

If Chinese Farmers Were to be Given Full Private Ownership of their Land, What Measures Might Contribute to this Being Most Confidently and Successfully Done?

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In a fuller presentation (book chapter), I have described in detail China's thus-far only partially successful efforts to give farmers 30-year, non-readjustable¹ and (now under the new Property Law) renewable rights to their arable land.²

Efforts by the central government to implement those 30-year rights continue,³ but, pending any reasonably full success for such efforts, dealing with the land-tenure issue—with secure, long-term land tenure viewed as a prerequisite for mid- to long-term farmer investments, creation of a meaningful land market and concomitant wealth for farmers, and the forestalling of rampant land takings for non-agricultural uses—continues to be a subject of controversy, and to elicit suggestions for alternative approaches.

Most recently, articles have appeared in the Western media⁴ noting that a small but significant movement is afoot—and is facing strong official opposition—to give Chinese farmers full private ownership of the land they till. In one of the same media accounts, a prominent Chinese academic opposed to private ownership was quoted as

¹ Following breakup of the collective farms and allocation of land to individual farm households in 1979-84, most villages in China adopted the practice of periodically readjusting or reallocating landholdings in response to changes in individual household makeup, total village population, and loss of land through land takings or expropriations. There are two basic types of readjustments. In “big readjustments,” a village takes back all land from farmers and then redistributes it in accordance with population changes at both the village and household levels (e.g., if village population has grown, every individual land share will be smaller). “Small readjustments,” involve taking land from households that have lost members (e.g., through death or a daughter's marriage out of the village) and giving it to households that have added members (e.g., through birth or a marriage into the village), and does not affect the entire village landholding pattern. More recent changes in the law have attempted to substantially end such readjustments. See Law of Land Management (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 29, 1998, effective Jan. 1, 1999, *translated in* LEXIS (last visited Oct. 6, 2006) (P.R.C.); Law on the Contracting of Rural Land (promulgated by the Standing Comm. Nat'l People's Cong.; Aug. 19, 2002, effective Mar. 1, 2003) *translated in* LEXIS (last visited Oct. 6, 2006) (P.R.C.); Property Law [Wu Quan Fa] of the People's Republic of China, passed at the fifth conference of the tenth People's Congress on March 16, 2007, effective Oct. 1, 2007.

² See generally Zhu Keliang, Roy Prosterman, et al, *The Rural Land Question in China: Analysis and Recommendations Based on a Seventeen-Province Survey*, NYU JILP Vol. 38 (4) 761 (2006).

³ See news report at <http://news.hexun.com/2007-08-25/100238594.html> (Aug. 24, 2007); reports at <http://nc.people.com.cn/GB/6843047.html> (Jan. 31, 2008); and Li Ping, “On Solid Ground”, *South China Morning Post*, Feb. 23, 2008 (this Op-Ed by the RDI staff attorney who heads our Beijing Representative office discusses the new No. 1 Document).

⁴ See, e.g., J. Bajoria, “China's Land Reform Challenge” (Council on Foreign Relations, March 10, 2008); J. Anderlini, “Losing the Countryside, A restive peasantry calls on Beijing for land rights,” *Financial Times*, P.7, Feb. 20, 2008; “This land is my land,” *The Economist*, Feb. 14, 2008.

saying “that if [the Chinese government] want the same problems as India has then they should go ahead and privatize the land”, and arguing to maintain “the current system of state [sic] ownership”.⁵ Actually, China experienced an initial period of full private ownership of farmland under reforms initiated as the Communist Party came to power, in 1949-56.⁶ It was highly successful, with grain production increasing by 70% and farm incomes by 85% during that period⁷, only to be succeeded by the ill-conceived and disastrous collectivization of agriculture.⁸ The collectivization period lasted, with variations along the way, from giant-size “communes” to smaller-size “production teams”, from 1956 to the end of the 1970s, and was then succeeded by family farms under the Household Responsibility System (HRS)—the “collective” retaining ownership of the land while the individual households had use rights—but with those individual farms generally held insecurely, first because of “readjustments” for population change, and more recently (especially in developing or peri-urban areas) due to taking of farmland for non-agricultural purposes.⁹ Since 1993 (in terms of policy) and 1998 (in terms of formal law), the readjustments have been first restricted, and now virtually banned.¹⁰ Takings for non-agricultural uses—a threat to much smaller amounts of land, but as to that land a severe threat—have also been increasingly the subject of attempted limitations.¹¹

But, as noted above, the safeguards and restrictions have not yet been fully and effectively implemented. Today they probably assure secure tenure to somewhere between one-third and two-fifths of Chinese farmers.¹²

The argument can be persuasively made that the existing provisions of law, *if effectively implemented*, create land rights that are not significantly inferior to full private ownership. Depending on the percentage factor used to discount a future stream of income, the usual formula would assign a 30-year land right, in year one, roughly 75 to 95 percent of the value of full private ownership.¹³ Moreover, full private ownership does not seem to be a prerequisite for a market economy. Farmers in Hong Kong’s New Territories have (and previously had under the British) 50-year rights to their land, while Hong Kong’s urban skyscrapers are built on land that is usually held with 75-year

⁵ *Financial Times*, supra note 4 (“state ownership” is an erroneous characterization: ownership of rural arable land in China is collective, as discussed below).

⁶ Land Reform Law of PRC (1950). As to implementation see CHINA INSTITUTE OF REFORM & DEVELOPMENT, HISTORY OF CHANGES AND INNOVATIONS OF CHINA’S RURAL LAND SYSTEM 31-32 (1999).

⁷ See *Id.* at 32; Zhang Gensheng, RURAL REFORM IN CHINA 3-4 (2001), p.6. Land ownership was also provided in the aftermath of World War II for the former tenant farms of Japan, South Korea, and Taiwan Province, and has been highly productive, wealth conferring, and successfully maintained.

⁸ See S. Weigelin-Schwiedrzik, TRAUMA AND MEMORY: THE CASE OF THE GREAT FAMINE IN THE PEOPLE’S REPUBLIC OF CHINA (1959-1961) (Brill Academic Publishers 2003); Xizhe Peng, *Demographic Consequences of the Great Leap Forward in China’s Provinces*, 13 (4) POPULATION & DEVELOPMENT REVIEW 639 (1987).

⁹ See the discussion of evolution of land tenure in Zhu, et al, note 2 above.

¹⁰ See note 1 above.

¹¹ See, e.g., 2008 No. 1 Document of the Central Committee and the State Council; Li, note 3 above.

¹² See Zhu, et al, note 2 above.

¹³ See Zhu, et al, note 2 above, at 784, fn 47..

rights.¹⁴ Most land in Israel is held under 49 or 98 year rights (the former with a biblical origin)¹⁵. Surely both Hong Kong and Israel would generally be considered market economies. So is Australia, where much privately used land (including extensive grazing land in “stations” held by private parties) is acquired for a single lump sum payment from the government for a “leasehold” period of 99 years.¹⁶ Further examples could be cited.

Moreover, as to the possible psychological significance of “ownership,” any market-defeating psychological difficulties seem to have been successfully overcome in the urban sector, where private rights now range from 50 to 70 years and are freely bought and sold (and mortgaged).¹⁷ The key psychological need would seem to be, not that of giving farmer’s formal “ownership”, but that of persuading them (and local officials and cadres) of the reality of the 30-year, extendable and non-readjustable property rights that farmers already possess under present law.

However, let us assume, *arguendo*, that the central government’s latest efforts to fully implement secure 30-year rights for farmers¹⁸ do not succeed. Conceivably, the pressures to do something—legally and psychologically—“more drastic” to ease the problems of the Chinese countryside and jump-start a new process of rural development might grow so great that Beijing would decide to amend the Constitution and give Chinese farmers full private ownership. How could this be structured to achieve maximum net benefits and the highest practicable confidence in its positive results, and thus also to minimize opposition? Of course, as noted above, China had great early success with such private ownership by farmers in the first seven years after the Communist Party came to power, 1949-56. And land ownership has worked well for the former tenant farmers of Japan, South Korea and Taiwan Province.

The senior Chinese academic quoted in the *Financial Times*¹⁹ as saying that the conferral of such ownership would create for China the same problems as are faced in rural India, is far off the mark in his comparison. India, except for two or three of its 28 states²⁰ has had little successful land tenure reform in the sixty-plus years since independence in 1947.²¹ At independence, there was a high proportion of tenant farmers

¹⁴ See HK Government, “Sino-British Joint Declaration: Exploratory Notes on Annex-II-III” (7 Nov. 1996) found at <http://www.hkbu.edu.hk/~pchksar?JK?jd-full8htm>; Lands Department, Government of Hong Kong SAR (28 Nov. 2005) found at <http://www.landsd.gov.hk/en/service/landpolicy.htm>.

¹⁵ See Israel Land Administration, “General Information” (March 11, 2007) found at http://www.mmi.gov.il/Envelope/indexeng.asp?page=/static/eng/f_gen...

¹⁶ See ACT Planning & Land Authority, “Leasehold—Lease availability, length and selling” found at http://www.actpla.act.gov.au/topics/property_purchases/leases_licenses...

¹⁷ The urban rights are now renewable at the end of their term. Article 149, Property Law of People’s Republic of China.

¹⁸ See note 3, above.

¹⁹ See note 5, above.

²⁰ In contrast to the central law-making power in China on land-tenure issues, each Indian state makes its own laws on these subjects.

²¹ A new initiative to give ownership of microplots to 10-to-15-hundredths of an acre (up to roughly one mu or 1/15 hectare in the Chinese measure) is contained in the new Five-Year Plan. See Government of India, *Eleventh Five-Year Plan*, sections 1.105-1.108 (2007). But the amount of arable land to be affected is small (less than 1%), and the arable land previously redistributed since independence is barely equal to

and agricultural laborers in India's countryside, and that proportion has not shrunk appreciably over the past six decades—indeed, as between the two non-landowning groups, there are probably fewer tenant farmers and more agricultural laborers (generally the worse-off of the two groups) today.²² China, by contrast, would begin with a system under which the great majority of rural families now have possession of a parcel or (usually) several parcels of land on a highly egalitarian basis, even though most of them remain insecure as to *which* parcel or parcels—and with what relocations, reductions, or reconfigurations—they will possess from one year to the next (or from several years to the next several years). There are, however, very few tenant farmers, very few agricultural laborers, and virtually no landlords in today's China. *Thus the starting point for any tenure reform in China is wholly different than it was, and remains, in India.* (Indeed, one of the hoped-for results of giving Chinese farmers highly secure, long-term land rights with respect to specified parcels of land is to forestall a gradual accretion of landlord-like powers in the hands of the local cadres.)

Hence the question: If full private ownership were to be conferred on Chinese farmers, are there lessons from the comparative experience that might help further to ensure the “safest” outcome, with a minimization of risk of near-term land concentration or a rebirth of pre-1949 “landlordism” by a different route—perhaps, opponents might argue, as a result of improvident or undesirable or coerced market transfers by the farmers of their new ownership rights? If full private ownership were to be granted to farm households for the same land on which they presently have 30-year rights (an in-place land-ownership-to-the-tiller program), the following safeguards might be considered in such a new governing law:

- Do not allow sale, or even lease, of land rights to anyone who would not be a directly self-cultivating farmer. Such a partial moratorium on transfers might be applied for an initial period, such as fifteen years, while farmers gained a better sense of land values and the land market (note that the government has not seen any necessity to apply such a restriction on the transfer of the present 30-year rights).²³ Or even establish such a partial moratorium initially without any time limit, and simply repeal it when the policymakers believed it was time to do so.
- This could be further reinforced with the requirement that any transferee via outright sale (even though that transferee is a self-cultivating farmer) could not re-transfer via sale or even lease, for some significant period of time, such as five or ten years. Again, this restriction could be terminated when the time seemed proper to

the proportion (five percent) of China's arable land that had been held in the “private plots” on China's former collectives since 1962.

²² See, e.g., P.S. Appu, *LAND REFORMS IN INDIA* 82-124 (New Delhi: Vikas Publishing, 1996).

²³ Under the RLCL, “assignment” of the full 30-year term does require approval by the collective; but this requirement is largely meaningless, since a “lease” for 29 years and 364 days (including one with a lump-sum payment up front for the entire term) does not require any approval.

end it. This would be a restraint on rapid turnover—what some opponents might call “speculation”, or what in the U.S. housing market has come to be known as “flipping”.

- Regardless of the extent of restrictions on sale, or as an alternative to moratorium periods, wherever sales were permitted there could be a “sliding-scale” tax on profits that was dependent on the length of time the land was owned, with a very high percentage tax on sales that were made after a relatively brief period of ownership. This would not, of course, apply to the 30-year rightholders who would be the initial beneficiaries of ownership, or their heirs, but only to buyers from them who then quickly resell.
- Farmers, as owners, should be able to capture the value of their land in transfers for non-agricultural purposes, *if* zoning and land-use restriction have been fully complied with. Again, *taxation* of the profits from such non-agricultural transfers (even where permitted and lawful) could be at a high percentage rate—but based on different, and complex, policy considerations, that rate might well be flat and might apply to the initial beneficiaries as well. Major changes should, in any case, be made in the legal regime for shifting land to non-agricultural uses, as further discussed below.
- There could also be restrictions—tailored to specific geographical regions and land types—as to the holding of agricultural land (either as owner or lessee) above specified maximum ceilings. Note that there are no such “ceilings” now, and their absence has sometimes helped pave the way for abuses such as “outside boss contracting” and “scale farming” (note too that large farms are *not* generally more productive or efficient, and certainly not in a setting such as China, which remains short on land and capital but long on labor²⁴).
- With a goal similar to that of imposing ceilings, there might be a blanket prohibition of any purchase or lease of agricultural land by foreign individuals or foreign legal entities, and perhaps also by domestic Chinese legal entities. Again, many of these restrictions could be for a fixed initial period of time, or could be unlimited in duration and repealed after policymakers gained assurance that this

²⁴ See, e.g., Hans Binswanger, Klaus Deininger & Gershon Feder, “Power, Distortions, Revolt and Reform in Agricultural Land Relations,” in Srinivasan & Behrman (eds.) *Handbook of Development Economics*, Vol. III, ch. 42, 2659-2772 (1995); Nancy L. Johnson & Vernon Ruttan, “Why Are Farms So Small?”, 22 *World Development* 691 (1994); and W. Peterson & Y. Kislev, “Economies of Scale in Agriculture: A Re-Examination of the Evidence,” Staff Paper P91-43, Department of Agricultural and Applied Economics, University of Minnesota; Roy Prosterman, Tim Hanstad and Li Ping, “Large-Scale Farming in China: An Appropriate Policy?” (RDI Reports on Foreign Aid and Development #90, July 1996).

could safely be done, in the more developed and less agricultural China of ten or twenty years in the future.

- A further set of legal safeguards would have to be introduced if a major piece still missing in the “bundle of sticks”²⁵ held by farmers with respect to their 30-year rights—the use of their land as collateral via mortgage-type arrangements, both to finance land improvements and to finance land sales—were to be put in place in conjunction with full ownership.²⁶ Such safeguards regarding mortgages might, initially at least (and taking a cautionary note from the current U.S. experience), impose strict licensing as to authorized mortgagees, and prohibit transfers of the mortgagor’s obligation by the mortgagee—that is, no “securitization” or cashing out by the mortgagee via a secondary market. There might also be an exempt land area for each farm household—perhaps roughly equivalent to what would be needed to produce their basic nutritional needs, as well as the foundation-plot land (homestead)—that would not be subject to mortgage.
- A further important element, in terms of normative rules, would be a law on takings to supersede the inadequate rules of the Land Management Law.²⁷ This could build on the legal provisions now in the 2007 Property Law (such as the new requirement that the farmer must receive the compensation for the land taken, not the collective cadres) and embody in positive law the policy provisions of recent documents such as the 2008 No.1 Document. The focus should be not only on compensation and other substantive rules, but on ensuring an open and public takings process. Among the substantive changes, mandatory takings rules should probably apply only to wholly non-commercial uses (a strict reading of “public purpose”), with farmers having to be negotiated with and voluntarily agree to price and terms for any proposed land transfer for non-agricultural uses—if otherwise approved and authorized—that would serve a profit-making purpose.

Of course, all of the limits and safeguards described above (with the exception of the final point on takings regime) also create constraints on a fully free private market for

²⁵ Especially in Anglo-American legal theory, property rights in land are often analyzed to a “bundle of sticks”, describing the various legal interests (that is, “sticks”) into which “complete property” (the bundle) may be divided. See R. Cunningham, W. Stoebuck & D. Whitman, The Law of Property 7 (West Publishing 1984).

²⁶ Mortgage of arable land is prohibited in the Guarantee Law of 1995, art.37. A draft of the Property Law would have permitted such mortgages under certain conditions, but did not survive into the final version. Mortgage of urban land rights is, however, permitted.

²⁷ See Law of Land Management, note 1 above, and its accompanying regulations. See generally the discussion in Zhu, et al, note 2 above.

land rights, and would thereby reduce the wealth-creation impact of giving ownership to Chinese farmers as long as such provisions remained in place.

And, finally, this entire package of mutually reinforcing rights, limits and safeguards would have to be the subject of an extensive implementation campaign, paralleling recommendations for enforcement of farmers' existing 30-year rights. This would need to range from issuance (and registration?) of title documents for farm households, to intensive publicity measures and grassroots monitoring—the latter both actively via farmer surveys and passively through establishing a hotline for complaints—to the cautioning of local officials that success in observing farmers' ownership rights will be one of the issues to which their careers will be linked, and to the training of circuit-riding Peoples Court judges to knowledgeably adjudicate land disputes and, perhaps, the provision of legal aid to farmers. (One of the arguments in favor of rules giving farmers “private ownership” is likely to be that this will be both more dramatic and more decisive than the present “30-year rights” as the subject of such an implementation campaign, will terminate any potentially competing collective land rights, and will thus lend itself to a greater degree to successful enforcement.)

In sum, if the “full private ownership” approach of 1949-56 were to be reintroduced, a series of mutually reinforcing limits and safeguards could be designed that should go far towards preventing possible abuses by the well-off or well-connected. In practice, it seems that the presently rather small chance of Beijing introducing private ownership for farmers is likely to be enlarged only to the degree that the accompanying discussion will offer and explain these protections, or most of them, as propitiation to the skeptical. Paradoxically, however, the uppermost danger to farmers' land rights is probably not that they will voluntarily and imprudently transact them away, but that collective cadres and local officials will exploit the residual ambiguity of the existing regime of “collective ownership” to steadily usurp more land and more of the value of land for their own narrow benefit.