

# FROM MAO TO MADISON AND BACK: AN EXAMINATION OF CHINA'S NATIONAL PROPERTY LAW AND ITS DIMINISHED POTENTIAL

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## ABSTRACT

This article examines China's recently passed National Property Law at a critical point in the nation's history: a time of Marxist resurgence amidst rising social problems connected to China's rapid economic growth.

In 2007, China passed the National Property Law, offering protection to private property for the first time since 1949. The new law ostensibly defines private property rights and protects owners against infringement of these rights. This has led commentators both in China and abroad to widely praise the new legislation, characterizing it as "landmark."

Through a detailed look at the law within China's history and political process, coupled with an analysis of contemporary social issues and the current administration's policy towards China's some eight hundred million rural residents, this Article challenges the prevalent view of the law. The National Property Law's impact has been diminished by a revival of Marxist concerns regarding ownership and private property. Indeed, the law retreats from instituting more effective market reforms through expanded property rights. By examining the law against the backdrop of current events, this Article directly challenges the dominant view of the National Property Law, concluding that it will be of little, if any, assistance in ensuring meaningful property rights to most of China's residents. Until China abandons its ideological commitment to Marxist notions of private property and concepts of ownership, the new law will be ineffective. The Communist government must elevate the practical need for property rights in a growing market economy above the principles enshrined in Marxist thought to effectuate meaningful property rights legislation.

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“It is sufficiently obvious, that persons . . . [and] property are the two great subjects on which Governments are to act.”

– James Madison<sup>1</sup>

### I. INTRODUCTION

In the early 1990s, an oil boom erupted in Jingbian County, Shaanxi Province, China.<sup>2</sup> When the boom began, Gao started as a truck driver transporting oil. Over many years, he scrimped, saved, and borrowed enough money to drill his

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1. James Madison, Representative to the Virginia State Constitutional Convention, Speech in the Virginia Constitutional Convention (Dec. 2, 1829), *available at* [http://www.constitution.org/jm/18291202\\_vaconcon.htm](http://www.constitution.org/jm/18291202_vaconcon.htm). (Madison concludes his thought by stating: “and . . . the rights of persons, and the rights of property, are the objects, for the protection of which Government was instituted. These rights cannot well be separated. The personal right to acquire property, which is a natural right, gives to property, when acquired, a right to protection, as a social right.”) *Id.* At the same time that China considered its first law on private property since turning communist, it also began drafting a law on human rights, a temporal coincidence that, perhaps unintentionally, highlights the connection between property rights and human rights. *See* Chris Buckley, *China Approves Amendments on Property and Human Rights*, N.Y. TIMES, Mar. 15, 2004, at A6.

2. Howard W. French, *Whose Rig Is It? China’s Property Laws Tested*, N.Y. TIMES, July 19, 2005, *available at* <http://www.nytimes.com/2005/07/18/international/asia/18china.html>.

own well, just like the companies that employed him.<sup>3</sup> After saving for years Gao had finally put enough money together to build his own well.<sup>4</sup> Drilling 750 yards deep, Gao set up camp, turned his oil pump on, “and follow[ed] the hypnotic nod of his derrick worrying about losing everything.”<sup>5</sup> Two days later, his well began extracting and has since pulled twenty-one tons of oil from the earth.<sup>6</sup> But Gao’s thrift, hard work, and investment proved short lived; in one day, all he had worked to build suddenly disappeared. In 2003, the provincial government seized his private well.

Gao’s experience was not an isolated event either. The Shaanxi government seized another 6,000 private wells in addition to his, representing over 60,000 private investors<sup>7</sup> and an estimated \$845 million take in private investment dollars.<sup>8</sup> One of China’s biggest legal battles surrounding the issue of private property rights ensued.<sup>9</sup>

This anecdote of the Shaanxi oil investor highlights one of the major problems facing China: ownership and protection of private property in a Marxist regime.<sup>10</sup> The oil boom began in 1994 when the Chinese Communist Party (CCP)

3. *Id.* Gao invested around \$84,000 to acquire his oil well. Gao would not further identify himself to the reporter for fear of reprisal by the Chinese Communist Party (CCP). *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* For a follow up on the Shaanxi Province Oil Wells see Philip P. Pan, *Chinese Anti-Government Organizer Faces Prison*, WASH. POST, Jan. 5, 2006, available at

[http://www.washingtonpost.com/wp-dyn/content/article/2006/01/05/AR2006010500766\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2006/01/05/AR2006010500766_pf.html) (telling the story of Mr. Feng Bingxian, a businessman from Shaanxi, who represented “thousands of investors” against the Chinese government for seizure of about 60,000 oil wells. On January 5, 2006, a Chinese court convicted Mr. Feng of organizing illegal protests, imposing a three year sentence on him). See also Philip P. Pan, *Property Rights Advocate Arrested in China*, WASH. POST, Aug. 19, 2005, at A14, available at

[http://www.washingtonpost.com/wp-dyn/content/article/2005/08/18/AR2005081801688\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2005/08/18/AR2005081801688_pf.html).

8. Antoaneta Bezlova, *China Seizes Private Oil Wells, Mirrors Russia*, ASIA TIMES ONLINE, Nov. 2, 2004, <http://www.atimes.com/atimes/China/FK02Ad03.html> (“[T]he forced seizures . . . [of] the wells are worth an estimated 7 billion Yuan (US\$845 million) and cover an area spread over 15 counties in Shaanxi province.”).

9. French, *supra* note 2 (“What followed has been called one of the most important legal battles ever fought in modern China.”). The Chinese authorities even went so far as to arrest the plaintiff investors’ lead counsel, Mr. Zhu Jiuhu.

10. See Andrew Batson, *Politics and Economics: China Builds Commerce Codes; Beijing Fashions Measures to Underpin Fast-Changing Economy*, WALL ST. J., Mar. 2, 2007, at A4 (“China’s economy has been changing faster than the legal system that is supposed to govern it. Huge numbers of Chinese now own their homes and run their own businesses, but it is difficult to settle who owns what and what they are allowed to do with it.”). The difficulty Baston refers to is what China’s New Property Law (“NPL”) is designed to address, exemplified by the Shaanxi Oil Wells. Not surprisingly, the new law most likely grants ownership of the lucrative wells to the State. For an English version of the law, and the translation this paper uses, see [Property Rights Law of the People’s Republic of China] (promulgated by the Standing Comm. of the Nat’l

changed the law to allow for private investment. For the first time, the China National Petroleum Corporation and the Oil Ministry allowed private citizens to “prospect and drill [for] oil in a . . . 417 square mile region in the province.”<sup>11</sup> Private investment dollars, consequently, poured into oil production<sup>12</sup> and oil businesses began to develop.<sup>13</sup> But in 2003, the Chinese government revoked this property right and seized the wells.<sup>14</sup>

Today, five years after the seizure of the Shaanxi oil wells, China appears to have again reversed itself, moving toward establishing recognition and protection of private property rights. Contradicting its longstanding governing political ideology that theoretically disallows for the ownership of private property, China has taken steps to give legal recognition and protection to citizens’ private property rights. For example, in 2004, China’s legislative body, the National People’s Congress (NPC), enshrined private property as “inviolable” in the People’s Republic of China’s (PRC) Constitution, by passage of Amendment Fourth.<sup>15</sup> Later, in 2007, the NPC enacted the National Property Law (NPL),<sup>16</sup> ostensibly China’s first law to offer formal legal protection to private property since China fell to Mao’s Communists in 1949.<sup>17</sup>

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People’s Cong., Mar. 16, 2007, effective Oct. 1, 2007) *trans.* by LEHMAN, LEE & XU TRANS. DEPT. (unofficial trans.) [hereinafter NPL], *available* at [http://www.lehmanlaw.com/fileadmin/lehmanlaw\\_com/laws\\_regulations/Propoerty\\_Rights\\_Law\\_of\\_the\\_PRC\\_LLX\\_03162007.pdf](http://www.lehmanlaw.com/fileadmin/lehmanlaw_com/laws_regulations/Propoerty_Rights_Law_of_the_PRC_LLX_03162007.pdf). Article 48 is the closest that the NPL gets to granting ownership rights over oil to the State. It states: “All natural resources such as forests, mountains, grassland, unclaimed land and beaches are owned by the State.” Thus, oil is definitely a “natural resource” but when that term is read with the rest of the article, it clearly is addressing categories of natural resources. So the State can own the forest, but does it own everything in the forest? Underneath the forest? This is a further example of the unclear delineations of ownership.

11. French, *supra* note 2.

12. Bezlova, *supra* note 8 (“Nearly 100,000 people rushed to invest, putting in sums ranging from a few thousands to hundreds of thousands of yuan.”)

13. *Id.* (“Joint oil and drilling partnerships were formed and money and oil began flowing in.”)

14. French, *supra* note 2 (“[A] few months after Gao struck oil, Beijing rescinded private prospecting rights.”)

15. XIAN FA art. 12 (2004) (P.R.C.). Article 12 states: “Socialist public property is sacred and inviolable.”

16. China’s Parliament only recently passed the NPL at the Fifth Session of the Tenth National People’s Congress, held from March 5 to March 16, 2007. *Landmark Property Law Adopted*, XINHUA, Mar. 16, 2007, at [http://www.chinadaily.com.cn/china/2007-03/16/content\\_829330.htm](http://www.chinadaily.com.cn/china/2007-03/16/content_829330.htm) (article on the two major laws, property and corporate tax, passed at the full meeting of the NPC). The NPL took effect on Oct. 1, 2007. For an article detailing how a bill becomes law in China, see Murray S. Tanner, *How a Bill Becomes a Law in China: Stages and Processes in Law Making*, 141 THE CHINA Q., Mar. 1995, at 39-64. For an exhaustive treatment of the legislative process, see MURRAY S. TANNER, *THE POLITICS OF LAWMAKING IN POST-MAO CHINA: INSTITUTIONS, PROCESSES, AND DEMOCRATIC PROSPECTS I* (1999).

17. Dexter Roberts, *Beijing Looks Set to Protect Private Property*, BUS. WK. ONLINE, Dec. 28, 2006, [http://www.businessweek.com/globalbiz/content/dec2006/gb20061227\\_760653.htm](http://www.businessweek.com/globalbiz/content/dec2006/gb20061227_760653.htm) (“What would become China’s first property law since the founding of modern China in 1949 has gone through a record seven readings since it was first introduced four years ago – more than any previous law on the mainland.”); *see also* *China Endorses Private Property*, BBC NEWS, Mar. 15, 2004, <http://news.bbc.co.uk/2/hi/asia-pacific/3509850.stm> (“China’s parliament has agreed

This legal recognition, moreover, emerged from a long, drawn out disagreement within the CCP on the issue of China's economic modernization.<sup>18</sup> At the core of this disagreement are questions concerning what type of society the CCP is attempting to build and the means by which it is doing so: a society with practical market-based reforms or one with a rigid commitment to Marxist theories of history, economy, and property. Furthermore, despite the successes of China's market based reforms to its economy, its success has generated other issues the CCP is currently confronting,<sup>19</sup> such as a massive rural to urban demographic shift,<sup>20</sup> and increasing disparities in income between rural and urban areas.<sup>21</sup> These recent

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[to] landmark changes to the constitution that will protect private property for the first time since the 1949 revolution.”).

18. *See infra* Part II.

19. For example, according to the Office of the Central Leading Group of Financial and Economic Affairs, China's towns and cities are expected to absorb 300 million farmers (roughly the entire population of the United States), or more, from the rural areas, if the urbanization rate stays at 1 per cent or above annually. Currently the urbanization rate sits at 1.4 percent, which translates to roughly twenty million farmers making their way into the cities each year. *See* Jiang Zhuqing, *Cities to Absorb 300 million Farmers*, CHINA DAILY, Mar. 21, 2006, available at [http://www.chinailydaily.com.cn/bizchina/2006-03/21/content\\_548099.htm](http://www.chinailydaily.com.cn/bizchina/2006-03/21/content_548099.htm). *But cf.*, TED C. FISHMAN, CHINA, INC. 7-14 (2005) stating, “[T]he migration is the largest in human history. It also has one of the least exact head counts: estimates of the number of people who have left for the cities to find work range from 90 to 300 million.”). Fishman also states: “Chinese officials . . . say the country must grow *better than 7 percent a year* to create enough jobs to busy those regularly entering the job market.” *Id.* at 11 (emphasis in original). These development strains are also creating a host of discontents among China's residents. *See, e.g.*, Kristin Jones, *China's Hidden Unrest*, DANGEROUS ASSIGNMENTS, May 2006, [http://www.cpj.org/Briefings/2006/DA\\_spring\\_06/china/china\\_06.html](http://www.cpj.org/Briefings/2006/DA_spring_06/china/china_06.html) (“‘Mass incidents’ is the term the Chinese government uses to describe demonstrations, riots, and group petitioning. In January 2006, the Ministry of Public Security announced that there were 87,000 such incidents in 2005, a 6.6 percent increase over the previous year.”). *See also* Kent Ewing, *The New Socialist Cityscape*, ASIA TIMES, Mar. 28, 2006, <http://www.atimes.com/atimes/China/HC28Ad03.html> (highlighting that the focus to build a “new socialist countryside” in China's most recent five year plan ignores the growing problems in China's cities). For example, Ewing states: “Disgruntled urban homeowners are also fed up with random fees, inadequate services, illegal structures, unscrupulous property developers and indifferent local officials.” *Id.* Unlike rural protests, “no official tally is kept on urban unrest sparked by property protests, but examples abound.” *Id.* Ewing also notes, “[a]t the core of the problem is the lack of any viable property law in China, despite the [2004 constitutional amendment].” *Id.*

20. *See* Zhuqing, *supra* note 19.

21. John Whalley & Ximing Yue, *Rural Income Volatility and Inequality in China* 1-3 (Nat'l Bureau of Econ. Research, Working Paper No. 12779), available at <http://papers.nber.org/papers/w12779.pdf> (stating that the ratio of mean urban to rural incomes suggests that urban incomes are three times greater than rural incomes). *But cf.* U.N. Development Programme, *China Human Development Report 2005*, “The State of Equity in China: Income and Wealth Distribution,” 21, 24-25, available at <http://www.undp.org.cn/downloads/nhdr2005/06chapter2.pdf> (noting that “the absolute amounts of income between urban and rural residents (between 1990 and 2003) rose more than six-fold.”). Mao himself once provided guidance on how to handle social contradictions, stating, “In ordinary circumstances contradictions among the people are not antagonistic.” However, if “not handled properly . . . antagonism may arise.” He continued: “In a socialist country, a development of this

problems have fostered an even more pronounced ideological response among CCP members to limit some of China's market reforms. For example, China's economic success is fueling the so-called "New Left"<sup>22</sup> (or more appropriately—and ironically—Marxist conservatives), who are looking for an "alternate way"<sup>23</sup> forward for China's future.<sup>24</sup> The NPL represents an important part of this dispute about China's future,<sup>25</sup> for the simple fact that it goes to the heart of what communist China disavows: ownership and rights over private property.

The NPL itself has been widely heralded in both China and abroad as "landmark legislation."<sup>26</sup> This prevalent view, however, is short-sighted.<sup>27</sup> This Article

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kind is of a localized and temporary nature phenomenon. The reason is that the system of exploitation of man by man has been abolished and the interests of the people are the same." Mao Zedong, Chairman of Chinese Communist Party, On the Correct Handling of Contradictions Among the People, Speech before the Eleventh Session of the Supreme State Conference (Feb. 27, 1957), [http://www.marxists.org/reference/archive/mao/selected-works/volume-5/mswv5\\_58.htm](http://www.marxists.org/reference/archive/mao/selected-works/volume-5/mswv5_58.htm). By "the system of exploitation" Mao meant the private property of the bourgeois over the means of production, in line with Marxist ideology. See *infra* note 92 for Marx's view on private property.

22. Pankaj Mishra, *China's New Leftist*, N.Y. Times Mag., Oct. 15, 2006, available at <http://www.nytimes.com/2006/10/15/magazine/15leftist.html?ex=1318564800&en=964c5cc6b6d30bc&ei=5089&partner=rssyahoo&emc=rss> ("Wang [Hui, professor at Tsinghua University], has emerged as a central figure among a group of writers and academics known collectively as the New Left. New Left intellectuals advocate a 'Chinese alternative' to the neoliberal market . . . view[ing] the Communist leadership as a likely force for change."). Mishra notes that this "Chinese alternative" is "one that will guarantee the welfare of the country's 800 million peasants left behind by recent reforms." *Id.* "New left" is a heuristic way to identify those who usually do not belong to the Party, focusing on social justice, and equality of outcomes. *Id.* As reformers they are not adverse to the CCP's role in China, and seemingly share some of the same concerns with the current Hu-Wen administration. *Id.* As Mishra's article notes, "their [the New Left's] concerns are increasingly amplified by the central leadership." *Id.*; see also Jehangir S. Pocha, *China's New Left*, 2 New Perspectives Q., Spring 2005, [http://www.digitalnpq.org/archive/2005\\_spring/07\\_pocha.html](http://www.digitalnpq.org/archive/2005_spring/07_pocha.html) ("The echo of this disillusionment [with China's economic progress], within intellectual circles has become the rallying cry of a group of intellectuals known as China's New Left.").

23. Pocha, *supra* note 22. (quoting Professor Wang Hui, saying, "China is 'caught between the two extremes of misguided socialism and crony capitalism, and suffering from the worst of both systems . . . . We have to find an alternate way. This is the great mission of our generation.'").

24. *Id.* ("[T]here's a growing disenchantment with the relentless market reforms. [Thus, the New Left] simply wants to rein in the excesses of China's market reforms.").

25. In 2005, Lu Xueyi, a sociologist for the Chinese Academy of Social Sciences, stated, "China is at a crossroads. It can either smoothly evolve into a medium-level developed country or it can spiral into stagnation and chaos." WILLY LO-LAP LAM, CHINESE POLITICS IN THE HU JINTAO ERA 247 (2006).

26. E.g., Shu-Ching Jean Chen, *China Adopts Landmark Property Law*, FORBES, Mar. 16, 2007, available at [http://www.forbes.com/markets/2007/03/16/china-property-law-marks-econ-cx\\_jc\\_0316markets2.html](http://www.forbes.com/markets/2007/03/16/china-property-law-marks-econ-cx_jc_0316markets2.html) ("A milestone property law was passed by an overwhelming majority in China's National People's Congress on Friday morning, establishing for the first time the legal concept of property ownership in China."); *Landmark Property Law Adopted*, XINHUA, Mar. 16, 2007, available at [http://www.chinadaily.com.cn/china/2007-03/16/content\\_829330.htm](http://www.chinadaily.com.cn/china/2007-03/16/content_829330.htm) ("China's parliament, the National People's Congress, adopted two landmark laws – the property rights law and the enterprise income tax law."); Pallavi Aiyar, *China Passes property law*, THE HINDU (Online ed.), Mar. 17, 2007,

will show that the reality of the NPL is entirely different, that is, that the NPL's moniker as "landmark" is illusory. Furthermore, the NPL's passage potentially marks a turning point in the efforts of the CCP's reformers to liberalize China's economy. Analyzing the NPL in both its historical and immediate context, coupled with a close analysis of its statutory language, exposes the NPL as a weak attempt to address the issue of private property rights within a communist-governed society.

Part II of this Article analyzes the two competing views within the CCP of how China's economic system is supposed to work. Further, Part II explains that China's market-based reforms, such as the NPL, are not the result of a conscious decision by a unified CCP. Rather, such reforms have emerged from discord within the CCP's ranks. With this larger dispute in mind, Part III analyzes the recent legislative history of the NPL, as well as the public debate the law created. Part III shows that when it came to the NPL and private property rights, the law itself initiated a very public, ideologically driven fight, revealing the deep divide in policy between CCP members. By examining this legislative history and public debate surrounding the NPL, this Article demonstrates that the process of even drafting such a law resurrected the long dormant ideological rift between reformers and conservatives within the CCP.

Part IV's examination of the NPL's provisions illustrates that Marxist notions of ownership and economy prevailed as the central principle of the NPL. If China's market reforms can be viewed as a victory for the CCP's reformers, Part IV demonstrates that the NPL, as drafted and enacted, is a victory for the Marxist con-

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<http://www.hindu.com/2007/03/17/storeis/2007031702601700.htm> ("After 14 years in the drafting and seven rounds of readings, a landmark property rights bill that gives private and public property equal protection under the law was passed."); *China's Parliament Adopts Landmark Property Law*, CHINA DAILY, Mar. 16, 2007, available at [http://www.bjreview.com.cn/quotes/txt/2007-03/16/content\\_59464.htm](http://www.bjreview.com.cn/quotes/txt/2007-03/16/content_59464.htm); *Landmark Property Law Passed as China Wraps up Annual Session*, GLOBAL INSIGHT, Mar. 16, 2007, <http://www.globalinsight.com/SDA/SDADetail8676.htm> ("The 3,000-member Chinese National People's Congress (NPC) today passed landmark legislation putting in place the country's first private property bill signaling the country's strong commitment to continuing and deepening the country's economic reform process."). See also Jim Yardley, *China Nears Passage of Landmark Property Law*, N.Y. Times, Mar. 9, 2007, available at <http://www.nytimes.com/2007/03/09/business/09yuan.html?ex=1331096400&en=a5c66ad9efdfcac5&ei=5124&partner=permalink&exprod=permalink> ("China's national legislature began deliberating Thursday on a landmark law that would provide legal protections for private property."); *Law Protecting Private Property Final Nail in Maoism's Coffin, Says Bao Tong*, ASIA NEWS, Mar. 19, 2007, available at <http://www.asianews.it/index.php?l=en&art=8771&size=A> ("The law protecting private property rights . . . represented the 'final bankruptcy' of Mao Zedong's brand of Chinese communism," said Bao Tong, former high ranking member of the CCP central committee purged from the Party in 1989). Clearly, the NPL's passage is believed to be a significant legal development.

27. See Antoaneta Bezlova, *Property Law Denies Farmers the Good Earth*, ASIA TIMES ONLINE, Mar. 2007, <http://www.atimes.com/atimes/China/IC20Ad01.html> ("[D]espite lofty-sounding clauses and media hype, the [NPL] fails to safeguard the ownership rights of more than half the population.").

servatives. Part V analyzes the practical significance of the NPL in light of the current administration's goal to catalyze rural economic development in China, arguing that the NPL will not assist the CCP's efforts to develop China's countryside. Part VI draws the conclusion that the NPL may in the end prove "landmark," but for a different reason than conventionally asserted.

## II. THE NPL AND CHINA'S ECONOMIC TRANSFORMATIONS: DECIDING ON MARKET BASED REFORMS

Beginning in 1978, China broke with inflexible Marxist economic theory and began to implement market based reforms.<sup>28</sup> By 1992, it appeared China had dispensed with Marxism as an economic theory almost in its entirety.<sup>29</sup> Yet China's market reforms did not result from a collective resolve within the CCP.<sup>30</sup> Instead, such reforms emerged from the struggle between the CCP's factions to assert one view of economics over the others. The determined efforts of the CCP's economic reformers, especially Deng Xiaoping, are responsible for China's current reforms, of which the NPL represents an important part.

After the fall of the Soviet Union<sup>31</sup> in 1991,<sup>32</sup> the CCP recognized that China could face the same prospect if it did not undertake structural reforms.<sup>33</sup> These changes focused on economic, as opposed to political, liberalization. The economic reforms began on January 17, 1992, when Deng Xiaoping,<sup>34</sup> the founding

28. See *infra* notes 34 and 72.

29. See, e.g., Isabel Hilton, *Karl, China Needs You*, THE NEW STATESMEN, Feb. 20, 2006, <http://www.newstatesman.com/200602200018>. ("Marxism . . . was an ideology that produced stagnation in China for the first 40 years of the revolution, an ideology that few in China today remember, let alone subscribe to, and which the Chinese Communist Party itself appeared to abandon as a working model in 1992.")

30. See *infra* notes 38, 40, and 41.

31. For a brief account of the collapse of the Soviet Union see RICHARD SAKWA, THE RISE AND FALL OF THE SOVIET UNION 423-96 (1999).

32. For a study on the unexpected difficulties encountered by neoliberal market economic reforms of former Soviet Bloc countries, which offers insights into how communist governments structured their governments both before and after communism failed as an ideology, see LADISLAV RUSMICH & STEPHEN M. SACHS, LESSONS FROM THE FAILURE OF THE COMMUNIST ECONOMIC SYSTEM (2003).

33. See *Caught Between Right and Left, Town and Country: A New Law on Property Rights Defines the Ideological Struggle at the Heart of China's Economic Reform*, ECONOMIST, Mar. 8, 2007, available at [http://www.economist.com/world/displaystory.cfm?story\\_id=8815195](http://www.economist.com/world/displaystory.cfm?story_id=8815195) [hereinafter *Caught Between Right and Left*] ("It was Mr. Deng who decided in the early 1990s that only rapid growth, fueled by the unfettering of the private sector, could save China from the fate of the Soviet bloc."). See also Suisheng Zheo, *Deng Xiaoping's Southern Tour: Elite Politics in Post-Tiananmen China*, 33 ASIAN SURVEY, Aug. 1993, 739, 743 ("Deng argued that the CCP needed to learn from the experience of the Soviet Communist Party (CPSU), which had become divorced from the people, had run counter to the interests of the state, and had failed in its attempts at economic development.")

34. DILIP K. DAS, ASIAN ECONOMY AND FINANCE: A POST-CRISIS PERSPECTIVE 44 (2005) ("Adoption of market-oriented reforms and economic liberalization was done under the doctrine



reformer largely responsible for China's economic liberalization,<sup>35</sup> caught a train and commenced his famous Trip to the South.<sup>36</sup> During his trip, Deng highlighted the importance of the Special Economic Zones,<sup>37</sup> need for capital,<sup>38</sup> and commitment to reform.<sup>39</sup>

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of the 'open-door policy,' conceived by Deng Xiaoping in 1978."). Das later states, "The Deng doctrine succeeded in integrating China with the regional and global economies." *Id.* at 45.

35. For full length treatment of Deng Xiaoping's legacy in China, see DAVID SHAMBAUGH, *DENG XIAOPING: PORTRAIT OF A CHINESE STATESMAN* (1995).

36. In the years before Tiananmen Square incident, the CCP had been moving towards more economic reform, and even possible political reform, under General Secretary and Premier Zhao Ziyang. For example, at the Thirteenth Party Congress in October 1987, Zhao delivered his speech which "on balance, favoured commitment to continued reform." TONY SAICH, *GOVERNANCE AND POLITICS OF CHINA* 72 (2d ed. 2004). Saich notes that "[i]n the economic sphere Zhao attacked . . . central planning and state ownership . . . [and made] . . . clear that political reform should continue." *Id.* However, the CCP crackdown on the students gathered in Tiananmen Square made them nervous about the extent of reform. Chen Yun, Bo Yibo, and Yang Shangkun, all "veteran orthodox party members," along with Deng instituted a two prong program that (1) restored the policy of economic austerity, which placed the centrally planned economy back at the center, and (2) provided "tight political supervision." *Id.* at 73. Deng supported the latter, but not the former since it conflicted with his own reform programs. By "early 1990, there were clear signs that the austerity measures (designed to control inflation) were pushing the economy towards a major recession." *Id.* at 74. For example, from January to March 1990, "industrial output recorded no growth while that of light industry fell to 0.2 per cent." *Id.* Fearing further economic downturn, reformers, led by Deng, "quietly introduced measures to undo the austerity program despite resistance by fiscal conservatives at the center." *Id.* This, coupled with the Soviet fall of communism and the upcoming Fourteenth Party Congress at the end of 1992, "which would define [Deng's] legacy," convinced Deng that incremental reforms against the austerity program would not work. *Id.* at 76. Since the south had a more prosperous economy than the north, it "was more threatened by the post-Tiananmen austerity policy. [T]he south was much more inclined to open up the country further to recapture its high economic growth." YONGNIAN ZHENG, *GLOBALIZATION & STATE TRANSFORMATION IN CHINA* 3 (2004). Thus, by 1992 Deng "felt it . . . necessary to reassess the hard-line policy and to push China once more along the road to reform." SAICH, *supra* note, at 76.

37. Special Economic Zones ("SEZs") had been a feature of China since 1979, with the establishment of four SEZs: Shenzhen, Zhuhai, Shantou in Guangdong Province, and Xiamen in Fujian Province. MANORANJAN DUTTA, *CHINA'S INDUSTRIAL REVOLUTION AND ECONOMIC PRESENCE* 125-27 (2006). However, disagreement arose between Deng and Chen Yun, a noted Marxist conservative, head of the Party's Central Advisory Committee, and author of the "bird-cage" economy, about the SEZs. Zheo, *Deng Xiaoping's Southern Tour*, *supra* note 33, at 742-43. Chen Yun focused on the problems the SEZs had as reasons to withdraw CCP support. See SAICH, *supra* note 36, at 77. Deng retorted, "Although some people are opposed to the way the SEZs are run, nobody can deny the great achievements of the SEZs." Zheo, *Deng Xiaoping's Southern Tour*, *supra* note 33, at 742-43.

38. See RICHARD BAUM, *BURYING MAO: CHINESE POLITICS IN THE AGE OF DENG XIAOPING* 342 (1994) (emphasizing that Deng "flatly rejected" the Leftists' argument that "with each dose of foreign capital we become more capitalistic," characterizing such "arguments as lacking in 'basic common sense' about capitalism.").

39. RASHID MALIK, *CHINESE ENTREPRENEURS IN THE ECONOMIC DEVELOPMENT OF CHINA* 51-54 (1997) ("Deng's trip can be viewed [as] a message to government officials, private entrepreneurs, and foreign investors that the reform towards private ownership was to continue even after the Tiananmen Square [and as a message] to convince the private sector that the

The 1992 Trip to the South can be seen as a political victory for Deng and the reformist members of the CCP.<sup>40</sup> After the 1989 Tiananmen Square killings, the Marxist conservatives regained the domestic initiative and began undermining Deng's authority to direct economic policy.<sup>41</sup> Indeed, after the "purge of the 'American Faction' at the Fourth Plenum in June 1989, the central planners were free to go about reining in Deng's economic reforms,"<sup>42</sup> which they did. For example, in November 1989, at the Fifth Plenum of the Central Committee of the CCP, Prime Minister Li Peng, an orthodox communist,<sup>43</sup> called for implementation of the austerity program under the guidance of the State Planning Commission.<sup>44</sup> This effectively returned "central control over the economy."<sup>45</sup>

Deng then moved to regain control over his economic initiatives.<sup>46</sup> To do so, he struck a deal with the People's Liberation Army (the same unit responsible for the deaths at Tiananmen Square). Deng proposed that if the Army provided support for him, his allies, and his economic reforms (known as the Four Modernizations), the State would reciprocate with more support for the Army.<sup>47</sup> Thus, Deng

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reform towards private ownership was genuine and enduring.").

40. MICHAEL MARTI, *CHINA AND LEGACY OF DENG XIAOPING: FROM COMMUNIST REVOLUTION TO CAPITALIST EVOLUTION* 2-74 (2002). Marti notes that Mao did not choose Deng as his successor, forcing Deng to maneuver within the CCP to solidify his authority. *Id.* at 2. As a result, "the period between 1979 and 1989 was one of constant struggle for Deng and his supporters to implement his agenda." *Id.* See also RODERICK MACFARQUHAR, *THE POLITICS OF CHINA: THE ERAS OF MAO AND DENG* 498-501 (1997). MacFarquhar notes that "Deng's opponents took active measures to resist this new [1992] offensive [for economic reform]" *Id.* at 499. In fact, one of Deng's ideological opponents in the CCP, Deng Liqun, made his own "trip to the south" visiting the cities of Wuhan and Xining. There, Deng Liqun declared, "There is the core of economic work but also another core of fighting peaceful evolution and waging class struggle." *Id.* While head of the Party's Central Advisory Committee, Chen Yun, author of the "bird-cage economy" analogy, told a gathering of Committee members that the only way to avoid a Soviet style collapse was to "emphasize communist ideology and strengthen Party building." *Id.* at 500. These pronouncements stand in contrast to Deng Xiaoping's belief that the only way to avoid collapse was through rapid economic reform.

41. MARTI, *supra* note 40, at 31. In a chapter titled "Conservatives Seize the Economic Initiative," Marti writes: "Domestically, the economic initiative rested with Chen [Yun and the Marxist conservatives], while internationally, with the collapse of communism, the initiative rested with the leftist ideologues . . . Deng had lost the power to control daily economic policy." *Id.*

42. *Id.* at 31-32.

43. *Li Peng: The man who took on the dissidents*, CNN, 1999 <http://www.cnn.com/SPECIALS/1999/china.50/inside.china/profiles/li.peng/> ("[Li Peng is a] true conservative, [and] an avowed adherent to orthodox Communist ideology."). *Id.*

44. MARTI, *supra* note 40, at 32 (noting that the State Planning Commission (SPC) had been inactive under former Prime Minister Zhao).

45. *Id.* (At this point in 1989, "Deng . . . had lost control of policy planning.").

46. See *supra* note 40.

47. *Id.* at 75-77, 114 (The People's Liberation Army (PLA) had performed slowly under Deng's Four Modernizations and amounted to the "last priority" under it. Deng convinced the PLA leadership that the answer to overcoming their paltry support rest with economic expansion. Thus, Deng and the PLA "decided that the PLA would undertake to promote Deng's reforms . . . [and] use their influence to persuade local leaders . . . to support him, [even] to the extent that they would ignore directives from Li Peng's State Council that were contradictory." The

pushed his reforms through by bargaining with the Army,<sup>48</sup> a bargain precipitated by the Marxist conservatives' ideological resistance<sup>49</sup> to Deng's market based reforms.<sup>50</sup>

Over the course of the next decade, the ideological debate between Marxist conservatives and reformers remained largely subordinate to China's economic growth.<sup>51</sup> With Deng's death in 1997, the reining in of Deng's reforms again posed a threat. Deng's successor, Jiang Zemin, rose to the position of President and decided to continue Deng's economic legacy.<sup>52</sup> In September 1997, at the Fifteenth Party Congress, President Jiang showed no deviation from Deng's economic reform movement. In fact, he raised Deng's reforms to the position of "Deng Xiaoping Theory[,] . . . a canonical status previously reserved exclusively for Marxism-Leninism and Mao Zedong Thought."<sup>53</sup> Further, President Jiang was faced

agreement between Deng and the PLA paid off. In March, 1992, Deng convinced those in the CCP who disagreed with the direction he wanted to push China that economic reform must be adopted as a policy of the Party. Encompassed in Central Document 2, the CCP dispersed Deng's policies to government officials. Deng followed up to make sure his reforms of economic liberalization actually materialized. Further, at the most recent meeting of the full NPC in March, 2007, the CCP increased the PLA's budget by 17.8% over 2006. See Xu Guangyu, Opinion, *What's Behind Increase in Military Budget*, CHINA DAILY, Mar. 15, 2007, available at [http://www.chinadaily.com.cn/opinion/2007-03/15/content\\_828146.htm](http://www.chinadaily.com.cn/opinion/2007-03/15/content_828146.htm).

48. Deng had learned Mao's maxim, "Every Communist must grasp the truth, 'Political power grows out of the barrel of a gun.'" Mao Zedong, former Chairman, CCP, *Problems of War and Strategy*, Speech before the Sixth Plenary Session of the Sixth Central Committee (Nov. 6, 1938), in *THE ART OF WAR BY MAO TSE-TUNG*, 289 (Foreign Language Press (Beijing) trans. (2005) available at <http://art-bin.com/art/omao5.html>).

49. For example, Chen Yun's "bird-cage economy" stood in opposition to Deng and the reformer's conception of the economy, which is primarily limited market. Chen first articulated his economic doctrine in 1982, stating, "One cannot hold a bird tightly in one's hand without killing it. It must be allowed to fly, but only within its cage. Without its cage it would fly away and become lost." BAUM, *supra* note 53, at 152. Compare JOINT ECONOMIC COMMITTEE, CHINA'S ECONOMIC FUTURE: CHALLENGES TO U.S. POLICY 73 (1997) ("The hardliners have enunciated the 'bird cage economy' doctrine. In the conception of its originator, Chen Yun, the central plan is the cage and the bird is the economy.") with PETER BOONE, P. R. G. LAYARD, & STANISLAW GOMULKA, *EMERGING FROM COMMUNISM: LESSONS FROM RUSSIA, CHINA, AND EASTERN EUROPE* 161 (1999) ("The liberal reformers, on the other hand, believe that only a market economy will promote long-term economic development."). The competition for supremacy between Chen's bird cage economy and Deng's market-oriented economy in the CCP highlights the divide between what the Marxist conservatives and the reformers considered to be China's best way to modernize.

50. MARTI, *supra* note 40, at 114 ("[T]here was continued resistance to actually implementing [Deng's] changes.").

51. Zhuang Pinghui, *New Draft Approved for Private Property Law*, S. CHINA MORNING POST (Hong Kong), Dec. 25, 2006, at 4 ("For the first time in over a decade, both the Chinese intelligentsia and the political establishment are embroiled in an intense ideological debate about socialism and capitalism, which long seemed to be buried by years of consecutive years of rocketing economic growth."). See also *infra* note 78.

52. Richard Baum, *Jiang Takes Command: The Fifteenth National Party Congress and Beyond*, in CHINA UNDER JIANG ZEMIN 15, 15-32 (Hung-mao Tien & Yun-han Chu eds., 2000).

53. *Id.* at 15. Raising Deng's reforms to the level of "theory" seems misplaced. He simply

with the difficult task encompassed in the next stage of the reforms: “the sale of market shares in more than 100,000 ailing, inefficient state-owned enterprises (SOEs).”<sup>54</sup>

President Jiang’s continuation of Deng’s policies did not please everyone, especially the Marxist conservatives within the CCP. In 1995 the Marxist conservatives published a “10,000 character manifesto” against China’s market reforms, attacking China’s economic moves and containing general policy provisions advocated by the reformers within the CCP.<sup>55</sup> But the manifesto failed to dampen the motivation to keep China moving forward, at least economically. For example, in a commemorative speech on the CCP’s eighty year rule over China, President Jiang clarified his “Three Represents Theory”<sup>56</sup> (which the CCP added as one of the guiding principles of the PRC Constitution)<sup>57</sup> that called for admitting private entrepreneurs, businessmen, and other non-party elites to the CCP.<sup>58</sup> This call di-

followed what market economists had advocated for many years before him.

54. *Id.* Baum characterizes this stage as “arguably [the] most controversial.” *Id.*

55. Sujian Guo, *Economic Transition in China and Vietnam: A Comparative Perspective*, 32 *ASIAN PROFILE* 393, 402 (2004), available at [http://bss.sfsu.edu/sguo/My%20articles/Economic%20transition\\_2004.pdf](http://bss.sfsu.edu/sguo/My%20articles/Economic%20transition_2004.pdf) (“In 1995 a leading CCP leftist study group circulated among party leadership the first of several ‘10,000 character manifestos’ . . . criticizing market reform[s] . . . and viewing [China’s] income gaps, corruption and unemployment as straying from the socialist road.”).

56. The “Three Represents Theory,” *san ge dai biao*, “declares that the CCP represents ‘the most advanced mode of productive force, the most advanced culture, and the interests of the majority of the population.’” JONATHAN STORY, *CHINA: THE RACE TO MARKET – WHAT CHINA’S TRANSFORMATION MEANS FOR BUSINESS, MARKETS AND THE NEW WORLD ORDER* 119 (2003). This theory is Jiang’s attempt to ensure that the CCP “always represent[s] the development trends of China’s advanced productive forces.” YANLAI WANG, *CHINA’S ECONOMIC DEVELOPMENT AND DEMOCRATIZATION* 172 (2003).

57. *China to put Three Represents into Constitution*, *PEOPLE’S DAILY*, Dec. 22, 2003, [http://english.peopledaily.com.cn/200312/22/eng20031222\\_130955.shtml](http://english.peopledaily.com.cn/200312/22/eng20031222_130955.shtml) (stating that the “important theory” of President Jiang is to be added to the Constitution, and notably, at the same time as a provision that states “private property shall not be violated.”). President Jiang’s “Three Represents” also signals a change in Party policy, which requires an amendment to the CCP constitution, as opposed to the PRC Constitution. At the Sixteenth Party Congress in 2002, the CCP discussed, and later implemented it. *See To Include ‘Three Represents’ in CPC Constitution Reflects Common Aspiration*, *XINHUA*, Nov 11, 2002, [http://news.xinhuanet.com/english/2002-11/11/content\\_626752.htm](http://news.xinhuanet.com/english/2002-11/11/content_626752.htm) (regarding the delegates, representing the will of the “entire Party and Chinese People,” to include the important theory in the CCP constitution).

58. Jia Hepeng, *The Three Represents Campaign: Reform the Party or Indoctrinate the Capitalist*, 3 *CATO J.*, Fall 2004, at 261, available at <http://www.cato.org/pubs/journal/cj24n3/cj24n3-5.pdf> (“The Three Represents . . . has long been considered to ensure that the Party expand its membership to include private entrepreneurs, redefine its societal role, modify its core tenets, and institutionalize its rule.”) However, admitting private entrepreneurs was seemingly nothing new. *See, e.g.*, Joseph Fewsmith, *Is Political Reform Ahead? Beijing Confronts Problems Facing Society – and the CCP*, 1 *CHINA LEADERSHIP MONITOR* 1-2 (2002), available at [http://media.hoover.org/documents/clm1\\_JF.pdf](http://media.hoover.org/documents/clm1_JF.pdf). (noting the case of Guan Guangmei, a party member from Liaoning Province, and the source of the “Guan Guangmei phenomenon.” Guan leased SOEs to private entities “running them as essentially private enterprises,” which boosted the SOEs production. It is not clear from Fewsmith’s article, however, if Guan was already a party member at the time General Secretary Zhao planned to introduce him at the Thirteenth Party Congress in 1987, or if he was a non-

rectly contradicted the Party's previous edict banning private entrepreneurs from Party membership after the Tiananmen Square killings.<sup>59</sup>

President Jiang's suggestion sparked an even more pronounced response from the Marxist conservatives. A new "10,000 character" manifesto focused not on a faction of the CCP, but personally on President Jiang himself.<sup>60</sup> The manifesto accused Jiang of, *inter alia*, developing a "cult of personality,"<sup>61</sup> ignoring the gap between the rich and the poor,<sup>62</sup> and "speak[ing only] on behalf of the rich."<sup>63</sup> Such an attack on a party leader by a collective of senior CCP members "appear[ed] unprecedented . . . [N]o one would have raised such a challenge to Mao [or] Deng."<sup>64</sup>

After President Jiang retired in 2002, the Sixteenth Party Congress elected Hu Jintao as the new CCP General Secretary. Then, in March 2003, Hu Jintao became president of the PRC at the Tenth National People's Congress.<sup>65</sup> Wen Jiabao also became the nation's Premier at the same Congress.<sup>66</sup> Together, Hu and Wen form the current leadership known as the Fourth Generation of Leaders.<sup>67</sup>

Like former President Jiang, the current administration supports China's economic reforms and growth,<sup>68</sup> but is increasingly trying to separate itself from Jiang's legacy.<sup>69</sup> Hu and Wen, consequently, have turned their attention from the rich to the rural poor, attempting to construct a "new socialist countryside"<sup>70</sup> for

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member who the CCP brought into the fold because of his success with the SOEs. However, with the authority to turn over SOEs to private management companies, the insinuation is that Guan already held membership in the CCP. Despite this vague example, Fewsmith purports that other entrepreneurs were added to Party rolls even after the CCP published its "Notice of the Central Committee of the Chinese Communist Party on Strengthening the Construction of the Party," which denied entrepreneurs CCP membership).

59. "Notice of the Central Committee of the Chinese Communist Party on Strengthening the Construction of the Party," in 2 CCP CENTRAL COMMITTEE DOCUMENTS RESEARCH OFFICE, (Selected Important Documents Since the Thirteenth Party Congress ed.) at 598 (1991).

60. See Fewsmith, *supra* note 58, at 3.

61. *Id.*

62. *Id.* (noting that the manifesto deemed this as the "sharpest contradiction in society.").

63. *Id.*

64. *Id.*

65. Bureau of East Asian and Pacific Affairs, *Background Note: China*, U.S. STATE DEPT., Jan. 2007, at 6, available at <http://www.state.gov/t/pa/ei/bgn/18902.htm>.

66. *Wen Jiabao, Premier of State Council*, XINHUA, Mar. 16, 2003, [http://news.xinhuanet.com/english/2003-03/16/content\\_780876.htm](http://news.xinhuanet.com/english/2003-03/16/content_780876.htm) ("The NPC, China's top legislature, picked Wen Jiabao to succeed Zhu Rongji as the new premier of the State Council.").

67. *Id.*

68. See *Landmark Property Law Adopted*, *supra* note 16 ("Wen said in the [government] work report that the most important task of the government this year is to promote sound and fast economic development, with the growth of GDP projected at 8 percent.").

69. For example, President Hu modified Jiang's "Three Represents" theory, "driven by his conviction that the CCP's ruling-party status would be jeopardized unless Jiang's perceived favoritism toward the 'privileged classes' was reversed." WO-LAP LAM, *supra* note 25, at 67.

70. See *infra* Part V. The "new socialist countryside" is an integral part to building a harmonious socialist society because of the increasing social divisions appearing from China's

the purposes of building a “harmonious socialist society.”<sup>71</sup> This new focus is a patent effort to help China’s rural poor,<sup>72</sup> a group the Marxist conservatives believe China’s economic reforms have left behind.<sup>73</sup> Thus, this Fourth Generation of

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economic reforms. See *Building a New Socialist Countryside Urgent Task: Official*, PEOPLE’S DAILY ONLINE, Feb. 26, 2006, [http://english.people.com.cn/200602/22/eng20060222\\_244944.html](http://english.people.com.cn/200602/22/eng20060222_244944.html) (quoting Chen Xiwen, deputy director of the Office of Central Financial Work Leading Group, “Building a new socialist countryside is also an essential requirement for building a harmonious socialist society, achieving social fairness and justice and making the benefits of economic and social development available to all people.”); Charles Hutzler, *Premier Says China to Focus on the Poor*, WASH. POST, Mar. 5, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/04/AR2007030401303.html> (describing the new Hu-Wen administration’s plans to spend heavily in the much poorer, rural countryside to close the increasing wealth gap between urban and rural residents). See also <http://www.china.org.cn/english/zhuanti/country/159776.htm>. (an official website on the “new socialist countryside”).

71. See *Building a Harmonious Society is Crucial for China: Hu*, PEOPLE’S DAILY ONLINE, June 27, 2005, [http://english.people.com.cn/200506/27/eng20050627\\_192495.html](http://english.people.com.cn/200506/27/eng20050627_192495.html) (“The problems and contradictions China will face in the next decades may be even more complicated and thorny than others as it is turning from a planned economy to a market economy with its social structure and ideological setup also in major shake-up, Hu acknowledged.”).

72. The Marxist conservatives’ concern for the poor tinges with irony too, since many of Marxism’s policies have created conditions of poverty. See e.g., Hilton, *Karl, China Needs You*, *supra* note 29. See also Ronald Bailey, *Poor Planning: How to Achieve the Miracle of Poverty*, REASON MAG., Sept. 18, 2002, available at <http://www.reason.com/news/show/34887.html> (“[M]odern world governments have to work hard to make and keep their people poor. [M]ost notorious, of course, was the grinding poverty sustained for seven decades in the communist bloc.”). In China, such Marxist programs as the Great Leap Forward, the Cultural Revolution, and collectivization of rural land lead to a precipitous drop in agricultural production, incomes, and famine. Since China began its economic reforms in 1978, the CCP has done a better job of interjecting large, centrally planned programs into the economy. But just as one can inherit wealth, one can inherit debt, and the CCP’s history of instituting a modern communist society has harmed as many inhabitants as it has helped in the more recent past. For a good survey on China during the Great Leap Forward and the Cultural Revolution see JONATHAN D. SPENCE, *THE SEARCH FOR MODERN CHINA* 574-618 (1991). For the effects of the Great Leap Forward, see DALI L. YANG, *CALAMITY AND REFORM IN CHINA: STATE, RURAL SOCIETY AND INSTITUTIONAL CHANGE SINCE THE GREAT LEAP FORWARD* 21-41 (1996), noting that the Great Leap “precipitated the worst famine in human history,” noting that some 30 million Chinese lost their lives because of the attendant drop in agricultural production after centrally planned collectivization. Comparatively, the same phenomenon of collectivization, social upheaval, and economic chaos is happening in Zimbabwe today, under Mugabe, another Marxist. See DANIEL BRETT, *Zimbabwe*, in *AFRICAN REVIEW* 2003/2004, 1, 369-71 (Daniel Brett ed., 2003), highlighting that once productive farms now “leave valuable crops rotting in the fields.” *Id.* at 371. Further, in 2000, Mugabe’s land grab of white owned farms set off a rise in inflation, some 2000%, resulting in economic havoc, food shortages, and a “general collapse in agriculture.” See Nasreen Seria and Brian Latham, *Zimbabwe’s Inflation May Have Surged Above 2000%*, BLOOMBERG NEWS, Mar. 9, 2007, <http://www.bloomberg.com/apps/news?pid=20601087&sid=aX.DgVCtSrQQ&refer=home>. For a look at Zimbabwe under Robert Mugabe see ANDREW NORMAN, *ROBERT MUGABE AND THE BETRAYAL OF ZIMBABWE I* (2004).

73. See *Caught Between Right and Left*, *supra* note 33 (“Last month the official media published a speech by Mr. Wen on the need for “social justice” – a term dear to the left (Marxist conservatives) which believes that the poor are being trampled upon.”).

Leaders' dedication to economic liberalization and reforms may be truncated by their commitment to make China's gains more even.<sup>74</sup>

### III. THE NPL'S LEGISLATIVE HISTORY AND THE PUBLIC DEBATE

The NPL developed<sup>75</sup> within the context of this larger debate<sup>76</sup> over China's economy.<sup>77</sup> Just before the NPL's passage, however, a public debate erupted in which Marxism featured prominently. The public debate was agitated by placing the State at the heart of China's economic system, and highlights the continuing vitality of Marxism in China, which some declared dead, or at least unimportant,<sup>78</sup> because of China's moves to market. Thus, China's Marxism still plays a critical role in its political discourse.

74. See *infra* Part V; see also *infra* note 84.

75. See *infra* note 94.

76. *China's Lawmakers Start Seventh Reading of Landmark Property Law*, PEOPLE'S DAILY ONLINE, Dec. 25, 2006, [http://english.people.com.cn/200612/25/eng20061225\\_335567.html](http://english.people.com.cn/200612/25/eng20061225_335567.html) ("The draft property law, a sweeping bill designed to protect both public and private ownership, has undergone more reviews than any other bill by the NPC Standing Committee, China's top legislature."); *China Starts 7th Reading of Draft Property Law*, XINHUA, Dec. 25, 2006, [http://news.xinhuanet.com/english/2006-12/25/content\\_5527655.htm](http://news.xinhuanet.com/english/2006-12/25/content_5527655.htm) ("China's long-debated property law is a step closer to approval as it was tabled again to lawmakers on Sunday for the seventh reading.").

77. The NPL became effective on October 1, 2007.

78. See BIH-JAW LIN & JAMES T. MEYERS, CONTEMPORARY CHINA AND THE CHANGING INTERNATIONAL COMMUNITY xvi (1994) (noting that "many outside observers . . . have concluded that communism was dead in China."); James A. Dorn, *The Death of Communism in China*, J. COMM., Mar. 5, 1999, available at <http://www.cato.org/dailys/03-09-99.html> ("Although China will commemorate 50 years of Communist Party rule this year, communism is dead in the hearts and minds of its people."); Nicholas Kristof, *The night China's Communist Party died*, THE AGE (Melbourne), June 3, 2004, available at <http://www.theage.com.au/articles/2004/06/02/1086058914367.html?from=storyrhs> ("China today is no longer a communist nation in any meaningful sense."). These statements ignore evidence of Marxism's strength in China, such as the fact that private land ownership is still verboten. See Kirsty Needham, *Rising Dragon Still Sees Red*, SYDNEY MORNING HERALD, Oct. 7, 2006, available at <http://www.smh.com.au/news/world/rising-dragon/2006/10/06/1159641528545.html?page=fullpage> (quoting Dr. John Hanafin, a Chinese philosophy specialist at the University of Melbourne's Centre for Applied Philosophy and Public Ethics, saying: "to say communism is dead in China is not true at all. [It is important to] challenge this dominant myth among academics and politicians.").

The NPL underwent extensive revisions through its seven readings.<sup>79</sup> In the context of China's tremendous economic transformations, opening its economy to market based reforms, the Marxist conservatives conceived the NPL as a vehicle to uphold Marxist economic principles itself, reinforcing fundamental principles of China's Marxist ideology.<sup>80</sup> This ideological view is distinct from the bargaining over the specific provisions of the law itself, such as the determination of whether the tenant or builder owns an apartment building's parking space.<sup>81</sup> In short, for the Marxist conservatives, the NPL represented an ideological fight, and the bargain struck by the two main factions of the CCP goes to the core of China's future development. Moreover, when parts of the law emerged that did not comport with Marxist conservatives notions of economics, a public debate erupted. This debate put pressure on the CCP to meet with the leading voices against the NPL and declare new drafting proposals more consistent with Marxist notions of property, ownership, and economy.

#### A. *The NPL's Revival Of Marxist Political Discourse*

The NPL's legislative history generated a debate that saw the revival of Marxist political dialogue.<sup>82</sup> Marxist ideology, which appeared quiescent during China's recent economic transformation, is re-emerging today.<sup>83</sup> Contemporary Marxist conservatives, however, use Marxism not only as a revolutionary language of class warfare, but increasingly as a vocabulary about social justice and equality.<sup>84</sup>

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79. See *Geopolitical Diary: Revising China's Property Law*, STRATEGIC FORECASTING, Mar. 14, 2007, available at [http://www.stratfor.com/products/premium/read\\_article.php?id=285723](http://www.stratfor.com/products/premium/read_article.php?id=285723) ("Sixty changes have been made since China's proposed landmark property law."); Li Li, *The Property Debate*, BEIJING REV., Mar. 1, 2007, available at [http://www.bjreview.com.cn/lianghai/txt/2007-02/25/content\\_57608.htm](http://www.bjreview.com.cn/lianghai/txt/2007-02/25/content_57608.htm) (article highlighting some of the revisions between the sixth and seventh draft of the NPL). For example, the sixth draft of the NPL says: "What are regulated as state properties by laws and administrative regulations belong to the state or the whole people." The seventh draft [says]: "What are regulated as state properties by laws belong to the state or the whole people," removing "and administrative regulations."

80. See Wang Zhaoguo, Vice Chairman of the Standing Committee of the NPC, Explanation of China's Draft Property Law, Address Before the Nat'l People's Congress, Mar. 8, 2007, available at [http://www.english.people.com.cn/200703/08/eng20070308\\_355492.html](http://www.english.people.com.cn/200703/08/eng20070308_355492.html). In his speech, Wang stated: "Enacting the property law is necessitated by the need to uphold the basic socialist economic system." The obvious implication is that the basic "socialist economic system" is not being upheld. Furthermore the NPL makes the State responsible for "implement[ing] the socialist market economy." NPL, *supra* note 10, at art. 3, LLX p. 4. Thus, the NPL gives the State center stage in the socialist economic system. This means that the CCP has a central role in the socialist economic system because of the CCP's control over the State.

81. See *Specific Issues Focus of Property Law Debate*, XINHUA, Aug. 24, 2006, <http://www.china.org.cn/english/government/179004.html> ("On Wednesday, debates on the draft law, which is in its fifth reading in the top legislature, moved on to specific issues such as the ownership of parking space[s]."). Not until the NPC reached an ideological consensus did it move forward with hammering out specifics of the NPL.

82. See *infra* Part III.

83. See *infra* Part III. See also *infra* notes 22-24; See Needham, *Rising Dragon Still Sees Red*, *infra* note 78.

84. Edward Cody, *Eight-Step Program Ails China: President Reacts to Rising Greed*,



Moreover, the current administration seems more committed than its predecessors to Marxism, consistently trying to reinvigorate its political forcefulness.<sup>85</sup> For example, although ostensibly committed to economic reform,<sup>86</sup> Hu is also a committed Marxist: “Since his rise to power in 2002, Mr. Hu has also tried to establish his leftist credentials, extolling Marxism, praising Mao, and bankrolling research to make [China’s] official but often ignored socialist ideology more relevant.”<sup>87</sup> The

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*Cynicism*, WASH. POST, Mar. 23, 2006, at A16, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/03/22/AR2006032202042.html> [hereinafter *Eight-Step Program*] (“The Communist Party’s traditional values of egalitarianism and service to the poor have largely faded away, they complain, in favor of a get-rich ideology that blurs the distinction between officials and entrepreneurs.”). See also Cheng Xiaonong, *China’s Economic Growth Cannot Defuse Social Unrest: Debunking the Myth of China’s Economic Reforms*, EPOCH TIMES, Dec. 5, 2006, available at <http://en.epochtimes.com/news/6-12-5/48932.html> (“In the 1980s, the regime usually took social justice into consideration when making decisions, since this was part of the ideology of socialism. Back then, the authority would try its best to redistribute financial resources to balance the interests of different social groups.”); Jason Subler & Chris Buckley, *China’s Wen Pledges Social Justice*, REUTERS, Mar. 16, 2007, [http://www.swissinfo.org/eng/international/ticker/detail/China\\_s\\_Wen\\_pledges\\_social\\_justice.html?siteSect=143&sid=7626147&cKey=1174029764000](http://www.swissinfo.org/eng/international/ticker/detail/China_s_Wen_pledges_social_justice.html?siteSect=143&sid=7626147&cKey=1174029764000) (quoting Premier Wen at the most recent NPC: “The two great tasks are first, focusing our energies on developing the productive forces of society, and second, advancing social justice and fairness.”).

85. See, e.g., Edward Cody, *Marxism and Markets*, WASH. POST, Dec. 5, 2005, at A16, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/04/AR2005120400982.html> (in his article describing Hu’s commitment to Marxism and the attendant Party program designed to reconcile Marxism with China’s economic reforms, Cody writes that President Hu has “repeatedly hailed China’s Marxist roots, dismissing Western style democracy as a ‘blind alley’ for China.” As a consequence, Hu has called for “the allocation of millions of dollars to produce new translations of Marxist literature[,] . . . more research on how Marxism can be redefined to inform China’s policies [coupled with] an 18-month campaign to reinvigorate the party rank and file.”) See also Isabel Hilton, *Karl, China Needs You*, *supra* note 29 (article noting that Hu’s project is “nothing if not ambitious: 3,000 ‘top Marxist theorists’ and academics from across the country to compile more than a hundred Marxism textbooks., each one to contain contributions from between 20 and 30 scholars.”); *Hu Jintao calls for upholding Marxism*, XINHUA, Apr. 28, 2004, <http://www.idcpc.org.cn/english/events/040428.htm> (“H[u] urged [the ideological workers] to further emancipate their thinking, seek truth from facts . . . and make new, greater contributions to the development of Marxism . . . building an overall well-off society and opening up a new situation for the socialist cause with China’s own characteristics.”).

86. See Xinhua, *supra* note 21.

87. Joseph Kahn, *A Sharp Debate Erupts in China Over Ideologies*, N.Y. TIMES, Mar. 12, 2006, <http://www.nytimes.com/2006/03/12/international/asia/12china.html?ex=1299819600&en=c153a109a4bfd193&ei=5088&partner=rssnyt&emc=rss> (noting that “[f]or the first time in perhaps a decade, the NPC, the Communist Party-run legislature . . . [are] consumed with an ideological debate over socialism and capitalism many . . . assumed was buried by China’s . . . economic growth. The roots of the . . . debate can be traced to a biting critique of the [NPL] . . . circulated on the Internet last summer.”). See also *President Hu Underscores Innovation of Marxism*, XINHUA, Nov. 27, 2005, <http://www.china.org.cn/english/government/150063.htm> (“Hu acknowledged that building a politically strong, competent and upright contingent [sic] is a crucial issue in doing a good job in Marxist theoretical studies.”). At his succession speech at the 16th Party Congress in Sept. 2004, Hu stated:

CCP went so far as to establish a campaign to modernize Marxism, attempting to reconcile the increasing contradictions between China's governing ideology and limited commitment to market capitalism.<sup>88</sup> Even though the nature of party politics may not have always brought Marxism to the fore, it remains a tenacious element within China despite the country's move towards market based economics.<sup>89</sup>

This reemergence of Marxism affected the NPL as well. Marxist notions of ownership and private property remain the basic principles behind the NPL.<sup>90</sup> Centering the law on these ideological notions, however, as opposed to well-drafted, clear articles establishing meaningful property rights, resulted in a weakened, ineffective law for China as a whole. Further, it reinforced the maxim that the State is central to China's economic future.<sup>91</sup> The NPL's perceived deviations from Marxist notions of private property<sup>92</sup> sparked an ideological debate regarding the status of private property in a communist country.<sup>93</sup>

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International monopoly-capitalist groups led by the US relied on ideology to bring down the Soviet Union and the Soviet Communist Party. The collapse of the Soviet Union and the Soviet Communist Party was absolutely not a defeat of Marxism and socialism. In the final analysis, it was the result of a gradual distancing from, turning the back on, and betrayal of Marxism, socialism and the fundamental interests of the people.

Paul Lin, *Hu Jintao is starting to show his true colors*, ASSOC. FOR ASIAN RESEARCH, Feb. 19, 2005, <http://www.asianresearch.org/articles/2524.html>. That is a curious argument Hu is making considering where China stands today, with economic reforms that rely on capitalist principles, foreign direct investment that comes by in large from capitalist countries, and acceptance of business men into the party ranks.

88. See Cody, *supra* note 85, at A16.

89. Shakespeare perhaps sums up Marxism's hold on China best: "I am a kind of burr; I shall stick." WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE* act 4, sc. 3.

90. See *infra* Part IV.

91. *Id.*; see also Wang, *supra* note 80.

92. Marx's concern with private property is over the ownership of the means of economic production rather than the possession of produced goods in general. In *The Communist Manifesto*, Marx states, "What is distinctively communist is not the abolition of property in general but the abolition of bourgeois property. [M]odern bourgeois private property is the final and most complete expression of production." KARL MARX & FRIEDRICH ENGELS, *THE COMMUNIST MANIFESTO* (1848), in *THE MARX-ENGELS READER* 346 (Robert C. Tucker ed., W.W. Norton & Company, 1978). Marx's vision of the world is divided into classes, based on who owned the means of production. RODNEY STARK, *SOCIOLOGY* 245 (9th ed. 2003) ("Marx conceived of only two classes in modern industrial societies, and the classes differed on the basis of ownership of the means of production."). Further, Marx believed that the modern bourgeois, or "industrial millionaires, the leaders of whole industrial armies" had to exploit the wage earning worker in order to secure a profit. *MARX-ENGELS READER, supra* at 336. See Jonathan Wolff, *Karl Marx*, STANFORD ENCYCLOPEDIA OF PHIL., Aug. 26, 2003, <http://plato.stanford.edu/entries/marx/> ("Marx claims that no previous theorist has been able adequately to explain how capitalism as a whole can make a profit. Marx's own solution relies on the idea of exploitation of the worker."). This exploitation produced an antagonism between the classes that Marx viewed as the engine behind historical change. As his partner Engels wrote, "all past history, with the exception of primitive stages, was the history of class struggles." Friedrich Engels, *Speech at the Gravesite of Karl Marx*, in *THE MARX-ENGELS READER, supra*, at 681-82. Thus, to correct for bourgeois exploitation and class struggle the state should own the means of production through the "revolutionary dictatorship of the proletariat" until the ultimate stage of history, communism, is reached. Karl Marx, *Critique of the Gotha Program*, in *THE*

### B. *The Ideological Debate on the NPL*

In 1998, Li Peng, Premier of China from 1988 to 1998, and the Chinese People's Political Consultative Conference (CPPCC) began developing the NPL.<sup>94</sup> In 2002, the CPPCC submitted the NPL to the NPC Standing Committee<sup>95</sup> for its consideration.<sup>96</sup> The NPC considered a third draft in June 2005,<sup>97</sup> a fourth in De-

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MARX-ENGELS READER, *supra*, at 538. State ownership places all of society in one class, eliminating any potential for class conflict. Stark, *supra* at 245. Hand in hand with state ownership is elimination of the means of private ownership over the means of production. Hence the Marxist aim of reaching the “abolition of private property.” THE MARX-ENGELS READER, *supra*, at 346. *But cf.* THE COMMUNIST MANIFESTO: NEW INTERPRETATIONS 3 (Mark Cowling ed., 1998). There Cowling states, “[for those] who have an image of Marxists as people hostile to capitalism, Marx and Engel’s praise of the revolutionary changes it brings as it destroys feudalism and develops a world market comes as a surprise . . . . [C]apitalism greatly develops the forces of production . . . which in turn lays the basis for a socialist society.” *Id.* Why that comes as a surprise is not clear. Cowling’s statement implicates the dangerous historical determinism bound up in Marxist thought. Marx could afford to feel ambivalent about capitalism (he did not), or even praise aspects of it, because either way the history of class conflict would force capitalism to collapse. Marx’s “praise” focuses on the revolutionary changes capitalism brought. For Marx, the benefits amounted to an unintended consequence of capitalism working towards Marx’s goal of full communism. Thus, any Marxist praise for capitalism is, at best, muted.

93. See Kahn, *supra* note 87.

94. *Backgrounder: Key Events in China’s Marathon Property Legislation*, XINHUA, Oct. 28, 2006, available at [http://english.people.com.cn/200610/28/eng20061028\\_315861.html](http://english.people.com.cn/200610/28/eng20061028_315861.html) [hereinafter *Backgrounder: Key Events*], (stating that in April of 1998 Li Peng, then China’s top legislator, “called for quick drafting of the property law.”). However, there is also some indication that the CCP had considered the NPL, or something like it, since as early as 1993, just after Deng’s Trip to the South. See Wang, *supra* note 39, at [http://english.people.com.cn/200703/08/eng20070308\\_355491.html](http://english.people.com.cn/200703/08/eng20070308_355491.html) (“Drafting of the property law started in 1993.”). Regardless, the NPC continued to draft for an extensive length of time. See also PETER HO, INSTITUTIONS IN TRANSITION: LAND OWNERSHIP, PROPERTY RIGHTS, AND SOCIAL CONFLICT IN CHINA 1 (2005). Ho writes:

At the time of writing—late 2004—the draft version of the new Property Law is still under review by the NPC. However, over two years after its submission to the NPC (in 2002), the majority of politicians and experts still do not expect a final decision on collective ownership soon. It is a clear illustration of the sensitivity and complexity of land ownership in China today.

HO, *supra*, at 196. In March 2007, after seven readings, a public debate, and a press blackout, the NPL finally passed. This highlights the internecine ideological struggle over the Marxist conceptions of property. See also *Amendment to Private Property Hailed by Chinese*, PEOPLE’S DAILY ONLINE, Jan. 12, 2004, [http://english.people.com.cn/200401/12/eng20040112\\_132370.shtml](http://english.people.com.cn/200401/12/eng20040112_132370.shtml) (article detailing some of the process around the NPL before the Marxist conservatives assailed it).

95. For an exhaustive resource on China’s government see ORGANIZATION FOR ECONOMIC DEVELOPMENT, CHINA IN THE GLOBAL ECONOMY: GOVERNANCE IN CHINA (2005), available at <http://www.sourceoecd.org/governance/926400842X> (making the observable argument that good governance matters and that China must reform its governmental institutions to keep up with its increasing economic successes).

96. *Draft Offers Legal Help for Property Disputes*, BUS. DAILY UPDATE, July 4, 2005, at 4, available at <http://www.chinaembassy.org.in/eng/zgbd/t201996.htm>. In 2004, the PRC updated

ember 2005,<sup>98</sup> a fifth in August 2006,<sup>99</sup> a sixth in October 2006,<sup>100</sup> and a record seventh draft in December 2006.<sup>101</sup>

Usually, the NPC acts as a complacent body and “rubber stamps”<sup>102</sup> most legislation that comes into its chambers.<sup>103</sup> On August 12, 2005, however, a public debate erupted after the NPL’s third draft was exposed. Professor Gong Xiantian, a CCP member<sup>104</sup> and Marxist law professor at Beijing University Law School,<sup>105</sup> posted an open letter on the Internet to Wu Bangguo, China’s top legislator, entitled “A Law That Goes Against the Principles of Socialism and the Constitution.”<sup>106</sup> Professor Gong’s letter sparked the public debate about the NPL.<sup>107</sup>

the Constitution by including provisions on private property. See XIAN FA, *supra* note 15, art. 14.

97. See *Backgrounder: Key Events*, *supra* note 94, at [http://english.people.com.cn/200610/28/eng20061028\\_315861.html](http://english.people.com.cn/200610/28/eng20061028_315861.html) (pointing out the important dates of the NPL up to 27 October 2006).

98. *Id.*

99. *Id.*

100. *Id.* See also *China’s draft property law tabled in legislature for 6th reading*, XINHUA, Oct. 23, 2006, available at <http://english.sina.com/1/2006/1019/92074.html>.

101. *Draft Property Law Under 7th Review*, XINHUA, Dec. 24, 2006, <http://www.10thnpc.org.cn/english/news/193697.htm> (“Chinese lawmakers on Sunday started debating the country’s landmark draft property law, a sweeping bill designed to protect both public and private ownership, for a record seventh time.”). See also Zhuang Pinghui, *New Draft Approved for Private Property Law*, S. CHINA MORNING POST (Hong Kong), Dec. 25, 2006, at 4 (“The seventh draft of the property law attempts to strike a balance between private property and state ownership . . .”).

102. For an exhaustive treatment of the NPC that argues that the NPC is growing in importance in China’s legislative process, shedding some of its “rubber stamp” reputation see TANNER, *THE POLITICS OF LAWMAKING IN POST-MAO CHINA*, *supra* note 16.

103. Ewing, *supra* note 19 (“The draft law became the subject of an intense debate between reformers and conservatives that spilled over into the normally placid, rubber-stamp NPC.”). See also William Jones, *The Constitution of the People’s Republic of China*, 63 WASH U.L.Q. 707, 709 (1985) (stating, “The most unusual feature (of the new constitution) is Congress . . . it is not intended to initiate legislation. [Rather] its primary function is to elect and remove the important officials of government, including a standing committee that can act as Congress when the latter is not in session.”). Cf. XIAN FA arts. 61 & 67.

104. Information about Gong Xiantian is difficult to come by. But what is at least known is that he is a Marxist himself, member of the CCP, and teaches at Beijing University Law School, and is considered a prominent Marxist legal theorist. See Wu Zhong, *Opinion, The Socialist Contradiction*, THE STANDARD (Hong Kong), Feb. 27, 2006, [http://hongkongstandard.hk/news\\_detail.asp?we\\_cat=5&art\\_id=12899&sid=6814740&con\\_type=1&d\\_str=2006027](http://hongkongstandard.hk/news_detail.asp?we_cat=5&art_id=12899&sid=6814740&con_type=1&d_str=2006027) (“Gong Xiantian, [is] a Peking University professor and Communist Party member.”); Ewing, *supra* note 19 (“Drafters had been fine-tuning the bill for eight years before a prominent Marxist legal scholar at Peking University, Gong Xiantian, blasted the proposed law.”).

105. See Ewing, *supra* note 19.

106. Li Li, *Setting a Precedent: China’s Legislature is Increasingly Considering Public Opinion in Formulating Laws*, BEIJING REV., Dec. 29, 2006, at 1, available at [http://www.beijingreview.com.cn/lianghui/txt/2006-12/29/content\\_57619.htm](http://www.beijingreview.com.cn/lianghui/txt/2006-12/29/content_57619.htm).

107. Kahn, *supra* note 87.

Gong argued against the NPL for numerous ideological reasons. He wrote that the NPL offered equal protection “to a rich man’s car and a beggar’s stick.”<sup>108</sup> Further, Gong felt the drafters “cop[ied] capitalist civil law like slaves.”<sup>109</sup> His main attack focused on the NPL’s lack of language that clearly made “state property inviolable.”<sup>110</sup> Additionally, Gong felt that the NPL eroded the socialist foundations of the Chinese state.<sup>111</sup>

### C. *The Fallout – New Drafting Standards for Revising the NPL*

The response to Gong’s letter was immediate. Some scholars and academics wrote essays and studies in support of Gong’s position<sup>112</sup> while others disparaged it.<sup>113</sup> Online forums analyzed, praised, and debated his assertions.<sup>114</sup> The CCP leaders of the Commission of Legislative Affairs of the NPC Standing Committee<sup>115</sup> wanted to meet with him,<sup>116</sup> and eventually the CCP banned any negative press reports about the NPL.<sup>117</sup>

108. *Id.* Gong gives no consideration to the idea that the property right granted to the beggar for the protection of his stick is more valuable than the property right granted to the rich man for his car. Indeed, the law may be all he has to protect his limited resources since he does not have the wealth to rely on.

109. *Id.* (In light of Gong’s criticisms, Kahn notes: “Those who dismissed his attack as a throwback to an earlier era underestimated the continued appeal of socialist ideas in a country where glaring disparities between rich and poor, rampant corruption . . . and land seizures offer . . . reminders of how far China has strayed from its official ideology.”)

110. *Id.* (“Most of all, he protested that the proposed law did not state that ‘socialist property is inviolable,’ a once sacred legal concept in China.”). But *cf.* with XIAN FA art. 12 (stating, “Socialist public property is sacred and inviolable.”). Unless there is a distinction between the inviolability of “socialist public property” and “state property” Gong’s contention is then merely a distinction with no difference. Relying on such a thin difference, if any, suggests that the debate around the NPL occurred out of political convenience for the CCP to test the ideological underpinnings of the NPL.

111. Richard McGregor, Comment, *Power, Not Socialism, is Today’s Chinese Ideology*, FIN. TIMES (London), July 26, 2006, at 9, available at [http://www.ft.com/cms/s/0/e2a7539a-1c02-11db-a555-0000779e2340.html?nclick\\_check=1](http://www.ft.com/cms/s/0/e2a7539a-1c02-11db-a555-0000779e2340.html?nclick_check=1) (“The bill, he said, would undermine China as a socialist state.”). See also Kahn, *supra* note 87.

112. Kahn, *supra* note 87 (stating that Mr. Gong’s “incendiary polemic on the property law prompted a succession of sympathetic essays and study sessions.”).

113. See *Overnight Celebrity*, CHINA LAW DIGEST, Mar. 25, 2006, <http://www.chinalawdigest.com/article.php?aid=657> (available with registration). The article, quoting Professor Xu Wangxuan of Jinan University, states: “[Gong’s] rhetoric is unadvisable and his legal knowledge deficient.” See also Zhong, *supra* note 106 saying “it is astonishing how confused this Marxist law theorist’s mind is in this regard” (referring to Gong’s assertion that the NPL only protects the interests of the rich.).

114. Li, *supra* note 106, at 2 (“Gong was widely supported by tens of thousands of internet users.”).

115. *Id.* (“In September 2005, Gong was summoned to a one-and-a-half-hour meeting with leaders of the Commission of Legislative Affairs of the NPC Standing Committee.”).

116. Mure Dickie, *China Puts Property Legislation on Hold*, FINANCIAL TIMES (LONDON), Mar. 10, 2006, at 9. (After the fourth reading of the NPL in December 2005, Dickie highlights the importance the CCP placed on it and the intense public response on the NPL engendered.

The response proved greater than expected,<sup>118</sup> and resulted in new standards for further drafts of the NPL. After the public eruption, Gong met with the NPC's Commission of Legislative Affairs.<sup>119</sup> Two weeks later, after briefing Gong for only ninety minutes on "the whole process of drafting the property rights law," Wu oddly declared new requirements for any further work the Commission performed on the NPL.<sup>120</sup> First, Wu stated that from that moment forward, the Commission must "adhere to the correct political direction."<sup>121</sup> Second, the Commission's orientation was limited to the practical situation of China, and copying provisions from the West was forbidden.<sup>122</sup> Third, he charged the Commission to remember that "the basis of China's socialist economy is public ownership."<sup>123</sup> These requirements, from China's top legislator, signaled that Gong and other Marxist conservatives had won a significant victory regarding the ideological hazard the NPL represented.<sup>124</sup> Gong's letter succeeded in delaying the NPL's passage.<sup>125</sup>

Gong was not alone in his position, nor did he fire the first shot.<sup>126</sup> A month before Gong published his article, Liu Guoguang, a leading Marxist economist and

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Dickie states: "Wu Bangguo said the property law topped a list of 25 bills to be considered this year. Publication of the draft law had prompted suggestions and objections from 47 central government departments, 16 large companies, 22 academic institutes, and 11,500 members of the public.").

117. China Bans Press from Criticizing Draft Property Law, BBC Monitoring, Jan. 26, 2007 (Source: Ming Pao website, Hong Kong, original in Chinese, Dec. 27, 2006); Andrew Baston, Geoffrey Fowler, & Juying Qin, China Magazine is Pulled as Property Law Looms, WALL ST. J., Mar. 8, 2007, [http://chinadigitaltimes.net/2007/03/china\\_magazine\\_is\\_pulled\\_as\\_property\\_law\\_looms\\_andrew\\_b.php](http://chinadigitaltimes.net/2007/03/china_magazine_is_pulled_as_property_law_looms_andrew_b.php) ("A landmark proposal to protect private property was formally introduced into China's legislature amid continuing controversy, and in one possible sign of the legislation's sensitivity, the latest issue of an influential Chinese business magazine that covered it was pulled earlier this week.").

118. See Dickie, *supra* note 116.

119. See Li, *supra* note 106, at 2. The contents or details of the meeting between Gong and the Commission remain unknown.

120. *Id.* By this, Wu means that direction set by the CCP. Further, in light of the Hu-Wen administration's greater devotion to Marxism than past administrations, this can reasonably be interpreted as a more Marxist direction.

121. *Id.*

122. *Id.*

123. *Id.*

124. See McGregor, *supra* note 111, at 9-10 (stating: "That [Gong's] argument won the day is astounding. After all, the Chinese who have made the most money from property in the past decade did so [in] . . . collusion with the local governments. For individuals . . . by contrast, the ability to buy a home has been tremendously empowering. With the [NPL] and independent courts, the property market would enrich . . . them and the country.").

125. Mure Dickie, *Chinese Leadership Signals Support for Further Reform*, FIN. TIMES (London), June 6, 2006, at 10 ("The passage of a landmark property law was also postponed after a Marxist academic (Gong) sparked . . . [a] debate over whether this would undermine the foundations of China's 'socialist market economy.'").

126. See Cody, *supra* note 85, at A16 ("Liu Guoguang, former assistant director of the Chinese Academy of Social Sciences, wrote a much-quoted article last July, for instance, accusing those who push for continuing swift reforms of weakening the party's grip on power and "changing our color."). Gong published his open letter in August 2005.

former deputy director of the Chinese Academy of Social Sciences, published an article in response to the NPL.<sup>127</sup> He accused CCP reformers of “weakening the party’s grip on power and ‘changing our color.’”<sup>128</sup> Liu insisted that China must “make sure leaders at every level are really Marxists, instead of having a red [communist] surface and white [capitalist] core.”<sup>129</sup> Finally, Liu noted that the NPL would “establish a market economy” in China, “where the rule of law is imperfect,” and that if China “[did] not emphasize the socialist spirit of fairness and social responsibility, then the market economy is going to be an elitist [one].”<sup>130</sup>

Despite the NPL’s successive revisions and Wu’s proclamations to the Commission, Marxist conservatives continued to voice their displeasure with new drafts.<sup>131</sup> For example, after the seventh draft, Gong again posted an open letter to the top leaders of the CCP challenging the NPL.<sup>132</sup> This time, he upped the ante by garnering 776 other signatures for his letter, among them influential leftist Wei Wei, the former head of the political department of the Beijing Military Region.<sup>133</sup> Gong gained further signatures from persons representing nearly all walks of life in Chinese society: peasants, students, party members, and former officials, such as Li Chengrui, former head of the National Bureau of Statistics.<sup>134</sup> The letter demanded revision of the NPL to “correct” areas that allegedly contradict constitu-

127. See Li, *supra* note 106.

128. *Id.*

129. Hannah Beech, *Is China Turning Back the Clock?*, TIME, Mar. 14, 2006, <http://www.time.com/time/world/article/0,8599,1173035,00.html>. Liu’s use of colors in his metaphor is traceable to the CCP’s struggle against Jiang Jieshi (Chiang Kai-shek). During the Chinese Civil War, the Red Army fought the Nationalists. In April of 1927, the Nationalists began a purge of communists, known as the White Terror, with Shanghai, home of the CCP, receiving the worst of it. See STELLA DONG, SHANGHAI: THE RISE AND FALL OF A DECADENT CITY 154-93 (2000) for an account of White Terror in Shanghai; W. SCOTT MORTON & CHARLTON M. LEWIS, CHINA: ITS HISTORY AND CULTURE 175-200 (4th ed., 2005) for a concise summary of the Chinese Civil War. Liu’s invocation of red versus white has significant cultural meaning for the Chinese and especially for CCP members.

130. Khan, *supra* note 88.

131. After Gong met with the Commission of Legislative Affairs, the four subsequent revisions of the NPL (the fourth, fifth, sixth, and seventh readings) paid greater attention to the status of state-owned property. See Li, *supra* note 113 (“The final four deliberations over the course of one year saw the fulfillment of [Wu’s] requirements . . . [Moreover,] the most recent draft has also stressed public ownership as the heart of the country’s basic economic system.”).

132. Chua Chin Hon, *Proposed Property Law under Fire Again: Hundreds of Conservatives Sign Letter Saying the Law Will Let Corrupt Officials Keep Their Gains*, THE STRAITS TIMES (Singapore), Dec. 14, 2006, available at [http://www.lexis.com/research/retrieve?\\_m=1f6761baa73d181b1e0cd1223475a34f&docnum=1&\\_fmtstr=FULL&\\_startdoc=1&wchp=dGLbV1W-](http://www.lexis.com/research/retrieve?_m=1f6761baa73d181b1e0cd1223475a34f&docnum=1&_fmtstr=FULL&_startdoc=1&wchp=dGLbV1W-zSkAB&_md5=68a1f0544a7884e861187cfd7e07a86&focBudTerms=&focBudSel=all)

zSkAB&\_md5=68a1f0544a7884e861187cfd7e07a86&focBudTerms=&focBudSel=all. (“A loose coalition of leftist scholars and conservative former officials have launched a fresh attack on China’s controversial draft property law, criticizing it for contravening the country’s Constitution. The unusual move is the second time this year that the conservative camp has openly challenged the draft law, which aims to protect the assets of ordinary Chinese.”).

133. *Id.*

134. *Id.*

tional provisions, such as Article 12 which holds that socialist public property is inviolable and sacred.<sup>135</sup>

#### IV. THE NPL'S FUNDAMENTAL PURPOSE: THE MARXIST FOUNDATION OF ITS STATUTORY LANGUAGE

Despite the success of the reformers' efforts to modernize China, the NPL codified a Marxist conception of ownership and economy. As a result, the NPL's textual provisions offer little assistance to China's effort to reform property rights for its quasi-market economy. The consequences of the NPL's public debate, coupled with the larger struggle to define China's future as detailed above in Part I, generated enough stress for the CCP to ensure that the NPL safeguarded State ownership over China's "productive forces"<sup>136</sup> as the heart of the Chinese economic system.<sup>137</sup> Although the NPL attempts to protect the assets of ordinary Chinese,<sup>138</sup> the ideological tug of Marxism won out against the practical necessity of greater property rights and undermined the NPL's significance. This resulted in a compromised law, which enshrined Marxist concepts of private property as one of the NPL's fundamental principles.

##### A. *The NPL's "Fundamental Principles"*

The NPL is organized in five parts, nineteen chapters, and 247 articles. It opens with a section entitled "Fundamental Principles" that describes in no uncertain terms exactly what the CCP designed the NPL to do. The "fundamental principle," of the NPL, is to help maintain the "basic economic system" and economic order of the socialist market.<sup>139</sup> China's constitution defines the "basic economic system" as socialist public ownership of the means of production.<sup>140</sup> Article 6 of the PRC Constitution enshrines Marx's belief that "from each according to his ability, to each according to his work."<sup>141</sup> Immediately, then, the CCP made clear the NPL is designed to serve the goal of upholding the "basic economic system."<sup>142</sup> In furtherance of this goal, the NPL defines the concepts of "property" and "property rights"<sup>143</sup> in accordance with the Constitution.

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135. *Id.* The article states that Gong and his supporters' "real aim was to stall the passage of the draft law again." However, "[a]ny backsliding on the draft property law would be seen as a blow to the general momentum for legal and market reforms in China." *Id.*

136. *See supra* note 92 (discussing Marx's definition and conception of ownership). (Which work in note 93??)

137. One might also reasonably infer, based on the foregoing, that the CCP reformers pushed closer to the privatization of land than most Marxists conservatives would allow.

138. *See Hon, supra* note 132.

139. NPL, *supra* note 10, at art. 1.

140. XIAN FA art. 6 (1982)(P.R.C.).

141. *Id.*

142. XIAN FA art. 6 (1982)(P.R.C.)

143. NPL, *supra* note 139, at art. 2.



Insofar as the 1982 PRC Constitution is “a statement of current policy,”<sup>144</sup> the NPL represents no major shift away from traditional Marxist notions of economy, society, or politics. In short, the “fundamental principles” expressed in the first articles of the NPL generally erode, if not destroy, any large effect it may have had, despite the widely-held belief that its subject matter would ensure the NPL would be “landmark.”<sup>145</sup> Part I of the law makes explicit that the “fundamental principle” behind the NPL is to assist the State in upholding a system of production consistent with the CCP’s Marxist view of economics.<sup>146</sup> The stated reason for the NPL’s existence is to “[maintain] the national basic economic system.”<sup>147</sup> This raises the clear inference that the CCP feels China’s market growth represents a threat to its “basic economic system.”<sup>148</sup> Hence, the CCP views the growth of private property not as an asset but as a potential hazard, which the NPL needs to control through its provisions.

The remaining articles in Part I, Chapter I (all asserting the NPL’s “fundamental principles”) reinforce this notion. Article 3, for example, states that in the “primary stage” of socialism the State adheres to the “basic economic system,” which the NPL is designed to maintain according to Article 1.<sup>149</sup> Whether the NPL continues to apply when the CCP decides that China is no longer in the “primary stage” of socialism is unclear.<sup>150</sup> It is likely, however, that when the policy regarding which stage of socialism China is in changes, so will the law.<sup>151</sup> There is no

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144. Jones, *supra* note 103, at 713 (stating, “The constitution is not written for the ages. It is a statement of current policy. When the policy changes, the law ipso facto changes. . . . Policy in China is law. It does not merely influence law.”) (emphasis in original).

145. *Id.*

146. NPL, *supra* note 139, at art. 1.

147. *Id.*

148. *Id.*

149. *Id.* art. 3.

150. The term “primary stage of socialism” is a hybrid concept representing the mixed types of economy that the CCP recognizes, *i.e.*, developing societies productive forces which is often in contradiction to Marxist economic thought. See HENRY YUHUI HE, *DICTIONARY OF THE POLITICAL THOUGHT OF THE PEOPLE’S REPUBLIC OF CHINA* 385-88 (2001). He states that the CCP adopted the “primary stage of socialism” concept at the 13th National Congress, held in October 1987. There, CCP General Secretary Zhao Ziyang expanded on this theory, which the Party adopted because it confirmed two Marxist assertions: “(1) only on a high degree of commercialization and socialization of production can socialism be built;” and (2) “productivity is the ultimate determinant in the development of any society.” *Id.* at 386. Once confirmed, the Party adopted the “one center, two basic points” slogan to identify what it had done. In short, the “one center” was the economic construction that was to be the sole focus of the Party. *Id.* The “two points” consisted of upholding reform, while also upholding the “four cardinal principles.” *Id.* Thus, in China, socialism is viewed as required to develop the “productive forces” of the economy in order to reach real communism. *Id.* at 387. Marx viewed socialism as the first, or lower stage, of a Communist society. *Id.* at 385.

151. See Jones, *supra* note 103, at 713 (noting that “The constitution is not written for the ages. It is a statement of current policy. When the policy changes, the law ipso facto changes.”).

indication in the NPL of any intent for the law to remain in force once China is no longer in the “primary stage” of socialism.<sup>152</sup>

Moreover, the NPL must be considered in light of traditional Marxist thought. According to Marxism, human economic and social development ultimately lead to the abolition of private property.<sup>153</sup> Thus, any movement from the primary stage would likely precipitate a response from the CCP that the NPL is no longer necessary or applicable.

In addition, although the NPL does state that property rights are protected from infringement by others,<sup>154</sup> it does not grant any new private property rights. Rather it only recognizes that some different types or forms of ownership exist in light of the primacy of the State.<sup>155</sup> This arrangement is buttressed by Article 5, arguably the most dangerous to any effectiveness the NPL may have. Article 5 dictates that the type and content of property rights will be determined by legislation.<sup>156</sup> Since it is the State, and by extension the CCP, that is responsible for drafting the laws described in Article 5, this clause effectively allows the CCP to expand, restrict, or abolish any of China’s property rights as it sees fit. Leaving the content and types of property rights to future legislation does little to assist the existing property rights regime.

Finally, the remainder of the NPL’s “fundamental principles” condition any property rights on registration<sup>157</sup> and compliance with laws, social morality, the legitimate rights and interests of individuals, and avoidance of harm to the public’s interest.<sup>158</sup> The nature of what “compliance” with “social morality,” individuals’ “legitimate rights,” and the “public’s interest” means is unclear, and the NPL leaves those amorphous concepts undefined.<sup>159</sup> The more important point, however, is that the “attainment and exercise of property rights” is not grounded in

152. This “primary stage of socialism” may persist for a long time, however. According to President Jiang, as of 1997, China remained in the “primary stage of socialism.” He, *supra* note 150, at 385-386 (“The primary stage of socialism is an undeveloped stage: it will take a least a century to complete this historical process.” This longevity raises another problem, however. China’s citizens will begin to rely on the limited property rights that might spring from the NPL. Once China moves beyond that stage, a whole system of relied on property rights would simply vanish since the NPL would likely no longer be applicable. Thus, the “primary stage of socialism” theory repudiated and criticized non-economic reformers in the CCP).

153. *See, e.g.*, ANTHONY GIDDENS, CAPITALISM AND MODERN SOCIAL THEORY 16-17 (1971) (“Overcoming alienation, Marx declares, hinges upon the suppression of private property. . . . What is demanded is a more thorough-going reorgani[z]ation of society, based upon the eradication of the contemporary relationship between private property and wage-labour.” Later, Giddens states: “The destruction of private property is certainly a necessary condition for the transition to a new form of society.” Thus, there is a movement *away* from private property and the relationships it creates that permeates the Marxist goal of establishing a Communist society.

154. NPL, *supra* note 139, at art. 4.

155. *Id.* at art 5. Indeed, the NPL explicitly states that the State shall consolidate and develop the public sector of the economy, and encourage the other sector, *i.e.*, the private sector, while allowing “diverse forms of ownership” to exist side by side.

156. *Id.*

157. *Id.* at art. 6.

158. *Id.* at art. 7.

159. *Id.*

some bedrock legal principle, encouraging the stabilization of such rights, but instead, it hinges on conformity with the vague concepts of “social morality” and not harming the public interest.<sup>160</sup>

Taken together, the NPL’s “fundamental principles” combine to give the CCP great authority to expand or cabin property rights. This power solidifies the State’s continued central role in China’s basic economic system, allowing the CCP to augment or curtail private property rights as it sees fit to uphold the “basic economic system.”<sup>161</sup> When viewed in the Chinese Marxist context of the “primary stage of socialism,” the NPL does nothing to encourage private property rights.<sup>162</sup> Rather, it is designed to manage such rights insofar as they are needed to develop the productive forces of China’s emerging economy.<sup>163</sup>

### ***B. The NPL’s Requirement of Registration For Recognition of Real Property Rights***

After the CCP articulated the NPL’s “fundamental principles,” it turned its attention to defining how to trigger property rights for both real and personal property.<sup>164</sup> While the establishment of rights in personal property is generated upon delivery of said property,<sup>165</sup> the establishment of property rights in real property is more involved.

Section I, of Chapter II, Articles 9-22, deal with establishing private property rights over real property.<sup>166</sup> Article 9 holds that the “establishment, modification, transfer and lapse (hereinafter collectively referred to as “Real Property Rights”) of the right in real property shall only take effect upon registration pursuant to laws.”<sup>167</sup> Thus, registration is a condition precedent to any real property rights pursuant to “laws” only vaguely referenced.<sup>168</sup> According to Article 11, registration under the NPL requires the interested party to “provide evidentiary materials showing the ownership as well as other necessary materials specifying the site and size of the real property.”<sup>169</sup> Only when these materials are provided, and the real property is registered do Real Property Rights become effective under the NPL’s provisions.<sup>170</sup>

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160. *Id.*

161. XIAN FA art. 6 (1982)(P.R.C.)

162. NPL, *supra* note 10, at art. 4.

163. *See supra* text accompanying notes 150, 152, 153.

164. NPL, *supra* note 139, at pt. I, ch. II.

165. *Id.* art. 23.

166. *Id.* at arts. 9-22.

167. *Id.* at art. 9. (emphasis added)

168. Of note is the CCP’s exemption of the requirement to register state-owned natural resources, “which might not be registered.” NPL, *supra* note 139, at art. 9

169. *Id.* at art. 11.

170. *Id.* art. 14.

This registration requirement is troubling for myriad reasons. First, mandated registration seems only to apply to private, individual landowners.<sup>171</sup> Although the NPL does not address this precisely, State- and collectively-owned lands do not require registration for the establishment of their Real Property Rights.<sup>172</sup> The State's property holdings are defined in Chapter 5, Articles 45-57. Article 47 defines the State's property as essentially all land available for ownership.<sup>173</sup> Specifically, the State lays claim to the urban land outright, and to rural and suburban land as "according to law," which the CCP is responsible for drafting.<sup>174</sup> Further, there is no individual ownership of China's collectively-owned lands.<sup>175</sup> Thus, only China's private property owners appear required to register in order for their rights in real property to have any legal effect.<sup>176</sup>

This requirement creates a real property register, compliance with which is required if property owners want any meaningful, effective rights, in a regime governed by an ideology dedicated to erasing the concept of rights, especially ownership, over the very property the owner is registering.<sup>177</sup> Should any shift from the "primary stage of socialism" occur, or a more robust strain of Marxism gain sway in China, that registry would prove a good resource for determining who owns what real property, and to what extent. Any emerging "bourgeois" class must use such a registry in order to have their Real Property Rights recognized. The distrust that private property owners may feel towards the CCP might lead some to forego the registry. If such an attitude prevails, the NPL will have failed in "clarifying"<sup>178</sup> China's property rights.

Taken together, the NPL's first chapters reveal its purpose. It is not designed to break free from Marxist conceptions of property, economics, politics, etc. It treats the emergence of private property as a temporary necessity while the State focuses on developing China's productive capacities during the "primary stage of socialism."<sup>179</sup> The very existence of the NPL, and the CCP's attempts to manage private property rights through further legislation and registration, implies that China's "primary stage of socialism" is too weak to completely exclude "diverse

171. *Id.* art. 9.

172. ANNIE J. DE ROO & ROBERT W. JAGTENBERG, YEARBOOK LAW & LEGAL PRACTICE IN EAST ASIA 76 (1995) (noting that "Chinese law divides ownership into state-owned and collectively-owned land. Both forms of ownership are based on the principle that there is no individual ownership of land in the PRC. Land is always publicly owned.").

173. NPL, *supra* note 10, at art. 47.

174. *Id.* Such an expansive claim to land ownership only reinforces Roo and Jagtenberg's point. Besides urban, rural, and suburban land, not much is left to which to lay claim.

175. *See* NPL, *supra* note 139, at arts. 58-63, for details on collectively-owned land. None of these articles mention a requirement of registration for such lands.

176. *Id.* art. 14.

177. GEORGE M. ARMSTRONG, THE SOVIET LAW OF PROPERTY: THE RIGHT TO CONTROL PROPERTY AND THE CONSTRUCTION OF COMMUNISM 149 (1983) (noting that both Marx and Lenin, "understood the nationalization of property to be but one step in the abolition of property, *i.e.*, of ownership altogether.") (emphasis in original).

178. NPL, *supra* note 10, at art. 1. A stated "fundamental principle" of the NPL was to "clarify" property rights through its provisions.

179. *See supra* notes 150, 152.

forms of ownership.”<sup>180</sup> When viewed in the context of Marxian conceptions of staged history, however, the conclusion emerges that the CCP’s goal to build a true socialist society will eventually collide with NPL, and one will have to yield.

#### V. THE NPL AND HU’S “NEW SOCIALIST COUNTRYSIDE”: REINFORCING THE RURAL STATUS QUO

The NPL had the potential to impact China’s countryside on an unprecedented scale. Instead, the CCP passed on the opportunity to effect substantive economic reform in China’s countryside via expanded private property rights. The NPL will not change the status of China’s rural citizens, because it reinforces the existing property rights structure already in place. As a consequence, the NPL does not assist, and may actually hamper, the Hu administration’s efforts to implement its “new socialist countryside” agenda.

While the NPL attempted to define and bestow private property rights, the CCP failed to change the existing property rights structure in China’s rural areas, especially in regards to privatizing ownership of a key asset: land.<sup>181</sup> Although the NPL does attempt to protect private property,<sup>182</sup> it does nothing to change Chinese law that denies land ownership to its rural residents.<sup>183</sup> In short, the NPL simply fortifies the status quo of China’s rural property rights regime.

At the same time the NPC reviewed and revised the NPL before its passage, President Hu committed his administration to implementing a “New Deal” for China.<sup>184</sup> His plan includes increased attention to the plight of those the CCP believes China’s economic reforms have benefited the least, specifically China’s

180. NPL, *supra* note 10, at art. 3.

181. See Lindsay Beck & Guo Shipeng, *China Property Law Bolsters Private Rights*, REUTERS, Mar. 8, 2007, <http://www.reuters.com/article/worldNews/idUSSP36543620070308> (“China on Thursday unveiled a landmark law on property rights that will bolster protection of private assets and stem illegal expropriation . . . but stops far short of moving toward privatizing collectively owned rural land.”).

182. NPL, *supra* note 10, at art. 4, (“The property rights of the State, collective, individual and other obliges shall be protected and shall not be infringed by any institute or individuals.”). See also *Landmark Property Law Adopted*, *supra* note 16 (“This is the first time that equal protection to state and private properties has been enshrined in a Chinese law.”).

183. *China Says ‘No’ to Land Privatization*, CHINA DAILY, Jan. 30, 2007, [http://www.chinadaily.com.cn/china/2007-01/30/content\\_796867.htm](http://www.chinadaily.com.cn/china/2007-01/30/content_796867.htm) (“China has no intention of privatizing land and cannot do so, said Chen Xiwen, directory of the rural work office of the central government . . .”).

184. See Cheng Li, *The “New Deal”: Politics and Policies of the Hu Administration*, in CHINA AFTER THE SIXTEENTH PARTY CONGRESS – PROSPECTS AND CHALLENGES 9 (T.Y. Wang ed., 2005). Li observes that after Hu ascended to the Party leadership in 2002, instead of challenging former President Jiang’s authority directly he “established his own image as a down-to-earth populist leader whose policy priorities differ significantly from those of his predecessor.” *Id.* at 8. As part of that process, Hu “outline[d] a . . . “New Deal” (*xinzhgen*) for China’s future.” *Id.* at 9. Instead of focusing on strictly on economic growth like his predecessor, Hu’s New Deal would emphasis a “more balanced regional economic development to reduce regional disparity [and show] increased concern for social justice, fairness, and . . . [a] social safety net.” *Id.*

poor countryside residents, which consist of mainly farmers.<sup>185</sup> The NPL offered a prime opportunity<sup>186</sup> to grant land ownership rights to those rural residents, significantly aiding Hu's plans to develop rural China. Instead, what remains is the NPL's codification of the current system of collective (state) ownership and a thirty-year usufructuary right, again undermining the contention that the NPL is indeed "landmark."

#### **A. Hu's Goal: Building a "Harmonious Social Society" via a "New Socialist Countryside"**

On October 11, 2006, the Sixth Plenum of the Sixteenth Central Committee of the CCP adopted a resolution to build a "harmonious socialist society" by the year 2020.<sup>187</sup> This policy arose out of the imbalance accompanying China's economic development and outbreak of protests in rural China.<sup>188</sup> A major factor in this imbalance is China's widening income distribution between the rural and urban areas.<sup>189</sup> A central consideration for the Hu-Wen administration is to make China's economic development more egalitarian, especially by lessening the wealth divisions between China's rural and urban residents.<sup>190</sup> Thus, the effort to build a

185. Richard McGregor & Yu Sun, Comment, *Challenging Change: Why An Ever Fiercer Battle Hinders China's March to the Market*, FIN. TIMES (London), Feb. 28, 2006, at 15 ("[Hu and Wen declared that] improving the lot of those left behind by the boom years, especially farmers, would be a hallmark of their administration").

186. Peter Harmsen, *New Property Law Sparks Debate*, BUS. IAFRICA, Mar. 16, 2007, <http://business.iafrica.com/worldnews/695848.htm> ("[M]urky definitions about who owns what assets are at the heart of some of modern China's most serious conflicts, such as bloody clashes over land use rights in the countryside."). See Baston, *supra* note 10, at A4.

187. WING THYE WOO, A HARMONIOUS SOCIALIST SOCIETY OR BUST 1 (2006), available at <http://www.brook.edu/dybdocroot/views/papers/20061206woo.pdf> ("Among the disharmonious features mentioned in the [resolution of the CCP was] . . . 'the serious imbalance in the social and economic development between urban and rural areas, and across China's thirty-one provinces.'"). See also Wang Weiping & Zhu Lin, *China Economic Review: China Aims at a Harmonious Society*, XINHUA, Dec. 17, 2004, [http://news.xinhuanet.com/english/2004-12/17/content\\_2348778.htm](http://news.xinhuanet.com/english/2004-12/17/content_2348778.htm) ("Never before has 'fostering a harmonious society' been put on the high agenda of economic work. This decision came in a timely manner, experts say.").

188. *Rural Unrest in China*, ECONOMIST, Mar. 15, 2007, [http://www.economist.com/displayStory.cfm?story\\_id=8864384&fsrc=RSS](http://www.economist.com/displayStory.cfm?story_id=8864384&fsrc=RSS) [hereinafter *Rural Unrest*] (describing a bloody outbreak in China's Hunan province, the "government's preoccupation with rural unrest," and the CCP's "effort to address [the] root causes of rural discontent" by spending more on rural health care, education, and welfare systems).

189. See *Gov't to Reduce Income Gap Through Reform: Officials*, XINHUA, July 18, 2006, available at <http://www.chinagate.com.cn/english/48108.htm>. See also WING THYE TOO, *supra* note 187.

190. See *China Eyes Narrowing Rural-Urban Wealth Gap*, REUTERS, Mar. 2, 2006, available at [http://www.chinadaily.com.cn/english/doc/2006-03/02/content\\_525752.htm](http://www.chinadaily.com.cn/english/doc/2006-03/02/content_525752.htm) ("[A]nnual parliamentary sessions open on Sunday with the government expecting to push through steps it hopes will narrow the wealth and development gap between its cities and vast countryside."); *China: The First Step in a Five-Year Plan*, STRATEGIC FORECASTING, June 10, 2006, [http://www.stratfor.com/products/premium/read\\_article.php?id=267453](http://www.stratfor.com/products/premium/read_article.php?id=267453) ("To implement China's five-year plan to bridge its urban-rural income gap, Beijing must reign [sic] in the rampant corruption and wanton fiscal policies."); Edward Cody, *China Warns Gap Between Rich, Poor Is Feeding Unrest*, WASH. POST, Sept. 22, 2005, at A16, available at

harmonious society is really an effort to redistribute China's wealth and develop its rural areas.<sup>191</sup>

Hu's task is significant. In 2006, rural incomes stood at \$448 (US),<sup>192</sup> whereas "the average city dweller's income reached \$1,300."<sup>193</sup> Urban income balloons to seven times that if one adds the value of urban benefits not available in the countryside.<sup>194</sup> The current Hu-Wen administration sees this income division as the driving force behind China's increasing social unrest,<sup>195</sup> something the ad-

<http://www.washingtonpost.com/wp-dyn/content/article/2005/09/21/AR2005092100727.html> ("China's official media warned Wednesday that the gap between rich and poor has become alarmingly wide during two decades of economic liberalization, contributing to spreading unrest in towns and villages across the country.") See also Richard Spencer, *China rich-poor gap is world's worst*, TELEGRAPH (London), Mar. 26, 2004, <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2004/02/27/wchina27.xml&Sheet=news/2004/02/27/ixworld.html> ("A report by the Chinese Academy of Social Sciences . . . said the earnings of urban residents were now more than three times those of residents in rural areas." The report by the Chinese Academy, "and its publication in the state media, [are] the latest sign of the government's concern that the country's rapid economic reforms have left most of its population behind, and may even become a threat to social stability."). See also *80% Chinese Youth Think Narrowing Wealth Gap Very Urgent: Survey*, XINHUA, Dec. 25, 2006, <http://www.chinagate.com.cn/english/reduction/49590.htm> (article describing surveys conducted on the wealth gap, showing that most respondents felt it was "very serious" and needed narrowing "urgently"). For a more comprehensive treatment of China's uneven economic development see SHAO GUANG WANG, *THE POLITICAL ECONOMY OF UNEVEN ECONOMIC DEVELOPMENT: THE CASE OF CHINA*, 1, 41-77 (1999) ("This chapter examines the extent of regional disparities in today's China as well as the issue of whether the market-oriented reforms implemented in 1978 have ameliorated or aggravated existing inequalities.").

191. Jonathan Watts, *China Vows to Create a 'New Socialist Countryside' for Millions of Farmers*, THE GUARDIAN (London), Feb. 22, 2006, available at <http://www.guardian.co.uk/china/story/0,,1715078,00.html> ("Against a background of rising rural unrest, China . . . unveiled ambitious plans to help the 800 million people living in the countryside catch up economically with people in the cities. More rural investment[,] . . . agricultural subsidies[,] . . . and improved social services are the main planks of [Hu's] 'new socialist countryside.'").

192. Adam Wolfe, *China's Priorities on Display*, ASIA SENTINEL, Mar. 22, 2007, [http://www.asiasentinel.com/index.php?option=com\\_content&task=view&id=427&Itemid=31](http://www.asiasentinel.com/index.php?option=com_content&task=view&id=427&Itemid=31) ("The rural-urban divide is worsening and with it the social strains. Rural incomes average 3,465 yuan (US\$448) a year, or about one-third of those in the coastal areas.").

193. Melinda Liu & Jonathan Ansfield, *China's Private Property Rebels*, NEWSWEEK, May 15-22, 2006, <http://www.msnbc.msn.com/id/12667617/site/newsweek/prin/1/displaymode/1098> ("This 3.22 to 1 ration represents the worst urban-rural income gap in the modern history of China.").

194. See Antoaneta Bezlova, *China: Back to the Land*, INTER PRESS NEWS, Mar. 6, 2006, <http://ipsnews.net/news.asp?idnews=32380> (" . . . the Chinese Academy of Social Sciences estimates that the average urban income is a whopping seven times that of rural areas, if benefits like superior education and medical care available to urban dwellers are included.").

195. Cody, *supra* note 190 ("China's official media warned Wednesday that the gap between rich and poor has become alarmingly wide during two decades of economic liberalization, contributing to spreading unrest in towns and villages across the country. . . . [T]he Standing Committee of the People's Political Consultative Conference, one of China's two legislative bodies, declared in July that the widening income gap 'is the root cause of disharmony.'").

ministration is acutely focused on.<sup>196</sup> To achieve this “harmonious society,” Hu has determined it is necessary to build a “new socialist countryside.”<sup>197</sup> Aimed at China’s 800 million rural residents<sup>198</sup> the “new socialist countryside” program is intended to pay for items such as health care<sup>199</sup> and education,<sup>200</sup> and is the primary focus of the next Five-Year plan (2006-2010).<sup>201</sup>

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196. *Id.* (Cody notes that “Riots and other violent protests, which the government acknowledges are increasing dramatically, have become a major issue for President Hu Jintao’s government. Hu and Premier Wen Jiabao have made calls for ‘harmonious society’ and ‘social stability’ watchwords of their speeches over the last year.”) *See also Essential Steps to Tackle Widening Income Gap*, CHINA DAILY, June 2, 2006, <http://www.china.org.cn/english/GS-e/170209.htm> (“President Hu Jintao recently presided over a meeting of leading officials on the issue of wealth distribution. This clearly indicates that the narrowing of the income gap tops the central government’s agenda.”).

197. *China Releases Policies on Building a “New Socialist Countryside,”* XINHUA, Feb. 21, 2006, [http://news.xinhuanet.com/english/2006-02/21/content\\_4208090.htm](http://news.xinhuanet.com/english/2006-02/21/content_4208090.htm) (“China’s central authorities released Tuesday its first major document of the year which calls for the construction of a ‘new socialist countryside’ as the foremost task facing China in the 2006-2010 five-year period.”).

198. Watts, *supra* note 191 (“More rural investment and agricultural subsidies and improved social services are the main planks of a policy to create a ‘new socialist countryside’, which the president, Hu Jintao, says is a priority.”). A study by the Organization of Economic Development highlighted that while China devoted nine percent of its GDP in 2002 to public fund spending, “a relatively low portion of outlays are made on basic human welfare and development needs such as education, health, science and social security.” *Challenges for China’s Public Spending - Where the Money is Going: A Reorientation Towards Human Development is Needed*, OECD (2003), [available at http://www.oecd.org/document/39/0,2340,en\\_2649\\_37407\\_36157799\\_1\\_1\\_1\\_37407,00.html](http://www.oecd.org/document/39/0,2340,en_2649_37407_36157799_1_1_1_37407,00.html). It seems that Hu is making good on his promises. *See Rural Unrest, supra* note 188 (“In March [2007], the ministry of finance [sic] announced that central government spending on healthcare would rise by 90% (over last year), while education would rise by 40%.” Further, at the most recent NPC convention, the CCP declared that the “the central government . . . would spend Rmb392bn (US\$50.6bn) on rural development, an increase of Rmb52bn over 2006 and of Rmb94bn over 2005.”) At least in terms of a monetary commitment Hu is following through.

199. *See Rural Unrest, supra* note 188; Watts, *supra* note 191. *See* OFRA ANSON & SHIFANG SUN, HEALTHCARE IN RURAL CHINA: LESSONS FROM HEBEI PROVINCE (2005) for a complete look at health care in rural China.

200. *Rural Unrest, supra* note 188.

201. *China Releases Policies on Building a “New Socialist Countryside,” supra* note 197 (“Central authorities released . . . its first major document of the year which calls for the construction a ‘new socialist countryside’ as the foremost task facing China in the 2006-2010 five-year period.” The article goes on to note that 2006 marked the “third consecutive time since 2004 that agriculture, farmers and countryside development have been the first document of the central authorities.”). The fact that rural areas are receiving first document priority from the CCP emphasizes the stress the CCP is placing on its development. *See also* Craig Simons, *China Pledges Increased Spending on Rural Poor*, COX NEWS SERVICE, Mar. 7, 2006, [http://www.coxwashington.com/reporters/content/reporters/stories/2006/03/07/BC\\_CHINA\\_SOC\\_IETY07\\_COX.html](http://www.coxwashington.com/reporters/content/reporters/stories/2006/03/07/BC_CHINA_SOC_IETY07_COX.html) (“Beijing will spend an additional \$5.2 billion on rural schools, hospitals, crop subsidies and other programs, raising spending on those areas by 15 percent to nearly \$42 billion.”); *Rural Unrest, supra* note 188 (“the central government. . . will spend Rmb392bn (US\$50.6bn) on rural development this year, an increase of Rmb52bn over 2006 and of Rmb94bn over 2005.”).



Additionally, the rural poor face another significant problem: illegal land seizures<sup>202</sup> by corrupt officials.<sup>203</sup> Corrupt officials<sup>204</sup> often illegally take land<sup>205</sup> and then collude with builders to reap some of the profits that come with capital improvements on the land.<sup>206</sup> The problem is pervasive. In 2003, the Ministry of Land and Resources (MLR) disciplined roughly 168,000 corrupt officials involved in illegal land deals.<sup>207</sup> In 2006, the MLR issued a report stating that more than sixty percent of recent land acquisitions for construction were illegal.<sup>208</sup> Further,

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202. Joseph Kahn, *In China a Warning on Illegal Land Grabs*, N.Y. TIMES, Jan. 20, 2006, available at <http://www.iht.com/articles/2006/01/20/news/china.php> (“Land grabs by officials eager to cash in on China’s booming economy are provoking mass unrest in the countryside.”). Quoting Premier Wen, Kahn states: “In some areas, illegal seizures of farmland without reasonable compensation have provoked uprisings. This is still a key source of instability in the rural areas and even the whole society.” *Id.*

203. Minxin Pei, *The Tide of Corruption Threatening China’s Prosperity* (Comment), FINANCIAL TIMES, Sept. 27, 2006, at 13 (“[O]fficial corruption is a serious matter. For the Chinese Communist party, it poses the most lethal threat to its survival.”).

204. See SAICH, GOVERNANCE AND POLITICS OF CHINA, 329-36 (New York: Palgrave, 2001) (Saich sees the “pursuit of economic riches without genuine marketization and democratization and where power remains hierarchically structured with information dependent on position and party membership” as the causal factors behind CCP corruption.).

205. See Kahn, *supra* note 202.

206. *China: The First-Step in a Five-Year Plan*, STRATEGIC FORECASTING, June 9, 2006, [http://www.stratfor.com/products/premium/read\\_article.php?id=267453](http://www.stratfor.com/products/premium/read_article.php?id=267453) (“In many instances, local officials used their authority to seize land from farmers and to give it to businesses for commercial development—an inexpensive means of lining more than a few official pockets.”).

207. Edward Cody, *China’s Land Grabs Raise Specter of Popular Unrest: Peasants Resist Developers, Local Officials*, WASH. POST, Oct. 5, 2004, at A1, available at <http://www.washingtonpost.com/wp-dyn/articles/A6968-2004Oct4.html> (“The Ministry of Land and Resources said it disciplined officials involved in about 168,000 illegal land deals last year.”).

208. *Beijing Orders Probe into Illegal Land Deals*, TAIPEI TIMES, June 8, 2006, at 10, available at <http://www.taipetimes.com/News/worldbiz/archives/2006/06/08/2003312359> (“More than 60 percent of recent land acquisitions for construction in China are illegal, with the figure rising to 90 percent in some cities, the government said in a report demanding investigations of such deals.”); *Real Estate Sector a Hotbed for Corruption: Minister*, XINHUA, Feb. 19, 2007, <http://www.china.org.cn/english/BAT/200501.htm> (describing Wang Guangtao’s, Minister of Construction, remarks at a recent conference “on building a clean and honest government.” Quoting Wang, *Xinhua* reported that “the industry suffers institutional loopholes in preventing and combating corruption.”).

these illegal seizures, often for little compensation,<sup>209</sup> have resulted in widespread protest, some 23,000 demonstrations in 2006 alone.<sup>210</sup>

For the Marxist conservatives these social problems call for bridling China's economic reforms, reasoning that China's increasing social problems only arose when China began implementing market procedures: "For the Marxists, growth in inequality and popular disenchantment with reform are directly related to the rise of the entrepreneurial economy and private wealth."<sup>211</sup> The Hu administration, however, cannot afford to neglect an emerging middle class,<sup>212</sup> "whose tolerance of party rule is particularly vital to its grip on power."<sup>213</sup> Thus, the Hu administration must be committed to moving forward with economic reform,<sup>214</sup> while also addressing the problems occurring in the countryside.<sup>215</sup>

209. *Caught Between Right and Left*, *supra* note 33. ("The large-scale appropriation of farmland in recent years for housing and factory construction has rendered million so farmers landless. Many have been given little to no compensation."). *See also* Cody, *supra* note 207. There, Cody tells the story of landless farmers in Minhou County, whom local Party officials promised between four and five thousand dollars for their land when those officials seized it in order to build factories on it. In addition, the local officials promised the farmers jobs in the new factories. Yet, the farmers never received more than \$150 for their land, and because of the "bitterness" that arose over the compensation issue, received no jobs from the local officials either.

210. *Caught Between Right and Left*, *supra* note 33. In 2005, China had around 87,000 protests, or 240 a day, erupt for all causes, including land and property seizures.

211. *Id.*

212. *Id.* ("Neglecting the middle class would be even more perilous for the current Chinese leadership than it was perceived to be by Mr. Jiang and Mr. Deng" because of "sweeping privatization" of housing and the growth of private businesses); *see also* Pete Engardio, *China is a "Private-Sector Economy,"* BUS. WEEK ONLINE, Aug. 22, 2005, [http://www.businessweek.com/magazine/content/05\\_34/b3948478.htm](http://www.businessweek.com/magazine/content/05_34/b3948478.htm) (quoting Fan Gang, an eminent Chinese economist based in Beijing, "the private sector accounts for 70% of the gross domestic product."). Having no law to clarify and define the rights for the majority share of China's GDP undermines the ability of CCP to control it. Thus, codifying the existing situation as perceived by the CCP is what the NPL is aimed at, not reforming the property rights system. Further, it is undisputed that China's urban dwellers have greater property rights than do their rural counterparts, although full, titled ownership is not given in China's cities either. Nevertheless, urban dwellers have more property rights, and consequently more wealth, than their rural brethren.

213. *Caught Between Right and Left*, *supra* note 33.

214. *China's Next Revolution*, ECONOMIST, Mar. 8, 2007, available at [http://www.economist.com/opinion/displaystory.cfm?story\\_id=8815075](http://www.economist.com/opinion/displaystory.cfm?story_id=8815075) ("The party's decision to enact the [NPL] in spite of that (ideological) resistance is a great symbolic victory for economic reform and the rule of law."). Additionally, earlier economic reforms, specifically since the early 1990s, have made a whole new propertied class in China's cities, which the NPL had to address as well. Long gone are the days of entirely non-propertied groups. *See Caught Between Right and Left*, *supra* note 33 (stating, "Sweeping privatisation (sic) of housing since the late 1990s has radically changed the social and political fabric of urban China. Property rights have become a topic of critical interest to urban residents anxious to protect their new assets" with the strength of law.). *See also* Baston, *supra* note 10, at A4 ("Huge numbers of Chinese now own their homes and run their own businesses . . .").

215. *See, e.g., China to Improve Villagers' Living Conditions*, XINHUA, Feb. 21, 2006, [http://news.xinhuanet.com/english/2006-02/21/content\\_4208090.htm](http://news.xinhuanet.com/english/2006-02/21/content_4208090.htm) ("The Chinese government vowed to focus on the development of villages . . . in a substantial, stable manner, and in line with

While striving forward to build a twenty-first century economy, China is governed by the nineteenth century ideology of Marxism.<sup>216</sup> As a result, the current NPL text elevates enforce and service the CCP's Marxist beliefs. The NPL strengthens State ownership,<sup>217</sup> and maintains at present the collective<sup>218</sup> ownership of other land<sup>219</sup> in exchange for putting private property on an alleged equal legal footing with State owned property.<sup>220</sup> But it is squarely the property right to ownership of land that is needed by China's rural poor to make certain that they too are "ensur[ed] equal legal status and right[s] for development of all market players."<sup>221</sup>

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the principle of thrift.”).

216. WILHELM ROEPKE, *ECONOMICS OF THE FREE SOCIETY* 18 (1963 ed.) (“In fact, the purely economic basis of Marxism must be regarded today as merely an intellectual anachronism.”).

217. NPL, *supra* note 10, at arts. 47-52 (“[U]rban land . . . [s]uch rural land and land on the outskirts of the city as belonging to the State according to law shall be owned by the State.”). Moreover, Article 47 operates to give ownership to the State over that which is not owned by the collective or the individual who owns commercial housing. See Li Bingping, *Urban Housing Privatization*, in *EXIT THE DRAGON? PRIVATIZATION AND STATE CONTROL IN CHINA* 145, 154 (Stephen Green & Guy S. Liu eds., 2005) (“There are owners of commercial housing bought at market price who enjoy full property rights.” Moreover, Article 47 allows for ownership “according to the law.” The NPL gives the State the right to expropriate property in the name of the “public interest,” whatever “public interest” means to the CCP. NPL art. 42. By the NPL's own terms then expropriation is “according to the law.” As well, the “according to the law” phrase gives the CCP a method of exacting ownership over valuable properties that may not be owned by them simply by enacting a new law that declares the State as owner. Thus, through either expropriation or through new legislation the “according to the law” language gives the CCP a means to acquire State ownership over lands the NPL might not have otherwise granted.)

218. The “collective” is a term used to describe the organization of China's farmers set up during the Mao's Great Leap Forward and still forms the basis of rural organization and ownership of land in the countryside. See SAICH, *supra* note 36, at 245-246 (“The countryside was organized on the basis of communes (collectives). These communes functioned at the highest level of economic organization in the countryside and as the basic level of government there.” *Id.* By 1980, the Household Responsibility System (HRS) had been implemented, which contracts out to individual houses. These contracts allow a farmer to work “on a clearly stipulated piece of land for a specific period of time.” The contract includes “all raw materials and means of production except land-use rights and access rights to irrigation facilities, the latter rights being made available by the collective.”).

219. See *China's Clause Four: The Recognition of Property Rights is an Ideological Landmark*, *TIMES ONLINE* (London), Mar. 17, 2007 at para. 4, [http://www.timesonline.co.uk/tol/comment/leading\\_article/article1528023.ece](http://www.timesonline.co.uk/tol/comment/leading_article/article1528023.ece) (“But, in deference to the Left — and to the detriment of China's rural poor — the law maintains the fiction that rural land is ‘collectively’ owned.”).

220. *Caught Between Right and Left*, *supra* note 33 (“The government's desire to keep all constituents happy—but the middle class a bit more so than others—is reflected in the property rights bill.”).

221. NPL, *supra* note 10, at art. 3 (“The State implements the socialist market economy, ensuring equal legal status and right for development of all market players.”).

### **B. Hu's Reality: The NPL's Articles on Collective Land**

“China’s rural residents are hurt by a simple fact: The country still lacks private-property rights. Chinese cannot legally own land.”<sup>222</sup> The NPL does nothing to change this fact. Instead it establishes varying degrees of property rights, if any, for the State, collective, and individuals.<sup>223</sup> Despite Hu’s focus on building a “new socialist countryside,” the majority of China’s citizens<sup>224</sup> are still left without solid, clearly defined ownership rights over land. Thus, the NPL amounts to a missed opportunity to vest meaningful land rights in the majority of China’s rural population.

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222. Liu & Ansfield, *supra* note 193, at para. 3.

223. Chapter 5 of the NPL, titled “State Ownership, Collective Ownership, and Private Ownership,” defines ownership for the State, collective, and the individual. Articles 47-52 articulate what the State owns. For example, the State owns all urban lands (NPL art. 47), and all rural land that belongs to the State “according to the law,” that is, land that belongs to the collective does not belong to the State. *Id.* Articles 58-63 deal with collective ownership of rural and urban properties. Finally, Articles 64-68 deal with individual ownership of properties, including “legitimate income, houses, living goods, production tools and raw materials.” NPL art. 64. The Articles on ownership make clear that the State has extensive property rights, with the collective receiving residual ownership of any land not owned by the State. What is left for individual ownership is unclear, but does not appear to be much. Article 64’s provision relating to ownership of “houses” applies only to urban dwellers and gives them greater security in a valuable asset, (a home), which can be used to enter China’s burgeoning market economy. Housing reform began in the 1980s, as part of the broader reforms initiated by Deng Xiaoping. See Min Zhou & John R. Logan, *Market Transition and the Commodification of Housing in Urban China*, in *THE NEW CHINESE CITY: GLOBALIZATION AND MARKET REFORM* 137, 140 (John R. Logan ed., 2002). The reforms moved housing from centrally planned distribution to market based allocation by selling government houses to the buying public, splitting housing property rights between ownership and occupancy. *Id.* Some property rights allow for full ownership, such as for buyers of commercial housing. See Li Bingping, *supra* note 217. Far more common is the right to occupancy defined by a seventy year lease. Chi Hung Kwan, *Putting in Place the Legal Framework for a Market Economy – High Expectations for the Corporate Bankruptcy Law, Antimonopoly Law, and Law on Real Rights* (NPL), *CHINA IN TRANSITION*, Sept. 22, 2006, <http://www.rieti.go.jp/en/china/06092202.html> (“[I]n the case of urban land for residential use, laws have only recognized the right to use the land (lease) for 70 years even if it was purchased.”). Moreover, the NPL gives ownership rights to the “exclusive parts within the apartment buildings.” NPL art. 70. However, as to China’s rural residents the NPL highlights the status quo. They are still subject to collective ownership of land (NPL art. 60: “As to those owned collectively by peasants of a village, the village’s collective economic organization . . . shall, on behalf of the collective, exercise the ownership.”), and a thirty year usufructuary right (NPL art. 125: “The contracted term of farmland shall by thirty years.”).

224. Official estimates on China’s rural population are around 60 percent. According to the National Bureau of Statistics, as of 2004 China’s rural population is 58.24 percent of its population, or 757 million, if the population is 1.3 billion people. See *Population and Its Composition*, *CHINESE STATISTICAL YEARBOOK 2005*, available at <http://www.stats.gov.cn/tjsj/ndsj/2005/indexeh.htm>. But see *Urbanization is Reducing China’s Rural Population*, Feb. 23, 2006, *PEOPLE’S DAILY ONLINE*, [http://english.people.com.cn/200602/23/en20060223\\_245283.html](http://english.people.com.cn/200602/23/en20060223_245283.html). Chen Xiwen, deputy director of the Office of Central Financial Work Leading Group, estimated China’s rural population at around 750 million residents, despite resident registrations showing a population of some 940 million. If the rural population is indeed 940 million, then the rural to urban residential ratio is around 72.3 percent. Either figure still places the rural residents in the majority.

The NPL contains three articles on collective ownership of real property, none of which provides real property rights, much less land ownership for the rural poor.<sup>225</sup> First, Article 58 of the NPL states that collectively-owned land shall include all “cultivated land . . . owned collectively.”<sup>226</sup> This clause is plainly designed for China’s farming population because they are in the business of cultivating said land. As for the cultivated land, the NPL grants its tenants “the right to possess, utilize, dispose o[f] and obtain profits from its real or movable property in accordance with the laws.”<sup>227</sup> These rights, however, are already permitted.<sup>228</sup> Thus, the NPL does not change the rural property rights structure. The owner of the land remains with the collective, and not the individual<sup>229</sup> – an important distinction and right in China’s undeveloped hinterland, since the land itself is often a good asset.<sup>230</sup>

Second, all other non-cultivated land is owned by the State,<sup>231</sup> meaning it is not available for potential individual ownership by the rural poor either. As mentioned, NPL reinforces this condition by conferring on the State ownership of all “urban lands . . . [as well as] [s]uch rural land and the land on the outskirts of the city as belonging to the State according to law.”<sup>232</sup> The NPL apports all the real property available for possible ownership between the State and the collective, leaving none available for China’s rural population.

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225. NPL, *supra* note 10, at art. 58.

226. *Id.* at art. 58 (ii).

227. *Id.* at art. 39.

228. *See infra* note 238.

229. *See China’s Clause Four, supra* note 219; NPL, *supra* note 10, at art. 39; *Id.* at art. 60 (“As to those owned collectively by peasants of a village, the village’s collective economic organization . . . shall, on behalf of the collective, exercise the ownership.”); *Id.* at 117 (“The owner of the usufructuary right shall, within the extent permitted by law, enjoy the rights to possess, utilize and obtain profits from the real or movable properties owned by others.”). While the local organization of China’s rural areas is beyond the scope of this paper, the important point is that ownership of the land itself rests in hands different from the farmer who works it, vesting the disposition and control of the real property in the hands of the collective, which is where it already rested before the NPL.

230. Mark O’Neill, *No Land for China’s Farmers*, ASIA SENTINEL, Nov. 26, 2007, at para. 11, *available at* [http://www.asiasentinel.com/index.php?option=com\\_content&task=view&id=898&Itemid=31](http://www.asiasentinel.com/index.php?option=com_content&task=view&id=898&Itemid=31) (“For local governments, land is a valuable asset when it can be turned to commercial use. A single transfer of land to a developer or factory owner can bring a mayor or party chief a payment on which he and his family can live for the rest of their lives.”).

231. NPL, *supra* note 10, at arts. 47-52. *See also supra* note 215.

232. NPL, *supra* note 10, at art. 47.

In light of the existing laws regarding rural land management and usage,<sup>233</sup> the NPL's most important provisions to China's farmers detail their usufructuary rights (UR).<sup>234</sup> A UR is "a right to use and enjoy the fruits of another's property without damaging or diminishing it."<sup>235</sup> The NPL maintains that "the owners of the usufructuary right shall, within the extent permitted by law, enjoy the rights to possess, utilize and obtain profits from the real . . . properties owned by others."<sup>236</sup> But this definition does not state anything new. Farmers already "assume responsibility to market . . . surplus [crops,] . . . engage in sideline production,"<sup>237</sup> and keep the remainders for themselves.<sup>238</sup> Indeed, that forms the backbone of the Household Responsibility System (HRS).<sup>239</sup>

At bottom, the NPL's provisions on "ownership" and URs show that the CCP had no real interest in changing the status quo of the property rights regime for China's country-side. Lack of land ownership prevents rural citizens from effectively using such an asset as collateral or security to raise capital, hampering their attempts to enter into China's growing market economy.<sup>240</sup> This condition only

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233. Specifically, the Land Management Law (LML) and Rural Land Contract Law (RLCL). The LML, revised in 1998, "gives farm households a 30-year (instead of fifteen) land rights backed by written contracts." Passed in 2002, RLCL "strengthens farmers 30-year land rights and provides a foundation for a land transfer market." Zhu Kelian & Roy Prosterman, *From Land Rights to Economic Boom*, CHINA BUS. REV., July-Aug. 2006, at 45 available at [http://www.rdiland.org/PDF/PDF\\_Publications/CBR.From%20Land%20Reform%20to%20Economic%20Boom.07.06.pdf](http://www.rdiland.org/PDF/PDF_Publications/CBR.From%20Land%20Reform%20to%20Economic%20Boom.07.06.pdf). The NPL does not offer any assistance on developing the transfer market that the RLCL was designed to foster. See *supra* note 39 (Before passage of the NPL, Wang Zhaoguo ended any questions concerning transfer and mortgaging rights that the NPL might have given to rural residents: "The conditions for lifting such restrictions are not yet ripe, when considering from the country as a whole.")

234. NPL, *supra* note 10, at pt. III.

235. BLACK'S LAW DICTIONARY 1580 (8th ed. 1999). The concept of the UR is essentially the same in Chinese law.

236. NPL, *supra* note 10, at art. 117.

237. MORTON & LEWIS, *supra* note 129, at 231.

238. JAMES A. DORN & XI WANG, *ECONOMIC REFORM IN CHINA: PROBLEMS AND PROSPECTS* 158 (1990) ("Under the arrangement of the household responsibility system, land is contracted to individual households for 15 years. After fulfilling the procurement quota obligations, farmers are entitled to sell the surplus on the markets or retain it for their own use.")

239. MORTON & LEWIS, *supra* note 129, at 231. See also SAICH, *supra* note 36, at 245-46 ("This household contracting system makes the rural household the nucleus of agricultural production, working on a clearly stipulated piece of land for a specific period of time. The contract includes all raw materials and means of production except land-use rights."); FISHMAN, *supra* note 19, at 46-50 (summarizing that the HRS grew out of an agreement among rural peasant farmers sparked by the famines caused by Mao's collectivization policies. Twenty farmers, now known as the Xiaogang Production Brigade, signed a contract in their own fingerprinted blood to divide land which the CCP forbade, fulfill their requirements to the State, and then keep any surplus crop for themselves to overcome the lack of food. Dividing land amounted to a *lese majeste*, but the resulting increase in the Production Brigade's productive outputs persuaded the CCP to adopt such an arrangement nationwide, and the household responsibility system arose.)

240. See O'Neill, *supra* note 230, at para. 8. ("Because farmers cannot own land, they also cannot mortgage their plots to obtain bank loans, leaving them unable to raise long-term capital to invest in supplies and equipment to raise production. Nor can they sell the land or change its

exacerbates the division of wealth President Hu is trying to overcome with his “new socialist countryside.” The CCP’s ideological hostility to private land ownership resulted in the NPL’s restatement of collectivist property rights for China’s rural areas.<sup>241</sup> The NPL simply codifies the system of limited property rights in the countryside.<sup>242</sup> Despite the NPL, China’s rural poor are still landless.<sup>243</sup>

### C. *China’s Wealthy Countryside – A Foregone Opportunity*

China’s countryside is not poor. Its wealth is caught up in inefficient property rights.<sup>244</sup> The amount of money that the Hu administration has committed to rural development pales in comparison to the amount of wealth trapped in unproductive property rules.<sup>245</sup> For the 2007 fiscal year, the CCP has pledged \$50.6 billion for rural development.<sup>246</sup> Yet farmers’ land use rights alone are worth an estimated \$500-\$600 billion.<sup>247</sup> Nevertheless, as Wang stated in his speech before the NPC, the time is “not yet ripe”<sup>248</sup> to allow residents of collectively owned land to mortgage, contract, sell, or otherwise capitalize on that wealth. And the NPL provides

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status. That is a major factor in what is becoming one of the world’s worst disparities between rural and urban incomes.”).

241. O’Neill, *supra* note 230, at para. 4. (“The fact is that despite the country’s unrelenting march towards a market economy, government ownership of the land is such an elemental part of China’s socialist character that the framers were unable to alter the fact and ministries are ignoring the law. In an indication of how controversial the law is, Premier Wen Jiabao did not even mention it in his two-hour opening speech to the 17th Party Congress in October.”).

242. These limited property rights, especially in regards to land, are already the source of many rural grievances. See Antoaneta Bezlova, *China: Rural Unrest Rooted in Land Rights Issues*, INTER PRESS NEWS, Mar. 24, 2006, <http://ipsnews.net/news.asp?idnews=32631> (“The lack of land property rights not only lies at the heart of rising rural instability but is also one of the main constraints on rural income growth.”).

243. The word “proletariat,” is translated into Chinese as *wuchan jieji*, which means one “who does not own property.” CHOIE CHATTERJEE, *THE 20TH CENTURY: A RETROSPECTIVE* 186 (2002).

244. DOUGLASS C. NORTH, *STRUCTURE AND CHANGE IN ECONOMIC HISTORY* 28 (1981) (“A ruler . . . frequently found it in his interests to grant a monopoly rather than property rights which would lead to more competitive conditions . . . . In effect, the property rights structure that will maximize rents to the ruler is in conflict with that [which] would produce economic growth.”).

245. Craig Simons, *China Pledges Increased Spending on Rural Poor*, COX NEWS SERVICE, Mar. 7, 2006, [http://www.coxwashington.com/reporters/content/reporters/stories/2006/03/07/BC\\_CHINA\\_SOC\\_IETY07\\_COX.html](http://www.coxwashington.com/reporters/content/reporters/stories/2006/03/07/BC_CHINA_SOC_IETY07_COX.html) (“Beijing will spend an additional \$5.2 billion on rural schools, hospitals, crop subsidies and other programs, raising spending on those areas by 15 percent to nearly \$42 billion.”); *Rural Unrest*, *supra* note 188 (“the central government. . .will spend Rmb392bn (US\$50.6bn) on rural development this year, an increase of Rmb52bn over 2006 and of Rmb94bn over 2005.”).

246. *Rural Unrest*, *supra* note 188.

247. Keliang & Prosterman, *supra* note 233, at 45.

248. Wang, *supra* note 80.

no support to China's rural citizens in extracting<sup>249</sup> wealth from that property through the ownership of the land.

Overall, real estate is the poor's greatest potential asset. According to one study, the total calculated value of land used, but not legally owned, by the poor of the Third World and former communist countries stands at US\$9.3 trillion.<sup>250</sup> China strengthens, if not proves, the point: "Land represents the single asset of greatest significance to the rural population in China."<sup>251</sup> The NPL's Marxist commitments, however, effectively keep the wealth of China's countryside trapped in the current property rights system, because the provisions of the NPL do little to overcome the status of property rights in China. It cannot be used as security for credit, financing, or capital necessary for entry into China's growing market economy.<sup>252</sup> In short, lack of legal title<sup>253</sup> hurts the same rural residents Hu is trying to help.<sup>254</sup>

249. Both figuratively and literally in Mr. Gao's case. *See supra* p. 4.

250. HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* 35 (2000). ("US \$9.3 trillion . . . is more than twenty times the total direct foreign investment into all Third World and former communist countries in the ten years since 1989 [and] forty-six times as much as all the World Bank loans of the past three decades."). American Indians fall within this category of land used, but not legally owned. Interestingly, American Indians are one of the most consistently, economically depressed groups in the United States. *See infra* note 253.

251. Keliang & Prosterman, *supra* note 233, at 46.

252. *See* MARC R. TOOL & WARREN J. SAMUELS, *THE ECONOMY AS A SYSTEM OF POWER* 102 (1989) ("[M]oney in our society is more than a "means of exchange," [it's] a ticket of entry into the market.").

253. American Indians provide an analogy to China's rural poor living on collective owned land. Like the Chinese farmers, most American Indians do not own legal title to their land. Rather they have a right of occupancy and use and the United States has right of title. *See Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823) (holding that tribes do not have fee simple absolute in their lands, but rather a right of occupancy as legal title is vested solely in the U.S. government by the doctrine of discovery); *Tee-Hit-Ton Indians v. U.S.*, 348 U.S. 272 (1955) (ruling that where Indians have only aboriginal title no compensation under the Fifth Amendment is necessary for seizure of their land because legal title is bound in the United States). Today "[n]early all of the land is in trust, with the United States holding naked legal title and the Indians enjoying the beneficial interest." WILLIAM C. CANBY, *AMERICAN INDIAN LAW IN A NUTSHELL* 381 (1998). The economic structure produced by such property rights regime is parallel to the China's rural areas. American Indians are among poorest in the United States. U.S. GOV'T ACCOUNTABILITY OFF., *INDIAN ECONOMIC DEVELOPMENT: RELATIONSHIP TO EDA GRANTS AND SELF-DETERMINATION CONTRACTING IS MIXED* 12 (2004), *available at* <http://www.gao.gov/new.items/d04847.pdf> ("American Indian Tribes are among the most economically distressed groups in the United States. According to data from the 2000 U.S. Census, American Indians tribes' median per capita income of \$9,200 in 1999 was less than half the \$21,600 per capita income for the for the entire U.S. Population."). The per capita GDP's of each group could be mere coincidence, but the fact that the property rights structure for both the Chinese collective resident and the American Indian mirror each other, in societies with very different ideologies of economy and politics, suggests that the property rights regimes underlying both the Indians and the Chinese poor has something to do with the similar outcomes.

254. *See* SAICH, *supra* note 196, at 244. Saich cites some problems remaining in China's rural areas, including "stagnating incomes and problems concerning land tenure and access to credit."



China's citizens subject to the NPL's collective provisions cannot be equal players in China's market economy system without some type of more meaningful property rights. Rural residents need greater rights allowing them to enter and use the market for economic gain.<sup>255</sup> Instead, the CCP believes the appropriate remedy is to build a "new socialist countryside." Hu's "new socialist countryside," however, might not have even been an administration focus if not for the Marxist conception of private property that provides the foundation for the NPL's provisions.

## VI. CONCLUSION

James Madison wrote that government exists to protect the rights of people and the rights of property.<sup>256</sup> At first blush, the NPL could appear to support Madison's notion. However, placing the NPL in context, studying the ideological debate surrounding its publication, and analyzing its resulting text reveals that the NPL is only remarkable insofar as it reasserts the primacy of the State, reaffirming the CCP's Marxist beliefs. For those who thought China had drifted away from Marxism because of its limited market reforms, the NPL serves as a poignant reminder that communism continues to govern China's moves forward, and will do so in the coming future.

Granting private ownership over land through the NPL, however, may have been asking for too much from the CCP. A government run by the "public property party"<sup>257</sup> could likely not write a law allowing for the private ownership of land. It would not know how to do so. Furthermore, such a concession would hollow out the Marxian underpinnings of the CCP, and by extension, their monopoly hold on power. Second, offering equal legal protection for private as well as State property is a recognition of the wealth that private property has brought to China,<sup>258</sup> a key factor in the CCP maintaining its legitimacy.<sup>259</sup>

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255. For a survey on property rights and their effect on the poor see Lee J. Alston, *Institutions, Property Rights, and their Impact on the Poor*, Dec. 2005, [http://www.cinder2005.com.br/trabalhos/PropertyRightsandthepoor\\_LeeAlston.pdf](http://www.cinder2005.com.br/trabalhos/PropertyRightsandthepoor_LeeAlston.pdf) (arguing about the importance of using assets for collateral to exploit the gains made from exchange).

256. *See supra* note 1.

257. The CCP's name, in Chinese, can roughly translate to "the public property party." *See China's Next Revolution, supra* note 214.

258. *See* Engardio, *supra* note 212.

259. *See* Elizabeth Economy, *Don't Break the Engagement*, FOREIGN AFF., May-June, 2004 at para. 3, <http://www.foreignaffairs.org/20040501faessay83309/elizabeth-economy/don-t-break-the-engagement.html> ("For the past several decades, as China's leaders have banked on the country's striking economic success to legitimize their leadership, they have ignored the political and institutional changes necessary to ensure that markets function smoothly and transparently.") *See also* Minxin Pei, *The Dark Side of China's Rise*, FOREIGN POL'Y, Mar-Apr. 2006 at para. 4, <http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=18110>. ("Behind the glowing headlines are fundamental frailties rooted in the Chinese neo-Leninist state. Unlike Maoism, neo-Leninism blends one-party rule and state control of key sectors of the economy with partial market reforms and an end to self-imposed isolation from the world economy. Additionally, Pei says, "optimistic visions tend to ignore the neo-Leninist regime's desperate need for unfettered access to economic spoils. Few authoritarian regimes can maintain power

Yet, in a bid to keep all parties happy, the property rights provisions the NPL does institute could be the source of the CCP's undoing. The NPL's shortcomings could easily exacerbate the existing rural-urban split occurring as China develops economically, since it offers no real, new protections to the rural population. At the same time, the NPL has ostensibly granted legal protection to a growing middle class who can now, theoretically, enforce their property rights against "infringement." Protection against "infringement" is also something the rural population violently protests for.

The potential for class conflict, that Marxist workhorse of historical change,<sup>260</sup> has emerged because of the disparate treatment of property by the NPL. As China continues to grow, any relinquishment by the State will only produce large outcries from the middle class.<sup>261</sup> Thus, the long term may reveal that the CCP's schizophrenic attempt to protect private property rights while maintaining its Marxist ideology could result in either the law's, or even the CCP's, implosion. Only then might the NPL truly earn its "landmark" label.

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through coercion alone. Most mix coercion with patronage to secure support from key constituencies, such as the bureaucracy, the military, and business interests.").

260. JOHN K. RHOADS, *CRITICAL ISSUES IN SOCIAL THEORY* 286 (1991) ("Marx believed that violent class conflicts were the engine of historical change.").

261. *See* NORTH, *supra* note 244, at 29 ("In short, the process of growth is inherently destabilizing to a state.").