

The Evolution of Land Law in China

Partial Reform, Vested Interests, and Small Property

This chapter investigates the history of land use reform in China and argues that the so-called rural land problem is the consequence of China's partial land use reform. In 1988, the Chinese government chose to conduct land use reform sequentially: first urban and then rural. It was a pragmatic move because it would focus the reform and provoke much less resistance. It also made local governments in China the biggest beneficiary and supporter of the partial reform.¹ However, a beneficiary of partial reform does not necessarily support further reform because of the excessive rents available between the market of urban real estate and the government-controlled system of rural land development and transfer. The central government, in particular its agency in charge of land administration (the former Bureau of Land Administration, which has been elevated to the Ministry of Land and Resources (the "MLR")), also has interests embedded in the current regime with the explicit goal of preserving agricultural land. In contrast, Chinese farmers and other interested groups have no voice or power in the political process of the reform, which makes it difficult for the central government to achieve an agenda that balances the interests of all parties.²

¹ Land sales revenue became an important source of Chinese local governments. In some Chinese cities, half of local government finance is from land sales revenue. Thus, it is not that particular individuals or constituencies benefited from land sales, or at least not directly. Of course, there are beneficiaries of government-dominated rural-urban land conversion, including real estate developers, and the department of land administration, which is able to maintain its budget and importance within the government system due to the existence of such a system. In general, land sales revenue has been in the *public* pocket of local governments, rather than in particular individuals or constituencies. The revenue has been used in maintaining the operation of the government and in various city public infrastructure projects.

² The influence of the partial reform on farmers is complicated. On one hand, it does give local governments incentives to grab farmers' land, which would not be so strong if there was no such a reform. On the other hand, thanks to the reform, local governments can afford to pay higher compensation to farmers than they could otherwise. In a more general way, urban land use reform was crucial to China's market transition and has greatly

However, this is not to say that a country, even without a democratic political structure, would necessarily be trapped in the partial reform equilibrium. In the China case, Chinese farmers challenged the existing system by forming a huge small-property market, through which social groups disadvantaged by the partial reform, mainly Chinese farmers and members of the middle-and-low income urban population, present their interests and display their capacity to counteract the goals of the central and local governments. This has led to adaptive policy changes. Recent news shows that Chinese land reform is moving in a direction that would address Chinese farmers' concerns, though much work is needed to unify the small-property market and the legal real estate sector.

My historical investigation builds not only on my systematic examination of national laws and landmark resolutions of the Chinese Communist Party ("CCP") but also on government documents generated in their drafting processes, ordinances, regulations, notices, communications between the central government and local governments, and memoirs of retired national leaders and senior government officials who participated in the reform. This chapter is organized as follows. Section 1.1 introduces the dual land ownership system in China. Sections 1.2 and 1.3 investigate the urban land use reform and rural land use reform, respectively. Section 1.4 explores how Chinese farmers have promoted policy changes through their illegal land uses.

1.1 Dual Land Ownership and Rural-Urban Land Conversion

Article ten of the current Chinese constitution reads that urban land is owned by the state and rural land is owned by collectives (except those owned by the state according to law). This is what dual land ownership means. *The most important character of this dual land ownership is the dominating role of the state landowner over the collective landowner, with the former's monopoly over rural-urban land conversion.* Throughout this book, "urban land" and "rural land" are legal terms regardless of the physical characteristics of the land. Rural land can be near the city center, such as that in some intracity villages, and urban land can be far away from the city center, such as those remote villages that were requisitioned by the government in recent years. In the following section, I discuss the origin and structure of dual land ownership in China.

facilitated China's urbanization process, from which farmers have benefited a lot. One example would be job opportunities for farmers who work in cities as migrant workers.

1.1.1 State Ownership of Urban Land

The undisputed moment at which private land ownership in China was abolished was the passage of the 1982 Constitution, which, for the first time in the history of the People's Republic of China, declared that urban land is state-owned without exceptions. Although several letters solicited from the populace on the draft of the 1982 Constitution addressed the state-ownership of urban land, this clause faced little dispute within the amendment committee.³ The 1982 Constitution recognized the *de facto* demise of private land ownership caused by the Cultural Revolution for two reasons. First, in the ideological struggle between market and planned economies, the latter still prevailed. The orthodox Marxist understanding of property was strictly followed and, thus, there was no need to deny the nationalization of urban real estate in the Cultural Revolution. It was not until two years later in 1984 that the CCP finally achieved consensus on building a commercial economy with planning (*you jihua de shangping jingji*). Second, it was widely regarded that state ownership of urban land would serve the purposes of state-dominated economic development, as demonstrated by the proposal to nationalize rural land described in Section 1.1.2.

1.1.2 Collective Ownership of Rural Land

The CCP's promise to reallocate landlords' land to millions of peasants contributed to the civil war victory over the Nationalist Party in 1949. The Common Program of the Chinese People's Political Consultative Conference (which was passed in September 1949 and served as the temporary constitution of the People's Republic of China until 1954) made a system of "peasant land ownership" a goal of the new Communist government and protected the private property of "workers, peasants, the petty bourgeoisie and the national bourgeoisie."⁴

However, this did not last long. The CCP began to promote the establishment of farmers' co-ops (*hezuohua*) in rural areas in 1951, which led to the establishment of the people's commune system

³ 程雪阳：“城市土地国有规定的由来”，“炎黄春秋”2013年第6期[Xueyang Cheng (2013). The origin of state ownership of urban land, 6 *Yan Huang Chun Qiu Mag.*], www.21ccom.net/articles/zgyj/ggzhc/article_2013061085334_3.html.

⁴ “中华人民共和国共同纲领”第三条[THE COMMON PROGRAM OF THE CHINESE PEOPLE'S POL. CONSULT. CONF., Article 3].

in 1958.⁵ The people's commune consisted of three echelons: the commune, the production brigade, and the production team.⁶

Since the early 1980s, the Household Responsibility System (hereinafter "HRS") has replaced the people's commune system as the main rural land institution. Under the HRS, the collective should contract collectively owned land to individual households. Individual households, as contractors of rural land, are free to use the contracted land for agriculture. In the past three decades, the contract rights have gradually matured to quasi property rights due to the extension of the contract period from 15 years to "permanency" (*changjiu bu bian*)⁷ and the establishment of measures to protect rural households' contract rights from the interference of rural collectives.⁸ Rural land is categorized into three types: residential land; agricultural land, and public construction land. The permitted uses of different categories of rural land are strictly controlled, and farmers are prohibited from diverting land to any other urban use – which encompasses any use not listed among the three categories above.

⁵ 陈锡文等：“中国农村制度变迁60年”，人民出版社2009年版[Xiwen Chen et al., *Six Decades of the Evolution of Chinese Rural Institutions*, People's Publ'g House 10–16 (2009).]

⁶ See Peter Ho (2001). Who owns China's land? Policies, property rights and deliberate institutional ambiguity, 166 *China Quart.* 394, 404–405.

⁷ See, 中国共产党第十七届中央委员会第三次全体会议公报（2008年10月12日中国共产党第十七届中央委员会第三次全体会议通过）[Gazette of Third Plenary Session of the 17th Central Committee of the CCP], promulgated October 12, 2008.]

⁸ The last nationwide reallocation of rural land happened in 1998. In 2002, the central government passed the Rural Land Contract Law ("RLCL"), which stipulates that farmland tenure security must be maintained for at least 30 years. The third plenary session of the seventeenth Party congress also decided that the current land contract system "should not be changed for a long time." (*changjiububian*). Thus under the current law and policy, village collectives have no right to change or revoke the contract. Under very exceptional situations, such as natural disaster, adjustment of the land contracts should be agreed by two-thirds majority of villager representatives approved by the local government. See, e.g., Article 27 of RLCL. Farmers can seek conciliation by local governments, special arbitration, and litigation for rural land contract disputes. See Article 51 of RLCL. However, failure to allocate land to the newly increased population often induced conflicts among village members if the above law and policy were strictly implemented. Administrative land reallocations then still continued in some villages to accommodate demographic changes in these places. Land requisition is another reason for land reallocation. According to a 2005 seventeen-province survey, 30.3% of the villages carried out land reallocation after 1998. See Zhu Keliang et al. (2006). 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, 794; see also Hui Wang, et al. (2011). To reallocate or not: Reconsidering the dilemma in China's agricultural land tenure policy, 28 *Land Use Pol'y* 805.

1.1.3 *Structure of Chinese Local Government and Rural-Urban Land Conversion*

In 1982, the Standing Committee of the NPC passed the Regulations on the Requisition of Land by the State for Construction (“RRLSC”). Article Two of the Regulations said that:

When the state conducts economic, cultural and national defense construction and social public affairs, it should requisition collective-owned land according to this regulation. All direct or covert buying or renting of land from rural people’s communes and production brigades by any unit shall be forbidden. Rural people’s communes and production brigades shall not participate in the business operations of any enterprise or institution by contributing land as shares.

It was clear from the RRLSC that all land use must be consistent with the State’s economic plan. Rural land was supposed to be used for agriculture and the livelihood of farmers, and it could only be used for “construction” if it was approved under the economic plan. State requisition is the only legal way of converting collectively owned land, which could only be used for agricultural and related uses, to state-owned land, which could be used for various construction projects.

Which level of the government represented the state in these types of conversions? According to Article Seven of the RRLSC, the city and county-level governments were responsible for selecting sites and requisitioning land for specific projects. Land requisition was subject to the approval of the provincial or central government, and decisions were made according to the size of the land requisitioned. City and county-level governments were able to approve requisition of land of no more than three *mu* of arable or garden land, ten *mu* of forestry or grassroots land, and twenty *mu* of other kinds of land. Although often subject to the approval of upper level governments, city and county-level governments were the actual managers of the state ownership of land.

Why were county and city governments responsible for land management? In contrast with the United States, China is a unitary state, meaning that all powers of local governments are delegated by the central government. Generally speaking, Chinese local governments are divided into four levels: province, city, county, and township, as shown in Figure 1.1.

Chinese provinces tend to be too large as an economic development unit and townships tend to be too small. Cities and counties, on the other hand, tend to be of an efficient scale for economic management.

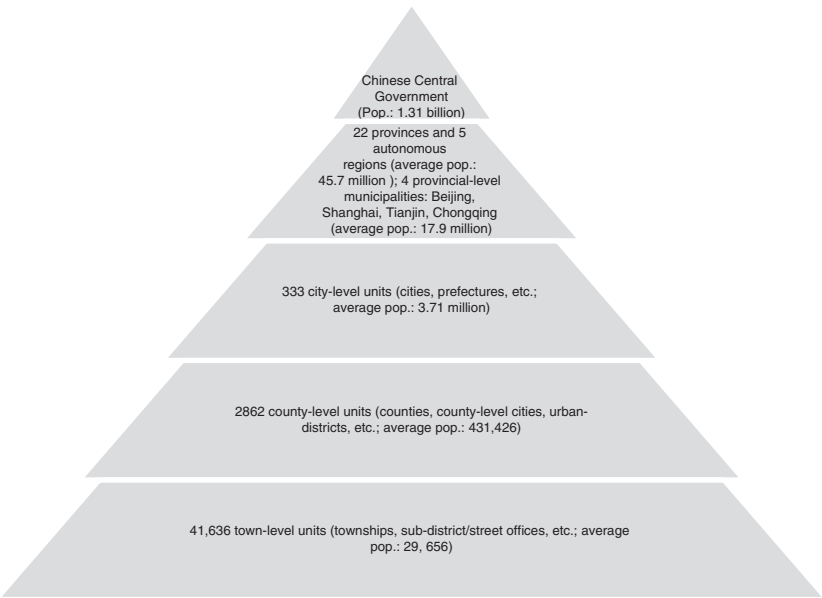


Figure 1.1 The structure of the Chinese government
Source: Xu Chenggang, *The Fundamental Institutions of China’s Reform and Development*, Journal of Economic Literature 2011, 49:4, 1076–1151, 1084.

In China’s economic reform process, cities and counties have become the administrative units that actually manage the economy.⁹ Naturally, city/county governments are the real managers of land within their jurisdictions. In the United States, land use power is also within the hands of the city or county governments.

Taking a Chinese city/county as an example, the structure of land ownership is as shown in Figure 1.2.

However, the boundary between urban land and rural land is not static. City/county governments can change this boundary by requisitioning rural land and converting it to urban land. The two kinds of land ownership, state ownership of urban land and collective ownership of rural land, are not equal. The organizational hierarchy of the Chinese

⁹ 张五常：“中国的经济制度”，中信出版社2009年版[Steven N.S. Cheung, *The Economic System of China*, CITIC Press Group (2009)] (concerning inter-county competition in China).

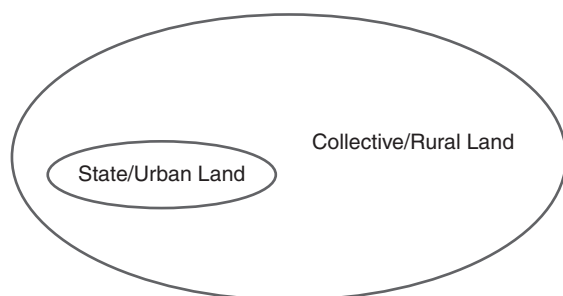


Figure 1.2 Dual land ownership in China

government and the county and city governments' legal power to requisition rural land for urban construction made it easy for city and county governments to encroach upon the collective ownership of rural land.

The former people's commune consisted of three echelons: the commune, the production brigade, and the production team.¹⁰ The people's communes were under the direct control of county or city governments. The reforms initiated in 1978 by Deng Xiaoping dismantled the communes and granted individual households the right to use the land. Generally, the township (*xiang/zhen*) replaced the commune, the village (*cun*) replaced the brigade, and the villagers' group (*cunmin xiaozu*) replaced the production team, as shown in Figure 1.3.¹¹ However, the political structure of local government did not change fundamentally. Townships were still under the direct control of the city/county governments. Village-level self-governance organization, under the leadership of the party branch, also remains a puppet of the local government.¹²

Moreover, at the policy level, city and county governments represented the interests of all units and individuals under their jurisdictions in the national political arena, including the rural sector. Villagers do not have direct access to the political process of policy making. Even in exceptional situations where the villagers' leaders are selected to serve as members of the NPC, their voices and influence were subject to and inferior to that of city and county government leaders.

¹⁰ See Ho, *supra* note 6, at 404–405. ¹¹ *Id.*, at 405.

¹² Shitong Qiao (2012). Governing the post-socialist transitional commons, 24 *Colo. J. Int'l Envtl. L. & Pol'y* 115, 146–148.

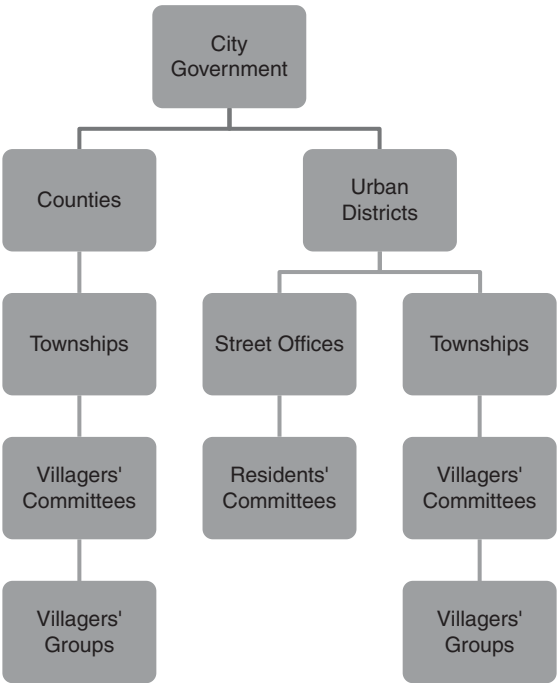


Figure 1.3 Chinese government structure under the city-level after 1978

Thus, politically speaking, Chinese farmers still do not have their own “autonomous organizations” that can represent their interests in national policy making. Their rights to use the land contracted to them are easily encroached upon by the city and county governments’ power to requisition land. The relationship between owners of urban land and rural land is the key to understanding the land use reform discussed in the following parts.

1.2 Urban Land Use Reform

Urban land use reform was initiated and captured by Chinese city governments. An urban land use market provided Chinese city governments with the financial resources urgently needed for urban construction and public investment, and has been a main engine for urbanization and economic development in China. Chinese local governments’ pursuit of financial interests forced the central government to concede most of the land revenue to them and has deeply shaped the Chinese land regime.

1.2.1 *The Creation of Land Use Rights: From Shenzhen Experiment to Constitutional Amendment*

Before 1979, land was controlled by the state and used by various government units for free in accordance with Marxist principles stating that the price mechanism was inapposite after abolishing private property. However, with the implementation of the reform and opening-up policies, state ownership of land must be given a richer understanding than under Marxist orthodoxy.

The cities at the frontier of reform and opening up blazed a trail of land use reform. On December 31, 1979, the Director of the Shenzhen City Construction Commission signed a contract with a Hong Kong investor, according to which the Shenzhen city government contributed land, the Hong Kong investor financed the land development and shared a fixed percentage of the profits.¹³ On December 5, 1980, the Shenzhen City Construction Commission signed the first “land use fee” contract with a Hong Kong investor, which included the essential contents of today’s standard contracts of assignment of state-owned land use rights between local governments and real estate developers, including the term (30 years in this contract) and price of the land use (HKD 5000 per square meter).¹⁴

Lawmaking and the practice of land use fees discussed above could be considered a prologue because of their limited scale, which ultimately served as the beginning of a norm cascade.¹⁵ Shenzhen, the first special economic zone (“SEZ”) of China, went a step further. In November 1981, the Shenzhen government extended the charging of land use fee from foreign investors to domestic investors.¹⁶

However, without a land market, the standard land use fee was arbitrarily fixed by law and was applied to all construction projects.¹⁷ Users who valued the land most did not have an opportunity to reveal

¹³ 冯杰：“深圳土地管理二十年”，“深圳特区报”2006年6月22日[Jie Feng, Two Decades of Shenzhen Land Administration, *Shenzhen SEZ Daily*, June 22, 2006], www.szpl.gov.cn/xxgk/gzdt/zwdt/200908/t20090825_46190.html.

¹⁴ *Id.*

¹⁵ See Robert C. Ellickson (2001). The market for social norms, 3 *Am. L. & Econ. Rev.* 1–49; Cass R. Sunstein (1996). Social norms and social roles, 96 *Colum. L. Rev.* 903, 903–968.

¹⁶ “深圳经济特区土地管理暂行规定”（广东省人大常委会，1981年12月24日）[Interim Regulations on Land Administration in Shenzhen Special Economic Zone, art. 19] (promulgated by The People’s Cong. of Guangdong Province, December 24, 1981).

¹⁷ Feng, *supra* note 13.

their willingness to pay higher prices. Shenzhen, as the first city to charge land use fees, first felt the constraints of the land use fee. After studying crown land sales in Hong Kong¹⁸ carefully, the Shenzhen government sensed the money-generating power of a land market. It wanted to sell land, and it created a slogan in response to the CCP's call to build a "commercial economy with planning." The slogan was: "No land market, no complete commercial economy." This reform faced an ideological challenge from Marxism: Should a socialist country that abolished private property sell land? In response to this challenge, reformers separated land use rights from land ownership. A local reformer checked the classics by Marx and Engels page by page and cited words from Engels as support. Engels wrote that, "[A]bolishing private ownership of land does not require abolishing land rents; rather it requires submitting land rents to the society."¹⁹ Thus selling land use rights would not challenge state land ownership in China and would allow the state to utilize land rents.

Shenzhen eventually held the first public auction of transferrable land use rights in the history of the PRC on December 1, 1987, in direct conflict with the then effective Land Administration Law ("LAL") and Constitutional Law.²⁰ The public defiance led to the legal authorization of transfer of land use rights by the People's Congress of Guangdong Province (the province where Shenzhen was located) on January 3, 1988, and more importantly, the Chinese Constitutional Amendment that allows the transfer of land use rights on April 12, 1988,²¹ and a similar amendment to the LAL on December 29, 1988.²²

The 1988 amendments of the Constitution and LAL removed the legal barrier against selling land use rights for local governments. On May 19, 1990, the State Council promulgated detailed rules governing the sales of land use rights from the government and the transfer among land users, i.e., the Interim Regulations of the People's Republic of China

¹⁸ See Roger Nissim, *Land Administration and Practice in Hong Kong* (2008).

¹⁹ Feng, *supra* note 13. ²⁰ *Id.* See also Chapter 3, Section 3.1.2 for more details.

²¹ "中华人民共和国宪法修正案" (1988年4月12日第七届全国人民代表大会第一次会议通过, 1988年4月12日第七届全国人民代表大会第一次会议主席团公告第八号公布施行) [See Article Two of the 1988 Constitutional Amendment].

²² "全国人民代表大会常务委员会关于修改<中华人民共和国土地管理法>的决定" (1988年12月29日第七届全国人民代表大会常务委员会第五次会议通过, 1988年12月29日中华人民共和国主席令第十二号公布 自公布之日起施行) [1988 LAL Revision] (promulgated by Nat'l People's Cong., December 29, 1988).