The Emergence of Private Property Law in China and Its Impact on Human Rights

Mark D. Kielsgard
Lei Chen
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By Mark D. Kielsgard and Lei Chen* 

ABSTRACT

This article investigates the development of private property law in the PRC and its connection to the growth of human rights trends in China. It assesses the vitality of these trends, reviews the relevant historic legal and social background and demonstrates how the introduction of private property in China has fundamentally altered the fabric of its civil society. Drawing upon case studies and statutory analysis, and evaluating them from the perspective of both Chinese and Western scholarship, it analyzes trends driving greater democratic structures by reviewing the self-governance of condominium owners associations and the human rights practices they have spawned. Moreover, this article tackles the future of these trends by reflecting upon conditions opposing continued development such as local corruption, lack of enforcement and inadequate judicial review. It also predicts future outcomes of the Chinese private property scheme as it begins to nurture the budding human rights reforms currently taking place. Finally, it suggests initiatives calculated to maximize those reforms through efficient legislative drafting and other efforts aimed at cultivating the sensitive and sometimes volatile free market.

Introduction

In January 2011 Chinese President Hu Jintao visited the United States and, when pressed on China’s human rights record, publicly conceded that “a lot still needs to be done.”1 He further elaborated that China has “made enormous progress”.2 Many are skeptical of the Peoples Republic of China’s (PRC) commitment to human rights, particularly civil and political rights.3 They point to the so-called “Beijing consensus”4 as a system of rights based on the perceived interest of the government without recourse to international norm.5 The PRC has the highest death penalty rate in the world,5 repeatedly strikes down

* Dr Mark D. Kielsgard and Dr. Lei Chen are Assistant Professors of Law at City University of Hong Kong and they would like to express their thanks to Brian Chok for his research assistance.


2 See id.


5 Amnesty International estimates that China carries-out more execution than the rest of the world combined. See AMNESTY INTERNATIONAL, DEATH PENALTY STATISTICS 2006, FACTS AND FIGURES ON THE DEATH PENALTY http://www.amnestyusa.org/document.php?lang=e&id=engact500122007. However, some recent movement is evident in Chinese death penalty practices as Professor Roger Hood concludes “…the last few years have witnessed a distinct change in the discourse, evidenced by the willingness of the Chinese authorities to discuss the death penalty in human rights seminars and dialogues with European countries, the gradual opening up the subject to research, and the attempt to guard against wrongful conviction and control the incidence of executions through review of all death penalty verdicts by the Supreme People’s Court”. See Roger G. Hood, Abolition of the Death Penalty: China in World Perspective, 1 CITY U. HONG KONG L. REV. 1, 16 (2009). Reform seems to be taking the form of reducing the number of offenses that carry the death penalty, from 68 to 55. The 13 offenses are property
free speech (including its visible contest with the ISP corporation Google over censorship practices), often incarcerates lawyers who sue the government under the Administrative Litigation Law (ALL), and continues to receive poor ratings on its human rights record from the U.S. Department of State and low “rule of law” ratings by the World Bank.

Yet changes have taken place, albeit slowly, to the Chinese political and rights landscape.

In 2004, China amended its 1982 constitution, purporting to guarantee private property ownership and human rights. In 1998, the PRC signed the International Covenant on Civil and Political Rights (ICCPR), though they have not ratified it. In 2009, the PRC released its national human rights action plan. In this plan, China promised to increase safeguards for civil and political rights and pledged protection from torture, and to ensure fair trials, and the rights of its citizens to participate in government and to question policies. These promises were subsequently re-pledged in China’s 2012 national human rights action plan. In 2012, China amended its Criminal Procedure Law to include, inter alia, a rudimentary exclusionary rule that prohibits the introduction of confession evidence when it is the product of torture. Amnesty International, while acknowledging gaps in these protections, “… welcomed the

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9 See id.
(2009 human rights) plan, saying that it signals the growing importance the Chinese authorities place on the protection of human rights and the adherence to international human rights standards.”

Moreover, in its country report in August 2006, though identifying many areas of concern, the CEDAW (Convention for the Elimination of Discrimination Against Woman) Committee acknowledged that China had taken positive steps for the promotion of equality for women. The Committee specifically cited the 2005 amendment to the Law on the Protection of Rights and Interests of Women, the 2001 amendment to the Marriage Law, the 2002 Law on Contracting of Rural Land, the 2006 amendment to the Law on Compulsory Education, and the 2001 – 2010 Programme for the Development of Chinese Women.

These trends, however deliberate, witness China’s inexorable drive toward compliance with international human rights norms. When viewed in contrast to the stark realities of the “cultural revolution” of a few generations ago, these trends corroborate the claims of progress made by President Hu Jintao. Yet this poses the inevitable question of what’s motivating China’s drive toward human rights and whether it is genuine and sustainable. One factor driving these changes is the PRC’s introduction of a market economy and the emergence of private property rights.

This article explores the implications for, and development of, private property law in the PRC and its connection to the growth of the nascent Chinese human rights scheme. It identifies and assess the vitality of emerging human rights trends, reviews the historic legal and social background and discusses how the introduction of private property in China has fundamentally altered the fabric of its civil society. Drawing upon case studies and statutory analysis, and reviewing them from the perspective of both Chinese and Western scholarship, it analyzes trends toward greater democratic governance. These trends can be illustrated in the self-governance of condominium owners associations and the human rights practices they have spawned. Moreover, this article addresses the future of these trends in light of current conditions opposing continued development such as local corruption, lack of enforcement and inadequate judicial review. It also predicts future outcomes of the Chinese private property scheme as it begins to nurture the budding human rights reforms currently taking place. Finally it suggests initiatives aimed at maximizing those reforms through efficient legislative drafting and other efforts designed to nurture the sensitive and sometimes volatile free market.

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Evolving Human Rights Trends in the PRC

China has repeatedly defended its slow progress on human rights on the grounds that, as a country with a poor population, it must provide for its people’s economic rights before it can focus on civil and political rights.\(^{19}\) However, along with economic based human rights, China’s drive to improve its economy is also, perhaps unintentionally, fueling trends favoring wider civil and political rights. Moreover, whether there is a significant connection between the recently promulgated market economy in China and its newly emerging sensitivity to human rights turns on the PRC’s motives and the sustainability/growth of the new rights regime taking shape. Indeed, as the PRC’s wealth and international influence grow, its sensitivity to human rights matures. Thus, these changes are, in part at least, economically driven.

Skeptics suggest that China’s emerging human rights regime is insincere, that it is not motivated out of a genuine subscription to the international human rights value-sets, but is only designed to lure continued foreign investment and trade.\(^{20}\) As a relatively closed society, this is an easy conclusion to reach – at least from the perspective of those on the outside looking in. They contend that real change will never take place until internal censorship abates and a free exchange of ideas, including criticism of the one party system, can occur without fear of reprisal. Others contend that the solution lies in universal suffrage and a robust judiciary exercising full authority of judicial review, particularly with respect to constitutional interpretation.\(^{21}\)

From this perspective, China’s recent human rights initiatives can be linked to its newly obtained economic clout as a formidable international trade colossus. China has recently grown the second largest world economy in terms of GDP (second only to the United States)\(^ {22}\) and is one of the world’s biggest lender states, though its people still have a relatively low per capita income.\(^ {23}\) This hypothesis provides that China’s efforts to reform its rights record is motivated by the desire to obtain and hold more foreign markets that might otherwise be squeamish at doing business with a perceived renegade nation, at least with respect to international human rights norms.

Indeed, it can be asserted that the reforms are motivated by a desire to curry favor from wealthier states or to emulate them for prestige or out of fear of retaliation or for favorable trade terms. During the Trustee\(^ {24}\) period of the 1950’s and 1960’s, when most of the world’s colonial nations were fulfilling their

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23 Compared to the US’s GDP per capita in 2011 ($48,442), China only yields $5,430 available at http://data.worldbank.org/indicator/NY.GDP.PCAP.CD.
self-determination goals, often ubiquitous international norms and treaty obligations were required of them for normal relations or other diplomatic advantages. Most of these states, newly independent, were in no position to refuse – due to poverty, lack of security and the need for continuity of trade relations or relief – they were under a form of duress. Thus, acquiescence to human rights norms under those circumstances could be attributable to external factors and cast doubt on the sincerity of the nation(s) coerced into adopting them.\textsuperscript{25}

However, these arguments are inapplicable to China as it has developed substantial economic clout in spite of a spotty rights record and it has always been independent of the Trustee system. Moreover, wealth patterns are changing, the old paradigms are no longer relevant, and many developing nations are acquiring greater economic muscle.\textsuperscript{26} Generally speaking, if adherence to human rights norms is grounded in the third world economic disparity of the 20\textsuperscript{th} century, then continuing subscription to these norms would evaporate within the states whose economy has substantially improved in the 21\textsuperscript{st} century. Yet, many developing states are championing the cause of human rights with greater vigor than ever before.

While China’s assertion that it was concentrating on social, economic and cultural rights before civil and political rights was met with skepticism, the objective evidence seems to bear them out. By building its economy it has created market forces that favor, at least to a point, greater human rights compliance. Apart from the international trade component of China’s economy, its domestic economic practices and reforms provide greater insight into what is transpiring in its rights regime. From the inside perspective, the economic changes taking place are affecting the domestic law in a way that is driving structural change conducive to greater rights recognition. These changes consist of the establishment of a basic market economy guided by economic self-interest. The sustainability of self-interest arguably provides a more reliable foundation than altruism.

In addition to public relations factors driving international finance and trade, one domestic economic engine for change has been the legislative reform of private property ownership laws newly established in the PRC. They have led to the development of a market economy, a Frankenstein’s monster in a post-Marxist society, where the monster ends up dictating to the master instead of the reverse. Thus, growth of the “market economy” becomes the overarching aspiration and policy must be reviewed in a prism adhering to the prerequisites of market forces. The market economy in turn leads to fundamental

\textsuperscript{25} Modern developing nations seem to be far less susceptible to intimidation of this sort now than during the middle of the 20\textsuperscript{th} century. They have showed backbone on such issues as the continuing controversy over trade in the Doha rounds and refused to give in on issues of arguably more importance to industrialized states, namely trade. Additionally, developing nations showed their willingness to disagree with industrialized states at the Copenhagen Climate Summit in 2009.

\textsuperscript{26} In his book, \textit{Fareed Zakaria} discusses the shifts in economic power from the industrialized states, especially the United States, to developing countries which he characterizes as the rise of the rest. Zakaria observes, “Over the past few decades, countries all over the world have been experiencing rates of economic growth that were once unthinkable, … In 2006 and 2007, 124 countries grew at a rate of 4% or more …\textendash the 25 companies most likely to be the world’s next great multinationals [are not U.S. companies] … \textendash the tallest building in the world is now in Taipei … \textendash the world’s richest man is Mexican, and its largest publicly traded corporation is Chinese. The world’s biggest plane is built in Russia and Ukraine, its leading refinery is under construction in India, and its largest factories are all in China. By many measures London is becoming the leading financial center, and the United Arab Emirates is home to the most richly endowed investment fund.” \textit{FAREED ZAKARIA}, \textit{THE POST AMERICAN WORLD} 2-3 (2008).
societal changes such as the growth of democratic governance in the most basic social structure - the neighborhood (or condominium project). Moreover, the establishment of a market economy drives other human rights synergies such as heightened government sensitivity to nuisances affecting market value and checks on public takings, without which a market economy would remain emotionally and structurally insecure. Additionally, with the promotion of the market as a matter of policy, precluding free and full access to the market for some groups, such as gender-based or ethnic groups, only serves to limit the market and is bad for business. Thus, market forces tend to reform pre-existing discriminatory practices. These changes promote democratic governance, transparency, public participation in government, greater social and economic rights, and non-discriminatory practices.

As these reforms have sprung, in significant measure, from the changing land law, one pragmatic way to promote human rights in the PRC, at least in the short term, may be in the drafting of more sophisticated, efficient and binding real property legislation and regulation. The 2004 amendment to the 1982 Chinese constitution introduced a notion of property that renders a free-market economy more viable and economic development more sustainable. Nonetheless, this constitutional aspiration to private property rights (and related human rights) has yet to be fully realized in a concrete fashion. The Chinese constitution still fails to fully play a transformative role in the property law for a number of reasons including defects in the legislative drafting, local government interference, deficiencies in the enforceability of judgments, and lack of reliable judicial review.

Legal and Social Background

China first began to reform its legal system during the late Qing dynasty by drafting a modern civil code. Although this draft never came into use, it was patterned after the German model as adopted by Japan. This germinated the civil law tradition in the Chinese legal system. The blossoming of the civil law occurred under the Kuomintang government. It was not until 1930 that the first Chinese Civil Code was promulgated. Having revised and reexamined the Qing’s Draft Civil Code, the Republican Civil Code Drafting Committee drew on the experience of such civil law countries as Germany, Japan and Switzerland to develop its civil law legislation. The rise of the Chinese Communist party in 1949 resulted in the repeal of the Republican era legal system and transplanted it with a portion of the 1950s Soviet legal system.

With Mao Zedong’s death in 1976, China began a program that opened the country to foreign investment and the pursuit of legal reform to prevent a reoccurrence of policy-driven excesses. Most

29 HUANG, supra note 27, at 49-51.
importantly, Chinese leaders decided that the major problem confronting China was not class struggle but economic growth. For this reason, Deng Xiaoping focused the governmental agenda on economic development.\textsuperscript{31} However, attracting foreign investment hinged on improving the legal system and placing a greater reliance on law and security for investment.

Until 1988, land law in China was posited in public or collective ownership. There were no individual land rights and no private land ownership.\textsuperscript{32} The burden of the government to provide enough housing for its citizens was seriously challenged by urbanization and an exploding population.\textsuperscript{33} To ease this housing burden, the country embarked on a new economic policy based on creating wealth by marketing housing.\textsuperscript{34} In accordance with this policy, China amended its Constitution in order to recognize privately owned transferable land use rights.\textsuperscript{35} This constitutional amendment was far-reaching since it allowed for the creation of a revolutionary new form of land-use right.\textsuperscript{36} However, while commercial transference of state-owned land was in its infancy, free market economy \textit{per se} was for a time eschewed and the predominance of public housing was still officially characterized as a form of socialist well-being. Hence, Chinese lawmakers initially paid little attention to adopting sophisticated modern real property legislation.\textsuperscript{37}

Subsequently however in 1994, the State Council adopted a comprehensive national housing reform policy.\textsuperscript{38} The privatization and commercialization of the housing market helped to relieve the government of its responsibility for maintaining and managing buildings that were originally constructed to accommodate state employees.\textsuperscript{39} The constitution was again amended to ensure private property within the Chinese legal system. It provided that “individual private and other non-public economies … are major components of the socialist market.”\textsuperscript{40} More significantly, the amendment put private property on an equal legal footing with state-owned property,\textsuperscript{41} such that ‘citizens’ legally obtained private property rights could not be violated. Furthermore, the amendment called for compensation whenever private property was expropriated by the government. Thus, the Chinese constitution acknowledged the right to

\begin{footnotes}
\item[31] XIAOPENG DENG, SELECTED WORKS OF DENG XIAOPENG, VOL 1 319-22 (2nd ed. 1994).
\item[34] In 1988 the State Council embarked on a staged housing reform by adopting a Scheme of National Housing Reform in Urban Areas. This stimulated the government’s initial efforts and provided a ten-year blueprint to expedite the commercialization of residential property and reduce state subsidies of housing. See J. Lee, From Welfare Housing to Home Ownership: The Dilemma of China’s Housing Reform, 15 HOUSING STUD. 61, 66 (2000).
\item[35] The commercialization of land-use rights was first tried in Shenzhen on 9 September 1987 and was formally adopted when Article 10 of the Constitution was amended on 12 April 1988 to permit the assignment of the right to use land.
\item[36] The amended Constitution of 1988 states: “the right to use land may be transferred according to law”. Soon thereafter, Article 2 of the Land Administration Law was revised stipulating that “the right to use State owned or collectively owned land may be assigned pursuant to the law”.
\item[37] PROPERTY MANAGEMENT LAW 8 (Shansheng Xia ed. 2003).
\item[38] The Decision of the State Council on Furthering Housing Reform in Urban Areas of 1994. (P.R.C.).(国务院关于深化城镇住房制度改革的决定).
\item[39] LEE, supra note 34, at 61.
\item[40] XIAN FA art. 11 (amended Mar. 15, 1999) (P.R.C.).
\end{footnotes}
private property as a fundamental freedom.

Despite these reforms China still lacked a comprehensive and consistently regulated land law scheme. There were divergent property law statutes in abundance, somewhat inconsistent administrative regulations, overloaded judicial pronouncements, and conflicting local norms. Thus, the Chinese land law was fragmented and susceptible to structural weakness, inconsistent treatment, corruption and an environment generally inconsistent with sustainable development. Further reform was essential.

The dysfunctional Chinese land law caused confusion amongst the relevant stakeholders. In response, in 2003, the State Council (the Central Government) provided the Property Management Regulation and, in 2007, the Property Law of the PRC came into effect. This legislation was intended to act as a comprehensive mechanism to regulate property and secure the protection of property rights by clearly defining different types of property as well as safeguarding title security and thus providing greater economic stability in the (real property) marketplace. It was designed to unify Chinese land law under a single coherent model. The effectiveness of this legislation is still an open question as it is too recent to adequately assess its impact. However, Article 4 provides for the protection of the rights of individuals (or any other right holder) and elaborates that these rights shall not be infringed by any entities or individuals, presumably including both the public sector and private developers.

The provisions of the Property Law of 2007 arguably bring the PRC into compliance with the norms set out in the Universal Declaration of Human Rights article 17(1) and (2) which provides “Everyone has the right to own property alone as well as in association with others,” and “No one shall be

43 Examples include the Provisions Concerning the Administration of Private Houses Owned by Foreigners (1984) (P.R.C.) (关于外国人私有房屋管理的若干规定) and the Interim Regulations on Assignment and Transfer of Rights to Use State-Owned Land in Urban Areas (1990) (P.R.C.) (城镇国有土地使用权出让和转让暂行条例).
44 For instance, the Judicial Pronouncement Regarding the Application of Some Provisions of the Law of Security (关于适用《中华人民共和国担保法》若干问题的解释) by the Supreme People’s Court (P.R.C.) (中华人民共和国最高人民法院). The legislative implementation of the property law has been controversial, disjointed and time consuming. Fourteen years passed from the time it was first on the parliamentary agenda. As early as 1994 the Chinese legislature devised a plan to enact the code, but it wasn’t until 1998 that a drafting panel was even tasked with the drafting. In October 1999, the drafting panel completed a model draft consisting of twelve chapters and containing 435 articles. See HUIXING LIANG, COMMENTARY ON CHINESE PROPERTY LAW DRAFT, 1-88 (2001). In 2000, a model property law draft was also completed. LIMING WANG, ANNOTATED DRAFT OF CHINA’S LAW OF THINGS, 1-67 (2001). Thereafter, in consultation with these two model drafts, the Standing Committee of the NPC deliberated and pruned its legislative draft seven times. Ultimately, eight parliamentary deliberations were held from December 2002 to March 2007.
45 Examples include Guiding Rules on the Management Corporation and Its Executive Council (深圳市业主大会和业主委员会指导规则), Shen Fu (深府) no. 11 (2005) by the municipal government of Shenzhen City on 17 January 2005.
arbitrarily deprived of his property.” Though the new legislation is content specific to land ownership rights it has consequences that are more pervasive and impact other rights as well. One area in which the introduction of personal ownership of real property impacts corollary rights is in the popular control and management of property associations and the resultant growth of local democratic governance.

The Right to Democratic Governance

Condominiums are the dominant mode of residential property in urban China. In the densely populated urban centers, condominiums are as familiar as they are practical. The percentage of residential properties individually held in condominium form far exceeds other building types and designs. In addition to the conversion of a large number of formerly publicly owned units into private hands, the market for new condominium development is booming and recent trends indicate the number is rapidly growing. Thus, condominiums are highly significant to the economic fabric of the PRC and serve as the appropriate real estate vehicle for studying the influences of free market forces on the rights regime in Chinese society.

Condominium ownership is closely linked to the concepts of independence of control and autonomy of unit owners and raises issues of collective action, mutual dependence and democratic participation. Hence, a regular feature of condominium ownership is the necessity for the management of buildings and the common elements such as swimming pools and elevators. Typically, the owners have influence over these issues. Thus, a degree of self-governance is, as a matter of practicality, unavoidable. Prior to the enactment of legislation permitting private property rights, all units were government owned and all buildings were government managed. With the sale and release of government property to the private sector, government control of building management also came to an end.

An examination of condominium law exemplifies that social obligation (by virtue of proximity) is inherent in property ownership. Condominium law cannot function well without the guiding principle of the ancient maxim *sic utere tuo ut alienum non laedes* (use your land in such a way as not to injure the land of others). Basic to condominium living is the principle that individuals must not be permitted to disrupt the integrity or condition of the overall condominium development with the unrestricted use of their own property. The unit owner can alter the interior in a manner that does not endanger the building’s

49 According to the Chinese Statistical Yearbook of 2009, by the end of 2008 the total construction area in urban China was 16.451 billion square meters. The area of residential condominiums was 10.769 billion square meters, which is 65.46% of the total construction area. Although there is no information available for industrial and commercial or mixed-use condominiums, the conclusion that the condominium is the principle housing feature of urban China is inescapable.
structural integrity or mechanical systems, but the structure, external elements, maintenance, available facilities and amenities, and land uses must be comprehensively managed. Restricting the use and enjoyment of individual units effectively protects all of the owners’ common interests and benefits all owners in the long run, both financially by increasing the condominium’s market value and by preserving a stable and orderly community. This is an easy fit for the traditional Chinese culture as it is steeped in a custom of communal ownership consisting of individual sacrifice for the stability and harmony of the group. Yet this is also an important point of intersection with a free market or quasi-free market economy when residential property often accounts for most of the owners’ net financial worth and so all owners are invested in encouraging appreciation and ameliorating waste. Under the old government-run system there was less incentive to encourage market value because there was no private real estate market to encourage and so tenants were less invested in the management of properties resulting in less efficiency. With the introduction of private ownership, considerations of market value dominate management decisions, resulting in more careful scrutiny of management and greater emphasis on long-term results. Thus, management becomes the responsibility of those with the profit motive to act efficiently. The new property law encourages this phenomenon.

Moreover, since the condominium is the predominant housing form in urban China, where resources are scarce and population vast, a communitarian perception of property is widespread and accepted at least to the extent of common [economic] interest. Yet, while community solidarity may lead to the conclusion that ‘claims of property may be abridged in order to further more highly rated social objectives,’ it is noteworthy that such social-harmony limits on property rights are likely at the periphery rather than at the core. Individual ownership is central. Without individual ownership interests, there is no point in extrapolating on neighborhood or communal rights and, by contrast, the earlier system of government managed/controlled properties failed to produce the renaissance of property design and attention to detail prevalent in modern condominium developments. It was wasteful and failed to provide for the efficiencies of free market ownership. Likewise, without the centrality of individual ownership, it is futile to emphasize the social obligations unit owners need to bear.

The International Covenant on Civil and Political Rights (ICCPR) article 25 provides:

Every citizen shall have the right and opportunity … without any unreasonable restrictions:

(a) To take part in the conduct in the public affairs, directly or through freely chosen representatives;

(b) To vote and be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
(c) To have access, on general terms of equality, to public service in his country.\(^59\)

Though the central government in Beijing does not provide for equal access to government or citizen participation or free elections, as contemplated in the ICCPR, democratic governance is beginning to make inroads into the governmental structure at the local level and/or at the neighborhood/condominium association level. These first steps are perhaps modest, but they witness the beginning of potentially substantial changes to come. Local governance accounts for transforming residents from tenants to property owners, thus making them stakeholders.

Recent developments in the control and management of condominiums in the PRC have stimulated democratic governance at the local level.\(^60\) As a matter of practicality, once private ownership was allowed, self-governance provided a greater cost benefit than government control as the duties were taken over by an unpaid association and/or an independent commercial management company that contributed to the economy in an efficient way as a profit-driven enterprise. Moreover, the nature of private ownership dictates, at least to a certain degree, the need for autonomous land rights including the maintenance and management of the property. The value and allure of property ownership is dampened by unreasonable external control and limitations on the free and personal enjoyment of the right. Its value diminishes if it is run in accordance with ease of management rather than according to the dictates of market forces. Naturally, some restrictions are inherent in land ownership (particularly in condominium ownership as previously discussed), but these restrictions are nonetheless consistent with free market economies, represent only minor and mutually beneficial restraints, and are common in the land law of other (democratic) states. Moreover, these restraints are favored by the majority of owners because they are directed at improving the marketability and appreciation of the property and thus reflect the democratic principle of majority rule.

The Chinese Property Law of 2007 includes a scant 14 articles dealing with condominium property,\(^61\) but “[c]ondominium ownership is now institutionalized and unit owner’s autonomy of management is statutorily recognized”.\(^62\) The Property Law provides that all registered purchasers of apartments or commercial units automatically become members of the management body of the


(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
(2) Everyone has the right of equal access to public service in his country.
(3) The will of the people shall be the basis of the authority of the government; this shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

\(^{60}\) B. Read, Assessing Variations in Civil Society Organizations: China’s Homeowner Associations in Comparative Perspective, 41 COMP. POL. STUD. 1240 (2008).

\(^{61}\) Property Law art. 70-83 (2007) (P.R.C.).

condominium. Moreover, the mode of management follows a democratic format christened in norms grounded in majority rule. Article 75 provides that the owners shall function through a general meeting and an elected executive board, and that the owners shall establish these organs with the help and instructions from local government departments (emphasis added). Article 76 further provides that rules governing the conduct of general meetings and the election and dismissal of the executive board, or the amendment of these rules, must be decided by majority vote (emphasis added). Thus, at the most basic grassroots level, democratic governance is taking root and the logic of majority rule is beginning to supersede elitism or paternalism as the logic for public policy and decision making.

The impact of the emerging Chinese policy of self-governance can be glimpsed in two case studies that have received significant domestic notoriety. The first witnesses evolving social expectations and exposes the trending mood of the times as expressed in the changing character of two public demonstrations staged by homeowners associations. The second discloses maturing legal developments that seem to be tracking swelling public expectations in the defense of homeowners’ rights to make and enforce decisions affecting their property.

Fangya/Lijiang case

In the first example, the evolution of changing public expectations can be seen in two public protests, one each in Beijing and Guangzhou. The Beijing protest took place in 2002 at the Fangya Garden development where the owners represented themselves as ‘commoners’ to gain the sympathy of government officials. The Guangzhou protest took place in 2009 at the Lijiang Garden development where the owners forthrightly asserted their right of participation. After only seven years, the owners’

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64 Property Law art. 75 (2007) (P.R.C.).
65 Property Law art. 76 (1) and (3) (2007) (P.R.C). The Property Law (see Judicial Interpretation) stipulates that the following matters must be decided by a simple majority:
(i) the drafting and amendment of rules governing general meetings;
(ii) the drafting and amendment of rules governing the management of the apartment ownership buildings and common facilities of the scheme;
(iii) the election and replacement of members of the executive board;
(iv) the appointment and dismissal of a professional management company or other managing agent;
(v) other important matters which are interpreted to include a change of the purpose of parts of the common property; the use of the common parts for business operations; disposal of the common parts; and matters which, according to the bylaws governing general meetings or the management of the buildings and the common property, require a simple majority.
The following matters must be decided by a two-thirds majority:
(i) raising of contributions to an administrative fund for the maintenance and repair of the apartment building and the common facilities; and
(ii) alteration and reconstruction of the building or the common facilities of the scheme.
perspective changed from supplication to rights-based demands. “Obviously, as the citizens of the society, the homeowners have stronger substance to oppose arbitrary rulings and ask for participation in rule-making.”

Thus, stakeholder status along with the passage of a relatively short period of time created a stronger sense of entitlement and has fueled more robust calls for a voice in matters affecting their interests. Furthermore, this trend appears to have garnered formidable momentum as some theorists contend that the advent of homeowners’ protests has expanded the acceptance of a rights-based scheme beyond issues involving the use and enjoyment of real estate to other civil and social rights as citizens.

Among those other areas are protests that have contributed to changes in the Labor Law, environmental rights, the repeal of the agricultural tax, and the recent amendment to the Criminal Procedure Law.

**Meiliyuan case**

In the second example, the Chinese legal community revealed noteworthy sensitivity to public sentiment and the changing public perceptions of an emerging rights-based scheme. In March 2005, the Meiliyuan (Beauty Garden) Homeowners’ Association (MLY HOA) formally resolved to bring suit against its management company, Hong Ming (HM), alleging “dishonest fees charging.” A total of 13 claims were brought against the management company at the District Court in Beijing.

The case was dismissed at trial, but it was reversed on the HOA appeal. The appellate Court ordered a 42.3% reduction of management fees (from RMB $2.72 (US .42) per square meter to RMB $1.58(US .24)). The management company was further ordered to return RMB$180,000 (US $27,692.31) for fraudulent advertising expenses and RMB $3533.76 (US $543.65) in excessive heating and property fees.

Thereafter, the management company applied for a re-trial based on three subsequently provided reports. These reports consisted of conclusions of the Municipal Price Certification Center, five legal scholars and

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75 See id.
the property management companies own legal advisors. The reports concluded that the decision to uphold the HOA’s claims would not only be a serious detriment to the property management industry and its growth, but would also disturb the stability and harmony within the community. The Court granted a re-trial.

In response, a MLY support group was formed by several HOAs in Beijing, the media and netizens. This in turn, sparked interest by other area HOAs to unite and campaign for their rights and a petition produced by the MLY was endorsed by 33 Beijing HOAs. Additionally, as the voices for the MLY HOA grew, the China Consumers’ Association also provided public support. This was no longer a mere dispute between the original parties, but a ubiquitous conflict impacting all Chinese HOAs and property management companies. In hindsight, it can also be viewed as a de facto contest between the legitimacy and enforceability of a rights-based regime and social-harmony paternalism. At trial the Court had a full house of onlookers including hundreds of reporters and homeowners with large overflow crowds spilling out onto the streets. With this backdrop the Court ruled in favor of the HOA. In retaliation, the property management company abruptly suspended its services causing the resident’s water and electricity to be cut off. However, these measures were short lived as the State agency intervened and ordered the property management company to return and provide service until the new property management company assumed its duties.

The MLY case represents a landmark victory for homeowners’ associations on property management rights and protections. This was one of the first cases to rule in favor of HOAs and it had significant impact. A case heavily covered by the media, this dispute had engaged the interest of homeowners and property management companies nationwide. Afterwards, many HOAs paid visits to MLY for an exchange of ideas and experiences in homeowners’ rights advocacy. The Court’s ultimate decision not only helps to protect homeowners against questionable management company practices, it buoys homeowners’ confidence in courts and the legislation affirming their rights. Moreover, it showcases the importance of democratically structured self-governing community associations and how they, working through the judiciary, can sometimes influence local practice and/or overcome local corruption. It also provides a glimpse of the changing trends in China favoring the rights of citizens to participate in government and the right to own property, as well as exposing the societal sensitivity to constructively harnessed popular opinion.

In one respect, this decision affirmed the legitimacy of rights-based arguments over more common justifications sounding in “social harmony” or other macro-centric policy issues. The management company’s legal strategy relied on a conservative, traditional Chinese approach asserting the superiority of the broad based societal interests over the rights-based interests of the individual owners.

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77 See id.
78 See id.
79 This case study has been conducted through the internet sources, including the MLY Complex owners’ forum, http://house.focus.cn/msglist/20/. See also Peng Chen, Legal Activism of Condominium Owners in Contemporary Urban China, 1 SOC. STU. 16 (2010).
The management company's reliance on the three reports effectively sidestepped the issue of owners' rights, neither repudiating nor distinguishing them, by emphasizing collective interests. However, by following this course they failed to sufficiently evaluate the weight of public opinion both as a factor influencing the court and as a driving, albeit highly emotive, factor in free market economics. Without consumer confidence in the product, real estate like any other commodity, will suffer market reversals and the vigorous public reaction to the MLY HOA case echoes the keen public interest in property rights.

On the other hand, the general popular appeal and vitality of the private ownership of real property is subject to varying opinions as traditional communal or collective practice is ingrained in Chinese society and even many unit owners may experience difficulty in overcoming this mental inertia. Some scholars suggest that if condominium associations provide a forum for discussing the nature of property rights, consensus from a social constructionist's view (i.e., communal ownership as merely a non-obligatory social construct) is required as a starting point for the growth of individual property rights. Otherwise, the practical impact of Chinese reforms will yield barren results.

Nonetheless the significance of these two case studies in Chinese socio-cultural economic life is of the first order as they demonstrate how opening the door to local democratic governance as a matter of right, and government sensitivity to public opinion (especially amongst the Chinese judiciary), may potentially lead to regional democratic structures and, ultimately impact the national governing organs themselves. The transitional process of democratization is driven by several conditioning factors: one, the mood of the community as it perceives the efficiency and benefits of self-rule and becomes more acclimatized to an empowering democratic process; two, the fruits of China’s growing economy as increased wealth creates a larger middle class who will demand greater input into government policy, consistent with a theory of economic determinism. Finally, market forces themselves drive greater democratic processes by encouraging market efficiencies in a free market environment as fundamentally consistent with greater democratic processes. This is the posture adopted by law and economic theory, which provides that law is designed to control externalities and reduce transaction costs. In the example above, local government corruption, developer or management company overreaching and lack of reliable judicial enforceability are the externalities being controlled and the synergies of individual ownership (e.g. cost sharing, volunteer owner management associations, owner maintenance and upkeep of facilities, etc.) reduce the transaction costs. While this theory is usually postulated in terms of common law systems, its inspirational genesis arises from laissez faire economics and can be applicable in a civil law system as well. Indeed, as the common law of contract, land law and tort developed in the international economic environment of nineteenth century free market economics so too has the recent statutory law of China developed in an arguably proximate international (neoliberal) economic milieu.

82 See generally Kevin J. O’Brien, Rightful Resistance, 49 WORLD POL. 31 (1996); See also Kevin J. O’Brien, Neither Transgressive nor Contained: Boundary-spanning Contention in China, 8(1) MOBILIZATION (2003).
83 See generally RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 343-49 (5th ed. 1998).
84 See id.
Potential Risks

Despite changing trends and indicators, there are risks associated with the fledging democratic direction taken in the Property Law of 2007. Among them is the risk of fiat exercised by local government overriding the condominium owner’s decisions, the lack of a fully authorized judicial branch for effective enforcement of remedies, propensity for corruption, and undue influence of developers throughout the process (including the handover to the owners association and the initial appointment of management companies or other outside contractors).

While the Property Law provides for free elections it also allows for the imposition of the local government to provide “help and instructions.” The issue of interference by local government is tied to judicial review and especially to the inefficient enforcement of judgments as executive mandate can tend to circumvent judicial decisions. Some of the influence of local government is purely ministerial such as providing for basic government services including the provision of electricity and water and sewer. It also assists owners’ associations with their initial set-up and the transfer from developers in newly constructed condominiums. However, in some cases there is a struggle between the local government and the owners’ associations. Originally, local government served as the landlord for all residential property within its jurisdiction. With the appearance of private property statutes that relationship changed but local government often retained control over the common elements and charged a fee to the owners for their use. This transitioned into the so-called “Shenzhen mode” or the privatization of the services previously supplied by the public sector. Thereafter, as the owners eventually gained control and ownership over these elements the local government continued to retain control over the service personnel, often in the form of a for-profit management company.

This transition can also be observed in newly constructed condominium projects with developers reluctantly relinquishing control of [for-profit based] common elements and professional management companies, usually only after a struggle with the owners. The developers are frequently aligned with the local government in this process or acting with their support. Moreover, recourse to judicial remedies sometimes proves vain as the lack of adequate judicial review or enforceability of judgments is often thwarted by the local authorities. This provides a rich medium for local corruption.

Therefore, the issue of local interference with the effective democratic governance in owners’ associations and the issue of judicial review and enforcement are intertwined. The continued control by local authority (or developers acting in concert with local authority) outside the judiciary is at odds with democratization and market forces. The failure to provide an adequate remedy has occasionally resulted

87 Though perhaps not strictly applicable to local government, the Property Law of 2007 does allow for the protection of the individual owner from overreaching by the owners association itself as it provides that the decisions of the general meeting and the executive committee are binding on the owners unless an owner can prove that the decision adversely affects his or her legitimate rights and interests. See Property Law art. 78(2) (2007) (P.R.C.). In the latter instance, or indeed if it can be proved that prescribed procedures have been contravened, he or she can approach the court for invalidation of the decision within a year after he has become aware or should have become aware of the decision. See Judicial Interpretation on Property Law art. 12 (2007) (P.R.C.). This provision reflects the protection of minority rights.
in owners taking a political stance instead of a purely legal one as sit-down protests have sometimes been
initiated in order to gain the attention of even higher ranking officials. Because they are actual
stakeholders, these protesters are more highly motivated then they would be as mere tenants. Though
sometimes effective, such methods alone are perhaps not a reliable engine to bring about change and
protect the rights of the owners (though they do serve as a barometer of changing societal perceptions and
expectations as seen in the Lijang Garden protests of 2009).

However, while the circumvention of some judicial remedies takes place, the greater weight of
the trends seem to favor the homeowners and market forces. Indeed, the solution to this dilemma resides
in both legal and non-legal arenas including political, economic and social. As owners obtain greater
stakes their rights to the property become more established and socially or culturally presumed. The
trending from public sector to private sector to “Shenzhen mode” is poised to ultimately transition to a
free market economy to ever greater owners’ rights and thus more profound and reliable democratic
governance including complete control over the service personnel and management of the development.

In one case study, the so-called “TM complex case”, a grass-roots homeowners’ organization
mounted a legal challenge to the local government in the city of Shenzhen. In this case the TM HOA
unsuccessfully relied on the judiciary to fend off illegitimate local government intervention in the
establishment of their HOA committee.

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**TM complex case**

In November 2006, the TM HOA held its election for the executive committee with the
incumbents running for a second term. Despite numerous attempts, the Sub-district Office (local
government agency) refused to participate or organize the election. Instead, they coerced homeowners in
an effort to sabotage the process. In spite of these efforts, the TM HOA executive committee was re-
elected. However, the Sub-district Office refused to approve or recognize the election and without their
approval the executive committee could not be registered with the District Housing Administrative
Department. Nonetheless, the executive committee subsequently held a general meeting where it
proposed and received approval for a tender for a new property management company. Allegedly, there
was collusion between the local government and the pre-existing management company and they refused
to approve the election results because they knew the executive committee would seek to replace the old
management company.

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88 One example occurred in 1998 when the owners of the Kai Li Garden in Shenzhen staged a sit-down strike in
front of the district and municipal government buildings over a dispute concerning unit ownership certificates.
89 In accordance with the Chinese Constitution Article 111 and the Organic Law on the Urban Residents’
Commitees, residents committees’ (RC) in China are grass-roots organizations of local residents in urban areas
who perform minor self-governing functions. RC’s are not state organs, but populous organizations voluntarily
formed by the residents to handle their own affairs under the guidance of the the Sub-district Office and serve as a
facilitator of government-community communications. The Sub-district Office is the lowest government organ in
the Chinese administrative structure.
90 The Sub-district Office denied the validity of the voting result by refusing to stamp and endorse the decision.
Prior to the completion of the tendering process, the local office of the District Housing Administrative Department along with the local government agency sent out a notice denying the authority of the executive committee and calling for a new election. The notice further stated that the election would be held at the local Housing Administrative Office and demanded homeowner participation. Moreover, the Beijing Municipality Construction Committee also issued a circular (No. 666) joining with the Housing Administration Office demands and requiring the HOA surrender all official documents (including the organization seal) to the Sub-district Office. Thereafter, a new election was held where the prior executive committee was replaced by a margin of one vote.

In retaliation, the former executive committee organized a seminar conducted by experts in district administrative matters, legal scholars and lawyers to investigate whether the local authority had the right to re-elect the executive committee and especially the legal status and propriety of Circular 666. This resulted in the filing of a suit against the Beijing Municipality Construction Committee for issuing the circular. The District Court dismissed the case and pointed out that Circular 666 was only an instructional opinion with no administrative binding force. Although the case was dismissed, many industry experts hailed the decision as a victory for HOAs chiefly for two reasons. First, in not questioning the locus standi of the HOA committee the Court per se acquiesced to the legitimacy of the action including the concession of judicial review of the administrative function and the HOA as an appropriate applicant. Secondly, Circular 666 has no precedential value since the Court considered it as only an opinion, thus local agencies cannot rely on it as a basis to intervene in the future.

This case is significant for two reasons. First, it illustrates the means and opacity of corruption in local Chinese politics and how it can occasionally circumvent both the best interests of the homeowners and the democratic structure of the association. In this case, the democratically elected executive committee was removed and the new committee put in place (ostensibly via coercion). Additionally, the management company was not replaced and, presumably the owners are still suffering the consequences. Second, it reveals the reluctant collusion of the judiciary in local corruption. In a country that has only recently made provision for judicial administrative review with arguable reticence, the court could have dismissed the case on the grounds of standing. By reaching its decision on the grounds it chose, the

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91 See the online forum by TM Comlex owners, http://www.timesmanor.org.
92 See id.
93 See id.
94 See id.
95 See id.
96 Administrative law in the People's Republic of China was virtually non-existent before the end of the Cultural Revolution. The Administrative Procedure Law was passed in 1989 and went into effect on 1 October 1990. This law made it possible for individuals to bring a case against the administration and also laid down the relevant criteria and procedures for administrative law litigation. See FENG LIN, ADMINISTRATIVE LAW: PROCEDURES AND REMEDIES IN CHINA (1996).
97 Although condominium litigation continues to increase in China, most courts initially were reluctant to grant a HOA the power to sue or be sued in the absence of statutory authority. However, quite recently, some provincial courts have issued judicial opinions allowing the executive council of a HOA to appear in court as either a plaintiff or a defendant on behalf of the owners. See Table 1 in this article. This has been well-received and may provide a grant to HOA’s to exclusively pursue claims in common property disputes. First, multiple-party litigation with every unit owner individually involved is cumbersome and a procedural nightmare for the courts. Second, with HOA standing the common interest of all members are protected instead of limiting litigation to individual interests.
court preserved the actions of other associations to bring future, presumably more effective, actions. On the other hand, though industry experts exhorted the positive ramifications of the decision, it seems faint praise in light of the result. The original association executive committee is no longer in power, the election was disrupted and the original for-profit management company is still in place (and apparently still in collusion with the local government). It is also easy to jump to the conclusion that the original suit should have centered on the actions of the local government (for its failure to recognize the first election) and for corruption instead of the declarations in circular 666. But some margin of appreciation must be afforded the local legal experts with regard to the most promising legal stratagem. Indeed, when considering the success of the MLY HOA case (above), public opinion and political support would have likely better served the claimants then a different legal plan.

Moreover, this scenario could have just as easily included developer overreaching if, for example, the developer were acting in concert with the local government as a parent company of the for-profit management company. In the development of greater democratic practices in the PRC, the battle-lines include, in large measure, the otherwise overlooked homeowner associations’ struggle against local government intrusion, corruption, and lack of effective judicial remedy.

**Inadequacy in the Legislative Drafting**

Other flaws obstructing democratic governance include structural defects in the legislation itself. Though trends favor greater legislative efficiencies, some defects continue to create barriers to full democratic processes or otherwise reduce the efficiency of the owners’ associations. This serves to impede the actualization of owners’ rights and cuts against the developing market economy. Legislative defects can exacerbate the problems pointed out in the previous section by feeding into judicial inefficiencies, local government interference, developer overreaching and corruption. Additionally, on a more basic level, poorly considered legislation makes for poorly run owners’ associations and ensures owner apathy and loss of essential credibility needed for growing stronger democratic structures. Thus, even if it is bereft of malevolent intent, badly drafted legislation will negatively impact the rights regime.

The PRC national law serves to provide basic guidelines for the provinces and municipalities to follow and implement. Flaws in the legislative drafting should therefore be viewed from the perspective of both the national land law (i.e., the Property Law of 2007) and the local implementing legislation or practice. The principle flaws in the legislative drafting of the national law (as it relates to condominium rules) can best be observed with respect to three issues. These are the law as it pertains to majorities required for HOA resolutions; two-tier management structures and; rules concerning the qualification and number of HOA executive council members. The issues concerning the legislative drafting on the local level include whether the local rule specifically carries out the mandate or policy of the national law, its legislative intent, or whether it allows for a continuation of local overreaching and corruption. Local compliance and implementing procedure can be observed by considering local legislation dealing with the

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Third, when the HOA has exclusive standing, defendants are protected from multiple and repeated suits of the same claim. With the above advantages, the HOA’s exclusive standing is an efficient way to resolve common property disputes.

formation of HOAs, the voting rights of the homeowners and the legal personality of the association (i.e., whether it has express legal standing in the courts).

National Legislation

In reviewing the utility of the national laws it is useful to compare the Property Law of 2007 to statutes in other jurisdictions. Comparatively speaking, it is unusual for rules governing the functioning of the general meeting, the executive board, and the rules governing common property and facilities to be decided by a simple majority vote. Most jurisdictions include these rules in statutes. These statutes tend to limit the adoption of organic changes in the initial stage, or require a super-majority. This is to guarantee the initial smooth running of general meetings and efficient management and seamlessly transition to owner control. Yet, the PRC fails to adequately provide for this transition. Indeed, the national legislation lacks a uniform obligation on developers to organize the first meeting of the management body as soon as possible after its establishment. In New South Wales Australia and in South Africa such provisions have proven indispensible. Failure to provide for the smooth transition of management will often hamper the association’s ability to self-govern by unnecessarily binding the future organization to contractors (including developer-owned commercial management companies) that limit

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99 These include, inter alia, the notice required for convening the general meeting, the kinds of general meetings, minimum agendas of general meetings, voting at general meetings, the quorum required for a general meeting, the representation of owners by proxies and the keeping of minutes.

100 These include amongst others the powers and functions of the executive board, whether it must consist only of owners, whether owners may attend its meetings, whether the members are entitled to remuneration, their fiduciary obligations and their period of office.

101 This is normally done in the so-called conduct rules of the scheme and needs more than a simple majority for amendment.

102 The New South Wales Strata Schemes Management Act 138 of 1996 e.g. regulates executive committees in ss. 16 to 25 and Schedule 3 of the Act and general meetings in Schedule 2 of the Act and the Singapore Building Maintenance and Strata Management Act 47 of 2004 in ss. 53-61 and the Second Schedule and Third Schedule to the Act. The Queensland Body Corporate and Community Management Act 28 of 1997 regulate these matters in ss. 90 to 101 of the Act, while the Strata Title Law 5 of 2007 of the Dubai International Financial Centre regulates them in ss. 60-64 of the Act. The South African Sectional Titles Act 95 of 1986 regulate both these matters in Annexure 8 of the Regulations to the Act.

103 See e.g., South African Sectional Titles Act 95 of 1986, reg. 30(1). Regulation 30(4) stipulates that these regulations may only be altered after 50 % of the units have been transferred and that they may only be altered by unanimous resolution.

104 See e.g., South African Sectional Titles Act 95 of 1986, reg. 30(4).

105 See e.g., Singapore Building Maintenance and Strata Management Act 47 of 2004 s. 26 and the South African Sectional Titles Act s. 36(7) which provides that the first meeting must be held within 30 days after the management body has been established with the registration of the first unit in the name of a purchaser. The Strata Schemes Management Act 1996, Schedule 2 Part 1 clause 2 requires a general meeting within 2 months after the end of the initial period. One of the problems encountered in this regard in China is that owners are widely defined in article 76 of the Property Law as persons who have acquired ownership of units by registration or under s. 11 of the Property Law. Under the latter section, persons who have acquired possession of a unit in terms of a recognised commercial transaction are also considered to be owners. This concession was made due to the fact that the registration of units in the names of purchasers in China is a drawn-out process.

106 VAN DER MERWE, supra note 54, at 14-37.
the owners’ available decision-making options and thus circumvent the democratic value of the owners’
association.\footnote{107}{The risk to the property owner is particularly heightened because of the lack of conventional constitutive documents and the developers role in the “participation quota” that allows developers to determine their own status early in the construction process and to ultimately dictate terms to the fledgling scheme. \textit{See} Lei Chen, supra note 62, at 234-41.}

On the other hand, the Property Law of 2007 provides that the number of owners who are eligible
to participate in building management shall be based on the number of individual apartments or
commercial units, with the qualification that all unsold units (units sold but not yet delivered by the
developer or multiple units owned by the same owner) should count only for one unit and that the total
number of owners shall be the aggregate of the results of the above computation.\footnote{108}{Judicial Interpretation on Property Law art. 9 §1 and §2 (2007) (P.R.C.).} Thus, the system is
determined, as far as the number of votes is concerned, via the democratic principle of “one owner, one
vote” as distinct from “one unit, one vote,” (which would provide disproportionate voting power to
developers still owning multiple units or owners who own more than one unit in the scheme).\footnote{109}{On the weight attached to votes, \textit{see generally} CORNELIUS G. VAN DER MERWE, APARTMENT OWNERSHIP 145, 154, 158, 194 (1994).}

Another feature of the Property Law is the provision for changes to the purpose/use of common
property (or its use for business operations) with a simple majority vote. In other jurisdictions, dramatic
changes of this nature usually require a super-majority.\footnote{110}{See \textit{infra} note 111.} Disposal or use change of parts of the common
property has a radical impact on the value of every owner’s abstract share in the common property and is
usually allowed [in other jurisdictions] only by a unanimous resolution or the written consent of all the
owners in the scheme.\footnote{111}{See e.g., s 17(1) of the South African Sectional Titles Act 95 of 1986 which requires a unanimous resolution and s 34(1) of the Singapore Building Maintenance and Strata Management Act 47 of 2004 which requires a 90% resolution.} This perhaps reflects the immaturity of the Chinese Property Law but it is
noteworthy that, in this case, it has arguably erred on the side of majority rule. However, a peculiarity of
the Chinese way of determining whether a motion has been carried is that a majority both in number and
value is required for all decisions. This differs from other condominium statutes where this double
majority is only required for certain resolutions.\footnote{112}{Another unfortunate consequence of this requirement is that it may not only slow down the time for decisions to be adopted, but would also have the effect that compromised resolutions (instead of sound resolutions would be adopted for instance, when the budget for the ensuing year has to be approved).} It also dilutes the democratic aspiration to a more
capital centric approach. Another potential defect in this approach is the creation of institutional
instability resulting in negative market impact. Buyers crave surety that the property they pay for will
retain its essential character into the future.

Moreover, the Property Law provides that unit owners may elect to manage the scheme
themselves or (by majority vote),\footnote{113}{Property Law art. 76 §4 (2007) (P.R.C.).} or choose a professional management company or another
manager.\footnote{114}{Property Law art. 81 §1 (2007) (P.R.C.); \textit{See generally} Lei Chen & Cornelius G. van der Merwe, \textit{Reflections on the Role of the Managing Agent in South African and Chinese Sectional Title (Condominium) Legislation}, J. S. AFR. L. 22 (2009).} Most local statutes make it optional for owners to employ outside managers to administer the
scheme. Self-management usually only occurs in smaller projects where owners organize themselves into groups according to their skills to undertake the work involved in the management of the scheme. Many foreign condominium statutes entrust the management of larger schemes either to the owners’ executive board (which usually consists of owners assisted by a managing agent), or provide for the appointment of a professional manager as the executive organ of the scheme with the assistance of an owners’ advisory board. The 2007 Property Law opted for the latter alternative, namely a professional manager as an executive organ conducting its functions under the supervision of the owners. It also allows the owners to replace a managing company or manager appointed by the developer. The rationale for this is to frustrate developer efforts to enter into “sweetheart” contracts with affiliated or subsidiary entities while in control of the association and binding it on a long-term basis. Many local statutes either call for a review of all contracts and appointments concluded by the developer at the initial meeting of owners, or grant the owners the power to terminate all such contracts unilaterally.

Another issue with the National Property Law of 2007 is its failure to provide for, as appropriate, a two-tier condominium management scheme. A two-tier scheme calls for the implementation of an umbrella management body managing an entire project at a senior level and subsidiary management bodies managing smaller residential units (e.g., single buildings in a multi-building association) and appurtenant common areas at a junior level. In the United States, master or umbrella associations are found in larger condominium complexes where the associations are layered according to function. In China such a two-tier management structure needs to be introduced because most of the condominiums on the market consist of multi-building or mixed-use projects. A two-tier approach makes owner management a less daunting enterprise and failure to provide for this scheme practically ensures disproportionately high professional management involvement and reduced owner participation. Thus, the inefficiency in the national legislation creates barriers to the democratic governance by its failure to anticipate and provide for a less onerous scheme.

Moreover, in addition to distancing owners from management, the development of multi-building and/or mixed-use projects in the traditional ‘single condominium, single association’ structure creates other inefficiencies. For example, in larger condominium developments it is financially burdensome to call meetings of all unit owners for issues related to only one building. Furthermore, unit owners in one building will often be unfamiliar with and/or disinterested in issues related to other buildings making detailed review of those issues by the umbrella organization unduly burdensome. This also fuels owner apathy and discourages otherwise qualified volunteers from participating in management because of the time commitment it requires. Additionally, the owners have less incentive to be concerned about

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115 For China, see id, at 36.
116 See the provisions of the French, German and Dutch statutes referred to in VAN DER MERWE, supra note 109, at 149.
119 See Chen & van der Merwe, supra note 114, at 29, which states that the drafters of the Property Management Regulation amended the designation of professional managers to ‘service providers’ in 2007 to put professional managers in their place.
120 See Uniform Common Interest Ownership Act § 3-105. These statutes usually provide for termination without penalty (upon not less than 90 days’ notice to the developer) so long as they are cancelled within two years of the owners assumption of control of the association.
121 P. ROHAN & M. RESKIN, CONDOMINIUM LAW AND PRACTICE: FORMS, VOLUME 1, 1A, 1B & 1C 43-184 (1980).
management issues encountered in other building. A single building’s management issue can usually be resolved more quickly and easily by its owners than by all the owners in the project.

The third issue involves the make-up of the HOA executive council members. Because it is impractical for all owners to attend to the day-to-day management of a condominium complex, Chinese law provides that the executive council is usually elected to execute the general meeting’s resolutions and to administer the day-to-day affairs of the condominium complex. Although the executive council has less authority than general meeting mandates, its standing committee’s role is evident in the management of the condominium. Thus, the identity and qualifications of executive council members are an important issue for unit owners. In many jurisdictions, council members do not necessarily need to be unit owners requiring only that at least a majority of the executive board members must be unit owners. Under Chinese law, an executive council member must be either a unit owner or a representative of a corporate owner. This may be counterproductive as some outside candidates could bring necessary professional experience and skills to the executive council, or an insufficient number of unit owners may be willing to serve as council members. It is also noteworthy that in China, where management by unit owners is still new, finding experienced and professional executive council members may be difficult. On the other hand, council members will ultimately gain the requisite experience or may be able to contract for needed skills and this approach ensures that the majority of executive council members have a genuine economic stake and a personal interest in the efficient management of the condominium.

Under Chinese law, the number of council members remains largely unregulated. There is no provision for the required number of council members in either the national Property Management Regulation of 2003 or in many local Regulations. In practice, this may lead to problems as the number of council members has a bearing on quorums and decision making, even in determining a simple majority vote. However, strict regulations imposing the number of council members are a wooden “one size fits all” approach that could also lead to inefficiencies. In a recent local property management rule, the Property Management Regulation of Shenzhen Special Economic Zone, the number of executive council’s members in a condominium association was expressly stipulated as an odd number from five to seventeen. However, by capping the number of members at seventeen, condominium projects will often be unable to include representatives from all subsidiary bodies, and/or from each building in many medium to large multi-building projects. This impacts the democratic character of the association and the individual owners’ access to their (council) representatives. To guard against this, other local ordinances such as the Shanghai Property Management Regulation have provided for an odd number of representatives of no less than five but with an open-ended maximum number.

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123 See Uniform Common Interest Ownership Act of 1994 § 3-103 (f) for USA; see Sectional Title Act, Annexure 8 reg. 5 for South Africa.
124 Property Management Regulation art. 16 (2) (2003) (P.R.C.); Property Management Regulation of Shenzhen Special Economic Zone art. 23 (2007) (P.R.C.).
125 GREAT BRITAIN DEPARTMENT FOR CONSTITUTIONAL AFFAIRS, ANALYSIS OF RESPONSES TO AN LCD CONSULTATION PAPER – “PROPOSAL FOR COMMONHOLD REGULATIONS” 65 (2003).
Thus, the National Legislation can be viewed in terms of factors directly impacting democratic governance and those that indirectly impact them. Direct factors include simple majorities for most association decisions, even those that constitute organic change to common property. Yet, this concession is often illusory as it must be predicated on a so-called “double majority,” including majorities of both unit numbers and value share. This may be advisable for issues of organic change where even traditional democratic societies include greater barriers (e.g., unanimous decisions or supermajorities), but is unjustified in less radical issues. This approach effectively provides a veto of association initiatives by those elite who collectively own more than 50% of the value of the project though they may own fewer than 50% of the units.\(^{129}\) Thus, those purchasers (including corporate purchasers) who buy more expensive units are also receiving a disproportionately larger voice in the running of the condominium than other owners. Heightened drafting complexity to the national legislature could assuage these inequities while simultaneously providing for greater protection from organic changes and warranting greater market security.

Additionally, legislation ensuring smooth transitions from developers to owners and exempting future associations from contract obligations provides for greater democratic decision-making. By binding future associations to long-term contracts, developer-controlled associations preclude the available choices to successor owner-controlled associations. While the 2007 Property Law allows owners to replace the developer-installed property manager,\(^{130}\) the provision for termination without penalty from other residual contracts is left to local regulation. China’s National People’s Congress is naturally deferential to provincial authority in matters involving the regulation of real property. This is also commonly the practice of authorities in other nations, including the United States,\(^{131}\) but the failure of China to establish more precise and binding national legislation allows for greater local corruption. This is evident in the case study above (TM case study) where the local authority colluded with the professional management company to subvert the democratic initiative of the owners’ association. Lack of drafting complexity and failure to establish firm legal responsibility in the national legislation on the issues of majorities and the future binding power of initial contracts are legislative flaws that directly and negatively impact the developing democratic governance currently taking root in the PRC.

Factors that indirectly impact democratic governance include the omission of the national legislation to implement provision for a two-tier management system (where applicable). In this case the national legislation, perhaps inadvertently, ties the hands of owners’ associations and creates inefficiency that is costly and onerous and encourages owner apathy. Furthermore, while it does mandate that executive committee members have an economic interest in the condominium, the national legislation fails to provide for guidance on the permissible number of executive council members. This failure allows for counter-productive local rules such as the inadequate regulation adopted in Shenzhen referenced above. National legislation allowing for structured flexibility could encourage efficiency and help to ensure that all condominium owners have meaningful and localized democratic representation and re-enforce consumer confidence in their investment. However, by taking a conservative approach, the

\(^{129}\) This would not allow the wealthier owners disproportionate authority to initiate changes as they would still require a majority of unit owners to agree, but a minority of wealthy owners could veto initiatives favored by a majority of unit owners.


\(^{131}\) Under the Uniform Common Interest Ownership Act of 1994 § 3-105, unit owners can terminate long-term ‘self-dealing’ contracts without court action before an executive board is elected.
national legislation fails to nurture market forces and tends to encourage corruption and/or inefficient drafting at the local level.

Local Rules

Although the 2007 Property Law, and to a lesser extent, the 2003 Property Management Regulation were designed to formalize the rules of condominium ownership nation-wide, many implementation issues remained largely unaddressed. Local regulations are intended to fill the gap. The breadth of local rules is as vast as the Chinese landscape, but insight into the evolution and statutory dynamics of local condominium law can be gleaned by an examination of local regulations’ development. Thus, a historical-comparative methodology for statutory changes will be adopted. In order to provide a coherent framework three localities have been chosen, namely, Beijing, Shanghai and Shenzhen. They were selected as representative of major metropolitan areas in the PRC. Moreover, these cities are among the first municipalities to enact local property management rules (Shenzhen enacted the earliest rule in 1994), and are top-tier Chinese cities in terms of economic development. They are also cities with high density private condominium complexes. This survey considers three local regulatory issues: regulation of the formation of owners’ associations; regulation of the voting rights of homeowners and; legal personality for owners associations. All three have a crucial impact on the democratic rights of the owners. HOA formation significantly bears on the ability of associations to act and on developer/local corruption. The regulation of owners’ voting rights and legal standing issues determines the practical character of the democratic process and its enforceability. Local compliance can best be viewed by considering the changes to local regulations prior to 2003 (before the enactment of the national Property Management Regulation); between 2004 and 2007 (before the enactment of the national Property Law of 2007); and after 2007. This model is intended to clarify how local authority has implemented the national law, regulation and policy.

Prior to passing the Property Management Regulations in 2003, local rules surrounding the establishment and operations of homeowners’ associations in Shenzhen, Beijing and Shanghai lacked uniformity and maturity. After the regulations of 2003 and the Property Law of 2007 these localities made significant changes. As seen in tables 1, 2, and 3 below, before 2003, Beijing and Shenzhen required developers to notice the local housing authority after 50% of the units were occupied (or two years from the occupancy of the first unit) and the housing authority would have six months to convene a home owners association. Shanghai required 30% of the square footage to be sold (not occupied) in existing projects and 50% of the square footage to be sold in new construction (or two years from the sale – not occupation – of the first unit). None of the provisions called for double majorities (i.e., number of units and gross square footage).

After the national legislative initiatives of 2003 and 2007 local regulations substantially changed. Beijing switched from requiring occupancy of 50% to sale of 50% triggering earlier developer notification requirements (to local housing authority). Additionally, a new mechanism was imposed to

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132 Property Management Regulation of Shenzhen Special Economic Zone (1994) (P.R.C.) (repealed).
allow homeowners to by-pass the developer and notice the housing authority directly with only 5% of owners (or 5% of square footage) approval. Moreover, the housing authority had significantly less time to establish the HOA (from 6 months to 60 days). In Shenzhen the requirements changed from 50% of the units to 50% of the square footage. Shenzhen also changed its statutory two-year period such that it started running from the sale of the first unit instead of the occupancy of the first unit. Shanghai changed to add, for the first time, a provision calling for time limits on the local housing authority to establish the HOA (including provision for the first meeting). Though the local implementing legislation varies significantly from one city to another, in all three places the trend is toward earlier owner control of the association (and thus an earlier voice in the management of the association). Local legal initiative is also trending toward shorter time periods for the local housing authority to actually convene the HOA. Thus, the trend is for quicker owner management.

The significance of these changes centers on developer and local corruption. Often developers retain large blocks of condominium projects after the project has been completed, which can consist of either commercial space or residential space or both. This may be done in order to manipulate supply to drive up price or to wait for natural property appreciation, as collateral for large credit lines and as an investment for lease income. Also if they retain a sufficiently large amount of the project, and prevent the owners association from taking control, the developer can maneuver the association to contract with property management companies, maintenance workers, landscape services, engineers and mechanical contractors, accountants and other professionals etc., who work for subsidiary corporations or otherwise associated groups. Additionally, local authorities sometimes conspire with developers and/or management companies to delay owner control in exchange for political influence or cash (as seen in the TM case study above). This results in a delay or even a permanent denial of self-governance by the owners. Thus, legislative reform is essential in clarifying when the developer must relinquish control of the association. Indeed, in Nanjing Jiangsu Province in 2006 the local authority specifically addressed this concern by mandating that developers may not retain more than 5% of any condominium development. However, several years later the rule was repealed.

The local rules in Beijing seem to be sensitive to this issue as the legislation passed in October 2010 (in table 1 below) provides an alternate route to forming an owner controlled HOA upon request of only 5% of unit owners (or 5% of square footage). It also helps bar local corruption by mandating unambiguous terms for the housing authority to follow. Indeed, the time limits on the housing authority in all three test cities were shortened. In Shanghai, the local rule changed from no time requirement to 60 days before the housing authority was required to act. Under the pre-2004 rule the Shanghai housing authority could have refused to form the HOA indefinitely. On the other hand, the establishment of double majorities could allow developers greater control. If they retain large blocks of property, developers could theoretically block the notification requirement on the basis of square footage. However, the local rules account for this possibility by incorporating a two year statutory fail-safe in Shenzhen and Shanghai and the 5% owner override provision in Beijing. Moreover, the two year fail-safe provisions in Shenzhen and Shanghai were shortened to start running from the time of the first unit sale instead of the first unit occupation. In some developments this difference could be many months or years.

In addition to HOA formation issues, local rules have substantially changed with respect to voting powers of the owners. In Beijing, prior to 2004 the owners had no statutory/regulatory right to vote. In stark contrast, present day owners have a vote on all resolutions (including the election of the executive council, the appointment of the management company and other significant contracts binding the association). Additionally, these residents can vote on matters involving organic changes to the property (e.g., change in land use, etc.). Like Beijing, Shanghai also allows for voting rights of the owners but both use double majorities requiring that the passage of routine resolutions consist of a majority of the units and of the square footage of the project. Both require 66.6% of units and square footage for resolutions calling for organic change to the development. Neither of these cities used double majorities for voting rights prior to 2007. Shanghai has never adopted a rule on double majorities but has always counted votes based on square footage, not units.

These rules still provide for developer overreaching as double majorities allow greater latitude for developers to block owner’s initiatives. The passage of a resolution is naturally very difficult if a majority (or super majority) of all owners are required to vote. The majorities are not of a quorum of a general meeting, but a majority of all units and square footage – that could be hundreds or even thousands of units and the requisite floor area. If the developer retains a substantial portion of the square footage, then it becomes even more difficult to obtain the (double) majority consensus. In new construction, the developer formulates the initial contracts, often with subsidiary companies, which provides additional income. It is in the developers’ best financial interest to prevent a HOA vote to upset those contracts and eliminate this income source. Therefore, even if the developer cannot prevent the formation of the HOA, s/he can unduly influence its activities by blocking a majority and thwarting the democratic process. This also showcases the importance of efficient condominium structure (in both national and local regulation) and the deleterious effect of owner apathy. Owners who refuse to take part in the voting process, based on the inefficient and cumbersome HOA structure, play into developers plans. Once owner apathy is taken into account, developers only need to retain a relatively small portion of the project to prevent a 50% (or 66.6%) majority and block any resolution. This is comparable to veto powers. Thus, despite the national legislation and the local implementation procedures, developer overreaching and locals facilitating these activities still occur as a consequence of flaws in the regulations. Double majorities play into this matrix as developers can render owners’ associations impotent.

In general, the new local regulations have provided for a clearer demarcation of rights and obligations between the homeowners, its committee, the developers, property management companies and government agencies. However, some matters are still left unattended. The question of whether the HOA or its committee is a legal person remains unanswered. The ability to vote and manage the association is only as good as the ability to enforce decisions. None of the local regulations have explicitly provided for legal standing of HOAs but the local courts have made rulings that imply standing. In a 2003 Beijing judicial opinion, the court implied the powers of standing of a HOA. In Shanghai, standing for HOAs

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135 Shanghai utilized intermediate legislation established in November 2004 providing for one unit one vote but with a caveat that non-residential owners were limited to one vote per 100 square meters floor area.


137 See id.
was implied in 2002 in judicial guidelines.\footnote{Answer to Questions Concerning Adjudication on Housing Management Disputes (Shanghai High People’s Ct., Mar. 19, 2002), available at http://www.law110.com/law/difangsifa/law1102009difangsifa182.html.} In these cases local courts have found that HOAs may be sued\footnote{See id.} which indirectly presupposes standing as HOAs must be competent to put on a defense. Moreover, if they can defend themselves they must be able to counter-sue and thus initiate cases in their own names. This is also consistent with the TM case study (discussed above), which was championed as a victory because the court expressly recognized the HOA standing. Shenzhen had a different scheme whereby the president or head of the HOA bore personal legal responsibility for the operations of the HOA, certainly a disincentive for running for office. In Shenzhen the HOA had no legal standing but in a decision in 2011 legal standing was ultimately recognized by judicial fiat.\footnote{Nan Tian Yi Hua Yuan Owners’ Committee v Shenzhen Urban Construction Development (Group) Company (Guangdong Province High People’s Ct., July 6, 2011), available at http://www.gdcourts.gov.cn/gdcourt/front/front!content.action?lmdm=LM43&gjid=20120817095722296178.}

Legal standing is an important component of democratic governance in the developing land law of China. However, standing does not \textit{per se} provide procedural or substantive due process. Judicial decree is often overturned by the local civil authority without recourse. This renders the judgment valueless. Moreover, judicial officers are as prone to corruption as any other local officials so owners sometimes have to appeal directly to the political authority as discussed in the Meiliyuan case study above.

Trends in democratic governance in the PRC are increasingly growing and are reflected in its burgeoning real estate market and the developing laws governing the control of condominiums. At the national level, laws and regulations create greater local obligation amongst housing authorities and tighter controls on corruption. At the local level, ordinances are trending in compliance with national policy to allay corruption and developer overreaching. Yet greater efforts must be undertaken to shore up China’s fledgling democracy such as further advancing its legislation by providing greater drafting complexity. In the national laws this includes accounting for the issues directly impacting democratic control such as “double majorities,” the future binding powers of developer-owned/run management companies and more explicit norms binding transitions from developers to owner associations. The national legislation also needs to develop a more sophisticated approach to obstacles indirectly impacting democratic governance such as improving efficiencies and allowing for two-tier management schemes, open-ended executive council membership and supermajorities on organic changes. Only with credible management will owner apathy evaporate and the marketability of private property persist. At the local level, though trends strongly favor earlier owner control (including fail-safe provisions to override developer machinations), other weaknesses continue to dog the legislation. These include double majorities which can often delay owner control and/or thwart important resolutions after the owners have taken control of the association. Statutes such as the Nanjing measure, limiting the amount a developer may retain in a completed project, have also proven abortive or unpopular. Thus, an important recommendation calls for greater erudition in the drafting of the Chinese condominium law legislation at both the national and local levels.
<table>
<thead>
<tr>
<th>Beijing</th>
<th>Establishing HOA</th>
<th>Homeowners’ Voting Powers</th>
<th>Legal Personality of HOA</th>
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<tbody>
<tr>
<td>Present: 北京市物业管理办法 (2010.10.01)</td>
<td>Owners <em>may</em> establish a HOA, but not it’s not obligatory (Reg. 13). Developers are obligated to submit the necessary documents to Sub-district office and local government for establishing HOA when the occupancy rate reaches not less than 50% or when two years has passed since the first owner moves in, whichever is earlier. Once more than 5% of owners have requested, developers are obligated to apply to the sub-district office, local government and district construction administrative office for establishing first HOA meeting. Owners may also apply to set up the first HOA meeting when they own more than 5% in total gross floor area or in total number of owners in support (Reg. 14). The sub-district office, local government and district construction administrative office must establish the preparatory group within 60 days of receiving the written request (Reg. 15).</td>
<td>Prior to the establishment of HOA, in times of emergencies (ex. cessation of services) owners have power to hold meetings to handle the matter, with the assistance of the sub-district office and local government. (Reg. 13) An approved resolution in meetings of HOA requires approval from more than 50% of owners AND in gross floor area (Reg. 11). For decisions of the HOA committee relating to funding, restructuring or rebuilding facilities, approval is required from more than 2/3 of owners AND in gross floor area (Reg. 17). The preparatory group determines the election procedures and requirements for HOA committee (Reg. 15) The opinions and suggestions made by members of the residential committee and the district construction administrative office shall be carefully considered at the HOA meetings (Reg. 22).</td>
<td>No definitions provided for HOA or HOA committee. However, the courts may revoke HOA and HOA committee’s decisions when asked to do so by an aggrieved party. The party may ask for compensations suffered as a result of the decisions (Reg. 44).</td>
</tr>
<tr>
<td>Pre- 2004: 北京市居住小区物业管理办法 (1995.10.01), modified on 1998.01.01.</td>
<td>Developers shall notify the district residential authority when the occupancy rate reaches not less than 50% or when two years has passed since the first owner moves in.</td>
<td>No mention of voting powers by owners.</td>
<td>Reg. 9 states that the PMA represents and protects the legal rights of all owners and users. It is notable that a judicial opinion, the</td>
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moves in, the authority shall convene the first HOA *within 6 months* of receiving the notice.

“Opinions Concerning Trialing the Property Management Cases” of the Beijing High Court in 2003 allowed the executive committee of a HOA to appear in court on behalf of the owners.

<p>| TABLE 1 |</p>
<table>
<thead>
<tr>
<th>Shenzhen</th>
<th>Establishing HOA</th>
<th>Homeowners’ Voting Powers</th>
<th>Legal Personality of HOA</th>
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</thead>
<tbody>
<tr>
<td><strong>Present:</strong> 深圳经济特区物业管理条例 (2008.01.01)</td>
<td>The developers or the property management company shall notify the sub-district office within 60 days of fulfilling either one of the following requirements 1) not less than 50% of total gross floor area has been sold and in use or 2) two years has passed since the sale of the first unit. (Reg. 19). Owners may also notify the sub-district office if they wish to do so (Reg. 19). The sub-district office, local government and district construction administrative office must establish the preparatory group to set up the first HOA within 1 month of receiving a written request for HOA (Reg. 19).</td>
<td>Every 1 square meter owned is given 1 vote. Below 1 square meter but more than 0.5 is counted as 1 vote (Reg. 14). A meeting passing a resolution must be attended by more than 50% of owners and more than 50% of suffrage votes (Reg. 14). For decisions of the HOA committee relating to funding, restructuring or rebuilding facilities, approval is required from more than 2/3 of owners and more than 2/3 of suffrage votes (Reg. 17).</td>
<td>No mention of the legal status of HOA’s. However, legal responsibilities arising out of the actions of the HOA committee are borne by the HOA President/Head (负责人), instead of referring to the HOA Committee itself. In 2011 the Guangdong High Court issued a judicial opinion allowing the executive committee of a HOA to have locus standi.</td>
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<tr>
<td><strong>Pre-2007:</strong> 深圳经济特区住宅区物业管理条例 (2004.06.25).</td>
<td>Developers shall notify the district residential authority when the occupancy rate reaches not less than 50% or when two years has passed since the first owner moves in. The authority shall convene the first HOA within 6 months of receiving the notice (Reg. 9).</td>
<td>A vote is given per 10 square meters owned. Those owning below 10 square meters but not less than 5 square meters is counted as one vote. A motion is passed if it is supported by more than 50% of those in attendance. HOA may use methods other than voting to decide on matters (Reg. 12).</td>
<td>No Change.</td>
</tr>
<tr>
<td><strong>Pre-2004:</strong> 深圳经济特区住宅区物业管理条例 (1999制定, 1999修正) (1999.06.30).</td>
<td>Developers shall notify the district residential authority when the occupancy rate reaches not less than 50% or when two years has passed since the first owner moves in. The authority shall convene the first HOA within 6 months of receiving the notice (Reg. 9).</td>
<td>Definition of HOA: HOA is made up of all owners (Reg. 10). HOA Committee can be fined if it has breached the rules in the Regulation (Reg. 56).</td>
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of owners with voting rights. They must have already moved in and be over the age of 18 (Reg. 10).

TABLE 2

<table>
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<tr>
<th>Shanghai</th>
<th>Establishing HOA</th>
<th>Homeowners’ Voting Powers</th>
<th>Legal Personality of HOA</th>
</tr>
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</table>

| Present: 上海市住宅物业管理规定 (2011.04.01) | Developers are obligated to apply to sub-district office and local government for establishing HOA **within 30 days** of fulfilling the following requirements: (1) not less than 50% of the total gross floor area has been sold or (2) two years have passed since the first unit has been sold (Reg. 12 & 13).

The sub-district office, local government and district construction administrative office must establish the preparatory group to set up the first HOA **within 60 days** of receiving a written request for HOA (Reg. 14).

The first meeting of HOA shall be hosted **within 90 days** of the establishment of the preparatory group (Reg. 15) (While no longer requiring the supervision of government agencies the preparatory group will now include government representatives).

An approved resolution in meetings of HOA requires approval from more than 50% of all the owners AND in gross floor area (Reg. 17).

For decisions of the HOA committee relating to funding, restructuring or rebuilding facilities, approval is required from more than 2/3 of all the owners AND in gross floor area (Reg. 17).

The sub-district office, local government and district construction administrative office must establish the preparatory group to set up the first HOA **within 60 days** of receiving a written request (Reg. 14).

The voting procedures and requirements for HOA committee members are determined by the preparatory group (Reg. 15).

The opinions and suggestions made by members of the residential committee and the district construction administrative office shall be carefully considered at the HOA meetings (Reg. 22).

The regulation does not give HOA or HOA committee a legal personality.

Reg. 12 states that HOA is made up of all owners. No definition is given for HOA committees. |
|---|
| Pre- 2007: 上海市住宅物业管理规定 (2004.11.01) | Developers are obligated to apply to sub-district office and local government for establishing HOA after the following requirements are fulfilled: (1) not less than 50% of the property in area has been sold or (2) two years have passed since the first unit has been sold (Reg. 7 & 8).

The sub-district office, local government and district construction administrative office must establish the preparatory group **within 60 days** after receiving a written request (Reg. 8).

Each residential unit is allowed 1 vote. For non-residential owners: a vote is given per 100 square meters owned. In the first meeting of the HOA, a single entity/person shall not hold more than 30% of the votes.

To approve resolutions, HOA’s must have in attendance a number at least greater than 50% of the owners and more than 50% of all owners must agree (Reg. 11).

For decisions of the HOA committee relating to

Definition of HOA: HOA is made up of all owners (Reg. 7). HOA committee is the executive branch of the HOA (Reg. 12). |
The first HOA meeting shall be convened within 30 days of establishing the preparatory group under the supervision of the sub-district office and local government (Reg. 8).

changing the contents of the mutual covenant, funding, restructuring or rebuilding facilities, approval is required from more than 2/3 of all owners.

The voting procedures and requirements for HOA committee members are determined by the preparatory group (Reg. 15).

The opinions and suggestions made by members of the residential committee and the district construction administrative office shall be carefully considered at the HOA meetings (Reg. 11).

The district construction administrative office together with the developers shall convene the first HOA meeting for electing HOA committee when either the 1) not less than 30% in total gross floor area of the communal/collective (公有住宅) units has been sold or 2) not less than 50% in total gross floor area of the communal/collective (公有住宅) units has been sold or 3) two years have been passed since units were sold (Reg. 7).

All meetings of the HOA shall be attended by more than 50% of the owners. All decisions made in these meetings shall be approved by more than 50% in total number of owners (Reg. 8). Reg. 9 provides a right of the HOA to elect its committee.

Reg. 6 defines HOA committee as a self-regulated organization for the management of property management representing all owners.

A judicial opinion issued by Civil Law No .1 division of Shanghai High Court in 2002 provided that the executive committee of a HOA may enjoy locus standi to sue or be sued on certain conditions.

| TABLE 3 |

CONCLUSION
Chinese human rights are growing, particularly in the area of grassroots democratic governance and citizen participation. Among the factors fueling this growth are the changing land laws and the newly privatized condominiums. While unimproved real estate remains either state-owned (in urban areas) or owned by collectives in rural areas, government regulations have relented to the extent that apartment ownership is common. Private ownership of all real estate seems to be the next hurdle for Chinese lawmakers and is, symbolically at least, one of the last residues of socialism in the Chinese land scheme. Growing claims for privatization and free market economics, the sanctity of market value and market forces are not only driving China’s economic aspirations but also blossoming into an emerging rights regime. This regime is replete with evolving societal perceptions and expectations that trend in favor of continued growth of human rights norms. These trends are driven by economic determinism, the mood of the times, the encouragement of efficiencies and reduction of transaction costs, and seem not to be gainsaid by minor corruption and other temporary structural defects. Moreover, these trends serve as the most reliable engine of prediction for future development and override other considerations. While the existence of local government interference with owners’ property rights, poorly drafted legislation and lack of judicial enforcement cut against the market, these defects can more properly be characterized as “growing pains” that will eventually relent in the face of market forces.

In order to promote the market-based changes taking place in the PRC, policy-makers can adopt measures used in other states to encourage private landownership and the creation of greater wealth. By growing the wealth of its citizens and developing an increasingly large middle class the PRC can ensure continued economic prosperity and developing human rights. Among the initiatives the PRC could create more binding laws overriding developer conflicts of interest in order to allow owner committees to take control of the management of their properties sooner and make the transition smoother. This process has begun to evolve with substantial changes to the national statutes in 2003, 2007 and later among the local legislation. However, additional legislative challenges remain and national and local legislators should continue to perfect the system to alleviate corruption and developer overreaching as well as create an equitable condominium structure that works efficiently.

The Central government in Beijing needs to be sensitive to developing low income (and lower middle income) housing options in order to allow those with modest incomes to grow wealth by acquiring equity in real estate and to begin their long march to the middle class. The government needs to eliminate barriers to this level of growth by, *inter alia*, introducing more scrupulous attention to zoning and making modest income properties a condition precedent to development contracts for large condominium schemes. This could also be done by providing more government money for loans such as first-time home buyer’s loan assistance including reduced down payment requirements, low interest, and long term government-backed terms.

Other synergies that could positively impact market forces include more binding legislation against discriminatory practices in property sales or lending and the creation of better public

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It should be noted that although there is no private landownership in China so far, the land use right holding which can be transferred and commercialized, thus making the urban land in China marketable and therefore a capitalized asset. China does not accept the rule that what is attached to the land becomes part of it. In consequence, the legal status of the land and that of the buildings on land are separate and distinct. See an extensive description of the Chinese land use right at P.A. RANDOLPH & JIANBO LOU, CHINESE REAL ESTATE LAW (2000).
transportation infrastructure to allow for even growth of marketable real estate. Additionally, the development of a national/provincial bureaucracy designed to provide effective oversight of the provisions of the real estate, particularly with regard to enforcement of judicial decisions and local corruption. Finally, the 2007 Property Law should be amended to afford greater protection for ethnic groups, indigenous peoples, country people, women and other groups traditionally discriminated against in the context of land law to allow greater popular access to real estate ownership.

On the other hand, wholesale importation of foreign legal schemes has never fully taken root in the long-term in China without incorporating so-called Chinese characteristics. Arguably, neither importation of Japanese, German nor Soviet Russian legal systems experienced complete acceptance in the PRC and were all either significantly changed to adjust to the Chinese culture or abandoned. The importation of prevailing neoliberal macroeconomics is likely to share the same fate. While market forces are changing the social and legal order of China and encouraging human rights, China fares best when putting its own impress on the forces driving the change. Being a country newly emerging from a communist system the implementation of a strict laissez faire free market economy may be inappropriate, at least in the early stages, as China needs to gradually build its economic order. China also faces unique challenges as it has denser populations, massive environmental considerations, lower per capita income, and significant challenges in providing for its huge population (including basics such as food, shelter and clothing), a history of corrupt local governing practices and a lack of transparency. The practical necessities of providing for its population and cutting against the tide of corruption require China to regulate its commerce to a greater extent than many Western states and means it must develop an economy that takes these exigencies into account. For example, imposing price restrictions on agricultural products has long been mandated by the Chinese government because of the considerable risk of mass starvation. Such government interference with commerce is contraindicated in the de-regulation emphasis in contemporary neoliberal economics. Additionally, the drive to oppose organized labor prevalent in the US would not be a good fit in China with its emphasis on economic rights and need to raise the basic standard of living. Thus, when projecting a market economy in China a Keynesian or neo-Keynesian macroeconomic model emerges as more appropriate to serve the best needs of its people and is more consistent with its past economic tradition. This model creates less shock on the Chinese economy and social structure and allows the government to put in place regulations aimed at curbing wealth disparities and corruption such as the (failed) Nanjing Jiangsu Province ordinance imposing restrictions on developers’ control of condominium projects. This macroeconomic model helps control changing financial fortunes and grows a stronger middle class and resultant human rights norms and practices.

Naturally these are only a few of the initiatives that are in use in other countries and are offered for illustrative purposes only. However, as the growth of private wealth from real estate equity is a significant conditioning factor in the ongoing trend toward greater human rights in the PRC, steps designed to stimulate continued property ownership are synonymous with steps to encourage human rights.

142 Huang, supra note 27.