

Evolving Property Rights in China: Patterns and Dynamics of Condominium Governance

Lei Chen & Mark Kielsgard

ABSTRACT

This article investigates the development of private property law in the PRC through the lens of condominium governance in urban China. It assesses the vitality of these trends, reviews the relevant historic legal and social background and demonstrates how the introduction of private property in China has fundamentally altered the fabric of its civil society. Drawing upon case studies and statutory analysis, and evaluating them from the perspective of property relations, it analyzes trends driving greater democratic structures by reviewing the self-governance of condominium owners associations and the grassroots democratic participation they have spawned. Moreover, this article tackles the future of these trends by reflecting upon conditions opposing continued development such as local corruption, lack of enforcement and inadequate judicial review.

Introduction

This article explores the implications for, and development of, private property rights through the lens of condominium governance in urban China. Condominiums are the dominant mode of residential property in urban China. In the densely populated urban centers, condominiums are as familiar as they are practical. The percentage of residential properties individually held in condominium form far exceeds other building types and designs.¹ In addition to the conversion of a large number of formerly publicly owned units into private hands, the market for new condominium development is booming and recent trends indicate the number is rapidly growing. Thus, condominiums are highly significant to the economic fabric of the PRC and serve as the appropriate real estate vehicle for studying the influences of free market forces on the rights regime in Chinese society.

In a mosaic of recent law and development literature, scholars have sought to prove that well-functioning legal institutions which enforce private property rights are indispensable to the promotion of the development of markets, and hence economic growth.² However, it has been argued that neither

¹ According to the Chinese Statistical Yearbook of 2009, by the end of 2008 the total construction area in urban China was 16.451 billion square meters. The area of residential condominiums was 10.769 billion square meters, which is 65.46% of the total construction area. Although there is no information available for industrial and commercial or mixed-use condominiums, the conclusion that the condominium is the principle housing feature of urban China is inescapable.

² There is abundant literature on property right formalization and the casual relationship between legal formalization and economic development. The following literature is referred from legal, economic, anthropological, and sociological perspectives. H Demsetz, 'Toward a Theory of Property Rights' (1967) 57 *The American Economic Review* 347; D Diermeier and others, 'Credible Commitment and Property Rights: the role of strategic interaction between political and economic actors' in DL Weimer (ed), *The Political Economy of Property Rights: Institutional Change and Credibility in the Reform of Centrally Planned Economics* (CUP, Cambridge 1997) 20.; CM Hann,

Black-letter approaches to property rights nor economic efficiency theory adequately captures the dynamics of the interrelationship among various factors (cultural or historical, social or moral in public and private spheres).³ Many cultural and sociological studies have challenged the efficacy of formalization of property rights because it disregards cultural and social variations of a place.⁴ Others even suggest empirically a reverse causal link between economic development and enforced contractual and property rights.⁵

Condominium ownership is closely linked to the concepts of independence of control and autonomy of unit owners and raises issues of collective action, mutual dependence and democratic participation.⁶ Hence, a regular feature of condominium ownership is the necessity for the management of buildings and the common elements such as swimming pools and elevators. Thus, a degree of self-governance is, as a matter of practicality, unavoidable. Without active participation in collective action driven by an awareness of 'my property, my destiny', the effects of condominium legislation are questionable. The success of condominium associations does not depend on a single controlling factor but "on a complex mixture of individual agency group dynamics, and trial and error, played out against a shifting backdrop of possibilities and constraints."⁷ Though they could not be generalized to fit every condominium association, Read's case studies captured the wide-ranging variations among homeowner organizations. This article is aimed to acquire an in-depth understanding of the relationship dynamics among stakeholders, i.e. developers, homeowners, homeowner associations and local governments in Chinese condominium governance. These dynamics are critical because they are directly referred to what reform measures are appropriate in a specific context.

This article identifies and assesses the vitality of emerging property rights trends, reviews the historic legal and social background and reveals how the introduction of private property in China has fundamentally altered the fabric of its civil society. Drawing upon case studies and statutory analysis, it analyzes trends toward greater democratic governance by illustrating the manner in which legal rules can be translated into a dynamic social, political and historical setting. These trends can be illustrated in the self-governance of condominium owners associations and the property rights practices they have spawned.

'Introduction: the embeddedness of property' in C M Hann (ed), *Property Relations: Reviewing the Anthropological Tradition* (CUP, Cambridge 1998) 18.; P Murrell, 'Can Neoclassical Economics Underpin the Reform of Centrally Planned Economics' (1991) 5 *Journal of Economic Perspectives* 59.; C Wolf Jr, 'Institutions and Economic Development' [1955] 867, D North, *Institutional Change and Economic Performance* (CUP, Cambridge 1990) 35.

3 J Gillespie, 'Commentary: Theorising Dialogical Property Rights in Socialist East Asia' (2011) 48 *Urban Studies* 595, 596; Frank Upham, 'From Demsetz to Deng: Speculations on the Implications of Chinese Growth for Law and Development Theory', (2009) 41 *NYU Journal of International Law and Politics* 551; Michael Trebilcock and Paul-Erik Veel, 'Property Rights and Development: The Contingent Case for Formalization' (2008) 30 *University of Pennsylvania Journal of International Law* 397.

4 C. Hann *Property Relations: Renewing the Anthropological Tradition* (Cambridge University Press, Cambridge 1998) ; D Fitzpatrick, 'Evolution and Chaos in Property Rights Systems: The Third World Tragedy of Contested Access' (2006) 115 *The Yale Law Journal* 996; D.C. Clarke, P. Murrell, and S. Whiting, 'The Role of Law in China's Economic Development' in *China's Great Economic Transformation*, eds. T. Rawski and L. Brandt (2008) 375-428.

⁵ HE Xin, "A Tale of Two Chinese Courts: Economic Development and Contract Enforcement," *Journal of Law and Society*, Vol. 39, No. 3, 384-409, 2012.

6 N. Yip & R. Forest, *Property Owning Democracies? Homeowner Corporations in Hong Kong*, 17 *HOUSING STUD.* 703, 704 (2002).

7 BL Read, 'Property Rights and Homeowner Activism in New Neighborhoods' in Li Zhang and Aihwa Ong (eds), *Privatizing China: socialism from afar* (Cornell University Press, New York 2008) 53.

Moreover, this article addresses the future of these trends in light of current conditions opposing continued development such as local corruption, lack of enforcement and inadequate judicial review. Finally, it speculates future outcomes of the Chinese private property scheme given the relationship dynamics among the groups.

Legal and Social Background

The rise of the Chinese Communist party in 1949 resulted in the repeal of the Republican era legal system and transplanted it with a portion of the 1950s Soviet legal system.⁸ With Mao Zedong's death in 1976, China began a program that opened the country to foreign investment and the pursuit of legal reform to prevent a reoccurrence of policy-driven excesses. For this reason, Deng Xiaoping focused the governmental agenda on economic development.⁹ However, attracting foreign investment hinged on improving the legal system and placing a greater reliance on law and security for investment. Until 1988, land law in China was posited in public or collective ownership. There were no individual land rights and no private land ownership.¹⁰ The burden of the government to provide enough housing for its citizens was seriously challenged by urbanization and an exploding population.¹¹ To ease this housing burden, the country embarked on a new economic policy based on creating wealth by marketing housing.¹² In accordance with this policy, China amended its Constitution in order to recognize privately owned transferable land use rights.¹³ This constitutional amendment was far-reaching since it allowed for the creation of a revolutionary new form of land-use right.¹⁴ However, while commercial transference of state-owned land was in its infancy, free market economy *per se* was for a time eschewed and the predominance of public housing was still officially characterized as a form of socialist well-being. Hence, Chinese lawmakers initially paid little attention to adopting sophisticated modern real property legislation.¹⁵

Subsequently however in 1994, the State Council adopted a comprehensive national housing

⁸ Lei Chen, *The Historical Development of the Civil Law Tradition in China: A Private Law Perspective*, 78 THE LEGAL HIST. REV. 159 (2010).

⁹ XIAOPING DENG, SELECTED WORKS OF DENG XIAOPING, VOL 1 319-22 (2nd ed. 1994).

¹⁰ S.P.S. Ho & G.C.S.Lin, *Emerging Land Markets in Rural and Urban China: Policies and Practices*, 175 THE CHINA Q. 681, 681-82 (2003); See Yaping Wang & A. Murie, *The Process of Commercialization of Urban Housing in China*, 33 URB. STUD. 971 (1996); See also LAND LAW 22 (Xiaoli Wang ed. 2003).

¹¹ M.T. Kremzner, *Managing Urban Land in China: The Emerging Legal Framework and Its Role in Development*, 7 PAC. RIM L. & POL'Y J. 611, 611-22 (1998).

¹² In 1988 the State Council embarked on a staged housing reform by adopting a Scheme of National Housing Reform in Urban Areas. This stimulated the government's initial efforts and provided a ten-year blueprint to expedite the commercialization of residential property and reduce state subsidies of housing. See J. Lee, *From Welfare Housing to Home Ownership: The Dilemma of China's Housing Reform*, 15 HOUSING STUD. 61, 66 (2000).

¹³ The commercialization of land-use rights was first tried in Shenzhen on 9 September 1987 and was formally adopted when Article 10 of the *Constitution* was amended on 12 April 1988 to permit the assignment of the right to use land.

¹⁴ The amended Constitution of 1988 states: "the right to use land may be transferred according to law". Soon thereafter, Article 2 of the Land Administration Law was revised stipulating that "the right to use State owned or collectively owned land may be assigned pursuant to the law".

¹⁵ PROPERTY MANAGEMENT LAW 8 (Shansheng Xia ed. 2003).

reform policy.¹⁶ The privatization and commercialization of the housing market helped to relieve the government of its responsibility for maintaining and managing buildings that were originally constructed to accommodate state employees.¹⁷ The constitution was again amended to ensure private property within the Chinese legal system. It provided that “individual private and other non-public economies ... are major components of the socialist market.”¹⁸ More significantly, the amendment put private property on an equal legal footing with state-owned property,¹⁹ such that ‘citizens’ legally obtained private property rights could not be violated. Furthermore, the amendment called for compensation whenever private property was expropriated by the government. Thus, the Chinese constitution acknowledged the right to private property as a fundamental freedom.

Prior to the enactment of legislation permitting private property rights, all units were government owned and all buildings were government managed.²⁰ With the sale and release of government property to the private sector, government control of building management also came to an end. With the introduction of private ownership, considerations of market value dominate management decisions, resulting in more careful scrutiny of management and greater emphasis on long-term results. Thus, management becomes the responsibility of those with the profit motive to act efficiently. The new property law encourages this phenomenon.²¹

Against this social background, democratic governance is beginning to make inroads into the governmental structure at the local level and/or at the neighborhood/condominium association level. These first steps are perhaps modest, but they witness the beginning of potentially substantial changes to come. Local governance accounts for transforming residents from tenants to property owners, thus making them stakeholders.

Despite these reforms China still lacked a comprehensive and consistently regulated land law scheme. There were divergent property law statutes in abundance,²² somewhat inconsistent administrative regulations,²³ overloaded judicial pronouncements,²⁴ and conflicting local norms.²⁵ Thus, the Chinese

¹⁶ The Decision of the State Council on Furthering Housing Reform in Urban Areas of 1994. (P.R.C.).(国务院关于深化城镇住房制度改革的决定).

¹⁷ LEE, *supra* note 34, at 61.

¹⁸ XIAN FA art. 11 (amended Mar. 15, 1999) (P.R.C.).

¹⁹ XIAN FA art. 13 (amended Mar. 14, 2004) (P.R.C.).

²⁰ Lei Chen & Hanri Mostert, *The Unavoidable Necessity of Formalizing Condominium Ownership in China: A Pilot Study*, 2 ASIAN J. OF COMP. L. 64, 64-5 (2007).

²¹ Property Law (promulgated by Standing Comm. Nat’l People’s Cong., Mar. 16, 2007, effective Oct. 1, 2007), art. 70, (2007) (P.R.C.); HUABIN CHEN, *STUDY ON MODERN CONDOMINIUM OWNERSHIP* 91 (1995); ZHIGANG HU, *NEW DISCOURSE ON REAL PROPERTY LAW* 22-29 (2006).

²² See e.g., Land Administration Law (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 29, 1998, effective Jan. 1, 1999, amended Aug. 28, 2004) (2004) (P.R.C.).

²³ Examples include the Provisions Concerning the Administration of Private Houses Owned by Foreigners (1984) (P.R.C.) (关于外国人私有房屋管理的若干规定) and the Interim Regulations on Assignment and Transfer of Rights to Use State-Owned Land in Urban Areas (1990) (P.R.C.) (城镇国有土地使用权出让和转让暂行条例).

²⁴ For instance, the Judicial Pronouncement Regarding the Application of Some Provisions of the Law of Security (关于适用《中华人民共和国担保法》若干问题的解释) by the Supreme People’s Court (P.R.C.) (中华人民共和国最高人民法院). The legislative implementation of the property law has been controversial, disjointed and time consuming. Fourteen years passed from the time it was first on the parliamentary agenda. As early as 1994 the Chinese legislature devised a plan to enact the code, but it wasn’t until 1998 that a drafting panel was even tasked with the drafting. In October 1999, the drafting panel completed a model draft consisting of twelve chapters and containing 435 articles. See HUIXING LIANG, *COMMENTARY ON CHINESE PROPERTY LAW DRAFT*, 1-88 (2001). In 2000, a model property law draft was also completed. LIMING WANG, *ANNOTATED DRAFT OF CHINA’S LAW OF THINGS*, 1-67 (2001). Thereafter, in consultation with these two model drafts, the Standing Committee of the NPC

property law was fragmented and susceptible to structural weakness, inconsistent treatment, corruption and an environment generally inconsistent with sustainable development. Further reform was essential.

In response, in 2003, the State Council (the Central Government) provided the Property Management Regulation and, in 2007, the Property Law of the PRC (the Property Law) came into effect.²⁶ This legislation was intended to act as a comprehensive mechanism to regulate property and secure the protection of property rights by clearly defining different types of property as well as safeguarding title security and thus providing greater economic stability in the (real property) marketplace.²⁷ It was designed to unify Chinese land law under a single coherent model. The effectiveness of this legislation is still an open question as it is too recent to adequately assess its impact. However, Article 4 provides for the protection of the rights of individuals (or any other right holder) and elaborates that these rights shall not be infringed by any entities or individuals, presumably including both the public sector and private developers.

Recent developments in the control and management of condominiums in the PRC have stimulated democratic governance at the local level.²⁸ As a matter of practicality, once private ownership was allowed, self-governance provided a greater cost benefit than government control as the duties were taken over by an unpaid association and/or an independent commercial management company that contributed to the economy in an efficient way as a profit-driven enterprise. Moreover, the nature of private ownership dictates, at least to a certain degree, the need for autonomous property rights including the maintenance and management of the property. The value and allure of property ownership is dampened by unreasonable external control and limitations on the free and personal enjoyment of the right. Its value diminishes if it is run in accordance with ease of management rather than according to the dictates of market forces.

Addressing Defects in the Current Legislation

While trends favor greater legislative efficiencies, some defects in statutory provisions continue to create barriers to full democratic processes or otherwise reduce the efficiency of the owners' associations. This serves to impede the actualization of owners' rights and cuts against the developing market economy. Legislative defects can exacerbate the problems pointed out in the previous section by feeding into judicial inefficiencies, local government interference, developer overreaching and corruption. Additionally, even if it is bereft of malevolent intent, poorly drafted legislation makes for poorly run

deliberated and pruned its legislative draft seven times. Ultimately, eight parliamentary deliberations were held from December 2002 to March 2007.

²⁵ Examples include *Guiding Rules on the Management Corporation and Its Executive Council* (深圳市业主大会和业主委员会指导规则), Shen Fu (深府) no. 11 (2005) by the municipal government of Shenzhen City on 17 January 2005.

²⁶ The enactment of Chinese property law immediately attracted international media's attention. See, e.g., China's Clause Four: The Recognition of Property Rights is an Ideological Landmark, THE TIMES, Mar. 17, 2007, available at http://www.martinfrost.ws/htmlfiles/mar2007/china_clause4.html; See also *Chinas Volkskongress billigt Eigentumsgesetz*, FRANKFURTER ALLGEMEINE ZEITUNG, Mar. 16, 2007.

²⁷ Lei Chen, *The New Chinese Property Code: a Giant Step Forward?*, 11(2) ELECTRONIC J. COMP. L. 1, 2 (2007).

²⁸ B. Read, *Assessing Variations in Civil Society Organizations: China's Homeowner Associations in Comparative Perspective*, 41 COMP. POL. STUD. 1240 (2008).

owners' associations and ensures owner apathy and loss of essential credibility needed for growing stronger democratic structures.

Although condominium ownership has been institutionalized and unit owner's autonomy of management is statutorily recognized under the Property Law,²⁹ it only includes a scant 14 articles dealing with condominium property.³⁰ Many important issues are left untouched which propel some further implementation regulation or local rules to flesh out details, such as rules pertaining to majorities required for HOA resolutions; two-tier management structures and; rules concerning the qualification and number of HOA executive council members.

Comparatively speaking, it is unusual for rules governing the functioning of the general meeting,³¹ the executive board,³² and the rules governing common property and facilities³³ to be decided by a simple majority vote. Most jurisdictions include these rules in special statutes.³⁴ These statutes tend to limit the adoption of organic changes in the initial stage,³⁵ or require a super-majority.³⁶ This is to guarantee the initial smooth running of general meetings and efficient management and seamlessly transition to owner control. Yet, the PRC fails to adequately provide for this transition. Indeed, the national legislation lacks a uniform obligation on developers to organize the first meeting of the management body as soon as possible after its establishment.³⁷ In New South Wales, Australia and in South Africa such provisions have proven indispensable.³⁸ Failure to provide for the smooth transition of management will often hamper the association's ability to self-govern by unnecessarily binding the future

²⁹ Property Law art. 70-83 (2007) (P.R.C.).

³⁰ Lei Chen, *The Developer's Role in the Surging Chinese Condominium Housing: Through the Comparative Lens of the US System*, 18 ASIA PAC. L REV 2, 223-4 (2010).

³¹ These include, *inter alia*, the notice required for convening the general meeting, the kinds of general meetings, minimum agendas of general meetings, voting at general meetings, the quorum required for a general meeting, the representation of owners by proxies and the keeping of minutes.

³² These include amongst others the powers and functions of the executive board, whether it must consist only of owners, whether owners may attend its meetings, whether the members are entitled to remuneration, their fiduciary obligations and their period of office.

³³ This is normally done in the so-called conduct rules of the scheme and needs more than a simple majority for amendment.

³⁴ The New South Wales Strata Schemes Management Act 138 of 1996 e.g. regulates executive committees in ss. 16 to 25 and Schedule 3 of the Act and general meetings in Schedule 2 of the Act and the Singapore Building Maintenance and Strata Management Act 47 of 2004 in ss. 53-61 and the Second Schedule and Third Schedule to the Act. The Queensland Body Corporate and Community Management Act 28 of 1997 regulate these matters in ss. 90 to 101 of the Act, while the Strata Title Law 5 of 2007 of the Dubai International Financial Centre regulates them in ss. 60-64 of the Act. The South African Sectional Titles Act 95 of 1986 regulates both these matters in Annexure 8 of the Regulations to the Act.

³⁵ See e.g., South African Sectional Titles Act 95 of 1986, reg. 30(1). Regulation 30(4) stipulates that these regulations may only be altered after 50 % of the units have been transferred and that they may only be altered by unanimous resolution.

³⁶ See e.g., South African Sectional Titles Act 95 of 1986, reg. 30(4).

³⁷ See e.g., Singapore Building Maintenance and Strata Management Act 47 of 2004 s. 26. and the South African Sectional Titles Act s. 36(7) which provides that the first meeting must be held within 30 days after the management body has been established with the registration of the first unit in the name of a purchaser. The Strata Schemes Management Act 1996, Schedule 2 Part 1 clause 2 requires a general meeting within 2 months after the end of the initial period. One of the problems encountered in this regard in China is that owners are widely defined in article 76 of the Property Law as persons who have acquired ownership of units by registration or under s. 11 of the Property Law. Under the latter section, persons who have acquired possession of a unit in terms of a recognised commercial transaction are also considered to be owners. This concession was made due to the fact that the registration of units in the names of purchasers in China is a drawn-out process.

³⁸ VAN DER MERWE, *supra* note 54, at 14-37.

organization to contractors (including developer-owned commercial management companies) that limit the owners' available decision-making options and thus circumvent the democratic value of the owners' association.³⁹

Secondly, the Property Law provides that the number of owners who are eligible to participate in building management shall be based on the number of individual apartments or commercial units, with the qualification that all unsold units (units sold but not yet delivered by the developer or multiple units owned by the same owner) should count only for one unit and that the total number of owners shall be the aggregate of the results of the above computation.⁴⁰ Thus, the system is determined, as far as the number of votes is concerned, via the democratic principle of "one owner, one vote" as distinct from "one unit, one vote," (which would provide disproportionate voting power to developers still owning multiple units or owners who own more than one unit in the scheme).⁴¹

Thirdly, it concerns about the provision for changes to the purpose/use of common property (or its use for business operations) with a simple majority vote. In other jurisdictions, dramatic changes of this nature usually require a super-majority.⁴² Disposal or use change of parts of the common property has a radical impact on the value of every owner's abstract share in the common property and is usually allowed [in other jurisdictions] only by a unanimous resolution or the written consent of all the owners in the scheme.⁴³ This perhaps reflects the immaturity of the Chinese Property Law but it is noteworthy that, in this case, it has arguably erred on the side of majority rule. However, a peculiarity of the Chinese way of determining whether a motion has been carried is that a majority both in number and value is required for all decisions. This differs from other condominium statutes where this double majority is only required for certain resolutions.⁴⁴ It also dilutes the democratic aspiration to a more capital centric approach. Another potential defect in this approach is the creation of institutional instability resulting in negative market impact. Buyers crave surety that the property they pay for will retain its essential character into the future.

Fourthly, the Property Law provides that unit owners may elect to manage the scheme themselves or (by majority vote),⁴⁵ or choose a professional management company or another manager.⁴⁶ Most local statutes make it optional for owners to employ outside managers to administer the scheme. Self-management usually only occurs in smaller projects where owners organize themselves into groups according to their skills to undertake the work involved in the management of the scheme. Many foreign

³⁹ The risk to the property owner is particularly heightened because of the lack of conventional constitutive documents and the developers role in the "participation quota" that allows developers to determine their own status early in the construction process and to ultimately dictate terms to the fledgling scheme. See Lei Chen, *supra* note 62, at 234-41.

⁴⁰ Judicial Interpretation on Property Law art. 9 §1 and §2 (2007) (P.R.C.).

⁴¹ On the weight attached to votes, see generally CORNELIUS G. VAN DER MERWE, APARTMENT OWNERSHIP 145, 154, 158, 194 (1994).

⁴² See *infra* note 111.

⁴³ See e.g., s 17(1) of the South African Sectional Titles Act 95 of 1986 which requires a unanimous resolution and s 34(1) of the Singapore Building Maintenance and Strata Management Act 47 of 2004 which requires a 90% resolution.

⁴⁴ Another unfortunate consequence of this requirement is that it may not only slow down the time for decisions to be adopted, but would also have the effect that compromised resolutions (instead of sound resolutions would be adopted for instance, when the budget for the ensuing year has to be approved).

⁴⁵ Property Law art. 76 §4 (2007) (P.R.C.).

⁴⁶ Property Law art. 81 §1 (2007) (P.R.C.); See generally Lei Chen & Cornelius G. van der Merwe, *Reflections on the Role of the Managing Agent in South African and Chinese Sectional Title (Condominium) Legislation*, J. S. AFR. L. 22 (2009).

condominium statutes entrust the management of larger schemes either to the owners' executive board (which usually consists of owners assisted by a managing agent), or provide for the appointment of a professional manager as the executive organ of the scheme with the assistance of an owners' advisory board.⁴⁷ The Property Law opted for the latter alternative, namely a professional manager as an executive organ conducting its functions under the supervision of the owners.⁴⁸ It also allows the owners to replace a managing company or manager appointed by the developer.⁴⁹ The rationale for this is to frustrate developer efforts to enter into "sweetheart" contracts with affiliated or subsidiary entities while in control of the association and binding it on a long-term basis.⁵⁰ Many local statutes either call for a review of all contracts and appointments concluded by the developer at the initial meeting of owners, or grant the owners the power to terminate all such contracts unilaterally.⁵¹

Fifthly, it fails to provide for, as appropriate, a two-tier condominium management scheme. A two-tier scheme calls for the implementation of an umbrella management body managing an entire project at a senior level and subsidiary management bodies managing smaller residential units (e.g., single buildings in a multi-building association) and appurtenant common areas at a junior level. In the United States, master or umbrella associations are found in larger condominium complexes where the associations are layered according to function.⁵² In China such a two-tier management structure needs to be introduced because most of the condominiums on the market consist of multi-building or mixed-use projects. A two-tier approach makes owner management a less daunting enterprise and failure to provide for this scheme practically ensures disproportionately high professional management involvement and reduced owner participation. Thus, the inefficiency in the national legislation creates barriers to the democratic governance by its failure to anticipate and provide for a less onerous scheme. Moreover, in addition to distancing owners from management, the development of multi-building and/or mixed-use projects in the traditional 'single condominium, single association' structure creates other inefficiencies. For example, in larger condominium developments it is financially burdensome to call meetings of all unit owners for issues related to only one building. Furthermore, unit owners in one building will often be unfamiliar with and/or disinterested in issues related to other buildings making detailed review of those issues by the umbrella organization unduly burdensome. This also fuels owner apathy and discourages otherwise qualified volunteers from participating in management because of the time commitment it requires. Additionally, the owners have less incentive to be concerned about management issues encountered in other building. A single building's management issue can usually be resolved more quickly and easily by its owners than by all the owners in the project.

Sixthly, problems arise on the make-up of the HOA executive council members. Because it is impractical for all owners to attend to the day-to-day management of a condominium complex, Chinese law provides that the executive council is usually elected to execute the general meeting's resolutions and

⁴⁷ See the provisions of the French, German and Dutch statutes referred to in VAN DER MERWE, *supra* note 109, at 149.

⁴⁸ Property Law art. 82 (2007) (P.R.C.).

⁴⁹ Property Law art. 81 §2 (2007) (P.R.C.).

⁵⁰ See Chen & van der Merwe, *supra* note 114, at 29, which states that the drafters of the Property Management Regulation amended the designation of professional managers to 'service providers' in 2007 to put professional managers in their place.

⁵¹ See Uniform Common Interest Ownership Act § 3-105. These statutes usually provide for termination without penalty (upon not less than 90 days' notice to the developer) so long as they are cancelled within two years of the owners assumption of control of the association.

⁵² P. ROHAN & M. RESKIN, CONDOMINIUM LAW AND PRACTICE: FORMS, VOLUME 1, 1A, 1B & 1C 43-184 (1980).

to administer the day-to-day affairs of the condominium complex.⁵³ Although the executive council has less authority than general meeting mandates, its standing committee's role is evident in the management of the condominium. Thus, the identity and qualifications of executive council members are an important issue for unit owners. In many jurisdictions, council members do not necessarily need to be unit owners requiring only that at least a majority of the executive board members must be unit owners.⁵⁴ Under Chinese law, an executive council member must be either a unit owner or a representative of a corporate owner.⁵⁵ This may be counterproductive as some outside candidates could bring necessary professional experience and skills to the executive council,⁵⁶ or an insufficient number of unit owners may be willing to serve as council members.⁵⁷ It is also noteworthy that in China, where management by unit owners is still new, finding experienced and professional executive council members may be difficult. On the other hand, council members will ultimately gain the requisite experience or may be able to contract for needed skills and this approach ensures that the majority of executive council members have a genuine economic stake and a personal interest in the efficient management of the condominium.

Under Chinese law, the number of council members remains largely unregulated. There is no provision for the required number of council members in either the national Property Management Regulation of 2003 or in many local Regulations. In practice, this may lead to problems as the number of council members has a bearing on quorums and decision making, even in determining a simple majority vote. However, strict regulations imposing the number of council members are a wooden "one size fits all" approach that could also lead to inefficiencies. In a recent local property management rule, the Property Management Regulation of Shenzhen Special Economic Zone, the number of executive council's members in a condominium association was expressly stipulated as an odd number from five to seventeen.⁵⁸ However, by capping the number of members at seventeen, condominium projects will often be unable to include representatives from all subsidiary bodies, and/or from each building in many medium to large multi-building projects. This impacts the democratic character of the association and the individual owners' access to their (council) representatives. To guard against this, other local ordinances such as the Shanghai Property Management Regulation have provided for an odd number of representatives of no less than five but with an open-ended maximum number.⁵⁹

Thus, the National Legislation can be viewed in terms of factors directly impacting democratic governance and those that indirectly impact them. Direct factors include simple majorities for most association decisions, even those that constitute organic change to common property. Yet, this concession is often illusory as it must be predicated on a so-called "double majority," including majorities of both unit numbers and value share. This may be advisable for issues of organic change where even traditional democratic societies include greater barriers (e.g., unanimous decisions or supermajorities), but is unjustified in less radical issues. This approach effectively provides a veto of association initiatives by

⁵³ Chinese Property Management Regulation art. 15 (2003) (P.R.C.).

⁵⁴ See Uniform Common Interest Ownership Act of 1994 § 3-103 (f) for USA; see Sectional Title Act, Annexure 8 reg. 5 for South Africa.

⁵⁵ Property Management Regulation art. 16 (2) (2003) (P.R.C.); Property Management Regulation of Shenzhen Special Economic Zone art. 23 (2007) (P.R.C.).

⁵⁶ GREAT BRITAIN DEPARTMENT FOR CONSTITUTIONAL AFFAIRS, ANALYSIS OF RESPONSES TO AN LCD CONSULTATION PAPER – "PROPOSAL FOR COMMONHOLD REGULATIONS" 65 (2003).

⁵⁷ VAN DER MERWE, SECTIONAL TITLES 14-66 (2007).

⁵⁸ Property Management Regulation of Shenzhen Special Economic Zone art. 24 (2007) (P.R.C.).

⁵⁹ See Shanghai Property Management Regulation art. 19 (2004, amended 2010) (P.R.C.).

those elite who collectively own more than 50% of the value of the project though they may own fewer than 50% of the units.⁶⁰ Thus, those purchasers (including corporate purchasers) who buy more expensive units are also receiving a disproportionately larger voice in the running of the condominium than other owners. Heightened drafting complexity to the national legislature could assuage these inequities while simultaneously providing for greater protection from organic changes and warranting greater market security.

Finally, legislation ensuring smooth transitions from developers to owners and exempting future associations from contract obligations provides for greater democratic decision-making. By binding future associations to long-term contracts, developer-controlled associations preclude the available choices to successor owner-controlled associations. While the Property Law allows owners to replace the developer-installed property manager,⁶¹ the provision for termination without penalty from other residual contracts is left to local regulation. China's National People's Congress is naturally deferential to provincial authority in matters involving the regulation of real property. This is also commonly the practice of authorities in other nations, including the United States,⁶² but the failure of China to establish more precise and binding national legislation allows for greater local corruption. This is evident in the case study below (TM case study) where the local authority colluded with the professional management company to subvert the democratic initiative of the owners' association. Lack of drafting complexity and failure to establish firm legal responsibility in the national legislation on the issues of majorities and the future binding power of initial contracts are legislative flaws that directly and negatively impact the developing democratic governance currently taking root in the PRC.

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

Case Studies: Property as Negotiated/Contested Relationships

⁶⁰ This would not allow the wealthier owners disproportionate authority to *initiate* changes as they would still require a majority of unit owners to agree, but a minority of wealthy owners could *veto* initiatives favored by a majority of unit owners.

⁶¹ Property Law art. 76 §4 (2007) (P.R.C.).

⁶² Under the Uniform Common Interest Ownership Act of 1994 § 3-105, unit owners can terminate long-term 'self-dealing' contracts without court action before an executive board is elected.

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

Fangya/Lijiang case

In the first example, the evolution of changing public expectations can be seen in two public protests, one each in Beijing and Guangzhou. The Beijing protest took place in 2002 at the Fangya Garden development where the owners represented themselves as 'commoners' to gain the sympathy of government officials. The Guangzhou protest took place in 2009 at the Lijiang Garden development⁶³ where the owners forthrightly asserted their right of participation. After only seven years, the owners' perspective changed from supplication to rights-based demands. "Obviously, as the citizens of the society, the homeowners have stronger substance to oppose arbitrary rulings and ask for participation in rule-making."⁶⁴ Thus, stakeholder status along with the passage of a relatively short period of time created a stronger sense of entitlement and has fueled more robust calls for a voice in matters affecting their interests. Furthermore, this trend appears to have garnered formidable momentum as some theorists contend that the advent of homeowners' protests has expanded the acceptance of a rights-based scheme beyond issues involving the use and enjoyment of real estate to other civil and social rights as citizens.⁶⁵ Among those other areas are protests that have contributed to changes in the Labor Law,⁶⁶ environmental rights,⁶⁷ the repeal of the agricultural tax,⁶⁸ and the recent amendment to the Criminal Procedure Law.⁶⁹

Meiliyuan case

⁶³ See Yongshun Cai, *China's Moderate Middle Class: The Case of Homeowners' Resistance*, 25(5) ASIAN SURV. 777 (2005); See also J. Zhu & C. Wang, *Seniors Defending their Rights – Strategies and Culture in Collective Action: The Homeowners Rights Movement in Lijing Garden, Guangzhou*, 40(2) CHINESE SOC. & ANTHROPOLOGY 5 (2007); See also Benjamin L. Read, *Assessing Variation in Civil Society Organizations: China's Homeowner Associations in Comparative Perspective*, 41(9) COMP. POL. STUD. 1240 (2008).

⁶⁴ David Kelly, *Citizen Movements in China's Public Intellectuals in the Hu-Wen Era*, 79(2) PAC. AFF. 183 (2006).

⁶⁵ YUAN SHEN, *TOWARDS CITIZENSHIP: HOMEOWNERS' RIGHT PROTECTION AS A CITIZEN MOVEMENT, MARKET, CLASS AND SOCIETY: CRITICAL ISSUES ON SOCIOLOGY OF TRANSFORMATION* (2007).

⁶⁶ Cynthia Estlund & Seth Gurgel, *A New Deal for China's Workers? Labour Law Reform in the Wake of Rising Labor Unrest* 19 (New York University Public Law and Legal Theory Working Papers No. 297, 2012).

⁶⁷ For example, there are two recent anti-pollution protests. The first consisted of a mass protest over the planned construction of a molybdenum-copper alloy plant in Shifanf, Sichuan. See Jiang Li, *Protests Show Rising Green Concerns*, S. CHINA MORNING POST, July 4, 2012, available at <http://www.scmp.com/article/1005800/protests-show-rising-green-concerns>. The second protest occurred in the coastal city of Qidong in Jiangsu in response to plans to build an industrial waste pipeline. See Tom Holland, *Anti-Pollution People Power Is Good for Growth*, S. CHINA MORNING POST, July 30, 2012, available at <http://www.scmp.com/article/1008120/anti-pollution-people-power-good-growth>.

⁶⁸ Mai Lu and Calla Weimer, *An End to China Agriculture Tax*, 3(2) CHINA: AN INT'L J. 320 (2005).

⁶⁹ China Media, *China Acts to Give Defendants Greater Rights*, Mar. 8, 2012, available at <http://www.chinamedia.com/2012/03/08/china-acts-to-give-defendants-greater-rights/>.

In the second example, the Chinese legal community revealed noteworthy sensitivity to public sentiment and the changing public perceptions of an emerging rights-based scheme. In March 2005, the Meiliyuan (Beauty Garden) Homeowners' Association (MLY HOA) formally resolved to bring suit against its management company, Hong Ming (HM), alleging "dishonest fees charging." A total of 13 claims were brought against the management company at the District Court in Beijing.⁷⁰ The case was dismissed at trial, but it was reversed on the HOA appeal.⁷¹ The appellate Court ordered a 42.3% reduction of management fees (from RMB \$2.72 (US .42) per square meter to RMB \$1.58(US .24)). The management company was further ordered to return RMB\$180,000 (US \$27,692.31) for fraudulent advertising expenses and RMB \$3533.76 (US \$543.65) in excessive heating and property fees.⁷² Thereafter, the management company applied for a re-trial based on three subsequently provided reports. These reports consisted of conclusions of the Municipal Price Certification Center, five legal scholars and the property management companies own legal advisors.⁷³ The reports concluded that the decision to uphold the HOA's claims would not only be a serious detriment to the property management industry and its growth, but would also disturb the stability and harmony within the community.⁷⁴ The Court granted a re-trial.

In response, a MLY support group was formed by several HOAs in Beijing, the media and netizens. This in turn, sparked interest by other area HOAs to unite and campaign for their rights and a petition produced by the MLY was endorsed by 33 Beijing HOAs.⁷⁵ Additionally, as the voices for the MLY HOA grew, the China Consumers' Association also provided public support. This was no longer a mere dispute between the original parties, but a ubiquitous conflict impacting all Chinese HOAs and property management companies. In hindsight, it can also be viewed as a *de facto* contest between the legitimacy and enforceability of a rights-based regime and social-harmony paternalism. At trial the Court had a full house of onlookers including hundreds of reporters and homeowners with large overflow crowds spilling out onto the streets. With this backdrop the Court ruled in favor of the HOA. In retaliation, the property management company abruptly suspended its services causing the resident's water and electricity to be cut off. However, these measures were short lived as the State agency intervened and ordered the property management company to return and provide service until the new property management company assumed its duties.⁷⁶

⁷⁰ Menghua Cheng, Hongsheng Yang Beijing yezhu wuyefei "tao jia huan jia" quanguo shouci shengsu [First Victory in China for Beijing Homeowners in Management Fee "Negotiation"], ZHONGGUO SHANGBAO [CHINA COM. NEWS], Aug. 29, 2006, available at <http://house.focus.cn/msgview/20/61/634006.html>; See also Donald C. Clarke, *The Private Attorney-General in China: Potential and Pitfalls*, 8(2) WASH. U. GLOBAL STUD. L. REV 241, 247 (2009).

⁷¹ Lei Zhang, *Condominium Owner's Movement of Maintaining Rights : Causes and Mechanics—Case Studies on Several Beijing Complexes*, 5 SOC. STUD. (2006).

⁷² See *id.*

⁷³ The "MLY Property Fees Report.", the "Expert Opinions Report." and the Industry Experts' "Reflections and Opinions on the MLY Case". See online forum of MLY Owner's Association, available at <http://www.house.focus.cn/msglist/20/>.

⁷⁴ See *id.*

⁷⁵ See *id.*

⁷⁶ This case study has been conducted through the internet sources, including the MLY Complex owners' forum, <http://house.focus.cn/msglist/20/>; See also Peng Chen, *Legal Activism of Condominium Owners in Contemporary Urban China*, 1 SOC. STUD. 16 (2010).

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

In one respect, this decision affirmed the legitimacy of rights-based arguments over more common justifications sounding in "social harmony" or other macro-centric policy issues. The management company's legal strategy relied on a conservative, traditional Chinese approach asserting the superiority of the broad based societal interests over the rights-based interests of the individual owners. The management company's reliance on the three reports effectively sidestepped the issue of owners' rights, neither repudiating nor distinguishing them, by emphasizing collective interests. However, by following this course they failed to sufficiently evaluate the weight of public opinion both as a factor influencing the court and as a driving, albeit highly emotive, factor in free market economics. Without consumer confidence in the product, real estate like any other commodity, will suffer market reversals and the vigorous public reaction to the MLY HOA case echoes the keen public interest in property rights.

On the other hand, the general popular appeal and vitality of the private ownership of real property is subject to varying opinions as traditional communal or *collective* practice is ingrained in Chinese society and even many unit owners may experience difficulty in overcoming this mental inertia.⁷⁷ Some scholars suggest that if condominium associations provide a forum for discussing the nature of property rights, consensus from a social constructionist's view (i.e., communal ownership as merely a non-obligatory social construct) is required as a starting point for the growth of individual property rights.⁷⁸ Otherwise, the practical impact of Chinese reforms will yield barren results.

Nonetheless the significance of these two case studies in Chinese socio-cultural economic life is of the first order as they demonstrate how opening the door to local democratic governance as a matter of right, and government sensitivity to public opinion (especially amongst the Chinese judiciary), may potentially lead to regional democratic structures and, ultimately impact the national governing organs themselves. The transitional process of democratization is driven by several conditioning factors: one, the mood of the community as it perceives the efficiency and benefits of self-rule and becomes more

⁷⁷ LIEMI CHEN, *MANAGEMENT OF SOLD PUBLIC HOUSING IN URBAN CHINA: A CASE STUDY OF RAILWAY NEW ESTATE*, SHANGHAI (2006), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.135.5625&rep=rep1&type=pdf>.

⁷⁸ A.M. Kim, *Talking Back: The Role of Narrative in Vietnam's Recent Land Compensation Changes*, 48 *URB. STUD.* 493, 505 (2011).

acclimatized to an empowering democratic process;⁷⁹ two, the fruits of China's growing economy as increased wealth creates a larger middle class who will demand greater input into government policy, consistent with a theory of *economic determinism*. Finally, market forces themselves drive greater democratic processes by encouraging market efficiencies in a free market environment as fundamentally consistent with greater democratic processes. This is the posture adopted by *law and economic theory*, which provides that law is designed to control externalities and reduce transaction costs.⁸⁰ In the example above, local government corruption, developer or management company overreaching and lack of reliable judicial enforceability are the externalities being controlled and the synergies of individual ownership (e.g. cost sharing, volunteer owner management associations, owner maintenance and upkeep of facilities, etc.) reduce the transaction costs. While this theory is usually postulated in terms of common law systems, its inspirational genesis arises from *laissez faire economics*⁸¹ and can be applicable in a civil law system as well. Indeed, as the common law of contract, land law and tort developed in the international economic environment of nineteenth century free market economics so too has the recent statutory law of China developed in an arguably proximate international (neoliberal) economic milieu.

Potential Risks

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

While the Property Law provides for free elections it also allows for the imposition of the local government to provide "help and instructions."⁸² The issue of interference by local government is tied to judicial review and especially to the inefficient enforcement of judgments as executive mandate can tend to circumvent judicial decisions. Some of the influence of local government is purely ministerial such as providing for basic government services including the provision of electricity and water and sewer. It also assists owners' associations with their initial set-up and the transfer from developers in newly constructed condominiums. However, in some cases there is a struggle between the local government and the owners' associations. Originally, local government served as the landlord for all residential property within its jurisdiction. With the appearance of private property statutes that relationship changed but local government often retained control over the common elements and charged a fee to the owners for their use. This transitioned into the so-called "Shenzhen mode" or the privatization of the services previously supplied by the public sector. Thereafter, as the owners eventually gained control and ownership over these elements the local government continued to retain control over the service personnel, often in the form of a for-profit management company.⁸³

⁷⁹ See generally Kevin J. O'Brien, *Rightful Resistance*, 49 *WORLD POL.* 31 (1996); See also Kevin J. O'Brien, *Neither Transgressive nor Contained: Boundary-spanning Contention in China*, 8(1) *MOBILIZATION* (2003).

⁸⁰ See generally RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 343-49 (5th ed. 1998).

⁸¹ See *id.*

⁸² Property Law art. 75 (2007) (P.R.C.).

⁸³ Z. W. Du, *Marketization of Property Management in Shenzhen (Part I)*, 111 *HOUSING & REAL ESTATE* 51-3 (2003).

This transition can also be observed in newly constructed condominium projects with developers reluctantly relinquishing control of [for-profit based] common elements and professional management companies, usually only after a struggle with the owners. The developers are frequently aligned with the local government in this process or acting with their support. Moreover, recourse to judicial remedies sometimes proves vain as the lack of adequate judicial review or enforceability of judgments is often thwarted by the local authorities.⁸⁴ This provides a rich medium for local corruption.

Therefore, the issue of local interference with the effective democratic governance in owners' associations and the issue of judicial review and enforcement are intertwined. The continued control by local authority (or developers acting in concert with local authority) outside the judiciary is at odds with democratization and market forces. The failure to provide an adequate remedy has occasionally resulted in owners taking a political stance instead of a purely legal one as sit-down protests have sometimes been initiated in order to gain the attention of even higher ranking officials.⁸⁵ Because they are actual stakeholders, these protesters are more highly motivated than they would be as mere tenants. Though sometimes effective, such methods alone are perhaps not a reliable engine to bring about change and protect the rights of the owners (though they do serve as a barometer of changing societal perceptions and expectations as seen in the Lijang Garden protests of 2009).

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

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

TM complex case

⁸⁴ Though perhaps not strictly applicable to local government, the Property Law of 2007 does allow for the protection of the individual owner from overreaching by the owners association itself as it provides that the decisions of the general meeting and the executive committee are binding on the owners unless an owner can prove that the decision adversely affects his or her legitimate rights and interests. *See* Property Law art. 78(2) (2007) (P.R.C.). In the latter instance, or indeed if it can be proved that prescribed procedures have been contravened, he or she can approach the court for invalidation of the decision within a year after he has become aware or should have become aware of the decision. *See* Judicial Interpretation on Property Law art. 12 (2007) (P.R.C.). This provision reflects the protection of minority rights.

⁸⁵ One example occurred in 1998 when the owners of the Kai Li Garden in Shenzhen staged a sit-down strike in front of the district and municipal government buildings over a dispute concerning unit ownership certificates.

In November 2006, the TM HOA held its election for the executive committee with the incumbents running for a second term. Despite numerous attempts, the Sub-district Office (local government agency)⁸⁶ refused to participate or organize the election. Instead, they coerced homeowners in an effort to sabotage the process.⁸⁷ In spite of these efforts, the TM HOA executive committee was re-elected. However, the Sub-district Office refused to approve or recognize the election and without their approval the executive committee could not be registered with the District Housing Administrative Department. Nonetheless, the executive committee subsequently held a general meeting where it proposed and received approval for a tender for a new property management company. Allegedly, there was collusion between the local government and the pre-existing management company and they refused to approve the election results because they knew the executive committee would seek to replace the old management company.

Prior to the completion of the tendering process, the local office of the District Housing Administrative Department along with the local government agency sent out a notice denying the authority of the executive committee and calling for a new election. The notice further stated that the election would be held at the local Housing Administrative Office and demanded homeowner participation. Moreover, the Beijing Municipality Construction Committee also issued a circular (No. 666) joining with the Housing Administration Office demands and requiring the HOA surrender all official documents (including the organization seal) to the Sub-district Office.⁸⁸ Thereafter, a new election was held where the prior executive committee was replaced by a margin of one vote.

In retaliation, the former executive committee organized a seminar conducted by experts in district administrative matters, legal scholars and lawyers to investigate whether the local authority had the right to re-elect the executive committee and especially the legal status and propriety of Circular 666. This resulted in the filing of a suit against the Beijing Municipality Construction Committee for issuing the circular. The District Court dismissed the case and pointed out that Circular 666 was only an instructional opinion with no administrative binding force.⁸⁹ Although the case was dismissed, many industry experts hailed the decision as a victory for HOAs chiefly for two reasons.⁹⁰ First, in not questioning the *locus standi* of the HOA committee the Court *per se* acquiesced to the legitimacy of the action including the concession of judicial review of the administrative function and the HOA as an appropriate applicant.⁹¹ Secondly, Circular 666 has no precedential value since the Court considered it as only an opinion, thus local agencies cannot rely on it as a basis to intervene in the future.⁹²

⁸⁶ In accordance with the Chinese Constitution Article 111 and the Organic Law on the Urban Residents' Committees, residents committees' (RC) in China are grass-roots organizations of local residents in urban areas who perform minor self-governing functions. RC's are not state organs, but populous organizations voluntarily formed by the residents to handle their own affairs under the guidance of the the Sub-district Office and serve as a facilitator of government-community communications. The Sub-district Office is the lowest government organ in the Chinese administrative structure.

⁸⁷ The Sub-district Office denied the validity of the voting result by refusing to stamp and endorse the decision.

⁸⁸ See the online forum by TM Complex owners, <http://www.timesmanor.org>.

⁸⁹ See *id.*

⁹⁰ See *id.*

⁹¹ See *id.*

⁹² See *id.*

This case is significant for two reasons. First, it illustrates the means and opacity of corruption in local Chinese politics and how it can occasionally circumvent both the best interests of the homeowners and the democratic structure of the association. In this case, the democratically elected executive committee was removed and the new committee put in place (ostensibly via coercion). Additionally, the management company was not replaced and, presumably the owners are still suffering the consequences. Second, it reveals the reluctant collusion of the judiciary in local corruption. In a country that has only recently made provision for judicial administrative review with arguable reticence,⁹³ the court could have dismissed the case on the grounds of standing.⁹⁴ By reaching its decision on the grounds it chose, the court preserved the actions of other associations to bring future, presumably more effective, actions. On the other hand, though industry experts exhorted the positive ramifications of the decision, it seems faint praise in light of the result. The original association executive committee is no longer in power, the election was disrupted and the original for-profit management company is still in place (and apparently still in collusion with the local government). It is also easy to jump to the conclusion that the original suit should have centered on the actions of the local government (for its failure to recognize the first election) and for corruption instead of the declarations in circular 666. But some margin of appreciation must be afforded the local legal experts with regard to the most promising legal stratagem. Indeed, when considering the success of the MLY HOA case (above), public opinion and political support would have likely better served the claimants than a different legal plan.

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

CONCLUSION

⁹³ Administrative law in the People's Republic of China was virtually non-existent before the end of the Cultural Revolution. The Administrative Procedure Law was passed in 1989 and went into effect on 1 October 1990. This law made it possible for individuals to bring a case against the administration and also laid down the relevant criteria and procedures for administrative law litigation. See FENG LIN, *ADMINISTRATIVE LAW: PROCEDURES AND REMEDIES IN CHINA* (1996).

⁹⁴ Although condominium litigation continues to increase in China, most courts initially were reluctant to grant a HOA the power to sue or be sued in the absence of statutory authority. However, quite recently, some provincial courts have issued judicial opinions allowing the executive council of a HOA to appear in court as either a plaintiff or a defendant on behalf of the owners. See Table 1 in this article. This has been well-received and may provide a grant to HOA's to exclusively pursue claims in common property disputes. First, multiple-party litigation with every unit owner individually involved is cumbersome and a procedural nightmare for the courts. Second, with HOA standing the common interest of all members are protected instead of limiting litigation to individual interests. Third, when the HOA has exclusive standing, defendants are protected from multiple and repeated suits of the same claim. With the above advantages, the HOA's exclusive standing is an efficient way to resolve common property disputes.

Private ownership of all real estate seems to be the next hurdle for Chinese lawmakers and is, symbolically at least, one of the last residues of socialism in the Chinese land scheme.⁹⁵ Growing claims for privatization and free market economics, the sanctity of market value and market forces are not only driving China's economic aspirations but also blossoming into an emerging rights regime. These trends are driven by economic determinism, the mood of the times, the encouragement of efficiencies and reduction of transaction costs, and seem not to be gainsaid by minor corruption and other temporary structural defects. Moreover, these trends serve as the most reliable engine of prediction for future development and override other considerations. While the existence of local government interference with owners' property rights, poorly drafted legislation and lack of judicial enforcement cut against the market, these defects can more properly be characterized as "growing pains" that will eventually relent in the face of market forces.

In view of the relationship dynamics among developers, homeowners and local governments, two policy recommendations are initiated. First, the PRC could create more binding laws overriding developer conflicts of interest in order to allow owner committees to take control of the management of their properties sooner and make the transition smoother. This process has begun to evolve with substantial changes to the national statutes in 2003 and 2007. However, additional legislative challenges remain and national and local legislators should continue to perfect the system to alleviate corruption and developer overreaching as well as create an equitable condominium structure that works efficiently. Second, enhancing homeowner's awareness to stand for their own interests is warranted. Through the dissemination of knowledge/ property rights, Chinese homeowners may transform concept of condominium ownership from home ownership into participation in community life.

⁹⁵ It should be noted that although there is no private landownership in China so far, the land use right holding which can be transferred and commercialized, thus making the urban land in China marketable and therefore a capitalized asset. China does not accept the rule that what is attached to the land becomes part of it. In consequence, the legal status of the land and that of the buildings on land are separate and distinct. See an extensive description of the Chinese land use right at P.A. RANDOLPH & JIANBO LOU, CHINESE REAL ESTATE LAW (2000).