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# Land Seizures in The People's Republic of China: Protecting Property While Encouraging Economic Development

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# Land Seizures in The People's Republic of China: Protecting Property While Encouraging Economic Development

Jarrett Noble\*

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## I. INTRODUCTION

In early November 2006, thousands of Chinese villagers barricaded foreign businessmen and Chinese government officials in a warehouse they claimed had

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\* J.D., University of the Pacific, McGeorge School of Law, to be conferred May 2010. I would like to thank my family and friends, without you my triumphs would not exist.

“been built on illegally seized land,”<sup>1</sup> which had been “grabbed by officials and sold off to developers.”<sup>2</sup> This is one of numerous incidents of Chinese civil unrest because of land seizures.<sup>3</sup>

As the rate of urbanization increases,<sup>4</sup> land expropriation via government condemnation actions has also risen to meet the demand for land to develop.<sup>5</sup> This increased demand for land has made land conflicts the top source of unrest among rural Chinese,<sup>6</sup> resulting in 17,900 cases of “massive rural incidents” in which a total of 385,000 farmers protested against the government.<sup>7</sup> Of these, “approximately 80 percent of these incidents were related to illegal land-takings.”<sup>8</sup>

This civil unrest is occurring in a country trying to establish a free-market economy and striving to sustain long-term economic growth.<sup>9</sup> In an effort to secure property rights and provide a framework for property transactions, China enacted a Property Law in March of 2007 entitled *Wuquan Fa*,<sup>10</sup> an incredibly broad and comprehensive legislation.<sup>11</sup>

This law attempts to provide rules and regulations on all aspects of property rights, however certain areas of the Property Law were omitted to be resolved at a later date.<sup>12</sup> Specifically, the Property Law failed to denote what constitutes a public purpose for actions of eminent domain and the amount of compensation the displaced people are entitled to receive.<sup>13</sup> While providing proper compensation, such as fair market value,<sup>14</sup> will alleviate many of the issues raised

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1. *Thousands Riot Over China Land Seizure*, THE EPOCH TIMES, Nov. 10, 2006, available at <http://en.epochtimes.com/news/6-11-10/47989.html>.

2. *Id.*

3. See Jonathan Watts, *Land Seizures Threaten Social Stability, Warns China's Leader*, THE GUARDIAN (London), Jan. 21, 2006, available at <http://www.guardian.co.uk/world/2006/jan/21/china.jonathanwatts> (reporting an average of more than 230 demonstrations each day in 2005). See also *China's Emerging Land Rights Movement*, CHINA DIGITAL TIMES, Dec. 22, 2007, <http://chinadigitaltimes.net/2007/12/chinas-emerging-land-rights-movement> (explaining 3 different situations involving protests by thousands of Chinese villagers in different provinces over land seizures).

4. See Watts, *supra* note 3 (6.7m hectares of agricultural land converted into roads, factories, and residential areas in 2005 creating problems of food self-sufficiency and leaving millions of farmers homeless).

5. See Zhu Keliang & Roy Prosterman, *Securing Land Rights for Chinese Farmers: A Leap Forward for Stability and Growth*, Cato Development Policy Analysis Series, No. 3, Oct. 15, 2007, at 6, available at <http://ssrn.com/abstract=1066812>.

6. *Id.* at 3.

7. *Id.*

8. *Id.*

9. YAN WANG, CHINESE LEGAL REFORM: THE CASE OF FOREIGN INVESTMENT LAW 1-3 (2002).

10. *Wuquan Fa* [Real Rights Law] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 16, 2007, effective Oct. 1, 2007) translated in 2007 China Law LEXIS (P.R.C.).

11. See generally Steven M. Dickinson & Daniel P. Harris, Commentary, *China's New Property Law*, 2008 EMERGING ISSUES 955 (2007).

12. *Id.*

13. *Id.* at 5.

14. See, e.g., Publ'n 561-Main Contents, IRS U.S. Dep't of the Treasury, available at <http://www.irs.gov/publications/p561/ar02.html#d0e139> (defining fair market value as the price a property

by Chinese farmers,<sup>15</sup> it is also essential that the Chinese government provide a working framework for when land may be appropriated for a public purpose.

This paper will analyze the American standard for what constitutes a public purpose for regulatory takings as held in *Kelo v. City of New London*<sup>16</sup> and will suggest that the Chinese adopt this standard for determining when a local government may expropriate land. It will then argue that the judiciary, rather than the executive, should make this distinction. Allowing the judiciary to take the lead and establish this standard will further efforts to establish the rule of law in China, while providing the flexibility suitable for a developing nation.

Part II of this paper will look at the historical background of property rights in China. Part III will examine the issues involving the Agricultural Collectives and peasant farmers, and the various attempts at reform, culminating with the passage of the new law in March, 2007. Part IV will examine the legal setting in China and the relationship between the different forms of government. Part V will review the *Kelo* case and Part VI will analyze why its reasoning is applicable in the People's Republic of China. In addition, this section discusses the importance of addressing this issue in the context of legal reform.

Part VI then concludes that adopting the *Kelo* standard will affirm the acts of local governments that have already occurred and provide foreign investors with guidelines to determine the legal status and availability of the land. Furthermore, in the context of legal reform and globalization, providing an explicit standard will establish guidelines for the Chinese population and the Chinese government to refer to and act in accordance with. An explicit standard will establish where the individual's interest in property must give way to the government's authority.

## II. A BRIEF HISTORY OF PROPERTY RIGHTS IN CHINA

The People's Republic of China has experienced numerous land reform laws in recent decades as the government moves from a strict socialist framework to a modified free market system.<sup>17</sup> However, to fully understand the complexity of land use rights issues in China one must look at the different policies and cultural perspectives that have developed throughout the country's history.<sup>18</sup>

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would sell for on the open market or the price that would be agreed on between a willing buyer and a willing seller, with neither being required to act, and both possessing a reasonable knowledge of relevant facts) (last visited Mar. 4, 2009).

15. See Keliang & Prosterman, *supra* note 5, at 6 (reporting that "land-losing farmers typically receive only 10-20 percent of a \$20,000 expropriation") See also, Patrick A. Randolph Jr., *The Chinese Property Law: A Real Estate Practitioner's Perspective*, 21 ABA PROBATE AND PROPERTY 14, 19 (Sept.-Oct. 2007) (expressing the author's opinion that the real fight "will be over compensation, not principle").

16. *Kelo v. City of New London*, 545 U.S. 469 (2005).

17. See generally PATRICK A. RANDOLPH JR. & LOU JIANBO, CHINESE REAL ESTATE LAW chs. 1-4 (Kluwer Law International 2000) (covering a brief history of land use rights in China).

18. See generally Matthew S. Erie, *China's (Post-)Socialist Property Rights Regime: Assessing the Impact of the Property Law on Illegal Land Takings*, 37 HKLJ 919, 927-32 (2007) (discussing the impacts of land reform in rural China).

A. *Early Concepts of Land Ownership*

Starting in 16 B.C., the Shang Dynasty developed a land law system where all parcels clearly belonged to the Emperor.<sup>19</sup> Land rights were provided as compensation, and although inheritable through bloodlines, the Emperor still retained ownership.<sup>20</sup> Thus, the land was considered inalienable, and, presumably, could be reclaimed by the Emperor at anytime.<sup>21</sup>

Private ownership first appeared during the Zhou Dynasty, and as the implementation of agricultural techniques and the development of more arable land occurred, the value of single parcels of land was reduced.<sup>22</sup> As a result, a concept of private ownership developed in which the rulers of sub-kingdoms taxed the individuals according to the size of the land.<sup>23</sup>

The concept of private ownership was even more prominent during the Qin dynasty when in 216 B.C. Emperor Qin Shi Huang<sup>24</sup> ordered the peasants to record private land ownership.<sup>25</sup> Over the next several centuries, each succeeding dynasty<sup>26</sup> established minor differences in land use rights, but largely the land was separated into two categories: state-owned land and privately-held land.<sup>27</sup> Large expropriations and redistributions from private land to state land and vice-versa occurred depending upon the prevailing philosophies of the current ruling class.<sup>28</sup> The unifying theme during this early history of China was that the security of private ownership existed at the mercy of those in control and their prevailing ideologies.<sup>29</sup>

B. *Communist Policies Prior to 1949*

The state of property rights in the first half of the 20th century was analogous to China's early history and was marked by inconsistencies as different factions sought control over the country.<sup>30</sup> The Communist Party controlled portions of China, along with the Kuomintang government,<sup>31</sup> until the revolution in 1949

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19. See RANDOLPH & JIANBO, *supra* note 17, at p. 1.

20. *Id.*

21. *Id.*

22. *Id.* at 2-3.

23. *Id.* at 3.

24. *Id.* ("The Qin Dynasty is viewed as China's first true centralized government, and the foundation of modern China.").

25. *Id.*

26. *Id.* at 3-6 (Some of the more notable dynasties, in order of succession, were the Qin, the Han, the Wei, the Sui, the T'ang, the Song, the Yuan (Ghengis Kahn's rule marked the first control of China by outsiders), the Ming, and the Qing.)

27. *Id.*

28. *Id.* at 3-7.

29. See *Id.*

30. *Id.* at 6.

31. The Kuomintang government is the Chinese nationalist party. It held majority control of China

when the Communist Party took full control.<sup>32</sup> During the 1920's all privately-held land was requisitioned and declared property of the people.<sup>33</sup> However, during the 1930s it was determined that the peasant population would produce more if given a sense of ownership and land was redistributed to the poor.<sup>34</sup> During the Japanese occupation<sup>35</sup>, the Communist party changed its stance and recognized ownership rights of landlords.<sup>36</sup> But, this recognition endured only for a short while.

### *C. Nationalization and Collectivization*

In 1949, the Communist government took control of mainland China and seized all state property and anything leased to foreign countries.<sup>37</sup> Initial land reform gave poor peasant farmers private ownership of their lands and this garnered much support for the Communist party in the former Kuomintang-controlled areas of the country.<sup>38</sup> This land reform resulted in the redistribution of over half the arable land in China to 50-60 million poor rural households and increased annual crop production by 70 percent.<sup>39</sup>

However, during the 1950's China again changed its stance on property rights and started the collectivization of farming land by prohibiting all private ownership of land.<sup>40</sup> These farming collectives became the new owners of arable farmland in China, and the farmers working the land were paid contingently upon the amount of time they put into the land.<sup>41</sup> Prior to 1958, peasant farmers were still allowed small parcels of land outside of the collective that they could farm themselves. However, even this small allotment was eventually absorbed by the collectives.<sup>42</sup>

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through World War II. After the revolution in 1949, the remnants of the Kuomintang party withdrew to Taiwan and it is the current governing body in that country. *Kuomintang*, MICROSOFT ENCARTA ONLINE ENCYCLOPEDIA 2008, [http://encarta.msn.com/encyclopedia\\_761563041/Kuomintang.html](http://encarta.msn.com/encyclopedia_761563041/Kuomintang.html) (last accessed Oct. 2, 2009).

32. *Id.*

33. RANDOLPH & JIANBO, *supra* note 17, at p. 6.

34. RANDOLPH & JIANBO, *supra* note 17, at p. 6. This sentiment was embodied in the Land Law of the China Soviet Republic. This vast, influential document stated that all major holders of land or "big peasants" were to have their land expropriated by the government, of which a parcel of less fertile land would be retained for them to till by their own labor. See Preface to Fundamental Laws of the Chinese Soviet Republic, available at <http://www.marxists.org/archive/kun-bela/assorted/1934/china.htm> (last visited Oct. 2, 2009).

35. The Japanese invaded China in 1937 during World War II and would remain until the end of the war in 1945. Richard Hooker, *Modern China: The Japanese Occupation* (1996), available at <http://www.wsu.edu/~dee/MODCHINA/OCCUP.HTM>.

36. RANDOLPH & JIANBO, *supra* note 17, at p. 6.

37. *Id.* at p. 9.

38. Keliang & Prosterman, *supra* note 5, at 3.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

Eventually these collectives evolved and began to let individual farmers have a limited amount of freedom to privately farm the land.<sup>43</sup> The farmers were granted the right from contracts issued by the collective.<sup>44</sup> In return, the farmers had a responsibility to fulfill quotas every year.<sup>45</sup> This method of collectives contracting land use rights out to farmers is referred to as the "Household Responsibility System"(HRS) and is the current system employed throughout China.<sup>46</sup>

### III. THE RURAL PROBLEMS CONCERNING AGRICULTURAL COLLECTIVES

#### A. *Issues with Readjustment and Contract Duration*

As officially recognized in the Chinese Constitution, Agricultural Collectives own the land outside of cities and towns while the state retains ownership of all other land.<sup>47</sup> However, the land is strictly to be used for agricultural purposes and is non-transferable.<sup>48</sup> While these Collectives have official ownership of the land, land use rights are allocated or contracted out to producers, which may be a group of peasants, an agricultural family, or a single peasant farmer.<sup>49</sup>

The HRS was immensely productive,<sup>50</sup> but several issues arose that hindered productivity and caused unrest among rural farmers.<sup>51</sup> The primary initial complications stemming from the collectives and the HRS system were the frequency of reallocations or readjustments of land and the duration of the contracted rights farmers received to privately use the land.<sup>52</sup> Readjustments were based upon a requirement that collectively-owned land be distributed equally between the members of a collective and occurred when the demographics of a village changed.<sup>53</sup>

The duration of the contract to farm the land was also a significant issue among the rural Chinese. While the HRS was still relatively young the contract rights to the land were only for 3-year terms.<sup>54</sup> The lack of long-term contracts and the insecurity of possessing a particular tract of land that is subject to

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43. *Id.* at 4.

44. *Id.*

45. *Id.*

46. *Id.*

47. XIAN FA art. 10, § 1 (1982) (P.R.C.).

48. See Gregory M. Stein, *Acquiring Land Use Rights in Today's China: A Snapshot from on the Ground*, 24 PAC. BASIN L.J. 1, 31 (2006).

49. RANDOLPH & JIANBO, *supra* note 17, at p. 116.

50. Erie, *supra* note 18, at 928 ("From 1979 to 1984, average net income of rural residents increased 11 percent per year.").

51. Brian Schwarzwald, *A Quiet Revolution Begins: Reinventing China's Farms*, SOUTH CHINA MORNING POST (Feb. 12, 2003).

52. *Id.*

53. Erie, *supra* note 18, at 929-30.

54. Keliang & Prosterman, *supra* note 5, at 4.

readjustment discouraged farmers from improving the land by investing in things such as irrigation and drainage systems.<sup>55</sup>

The Chinese government addressed these issues in a series of legislative acts. In 1998, the Law of Land Administration was revised to extend the contractual rights of farmers to 30-year terms.<sup>56</sup> Further, the Law of Land Administration limited readjustments to specific circumstances requiring a two-thirds vote by the village committee.<sup>57</sup>

The Rural Land Contracting Law of 2002 further sought to secure land tenure for rural farmers by increasing the restriction of land readjustments to special circumstances such as natural disasters.<sup>58</sup> The Rural Contracting Law dealt exclusively with issues of rural land tenure and provided means of legal redress for dispute settlements.<sup>59</sup> However, a survey conducted in 2005 reported that readjustments had increased between 2001 and 2005, which shows that most villages have not obeyed the natural disaster exception to readjustments.<sup>60</sup> Despite these findings the Rural Land Contracting Law has had at least some effect as the percentage of farmers expecting to see future readjustments has dropped and the amount of farmers who “categorically” rule out any readjustments in the future has risen.<sup>61</sup>

While both the Land Administration Law and the Rural Land Contracting Law represent steps taken by the Chinese government to address issues involving the rural farmers and Agricultural Collectives, neither addressed the issue of interpreting public use in the context of regulatory takings.<sup>62</sup>

### *B. The Taking of Agricultural Collective Land*

The major issue facing farmers in modern China is that land is becoming a valuable commodity as foreign investment increases,<sup>63</sup> and neither the developers nor the collectives have the legal ability to leverage this resource by dealing

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55. Erie, *supra* note 18, at 929.

56. Law of Land Administration (Nat'l People's Cong., June 25, 1986, amend. Aug. 29, 1998) art. 14 (P.R.C.).

57. *Id.*

58. Rural Land Contracting Law (Nat'l People's Cong. Aug. 29, 2002, effective Mar. 1, 2003) ch. 2 § 4, art. 27 (P.R.C.).

59. *Id.* at ch. 4.

60. Zhu Kelian et al., *The Rural Land Question in China: Analysis and Recommendations Based on a Seventeen-Province Survey*, 38 N.Y.U. J. INT'L L. & POL. 761, 794 (2006) (noting that there are only 6 cases of readjustments from natural disasters and probably 423 illegal readjustments).

61. *Id.* at 795 (reporting that while this is a positive trend, the calculations do not factor in land takings).

62. Article 2 of the Land Administration Law merely decrees that the state can expropriate land according to public needs. Land Administration Law (Nat'l People's Cong., June 25, 1986, amend. Aug. 29, 1998) art. 2 (P.R.C.).

63. For example, the coastal metropolitan regions of China receive US\$45 billion in foreign investment per year. Erie, *supra* note 18, at 926-27.



directly with each other.<sup>64</sup> A survey conducted in 2005 reported that incidents of land takings have increased by more than 15 times during the past 10 years and appear to be accelerating.<sup>65</sup>

Since farmers have no ability to negotiate or make transfers of their interest in land use rights, they are effectively locked out of the market.<sup>66</sup> If a developer wishes to obtain land, they must petition the government to exercise their eminent domain power to requisition the land from the Collective and, consequently, the farmer.<sup>67</sup> Once the land has been expropriated, the government converts the collectively-held land into state-owned land and then grants the land use rights to the prospective developer.<sup>68</sup>

This encourages corruption via illegal land requisition for a variety of reasons. The lack of alienability of property rights for collectives and farmers means that a developer's only recourse for obtaining and developing agricultural land is through local government.<sup>69</sup> Further, since compensation is computed according to current value rather than future use,<sup>70</sup> and because the value of agricultural land is significantly lower than industrial land,<sup>71</sup> the potential for profit is an alluring enticement to local officials.<sup>72</sup> Finally, this is exacerbated by a public use requirement that has not been interpreted,<sup>73</sup> thus allowing officials to requisition land under the guise of public use with little follow-up or recourse.<sup>74</sup>

While other key issues such as marketability and compensation must be addressed to assure the rural population that measures are being taken to protect their rights and encourage land development,<sup>75</sup> an interpretation of what constitutes a public use would add legitimacy and a level of formality to the entire requisition process. A broad interpretation of the public use requirement

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64. See generally, Jayshree Bajoria, *China's Land Reform Challenge*, COUNCIL ON FOREIGN RELATIONS, Mar. 10, 2008, <http://www.cfr.org/publication/15699/>.

65. Kelian, *supra* note 60, at 780.

66. Stein, *supra* note 48, at 36.

67. *Id.*

68. *Id.*

69. SHOUSHUANG LI, *THE LEGAL ENVIRONMENT AND RISKS FOR FOREIGN INVESTMENT IN CHINA* 184-86 (2007).

70. See Stein, *supra* note 48, at 36 n.93 (providing that compensation for requisitioned agricultural land is six to ten times the average crop yield from the prior three years plus some allotment for resettlement, fixtures, and crops yet to be harvested (*referencing* Law of Land Administration, *supra* note 56, at art. 47)).

71. Stein, *supra* note 48, at 36-37 n.93 (noting the computation reflects what the land is worth as agricultural land and not what the value would be when negotiated between "willing participants").

72. Watts, *supra* note 3.

73. Wuquan Fa, *supra* note 10, at Part II, Chapter IV, Art. 42 ("In order to meet the demands of public interests, the requisition of lands owned collectively. . . is permitted according to limits of statutory power and procedures.").

74. See LI, *supra* note 69, at 185-86 (discussing hidden risks with foreign investment and requisitioned land); 110-11 (noting the lack of clarity on what the meaning of public use actually entails).

75. See Dennis Schmelzer, *Note: Takings for Granted: The Convergence and Non-Convergence of Property Law in The People's Republic of China and The United States*, 19 DUKE J. COMP. & INT'L L. 133, 135-37 (2008) (summarizing the responses the Chinese government has made to takings law in China).

will allow the Chinese government to sustain its economic growth,<sup>76</sup> while at the same time provide an explanation to the Chinese population and investors of what constitutes a public interest in the context of acceptable uses of the eminent domain power.<sup>77</sup>

### *C. The New Property Law*

The Property Law signifies the start of a new era for property rights in China because it provides for property rights instead of the contractual right to privately farm the land that was established by the HRS.<sup>78</sup> However, while the law does establish legal protection for private property, it does not privatize Collective land; it bestows a legislative recognition that there is a legal interest in the property people use.<sup>79</sup> The law places private property interest on equal footing with the interests of the state and the collective, both of which had priority prior to the Property Law's passage.<sup>80</sup>

The law is incredibly broad in scope, divided into five parts, 19 divisions and 247 sections, addressing all real property issues.<sup>81</sup> The law met considerable opposition and many contested issues were intentionally left vague just to get the law promulgated.<sup>82</sup> There were six drafts of the Property Law. During this time 47 government departments, 16 large companies, 22 academic institutions, and upwards of 11,500 members of the public were consulted. This level of nationwide involvement in the political process was the first of its kind in China.<sup>83</sup>

One of the most notable examples of intentional vagueness in the Property Law is the definition of public interest. Lawmakers admittedly opted for a lack of specificity in certain portions of the law in the interest of "compromise and ensuring the passing of the bill."<sup>84</sup> The public interest is referred to three times within the law: Chapter I, Article 7 states the acquisition of real rights must not harm the public interest, Chapter IV, Article 42 allows for the requisition of land to meet the demands of public interest and requires compensation to be paid, and

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76. Stein, *supra* note 48, at 40 (discussing the long term sustainability of the Chinese economy in relation to land transfers).

77. See, e.g., Jeff Pan, *Square "Nail Household" Seeks Round Solution*, CHINADAILY, Mar. 23, 2007, available at [http://www.chinadaily.com.cn/china/2007-03/23/content\\_835341.htm](http://www.chinadaily.com.cn/china/2007-03/23/content_835341.htm) (discussing a case concerning a challenge to whether a requisition to make way for a new shopping mall was a valid public interest).

78. Wuquan Fa, *supra* note 10, at Part I, Chapter I, Art. 1-5.

79. *Id.*

80. See LI, *supra* note 69, at 111 (noting civil, administrative, or even criminal liability could be incurred for interfering with private property interests).

81. Wuquan Fa, *supra* note 10.

82. Dickinson & Harris, *supra* note 11.

83. Erie, *supra* note 18, at 934.

84. *Id.* at 943-44.

Chapter XII, Article 148 provides that land may be taken before construction rights expire if in the public interest.<sup>85</sup>

The debate over the meaning of public interest and the intentionally vague definition within the Property Law stem from issues over what should actually be sanctioned as a valid public purpose. Many Chinese feel that urban and commercial developments are not valid public purposes, yet the vast majority of seizures are for these commercial reasons.<sup>86</sup> This issue has also been at the forefront of Fifth Amendment jurisprudence in the United States, and has recently undergone a broader interpretation,<sup>87</sup> a topic that will be addressed in part V.

#### IV. LEGAL BACKGROUND

China's legal system is experiencing a rebirth along with its increased economic development. In the context of public use and government expropriations, it will be critical that the courts have a clear standard to issue rulings from.<sup>88</sup> This section will look at a legal system in transition and examine the interplay between the National People's Congress (NPC) and the Supreme People's Court (SPC) to determine which branch of the government should provide the interpretation of "public interest."

##### A. Cultural Ideals and Legal Reform

Traditionally speaking, societal concepts of law and order do not regulate life in the East as much as they do in the West.<sup>89</sup> Centered upon the Confucian concept of *ho*, or harmony,<sup>90</sup> conflict and dispute were seen as contrary to the balance of maintaining inter-personal relationships.<sup>91</sup> Nevertheless, formal law did develop as a political necessity. However, instead of focusing on the protection of individual rights, the purpose of law was to consolidate state power and was "designed to shield the bureaucracy from the common people."<sup>92</sup> Thus, rather than a tool to liberate one's rights, the law was punitive in nature and used

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85. Wuquan Fa, *supra* note 10, at Chapter I, Art. 7; Chapter IV, Art. 42; Chapter XII, Art. 148..

86. See Stein, *supra* note 48, at 40 n.102 (discussing that cities represent 70% of the country's economic output, and continued economic success will demand increased expansion); see also THE EPOCH TIMES, *supra* note 1, and Yuan Shuhong, Comment: Defining the 'Public Interest', CHINADAILY, Aug. 17, 2004, available at [http://www.chinadaily.com.cn/english/doc/2004-08/17/content\\_365971.htm](http://www.chinadaily.com.cn/english/doc/2004-08/17/content_365971.htm).

87. See *Kelo v. City of New London*, 545 U.S. 469 (2005).

88. See Li, *supra* note 69, at 111-12 (discussing the legislation's broad interpretation in relation to abuse of the law).

89. GOH BEE CHEN, LAW WITHOUT LAWYERS, JUSTICE WITHOUT COURTS: ON TRADITIONAL CHINESE MEDIATION 24 (2002).

90. *Id.* at 25 (providing a philosophical analysis of Confucian principles).

91. *Id.*

92. *Id.* at 26.

as a form of social control.<sup>93</sup> As a result, disputes were resolved through mediation within local groups rather than in the courts.<sup>94</sup>

While China is long removed from these traditional roots and societal influences,<sup>95</sup> reflections of these sentiments can still be found in modern Chinese laws and statutes.<sup>96</sup> These cultural factors, along with the decimation of the legal community by Chairman Mao,<sup>97</sup> provide an understanding on how difficult it is to establish *Fazhi*, or “The Rule of Law,” in a country whose society has never entirely relied on the legal system.

The eventual reestablishment of the legal system was born from recognition that a system of law was essential to modernize the economy and provide security to potential foreign investment.<sup>98</sup> These necessities have resulted in a reinterpretation on the functions of law in Chinese society and a rejuvenation of the legal system.<sup>99</sup>

As China continues to assert its presence in the global marketplace and strives to establish its legal system, the interplay between the NPC and the SPC will become increasingly important.<sup>100</sup> This will assure the domestic population that the system is functioning and provide a measure of reliability and consistency to foreign investors.<sup>101</sup>

#### *B. The National People's Congress*

The NPC is the highest source of governmental force and authority in China.<sup>102</sup> The powers of the NPC include enacting laws, amending the Constitution, interpreting laws and supervising legislative operations.<sup>103</sup> However,

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93. *Id.* at 28.

94. *Id.* at 26, 28.

95. *Id.* at vii.

96. For example, Article 51 of the Rural Land Contracting Law, requires that disputes regarding land contracts shall first seek redress through consultation and mediation, before formal complaints can be brought to court. Rural Land Contracting Law (Nat'l People's Cong. Aug. 29, 2002, effective Mar. 1, 2003) ch. IV, art. 51 (P.R.C.).

97. As The Communist Party gained dominance in China, Party policies became more important than legal rule. The legal system was weakened even further because any legal scholars, judges, or lawyers that promoted legal independence, equality before the law, or due process were either killed or sent to work-camps in the countryside for “re-education.” WANG, *supra* note 9, at 10-12.

98. *Id.* at 12-13

99. BIN LIANG, THE CHANGING CHINESE LEGAL SYSTEM, 1978-PRESENT: CENTRALIZATION OF POWER AND RATIONALIZATION OF THE LEGAL SYSTEM 42-64 (2008) (In 1979 there were 685 law firms as compared to 12,988 in 2005. The number of lawyers rose from 2,200 in 1979 to over 150,000 in 2005.).

100. See DAVID SMITH & ZHU GUOBIN, CHINA AND THE WTO: GOING WEST 1-5 (2002) (noting the impact of the WTO on the administrative and judicial branches of government by requiring greater transparency and predictability in the political process).

101. See LIANG, *supra* note 99, at 136-44 (discussing the impact of China's globalization and acceptance into the World Trade Organization (WTO) on both foreign and domestic law).

102. *Legislation of the NPC and Its Standing Committee, China Through a Lens*, <http://www.china.org.cn/english/kuaixun/76337.htm> (last visited Mar. 5, 2009).

103. XIAN FA arts. 62-64 (1982) (P.R.C.).

the NPC is characterized as a “rubber stamp”<sup>104</sup> for the Communist Party of China (CPC) causing some to question the legitimacy of government.<sup>105</sup> For example, no motions introduced by the CPC for approval by the NPC have ever been defeated.<sup>106</sup>

This characterization has caused the entire political system in China to be questioned and undermined legitimate efforts at reform.<sup>107</sup> While CPC measures are still passed with overwhelming votes, debate behind the scenes on legislation has increased.<sup>108</sup> This tends to show that while open opposition to legislation is still rare, the members of the NPC are increasingly willing to debate terms and provisions before voting, which is a long step away from the unquestionable rule of the CPC in China's past.<sup>109</sup>

### C. The Supreme People's Court

The SPC represents the highest level of judicial authority in China and supervises the administration of justice by all other courts in the country.<sup>110</sup> The SPC conducts trials independently and reports its work to the NPC.<sup>111</sup> While strides have been made to increase judicial independence in China, the court is still subject to CPC influence via judge selection and indirectly via the NPC.<sup>112</sup> The chief purpose of the SPC is to implement the laws passed by the NPC.<sup>113</sup> While the SPC does provide interpretation of the law, China is a civil law country and most legal evolution occurs through the activities of the political branch.<sup>114</sup>

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104. “Rubber Stamp” is a term of art and refers to institutions that have formal power invested in them but rarely disagree with controlling powers such as the CPC. Rubber Stamp (Politics), [http://en.wikipedia.org/wiki/Rubber\\_stamp\\_\(politics\)](http://en.wikipedia.org/wiki/Rubber_stamp_(politics)) (last visited Mar. 5, 2009).

105. ALBERT HY CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 58 (2004) (noting that the ninth NPC (1998-2003) consisted of 71.5% CPC members).

106. *Id.* at 62.

107. There are some reports that the stigma of the NPC being a rubber stamp is beginning to fade away, however, the characterization is still appropriate. See Louisa Lim, *China's Parliament: Power to the People*, BBC News, Mar. 4, 2004, available at <http://news.bbc.co.uk/2/hi/asia-pacific/3533461.stm> (reporting on experiences of the longest-serving member of China's legislature and the changes that have taken place). See also *Inside China's Ruling Party, How China is Ruled*, BBC NEWS, available at [http://news.bbc.co.uk/2/shared/spl/hi/asia\\_pac/02/china\\_party\\_congress/china\\_ruling\\_party/how\\_china\\_is\\_ruled/html/national\\_people.stm](http://news.bbc.co.uk/2/shared/spl/hi/asia_pac/02/china_party_congress/china_ruling_party/how_china_is_ruled/html/national_people.stm) (noting the increasing independence of NPC members and a willingness to voice at least some dissent).

108. See, e.g., Erie, *supra* note 18, at 932-36 (noting that the property law went through 6 drafts before approval, and arguably was seen as a “showcase for legislative transparency”).

109. See Lim, *supra* note 107.

110. *China's State Organizational Structure*, Congressional Executive Commission on China, available at <http://www.cecc.gov/pages/virtualAcad/gov/statestruct.php#independence> (last visited Mar. 2, 2009).

111. The Supreme People's Court, ([www.gov.cn](http://www.gov.cn)) available at [http://english.gov.cn/2008-03/16/content\\_921794.htm](http://english.gov.cn/2008-03/16/content_921794.htm).

112. *China's State Organizational Structure*, *supra* note 110.

113. See Schmelzer, *supra* note 75, at 150-52.

114. *Id.*

*D. The Interpretation of "Public Interest"*

The structure for the interpretation of laws in China is markedly different than that in the United States where it is the unquestioned role of the Supreme Court to rule on such matters.<sup>115</sup> Technically speaking, the Chinese Constitution vests the power of legal interpretation in the NPC.<sup>116</sup> However, in practice the SPC issues most interpretations of law.<sup>117</sup>

Determining the standard for "public interest" could have a varying level of social impact depending upon who issues the interpretation. Since the NPC is predominantly considered to be a "rubber stamp," allowing the SPC to issue the interpretation would be consistent with the recent past and perhaps distance the public purpose debate from the perception that the CPC is controlling everything.<sup>118</sup>

Further, in the context of establishing a legal system and instilling faith in the population, such an important interpretation issued by the SPC could represent a measure of judicial independence from CPC influence.<sup>119</sup> However, considering that the NPC has the official power to interpret the laws, it could also be argued that an interpretation issued by NPC would establish legitimacy in an area of government function that has been slow to develop.<sup>120</sup>

Bearing these considerations in mind, one must look at the primary place of application to determine which body is best suited to interpret this standard. Since the "public interest" standard will be applied in lower courts, it is arguable that the ideal interpretation would issue from the SPC because in practice precedents set by the SPC are binding on lower courts.<sup>121</sup> This could also have the secondary benefit of helping to shape the public opinion of property rights and legal reform in China. As the legal community continues to build upon itself, judicial issued interpretations such as this will provide a firm example of a legal system that is beginning to operate clear of other governmental influence. This, in turn, will aid in establishing faith among citizens that the courts are applying the law independently and not succumbing to the will of the legislature.<sup>122</sup>

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115. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803).

116. XIAN FA art. 67 (1982) (P.R.C.).

117. CHEN, *supra* note 105, at 124-28.

118. *Id.* at 62-64.

119. *Id.* at 151-53.

120. *Id.* at 120-22 (noting that prior to an enactment of Law on Legislation in 2000, the NPC had issued only 3 clear interpretations of laws, and since has only issued 6).

121. *Id.* at 128-29.

122. See William W. Fisher III, *The Significance of Public Perceptions of the Takings Doctrine*, 88 COLUM. L. REV. 1774 (1988) (discussing the effect of popular opinion on court rulings, and the effect court rulings may have on public perceptions over time).

V. KELO V. CITY OF NEW LONDON

The evolution of property rights in America stems from the British Common Law system, and the expectations of landholders in the United States are markedly different than those of the Chinese. Traditionally referred to as a “bundle of rights,”<sup>123</sup> landholders enjoy the luxury of a consistent history of real rights in property and have not been subjected to the centuries of mass expropriations and unclear land policies that the Chinese have experienced.<sup>124</sup> Despite these differences, there is a measure of commonality in the struggle of defining the scope of public use and the extent of power the government holds when exercising eminent domain.

The recent broad interpretation of what constitutes a public use in the United States could provide a workable standard for the Chinese government that would provide flexibility for a country undergoing massive industrialization and economic reform, and arguably define a limit to just how far the eminent domain power can be used to further those ends.

A. *From Public Use to Public Purpose*

There is no express grant of the eminent domain power in the United States Constitution; the power was seen as an implicit right of sovereignty. However, the Constitution does limit the scope of this power. This limitation is found in the Fifth Amendment and is generally referred to as the Takings Clause.<sup>125</sup> It reads: “Nor shall private property be taken for public use, without just compensation.”<sup>126</sup>

Seen as a check on government power, courts have struggled to define what exactly constitutes a public use. In the past, public use was characterized as requiring that the public physically use the land in question and focused upon the identity of future users.<sup>127</sup> However, two Supreme Court decisions, *Berman v. Parker*<sup>128</sup> and *Hawaii Housing Authority v. Midkiff*<sup>129</sup> heralded a change in interpretation.

As cities began urban renewal projects to revitalize blighted neighborhoods, the characterization of public use was seen as unworkable and a new interpretation gradually emerged centering upon an underlying public purpose.<sup>130</sup> In *Berman v. Parker*, the plaintiff's department store had been condemned as part

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123. This bundle includes the right to exclude, the right to transfer, and the right to possess and use property. *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945).

124. *See supra* Part II.

125. U.S. CONST. amend. V.

126. *Id.*

127. *See Lawrence Berger, The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203, 205 (1978).

128. 348 U.S. 26 (1954).

129. 467 U.S. 229 (1984).

130. *See Berman*, 348 U.S. at 29.

of a large-scale urban renewal project to eliminate unsafe slums from the area.<sup>131</sup> The plan was to resell the condemned land to investors who would rebuild consistent with the urban renewal plan.<sup>132</sup>

Departing from the traditional focus on who the future users would be, the Court held that the proper standard was the underlying purpose of the government action, and that eliminating unsafe areas from a city did serve a public purpose.<sup>133</sup> While the plaintiff's department store itself was not a slum, the legislature determined that the area needed to be redesigned as whole and the Court held that "Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch."<sup>134</sup>

This shift from public use to public purpose broadened the scope of power held by the government when exercising the power of eminent domain. In *Hawaii Housing Authority v. Midkiff*, the Court held that the eminent domain power allowed the State to condemn land from a landowner and convey it to the tenant in possession in order to prevent a land oligopoly.<sup>135</sup> This oligopoly artificially increased land value and prevented many families from owning homes.<sup>136</sup> The opinion also articulated the standard of review courts would use when determining the validity of the legislative acts.<sup>137</sup>

#### *B. The Background of Kelo v. City of New London*<sup>138</sup>

The controversy surrounding *Kelo v. City of New London* stemmed from a comprehensive development scheme that was "projected to create in excess of 1,000 jobs, to increase tax and other revenues, and revitalize an economically distressed city, including its downtown and waterfront areas."<sup>139</sup> The city had experienced decades of decline that culminated in 1996 when the federal government closed the Naval Undersea Warfare Center.<sup>140</sup> Located in the Fort Turnbull area of the city, the Center had employed over 1,500 people and its closure exacerbated the existing economic problems. By 1998, the city's

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131. *Id.* at 30-31.

132. *Id.* at 30.

133. *Id.* at 32-33.

134. *Id.* at 35-36.

135. 467 U.S. 229, 232 (1984).

136. *Id.* at 231-232 (noting 22 owners held 72.5% of fee simple land on the island of Oahu).

137. *Id.* at 242-243, 244 (Explaining that a court may only evaluate the eminent domain action under a rational basis review. This standard is incredibly deferential to the legislature, requiring that there only be a rational relation to a conceivable public purpose).

138. 545 U.S. 469, 472 (2005).

139. *Id.* (quoting *Kelo v. City of New London*, 843 A.2d 500, 507 (2004)).

140. *Id.* at 473.



population was at its lowest since the 1920s, and the unemployment rate was double the state average.<sup>141</sup>

In response to these problems, a private nonprofit entity, the New London Development Corporation (NLDC), was reactivated to assist the city in coming up with a plan to revitalize the town.<sup>142</sup> During this process, the pharmaceutical company Pfizer Inc. announced plans for the construction of a \$300 million research facility in the area.<sup>143</sup>

Banking on this facility drawing new business into the area, the NLDC created a development plan that would transform the surrounding area into an economically viable region.<sup>144</sup> Some of the more notable improvements were a small urban village that included restaurants, shopping, marinas, a river walk, new homes, a U.S. Coast Guard Museum and further office and retail spaces.<sup>145</sup> The plan was designed to increase leisure and recreational activities within the area.<sup>146</sup>

The projected development was problematic because the area targeted for revitalization contained approximately 115 privately-owned properties, and while most were successfully purchased, the remaining properties were to be requisitioned via eminent domain.<sup>147</sup> The city had been acting pursuant to a state statute expressing a legislative determination that the taking of developed land as part of an economic development was “public use.”<sup>148</sup> In spite of this express authorization, nine petitioners brought suit claiming that the taking of their properties for the explained reasons violated the “public use” restriction of the Fifth Amendment.<sup>149</sup>

### C. *The Supreme Court's Ruling*

The essential question addressed by the Court in the opinion authored by Justice Stevens was whether the taking of a private home for the purpose of economic development constitutes a public use.<sup>150</sup> Examining the circumstances in the case under the broader public purpose standard, the Court held that the “plan unquestionably serves a public purpose.”<sup>151</sup> The opinion focused upon the

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141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 474.

145. *Id.*

146. *Id.* at 474-475.

147. *Id.* at 474, 475.

148. *Id.* at 476.

149. *Id.* at 475.

150. *Id.* at 477.

151. *Id.* at 484.

nature of the development and the traditional deference afforded to state legislatures to determine what justified the use of the takings power.<sup>152</sup>

Looking at the nature of the proposed development scheme, the Court recognized that “the sovereign may not take the property of A for the sole purpose of transferring it to another private party B.”<sup>153</sup> The primary concern was to ensure that the underlying purpose of the takings was not to bestow a benefit on a private individual under the guise of “public use.” Numerous factors showed an absence of a sinister plot to provide a benefit to private parties. Most importantly, while the city did plan to lease the land to private developers, the specific developers were unknown at the time the plan was adopted.<sup>154</sup>

Further, the city had a comprehensive economic plan that was designed to manifest benefits to the city as a whole through increased tax revenue and jobs, all of which was occurring in the context of a city that had experienced decades of economic decline.<sup>155</sup> While the arrival of Pfizer certainly had played a role in the breadth and scope of development that was planned<sup>156</sup> they were not the inciting incident. The takings were not for the benefit of Pfizer; the city was merely capitalizing on an opportunity that had presented itself.<sup>157</sup>

Another key factor that influenced the Court’s holding was the deference given to state legislatures “in discerning public needs.”<sup>158</sup> While the majority opinion is silent on what exact standard is to be applied in eminent domain cases involving economic development, the court does acknowledge that states are the ones best suited to determine what serves a “public use.”<sup>159</sup>

The Court also rejected the petitioner’s argument that takings involving economic development should trigger a heightened standard of review.<sup>160</sup> This standard would have required a “reasonable certainty” that the expected benefits to the public would occur.<sup>161</sup> Again focusing on the broad deference given to legislative determinations, the Court held that this heightened form of review would prove unworkable and “unquestionably impose a significant impediment to the successful consummation of many such plans.”<sup>162</sup> However, the Court did hint that there might be some circumstances that would require a heightened

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152. *Id.* at 480.

153. *Id.* at 477.

154. *Id.* at 478 n. 6 (“It is of course, difficult to accuse the government of having taken A’s property to benefit the private interests of B when the identity of B was unknown.”)

155. *Id.* at 473-74.

156. *Id.* at 473 (the city had already obtained funding to create a state park adjacent to the site where Pfizer was going to build the research facility).

157. *Id.* at 474 (state agencies had studied the probable effects of the proposed plan, and had also looked at six alternative development proposals, concluding that the proposed plan was consistent with state policy).

158. *Id.* at 482.

159. *Id.* at 482-83.

160. *Id.* at 488 .

161. *Id.* at 487.

162. *Id.* at 488 (A standard such as this would threaten to substitute the judgment of the judiciary for that of the legislatures and agencies that had formulated the plan. (citing *Lingle v. Chevron*, 544 U.S. 528, (2005).)

standard of review<sup>163</sup> but declined to address the issue until the problem had arisen.<sup>164</sup>

Although the majority opinion failed to express the standard governing the level of judicial review involved with takings and economic development, Justice Kennedy's concurring opinion suggests a rational basis test.<sup>165</sup> Under this standard the taking must rationally relate to the development plan, "with the presumption that the government's actions were reasonable and intended to serve a public purpose."<sup>166</sup>

While refusing to impose a heightened standard of review solely for the reason that the proposed taking involves economic development, Justice Kennedy does leave the door open for a narrow line of cases that may depart from this standard and require a higher level of scrutiny.<sup>167</sup>

In summation, *Kelo v. City of New London*, demonstrates that takings pertaining to economic development executed within the scheme of a comprehensive plan serve a valid public purpose within the meaning of the 5<sup>th</sup> Amendment.<sup>168</sup> Further, the case illustrates that the role of the court in eminent domain actions is to evaluate the relation of the taking to the underlying purpose.<sup>169</sup> The Court's role and function is only to ensure that there is a rational connection between the two, and not to substitute the opinion of the judiciary for that of the legislature.<sup>170</sup> A framework requiring that there be a rational relation to the purported public purpose could significantly aid China, a country that is striving to develop by giving broad leeway on how far the eminent domain power should extend. This flexibility will allow the country to continue its economic development while operating within the confines of its own laws and provide a legitimacy that the entire condemnation process has been lacking.

## VI. ANALYSIS

### A. Factors Contributing to Illegal Land Seizures in China

The land system in China is significantly different than in other areas of the world. Unlike a system of fee simple estates like in the United States, all land in

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163. See *Id.* at 486-87 (noting if land was requisitioned from *A* and transferred to *B* for the sole reason that *B* would be more productive than *A*, such a transfer would raise suspicion, especially if occurring outside a development scheme).

164. *Id.* at 487.

165. *Id.* at 490 (Kennedy, J., concurring).

166. *Id.* at 491.

167. *Id.* at 493 (suggesting that cases may arise where the transfers are suspicious or the benefits provided to the public are excessively trivial and could therefore trigger a heightened standard of review).

168. See generally *id.* at 469 (majority opinion).

169. *Id.* at 484.

170. *Id.* at 488 (quoting from *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 242 (1984)).

China is either owned by the State or by Agricultural Collectives.<sup>171</sup> Agricultural Collectives then allocate land use rights to farmers for 30-year periods of time via contract.<sup>172</sup> While land held by Agricultural Collectives can be contracted out to third parties, the designated use of the land cannot be changed.<sup>173</sup>

This causes a problem with land seizures because the only way for investors to obtain developable land is to deal with local governments who condemn farmland via eminent domain, convert it into industrial land, and then transfer the usage rights to developers.<sup>174</sup> Often, these transfers do not occur within a comprehensive development scheme like in *Kelo v. City of New London*, but rather happen on a piecemeal basis as each investor arrives.<sup>175</sup>

There are three major factors enabling illegal land seizures in the rural farmland areas of China: lack of transferable rights, improper compensation,<sup>176</sup> and no clear official recognition of the scope of the eminent domain power.<sup>177</sup> While the primary purpose of this comment is to assess what the proper interpretation of public use should be, the first two factors will be addressed briefly.

Although farmers are allocated the right to use their land for 30-year periods, this interest cannot be alienated.<sup>178</sup> Since the farmers cannot effectively tap into the value of their land and the collectives cannot change the designated agricultural purpose of the land itself, developers have no choice but to approach government officials to obtain land rights.<sup>179</sup> This contrasts with the United States where the majority of the time developers deal with the landholders and negotiate the purchase of title without involving the government.

Compensation is an issue because the disparity in the value of farmland compared to its value when converted to industrial land is enormous. As stated above in footnote 176, a parcel worth \$5000 as agricultural land is worth \$20000 as industrial land.<sup>180</sup> Further, since the Agricultural Collective is the technical holder of the land, they receive the payment, which invites further dissolution of

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171. RANDOLPH & JIANBO, *supra* note 17, at 59.

172. Law of Land Administration, ch. 2, Art. 14 (effective June 25, 1986, amended Aug. 29, 1998) (P.R.C.).

173. *Id.* at ch. 2, Art. 15 (designating acceptable uses such as farming, forestry, animal husbandry and fisheries operation).

174. LI, *supra* note 69, at 184-86.

175. *Id.*

176. See Keliang & Prosterman, *supra* note 5, at 6 (explaining that compensation averages out to approximately \$5,000 per hectare of land, which in turn increases to \$20,000 in value as its use changes from agricultural land to developable land).

177. Real Rights Law (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 16, 2007, effective Oct. 1, 2007), Part II, ch. IV, Art. 42, *translated in* 2007 China Law LEXIS, (P.R.C.) ("In order to meet the demands of public interests, the requisition of lands owned collectively. . . , is permitted according to limits of statutory power and procedures.").

178. RANDOLPH & JIANBO, *supra* note 17, at 80-81.

179. LI, *supra* note 69, at 184-86.

180. See Keliang & Prosterman, *supra* note 5, at 6.

the funds before the farmer who is being displaced receives any money.<sup>181</sup> The issue with compensation has two effects: The profit encourages corrupt acts by local officials, and the inadequacy of the compensation system leaves farmers with little with which to continue their lives.<sup>182</sup>

The lynchpin of the land seizure issue is that there is no clear delineation of what constitutes a public use or purpose within the New Property Law.<sup>183</sup> With the possibilities of gross profits from the compensation system and no alternative route to obtaining land in rural areas except via eminent domain, local officials exploit the lack of legislative interpretation on what constitutes a public use.<sup>184</sup>

As a result, a chief cause of civil unrest in China is land requisition.<sup>185</sup> This threatens the economic future of China because it undermines the efficiency of labor by discouraging investment in the land by the farmers who have allocated land use rights. Further, these land requisition tactics may create distrust in some foreign investors looking to expand into China.<sup>186</sup>

China needs a workable interpretation of what constitutes a public use to provide a framework from which government officials, mediators, investors, and the general population can refer to in order to understand their respective rights and obligations.<sup>187</sup> Further, this interpretation needs to be broad enough to allow for adaptation as the economic needs of the nation change and still have some sort of limit and purpose to discourage abuse.

## B. The Kelo Model

*Kelo v. City of New London*<sup>188</sup> provides a broad interpretation of public use that focuses on the underlying purpose of a taking, which can include economic development, to determine whether it is valid. Further, the case affords a broad amount of deference to the legislature in its determination of what the public needs.<sup>189</sup>

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181. *Id.*

182. *Id.*

183. See Real Rights Law, *supra* note 177.

184. See RANDOLPH JR. & JIANBO, *supra* note 17, at 19 (noting in urban renewal context, properties are taken with the sole purpose of replacing them with more desirable buildings without a comprehensive development plan); see also LI, *supra* note 69, at 184-86 (discussing the process of how investors obtain developable farmland in rural China).

185. Keliang & Prosterman, *supra* note 5, at 1.

186. See generally LI, *supra* note 69, at 175-193 (explaining the various risks that investors may expose themselves to when dealing with land belonging to collectives in China).

187. Wang Zhaoguo, *Explanation on the Draft Property Law of the People's Republic of China*, <http://china.org.cn/english/government/202091.htm> (explaining that some of the goals for the new law were to provide security for state and collective owned land, and safeguard interests).

188. 545 U.S. 469 (2005).

189. *Id.* at 479 (explaining that the traditional public use interpretation was too narrow and impractical considering the diverse needs of a country and how they can change over time).

A broad interpretation would allow the Chinese government to validate many land seizure issues<sup>190</sup> and allow flexibility in the scope of public use as economic goals and needs change in the future.<sup>191</sup> Further, focusing on the underlying purpose and employing a rational basis test<sup>192</sup> would provide governmental clarification on what constitutes a public use and a standard that the courts could look to when examining these types of issues.

While *Kelo v. City of New London*<sup>193</sup> occurred in the context of revitalizing an economically-depleted area, and China is in the midst of industrializing and establishing a market economy,<sup>194</sup> there are similarities between the two situations. Both circumstances illustrate situations where governments are seeking to adapt past conditions to present demands.<sup>195</sup> Further, both governments are trying to set some limit on how far the power of eminent domain should extend without unduly interfering with economic progress. Finally, a broad interpretation of public use enabling the government leeway to adapt to economic issues as they arise would be consistent with China's history of property rights.<sup>196</sup>

### C. Criticisms and Concerns

*Kelo* was not the most popular opinion in U.S. Supreme Court history, and the ruling has prompted a wide array of state legislation to curb the eminent domain power of state governments.<sup>197</sup> Chief concerns raised by the dissent in *Kelo* are that the majority opinion's lack of clear rules about when takings are permissible rendered all private property subject to takings.<sup>198</sup> However, this view has little weight in a country with a history of land takings and redistributions

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190. See, e.g., *Beijingers Protest Olympic Evictions*, CBS/AP, Aug. 4, 2008, available at [http://www.cbsnews.com/stories/2008/08/04/world/main4318385.shtml?source=RSS&tr=World\\_4318385](http://www.cbsnews.com/stories/2008/08/04/world/main4318385.shtml?source=RSS&tr=World_4318385) (reporting protests over housing requisitions in preparation for the Olympics); see also Pan, *supra* note 77 (reporting on an eminent domain action where the owner challenged whether that taking was in the public interest, ultimately resolved by increased compensation).

191. SMITH & GUOBIN, *supra* note 100, at 1-2 (discussing China's entry into the World Trade Organization and its effects on investment from abroad, policy and the rule of law).

192. *Kelo*, 545 U.S. at 490 (Kennedy, J., concurring) (suggesting that a taking would be consistent with public use so long as it was "rationally related to a conceivable purpose").

193. *Id.* at 472 (majority opinion).

194. WANG, *supra* note 9, at 1-3 (discussing the establishment of a market economy, and the influx of foreign investment laws China has enacted to "promote market-oriented economic behavior").

195. See Marie Söderberg, *Preface* to Yan Wang, *supra* note 9, at xi-xii (noting that China receives more foreign investment than any other developing country and the impact 1.3 billion consumers could have on foreign businesses).

196. See *supra* Part II.

197. Elizabeth Sperow, *The Kelo Legacy: Political Accountability, Not Legislation, Is the Cure*, 38 McGeorge L. Rev. 405, 418-422 (2007) (discussing the varying state legislative responses to *Kelo*, notably, that 28 states passed bills addressing eminent domain the year after the Court's decision).

198. *Kelo*, 545 U.S., 469 at 494 (2005) (O'Connor, J. dissenting).

because there has never been an idea of perpetual ownership in property like there has been in the United States.<sup>199</sup>

There are also substantial issues with corruption and oppression within the legal system and the Chinese government.<sup>200</sup> These issues surrounding pervasive corruption must be addressed at all levels of government in China for any meaningful application of law.<sup>201</sup> However, considering the increase in laws and regulations since the 1980s, significant strides have recently been made in establishing an effective legal system.<sup>202</sup> While substantial issues must still be resolved, there is, at least in appearance, a trend proceeding in the right direction.

## VII. CONCLUSION

The purpose of this comment has been to analyze the Property Law recently passed in China in the context of “public interest” and eminent domain. Property is a complex concept that has affected every culture of the earth and created diverse views and opinions about the right to call something your own.

Legitimizing the process of eminent domain actions will show the Chinese population that in addition to granting rights in property the government is also respecting those rights within the law. The issue of state requisition and what serves the “public interest” in China involves a plethora of different factors and requires an understanding of the different influences and forces that have shaped the country<sup>203</sup> and the legal system over time.<sup>204</sup> Interpreting the “public interest” standard is just a small piece to solving the rural property puzzle in China. In order for any meaningful change to occur, compensation, marketability and continued legal reform will have to be addressed.

However, the holding in *Kelo v. City of New London*<sup>205</sup> will provide government clarification on when a taking may occur in the “public interest.” Further, considering that there are approximately 737 million rural Chinese, even a small piece to a larger puzzle will have a significant impact and be a step towards clarification.<sup>206</sup> Such an interpretation will give the people a standard that

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199. See *supra* Part II.

200. See, e.g., *Chinese Government Takes Steps Against Corruption While Land Abuses Continue*, Congressional Executive Commission on China, <http://www.cecc.gov/pages/virtualAcad/index.phpd?showsingle=33854> (last visited Mar. 1, 2009) (noting that despite ongoing efforts to combat corruption in government, China was still ranked 78 out of 158 in a 2005 Corruption Index).

201. Matt Erie provides an excellent discussion about anthropological approaches towards institutional reform in China. See Erie, *supra* note 18, at 948 (noting that law alone may not be enough to solve the takings problem).

202. See WANG, *supra* note 9, at 1 (noting that since 1979, over 300 laws and 700 regulations have been enacted, and that legal reform in China has been conducted in an unprecedented amount of time compared to other modern societies).

203. See *supra* Part IV.

204. See *supra* Part III.

205. 545 U.S. 469 (2005).

206. NBS: *China's Rural Population Shrinks to 56% of Total*, Xinhua (Oct. 2007), <http://www.china->

they can look too and understand. It will eliminate speculation on how far the government can legally go when expropriating land and give the people an idea on what rights they should expect in their property. Further, having the SPC rule on what the interpretation for public purpose should be will help establish the courts as a forum for the people to seek justice.

While the shortcomings in the developing legal system still need further reform, and enforcement of laws at the local level must be addressed, the broad interpretation of public use as represented in *Kelo v. City of New London*<sup>207</sup> will provide a working framework enabling China to continue its development while providing some limit to the eminent domain power.

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[embassy.org/eng/xw/t374790.htm](http://embassy.org/eng/xw/t374790.htm).

207. 545 U.S. 469 (2005).



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