255.

Villages frequently readjusted land contracts, typically enlarging allocated lands when wives moved into their husband's family and decreasing allocations when a daughter left following her marriage.³⁸ This arrangement forced women to undergo a cycle of loss and gain of land upon marriage.³⁹ Readjustment of household land at marriage could increase a new wife's sense of value in the household.⁴⁰ On the other hand, readjustments served as the largest source of land tenure insecurity since a household's land could unpredictably decrease.⁴¹ Such insecurity prompted farmers' reluctance to make economic investments in the land, prompting the central government to seek a solution.⁴²

B. Legal Developments Promoting Economic Development for Farmers Led to Rural Women's Landlessness

The 1998 Land Management Law intended to provide greater security to farmers by reducing the frequency and scope of readjustments.⁴³ The Land Management Law established a thirty-year land use right for all farmers and "strongly discouraged" readjustments.⁴⁴ A 2005 seventeen-province survey of China shows some measure of success behind these efforts. In the years when villages issued written contracts to farmers, an act symbolizing reassurance of their thirty-year right, the size of farmers' investments on their land increased, representing farmers' confidence in those rights.⁴⁵

For women, however, rural economic development held negative implications. The national policy of deterring readjustments coincided with reports of gender discrimination at the local level.⁴⁶ The Land Management Law's limitation on readjustments cut short the land allocation cycle for women at marriage, divorce, or widowhood—the point in time when they

³⁸ Zhu Keliang et al., *supra* note 13, at 770; Zongmin Li & Bruce, *supra* note 5, at 317.

³⁹ See Zongmin Li & Bruce, *supra* note 5, at 318-22 for further discussion on the spectrum of discriminatory land allocations women have faced throughout their life-cycles.

⁴⁰ LAUREL BOSSEN, CHINESE WOMEN AND RURAL DEVELOPMENT 97 (2002).

⁴¹ PROSTERMAN ET AL., *supra* note 9, at 13-14.

⁴² Zhu Keliang et al., *supra* note 13, at 771.

⁴³ Land Management Law, *supra* note 9, art. 14; PROSTERMAN ET AL., *supra* note 9, at 20-22.

⁴⁴ Zongmin Li & Bruce, *supra* note 5, at 313. See also Zhu Keliang et al., *supra* note 13, at 771-72 (discussing Article 14 of the Land Management Law, which requires land readjustments to be approved by two-thirds of village members).

⁴⁵ Zhu Keliang & Prosterman, *supra* note 8, at 47-48; Zhu Keliang et al., *supra* note 13, at 798.

⁴⁶ Zongmin Li & Bruce, *supra* note 5, at 314-16. Five separate study results published between 2000 and 2003 confirmed women's growing loss of land rights upon marriage, especially among women married following the central government's encouragement of no-readjustment policies.

left behind their land share and moved to a new village.⁴⁷ Divorce could mean a complete loss of land for many women;⁴⁸ women are often forced off marital land at divorce, with no land share to return to nor the potential of land through readjustment.⁴⁹

Given the tension between harming rural women's land rights and benefiting land tenure security for all farmers over the long run, curtailing of land readjustment sparked considerable debate among scholars.⁵⁰ Meanwhile, farmers' perspective on readjustment policies may not be clear. While the 2005 survey found more than seventy-five percent of farmers said they would "support or not oppose" a strict prohibition on readjustment, notably this data does not delineate women's responses.⁵¹ This Comment recognizes the importance of improving farmers' economic stability and argues for protection of women's rights to land in the context of the legal and social reality of rural China.

III. AMBIGUITY WITHIN CHINA'S LEGAL FRAMEWORK PREVENTS WOMEN FROM RETAINING LAND UPON MARRIAGE, DIVORCE, AND WIDOWHOOD

Women's landlessness in rural China is due to ambiguities and inconsistencies in the overall legal framework, which purportedly recognizes women's rights. The framework begins with a baseline principle of equality in China's constitution⁵² granting broad equal rights to women in all spheres

⁴⁷ Ping Li, *Rural Land Tenure Reforms in China: Issues, Regulations and Prospects for Additional Reform*, in LAND REFORM, LAND SETTLEMENT AND COOPERATIVES 59, 63 (Food and Agric. Org., Publ'n. No. 2003:3, 2003), available at <http://www.fao.org/docrep/006/y5026e/y5026e06.htm#bm06>. Some scholars concluded that women's "emerging landlessness" upon marriage stemmed from the Land Management Law's restrictions on readjustments for new village inhabitants, as well as traditional social norms requiring women to move to their husband's village and influencing the redistribution of women's land shares in her natal village. Zongmin Li & Bruce, *supra* note 5, at 316. See *infra* Part IV.B.

⁴⁸ While the divorce rate is on the rise in China, the overall rate in 2006 remains 2.73 per thousand couples. *Divorce Rate Rises As China Develops: Scholar*, CHINA.ORG.CN, June 23, 2006, <http://www.china.org.cn/english/2006/Jun/172598.htm>.

⁴⁹ DUNCAN & LI PING, *supra* note 10, at 40.

⁵⁰ Jennifer Brown, *Protecting Women's Land Rights Through RLCL Implementing Regulations 7* (Aug. 2003) (unpublished paper, on file with the *Pacific Rim Law & Policy Journal*). Compare Zhu Keliang et al., *supra* note 13, at 829 (advocating for lost land rights to be addressed via compensation and market transfer, as opposed to administrative readjustments affecting all farmer's land), with Yang Li & Xi Yin-Sheng, *supra* note 20, at 634-35 (arguing for continuation of readjustment on a limited basis, while acknowledging the long-term limitations of such practices to both economic development and women's land rights).

⁵¹ Zhu Keling et al., *supra* note 13, at 796. The proportion of farmers supporting or not opposing such a prohibition increased from 57.5 percent found in a 2001 survey conducted by the same researchers.

⁵² See Robin Nielsen, "If He Asks Me to Leave This Place, I Will Go": *The Challenge to Secure Equitable Land Rights for Rural Women*, in REALIZING PROPERTY RIGHTS 204, 208 (Hernando de Soto & Francis Cheneval eds., 2006), available at <http://www.swisshumanrightsbook.com> (noting that most countries include some form of gender equality in their constitutions).

of life.⁵³ China goes further in its civil laws, specifically the 1992 Law on Protecting Women's Rights and Interests of the People's Republic of China ("LPWRI"), which provides specific protection for contracted land rights.⁵⁴ Unfortunately, neither provision offers a direct cause of action to enforce women's rural land rights.⁵⁵

The Marriage Law, the RLCL, and the Property Law seemingly affix remedies to women's loss of land. However, they fail to provide practical solutions, such as classifying rural contract land as owned by share and making partition clearly available, ultimately limiting their ability to protect women's rights. These three laws further perpetuate a single-representative land contracting system that can harm women's land rights, as illustrated in examples from Vietnam⁵⁶ and Kenya.⁵⁷ Reliance on the current form of the Marriage Law, the RLCL, and the Property Law will not bring needed relief to women's landlessness.

A. *The Marriage Law Fails to Fully Protect Rural Women's Land Rights upon Marriage and Divorce*

Ambiguity in the amended Marriage Law⁵⁸ significantly impacts women's land rights in China. China first promulgated the Marriage Law in 1950, in part to increase women's rights to property.⁵⁹ While this early goal failed to materialize,⁶⁰ amendments to the Marriage Law in 1980 and again in 2001 developed a form of community property. The law considers property acquired during marriage to be in "joint possession," belonging to both spouses.⁶¹ Article 31 of the Marriage Law explicitly protects each spouse's interest in household land use rights.⁶² At divorce, the People's

⁵³ XIAN FA art. 2 (1982) (P.R.C.).

⁵⁴ Article 28 of the Law on the Protection of Women's Rights and Interests dictates that the state ensures women to have equal rights to property with men. Article 30 further establishes that women and men have equal rights to farmland and housing. The Law on the Protection of Women's Rights and Interests (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 3, 1992, effective Oct. 1, 1992), arts. 28, 30, translated in ISINOLAW (last visited Jan. 29, 2007) (P.R.C.).

⁵⁵ Charles J. Ogletree, Jr. & Rangita de Silva-de Alwis, *The Recently Revised Marriage Law of China: The Promise and The Reality*, 13 TEX. J. WOMEN & L. 251, 256-57 (2004).

⁵⁶ Jennifer Brown, *Rural Women's Land Rights in Java, Indonesia: Strengthened by Family Law, But Weakened by Land Registration*, 12 PAC. RIM L. & POL'Y J. 631, 634 (2003).

⁵⁷ Celestine Nyamu, *How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?*, 41 HARV. INT'L L.J. 381, 407 (2000).

⁵⁸ Marriage Law Amendments, *supra* note 22.

⁵⁹ JACKA, *supra* note 26, at 30.

⁶⁰ See Margaret Y.K. Woo, *Shaping Citizenship: Chinese Family Law and Women*, 15 YALE J.L. & FEMINISM 99, 107 (2003).

⁶¹ Marriage Law Amendments, *supra* note 22, art. 13.

⁶² *Id.* art. 31.

Court may divide jointly possessed property between spouses upon "taking into consideration the rights and interests of the child and the wife."⁶³ Read along with the Constitution and LPWRI, rural land acquired during marriage would seem jointly owned and subject to property settlement on divorce.⁶⁴ Such a construction appears applicable within households that contract land use rights following marriage.⁶⁵

However, if the husband obtained the land contract prior to marriage, rural married women's right to household land is compromised. The Marriage Law uses overly broad language to define jointly and separately possessed property, yet joint property seemingly precludes land use rights acquired prior to marriage.⁶⁶ Of significant note, the RLCL purportedly left out an earlier provision that would have categorically included rural land rights as jointly owned property, regardless of when the household acquired land use rights.⁶⁷ The basic scope of a woman's right to land at divorce may hinge on whether her household received land before or after marriage.

B. *The Rural Land Contracting Law Falls Short in Establishing Appropriate Mechanisms to Protect Women's Land Rights*

The RLCL came into effect March 1, 2003, attempting in part to reestablish women's right to land.⁶⁸ Most significantly, Article 30 preserves women's land share from loss at marriage, divorce, or widowhood.⁶⁹ This provision expressly prohibits the contracting party from taking a woman's

⁶³ *Id.*

⁶⁴ See Xiaoqing Feng, *A Review of the Development of Marriage Law in the People's Republic of China*, 79 U. DET. MERCY L. REV. 331, 382 (2002).

⁶⁵ See Brown, *supra* note 50, at 6.

⁶⁶ Marriage Law Amendments, *supra* note 22, art. 17. Article 17 defines jointly owned property as: wages and bonuses, earnings from production and business operations, incomes from intellectual property rights, property acquired by inheritance or gift except for those listed in Article 18, and "other property that should be in their joint possession." Article 18 defines separate property as "the property that belongs to one party before marriage," presumably encompassing real property. Xiaoqing Feng, *supra* note 64, at 360.

⁶⁷ Zongmin Li & Bruce, *supra* note 5, at 327 n.25.

⁶⁸ See Brian Schwarzwald, *A Quiet Revolution Begins: Reinventing China's Farms*, SOUTH CHINA MORNING POST, Feb. 12, 2003, at 18, available at 2003 WLNR 5862801.

⁶⁹ Since passage of the RLCL, there appears no right to inherit individual shares of rural land contract land. Brown, *supra* note 50, at 22. The RLCL give no direction on the inheritance of arable contract land, providing only for inheritance of income interests from the land. RLCL, *supra* note 20, art. 31. In a later provision, however, the RLCL allows heirs to inherit both income interests and the right to continue the contract of forestland. RLCL, *supra* note 20, art. 50. Furthermore, the legislative intent behind the omission in Article 31 supports the principle that the household contracts the land and one member's death should not affect the structure of the landholding. Ping Li, *supra* note 47, at 62. While a widow should have legal right to household contract land following her husband's death, social pressures may force a widow to leave her household, especially if it includes her husband's extended family, subjecting her to land loss. See *infra* Part IV.B.1.

share in her original village until she receives land in the village where she relocates.⁷⁰ Yet, the RLCL's primary purpose is to strengthen farmers' thirty-year contract right by reemphasizing the policy against readjustment to rural land contracts.⁷¹ Large readjustments are specifically prohibited with an exception for small readjustments in cases of "natural disaster . . . and other special circumstances" upon approval by two-thirds of the Village Assembly or Village Representatives.⁷²

The RLCL's attempt to strengthen women's land rights lacks both foresight and clear measures, namely the ability to partition rural contract land for implementing actual change. Initially the protection of women's natal land share inherent in Article 30 seems well founded, especially in light of the inadequate protection of household contract land under the Marriage Law.⁷³ Yet, the law falls short of strengthening women's land rights for three reasons: 1) inadequate means to protect women's natal share against assumption by her family of origin, 2) ambiguity with regard to the availability of partition, and 3) no requirement for women to approve of market transfers by the head of household.

1. *The RLCL Does Not Adequately Protect Women's Land Rights in Their Natal Villages*

Article 30 focuses too narrowly on preserving land allocated in a woman's original village. This limited scope protects only women with

⁷⁰ RLCL, *supra* note 20, art. 30 (providing that the contracting party may not take back land if a woman "gets married and undertakes no contract for land in the place of her new residence" or is divorced or widowed and "still lives at her original residence or does not live at her original residence but undertakes no contract for land at her new residence"). *See also* Ping Li, *supra* note 47, at 63.

⁷¹ RLCL, *supra* note 20, art. 1, 27; Zhu Keliang et al., *supra* note 13, at 772-73; Zongmin Li & Bruce, *supra* note 5, at 325. While official policy prohibits readjustments, a 2005 seventeen-province survey reports a substantial number of readjustments in rural China continued in the years just prior to and following passage of RLCL. Over seventy-two percent of readjustments still occur due to village population changes. Strikingly, the study found an increasing number of villages carrying out readjustments since passage of RLCL, which the study's authors consider illegal. Zhu Keliang et al., *supra* note 13, at 793-94.

⁷² RLCL, *supra* note 20, art. 27; Brian Schwarzwald et al., *An Update on China's Rural Land Tenure Reforms: Analysis and Recommendations Based on a Seventeen-Province Survey*, 16 COLUM. J. ASIAN L. 141, 210-11 (2002). According to some legal scholars, the law's failure to define "other special circumstances" left open the question of whether rural women who move to their husband's village at marriage would constitute such a circumstance. *See* Brown, *supra* note 50, at 8 (citing an interpretation by the National People's Congress Law Committee during the second reading of RLCL that "serious imbalances between land and population within the village" would comprise one of two possible "special circumstances"). *See also*, Yang Li & Xi Yin-Sheng, *supra* note 20, at 635. The recently promulgated Property Law omits this phrase, limiting readjustments to "exceptional circumstances such as destruction to the contracted land by natural disasters" and otherwise states such situations will be handled in accordance with RLCL. Property Law, *supra* note 23, art. 130.

⁷³ *See supra* Part III.A.

existing land allocations⁷⁴ and fails to help those who have already lost land.⁷⁵ Furthermore, the law assumes that village officials represent the only entity denying women their share of land. While the RLCL may effectively prevent the village collective from taking back a woman's share prior to allocation in her new village,⁷⁶ the law provides no practical protection against illegal assumption by her family.⁷⁷ Yang Li & Xi Yin-Sheng report accounts of such assumption throughout two provinces of China.⁷⁸ For example, one woman whose maternal family cultivates her land share just 500 meters away from her residential village says her family never mentions the land to her and she will "never ask for the rights to use it."⁷⁹

2. *Partition Is Necessary for Women to Take Full Advantage of Land Shares Left Behind at Marriage, Divorce, or Widowhood*

Women who retain land in their former village cannot fully benefit from their share without the ability to partition.⁸⁰ Women traditionally move to their husband's village upon marriage⁸¹ and are unable to maintain land rights in their parental village.⁸² Partition would theoretically allow a woman to "cash in" on her share of household contracts by assigning her thirty-year right by lease or transfer and using the funds to acquire land on the market in her new village.⁸³ Jennifer Brown argues partition would give women legal certainty against misappropriation by family members and exempt women's shares from being resumed by the village collective should the family move away.⁸⁴

⁷⁴ Zongmin Li & Bruce, *supra* note 5, at 326.

⁷⁵ This analysis is limited in scope to women who risk losing land following passage of the RLCL. The problem of land lost prior to the RLCL, as well as failed or discriminatory allocations, is beyond the scope of this paper.

⁷⁶ RLCL, *supra* note 20, art. 54, § 7 (providing a civil cause of action against the contracting party, or village collective, and prospective relief for "depriving women of, or violating, the land contracting and operation rights legally enjoyed by women").

⁷⁷ Zongmin Li & Bruce, *supra* note 5, at 326. See Yang Li & Xi Yin-Sheng, *supra* note 20, at 629 (finding that surveyed local authorities would not take back married women's share of land rights in their natal villages, but over seventy-five percent of those surveyed considered married women as unable to obtain any benefit from her share of natal village land).

⁷⁸ See Yang Li & Xi Yin-Sheng, *supra* note 20, at 625-28.

⁷⁹ *Id.* at 626.

⁸⁰ Li Ping, *supra* note 47, at 63.

⁸¹ See BOSSEN, *supra* note 40, at 95 (discussing Lu Village in Yunnan Province); DUNCAN & LI PING, *supra* note 10, at 29 (discussing Dongfang City in southwestern Hainan Province); Li Zongmin, *supra* note 14, at 248 (discussing Dongyao Village in Heibe Province).

⁸² Zongmin Li & Bruce, *supra* note 5, at 318; Li Ping, *supra* note 47, at 67.

⁸³ Zongmin Li & Bruce, *supra* note 5, at 320 (citing Li Ping, Women's Land Rights in China (2001) (unpublished paper)).

⁸⁴ Brown, *supra* note 50, at 14.

Rural women's legal ability to partition their share depends on whether rural contract land is considered jointly held by share or common ownership under the General Principles of Civil Law.⁸⁵ Share joint property establishes a separate interest for each joint holder, whereas common ownership dictates all owners have a joint right to the property.⁸⁶ If rural contract land is co-owned by share, a woman would be permitted to legally partition her land share at marriage, widowhood,⁸⁷ or divorce.⁸⁸

The RLCL did not clarify the availability of partition for rural land contracts.⁸⁹ The law failed to address whether rural land contracts would be held in share or common ownership and available for partition under other laws. In 2004, the Supreme People's Court made marital property partitionable for litigants under the Marriage Law,⁹⁰ but again there was no explicit mention of rural land contract. While the recently promulgated Property Law provides for the partition of real property, the law still restricts rural women's potential use of partition.⁹¹

3. *The RLCL Failed to Protect Wives' Interest in Potential Market Transfers of Household Land*

Finally, the RLCL may foster women's land loss. The RLCL's corollary provision establishing the "legal foundation for a market in use rights to rural land"⁹² allows a broad range of household contracting via transfer, exchange, assignment, and lease.⁹³ The original land use right is contracted to only a household representative,⁹⁴ not both husband and wife, and just this representative is required to be a signatory on contracts for land transfer.⁹⁵

⁸⁵ General Principles of the Civil Law (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 12, 1986, effective Jan. 1, 1987), art. 78, *translated in* CHINACOURT.ORG, http://en.chinacourt.org/public/detail.php?id=3&k_title=civil (last visited Aug. 4, 2007) (P.R.C.).

⁸⁶ *Id.*

⁸⁷ Partition may be necessary for widows forced to leave their late husband's extended family residing in the households. *See supra* note 69.

⁸⁸ Brown, *supra* note 50, at 13.

⁸⁹ *Id.* at 13; Li Ping, *supra* note 47, at 68.

⁹⁰ Interpretations of the Supreme People's Court about Several Problems Concerning the Application of the Marriage Law of the People's Republic of China (II) (promulgated by the Sup. People's Ct., Dec. 26, 2003, effective Apr. 1, 2004), art. 1, *translated in* CHINALAWINFO (last visited Dec. 19, 2006) (P.R.C.) (making partition of marital property available and instructing courts to accept lawsuits filed by the parties due to disputes over the partitioning of property).

⁹¹ Property Law, *supra* note 23, art. 99. *See infra* Part III.C.1.

⁹² Brown, *supra* note 50, at 5.

⁹³ RLCL, *supra* note 20, art. 32.

⁹⁴ *Id.* art. 21.

⁹⁵ *Id.* art. 37.

Lessons from the Vietnamese title registration system warn against a single-representative title system in China. Vietnam previously issued long-term contracts only to the head of household, generally the husband, even though Vietnam considers land use rights as co-owned marital property of both spouses.⁹⁶ After studies documented husbands selling land without wives' consent, Vietnam revised the title system to require that the title be registered in the names of both husband and wife.⁹⁷ China should follow Vietnam's revision. The 2005 seventeen-province survey shows potential growth of the rural land transfer market by way of land use transfers both increasing to terms of more than one-year and covering a larger geographic region.⁹⁸ As the economic landscape of rural China shifts toward a market-centric approach, the RLCL's failure to specify protection for women as required signatories to any land transfer may result in further harm.

C. *China's New Property Law Is Unlikely to Clarify the Scope of Women's Retained Land Rights and May Cause New Obstacles*

The sweeping Property Law, promulgated on March 16, 2007 following five years of revisions,⁹⁹ neglects to clarify these ambiguities within the Marriage Law and RLCL. Drafters of the law clearly contemplated issues of land tenure security for farmers by reiterating protections of rural contracted land as a usufruct right and giving farmers the right to renew their contracts after the thirty-year term.¹⁰⁰ Yet, the Property Law fails to define rural contract land as jointly possessed regardless of when the contract was issued and does not require land contracts to include signature lines for both spouses. Furthermore, the Property Law adds new ambiguity as to when a woman may partition land from family holdings and exacerbates potential harm by requiring all property rights to be registered.

⁹⁶ Brown, *supra* note 56.

⁹⁷ *Id.*

⁹⁸ Zhu Keliang et al., *supra* note 13, at 784-85. The authors distinguish these results from their 2001 survey, finding an increasing number of "market transactions" in 2005 despite a similar proportion of households involved in land transfers in 2001. Over half of the households in 2001 involved in land transfers involved at-will, verbal transfers among relatives without payment.

⁹⁹ Joseph Kahn, *China Approves Property Law, Strengthening Its Middle Class*, N.Y. TIMES, Mar. 16, 2007, at A1. See also, *Lawmakers Start 7th Reading of Landmark Property Law Draft*, GOV.CN, Dec. 24, 2006, http://english.gov.cn/2006-12/24/content_477215.htm.

¹⁰⁰ Property Law, *supra* note 23, arts. 124-34; *Caught Between Right and Left, Town and Country*, THE ECONOMIST, Mar. 10, 2007, at 24; *China Grapples With Thorny Issue of Rural Land Rights*, PEOPLE'S DAILY ONLINE, Sept. 1, 2006, http://english.people.com.cn/200609/01/eng20060901_298824.html.

1. *The Availability of Partition for Women's Natal Landholdings Is Unclear*

Women's share of household contract land may not be easy to partition under the Property Law. The Property Law makes partition available on the basis of joint ownership.¹⁰¹ Property commonly owned by share¹⁰² may be assigned at-will¹⁰³ or partitioned "at any time."¹⁰⁴ Property classified as jointly-owned foregoes the notion of individual shares¹⁰⁵ and limits partition to only "when the basis for co-ownership is lost or there exists a significant reason justifying the partition."¹⁰⁶ Article 103 includes critical language that may further clarify the status of household contract land. Absent agreement on the property's classification, the default for co-ownership is by share, "unless the co-owners have a family relationship."¹⁰⁷

A plain reading of Article 103 sets forth that the default classification for property jointly held by family members, such as household contract land, is joint co-ownership.¹⁰⁸ Thus, for rural women, partition of contract land may well be limited to local interpretation of when "basis for co-ownership" is lost and "significant reason" exists under the Property Law. The Property Law's ambiguous terminology will not clarify women's ability to partition their share. The Supreme People's Court should accordingly issue an interpretation of Article 99 to include departure by a household member as a lost "basis for co-ownership" and marriage, divorce, or widowhood as a "significant reason" justifying partition.

2. *Heightened Registration Requirements May Further Contribute to Women's Loss of Land Rights*

The Property Law registration requirements fail to safeguard recognition of all household members' property rights. Previously, the Land Management Law provided for registration of rural land at the county level and issuance of certificates confirming use rights.¹⁰⁹ The Property Law goes far beyond the Land Management Law, establishing that all rights in

¹⁰¹ Property Law, *supra* note 23, art. 99.

¹⁰² *Id.* art. 94.

¹⁰³ *Id.* art. 101.

¹⁰⁴ *Id.* art. 99.

¹⁰⁵ *Id.* art. 95.

¹⁰⁶ *Id.* art. 99.

¹⁰⁷ *Id.* art. 103 (emphasis added).

¹⁰⁸ *Id.*

¹⁰⁹ Land Management Law, *supra* note 9, art. 11.

property must be registered to be effective.¹¹⁰ While the registering agency must verify ownership of the property,¹¹¹ the Property Law does not require the agency to verify that all owners registered their rights. Article 17 of the Property Law authorizes use of the title certificate to serve as proof of the property right;¹¹² however, the RLCL only requires that the title certificate list *a* household representative.¹¹³

Registration requirements that fail to account for each household member's interest puts women's shares at risk of being sold without their knowledge. As discussed, the Vietnamese single-representative title registration system led to women's land loss when husbands unilaterally sold family land.¹¹⁴ Similar results occurred in Kenya upon official switch from customary recognition of multiple and overlapping interests in land to formal land titling solely in the name of male heads of household.¹¹⁵ The overemphasis on individual and absolute title devalued the unregistered claims of other Kenyan family members.¹¹⁶ As the land rights market develops in rural China, the registration requirement in the Property Law could very well mirror Vietnam or Kenya's experience, making it easier for women's land tenure to be lost via sale by a husband or family members.

IV. RECOMMENDATIONS MUST BE FRAMED IN THE CONTEXT OF CURRENT SOCIAL CONDITIONS

Legal solutions that fail to comport with current social relations will not effectively improve women's access to land. Unfortunately, the central government's approach to this problem in China failed to recognize this very principle. Disjunction between legal reforms designed to improve women's land rights and social conditions that actually dictate access to land is all too common throughout developing countries. For example, recent revisions to the inheritance law in India provide comparison for how shortsighted laws fail to benefit women. In rural China, both virilocal tradition and ineffective rule of law influence the implementation of central policies promoting women's land rights. Recommendations for ending women's landlessness must consider how legal measures will bode in the social context of rural China in order to improve women's land rights.

¹¹⁰ Property Law, *supra* note 23, art. 9.

¹¹¹ *Id.* art. 12.

¹¹² *Id.* art. 17.

¹¹³ RLCL, *supra* note 20, art. 21.

¹¹⁴ Brown, *supra* note 56, at 634.

¹¹⁵ Nyamu, *supra* note 57.

¹¹⁶ *Id.*

A. *Social Relations Hold More Influence over Property Rights in Developing Countries than Formal Law*

Women's land loss in rural China emulates the struggles of women throughout the developing world to gain rights to housing and land in a rapidly changing legal and economic environment.¹¹⁷ While most countries have constitutional provisions and civil codes guaranteeing equality, these laws often make little impact on the intra-familial relationships that typically govern how property passes to women at death, marriage, and divorce.¹¹⁸

A comparison of women's perceptions of land rights in two districts of the Indian state of Karnataka bolster the argument that land rights arise from social relations as opposed to formalized legal definitions.¹¹⁹ Both the national and state governments instituted housing schemes in Karnataka that require housing in certain rural developments to be titled in the name of women.¹²⁰ In one district, women interviewed were unaware of these rights and resigned to an existence as defined by their husbands.¹²¹ As quoted by a resident, "[i]f he asks me to leave this place, I will go."¹²² In another district, where local officials educated the community and organized women into self-help groups, women expressed recognition of their legal right to the home.¹²³

Yet community education campaigns alone cannot transform the nexus between formal law and social relations into enforceable property rights. Laws that aim to secure women's property rights but focus on only one aspect of the family relationship or individual rights within the family cannot be effective in a cultural context that centers on "the life of the family as a whole."¹²⁴ Returning to Karnataka State, India's failed attempt to provide women with a legal avenue to land rights through inheritance laws provides such an example. A recent study in Karnataka found that despite women's legal right to own land, land is most commonly titled and controlled by men.¹²⁵ Customary law prevents Hindu women from claiming

¹¹⁷ See generally Nielsen, *supra* note 52 (discussing several of the world's poorest regions and the mechanisms that provide women with rights to land); Tinker, *supra* note 28, at 9 (surveying how women around the world are addressing their needs for property rights).

¹¹⁸ Nielsen, *supra* note 52, at 208.

¹¹⁹ *Id.* at 209-10.

¹²⁰ JENNIFER BROWN ET AL., WOMEN'S ACCESS AND RIGHTS TO LAND IN KARNATAKA 9 (Rural Dev. Inst., Reports on Foreign Aid and Development No. 114, 2002).

¹²¹ Nielsen, *supra* note 52, at 210.

¹²² *Id.* at 210.

¹²³ *Id.* at 210.

¹²⁴ Renee Giovarelli, *Customary Law, Household Distribution of Wealth, and Women's Rights to Land and Property*, 4 SEATTLE J. FOR SOC. JUST. 801, 823 (2006).

¹²⁵ BROWN ET AL., *supra* note 120, at 8.

land or property brought into the marital community.¹²⁶ While Hindu women have a right to spousal maintenance under the Hindu Marriage Act, divorced, separated, and widowed women are usually not supported by their ex-husbands, in-laws, birth parents, or community.¹²⁷

The formal law in India attempted to remedy women's landlessness via the Karnataka Amendment to the Hindu Succession Act in 1994, providing for daughters to inherit part of their parents' land.¹²⁸ However, the amendment holds limited effectiveness given women's reluctance to enforce inheritance rights after their parents already contributed much of the family wealth to their dowry.¹²⁹ The amendment's failure to empower women in India demonstrates how laws that attempt to strengthen women's rights assume an idealized world and fail to operate within the system in which women live.¹³⁰ As such, these laws cannot materialize their intended outcome.

Legal solutions to women's landlessness must take a pragmatic approach to combating oppression, attending to the "actual workings" of the social context in which law operates.¹³¹ Legal scholar Celestine Nyamu specifically advocates for a critical pragmatic approach in promoting women's land rights, which both challenges and works within customary traditions.¹³² She also advocates recognition of the symbiotic relationship between culture and formal institutions.¹³³ China's own historic struggle to promote gender equality reveals how formal laws that do not consider the current culture risk rejection and failure from the outset.¹³⁴ Land and marriage laws first enacted in China in the 1930s and again in the 1950s attempted to establish equitable property rights for women but lacked a strategic aim to overcome the prevailing patriarchal attitudes and social

¹²⁶ Giovarelli, *supra* note 124, at 813.

¹²⁷ BROWN ET AL., *supra* note 120, at 34-35.

¹²⁸ *Id.* at 24; Giovarelli, *supra* note 124, at 815.

¹²⁹ Giovarelli, *supra* note 124, at 815-16. Despite the illegality of dowry under the 1961 Dowry Prohibition Act, dowry is still commonly practiced. BROWN ET AL., *supra* note 120, at 18-19.

¹³⁰ Giovarelli, *supra* note 124, at 823.

¹³¹ See Joseph William Singer, *Property and Coercion in Federal Indian Law: The Conflict Between Critical and Complacent Pragmatism*, 63 S. CAL. L. REV. 1821, 1821-24 (1990), for a discussion on pragmatism as an approach to viewing the legal struggles of oppressed groups.

¹³² Nyamu, *supra* note 57, at 409-18.

¹³³ *Id.* at 411.

¹³⁴ See generally Randall Peerenboom, *Law and Development of Constitutional Democracy in China: Problem or Paradigm?*, 19 COLUM. J. ASIAN L. 185, 231-32 (2005) (noting that successful legal reforms in China are generally gradual and grounded in pragmatism).

traditions in rural China.¹³⁵ Unfortunately, China's most recent attempts to improve women's rights to land continue these same mistakes.

B. Rural Village Culture Contributes to Women's Landlessness

The shortcomings of China's laws as a remedy for women's landlessness are inextricably linked to traditional virilocal patterns that persist in rural China¹³⁶ and customary practice that defies the rule of law.¹³⁷ Developing countries require more than just a legal framework to achieve equitable land rights.¹³⁸ Land rights must also be socially recognized and enforced.¹³⁹ Zongmin Li and John Bruce specifically discuss the interconnectedness of national law and local practice in rural China, asserting that:

In the absence of detailed instructions ensuring women's rights, local communities routinely deprive women of access and rights to land. And in the absence of strong pressures from the center, villages can persist in local policies (*cun gui min yue*, or customary law) in violation of national law.¹⁴⁰

The cultural traditions influencing local implementation of law in rural China contribute to women's landlessness.

1. Traditional Social Relations Influence Daily Life and Bear a Stronger Impact on Women's Relationships to Land than National Law

Local custom and policies in rural China emanate from intra-familial household dynamics.¹⁴¹ The place of women in the Confucian social order begins with the "three obediences" (*san fucong*): obedience to her father before marriage, her husband when married, and her son when widowed.¹⁴² Under the *cong fu ju* marriage custom, sons stayed in their natal village to inherit family property, while daughters "married-out" to join their husband's households.¹⁴³ While the culture has shifted from strict Confucian

¹³⁵ See JACKA, *supra* note 26, at 27-30, for a brief history of the failures of agrarian reform laws and marriage laws, passed just prior to and following the Communist revolution, impacting women's rights.

¹³⁶ Li Ping, *supra* note 47, at 67.

¹³⁷ See Zongmin Li & Bruce, *supra* note 5, at 326-27.

¹³⁸ See Nielsen, *supra* note 52, at 207.

¹³⁹ AGARWAL, *supra* note 15, at 19.

¹⁴⁰ Zongmin Li & Bruce, *supra* note 5, at 322 (citation omitted).

¹⁴¹ ELLEN R. JUDD, GENDER AND POWER IN RURAL NORTH CHINA 165 (1994); Li Zongmin, *supra* note 14, at 248.

¹⁴² JUDD, *supra* note 141, at 166.

¹⁴³ Li Zongmin, *supra* note 14, at 248.

dictates, these living arrangements continue today in rural China.¹⁴⁴ Village cadres and local officials similarly follow traditional customs when instituting local law, at times blatantly discriminating against women in their right to property under formal law.¹⁴⁵ Married women are “generally considered in common parlance to be ‘water splashed out’” in their home village and often lose the right to land in their natal village.¹⁴⁶

Women moving to their husbands' village may not fully perceive the impact of land loss until divorce or widowhood. For women who remain married, loss of land rights in years prior may have been in name only or temporary in light of actual village practice.¹⁴⁷ Upon divorce, however, a woman allocated land in her husband's village¹⁴⁸ likely lost her land tenure in its entirety.¹⁴⁹ Such loss occurred despite legal principles recognizing women's rights in divorce proceedings.¹⁵⁰ Social pressures commonly force women to return to their home village at divorce, resulting in “one of the greatest shortcomings of the land rights system in China.”¹⁵¹ Official policy against readjustment under the Land Management Law and RLCL should have enabled women married after passage of these laws to retain land only in their natal village.¹⁵² However, the 2005 seventeen-province survey finding that readjustments increased since 2001 indicates the inability to generalize about where women hold land shares.¹⁵³

¹⁴⁴ See BOSSEN, *supra* note 40, at 95 (discussing Lu Village in Yunnan Province); DUNCAN & LI PING, *supra* note 10, at 29 (discussing Dongfang City in southwestern Hainan Province); Li Zongmin, *supra* note 14, at 248 (discussing Dongyao Village in Hebei Province).

¹⁴⁵ Ogletree & de Silva-de Alwis, *supra* note 55, at 267 n.57. Ogletree & de Silva-de Alwis discuss a case of forty-five married women who stayed in their villages of origin, but whose village committee took their land back by force. Even though the court ruled in their favor, the village leader refused to give back their land.

¹⁴⁶ *Id.* at 268.

¹⁴⁷ See generally Yang Li & Xi Yin-Sheng, *supra* note 20, at 631-34 (discussing accounts of women having no land share in their marital village for three to six years until their village readjusted land and allocated them a share).

¹⁴⁸ Yang Li & Xi Yin-Sheng's 2002 survey found 89.9 percent of women had land only in their husbands' households and 2.3 percent having no land share whatsoever, meaning that over 90 percent of women surveyed would have no land share in their natal village following divorce. Two percent of married women had no land either in their natal or their husbands' households. *Id.* at 624.

¹⁴⁹ Duncan & Li Ping cite varying opinions by villagers in Dongfang County as to the social acceptability of land being awarded to wives at divorce, many asserting the outcome would be dependent on the reasons behind the divorce. DUNCAN & LI PING, *supra* note 10, at 40 nn.141-42.

¹⁵⁰ Marriage Law Amendments, *supra* note 22, art. 31.

¹⁵¹ DUNCAN & LI PING, *supra* note 10, at 40.

¹⁵² Yang Li & Xi Yin-Sheng's survey found 6.4 percent of women had land only in their natal household. Yang Li & Xi Yin-Sheng, *supra* note 20, at 624.

¹⁵³ Zhu Keliang et al., *supra* note 13, at 794. While the 2001 survey found that 17.9 percent of villages had carried out readjustments, the 2005 survey revealed 30.3 percent of villages carrying out readjustment.

Widows may fare somewhat better in practice. Jennifer Duncan and Li Ping report in their fieldwork from Dongfang Village in Hainan Province that widows usually stay in their husband's village, stepping into the role of head of household.¹⁵⁴ However, the All-China Women's Federation noted in 2000 that widows in some areas are treated the same as divorced women and forced out of their marital village.¹⁵⁵ Differences in widows' accounts may be attributable to whether the widow is elderly, resides alone or with a grown son,¹⁵⁶ or may still remarry and start a new family.¹⁵⁷

2. *Local Tradition Obstructs Implementation of Laws Guaranteeing Equal Rights to Women*

Weak implementation of the central government's land policies further compounds traditional attitudes towards women's land rights.¹⁵⁸ Local officials remain an impediment to the effectiveness of national laws due in part to self-interest and power seeking, but also because they lack clear understanding of the laws and central policies.¹⁵⁹ Successful implementation depends on the law attaining a level of legitimacy and credibility at the local level, such that village officials accept the law as binding, and observe the law's application and enforcement.¹⁶⁰

In turn, rules that fail to account for Chinese social reality are "dead letters right from the start."¹⁶¹ The Land Management Law's failure to achieve full congruence in rural China exemplifies this phenomenon.¹⁶² While national publicity increased farmers' awareness of their thirty-year land use rights and influenced farming practices, "few farmers know of the [Land Management Law's] dispute resolution procedures and few county or township officials have created a framework for resolving disputes."¹⁶³ This limited implementation of the Land Management Law does nothing to

¹⁵⁴ DUNCAN & LI PING, *supra* note 10, at 42.

¹⁵⁵ Zongmin Li & Bruce, *supra* note 5, at 321.

¹⁵⁶ Li Weisha assessed housing patterns in rural communities in the 1990s and found over sixty-five percent of households included parents living with their married sons. Li Weisha, *supra* note 18, at 232-33.

¹⁵⁷ See, e.g., Laurel Bossen, *Village to Distant Village: The Opportunities and Risks of Long-Distance Marital Migration in Rural China*, 16 J. CONTEMP. CHINA 97, 111 (2007) (discussing an account of a young widow who abandoned her husband's village after being unable to successfully remarry and her husband's brothers taking over her household land).

¹⁵⁸ See Ping Li, *supra* note 47, at 70.

¹⁵⁹ *Id.* at 70.

¹⁶⁰ See DAVID J. BLEDSOE & ROY L. PROSTERMAN, POLICY, THE RULE OF LAW, AND RURAL LAND REFORM IN CHINA 7 (Rural Dev. Inst., Reports on Foreign Aid and Development No. 101, 2000).

¹⁶¹ Donald C. Clarke, *What's Law Got to Do With It? Legal Institutions and Economic Reform in China*, 10 UCLA PAC. BASIN L.J. 1, 36 (1991).

¹⁶² BLEDSOE & PROSTERMAN, *supra* note 160, at 13.

¹⁶³ *Id.*

resolve the “growing sense that the legal reforms . . . have failed to provide adequate channels for resolving conflicts of interest and viewpoint[s] between government and citizens.”¹⁶⁴

For the rule of law to effectively impact women's access to land, “the idea of legality and the use of legal instruments to settle rights and social problems must exist at the level of ordinary citizens.”¹⁶⁵ Any assessment of a law's potential for remedying women's landlessness cannot be contemplated without such recognition. Given that women may be less aware of their rights than men in the social context of rural China,¹⁶⁶ promulgating laws which facially protect women's land tenure will not be enough to ensure a policy of gender equality for women.

C. *Recommendations Must Harmonize with Social Relations to Improve Women's Access to Land in Rural China*

A predominant recommendation for strengthening women's rights to land is to make partition available for rural contract land, in order to realize the promise of Article 30 in the RLCL.¹⁶⁷ Yet partition only holds limited effectiveness as a legal solution; like in Karnataka, partitioning does not align with social relations that dictate women's access to property. For women at marriage, partition does not create rights that women are likely to assert within the reality of traditional social relations in rural China. Nonetheless, partitioning may be a promising legal tool that women would be more likely to assert upon divorce or widowhood.

1. *Arguments Favoring Partition of Familial Land Rely on Women Asserting Their Rights in Defiance of Existing Social Patterns*

Partition under Article 30 of the RLCL would “legitimize the possibility of change” for women upon marriage who are “brave enough,

¹⁶⁴ Eva Pils, *Land Disputes, Rights Assertion, and Social Unrest in China: A Case From Sichuan*, 19 COLUM. J. ASIAN L. 235, 235 (2005).

¹⁶⁵ Woo, *supra* note 60, at 100.

¹⁶⁶ Duncan & Li Ping found women in Dongfang County are less knowledgeable about household land rights than men. Reasons for this discrepancy include lower levels of education and literacy among women, methods of circulating information within a village, and village custom, which dictate only head of household (most often men) will take part in village conferences where new policies are announced. DUNCAN & LI PING, *supra* note 10, at 27-8. More recent and comprehensive data on farmer's knowledge of their land rights indicates strong awareness of many aspects of land rights (generally between fifty and eight-five percent awareness rate), however the data does not differentiate women's responses from men's. Zhu Kelian et al., *supra* note 13, at 790-91.

¹⁶⁷ Zongmin Li & Bruce, *supra* note 5, at 327. See, e.g., Brown, *supra* note 50, at 2; DUNCAN & LI PING, *supra* note 10, at 41.

desperate enough, or organized enough to use the law.”¹⁶⁸ A 2002 survey notes that over seventy-five percent of villagers thought women would obtain no benefit from retaining contract land in their natal village.¹⁶⁹ While the legal availability of partition initially seems a viable option for women to benefit from their natal land holdings, this assumes that women would assert rights against their family of origin.¹⁷⁰ For women to take advantage of partition in practice would be socially difficult at best.¹⁷¹ With an expectation of permanently moving to their husband’s village at marriage, women may not be aware of the importance of preserving their natal land share at marriage unless they divorce or are widowed,¹⁷² at which point partition may no longer be possible.¹⁷³ As exemplified in the aftermath of the Karnataka Amendment of the Hindu Succession Act, measures that contradict social norms are generally not useful for the masses.

Social and legal realities of rural China limit the potential of partition as a measure to secure women’s access to land following marriage. So long as advances toward the economic health of all farmers require continuation of policies disfavoring readjustments, women may only have rights in name to their natal share of land upon marriage. Partition only makes the following options available to a woman who moves to her husband’s village: shamefully claiming right to part of her family’s land¹⁷⁴ or requesting a readjustment that seemingly defies national laws.¹⁷⁵ Yet advocacy of partition in combination with revision to marital property laws could create a third option that would at least protect against women becoming entirely landless at divorce or widowhood.

2. *Promoting Women’s Rights to Property Within the Marital Household Holds Greater Promise for Preserving Women’s Access to Land*

Partition holds great potential for protecting women from complete loss of land at divorce or widowhood so long as women have a legal claim to part of the marital household contract.¹⁷⁶ At divorce, and possibly at widowhood, women may find it socially difficult to remain in their marital

¹⁶⁸ See Giovarelli, *supra* note 124, at 825.

¹⁶⁹ Yang Li & Xi Yin-Sheng, *supra* note 20, at 629.

¹⁷⁰ See Brown, *supra* note 50, at 13-14.

¹⁷¹ *Id.* at 15; Zongmin Li & Bruce, *supra* note 5, at 326.

¹⁷² Zongmin Li & Bruce, *supra* note 5, at 321.

¹⁷³ *Id.* at 322.

¹⁷⁴ *Id.* at 320.

¹⁷⁵ RLCL, *supra* note 20, art. 27.

¹⁷⁶ See *id.* at 328; Giovarelli, *supra* note 124, at 823.

village,¹⁷⁷ so they return to their parent's village.¹⁷⁸ Divorce or widowhood becomes the point when women experience the impact of land loss and are most likely to assert their legal rights. China has seen a steady increase in the number of divorces litigated in the courts,¹⁷⁹ and at least in the urban areas, women are more likely to be initiators of divorce petitions.¹⁸⁰ The social implications of asserting rights to partition against a soon-to-be ex-husband may be of a lesser consequence than asserting those rights against a woman's parents.

Assuming the legal availability of partition for rural contract land, women's abilities to partition upon divorce or widowhood would still be predicated on the status of the household land as joint property under the Marriage Law. As discussed above, marital property is only unambiguously joint property if acquired following marriage.¹⁸¹ If a household's contract land does not include an allocation made on her behalf, a woman may be unable to partition at divorce. The necessary corollary for partition to offer the greatest protection to rural women is to guarantee legal claim to household land at the time of marriage, regardless of when the land was contracted.

V. CHINA SHOULD REVISE ITS COMMUNITY PROPERTY SYSTEM IN ORDER TO STRENGTHEN WOMEN'S LEGAL ACCESS TO LAND

Universal classification of rural household contracts as jointly possessed under the Marriage Law and partitionable under the Property Law can legally protect women against both complete loss of land at divorce and widowhood. Such a measure would provide women with a functional property right more congruent within both the existing legal and social structures in China. Effectively ending women's landlessness will require additional shifts at the local level, such as social recognition and enforcement of these rights. Nevertheless, women's land tenure would be strengthened by classifying all rural household land contracts and rights to land allocated prior to marriage as jointly possessed between husband and wife.

¹⁷⁷ DUNCAN & LI PING, *supra* note 10, at 40.

¹⁷⁸ Brown, *supra* note 50, at 13; Ogletree & de Silva-de Alwis, *supra* note 55, at 267.

¹⁷⁹ The *xieyi* [agreement] system of divorce was previously the preferred method of handling divorce, which involves mediation by the couple's work unit and other local organizations. Woo notes that couples increasingly have turned to the courts to protect against excessive mediation and community involvement. Woo, *supra* note 60, at 110-12.

¹⁸⁰ *Id.* at 114.

¹⁸¹ Marriage Law Amendments, *supra* note 22, art. 17.

A. *Increasing Women's Land Rights Through Revisions to Marital Property Laws Fits Within China's Legal Structure*

An expanded definition of jointly possessed marital property to include all rural household allocations only slightly modifies China's current legal system of property rights at marriage. Under both the Marriage Law¹⁸² and General Principles of Civil Law,¹⁸³ China recognizes the ganancial¹⁸⁴ system of community property whereby property obtained during marriage may be jointly possessed.¹⁸⁵ By going one step further and legally designating that all rural land allocated prior to marriage is nonetheless jointly possessed, married women in rural China would gain a significant property right.¹⁸⁶ China would not be the only country to recognize a required change in the legal status of separate property to joint property upon marriage.¹⁸⁷ This minor change in China's marriage and property laws could immediately shift women from being at risk for landlessness upon divorce or widowhood to securing rights to a half-interest in their marital household.

Equitable concerns that spouses should be able to maintain their own separate property earned prior to marriage are balanced by two aspects of these recommendations. First, such a designation would not result in a universal system of property.¹⁸⁸ Only interests in land that have been allocated by the village, not obtained via market transfer, should be automatically considered jointly possessed if held by a spouse prior to marriage. Restricting this definition to only allocated land preserves recognition that property resulting from individual market-based efforts

¹⁸² *Id.*

¹⁸³ General Principles of the Civil Law (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 12, 1986, effective Jan. 1, 1987), art. 78, *translated in* CHINACOURT.ORG (last visited Aug. 4, 2007) (P.R.C.).

¹⁸⁴ The ganancial or Spanish system of property considers all property to be presumed marital property belonging equally to husband and wife unless it is proved to be the separate property of either spouse. Property obtained prior to marriage is considered as separate from the community whereas property obtained during marriage, unless by some prior agreement, becomes equally owned by husband and wife. RICHARD A. BALLINGER, *BALLINGER ON COMMUNITY PROPERTY* § 5, at 23-27 (1895).

¹⁸⁵ Ogletree & de Silva-de Alwis, *supra* note 55, at 258.

¹⁸⁶ *See* Giovarelli, *supra* note 124, at 823.

¹⁸⁷ WILLIAM Q. DE FUNIAK & MICHAEL J. VAUGHN, *PRINCIPLES OF COMMUNITY PROPERTY* § 16, at 34 (2d ed. 1971). The Netherlands recognizes this transference of property rights.

¹⁸⁸ A universal system of property creates a general community of goods between husband and wife, regardless of when acquired. Such system survives in the Netherlands and regards all property held by husband and wife as community property in the absence of a premarital contract stating contrary. *Id.*

should remain separate property within the marriage community.¹⁸⁹ Second, both spouses' land allocations prior to marriage should be considered "jointly possessed," entitling husbands to a half-interest in land shares that women retain in their natal village. While the current social climate makes it unlikely that women will choose to partition their holding against family, increased awareness of husbands' legal claim to wives' share in her natal village could serve as a catalyst for changing social attitudes about partitioning.

B. Classifying All Rural Contract Land as Jointly Possessed by Husband and Wife Complements China's Social Structure

Using a modified community property system to strengthen women's land rights fits within China's current social realities. The community property system originated among the Visigoths, a Germanic tribe existing during the first century in which women worked "shoulder to shoulder with the husband to build and keep the home and property."¹⁹⁰ The community system today is:

most frequently found to exist and to continue to exist among the common masses of the people, those who do not own great worldly possessions, those who must labor from day to day to maintain themselves and their children, those among whom the husband and wife work equally together in one capacity or another.¹⁹¹

Such description parallels both the policies of the central government that flourished in the years since Mao Zedong,¹⁹² as well as the actual "feminization of agricultural"¹⁹³ that developed in rural China under both collectivized farming and the HRS.¹⁹⁴

Women's relationship to rural land in China is now significantly associated with their participation in agricultural production.¹⁹⁵ Wives'

¹⁸⁹ See Xiaoqing Feng, *supra* note 64, at 351-52 (discussing the importance of separate marital property rights, established under the 2001 Amendment to the Marriage Law in the midst of China's transformation to a market economy).

¹⁹⁰ Michael J. Vaughn, *The Policy of Community Property and Inter-Spousal Transaction*, 19 BAYLOR L. REV. 20, 32-33 (1967).

¹⁹¹ DE FUNIAK & VAUGHN, *supra* note 187, § 11, at 21.

¹⁹² From the beginning of the People's Republic of China in 1949, the central government advocated that women should take part in economic production outside the home. Li Zongmin, *supra* note 14, at 247.

¹⁹³ See Summerfield, *supra* note 37, at 146-47 (citing report by *Xinsha* that over sixty percent of agricultural workers are women).

¹⁹⁴ DUNCAN & LI PING, *supra* note 10, at 15-16; Li Zongmin, *supra* note 14, at 250-51.

¹⁹⁵ See Summerfield, *supra* note 37, at 147.

contribution to the production of agricultural income in villages meets or exceeds that of their husbands'.¹⁹⁶ Since women are likely to contribute more than their husband to cultivation, granting women an equal right to the land provides legal recognition of current practices and secures the right to women's continued livelihood should the marriage end.

Finally, promoting women's rights to contract land within the marital community complements rural China's virilocal living pattern. Designating all rural contract land as jointly possessed reflects the expectation that when a woman marries in rural China, the marriage and her relocation to a new village are expected to be permanent with little likelihood that she will return to her parent's village.¹⁹⁷ Introduction of this type of law does not disturb long-term social relations between most families in rural China.

C. Improvement to Women's Land Rights Also Requires Effective Legal Implementation and Social Recognition of Those Rights

Although these measures can improve women's access to land only to a limited degree, reforms establishing rural contract land as joint marital property and making partition readily available are a necessary predicate to increasing women's rights to land. This Comment recognizes that strengthened marital property rights will not create rights to additional land beyond what was allocated prior to marriage. The amount of household land women would be able to request for partition at divorce may be relatively small.¹⁹⁸ Most women will not be able to increase the size of their share due to the necessity of the no-readjustment policy and social dynamics that make partition difficult for daughters. Revisions to community property laws in rural China would simply protect women from having no claim to land at divorce or widowhood.

Enforcing changes to the Marriage Laws and Property Law presents the more daunting challenge. China's transition toward an effective rule of law complicates immediate enforcement of changes in the law at a local

¹⁹⁶ See, e.g., BOSSEN, *supra* note 40, at 112; DUNCAN & LI PING, *supra* note 10, at 26; Li Zongmin, *supra* note 14, at 250-51.

¹⁹⁷ Xiaoqing Feng, *supra* note 64, at 353.

¹⁹⁸ The 2005 seventeen province survey revealed households possessed, on average, total landholdings of 0.92 acres or 5.61 mu of arable land for an average of 4.55 household members, representing an average of 1.23 mu of land per member. Zhu Keliang et al., *supra* note 13, at 773-74. In countries implementing land reforms, small plot sizes are generally more productive per hectare than large ones. Prosterman & Hanstad, *supra* note 8, at 769. Yang Li & Xi Yin-Sheng cite anecdotal accounts of women economically and emotionally struggling due to the household only having 0.5 mu of land per member, yet later argue that a land endowment of 0.8 mu per capita could be considered a threshold rate that should be maintained for households. Yang Li & Xi Yin-Sheng, *supra* note 20, at 627, 635.

level.¹⁹⁹ An increasing use of the courts in divorce proceedings²⁰⁰ combined with directives from the Supreme People's Court protecting women's property upon divorce²⁰¹ may aid in affirmation of women's rights. However, sanction or censure of local officials who fail to follow court orders and participation by the central government would also be necessary to protect women's claims to awarded property rights.²⁰²

Significant improvement to women's rights and access to land in rural China will ultimately require more than a shift in legal paradigm, but would also necessitate a concurrent shift in social recognition of those rights. Even if China could create the institutional competence to support women's rights, a greater feat may be shifting women's own understanding of their legal right to land within marriage. As a general matter, rural farmers' awareness of their legal rights to land often differs significantly from actual laws and policies.²⁰³ Furthermore, women's rights to land upon divorce may not be socially recognized as an absolute entitlement at the immediate outset.²⁰⁴ Community education and access to legal aid for women would be necessary for legal changes to be both useful and accepted.²⁰⁵

¹⁹⁹ See BLEDSOE & PROSTERMAN, *supra* note 160, at 2.

²⁰⁰ Woo, *supra* note 60, at 111-12.

²⁰¹ Dia Warren, *Chinese Women's Housing Rights: An International Legal Perspective*, in WOMEN'S RIGHTS TO HOUSE AND LAND: CHINA, LAOS, VIETNAM, *supra* note 14, at 165, 173; See, e.g., Interpretations of the Supreme People's Court about Several Problems Concerning the Application of the Marriage Law (II), (promulgated by the Sup. People's Ct., Dec. 26, 2003, effective Apr. 1, 2004), art. 1, *translated in* LAWINFOCHINA (last visited Oct. 5, 2007) (P.R.C.); Guidelines in Trial Implementation of the Supreme People's Court on Implementing the General Principles of Civil Law, (promulgated by the Sup. People's Ct., Jan. 26, 1988, effective Jan. 26, 1988), art. 90, *translated in* ISINOLAW, (last visited Oct. 5, 2007) (P.R.C.) (calling for the division of joint property upon dissolution of partnership to follow the regulations of the Marriage Law, if the parties have not previously agreed between themselves).

²⁰² See BLEDSOE & PROSTERMAN, *supra* note 160, at 11-12.

²⁰³ See Zhu Keliang et al., *supra* note 13, at 830 ("Farmers cannot enforce their rights if they are not aware of them").

²⁰⁴ See DUNCAN & LI PING, *supra* note 10, at 40 nn.141-42 (observing that many villagers considered a fault-based measure to be used in household land allocations at divorce).

²⁰⁵ See, e.g., Brown, *supra* note 50, at 26-30. Brown outlines specific policy measures necessary to effectuate women's legal rights in rural China. First, education is necessary both to inform women of their right to retain land in their maiden village and administrative remedies available, and to promote a cultural shift through awareness of these rights at the village level. Second, legal aid programs, which are more prevalent in urban areas, must strategically conduct outreach to rural villages. Finally, more arbitration bodies should be established and available to rural residents, as initial attempts by Village Committees to mediate women's land rights are unlikely to prove successful. See also, Zhibin Lin & Lixin Zhang, *supra* note 10, at 647-48 (demonstrating how women's increased political representation can alter women's rights to land).

VI. CONCLUSION

Women's legal rights to land at marriage, divorce, and widowhood should not be neglected in the rapidly changing rural landscape. Women's insecure land rights will not improve under protections offered by the RLCL and may become even more at risk under the new Property Law. China must strive to effectuate substantial land rights for women at the local level by considering how legal recommendations will be received in the context of social relations, which often precede formalized rights. Revising China's laws to include rural contract land as jointly possessed property that is definitively partitionable would protect women against complete loss of land and be effective within rural China's legal and social realities.