# 4 The success of law and development in China

## Is China the latest Asian developmental state?

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### Introduction

After nearly 30 years of successful economic development, it is clear that law has been a key part of the economic development story of China's market economy. That was also one of Premier Deng Xiaoping's aims when he announced the Four Modernizations and China's Open-door Policy in December 1978. What is less clear is the extent to which law was a driver of economic development and whether China's experience fits into any of the various Western law and development models or paradigms.

This chapter argues that China's development story and Chinese law clearly do not conform with Western notions of the "rule of law" or "democracy". These inhabit rights-based laws, institutions and practices, which have rarely been popular currency in Asia, and never in China. Rather, the chapter argues that modern Chinese law, like law in the 1960s Asian developmental states, is an instrumentalist mix of borrowings and pragmatic adaptations from both east and west which has grown into an autochthonous construct that serves specific local concepts of development. Similar "localist" statutes and institutions have been evident in the newly industrialized nations in Asia, which have been dubbed the Asian developmental states, tigers and miracles. Their laws were designed to serve the developmental purposes of the Asian societies in which they are fostered. As an example, this paper discusses China's path to protecting businesses and private property. It acknowledges the National People's Congress (NPC, China's parliament) revision of the Constitution in 2004 to include the clause: "Citizens' legal private property is inviolable" and examines aspects of business law and the 2007 Property Law which was more than a decade in the making.

The law and development movement, whether in its old or its new guise,[1] appears to hold that to achieve economic development, a developing country must build institutions that allow political participation and implement "the rule of law" (variously defined, but always including, at a minimum, protection for individual property rights and contractual rights). The absence of these, so the theory claims, discourages investment and specialization, and ultimately thwarts economic growth. Even to the untrained eye, China's recent performance appears to refute this proposition. With gross domestic product (GDP) growing

by 9 percent or more nearly every year for the past 30 years, it is clear that China has enjoyed rapid social and economic development—without adopting either the rule of law or democracy. However, right from the start of the implementation of Deng Xiaoping's modernization policy in 1979, China enacted an abundance of laws and regulations in an attempt to stabilize Chinese society after the lawlessness of the Cultural Revolution (1966–76) and to entice foreign investment that the government hoped would help foster rapid economic development.

Clearly, law is a key part of China's economic development story. However, in agreement with many scholars, this chapter holds that, even if China were to adopt the Western notion of the rule of law as a serious model for emulation, significant hurdles would need to be overcome before the phrase "rule *of* law" could ever replace the phase "rule *by* law," which more aptly describes the current Chinese experience (Lubman 2006; Chen Jianfu 2003; Peerenboom 2007). Instead of re-visiting the rule of law debate, this paper considers whether China's use of law is more akin to law that was used in the Asian developmental states in the 1960s through to the 1990s and perhaps even today. For, although some have announced the death of the Asian developmental state, close scrutiny reveals that its characteristics are still alive and well and living in Singapore, South Korea, Taiwan, Thailand, Malaysia and so on. For instance, among the wide range of government interventionist measures that these states used to foster economic development from the 1960s and beyond, "governing the market" through the widespread use of law and regulations was one of the most effective. This paper argues that China is doing the same. However, whereas it is popularly agreed that the "Tigers" or "Asian miracles" experienced growth with a high degree of equity, that does not appear to be the case in China.

This chapter is divided into six parts. Following this introduction, the second part contextualizes the Asian developmental state as a basis for discussing China's experience. The third part paints a picture of the legal culture that pertained in China before the legal and economic reforms were launched in 1979. The main focus is on the period from 1949 when the People's Republic of China (PRC) was founded and Mao Zedong and the Communist Party experimented with Marxism. Land reform is used as an example both here and in the analysis in the fifth part since property rights are supposedly one of the key factors of production that affect the fostering of economic development. The fourth part addresses the post-1979 legal culture and the prominence given to law and legal institutions during the Deng years and beyond. Part five analyses some of the rules that deal with private businesses and private property in an attempt to discover whether China as an Asian developmental state might be breaking new ground in these areas. Finally, the sixth part concludes that China's economic development practice exhibits an abundant use of substantive law but weak and inherently flawed enforcement, and enforcement institutions. There is strong evidence that China is using law to intervene and "govern the market" at every conceivable opportunity in order to foster social and economic development.

This conclusion also raises several new questions:

- Does China's model prove definitively that to develop, developing countries need not observe the rule of law since they might be better off growing their own authoritarian regimes that focus wholeheartedly on developing the economy through the instrumental use of law, rather than focusing on the rights-based rule of law and Western democratic institutions which Western aid and other agencies [the Washington Consensus] prescribe?
- Might China's experience be derailed because China is not able to provide 'rapid *growth with equity*' to the same extent or in a similar fashion in which its successful Asian predecessors did during their formative years?
- Specifically, how will China bridge the prosperity gap that is currently widening between its vast rural and its urban population?
- If development is about freedom to choose (Sen 1999), what choices will China make to ensure stability or "harmony" in the countryside and between the countryside and the cities?

## Law and the Asian developmental state

"Governing the market" was not only the title but also the economic development model identified by Wade (1990) when he described the bold interventionist policies and actions used to effect rapid economic growth in Taiwan during the 1960s and 1970s. Researching these Asian countries, economists and political scientists such as Chalmers Johnson (1982), Alice Amsden (1989), Thomas Gold (1986), Stephen Haggard (1990), John C. Fei *et al.* (1979), and others also identified and helped to popularize the brand of Asian developmentalism which the World Bank in 1993 admiringly called the Asian economic miracle. My own work on Singapore (Carter, 2002) was one of the few that analyzed the role of law in Singapore's economic development and later sought to explore whether the Singapore model, at Deng Xiaoping's behest, could be replicated in Suzhou, China (Carter, 2003). However, "official" admiration for the Asian model or the Asian tigers' experience was short-lived especially among the World Bank pundits because of fast-changing trends in the so-called law and development model. In her review of the World Bank's report on the Asian miracle, Amsden seems to have found that, despite the Asian developmental states' excellent track records in achieving 'rapid economic growth *with equity*', the world was not experimenting with the East Asian development model because by 1994, the tools for changing the world (according to the Washington Consensus) had changed. Quite simply, a new "moment" in the law and development movement had arrived. This new moment required a wider definition of "law" and of "development" as well as greater adherence to the neo-liberal theory for growth (free trade, free labour market, low interest rates and conservative budgets). The phrase on the lips of most developmental do-gooders from the West was "getting the price right" and since the Asian Tigers only got their prices right through government intervention, the Bank would no longer be able to tolerate what its

1993 report had called "effective but carefully limited government activism." Under the new moment in the new law and development model, the state or government was to be kept out of the market at all costs since the "free market" would regulate itself—and "get the price right." This new law and development model seems to have rendered the achievements of the Asian developmental states almost null and void. It effectively prevented attempts to replicate or adapt their model—at least at that moment. Focus was later to turn to the new prescription of "getting the institutions right"—especially in the wake of the economic downturn in Asia in 1997. However, for the Asian states themselves the model of "governing the market" was still intact. The model adjusted to the new realities—for example, pressure from the USA and the European Union to build institutional capacity—but the basic model did not go away. Below, the salient features of "governing the market" using the potent law and development model as practiced by the Asian developmental states are discussed briefly.

The gist of the model is summarized by Amartya Sen (1999, 150):

> While different empirical studies have varied in emphasis, there is now a fairly agreed list of 'helpful policies' that includes openness to competition, the use of international markets, a high level of literacy and school education, successful land reforms, and public provision of incentives for investment, exporting and industrialisation.

It was as simple as that, but difficult. For at the time, the pioneering Asian nations were "new states" which essentially rejected the then popular economic development mantras in order to try something which in their world seemed more pragmatic. They opted for export markets rather than the recommended import substitution. They prioritized education and skills training to ensure a qualified workforce. They rejected Adam Smith's theory of the self-regulating (free) market economy and the idea of minimal government interference in economic matters. Instead, they chose Keynes and consistently interfered or intervened in the market to regulate it in the directions they found suitable. They used law as the regulator/intervener; masses of laws—just like China has been doing in the post-Mao era. No section of society or business was left untouched: from labour relations, to housing, health care and education, to pensions and welfare benefits; in short, from the cradle to the grave. They also provided low-interest loans and subsidies to state-owned enterprises and other government-linked companies which operated in strategically-picked industries.

Industrialization, which entails the systematic application of technology to production, thereby mechanizing the manufacturing process, was held to be the source of modern economic growth. This was the story of the developed West—from England, continental Europe, America, Canada, and so on. Therefore, following in their footsteps and in Japan's, it is clear that industrial manufacturing would be the engine of economic growth for the new Asian nations.

In the case of Singapore, the two key ingredients for rapid economic growth were to ply external free trade while maintaining strong internal economic

control, and building the country's social and physical infrastructure. China's post-Mao strategy seems to match this model. The results are also identical—except for the scale and the accelerated pace.

Singapore's model protected a bundle of rights, including property rights and contracts, but all were subject to "the public interest" just as is the case in the new Chinese Property Law 2007, as discussed below. And "public interest"—not surprisingly—is defined exclusively by the government (Carter, 2002, 203). However, the new law and development moment demands that the (World Bank) approved developmental state model should incorporate not just the "thin" rule of law but the "thick" (Peerenboom 2004, 1) or "comprehensive" developmental model which incorporates human rights, labor rights, good governance, access to justice in addition to the usually required protection of property rights and contract enforcement. There is nothing to indicate that the new demands cannot be met as long as they too are subject to the "public interest" and that what is in the public interest is balanced and decided by the government. But this is where dissonance occurs. For as Sen (1999, 150) puts it:

> There is nothing whatsoever to indicate that any of these policies [in the model above] is inconsistent with greater democracy and actually had to be sustained by the elements of authoritarianism that happened to be present in South Korea or Singapore or China.

However, since this cannot easily be proven, a different question can be asked: why did the Asian developmental states display comparatively equal distribution of wealth and social benefits although they were not compelled by law or democratic forces to do so? Or why did the Asian developmental states bother to strive for and achieve "growth with equit" although they were all regimes working without the constraint of the rule of law or democracy? Put another way, why did citizens in Singapore forego their democratic rights and subject themselves to the whims of the Asian developmental [authoritarian] state?

I have argued elsewhere (Carter 2002) that the explanation is that the government *succeeded* in creating a communitarian ideology and delivering a *feeling* or *perception* of social justice and tangible benefits which secured the acquiescence of the people to endure the intrusive activities of the state and its elite bureaucrats. Tangible benefits included all the physical provisions of food, clothing, and shelter to satisfy the base of Maslow's hierarchy, but also education, health care, social security and so on. An obvious question then is: could these tangible benefits and the perception of social justice be construed as "comprehensive development"—the new phrase in one of the new land and development (LAD) movements? Perhaps other rights or freedoms were subsumed or sacrificed for the common good in the "public interest" of achieving and sharing in the overall success of rapid economic growth.

In truth, the issues might be even wider as the new "moment" in the law and development paradigm is extended to incorporate "the social" and "the human" in the ever-emerging paradigm. However as Kerry Rittich (2006: 15) points out,

the new "social" rhetoric might still be based in economic development since even the rationale for introducing basic human rights such as freedom of expression and freedom of association are motivated by the need to "protect the interest of civil society, serve as a counterweight to state power and form part of the political climate necessary to attract investment and ensure growth … thus serving both an economic and a social purpose" (*id*). So be it, since none of these "freedoms" will be available without economic support and a socio-economic infrastructure. Life does not happen in a vacuum, and it is certainly not gratis to live—with or without these freedoms. Thus "social reforms are seen as both a means as well as an end to development" (*id*) as the crux seems to be a redefinition of what "development" means. However, that's nothing new in the "growth with equity" model of the Asian developmental states. In fact, arguably, their definition of development was always "comprehensive" embracing both the social and the human—albeit not always the Western notion of "human right."

## Legal culture in China: pre-1979

Characterizing legal culture in China, briefly, is a tough task. The challenge is the amalgam of thousands of years of traditional law and cultural beliefs which underpin legal perceptions in modern Chinese society. But it is also the short, sharp shock of three decades of Marxist-influenced Maoist governance,[2] remnants of which still hold sway in today's society. For some three thousand years in traditional China, up to the fall of the Qing dynasty in 1911, formal law essentially comprised commands and instructions to bureaucrats outlining how to govern the country. People's behavior was governed separately by a code of conduct (*li*) and punishments (*fa*), which were used as a last resort when *li* failed. Their business transactions were regulated mainly by the clan (*tsu*) and craft associations. In other words, society functioned—even if it "lacked" the Western perception of law and legal institutions.

The fall of dynastic rule in 1911 created a power vacuum that was filled by 40 years of various competing political doctrines and an array of imported laws and legal institutions. The Kuomintang (KMT), which overthrew the Qing, was a strong contender for succeeding and for ruling a unified China. However, the successful competitor was Mao Zedong and the Communist Party, which had been established in China in 1923. They allied themselves with the rural population with which they thrived—especially after 1927 when the KMT abandoned the United Front against the Japanese invaders and the Communist Party was forced to flee to the countryside. During the summer of 1949, the KMT began fleeing to Taiwan and on October 1, Mao Zedong and the Communist Party declared the founding of the People's Republic of China (PRC).

Under Mao Zedong, law (however defined) was treated with immense suspicion and disrespect. Most KMT laws were abolished, and legal institutions—including courts, lawyers and judges—were abandoned. The latter, together with most intellectuals, were banished to the countryside to learn from the peasants. Indeed the "Down to the Countryside Movement," as it became known during

the Cultural Revolution (1966–76), was the preferred Maoist way of ensuring that everyone shared his revolutionary zeal. In short, the legal system, such as it was, was greatly diminished and politicized. Law became policy-implementing tools (regulations and orders) and the policies emanated from Marxism (as developed by Lenin). Marxism is based on the belief that "the history of all hitherto existing society is the history of class struggles."[3] According to Marx, progress is the result of class struggles, and they cause society to move through a series of inevitable phases, from serfdom to feudalism, capitalism, socialism and finally to communism—a stateless utopia in which land and capital are owned collectively by a society that is free of class divisions (Rohmann, 1999, 250). The belief is that once the Communist utopia is established, the state as well as law would simply "wither away."

A great deal of what occurred in China during the Maoist years, 1949–76, constituted a period of ideological experimentation, during which the Communist Party tried to implement Marxism-Leninism in China. There was a period of "self-reliance", at the beginning of which foreign investors were forced to leave China and it is "no understatement to say that between 1949 and 1979 China's foreign trade was conducted in a legal vacuum" (Lubman 2006, 10). For nearly 30 years, all trade with non-Communist Western countries was conducted through a small clique of trading companies—the most reputable of which were based in London and Hamburg. Disputes with foreign business partners were settled through negotiations relying on the usual anticipation of continued future business relationships and past commercial dealings.

The organization and conduct of domestic business fared no better: the command economy developed its own huge state planning bureaucracy endowed with vast unbridled discretion. The goal, according to Marxism-Leninism, was that land and capital should be owned collectively by society, so the state experiments focused on these. Collective enterprises were set up both in the rural and urban areas of China and work units (*danwei*) and teams were formed so that life for all Chinese soon revolved around these and similar forcibly formed collective organizations.

With its background and primary support clearly solidified among the rural population during the decades in the wilderness, the Communist Party soon delivered on its primary promise to the peasants: land reform. The Party was able to break the dominance of the landlord class in the countryside and redistribute land to the peasants. In so doing, the Communist Party also categorized the rural population into various classes and identified landlords as the "enemies of the people and the Chinese revolution." In later years landlords were also categorized as "counter-revolutionaries" along with all others (especially jurists and academics) who dared articulate protest against Maoists. Counter-revolutionaries and enemies of the people were to be "treated harshly according to law"—that is, punished in the manner of *fa*.

Teams of students and peasants conducted the confiscation of land in the Party's name. Confiscation and redistribution were carried out in a confrontational and violent manner in order to demonstrate the power of the Party and the

newly empowered peasant masses. Some sinologists report that many landlords were punished publicly and even executed in "retaliation for centuries of exploitation" while their surviving family members were forced to carry, for the rest of their lives, their new disparaging and dangerous status as "enemies of the people" (Stockman 2000, 179).

Small and mostly economically inefficient plots were created from the redistributed land. This in turn created friction between the new landed neighbours and resulted in food shortages in the cities. To solve these newly created problems, Mao and the Party organized farmers to work together in mutual aid teams (MATs). Their purpose was pure commonsense: work together, lend tools to each other and generally assist each other in conducting chores on the farms. These were feats which farmers in the countryside had always done anyway; that was their chosen way of life. Now there was no choice, they were forced to work in MATs, the precursors of the dreaded Maoist cooperatives and collectives.

To further move towards socialism, the Maoists ordered land-holding peasants to form cooperatives, each consisting of about 35 households whose members would pool the working of their plots, animals and tools. They were allowed to retain titles to their land and small plots for private use. As this experiment was deemed a success, despite complaints from members of the cooperatives, in 1956 the Party ordered the formation of so-called higher-level agricultural producers' cooperatives (APCs). Each higher-level APC comprised about 160 households. In this model, peasants lost private ownership of all their principal means of production as well as titles to their plots of land, which were now to be held only by the collectives. As ideological zeal rose, so did lawlessness. For example, militant groups of students, who called themselves the Red Guards, roamed cities as well as the countryside "meting out justice" and generally opposing anyone who dared utter protests against the Maoist experiments. During the Cultural Revolution, 1966–76, law itself was denounced as an alien and bourgeois notion.

## Legal culture in China: post-1979

As noted above, for the first three decades of the PRC's existence, the Communist Party and Mao Zedong ruled China without any legal codes of substance and with very little regard for law, culminating in a complete denunciation of law during the Cultural Revolution. Upon succeeding Mao, Deng Xiaoping's first goal was to seek stability through law in order to foster economic growth in China. This he summarized as a "two hands policy": on the one hand, the economy must be developed; and on the other the legal system must be strengthened (cited in Chen Jianfu, 1999, 40). Deng's first major policy declaration, in late December 1978,[4] launched "the Four Modernizations," in which he focused on economic and legal reforms. The four modernizations are agriculture, industry, technology and national defence. This policy declaration was accompanied by a raft of statutes and regulations whose stated preeminent goals were social and economic development.

One of Deng's first steps in modernization started in the countryside: it was to lift the artificial restrictions which Mao had placed on the small farmers and peasants. Deng reinstated the small household units and announced that henceforth peasants were only required to sell specified amounts of their crops and products to the government at state-set prices; anything above those set quotas could be consumed by the teams or sold in the free domestic market. It was a small but meaningful gesture as it released "market forces" among the farmers for the first time since the rule of the Communist Party.

Deng's first major experiment in economic development was the establishment of special economic zones (SEZs)—first in Shenzhen (1979), then in Xiamen, Shantou and Zhuhai in 1980. Others followed over the years; what they all had in common was that they were coastal cities or areas in which development experiments could be conducted without affecting the inland/heartland of China. Chinese laws relating to foreign investments and social engineering could therefore be tried out in these areas and were kept insulated from other domestic laws which regulated Chinese domestic enterprises (Carter, 2003). Modeled on export processing zones in other developing countries, China's SEZs soon became pockets of prosperity and management incubators for training young Chinese managers, as foreign investors claimed the tax and other incentives in return for setting up production joint ventures and exporting their manufactured goods. In general, SEZs were regulated by special provincial or local laws; many of which were sometimes contrary to national legislation. It was in these SEZ settings too that the Chinese experiment in "governing the market" accelerated. As a developmental vehicle, the SEZ phenomenon is being studied in its own right and although academic research has been scant, it is expected to accelerate as India and other developing countries attempt to imitate China's model (Carter and Harding, 2009).

From 1979 up to the current period, legal reform and economic development would go hand in hand. The one impacted the other and both are now inextricably entwined so it is difficult to say whether law was the engine or facilitator of economic development or whether rapid economic growth spurred the development of law and legal institutions. Economic development (especially through foreign direct investment—FDI) requires stability within the state, and often economic betterment supports stability. But what is the nature of the law and legal system in the post-Mao era? Clearly it is law in its highly instrumentalist guise, law as the "mature policy" of the state as was the case in the Asian developmental states and as is articulated in Singapore's transformation (Carter, 2002).

Some sinologists identify three waves of legal development in modern China (Cohen, 2006; Chen, 2003). The following sections highlight a few laws in each wave in an attempt to characterize the nature of law that was being developed and implemented.

### *The first wave of legal development: 1979–92*

The "first wave" is represented by the clutch of laws enacted by the National People's Congress (NPC, China's Parliament) in 1979, and quickly followed by other laws and regulations enacted by various national and provincial bodies up to the early 1990s. The very first batch of national laws included those that reinstated criminal law, and thus attempted to reestablish law and order, as well as China's first Joint Venture Law, designed to attract foreign investors. The latter was merely three pages long and investors and others had to await the 1983 Implementing Regulations before the law made much sense. But it was a testimony to the seriousness of Deng Xiaoping's Open-door Policy and his commitment to foreign investment as an engine of economic growth. It was later called the Equity Joint Venture Law (EJV, 1979) to differentiate it from the 1988 Contractual Joint Venture Law (CJV) which was preferred by many foreign investors of Chinese heritage who returned to invest in the regions of their ancestral homes (especially in Fujian and Guangdong provinces). Indeed, hundreds of CJVs were actually established prior to when the CJV law came into force. This is a continuing feature of law in early post-Mao China: many laws lagged reality and those that were ahead were labeled "provisional" as they were meant to be experimental. Surprisingly, an Environmental code was also enacted in 1979, although, like the Joint Venture Law, it was programmatic and would not get any teeth until later—in this case in 1989.

It was also during this first wave that a new Chinese Constitution 1978 was promulgated but it was based on the very programmatic and unsatisfactory 1954 Constitution and was therefore readily amended in 1982. The 1982 Constitution declared that the "lawful rights and interests" of foreign investors would be protected. It also specified three types of "ownership": socialist public ownership, collective ownership, and "the individual economy of urban and rural working people, operated within the limits prescribed by law". The latter was characterized as a "complement" to the "socialist public economy" (Lubman, 2006, 8). Clearly, the experiment of releasing a degree of "free market" operation among the peasants and small farmers in the countryside in parallel with the command economy of public and collective ownership supported a new kind of economic development.

The first of several contract laws emerged in 1981. This, the Economic Contract Law, which applied only to domestic transactions, regulated "agreements reached by *legal persons* to define their mutual relations in regard to their rights and duties so as to realize certain economic goals" (article 2). Separate contract laws were enacted to regulate transactions between Chinese and foreigners—and not until 1999 was the Unified Contract Law enacted. This law is a good example of China's move to prepare for WTO membership which finally occurred in 2001.

But the single most ambitious piece of legislation of the early wave was undoubtedly the General Principles of Civil Law (GPCL, 1986). Like many of the other new Chinese laws, it was borrowed from the European Civil Law

heritage (as opposed to the Common Law). The GPCL signaled a departure from central economic planning and the command economy. The most important feature was its definition of natural and legal persons capable of having legal rights, and the process by which such rights were to be created, modified or terminated.[5] These definitions brought Chinese law within the sphere of what the West calls "private law" and thereby indicated a definitive move away from China's predominantly public ownership policy and code. State-owned enterprises (SOEs), collective enterprises, Sino-foreign joint ventures and wholly foreign-owned enterprises (WFOEs) were all recognized as "enterprise legal persons".

This wave would seem to coincide with the early developmental phases of the Asian developmental states, for example, Singapore's early post-colonial experience, and Taiwan's and South Korea's early years. However, in the case of these developmental states, laws (mainly inherited Western laws) were already in place. None of these states had the heavy burden that China had to bear in going from a totally lawless society as characterized by the events of the Cultural Revolution and trying to develop a system of laws from ground zero. In addition, none of the Asian Tigers moved from a Communist command economy to a mixed socialist market economy. From these two points of view alone, China's achievement has been remarkable. That the laws and institutions built in the short period were probably also able to facilitate development is also almost incomprehensible.

### *The second wave of legal development: 1992–99*

The "second wave" of law is counted from around 1992. It is marked by the period after Deng's now famous southern tour that he made to the special economic zones of Shenzhen and Zhuhai and after the Party made an important policy decision regarding the establishment of the so-called "socialist market economy." This policy decision was supported by a batch of laws designed to foster fairer, more equal transactions between state and non-state players, to encourage the use of capitalist mechanisms, freedom of contract, and general respect for "rational" law as espoused by Max Weber. The Party's decision regarding developing a "socialist market economy" specifically mandated that enterprises should become "legal entities bearing civil rights and duties."

During this wave, the main thrust of legal development focused on business organisations. For example, after many years of debate, the Company Law was enacted in 1994, as was the first Copyright Law (1995), and a Patent Law (1997). The Trademark Law which had been enacted in 1982 was substantially revised in 1993 and its Implementing Regulations made important clarifications in 1995 (Carter, 1996).

The Company Law was modeled on the German corporation law and therefore included a supervisory board as well as a board of directors. However it was not until 2006 that the Standing Committee of the NPC issued "niceties" such as rules regarding piercing the corporate veil—but only when a controlling

shareholder abuses incorporation privileges. The Company Law itself was also amended in 2005 to allow shareholders to bring a civil lawsuit in the interests of the company and in their own names regarding the job-related acts of members of the board, supervisors and so on, which violate laws, regulations, or the articles of association and cause injury to the company. Other examples of piecemeal development of this and other important commercial laws are rife. It points to the fact that the legal infrastructure, especially business law, is still, even now, a work in progress. For as Lubman states (2006, 9): "nationwide standards for Chinese corporate governance remain confused and ineffective, and China's corporate culture remains muddled and its standards unclear—as shareholders and, sometimes, foreign investors often discover when they encounter corruption in Chinese companies."

It was during this wave, in 1996, that the 4th plenary session of the 8th National People's Congress (NPC) announced what some have called a long-term legal development strategy. It promised to "rule the country according to law and build a socialist rule of law country (*Yifa zhiguo, jianshe shehuizhui fazhiguo*)." The declaration was incorporated into both the State (1999) and the Party (2002) Constitutions. This has been exciting news for many Chinese legal scholars, some of whom have interpreted the declaration as a move towards implementing and living up to "the rule *of* law." This debate will be left for another paper. Suffice it to say that such declarations are similar to campaigns for the protection of intellectual property rights: they are promises and policy statements which can never and will never replace action. Action, however, is probably what the third wave will try to effect.

### *The third wave of legal development: 2000 to current*

The "third wave" is marked by the fact that China acceded to the Treaty of the World Trade Organization (WTO) in 2001. Accession requires an acceleration of legal and institutional reforms to help ensure that Chinese laws, regulations and the trade-related legal infrastructure comply with WTO rules. That is the stated objective and it will be and has been difficult to fulfill.

The WTO requires that China's laws and regulations are rendered transparent, easily accessible, stable and universally applicable. This means that Chinese laws can no longer be *neibu* (hidden); all must be published.[6] Furthermore, judicial and other dispute settlement mechanisms must be impartial, independent and operate transparently so that the results can be predictable. Judicial decisions must also be published—at least to the parties involved.

Some areas of the WTO Treaty specifically require special mechanisms for enforcing and adjudicating rights. For instance, under the appended Agreement on Trade-Related Intellectual Property Rights (TRIPs) member states must provide domestic procedures, institutions and remedies, which allow IP right holders to acquire, maintain and enforce protection of their rights effectively. Furthermore, article 41 compels members to integrate the enforcement procedures listed in Part 111 of the TRIPs Agreement into "their national laws so as to

permit effective action against any act of infringement of intellectual property rights covered by this Agreement."

Although TRIPs does not require "a judicial system for the enforcement of intellectual property rights distinct from that of enforcement of laws in general" nevertheless the remainder of Part 111 sets out detailed provisions and procedures, including injunctions and court orders for freezing assets, preserving evidence, and so on. All WTO member states must make these remedies available. Like most developing countries, many of China's laws comply, but only "on paper."

It is not just in legislation that some Chinese laws fall short. It is especially in enforcement. Indeed, the huge outpouring of laws within an extremely short period of time compounds the issue regarding enforcement. It could be argued that China has not had sufficient time to build the other institutions of the legal system. For instance, the position of lawyers and judges remains problematic. They are neither impartial nor independent. The Party still seems to value total control over Chinese society more than it values promoting legal reforms and an *independent* judiciary. However, this performance also mimics the model of the Asian developmental states.

Furthermore, the powers to restrain the huge bureaucracy's exercise of its wide discretion are still either too weak or not enforced with much credibility. Several administrative laws have been enacted, and many cases brought to trial but success rate is low (Palmer 2010). In short, neither the government nor the Party is under the law, and both—especially at the local and provincial levels—often hinder the impartiality and independence of judges and lawyers. Judges are selected and their wages paid by the government, and lawyers have yet to regain the respect of the system and society—especially when they represent defendants in criminal cases.

## Protecting real property in the PRC

This part analyzes some of the rules that deal with private property in an attempt to discover whether China as a developmental state might be breaking new ground in an area where, according to the 2004 Constitution, legal rights are inviolable. One major issue facing China is how to balance the use of land between its agricultural and its industrial development endeavors; in other words, between its rural and its urban developmental use. Rapid industrialization and export of manufactured goods propelled economic development in the Asian developmental states and so far China has adopted that model well. However, some 70–80 percent of China's population is still domiciled in the rural areas and as land is expropriated or requisitioned "in the public interest" to facilitate even more industrialization, the peasant farmers are being forced off the land with little compensation and into an insecure future as factory hands. The rural–urban prosperity gap has grown wide and will grow even wider. This is an issue which no Asian tiger had to deal with on a large scale so China will be breaking new ground in its developmental model when it chooses a solution. In this

respect, India could probably also gain useful insights since India seems to be following in China's footsteps in so far as the SEZ strategy for attracting foreign direct investment is concerned.

Land rights are protected and regulated in the Constitution (most recently amended in 2004), the Land Administration Law, the Law on the Contracting of Rural Land and in the PRC's first Property Law, which came into force in October 2007. Aspects of these laws will be discussed below but first some general observations regarding steps towards the modernization of agriculture and land use rights.

### *A free market for the peasants' crops?*

As noted previously, Deng's first act towards modernization was in agriculture. He lifted Mao's artificial restrictions on the sale of produce and allowed peasants to sell their crops on the free market once their pre-arranged state quotas were met. Second, he dismantled the hated MATs: mutual aid teams and reinstated the household units. Third, by setting up SEZs in Shenzhen, Xiamen, Shantou, Hainan and Zhuhai, and later on in dozens of other locations, he encouraged the rural surplus workforce to move to these urbanized developing zones in order to support industrialization and improve the peasant farmers' individual situation.[7] But the most important move was that in 1979, the Party reinstated the household unit (and jettisoned the team system) as the primary accounting unit. The Household Responsibility System (HRS) allowed individual households to contract with the collectives (the legal holders of the land) for the right to farm certain areas of land. In return they agreed to deliver a certain portion of their crops to the collective in lieu of rent (Stockman, 2000, 137).

A raft of regulations followed during the next few years, all of which aimed to encourage investment in agriculture. For instance, in 1984, the duration of HRS contracts was extended to 15 years and land could be inherited during the contract period. The duration of contracts is now 30 years. TVEs—township and village enterprises—were formed in local governments when the Maoist communes and brigades were dismantled under Deng. Some of these expanded their operations to include management of the collectives' land and since central planning no longer dictated what they must produce, many TVEs thrived. Other TVEs took on the management of industrial operations and thereby introduced industrialization into the countryside. During the 1980s and early 1990s much agricultural land was transferred from agriculture into industrial ventures, which were much more lucrative than agriculture.

Although the circumstances of farmers improved markedly under Deng and subsequent modern-era leaders, they would never achieve the economic standards that are common among people working in industry. One of the main impediments is that the peasant farmer or household does not have a permanent and secure title to the land. The thirtieth anniversary for Deng's initial agricultural reforms, 2008, promised to bring further reforms in an attempt to enhance economic prosperity among people in the rural areas but so far only small and

relatively insignificant steps have been made. Indeed, land grab issues have proliferated as have charges of corruption among officials who allegedly confiscate farmlands and rezone them for factory and residential building.

### *Constitutional protection of land rights*

The principles of land ownership are enshrined in article 10 of the PRC Constitution. This divides all land into two categories: urban land, which is owned by the state; and rural and suburban land, which is owned by collectives or by the state pursuant to law. All other parties who are in neither of these categories have contracts for land use rights of anything from 30 years' duration and up to 70 years in some privileged industrial areas.

Furthermore, "the state may, in the public interest, requisition land for its use in accordance with the law". However, it was not until the 2004 amendment of the Constitution that the NPC added that the state "shall make compensation for the land expropriated or requisitioned." For the first time, those with land use rights contracts were also permitted to transfer their contracts by lawful means.

Article 8 establishes the Household Responsibility System (HRS), creating "rural collective economic organizations" that serve as the source of collective ownership in the countryside. Thus, Household Responsibility System units are the land-title holders as well as the managers who oversee the administration of land use rights.

Article 13 was strengthened in the 2004 amendment to guarantee that "Citizens' lawful private property is inviolable" and the "state protects the rights of citizens to private property." This amendment was necessary to facilitate the new Property Law, which was finally enacted in 2007. It changed the entire foundation upon which the Chinese Communist Party and society had operated in the decades since 1949 when the preeminent objective was to achieve a Communist society, which would usher in a stateless utopia in which all land and capital are owned collectively by a classless society.

### *The Property Law of the PRC 2007: equal protection to "a rich man's car and a beggar's stick"*

Many observers, both in China and in the West, regard the new Property Law as the final nail in China's socialist coffin. It is the definitive step towards a legal system and society patterned on capitalist notions, they say. For it is well known that Marxist theory holds that the state must control all the means of production to prevent individuals from exploiting each other and to preserve equality of labour. Yet the new law accords the same degree of protection to state-owned, group-owned and private-owned property (article 4).

The Property Law is also unique in that it had a long passage in the legislative machine: the NPC's Standing Committee read it seven times, and when a draft was submitted to the public for comments over 11,000 opinions were lodged within 40 days. Of the many who opposed enactment, Gong Xiantian, a Beijing

University law professor was most vocal. Nevertheless, the bill was passed by 98 percent of the NPC's voting delegates—giving equal protection to "a rich man's car and a beggar's stick," as Professor Xiantian expressed it scornfully.

Surprisingly, while there are solid gains for the protection of urban land use rights, gains for rural holders of land use rights are miniscule. Of course there are several chapters that deal with non-urban lands but most of these mainly reiterate clauses from other laws, e.g. the Land Administration Law and the Law on the Contracting of Rural Land. According to Benjamin James (2007), by reiterating these clauses in the Property Law, the Chinese leadership is likely sending a stern message to local leaders in the rural areas to remind them about how to administer the law honestly.

One possible loophole that may allow fruitful development is article 126, which begins by reaffirming that the contracting period for cultivated lands is 30 years but continues by stating that once the contracting period has been completed "the one holding the right to operate the contracted land may continue the contract according to the relevant national rules" (*id*). Since there are no known provisions for renewal of these contractual rights no one knows what the phrase "the relevant national rules" means. However, vague and unqualified statements are often used by the PRC leadership to signal some future change or to test some idea for future legislation. In any event, at a minimum, the phrase signals that land use rights holders will not have to return the land to the collective and await redistribution in a manner which is to be determined by the collective alone. It is hoped that renewal and redistribution procedures will be formalized following Deng's first land reform announcement on December 29, 2008. *Prima facie*, the signaled provision offers greater security and a degree of predictability regarding the outcome of redistribution or "renewal" of land use rights. It therefore encourages the rights holder to invest in the land since there is known tenure.

The expectation is that, at a minimum, the Chinese government will make a policy announcement that farmers will be allowed to "subcontract, lease, exchange or swap their land-use rights or to consolidate their farm land with others within shareholding agri-businesses" (Callick, 2008). The main policy change here will respond to speculations that were rife after the vague, programmatic provisions of article 126 of the 2007 Property Law regarding renewal of land use rights contracts. But before the celebrations grow in might, it must be noted that rural land remains in collective ownership and only the transactions of land use rights have been affected. As reported by Xinhua, the state news agency, the government's move is designed to ensure that farmers' incomes will double by 2020. However, there is no indication of how this feat will be achieved. The average income of rural workers was US$906 in 2007, while the average urban income was US$3,010 during the same period. As the wealth gap widens between the rural and urban areas in China, all that can be hoped is that the new land use rights arrangements will empower farmers themselves to become the prime actors in land transactions and thus replace the local, often corrupt, party officials whose secret land transactions have often caused protests

and "mass events" throughout China and especially in Fujian and Guangdong provinces where the appetite for land for conversion into industrial parks and special economic zones seems to be insatiable.

### *What does it all mean?*

Development pertains substantially to removing what Amartya Sen (1999, 3) calls "un-freedoms." These are artificial barriers to natural human agency and economic transactions between individuals and communities. It is argued here that to judge by legislation regarding the protection of property rights, and many other actions in the post-Mao era, China's recent history of development largely supports Sen's basic idea. For once Deng Xiaoping and the Communist Party had lifted the artificial restrictions which Mao had imposed under the centrally planned economy, and started to free China's citizens from the tedious social control of the work-units (*danwai*) and forced agricultural teams, and to gradually allow the rural surplus workforce to move to factories in the urban areas, the economy took off, and China started to (re)gain its rightful place in the world.

To quote Sen (1999, 3):

> If freedom is what development advances, then there is a major argument for concentrating on that overarching objective, rather than on some particular means, or some specially chosen list of instruments. Viewing development in terms of expanding substantive freedoms directs attention to the ends that make development important, rather than merely to some of the means that, inter alia, play a prominent part in the process.

Clearly, in Sen's parlance, China is doing the right thing: focusing on development, widely defined, so the means are perhaps of little importance. However, Sen also defines the sources of "un-freedom" (*id*, 53):

> poverty as well as tyranny, poor economic opportunities as well as systematic social deprivation, neglect of public facilities as well as intolerance or over-activity of repressive states.

From this point of view, China's "development" trajectory seems less secure. "Intolerance or over-activity of repressive states" seems to bring us back full circle to the human rights issues—all those rights that are supposedly protected by the "rule of law"; the rule of law which repressive states as well as many developmental states loved to hate or form in their own image, for their own purpose and convenience.

## Conclusion

Since Deng Xiaoping launched the legal and economic reforms in 1978, China's development path has followed the Asian developmental state model in many

respects. By enacting an abundance of laws in the past three decades, China has put in place many of the statutory controls over trade and capital flows that propelled the Asian developmental states' industrial policies and growth. Despite having to start from a very low base in terms of existing legal infrastructure, Chinese legislation has touched nearly every area of the agreed list of "helpful policies" that populate the Asian developmental state model. These include the use of international markets, a high level of literacy and school education, fairly successful (though recent and timid) land reforms, and public provision of incentives for investment, exporting and industrialization—especially through SEZs.

Law enforcement still lags and corruption is still rife, more so than in any of the original Asian developmental model states. However, the "third wave" of post-Mao legal reforms is only just beginning and as discussed above, this wave will focus on enforcement, transparency, development of an independent and impartial judiciary, and so on, if nothing else then in order to comply fully with WTO treaty commitments.

With its recent moves of inviting successful capitalist entrepreneurs to join the Communist Party and enacting a new Western-friendly Property Law (2007), which many claim is the last nail in China's socialist coffin, China may well be contemplating a move towards a more classical Asian developmental state model.

It is true that China's current performance has deviated from the Asian developmental state model in one major way: that is, there is a less *equal* sharing of the fruits of economic development—especially in allowing the prosperity gap between the urban and the rural populations to widen. This is a paradox since China started from a socialist base, which required equal division of wealth and ownership of the productive resources. However, the current leadership is addressing the issue of property rights and the rural–urban divide. Its professed focus is also on building a more "harmonious" if not a more "equal" society.

## Notes

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1 For a discussion of law and development in its old guise, see David Trubek and Marc Galanter, "Scholars in Self-estrangement: Some Reflections on the Crisis in Law and Development in the Unirted States" (1974) 4 *Wisconsin Law Review* 1062. For a discussion of the concept in its new guise, see David Trubek and A Santos, eds, (2006) *The New Law and Economic Development: A Critical Appraisal*, Cambridge University Press.

2 For a study of law in Communist China in three parts, see Alice Tay (1969) "Law in Communist China – Part 1," 6 *Sydney Law Review*, 153.

3 Karl Marx and Friedrich Engels (1848) *The Manifesto of the Communist Party*, available at www.anu.edu.au/polsci/marx/classics/manifesto.html.

4 At the 3rd plenary session of the 11th Central Committee of the Communist Party of China.

5 For an excellent discussion, see William C. Jones (1987) "Some Questions Regarding the Significance of the GPCL of the PRC," 28 *Harvard International Law Journal* 309.

6 Many legal practitioners, including this author, have experienced the surprise of laws

or regulations, especially at the provincial level of government, which were unveiled only when the dispute settlement was being negotiated.

7 This latter point is controversial since some academics argue that the displacement of peasant farmers from the countryside to the urban areas creates a new category of migrant workers who suffer huge discrimination in the labour market. For a discussion, see, for example, Bjorn Gustafsson and Li Shi, "The Anatomy of Rising Earnings Inequality in Urban China" (2001) 29 *Journal of Comparative Economics* 118; Cliff Waldman, "The Labor Market in Post-Reform China: History, Evidence and Implications" (2004) 39 *Business Economcs* 50; Ronald C Brown, "China's Employment Discrimination Laws during Economic Transition" (2005) 19 *Columbia Journal of Asian Law* 361.

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