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DEVELOPMENT OF PROPERTY LAW IN
CAMBODIA, VIETNAM AND CHINA:
WHAT IS BEHIND THE LEGAL REFORMS IN
TRANSITION TO A MARKET ECONOMY?

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Development of Property Law in Cambodia, Vietnam and China

What is behind the legal reforms in transition to a market economy?

Abstract

This research reviews how constitutional, legal or political reforms in Cambodia, Vietnam and China throughout the last three decades have resulted in some recent conceptual changes in ownership protection and the system of (land) property management in these countries. The focus is on how the countries embarked on their respective approaches toward balancing and rebalancing the roles of the State, collectives (or communities) and autonomous private players in dealing with the question of ownership and marketization. The findings show that, despite a common rhetoric of marketization, the approaches have in fact led to the emergence of three distinctive models in the three evolving political and social contexts.

Introduction

When the socialist or former socialist countries publicly proclaimed that they would open up the economy and introduce the rules of market into their economic legal system, they might have expected that at a certain juncture down the road they would have to re-introduce some institutions which they tried so hard to discard at the earlier stage of the revolutionary struggles against capitalist way of life. In the subsequent legal and economic reforms, different experiments took place, some being more promising others less. Private property law is one of these institutions in question. The objective of this paper is to look into experiences of reintroducing property law in Cambodia, China and Vietnam and to understand the reforms in their relevant legal, political and social contexts. This exercise is not only useful for understanding the logics of transition which is taking place in these countries, but also suggests the need to reconsider some important issues about the relative

roles of the State, community and individual rights-holders in managing properties and exercising ownership, particularly in land and housing, in the emerging market-oriented economy.

The three countries included in this study are not only geographically close to one another, they also share many common political and legal features in the recent past, at least in the 1980s when the shadow of the USSR in East and Southeast Asia started to wane. With regard to the legal regime related to land ownership for instance, the development in these three countries shared an interestingly parallel initial process of change. For example, the role of the State and collectives in land ownership was explicitly stipulated in the Constitution of the People's Republic of China in 1982. The 1954 Constitution did not denounce private ownership in land.¹ However, in practice, the role of law and leftist policies under the Mao regime between the late 1950s and early 1970s² resulted in *de facto* elimination of the private ownership regime.³ In Vietnam, the 1980 Constitution aborted the provisions on private and collective land ownership and concentrated land ownership in the State. Until then, private ownership was constitutionally admitted in Vietnam, although at the technical level non-transferrability of this ownership

¹ Article 8(1) of the 1954 Constitution. See also Qu Tao "Ownership System in the Chinese Property Law – Characteristics and Challenges", in Hoshino Eiji ed. al., *Considering the Chinese Property Law*, Shojihomu, 2008, p.73, at footnote 3.

² For a summary description of the role of law in China since 1949, see Jianfu Chen, "Policy as Law and Law as Policy – The Role of Law in China's Development Strategy", in Christoph Antons (ed.) *Law and Development in East and Southeast Asia*, RoutledgeCurzon, 2003, pp.251-270.

³ According to Mark Selden, the process was a result of increased collectivization which started from voluntary cooperation schemes among farmers and developed into stronger state-dominated collectives. Mark Selden "Household, Cooperative, and State in the Remaking of China's Countryside", in Eduard B. Vermeer, Frank N. Pieke, and Woei Lien Chong (eds), *Cooperative and Collective in China's Rural Development – Between State and Private Interests*, M.E. Sharpe, 1998, pp.20-24; Mark Selden, *The Political Economy of Chinese Development*, M.E. Sharpe, 1993, pp.62-108.

virtually made it an empty provision.⁴ As for the case of Cambodia, its post-1979 legal system was influenced by Vietnam, which sent its army into Cambodia to help remove the Khmer Rouge regime and had to support the new Phnom Penh administration in its reconstruction at the wake of serious destructions caused by wars and the Khmer Rouge rules. However, the constitutional provisions adopted in the early 1980s did not show an equivalent level of ideological commitment. As will be mentioned below, the “socialist” system of ownership in Cambodia during the 1980s was more a result of responses to the actual needs of the time. Ideological development was hampered by the lack of political readiness, low technical capacity and destructive experiences of radical communism practiced by the Khmer Rouge from 1975 to 1979. It was therefore obvious that any pre-mature embracement of ideologically-led transition to socialism would also backlash and lead to false identification of the new regime with the Khmer Rouge.

However, the path of development started to diverge in the 1990s. Following the 1993 elections, Cambodia constitutionally abandoned the socialist journey and adopted a market system which, at least in form, is more similar to the systems one can find in the fore-running Western bloc countries which adopt a civil law system. China, with its reforms gearing fast in the 1990s and the stable growth it has maintained ever since, has risen to a completely new horizon where luring foreign investment is becoming not much more important than setting stages for its presence felt overseas. Its development and increasing influence in the past decade has also augmented its confidence in the existing system and the way the system has been operated.⁵ Vietnam, while also trying to look beyond its borders,

⁴ See *Infra* at section on Vietnam.

⁵ Yongnian Zheng, *Globalization and State Transformation in China*, Cambridge University Press, 2004. Zheng describes how China built up its statehood by actively joining in global projects. In his account, China has been trying to combine selected importation of foreign ideas with innovation to benefit from the current trends of globalization and to establish its own models of an economic state. See

may in fact be finding the Chinese model more and more irrelevant in many aspects. It is not enjoying the same level of confidence and understands that the system that has been working more successfully in the giant Chinese economy may not necessarily be appropriate for a smaller economy in Southeast Asia. Instead, it has to rely more on its own way of moving ahead with the legal and economic reforms.⁶

Legal and institutional reforms introduced by these three countries in the last two decades have been filled by "innovations",⁷ but at the same time there may have been some conceptual roots which had either existed earlier in the older institutions of these countries or looked similar to many foreign models developed in the western or other predecessors of the "market economy" system. However, it may be one step too early to conclude that the institutional similarities such as those between the new and the old systems (in the case of Cambodia) or the similar institutions across boundaries (such as the systems of land-use right in China or Vietnam, or even the Property Law of China, the Civil Codes of Cambodia and Vietnam which some scholars considered as sharing a few similar features

also brief remarks on the People's Republic of China in the context of "Globalization and the new world order" in Peter de Cruz, *Comparative Law in a Changing World*, Third Edition, Routledge-Cavendish, 2007, pp.493-497.

⁶ In a book published in 1999 and edited by Anita Chan, Benedict J. Tria Kerkvliet and Jonathan Unger, authors argue about different reasons which may have caused the reforms in Vietnam and China to diverge. Among these reasons, China's strong confidence in its socialist ideology and political and economic potential seems to have accounted for most of its lower level of openness than that of Vietnam. See Anita Chan, Benedict J. Tria Kerkvliet, and Jonathan Unger, "Transforming Asian Socialism – China and Vietnam Compared", Rowman & Littlefield Publishers, New York, 1999.

⁷ Yongnian Zheng, *Globalization and State Transformation in China*, Cambridge University Press, 2004, pp.56-59. "Doi Moi" in Vietnamese literally means "innovation".

with the Japanese or German Civil Code)⁸ would bring forth similar results. It is often the “less familiar aspects” of these institutions and the interactions between them, including property rights, the judicial system, taxation, the press regime, the law enforcement regimes, etc, that really characterize the differences.

It is therefore not the purpose of this paper to examine the advantages and disadvantages of the three different regimes developed in Cambodia, China and Vietnam. The issue of failures and successes of different models depends greatly on how laws and institutions are implemented, enforced or adapted in practice. In accounting for the fact that ownerships of the rich are better protected than the poor, or large-scale developmental projects are or appear to be better treated than local needs of individual households or communal societies, ownership regimes share the blame only to the extent that it may facilitate an imbalanced interaction between the public power to regulate and the private power to resist. In this regard, analytical reviews of the roles of the State, the collective, the individual property right-holders and other important stakeholders are relevant. But this examination does not necessarily suggest that a liberalist system of ownership should be more preferable to the property law system of a developmental regime. Similarly, nor do these reviews lead to any possible conclusion that a liberal property rights regime would be able to reduce the desire of the developmental State to exercise its regulatory power to prioritize development projects over individual ownerships.

⁸ The drafting of the Cambodian Civil Code and revision of the Vietnamese Civil Code in late 1990s and early 2000s was assisted by Japanese experts. The Japanese influence is apparently stronger in the case of Cambodia and much less in the case of Vietnam. The Property Law of China is considered as only having partly developed based on some concepts of the German Civil Code. See, for example, Gebhard M. Rehm & Hinrich Julius, “The New Chinese Property Rights Law: An Evaluation from a Continental Perspective”, *Columbia Journal of Asian Law*, vol.22, no.2, 2009, pp.177-234.

However, at the more conceptual level, development of property rights regimes in these three countries has been the result of, and at the same time, the locomotive for their transitions towards a market-oriented economy. The development has been shaped and strengthened by laws which reflect the dynamic changes in the political and economical thoughts in different times. These laws in fact are evolving in close connection with the evolving conceptual developments supporting these political and economic trends.

A closer look into the conceptual development of property law reforms in these countries may therefore help us discover some aspects of the institution that survived and re-emerged after decades of political turmoil in the three different constituencies and to identify some less familiar elements of the currently evolving institutions of property rights. From a local stance, one may call these parts altogether the "innovation" and "particularities" of these constituents. But from a globally oriented point of view, the phenomenon may be labelled the pluralism in progress. However, it is oversimplification to attribute the discovery of the historically familiar elements to a global trend of "universalization" or "convergence" of legal concepts or principles, before it is possible to convincingly argue or prove that the path of development today is a complete repetition of the past, not only in terms of the process of development but also in the results it leads to.

This paper therefore starts with an inquiry on how the former planned economies opened up some space for private ownership or property rights to emerge; what kind of legal designs have been introduced; and how the rules have been developed along the way. At the same time, the analyses will also focus on what legacies of the planned economy, if any, remain in the whole transitional process which in fact is still going on; how the new system design allows these legacies to retain their roles and functions; what are the legal justifications and how they influence the outcome of the transitions towards a "market economy". All these

inquiries will not suffice for a comprehensive explanation of all the problems these countries are facing today with regard to land or property, but they may at least clarify some conceptual parts of the problems. The analyses will focus on two aspects. One is the process and techniques applied in opening up the space for private property or ownership as a new facilitator for the growth of the marketplace and for that reason the system design which permits the co-existence of state ownership and private property/ownership in the new market mechanism. The other aspect is how the concept of ownership or property rights has been technically revised by means of the legal reforms to allow the first aspect to become legally possible in the socialist or historical context and to offer practical responses to the call for more flexibility in the new market environment.

In the following sessions, a brief historical development of the legal system on land and ownership in these three countries will be summarized separately with descriptions and analyses of the current circumstances. The final part suggests some concluding observations.

The three constituencies

(I) Cambodia

After taking power in 1975, the Khmer Rouge implemented a policy of de-urbanization, making every citizen a mere element of labour force for national production. The only chapter of the 1976 Constitution dealing with economy had only one article (Article 2) that reads:⁹

⁹ As often found in comparative studies, definitional gaps may exist among the different terms being expressed in constituencies using different languages in the same subject matter. Hereinafter, some English translations of the legal texts and

All important general means of production are the collective property of the State which belongs to the people, and the common property of the people's collectives.

Property for everyday use remains in private hands.

There were no other legal documents to rely on in interpreting this provision, but based on observations of the actual practices under the rule of the regime,¹⁰ "all important general means of production" surely included land and were considered collective property of the State and the common property of the collectives. Only property for everyday use (not production) was privately owned. That could surely have included the few clothes worn by the people and nothing much more. The operation of this political and legal system ended in serious failure both socially and economically.

The government that took power after the fall of the Khmer Rouge regime was assisted by Vietnamese military and political forces to establish an administration and to rebuild the country. Re-urbanization in its more rudimental form took place slowly throughout a span of months, starting from re-establishment of government offices, military bases, admission of families of these government officials to

other policy documents available in print or on the homepage are to a certain extent consulted. But for my own satisfaction, I have added in some slight modifications or simply replaced it with my own translation. The latter happens partly because of my desire to have better consistency in the choice of words throughout this paper and partly because of my preferred way of reflecting the nuances which I think are included in the sentence structures appeared in the original language.

¹⁰ There have been several publications on the situation of livelihood under the Khmer Rouge. A recent one is Ben Kiernan, *The Pol Pot Regime – Race, Power, and Genocide in Cambodia under the Khmer Rouge, 1975-79*, Third Edition, Yale University Press, 2008.

gradual lifting of barriers for more population inflows from the liberated zones.¹¹ Most of those who returned to the cities then were either previous inhabitants of these cities or inhabitants from other towns or cities who just happened to have been relocated to a rural area by the Khmer Rouge close to the newly re-established towns or cities. Now with the Khmer Rouge being driven out of the country, these inhabitants were able to move into the city or town where they could arrive literally on foot. Rarely could people come back to the place (house or urban land) where they had been before mid-1970s.¹² It was a random process of occupying a place for shelter and sharing extra space with others who also came back in search for life in the urban areas. Only on October 20, 1981, that the Council of Ministers issued a Sub-Decree on Public Order in the Phnom Penh Capital City.¹³ Until then, migration into the cities, including the capital city, was unruly.

¹¹ Information on Cambodia during this period has mainly been based on personal stories told by individuals or observations made by scholars or journalists who came in Cambodia once in a while and tried to construct the general situation based on limited sources of narrations or statements made by the refugees at the border camps, officials and people living in some particular parts of Cambodia. See for example, Michael Vickery, *Cambodia – 1975-1982*, South End Press, Singapore, 1984, pp.203-253.

¹² Written at a later stage in 1986, Michael Vickery noticed that some better pre-war dwellings were occupied by high-ranking officials of the post-1979 regime as a result of authority and privileges. Michael Vickery, *Kampuchea – Politics, Economics and Society*, Frances Pinter, London, 1986, p.58. However, no data seem to have been available to elaborate when and how the housing readjustment took place after 1979. Readjustment might not have been considered for the non-privileged residents in urban and rural areas. The random acquisition, distribution and redistribution of shelters are stated as part of the chaos and facts of life in 1979-1980 by some survivors of the Khmer Rouge regime in some of their memoirs written in recent years. See for example, Denise Affonco, *To The End of Hell – One Woman's Struggle to Survive Cambodia's Khmer Rouge*, Reportage Press, 2007, pp.121-130; Theary C. Seng, *Daughter of the Killing Fields*, Fusion Press, London, 2005, p.150-190.

¹³ Sub-Decree no.01 on Public Order in the Capital of Phnom Penh, signed by Pen Sovan on October 20, 1981 and published in *Compilation of Legal Documents*, no.2 published by the Ministry of Justice of the People's Republic of Kampuchea.

The situation between 1979 and 1981 was beyond imagination.¹⁴ The Vietnamese were there to supply food and other daily needs at least to a limited part of the population and the rest were able to survive only to a very limited extent on the ruins and whatever left behind by the Khmer Rouge. The kind of people's collectives organized by the Khmer Rouge was dismantled but a new society was far from being formed. In addition, the pre-1975 forms of traditional society were nowhere recoverable after having been totally dismembered by the Khmer Rouge subsequent to their victory in April 1975.

The immediate tasks of the new government established in January 1979 stressed on at least three aspects. First, it had to fight the Khmer Rouge remnants who retreated to the Cambodian-Thai border and, together with other two non-communist resistance groups, started guerilla warfare against the Phnom Penh administration supported by the Vietnamese forces.¹⁵ Second, it had to recruit local forces and people who could join and work with the new government to establish a new administration which needed an ideological separation from any of the previous regimes.¹⁶ Third, there was an urgent need to start putting farmland into

¹⁴ There are only limited reports with little reliable data on the general situation in these days besides sporadic observations and interviews. For some of the interviews, see "Kampuchea Stumbles to its Feet by Ben Kiernan", in Ben Kiernan and Chanthou Boua (ed), *Peasants and Politics in Kampuchea, 1942-1981*, Zed Press, London, 1982, pp.363-385.

¹⁵ The fighting continued well after the 1993 elections and effectively ended only in December 1998 when the last pocket of the former Khmer Rouge forces led by Ta Mok was apprehended on the Thai-Cambodia border after the death of Pol Pot. See Nate Thayer, "End of Story? Last Khmer Rouge defections don't bring closure - yet", *Far Eastern Economic Review*, December 17, 1998, pp.23-24.

¹⁶ Some examples were given in an article by Chanthou Boua after spending 10 months in Cambodia in 1980-1981 trying to review the situation. See Chanthou Boua, "Observations of the Heng Samrin Government 1980-1982" in David P. Chandler and Ben Kiernan (eds), *Revolution and Its After math in Kampuchea:*

use and producing basic foodstuff for the subsistence of the population.¹⁷ Reorganization of the social infrastructure could only happen on a random and spontaneous basis, with restraints caused by the continuing fighting and the occasional interruptions by some particular elements of the new regime either for ideological or other practical reasons.¹⁸

It took several months for the situation to become less chaotic in some parts of the country. Government supervisions and instructions started to emerge in early 1980. The first documented legal instrument published by the government was the provision on establishment of courts at municipalities and provinces, and later a Decree-Law to try counter-revolutionary activities issued in May 1980. Other legal documents only became more widely available and published in 1981. At that time, the question of land property was only important for rural areas where production had to commence after having been liberated from the Khmer Rouge controls. The administration then issued several instructions on the establishment of production collectives,¹⁹ grouping several families, to work on available land and start the

Eight Essays, Monograph Series No.25/Yale University Southeast Asia Studies, 1983, pp.280-283.

¹⁷ For a brief description of what happened inside Cambodia in these days, see Eva Mysliwicz, *Punishing the Poor – The International Isolation of Kampuchea*, Oxfam, UK, 1988.

¹⁸ These interruptions could be caused by technical differences between the Cambodian technocrats who had their own visions of reconstruction which were not shared by their Vietnamese mentors or advisors, or ideological differences at different levels of the administration or even by some attempts to establish underground organizations against the post-1979 government or the Vietnamese occupation. See for example Michael Vickery, *Cambodia – 1975-1982*, South End Press, Singapore, 1984, pp.227-234.

¹⁹ This is called the “*Krom Samaki*” in Khmer, literally translated into English as the “solidarity group”. It is a grouping of about 10 to 15 families to share a plot of land for farming or other production activities. Some grouping might even have to share production tools, animals or labour forces. For detail study about the establishment and operation of these samaki groups in Cambodia after 1979 and the relevant

production process. Given the situation of that time, organizing farmers' population into such production collectives could be seen as a practical survival technique in response to the dire need of resources and capitals, rather than a devotion to the socialist ideology.²⁰ For the majority of the population, the ideology might simply have been an inevitable political choice or a partner of convenience at best.

A constitution was adopted in 1981 therefore to start a national process of rebuilding. The State claimed ownership of land, forests, seas, rivers, natural resources, economic and cultural centers, national defense bases, and other constructions of the State.²¹ Article 15 provided that "Citizens have the right to use and to bequeath land which the State assigned to each family in accordance with the law, for the purpose of building residence, garden or vegetable plantation."

The Constitution divided national economy into three sectors, namely the State economy, collective economy and family economy.²² Private individuals doing small business in towns or cities could only be understood as part of the family economy under this provision. Again, apart from the symbolic ideological aspect of the constitution, this economic arrangement was indeed a practical response to the need to solve the immediate social and economic situation of the day. At the end of the Khmer Rouge regime, particularly in the first few years after 1979, there was an urgent need to pool together not only capitals or assets but also basic labor forces

regulations or instructions, see Viviane Frings, *Le Socialisme et le Paysan Cambodgien*, l'Harmattan, Paris, 1997, pp.29-56.

²⁰ Chanthou Boua, "Observations of the Heng Samrin Government 1980-1982" in David P. Chandler and Ben Kiernan (eds), *Revolution and Its After math in Kampuchea: Eight Essays*, Monograph Series No.25/Yale University Southeast Asia Studies, 1983, pp.259-271.

²¹ Constitution of the People's Republic of Kampuchea, Article14.

²² Article 12.

to respond to the quest for survival of the population.²³ Families led by widows, unattended orphans, unaccompanied elders would not be able to survive either on an assigned farm or in a shelter occupied by themselves in the destructed cities or towns. In fact, before the adoption of the Constitution, the Chairman of the People's Revolutionary Council issued on July 8, 1980 an order on the registration and management of family book, based on an earlier resolution no.154-80 of the same Council. The first Article stated that "all Cambodian citizens and foreigners living in the territory of the People's Republic of Kampuchea shall be registered in the family book, as a family or a collective. This grouping identifies the permanent location where the person concerned stays." Family as defined by the order "comprises of people who are economically related, eating and living together in a house."²⁴ This is obviously an expanded interpretation of the concept of family, even from the viewpoint of the traditional Cambodian rural societies. Politically, this family system permitted the authority to control and keep track of population movement whereas socially it was aimed at enabling a more inclusive approach to community building and offered a formal social structure to facilitate mutual helps among people in the same locality who could afford to share common livelihood together after the Khmer Rouge tragedies.

Land of all kinds then belonged to the State. Local authorities, production collectives and families only had the right to manage and use it. Attention was mainly paid to the management and use of agricultural land. Residential land was given to families for living. Gradually, the population movement became controllable by means of family books. Once a rural family moved base, only with prior approval by the local authorities, the land had to be returned to the local

²³ Viviane Frings, *Le Socialisme et le Paysan Cambodgien*, l'Harmattan, Paris, 1997, pp.29-56.

²⁴ Article 2, para.1.

authorities before it could be given to someone else.²⁵ Local authorities' monitoring and discretionary controls over the movement of people and the use of land especially in rural Cambodia were therefore as thorough as possible. Besides being for economic reasons, the controls were also considered necessary to prevent infiltration of guerilla forces into the villages.

Although the Constitution provides legal protection for private ownership over profits and other legal property,²⁶ transactions in land, such as in the forms of sale, purchase, mortgage or loan, were prohibited.²⁷ The sign of a market economy started to emerge legally in mid-1980s, particularly when Article 12 of the 1981 Constitution was amended to reorganize the national economy, adding in two other categories of economies, namely the "private economy" and the "mixed State-private economy".²⁸ This sparked a rapid development of private sector economy. Restaurants, shops, companies, trading of different goods, and entertainment business started to grow particularly in cities and towns.²⁹ People engaged in these

²⁵ Subdecree no.06 on the Management and Use of Agricultural Land, adopted by the Council of Ministers on May 6, 1985, Article 5.

²⁶ 1981 Constitution, Article 18.

²⁷ 1981 Constitution, Article 17. Private trading and commercial activities in general were no longer prohibited after the Khmer Rouge. For example, on October 20, 1981, the Council of Ministers issued a Sub-Decree on maintaining public order in the capital city of Phnom Penh in which Chapter 3 states how markets had to be organized and orders that restaurants and shops had to close during curfews.

²⁸ Law on Amendment of Article 12 of the Constitution of the People's Republic of Kampuchea adopted on February 7, 1986, and Law on Amendment of Articles 12 and 19 of the Constitution of the People's Republic of Kampuchea, adopted on July 11, 1988.

²⁹ Observing in 1989, a western reporter reported the opening of discos, video tape rental shops of western movies, Mercedes, and renovated villas "for rent to foreign-aid agencies for up to US\$4,000 a month" in Phnom Penh. See Murray Hiebert, "Economic Reform Boosts the Private Sector – Change in the Air"; and, "The Capital Bustles with Activity – And Reform; Rising from the Ashes", *Far Eastern Economic Review*, June 29, 1989; 144, 26; pp.16-17 and January 12, 1989; 143, 2; pp.16-17 respectively. Although economic activities may have thrived only since 1989, the capital collection by individuals or families seem to have started a few

business activities needed new premises and land for business development. People earning wages from these businesses also started looking for their own houses and private spaces. A black market for real property also started to grow, despite the constitutional prohibition which continued from the early 1980s.³⁰

Cease-fire and peace negotiations among the warring Cambodian fighting factions also started and took new momentum in mid-1980s. When the possibility of a peace agreement loomed in the second half of the decade,³¹ fears of overseas Cambodians returning to the cities and towns to claim back their pre-1975 properties, including houses and residential land, became prevalent. The fears particularly pre-occupied the post-1979 richer urban residents since most of the villas or apartments they possessed in city centers used to belong to pre-1975 aristocrats or high-ranking officials who were then leaders or supporters of the non-communist resistance forces involved in the peace negotiations. Some of these aristocrats or high-ranking officials left Cambodia before the fall of Phnom Penh in

years before that. For summary accounts of the changes inside Phnom Penh from 1979 to 1989, see Milton Osborne, *Phnom Penh – A Cultural History*, Oxford University Press, 2008, pp.181-191.

³⁰ Although it is not clear when exactly this started, the practice of selling houses or flats in Phnom Penh, if not in other places, at least already happened in 1988, one year before the practice was legalized in early 1989 (see supra, text at footnote.....). The practice was well understood even by the local authorities. Sometimes local officials might also get a share out of the transaction either in the form of a bribe or a gift, since their roles in facilitating the completion of the transfer were crucial. They would include the buyer into the existing family registration of the seller before striking out the latter from the book later on or simply issue a new family book to the buyer whenever possible.

³¹ Although diplomatic attempts to seek political solution to the Cambodian conflicts started in early 1980s, they took new momentum in 1984-1985 and culminated in the first direct meeting between Sihanouk and Hun Sen in November 1987. See Patrick Raszelenburg and Peter Schier, *The Cambodian Conflict: Search for a Settlement 1979-1991 – An Analytical chronology*, Mitt.... Des Institutes fur Asienkunde, Hamburg, 1991, pp.142-147.

April 1975 and were in some cases still holding legal documentation of their previous ownership in existing houses or properties.

As a matter of fact, the Phnom Penh administration already anticipated overseas Cambodians to come back and participate in the development of national economy rather early on. A Sub-Decree no.6 issued by the Council of State on May 6, 1985, on the management and use of agricultural land, states that

“..... To Cambodian families returning to the motherland and being capable of engaging in agricultural production, local authorities shall give them some land for use.

Defectors from the enemy troops who come back to unite with their families shall be entitled to the same land use right as other farmers.”

Even though this Sub-Decree envisaged returnees from a foreign country, or the border refugee camp, to come back to Cambodia and to ask for help in securing farm land for production and residence, there was no need for the State to deny these people's right to claim for pre-1979 ownership. The difference between the attitude in 1985 and the later efforts in 1989 can be explained in two ways. First, it was because Sub-Decree no.6 was about agricultural land, not urban residential land. Second, it envisaged those returnees who came back to join the Phnom Penh administration and were not in the position of making any political negotiation. However, the progress of peace negotiation in the second half of the 1980s really gave the Phnom Penh administration the motivation to lure the non-communist bourgeois back and brought peace to Cambodia without the participation of the Khmer Rouge. That was theoretically where a conflict of interests regarding entitlement to urban land and housing would potentially happen between those former Cambodian urbanites and the post-1979 urban rich and hinder any possible progress of the peace process.

To address this problem, one preventive step taken by the Phnom Penh administration was to denounce such potential property claims in advance and pass some sort of ownership or property right to the current occupants, making such potential claim legally and physically impossible. This was done by first introducing a slight constitutional amendment and then issuance of a Sub-Decree which regulates the new property market order.

Amendment of the Article 15 of the Constitution was adopted on February 11, 1989. The phrase “doing business” was added after the word “living” to justify citizens’ right to use land for doing business.³² The amended article thus states:

Citizens have the full right to possess, use and to bequeath land which the State assign them for living and doing business.

However, the ambiguity of the phrase “doing business” as to whether it included sale and purchase or mortgage of the possessed land itself was not clarified anywhere in the Constitution. Soon afterwards, on April 22, 1989, the Council of Ministers issued a Sub-Decree no.25 on Provision of House Ownership to Cambodian Citizens. Article 1 of the Sub-Decree states:

Land for construction of all residences, large and small buildings, villas and other separate houses or flats in the People’s Republic of Kampuchea is the common property of the people which is managed by the State according to the existing law. No one shall claim for the right of pre-1979 ownership in residential construction land or any forms of housing.

Then Article 2 continues:

³² Law on the Amendment of Articles 15, 16 and 17 of the Constitution of the People’s Republic of Kampuchea, February 11, 1989.

From this day onwards, the State allocates to families of Cambodian citizens the ownership over residences in the communes and sangkats (counties) all over the country, where these families currently live, as is recognized by the local communal and Sangkat authorities. Families of Cambodian citizens living in detached villas, houses or flats shall receive the ownership to possess and use these premises as are considered to be houses for living from now on.

The ownership in the premises may be bequeathed to descendants for possession and use without a time limit, be donated to relatives and friends or be sold to any other person for his/her possession and use, provided that their uses do not serve purposes or interests in violation of the law. The State prohibits sale of house and land for residential construction to foreigners.”

This Sub-Decree clearly demonstrated the political decision to open up commercial activities in real properties. Under this Sub-Decree, urban and construction land in particular was attributed to the common property of the people, thus making the State the agent of the whole people in dealing with such land – quite a reversal of the earlier conceptual background expressed in the 1981 Constitution that the State was the principal that owned the land and collectives and families were agents who actually managed and used it. It seemed to be one move closer to the theory of people having ownership in land which is placed under the management of the State, as having been introduced into the Vietnamese Land Law of 1982.³³ The Sub-Decree picked up this concept without a constitutional amendment to that effect. Article 2 then signals a clear distinction between ownership in land and ownership in buildings on the land. Families of Cambodian citizens can be allocated ownership in these buildings. However, the final clause of Article 2 that

the State “prohibits sale of house and land for residential construction to foreigners” seems to suggest something more. The State prohibits sale of ... land for residential construction... only if the buyers are foreigners. Although the clause only refers to “land for residential construction”, it indirectly opens up the sale of land under limited circumstances.

The enactment of the Sub-Decree no.25 to open up business operations in houses³⁴ eleven days after the minor constitutional amendment also indicated the degree of exigencies perceived by the government at that time to respond to the general fears and sense of insecurity among the urban population in particular with regard to potential ownership reclaims by pre-1975 residents. It was the first legal document to explicitly rule out any claim of the pre-1979 ownership.³⁵ Actually, private ownership of land or houses did not exist between April 17, 1975 and 1979, so the right of “pre-1979 ownership” in effect referred to legitimate property claim of ownership before April 17, 1975. However, the “pre-1979 ownership” phrase has important legal and political implications. It defines the scope of legal responsibility undertaken by the post-1979 regime and politically attributes whatever legal problems inflicted upon the pre-1975 proprietors to the Khmer Rouge regime which ruled Cambodia between April 17, 1975 and January 7, 1979 and then became one of the three factions in the resistance. Technically, the reclaims of pre-1975 ownership, if allowed to happen, would lead to domino effects in land and property disputes, probably causing domestic chaos and internal resistance to the ongoing political negotiations in search of a political settlement to the civil war.

³³ See *infra*, section on Vietnam.

³⁴ As mentioned earlier, trading activities in Cambodia has resumed soon after the fall of the Khmer Rouge. It is the permission for commercial transactions in housing and premises which is new with this Sub-Decree.

Together with the constitutional amendment of Article 15, Article 17 which originally prohibits land sale, purchase, mortgage or loan was also substantively amended and became Article 16. The new Article 16 read that “the State prohibits the act of seizing unoccupied land, paying taxes and keeping it for the purpose of selling and leasing to others.....”. It also became apparent that a comprehensive land law would be necessary to regulate the increasingly complicated land management at the wake of a sudden growth of transactions in premises and the construction land. So in the same law on constitutional amendment, a new Article 17 was inserted which stated that “the right to possess and use land shall be determined by a separate law”.³⁶

The first Land Law was therefore enacted in August 1992. Apart from ensuring that land and other immovable property can be used for doing business and investment, through such methods as sale, mortgage, pledge, succession and contractual transfer of some forms of rights or ownership, etc, the Law pays particular attention to the issue of securing urban residents’ possession of the land and houses by

³⁵ The same clause of denunciation appears in most of sequent pre-1993 land law documents, including the Implementation Directive no.03 SNN on policy for land management and use, dated June 3, 1989; and Land Law of 1992 (Article 1).

³⁶ On April 30, 1975, one week after the adoption of the Sub-Decree no.25, the Constitution was further amended and a 1989 Constitution emerged. Although several authors indentify this 1989 Constitution as a landmark of the resumption of land ownership in Cambodia, it actually was adopted after the Sub-Decree no.25, and indeed incorporated strong legal reservations with regard to private ownership in agricultural land. Although articles 18 and 19 of the Constitution offered strong guarantees for security of private ownership, there was no explicit reference to ownership in land per se. The earlier amended Article 17 was not further revised. It only provided that “the right to possess and use land shall be determined by a separate law”. The English translation might have been the cause of confusion. The word “kan kap” (to possess or to occupy) was translated as “to own”, leading to the presumption that the “right to own” means “ownership”. See for example, Kyoko Kusakabe, Wang Yunxian, Govind Kelkar, “Women and Land Rights in Cambodia”, *Economic and Polical Weekly*, October 28, 1995, republished in

denouncing the right to claim pre-1979 ownership and reconfirming the State's ownership in land. Article 1 reads:

Land in the State of Cambodia belongs to the State, and is managed by the State by nation-wide consents. The State shall absolutely not recognize previous ownership in land before 1979. Ownership and other rights in land shall be under the authority of this Law.

With particular regard to urban land, the Law opens up a possibility for private ownership in Article 19:

Ownership is the legal right to enjoy and dispose of any property in an absolute and exclusive way, provided that the property is not used in any way prohibited by law. Only land for residential constructions can be subjected to ownership. Land for residential constructions in towns and cities shall be determined in a separate law.”

The first sentence of this Article was a direct reintroduction of Article 644 of the old Civil Code promulgated in early 20th century under French colonial rule, with subsequent amendments up to 1954. The move away from the Constitutional constraint towards a market economy modeled after the pre-1975 system is more than apparent in this Law. It took place during the time of political transition supervised by the United Nations peacekeeping operation in Cambodia, although there remained some reservations with regard to land ownership. Development of property law during this period of political transition was obviously extra-constitutional and extra-legal. The quest for legality gave in to pragmatism in dealing with the changing domestic demands.

Sorpong Peou (ed.), *Cambodia: Change and Continuity in Contemporary Politics*, Ashgate, 2001, pp.425-430.

Here it is interesting to note that the extra-constitutional permission for sale and other forms of transaction in construction land but not agricultural land³⁷ developed from the earlier effort to forestall any potential reclaim of the pre-1975 ownership. Any reclaim would only have been physically possible with regard to houses or buildings which remained without major modifications since 1975. Reclaim of agricultural or other land outside the cities would not have been practically possible due to the drastic changes in rural landscape and discontinuity of cadastral mapping and registration particularly after the Khmer Rouge extremist agrarian policies. The administration at that time would not have needed to be worried about any possible reclaim of non-construction land.

The new Constitution adopted after the multi-party free elections in 1993 and the subsequent Land Law enacted in 2001 brought the development of land ownership in Cambodia to a new level. Provision on the protection of private ownership is written in the chapter on rights and responsibilities of Khmer citizens of the 1993 Constitution as amended subsequently. Although in abstract terms, Article 58 of the Constitution states that State property consists mainly land, mountains, rivers, forests, the final clause of this Article puts the State's power to manage and use its property under the law. It says:

The management, use and disposal of state property shall be determined by law.

In a similar way, Article 44 provides that "legal private ownership shall be protected by law". This ownership can be taken away only for public interests and with prior legal permission. The relevant part of Article 44 reads:

³⁷ To the knowledge of the author, commercial and speculative transactions in rural land in fact also started informally in the late 1980s if not earlier.

Deprivation of ownership from any individual shall be possible only if public interests so require, in terms determined by law. Compensation shall be given in advance in a fair and just manner.

However, land ownership under this Constitution also takes on a nationalist character. The first sentence of Article 44 states that “Any individual or collective has the right to ownership. Only natural and legal persons holding Khmer nationality may have right to ownership in land”. This provision has not proven much practical significance. In fact, its impact on the development of real estate business has led to recent legislative efforts to separate ownership in land from ownership in premises, particularly the condominiums, albeit not without opponent sentiments in political terms. The nationalistic tone of the property law in Cambodia may be a reflection of the popular mentality of a new independent country which is often highly sensitive to the idea of a possible loss of sovereignty by foreign occupation not only militarily but also demographically and economically.³⁸

Ownership is not the only legal scheme for private possession and use of land and other properties. There are also other forms of rights defined by the 2001 Land Law and the 2007 Civil Code. The Civil Code is a close resemblance of the current Japanese Civil Code. It classifies property rights into real rights³⁹ which consist of

³⁸ Although Cambodia officially gained its independence from France in 1954, the period between 1979 till 1993 is considered by some as a time when the country was lost to Vietnamese invasion. It remains a controversial issue to be discussed today. However, the 1993 Constitution was adopted after a general election which resulted in a majority of the Constituent Assembly seats being won by the FUNCINPEC Party, the political branch of a once anti-Vietnamese resistance force.

³⁹ Article 130 of the New Civil Code defines real rights as “the right to directly control things. This right can be asserted against all individuals”. Article 131 then stipulates that categories and contents of real rights shall be confined to those recognized by the Civil Code or other special laws only. Real rights existing under

possession,⁴⁰ usufruit (including easement,⁴¹ long-term lease,⁴² profiteering and housing right⁴³) and credit rights⁴⁴ in various forms of contractual arrangements. Two separate articles incorporate the State ownership, the Buddhist monasterial ownership, ownership of the indigenous people and other communities⁴⁵ as well as the land concession⁴⁶ into the legislative categories of real right. There are also provisions for land to be used in different forms of surety.⁴⁷ The effort to introduce diversification of property right to allow maximal uses and shares of limited land resources in fact started with the 1992 Land Law and further expanded in the 2001 Land Law and the 2007 Civil Code.

With regard to land (immovable property) ownership, one important difference between the Cambodian Civil Code and the Japanese Code lies in Article 122 of the former which adopts the principle of non-separation of fixtures from the land beneath.⁴⁸ However, Article 123 provides for an exception in case the fixtures have been built on the land of someone else in exercise of a right, such fixtures do not constitute a part of the land beneath, i.e., separate rights to ownership may then exist between the owner of the land and the owner of the fixture. This provision seeks to protect the interests of the tenant, who may be a long-term leaseholder for instance, against the landlord, with regard to the legal effects of ownership created

the customary law shall be valid under the Civil Code if these rights do not contradict the provisions of the Code or other special laws.

⁴⁰ Articles 227-243.

⁴¹ Articles 285-305.

⁴² Articles 244-255.

⁴³ Articles 256-284.

⁴⁴ Also known as the law of obligations regulating the relationship between the obligor and the obligee in the civil relation, starting from Article 308.

⁴⁵ Article 306.

⁴⁶ Article 307. Provisions on long-term lease are applicable to cases of land concession.

⁴⁷ They are also called real right guarantees and include detention, privilege, pledge, mortgage and transfer security.

⁴⁸ Article 122.

by the tenant based as a result of his/her exercise of the right derived from the long-term lease.

Under the 2001 Land Law, the State can only actively claim its ownership in places of common interests, such as mountains, rivers, forests and national parks, and land or building which have been owned by state institutions or organizations, or land which does not belong to a private ownership or subjected to possible private ownership in accordance with the principle of adverse possession. Article 12 sets out the definition for State ownership in land:

The State owns all properties in the territory of the Kingdom of Cambodia stipulated in Article 58 of the 1993 Constitution; all properties not bequeathed; properties which the owner voluntarily donates to the State; or properties not subjected to acquisition as private ownership in accordance with the law; or properties not under private possession in conformity with provisions of Chapter 4 of this Law.

State properties (land) are divided into public state property and private state property. While the latter can be subject to commercial transactions, the former is not supposed to be so.⁴⁹ However, there can be cases where public state property loses its utility for public interest and be turned into private state property by legislative means.⁵⁰

The concept of the "State as guardian of public property interest" remains to the extent it does not intrude into private sphere of interactions in the marketplace.

⁴⁹ 2001 Land Law Article 14.

⁵⁰ 2001 Land Law Article 16. Public interests in this context include also land concession for social purpose, which is basically a kind of temporary land distribution based on the earlier land-use right concept when commercialization of land-use right was still banned.

Whereas in the marketplace, the Civil Code in particular brings all actors into one single playing field, thus reintroducing the original concept of a stage for private law to develop on its own right. However, in terms of real practice, with regard to private management and use of the land resources in the spheres of livelihood and commercial activities, the results of these legislative progresses have not been so rosy. The lack of cadastral mapping and registration records, combined with corrupt practices in the making of the basic cadastral data and in dispute resolutions have so far been the collaborators, the facilitators and sometimes even the causes of land disputes and facilitated incidents of land-grabbing, particularly in the rural areas.⁵¹ The failure of these administrative functions to work as preconditions for smooth operation of private legal relationship in the society is posing serious challenges to the cause of Cambodia's legal reforms in this area.

(II) Vietnam

Until the 1980s, the Democratic Republic of Vietnam (the Hanoi Administration) recognized the parallel existence of four types of ownership, i.e., the State ownership, the collective ownership, and individual worker's ownership and national capitalist's ownership (Constitution of 1959, Article 11)⁵², in the

⁵¹ Although reliable statistical data on evictions and “land-grabbing” do not seem readily available, there are several investigative reports on existing cases and number of complaints filed by affected families or communities to different civil society organizations. See for example a report by LICADHO issued in May 2009, *Land Grabbing and Poverty in Cambodia: The Myth of Development*, <http://www.licadho-cambodia.org/reports/files/134LICADHOREportMythofDevelopment2009Eng.pdf>

⁵² Article 11 provides that “In the Vietnam’s Democratic Republic in this transitional period, the main forms of ownership in production materials nowadays consist of: ownership of the State, i.e. of the whole people; ownership of the collectives, i.e. collective ownership of the workers; ownership of individual workers, and ownership of national capitalists.” See also *Textbook on Land Law*, (in Vietnamese) Hanoi Law University, Cong An Nhan Dan, 2008, p.9

transition from people's democracy to socialism (1959 Constitution, Article 9). Article 14 stated:

The State, in conformity with the law, protects the farmers' right to ownership in farms and other production materials belonging to the farmers. The State endeavors to guide and assist farmers to improve farming techniques, develop productivity, and encourage farmers to organize themselves into production cooperatives, trading cooperatives, and loan cooperatives, on voluntary basis.⁵³

Although "voluntary basis" here may have been the means, the resulting changes in landholding in North Vietnam in the end of the 1950s reportedly led to increasing collectivization of farming.⁵⁴ The Constitution protected workers' right to own legally acquired assets, preserved assets, housing and other things for individual uses.⁵⁵ It also protected workers' right to succeed private property.⁵⁶ The provisions that marked the uniqueness of a planned economy could be found in Article 17 which read:

The State strictly prohibits utilizing private property to cause chaos to economic activities of the society, sabotaging the national economic plan.

In the wake of the North-South unification, a new period of transition towards

⁵³ Translation by author. *Hop tac xa* is often translated as "cooperatives" in most English writings about Vietnamese collective production. This is conceptually similar to the *krom samaki* translated as "collectives" in the Cambodian case. For easy reference, the word "cooperative" will be used here for the case of Vietnam with the presumption that it is not substantially very different from the word "collective" used in the previous sections about Cambodia.

⁵⁴ Martin Ravallion and Dominique van de Walle, *Land in Transition - Reform and Poverty in Rural Vietnam*, the World Bank, 2008, p.2.

⁵⁵ 1959 Constitution of the Democratic Republic of Vietnam, Article 18.

socialism started nation-wide. Amendments to the 1959 Constitution started. A Drafting Commission headed by Truong Chinh, the Chairman of the Standing Committee of the National Assembly, was established to deliberate on a new Constitution.⁵⁷ The new Constitution was adopted on 18 December 1980.⁵⁸ This new Constitution provided for only the State ownership in land.⁵⁹ The economy was also reorganized into two components - one led by state enterprises and the other led by cooperative groups representing collective ownership of the workers' class.⁶⁰ Article 20 indirectly explained the rationale of this unification of ownership into the State by providing that

The State unifies the management of land according to a common framework, in order to guarantee reasonable and economical utilization of land.

All communities and individuals who are utilizing the land may continue to do so and enjoy the fruits of their labors as provided by the law.

Communities or individuals utilizing land are responsible for (its) protection, consolidation and development in conformity with policies and plans of the State.

Agricultural and forest land shall not be converted for other purposes without permissions by the competent State institutions.⁶¹

⁵⁶ 1959 Constitution of the Democratic Republic of Vietnam, Article 19.

⁵⁷ *Textbook on Vietnamese Constitutional Law*, Hanoi Law University, Cong An Nhan Dan, 2008, p.88.

⁵⁸ *Textbook on Vietnamese Constitutional Law*, Hanoi Law University, Cong An Nhan Dan, 2008, p.89.

⁵⁹ 1980 Constitution of the Socialist Republic of Vietnam, Articles 18 and 19. See also *Textbook on Land Law*, (in Vietnamese) Hanoi Law University, Cong An Nhan Dan, 2008, p.9

⁶⁰ 1980 Constitution of the Socialist Republic of Vietnam, Article 18. See also *Textbook on Vietnamese Constitutional Law*, Hanoi Law University, Cong An Nhan Dan, 2008, p.91

⁶¹ Translation by author, with clarifications added.

In the absence of a market for free transactions of goods and production means, including farms and other types of land, preservation of individual ownership in land in fact would make little sense. To put all land under the management of the State was thus considered the most effective way of ensuring implementation of national economic plans and policies. With its monopolized power to use violence and coercion in case of need, the State is in the best position to demand collective corporations and individuals to follow these plans and policies. In theory at least, collective corporations and individuals who abide by and support the State plan will be spared from State coercion. Those who don't are subjected to coercion in the form of laws and institutional sanctions established by the State itself. Ownership is therefore used here as means to secure implementation of economic plans and policies and to represent the ultimate power of control.

This was particularly relevant to the case of agricultural land. The process of collectivization of agricultural land started in the end of 1953 in North Vietnam and extended to South Vietnam after the reunification.⁶² But the project failed drastically due to drops in agricultural productivity and stringent resistance by farmers, particularly those in the South.⁶³ To save the situation, the Central Committee Secretariat of the Vietnamese Communist Party issued Directive 100⁶⁴

⁶² Chad Raymond, “‘No Responsibility and No Rice’: The Rise and Fall of Agricultural Collectivization in Vietnam”, *Agricultural History*, Winter 2008, pp.43-51.

⁶³ Chad Raymond, “‘No Responsibility and No Rice’: The Rise and Fall of Agricultural Collectivization in Vietnam”, *Agricultural History*, Winter 2008, pp.43-51, Nancy Wieggersma, *Vietnam: Peasant Land, Peasant Revolution – Patriarchy and Collectivity in the Rural Economy*, St. Martin’s Press, New York, 1988, chapters 7, 8 & 11; some simple statistics and explanations are also given by Ha Vinh, *Nong nghiep Viet Nam trong buoc chuyen sang kinh te thi truong* (Vietnamese agriculture in transitional steps to market economy), Nha Xuat Ban Khoa Hoc Xa Hoi (Social Science Publisher), Hanoi, 1997, pp.112-128.

⁶⁴ Also known as “Khoan 100” (Contract 100). The full title of the document is “*Cai tien cong tac khoan san pham den nhom va nguoi lao dong trong hop tac xa san*

on January 13, 1981, to confer farming households active roles in taking over the planting, tending and harvesting of crops on land contracted from cooperatives for a period of one to three years, in “exchange for delivering to the cooperative a specified quantity of grain at each annual harvest.”⁶⁵ This was an attempt to convert the previous workpoints-based crop award system⁶⁶ to a quota-based remuneration system in which the household could sell at a higher price or on the free market any crops in excess of the specified quota originally set to be delivered to the cooperative.⁶⁷ According to one Vietnamese scholar, the “Contract 100” scheme was “in fact the first step for household members of the cooperative to exercise their own right to control the use of land and labour, to attach labour to the land and to make those who labour become more concerned about their final outputs.”⁶⁸ They could take charge of planting, tending and harvesting independently from the cooperatives. However, the cooperatives retained their vital roles in securing production by holding the monopoly to charge fees for the provision of plowing services, seeds, irrigation, fertilizers, and pest control services.⁶⁹

xuat nong nghiep” (Improvement of Production Contracting for Worker and Group of Workers in Agricultural Production Cooperatives).

⁶⁵ Chad Raymond, “‘No Responsibility and No Rice’: The Rise and Fall of Agricultural Collectivization in Vietnam”, *Agricultural History*, Winter 2008, p.52.

⁶⁶ In simple terms, under this system the farmers were awarded a portion of the cooperative’s net harvest corresponding to the time they spent performing collective labor. See Chad Raymond, “‘No Responsibility and No Rice’: The Rise and Fall of Agricultural Collectivization in Vietnam”, *Agricultural History*, Winter 2008, p.47.

⁶⁷ Chad Raymond, “‘No Responsibility and No Rice’: The Rise and Fall of Agricultural Collectivization in Vietnam”, *Agricultural History*, Winter 2008, p.52.

⁶⁸ Ha Vinh, *Nong nghiep Viet Nam trong buoc chuyen sang kinh te thi truong* (Vietnamese agriculture in transitional steps to market economy), Nha Xuat Ban Khoa Hoc Xa Hoi (Social Science Publisher), Hanoi, 1997, p.128.

⁶⁹ Chad Raymond, “‘No Responsibility and No Rice’: The Rise and Fall of Agricultural Collectivization in Vietnam”, *Agricultural History*, Winter 2008, p.52.

In 1986 and 1987, new challenges emerged in the implementation of the “Contract 100” scheme. Since the cooperatives continued to exercise control in the distribution of the five services mentioned above and in entering into contracts with farming households, they were often allegedly biased in contracting quotas with cooperative members and allocating land to them, or sometimes lacked the capacity to purchase crops from farmers at bonus prices.⁷⁰ To further cope with these problems, the 1988 Land Law served to weaken the roles of cooperatives in managing agricultural land and converted the legal status of these cooperatives to be same level as those of individual farmers, ending the privileges so far held by this entity in implementing the agricultural policies of the State. Since elaborations on subsequent development of land laws will be presented in the sections below, only provisions of Article 1 of the Law are introduced here:

Land belongs to the ownership of the whole people and shall be managed by the State in unity.

The State shall give land to farming entities, forest entities, cooperatives, agricultural, forest or entrepreneurial production groups, People’s Armed units, State institutions, social organizations and individuals – hereinafter, in general terms, the land users – for stable and long-term use.

The State shall also allocate land for use on a temporary basis or within a specific time span.

Those who are exercising legal uses of land shall continue the uses in conformity with the provisions of this Law.⁷¹

⁷⁰ Chad Raymond, ““No Responsibility and No Rice”: The Rise and Fall of Agricultural Collectivization in Vietnam”, *Agricultural History*, Winter 2008, p.53; Ha Vinh, *Nong nghiep Viet Nam trong buoc chuyen sang kinh te thi truong* (Vietnamese agriculture in transitional steps to market economy), Nha Xuat Ban Khoa Hoc Xa Hoi (Social Science Publisher), Hanoi, 1997, pp.132-133.

⁷¹ Translated by author.

On April 5, 1988, soon after promulgation of the Land Law, the Politburo issued the Resolution no.10, which abolished the requirement of collective labor, reconfirmed farming households' access to long-term land use right, and terminated the work-points system. Autonomy of households in contracting agricultural work was also enhanced by the Resolution. These households would have the right to choose either to purchase services from the cooperatives or from private suppliers.⁷² It is important to note that both the "Contract 100" of 1981 and "Contract 10" of 1988 were Party documents. They were not legal documents issued by the State. But, as it happened in Vietnam before the 1992 Constitution was adopted, these Party documents were powerful and consisted of the effect of normative rules.⁷³

The Land Law was first adopted in 1987, one year after the commencement of Doi Moi in Vietnam.⁷⁴ This Law was later revised in 1993, 1998, 2001, and finally replaced by the 2003 Land Law, which remains applicable to this day. Just like the previous periods, the process of land legislative development since 1987 has been

⁷² Chad Raymond, "'No Responsibility and No Rice': The Rise and Fall of Agricultural Collectivization in Vietnam", *Agricultural History*, Winter 2008, p.54; Tran Thi Van Anh and Nguyen Manh Huan, "Changing Rural Institutions and Social Relations" in Benedict J. Tria Kerkvliet and Doug J. Porter (eds), *Vietnam's Rural Transformation* Westview Press, Institute of Southeast Asian Studies, Singapore, 1995, p.202.

⁷³ This by no means implies that these documents are no longer normative. But, according to Sidel, unlike Article 4 of the 1980 Constitution, which referred to the Party as "the only force leading the State and society", the word "only" was removed in the 1992 Constitution and the second paragraph of Article 4 reads: "All Party organizations operate within the framework of the Constitution and the law". The 1992 Constitution appears to have moved State institutions farther away from the only influence of the Party and made all party organizations "operate within the framework" of "the law". See Mark Sidel, *The Constitution of Vietnam – A Contextual Analysis*, Hart Publishing, Oregon, 2009, pp.8-15, 83-89.

⁷⁴ Doi Moi officially commenced with detail policy submissions at the 6th National Congress of the Communist Party organized from December 15-18, 1986. See

more than a grand national development plan heading towards socialism. It seemed to be a real process of trials and errors featured by continuous adjustment to the reality and desperate efforts to keep the pace of marketization from spinning out of the control of the ruling political structure. The following paragraphs will elaborate more about the development leading to the ultimate adoption of the 2003 Land Law.

Although the 1988 Land Law⁷⁵ was obviously the attempt of the Vietnamese government to invest land into the opening market, it nevertheless was cautious to protect the land from being subject to speculation and getting out of the State's control. The relevant parts of Articles 2 and 5 of the Law state:

Article 2

The State encourage investment of labour, materials, capital, scientific and technological achievements in:

- Strengthening of cultivation, increasing of services and enhancement of the economic efficiency of land use;

.....

Article 5

Prohibited are acts of purchase, sale and occupation of land, land-leasing for labour in any form, failure to use the assigned land, land use not in terms with the right purposes, arbitrary use of agricultural and forest land for a different purpose or causing damages to land.

Report by Truong Chinh, then Chairman of the National Assembly, to the National Congress of the Party on December 15, 1986.

⁷⁵ The Land Law was adopted on December 29, 1987, but promulgated on January 8, 1988.

This law was promulgated on January 8, 1988. However, not long after the promulgation of this law, the Council of Ministers issued Directive no.154 on “implementation of the politburo’s instructions with regard to the settlement of a number of urgent problems concerning farmland” on October 11, 1988, followed by a decision no.13 of the same Council on “the Settlement of a number of urgent issues concerning farmland”, issued on February 1, 1989. Then on March 23, 1989, Deputy Prime Minister Vo Van Kiet issued Directive no.67-CT on “Some measures to be taken in further implementation of the Land Law”. All these documents were substantively related. They were responses to the Instruction no.47-CT/TU issued by the politburo of the Communist Party on August 31, 1988, related to the settlement of a number of urgent issues concerning farmland. Some paragraphs in the Instruction issued by the politburo describing the “urgent issues” particularly pointed to a new trend in the Vietnamese approach to marketization in the late 1980s. Some relevant parts of the instruction are as follows:⁷⁶

After the liberation of the Southern Vietnam, the Party and the State have issued many important policies on farms. However, in some rural areas, there remain many complicated farm issues to be solved. Currently, in many locations, particularly in the Western and Eastern regions of the Southern Vietnam, a number of farmers are **claiming back** their previous farms. In some places, tense disputes broke out.

The common categories of land being claimed by these farmers are: land which has gone through a few times of adjustment; land managed by the forest or agricultural sectors and the military units but not yet utilized to its full capacity.....; land occupied by some cadres or Party members for private interests. In the highland areas, there are farm disputes between the local indigenous people and people from other places who came to engage in production and explore new land in the process of building the ‘New

⁷⁶ Translation by author.

Economic Zone ‘. Besides, there are also disputes between those using the land for rice-production and those who raise shrimps; land for latex forestry and land for black pepper, coffee and cashew nuts.....⁷⁷

The document further presented the cause of the problems in a straightforward and critical manner with regard to some mistakes made earlier by the Party itself:

The situations mentioned above emerged because: (1) After the liberation of the Southern Vietnam, the instruction no.57-CT/TU dated November 15, 1978 of the politburo and the instruction no.19-CT/TU dated May 3, 1983 of the Party Secretariat, and no.100-CT/TU dated January 31, 1981, have suggested some right policies.....

But among them, particularly the instruction no.19-CT/TU, dated May 3, 1983 of the Secretariat..... contained the following mistakes: “The policy to assign (chia cap) land to farming households that do not have or have little land, based on the average population of the commune”; “at locations where farmland adjustment has taken place but there remains a degree of differences in land among the farmers, the problems should be further resolved by introducing the formation of communities and implementation of products contracting” – these have led to a phenomenon of “messing (xao canh)” and “equitable redistribution (cao bang)” in rural farm land, causing huge chaos (xao tron lon) among farming households with regard to their farms. The assignment of farms to families doing trade or who have already been in a different profession, without examining the agricultural production capacity of each family has resulted in some farming households possessing

⁷⁷ Instruction no.47-CT/TU issued by the politburo of the Communist Party on August 31, 1988, related to the settlement of a number of urgent issues concerning farmland, para.1. Emphasis by author.

insufficient land for production despite their capacity to produce agricultural products.

Therefore, production of agricultural goods in the Southern rural areas used to move one step forward but now decelerates. Farming households living in poverty or not familiar with agricultural work were given farms but could not afford capital and lacked of experience. It led to weak production results and the State has not yet been able to invest in reinforcing the farmers. Meanwhile, making use of the land adjustment policies, a number of Party members and cadres illegally occupied land for use in exercise of their positions and power. A number of institutions and units occupied many farm lots but did not use them all. Farmers have tried to claim them back for several times but to no avail. The farmers are confused.⁷⁸

Paragraph (2) of the document then proceeded to criticizing some local efforts to form production communities and agricultural cooperatives as being too hasty at the first place failing “to truly respect the principle of letting farmers to participate on a voluntary basis; (failing) to set sufficient conditions, especially with regard to cadres: (failing) to confirm the substances, the steps and the suitable formalities”, leading to many community and cooperative failures in running good business and “hard times for farmers”. The subsequent sentences criticized party committees and authorities for being too slow in solving farm disputes and that “A number of bases and localities remain to *be biased towards the measure of issuing administrative orders* when addressing petitions by the farmers”⁷⁹.

Paragraph 4 then states that “Recently, by comparing the Land Law, the Resolution no.10 of the Politburo and Resolutions of the Fifth Conference of the

⁷⁸ Instruction no.47-CT/TU issued by the politburo of the Communist Party on August 31, 1988, related to the settlement of a number of urgent issues concerning farmland, para.1

Sixth Party's Central Committee (Hoi nghi lan thu 5 cua Trung uong Dang khoa 6) against the reality, the farmers discovered the mistakes made by a number of Committee-level and local-government-level cadres, which are incompatible with the policies on farm land management and use. They therefore have *requested that farm disputes be settled in accordance with the new policies issued by the Party and the State.*"

The fact that in this Party document most of the attention was paid to the Southern Vietnam during this period is significant. Although purchase and sales of land might not have been the problem in the 1980s, the emergence of land disputes caused by farmers in the South who "claim(ed) back" the "previous land" as reported by the Party paper reflected a reality in Vietnam which may be important in explaining a major part of the motivation in introducing the economic and land reforms in the 1980s. Until 1975, the concept of private land ownership had been a familiar terminology in Southern Vietnam for many decades.⁸⁰ For that reason, the unpleasant feelings of deprivation of property or ownership could have been dramatic among people in the South after 1975. When the 1988 Land Law opened up an opportunity for land transfer and letting (without payment) and sales of achievements made by one's own labour and investment;⁸¹ and allowed the State to assign or reassign land to cooperatives as well as individuals (known as land-

⁷⁹ Paragraph 3. Emphasis original.

⁸⁰ Although this does not necessarily mean that there were no differences between the traditional Vietnamese land ownership and the modern Western notion of land ownership, yet the differences could not have affected the way deprivation of land right came to be perceived by large and small land lords or landowners who had been familiar with some sort of a private land ownership system in the pre-1975 Southern Vietnam. For a general analysis on traditional and pre-1975 Vietnamese land right systems, including those of the North and the South Vietnam before the unification, see Nancy Wieggersma, *Vietnam: Peasant Land, Peasant Revolution – Patriarchy and Collectivity in the Rural Economy*, St. Martin's Press, New York, 1988, chapters 1, 2, 3, 7, 8, & 9.

⁸¹ 1987 Land Law, Art.3.

users) to use on a long-term stable basis,⁸² it sounds logical that farmers who used to farm their own land and make a living for years before the war or the liberation ended in 1975 would stand up to claim “previous land” back and start a new profitable agricultural production for their own family, instead of having to be always part of an inefficient cooperative. The Party document cited above fully acknowledges this phenomenon.

The acknowledgement seemed to have revealed two important facts. First, transformation of agricultural production system in the South into the cooperatives imported from the North was too hasty and had not bided well. Second, the need to quell abuses by local authorities controlling the agricultural South was very real.⁸³ The document did not suggest that the disputes were caused by the reform but stated that the reform brought into light serious mistakes in implementation of past instructions as well as mistakes in the instructions issued by the Party itself.⁸⁴ In fact, studies also pointed out that reforms spearheaded by the 1988 Land Law, the Resolution no. 10 of the Party Politburo and the Resolution no.6 of the Party’s Central Committee⁸⁵ resulted in unprecedented recovery and improvement of

⁸² 1987 Land Law, Art.1

⁸³ One should not think that the problem only happened in the South. There were also incidences in the North as well. As a matter of fact, until 1982, private ownership had been constitutionally recognized and therefore existed in Northern Vietnam as well. However, the system of cooperative had been imposed and implemented in the North much earlier since the 1950s.

⁸⁴ For some examples of these disputes or “mistakes”, see Benedict J. Tria Kerkvliet, “Rural Society and State Relations” in Benedict J. Tria Kerkvliet and Doug J. Porter (eds), *Vietnam’s Rural Transformation* Westview Press, Institute of Southeast Asian Studies, Singapore, 1995, pp.65-96.

⁸⁵ Resolution no.10 was adopted by the Politburo on April 5, 1988, and Resolution no.6 was subsequently adopted by the 6th Conference of the Sixth Party’s Central Committee in March 1989. These two Party resolutions were aimed at reconfirming the economic autonomy of farming households and production cooperatives initiated earlier under the “Contract 100” scheme. See Ha Vinh, *Nong nghiep Viet Nam trong buoc chuyen sang kinh te thi truong* (Vietnamese agriculture in transitional steps to market economy), Nha Xuat Ban Khoa Hoc Xa Hoi (Social

agricultural production in Vietnam both quantitatively and qualitatively, despite the increasing gaps between the poor and the rich.⁸⁶

Stability in land use is also indispensable to promote investment in land and land-related production activities. The 1988 Land Law tackled the issue of land management in Chapter II. Article 9 of this Chapter listed 7 measures which “the State shall take” in land management.⁸⁷ Paragraph 5 mentioned land registration, inventory and issuance of a land-use certificate. On March 23, 1989, the Council of Ministers issued a Sub-Decree no.30-HDBT on the implementation of the Land Law. Article 4 of this Sub-Decree provides:

Legal land-users shall be those who have been issued the land-use certificate and whose name is registered in the cadastral records”.

With this legal clarity and the actual land registration and user certification being processed and issued, land transfer can be understood to take place under a legal and stable manner. It would be less risky to acquire land transferred by somebody who actually holds a land-use certificate bearing his/her own name as it rightly

Science Publisher), Hanoi, 1997, pp.129-135. For details on “Contract 100” scheme, see *supra* at footnote 64 and the accompanying text.

⁸⁶ Ha Vinh, *Nong nghiep Viet Nam trong buoc chuyen sang kinh te thi truong* (Vietnamese agriculture in transitional steps to market economy), Nha Xuat Ban Khoa Hoc Xa Hoi (Social Science Publisher), Hanoi, 1997, pp.134-143; Benedict J. Tria Kerkvliet, “Rural Society and State Relations” in Benedict J. Tria Kerkvliet and Doug J. Porter (eds), *Vietnam’s Rural Transformation* Westview Press, Institute of Southeast Asian Studies, Singapore, 1995, pp.165-184.

⁸⁷ These included (1) To investigate, conduct surveys, take measurements, categorize and prepare cadastral maps; (2) To regulate and plan land use; (3) To determine land use and management regimes, and to organize the implementation of these regimes; (4) To hand out and to recover land; (5) To perform land registration; to establish and keep cadastral records; to take inventory on land; and to issue certificate for land use right; (6) To inspect the implementation of land use and management regimes; (7) To settle land disputes.

appears on the cadastral registration records. Since Articles 3 and 49 of the Law allow one to transfer his/her land, which is no longer in use, to others and to claim payments for constructions, labor or other forms of investment made on the land, the transferor holding a legitimate land-use certificate would feel comfortable enough to demand higher payment from the transferee who needs a land to expand his/her agricultural production – now on a legally-guaranteed stable and long-term basis. Between the transferor and the transferee, this kind of transaction would be comparable to sales of land, or sales of the land-use right to be more exact, even though such acts had not been legal during that time.⁸⁸ To legalize sales of land-use right would then logically become not too different from a simple political act of acknowledging the reality. However, the loser in this black market land transaction could have been the State itself for not being legally equipped with the right to tax secondary transfer of land or ‘illegal’ private sales of land use right under the 1988 Land Law.

The 1993 Land Law contained explicit provisions to deal with some of these defects. One of the features of this Law was the permission to lease and to mortgage the land use right assigned by the State. Article 1 explicitly states that the State shall allow foreign organizations and individuals to lease land from the State. Lessees are included in the definition of “land-users”. Under Article 3 of the 1993 Law, land assignees were also entitled to lease and bequeath land, in addition to the permission to transfer land-use right⁸⁹ provided for by the 1988 Law. In terms of obligations, Article 79 of the 1993 Land Law states that land users have

⁸⁸ Benedict J. Tria Kerkvliet, “Rural Society and State Relations” and Dang Phong “Aspects of Agricultural Economy and Rural Life in 1993”, in Benedict J. Tria Kerkvliet and Doug J. Porter (eds), *Vietnam’s Rural Transformation* Westview Press, Institute of Southeast Asian Studies, Singapore, 1995, p.73 and pp.168-169.

⁸⁹ The 1993 Land Law also rewrites some provisions of the 1987 Law, which were poorly drafted, such as the issue of transfer. It was not clear in the 1987 Law what could be transferred – the land or the land-use right, although reading in context it could not have been the transfer of land per se, but the land-use.

the obligation to pay “land-use tax, tax on transfer of land use right, and cadastral fee provided by the law”⁹⁰, while Article 48 of the 1988 Land Law only mentions the land users’ obligation “to pay tax and cadastral fee when applying for any cadastral procedures provided by the law”.⁹¹ Imposition of land-use right transfer tax also serves the purpose of controlling land speculations.⁹²

Comparing to the 1988 Land Law, “cooperative” or “production communities” also disappeared from the provisions of the 1993 Land Law. In their places were economic organizations which seemed to have a wider scope and implied a legal entity rather than any local informal community arrangement. “Household” was added into the list.⁹³ Article 1 of the 1993 Land Law thus states:

Land belongs to the ownership of the whole people and shall be managed by the State in unity.

The State shall assign land to economic organizations, People’s Armed Forces units, State institutions, social and political organizations (referred to in general as organizations), households and individuals for stable and long-term use. Organizations, households and individuals that are assigned land by, or acquire leased land from, the State under this Law shall be referred to as land users.

The State shall allow foreign organizations and individuals to lease land.⁹⁴

⁹⁰ The 1993 Land Law Article 79, para.4.

⁹¹ The 1988 Land Law Article 48, para.5.

⁹² Land Law Textbook (*in Vietnamese*), 5th ed., Hanoi Law University, Nha Xuat Ban Cong An Nhan Dan, Hanoi, 2008, p.72.

⁹³ For related and other relevant discussions about the 1993 Land Law, see Benedict J. Tria Kerkvliet, “Rural Society and State Relations” in Benedict J. Tria Kerkvliet and Doug J. Porter (eds), *Vietnam’s Rural Transformation* Westview Press, Institute of Southeast Asian Studies, Singapore, 1995, pp.84-86.

⁹⁴ Translated by author.

Further development in land use and management was incorporated in the 2003 Land Law.⁹⁵ This Law allows the State to allocate or lease land to overseas Vietnamese who come back to Vietnam to invest, engage in frequent cultural and scientific activities or to live. The returning overseas Vietnamese can also buy residential house attached to the land they use.⁹⁶ But foreigner investors are only entitled to lease land.⁹⁷

Another remarkable feature of the 2003 Land Law is the Section 7 of Chapter II. Article 61, the first Article of this Section, states

Land which may participate in the real estate market shall comprise:

1. Land on which this Law permits the land user to exercise one of the following rights: the right to exchange, assign, lease, sub-lease, bequeath and donate land use rights; to mortgage, guarantee and contribute capital using land use rights;
2. Lease land on which there are assets which the law permits to participate in the real estate market.”⁹⁸

With regard to expropriation, Section 4 of Chapter II consists of 8 articles with many details on situations where expropriation (or land recovery as translated by some from the words “*thu hoi dat*”) may occur - expropriation for national defense, security, national interests and public interests; expropriation for economic

⁹⁵ For some general details about the legal and policy developments on land and real property in Vietnam between 1993 and 2003, which are not covered in this paper, see Vu Dinh Bach ed., *The Socialist-oriented Market Economy in Vietnam* (in Vietnamese), Chinh Tri Quoc Gia, Hanoi 2008, pp.171-173, 229-237.

⁹⁶ Article 9 para.6.

⁹⁷ Article 9 para.7. This differentiation between overseas Vietnamese and foreigner is an interesting phenomenon, as an overseas Vietnamese under the Vietnamese Constitution and the 1998 nationality law is not considered holding Vietnamese nationality.

⁹⁸ English translation found in *Land Law – Bilingual Vietnamese-English*, published by Nha Xuat Ban Giao Thong Van Tai. 2008.

development; expropriation and management of expropriated land fund; compensation and relocation of people whose land has been expropriated; uncompensated appropriation; and requisition of land for definite period. These issues will not be further discussed here.

Section 2 of Chapter VI contains provisions to deal with land disputes, complaints and denunciation about land. Procedures for resolving disputes or complaints differ to a certain extent, but in general the issues can be submitted for settlement at the local people's committees or at the People's Court.⁹⁹ An additional conciliation procedure is available for resolving land disputes before the cases can be sent to the People's Court, but for cases of dispute involving parties not having a land-use right certificate or having insufficient legal documents, the final decision has to be made by the People's Committee at the provincial or municipal level or by the Minister of Resources and Environment.¹⁰⁰

Vietnamese scholars also point out that the 2003 Land Law fill in the lacunae embedded in the 1993 Law regarding the roles of the State. It was not legally clear under the 1993 law whether the State, in its capacity of representing the whole people, was the owner of land. This ambiguity "led to the impossibility to establish a concrete mechanism for land management, suitable for responding to the demand for land management in a market economy."¹⁰¹ In a country that adopts the principle of parliamentary supremacy and where separation of the three branches is not a constitutional norm but the Supreme Court is considered one of the many state institutions under the supervision of the Parliament, this ambiguity in the roles of the State poses the question of what roles the judiciary or other State institutions can play in solving complaints by the land-users against

⁹⁹ Articles 135 and 138.

¹⁰⁰ Article 136.

administrative measures taken in the name of the government in protecting the interest of the State. In a situation where the owner is at the same time the manager and the judge, the principle of fairness and equality in settling disputes or complaints involving the owner himself is hardly applicable or believed to be applicable.

Therefore, the 2003 Land Law includes provisions for complaints (petitions) to be filed by the land-users against administrative decisions or acts with regard to land management.¹⁰² Although the State remains to be the representative of the whole people as the owner of the land,¹⁰³ there are more precisions in the way the Parliament, the Government, and the different levels of the People's Committees exercise their respective roles and responsibilities, comparing to the law of 1993.¹⁰⁴ The first paragraph of Article 7 gives the Parliament the power to make laws and decide nation-wide plans for land use. The second paragraph gives the Government the mandate to plan for land-use in provinces or municipalities directly within the jurisdiction of the central government, plan for land-use for the purposes of national defence and security, and unify land management all over the country through the Ministry of Resources and Environment. Paragraph 3 defines the role of the different levels of People's Council as monitoring implementation of the Land Law at the local level and, finally, paragraph 4 authorizes different levels of the People's Committee to represent the landowner (i.e. the whole people) and (to represent) national management of land at the local level in conformity with their own jurisdictions defined by this Law. At least, these provisions give a clear picture of which institution is in charge of what and accountable for which specific parts of the problem if the land management system breaks down at a certain point. The

¹⁰¹ Land Law Textbook (*in Vietnamese*), 5th ed., Hanoi Law University, Nha Xuat Ban Cong An Nhan Dan, Hanoi, 2008, p.84.

¹⁰² Article 138 para.1.

¹⁰³ Article 5.

¹⁰⁴ Article 7 of the 2003 Law comparing with the Articles 13, 14, 15, 16, 17 and 18.

Court is given an important role in addressing the disputes and the complaints. Logically, these provisions may also give rise to some sort of tensions between the different State institutions in responding to problems, such as those between the Parliament and the Government represented by the Ministry of Resources and Environment or between the different levels of People's Committees or Councils, or even between the People's Committees and other State institutions.

In fact, the separation of the “nominal” role of State as representative of the whole people owning the land in Vietnam and the substantive role of State as land manager is made more obvious in the Civil Code adopted in 2005.¹⁰⁵ Chapter XIII of the Code defines the types of ownership, in which State ownership (Section 1)¹⁰⁶ is listed together with collective ownership (Section 2), private ownership (Section 3), joint or common ownership (Section 4), ownership by political organizations and political-social organizations (Section 5), and ownership by socio-political professional organizations, social organizations and social-professional organizations (Section 6). Objects of the State ownership as defined in Section 4 consist of “land, forests, mountain”, etc, the kind of ownership which the State can be seen as the owner in its capacity of representative of the whole people, and

¹⁰⁵ This is an amendment of the 1995 Civil Code.

¹⁰⁶ In the 1995 Civil Code, Section 1 did not provide for “State ownership” but “Ownership of the whole people”. Article 205 therefore had the title “Property under the ownership of the whole people”. Conceptually, this was very ambiguous and abstract. First, “the whole people” was neither an institution nor a legal entity. Second, the State was mentioned not as an owner in this “whole people’s ownership”, but merely the “representative of the proprietor in the “whole people’s ownership” scheme (Article 206). Although a legal representative may in specific circumstances exercise most of the proprietor’s rights in the civil matter, the State in this case was the representative of an abstract and symbolic owner, giving rise to conceptual ambiguities in the issue of equal partnership and the implications of a civil liability or an expression of intention (i.e. who is really liable? How can we interpret the intentions of the actor? To what extent is the State an actor or a representative of the “whole people”?, etc), whenever it occurred, vis-à-vis the

other forms of property like “capital and assets which the State invested in business operations, projects in the economic, cultural, social, scientific... fields...”¹⁰⁷ Objects of private ownership are defined as “legal incomes, savings, residential houses, materials for living, materials for production, capital, profits (*hoa loi*), interests (*loi tuc*) and other legal property.....”¹⁰⁸

In case of encroachments, Chapter XV of the Civil Code provides for several protection measures. Article 255 will be mentioned here as an example: “The owner or legal possessor (*nguoi chiem huu*) has the right to request the courts, institutions and other competent organizations to compel individuals who acted in encroachment upon the ownership or the possession right to return the property, stop the illegal behavior of obstructing the realization of ownership or possession right, and to request for compensating the damage”. Here specific State institutions, such as the courts and other institutions, legally mandated to deal with land disputes in exercising the State’s role as manager, have to protect the “ownership” and “possession right” of rightful owner, without particular specification of whether the owner is the State or private individuals. Logically under these provisions, if there is a dispute regarding a piece of land between the State or State institution representing the whole people as the landowner and a private individual of an residential house having the legal land-use right on the piece of land in dispute, there can be two scenarios which the Civil Code and the 2003 Land Law may help to solve the dispute. Although the State can claim ownership in the land on which the individual live in the house, the house owner can defend him/herself by claiming the land use right and his/her ownership over the house built on that piece of land. So either the State has to give in or if the recovery of the State land is permitted for a certain reason not caused by any illegal acts on the part of the

other party in a civil legal relationship. By making the State the owner of things in a civil legal relationship, the 2005 Civil Code corrects these weaknesses.

¹⁰⁷ Article 200 of the Civil Code.

private individual, the latter still has the legally protected right of claiming for damage compensations for the house which he/she has been living in, together with claims for other subsidiary benefits and interests. The State does not enjoy any legal privilege to deprive private individuals of their property right if these laws are to be properly and professionally implemented. However, if the dispute involves a non-residential farmland, the balance may tilt to the side of the landowner, i.e. the State, to recover the land, with compensations to be given to the land-user for material damages or loss of profits and interests related to the production only.¹⁰⁹

After marketability of land was legally permitted in 1993, the government also issued a sub-decree on ownership in houses and land use right in the cities.¹¹⁰ It defined “residential land” in municipalities, towns and village centers as land for construction of residences; construction projects to serve residential needs and gardens, if any, in conformity with schemes already approved by the competent state institution.¹¹¹ The Decree also regulates registration and certification of ownership in residential houses and land use right.¹¹² Article 4 forestalled any possible reclamation of previous ownership lost due to earlier government policies by stating that:

The State shall not recognize reclamation of residential houses which are under State management as a result of the previous implementation of socialist reform policies on land and houses.

¹⁰⁸ Article 211 of the Civil Code.

¹⁰⁹ Articles 38 to 45 of the 2003 Land Law are about expropriation (or recovery). There are rather detail provisions on situations of compensable expropriation and uncompensable expropriation. These details will not be discussed here.

¹¹⁰ Decree no.60-CP, dated July 5, 1994, on Ownership in Residential Houses and Land Use Right in Cities.

¹¹¹ Decree no.60-CP, Article 1.

¹¹² Decree no.60-CP, Chapter III, Articles 8-17.

The State shall not recognize reclamation of residential land which the State already assigned to the use of someone else as a result of implementing policies of the Democratic Republic of Vietnam, the Provisional Revolutionary Government of the Republic of South Vietnam and the Socialist Republic of Vietnam.

The context here is different from what happened in Cambodia in the end of the 1980s. It obviously was not dealing with any pre-1975 ownership claims. For, until the adoption of the 1980 Constitution, private ownership in land, and for that reason houses, was constitutionally recognized. People in South Vietnam theoretically continued to have land and house ownership from 1975 until 1980. It was only after the subsequent redistribution and nationalization processes that they were deprived of it. This Article 4 equally applied to people in North Vietnam.

A Law on Housing was adopted on November 29, 2005, to reconfirm citizens' housing right and to secure the exercise of this right. Articles 4 and 5 read:

Article 4 – The right to shelter and the right to own houses

Citizens have the right to shelter by means of establishing legal housing or by means of renting, borrowing or depending on someone else's housing in conformity with the provisions of the law. People who establish legal housing shall have the right to ownership in the house.

Article 5 – Protection of ownership in housing

1. The State recognizes and protects the proprietors' right to own their housing.
2. Houses in the ownership of organizations and individuals shall not be nationalized. In case of genuine needs for reasons of national defence, security and for national interests, and when the State may decide to buy off or requisition these houses, the State shall compensate the house

owners with payments equivalent to the market price at the time of the payments, and shall create favorable opportunities for them to establish alternative housing.¹¹³

(III) China

Observations of the Chinese case in this paper is based on analytical reading of the relevant legal texts and some academic writings regarding the real property or land legal issues in China. The efforts at this stage of my research are to identify some general trends as observed by scholars on Chinese property/land law in the way the law has developed conceptually and operationally in the last two decades. The following sections therefore start with a quick historical review of how property (land) law has developed in China so far and a summary of some views expressed by well-informed authors in the latest debates about drafting of a new Civil Code and about the Property Law adopted in 2007. The analysis will be focused on the emergence of increasing legal space for the non-public economic sector and its relationship with the State and the public sector economy, and on that basis, suggest some issues for further deliberation in the area of comparative legal studies.

China experienced more turbulences than Vietnam in its land reform with more devastating periods in the 50s and the 60s. However, unlike the cases of Cambodia and Vietnam, all these happened in China without a regime change since 1949. Research on land reform and property regimes in communist China frequently divides the development into 5 periods. The periods of 1949-1956, 1956-1962, 1966-1976 and 1978-1988 represent the periods of socialist transformation and radical land reforms before and after the commencement of the

¹¹³ Translation by author.

open-door policy, whereas the period of 1988 onwards is considered the modern era of land and property regime.¹¹⁴ Although by no means absolute and complete, these periods are identifiable with some landmark events or political trends. They do not represent any change in political regime but mainly constitute a significant way of understanding the kind of political, economic and social challenges facing China in the course of transition towards “socialism” in more than half a century. They also give important clues to the nature of political transition during these periods. The transition then and now can be articulated in several different ways, including the argument that it is a process of institutional transformation connected to the forming and reforming of the relationship between the State, the collectives and individuals in land ownership and management; the tension between ideology and economic reality; and, the legislative turns in China’s property or land law development history.

This paper will not review these details. The focus here will be on the post-1978 period and examine the relationship between public and private property rights as they develop throughout the 1980s and the 1990s to finally lead up to the latest promulgation of the 2007 Property Law.

Land in China legally belongs to the State and the rural collectives. The State owns urban land and the collectives own rural land in places where people are organized into different rural production collectives.¹¹⁵ In an August 2007 conference in Tokyo,

¹¹⁴ Patrick A. Randolph Jr. and Lou Jianbo, *Chinese Real Estate Law*, Kluwer Law International, the Netherlands, 2000; Peter Ho, *Development Dilemmas – Land reform and institutional change in China*, Routledge, New York, 2005, pp.10-12; Jiang Bing, “China’s Dual Land Ownership System: Formation and Problems”, *Working Paper*, No.93/8, November 1993, Chinese Economy Research Unit, the University of Adelaide, Australia.

¹¹⁵ This may be a little oversimplified. Article 47 of the Property Law actually states that “the urban lands are owned by the State. Such rural land and the land on the outskirts of the city as belonging to the State according to law shall be owned by the

Liang Huixing reported that during the early years of the economic reform, drafting of a Civil Code was attempted. But the Legislative institution in 1982 considered it more appropriate to start with separate laws regulating specific civil legal relations than to draft a comprehensive civil code, since economic relations were still undergoing constant changes at the dawn of the reforms. The civil code would better be adopted when all conditions became ripe.¹¹⁶ A number of relevant laws were then promulgated by 1985. Those included Economic Contract Law, Foreign Economic Contract Law, Succession Law, Patent Law and Commercial Trademark Law.¹¹⁷ Other legislative measures were also taken after 1986 with regard to commerce, land and property, such as the Company Law of 1993 amended in 2005, the Partnership Enterprise Law of 1997, the Sino-Foreign Contractual Joint Venture Law of 1988, the Securities Law of 1998, the Urban Real Estate Law of 1994, the Land Administration Law of 1998 revised in 2004, the Law on the Contracting of Rural Law of 2002, etc.¹¹⁸ Since adoption of separate laws related to civil matter without some fundamental principles and institutions in place caused several inconveniences, the Chinese government enacted Common Provisions of

State.” (English version taken from http://www.lehmanlaw.com/fileadmin/lehmanlaw_com/laws_regulations/Property_Rights_Law_of_the_PRC_LLX_03162007.pdf, last accessed: July 2010).

Collectives do not unconditionally own all rural and suburban land.

¹¹⁶ Liang Huixing “On the Enactment of the Chinese Property Law” (translated into Japanese by Guo Tao), in Hoshino Eiji ed. al., *Considering the Chinese Property Law*, Shojihomu, 2008, p.3.

¹¹⁷ William C. Jones, “Some Questions Regarding the Significance of the General Provisions of Civil Law of the People’s Republic of China”, *Harvard International Law Journal*, vol.28, no.2, Spring 1987, p.311.

¹¹⁸ Stanley Lubman, “Looking for Law in China”, *Columbia Journal of Asian Law*, vol.20, no.1, Fall 2006, pp.7-17; Benjamin W. James, “Expanding the Gap: How the Rural Property System Exacerbates China’s Urban-Rural Gap”, *Columbia Journal of Asian Law*, vol.20, no.2, 2007, pp.467-472; Timothy A. Galatt, “China’s New Cooperative Joint Venture Law”, *Syracuse Journal of International Law and Commerce*, vol.15, 1988-1989, pp.187-201; Patrick A. Randolph Jr. and Lou Jianbo, *Chinese Real Estate Law*, Kluwer Law International, the Netherlands, 2000.

the Civil Law in 1986.¹¹⁹ However, there remained significant opinion divides in whether provisions on the concept of “wuquan”¹²⁰ needed to be considered. Therefore, direct reference to the issue of “wuqian” was excluded from the Common Provisions of the Civil Law. In its place was the reference to “ownership in property and (property) rights related to ownership in property”.¹²¹

In the 1990s, the system of socialist market economy was established as the direction and goal for economic reform and opening.¹²² It was not until 1988 that land use rights took up a new characteristic of something based on contractual terms rather than State conference by means of an administrative act. It was known as “granted” land use rights and became transferrable, leaseable and more mortgageable than the “allocated” land use rights which had been the predominant

¹¹⁹ William C. Jones, “Some Questions Regarding the Significance of the General Provisions of Civil Law of the People’s Republic of China”, *Harvard International Law Journal*, vol.28, no.2, Spring 1987, pp.309-331.

¹²⁰ “Wuqian” is generally translated as “property” or literally “right in things”. In Japanese, the same character (pronounced in Japanese as “bukken”) exists in the Civil Code. Some people translated it as the “right in *rem*”. But there seem to be subtle differences between the various translations. And there also seems to be subtle difference between wuquin in this Property Law and the Japanese bukken in the Civil Code. For the current purpose, wuquan in Chinese will be translated as “property right” or “property” as it is generally treated in many translated texts.

¹²¹ Liang Huixing, in Hoshino Eiji ed. al., *Considering the Chinese Property Law*, Shojihomu, 2008, p.3.

¹²² Following Deng Xiaoping’s southern tour of China in 1991 to campaign on his own vision of a socialist market economy, a relatively more unified understanding about the market economy was forged at the 14th Communist Party Congress in 1992. The National People’s Congress then amended the Constitution in 1993 and 1999 to abolish planned economy and formally subscribe to the idea of a socialist market economy. While retaining the prime position of public ownership in the economy, the revised constitution recognizes the parallel development of diverse sectors of the economy (Article 6) in which “individual, private and other non-public sector economy” is a major component (Article 11). For some details, see Yongnian Zheng, *Globalization and State Transformation in China*, Cambridge University Press, 2004, pp.80-82; Hu Jinguang and Han Dayuan, *Zhongguo Xian Fa (The Chinese Constitution)*, Beijing, Fa Lu Chu Ban She, 2004, p.58.

form of land management performed by the State.¹²³ This new type of land use rights symbolized “a new movement toward a market economy”.¹²⁴ A system of real right security also became increasingly important in the context of market economy. Therefore, not only was the concept of “granted” land use rights introduced into the land management system, but conversions from “allocated” land use rights into “granted” land use rights was also permitted under certain circumstances to allow for enterprises to mortgage State-owned land.¹²⁵ Land ownership was then separated from the land use right for practical economic reasons. Therefore, establishment of a new legal framework for categorization of rights became necessary to re-define investment interests in a civil law context, instead of the system based on administrative regulations.¹²⁶

While no Civil Code drafts were able to reach its final stage for discussions and adoption for more than two decades, the original plan to review a draft property law as part of the Civil Code in early 1998 would then turn out to be a full property law project. In discussing the property law part of the Civil Code drafting project, the

¹²³ Patrick A. Randolph Jr. and Lou Jianbo, *Chinese Real Estate Law*, Kluwer Law International, the Netherlands, 2000, pp.85-158. In fact, the granted land use rights were introduced in addition to but not to replace the allocated land use rights.

¹²⁴ Patrick A. Randolph Jr. and Lou Jianbo, *Chinese Real Estate Law*, Kluwer Law International, the Netherlands, 2000, p.89.

¹²⁵ Patrick A. Randolph Jr. and Lou Jianbo, *Chinese Real Estate Law*, Kluwer Law International, the Netherlands, 2000, pp.98-103.

¹²⁶ One example given by Liang is the use of construction land. See Hoshino Eiji ed. al., *Considering the Chinese Property Law*, Shojihomu, 2008, p.5. His arguments are that prior to the adoption of the 2007 Property Law, land use rights was not even a usufruct (*yoeki bukken* in Japanese) and the legal rights of parties having the use right in State-owned land were not substantially protected. The reason was because the previous system allowed the land owner to obtain on-the-ground constructions without compensation, upon the termination of the use period in land for constructions. Also, land in which land use rights had been conferred could be recovered by local authorities without compensation if left unused for two years. Such arrangement was not favorable to land use right-holders and did not

Legislative Work Commission of the National People's Congress Standing Committee received an initial draft prepared by a working group headed by Liang Huixing and held a drafting committee's debates on the draft. In response to some disagreements with regard to Liang's draft,¹²⁷ another working group led by Wang Liming was given the task to prepare a counter draft. Huixing's group submitted their completed draft in March 1999 and Liming's group submitted theirs in December 2000. By the end of 2001, the Legislative Work Commission produced the first complete draft of the Property Law part, based on a combination of the two drafts mentioned above. The draft was included into the Civil Code project and submitted to committee debates and revisions for the whole year of 2002. A completed Civil Code compiled by the Standing Committee was not well received by scholars and legal professionals. Some more discussions on the Property Law part of the draft Code were organized in 2003. Finally the Standing Committee decided to put the Civil Code project aside in mid-2004 and started working on the Property Law only. By December 2006, it was discussed and revised at the Standing Committee meetings for 7 times. It was finally considered mature enough and submitted to the National People's Congress plenary session for adoption in early 2007.

The Property Law is made up of 247 articles, grouped into 19 chapters and 5 parts. Although the law takes the form of a codification and is generally claimed by Chinese specialists as a comprehensive piece of private law on property, it is

serve well the establishment and maintenance of a regular legal order in the use of State-owned land.

¹²⁷ These disagreements concerned whether the Property Law should incorporate the ordinary civil law approach of not specifically naming whether the object belongs to that of individuals, collectives or the State (Liang's draft) or it should reflect the Chinese legal tradition by incorporating separate specific provisions on individual properties, collective properties and State properties (Wang's draft). See Qiao Liu, "Chinese Property Rights Law: Old Wine in a New Bottle?", *Lawasia*

rather different from the general characteristics of the Civil Code or property law in the codification of private laws in other countries. Unlike Cambodia or Vietnam after the 1980s, in China, land (including mountains, forests, and natural resources) ownership belongs to the State and collectives. Articles 9 and 10 of the 2004 Constitution provide:

Article 9.

Mineral resources, waters, forests, mountains, grassland, unreclaimed land, beaches and other natural resources are owned by the state, that is, by the whole people, with the exception of the forests, mountains, grassland, unreclaimed land and beaches that are owned by collectives in accordance with the law. The state ensures the rational use of natural resources and protects rare animals and plants. The appropriation or damage of natural resources by any organization or individual by whatever means is prohibited.

Article 10.

Land in the cities is owned by the state.

Land in the rural and suburban areas is owned by collectives except for those portions which belong to the State as prescribed by law; house sites and privately farmed plots of cropland and hilly land are also owned by collectives.

The State may, in the public interest and in accordance with the provisions of law, expropriate or requisition land for its use and shall make compensation for the land expropriated or requisitioned.

No organization or individual may appropriate, buy, sell or otherwise engage in the transfer of land by unlawful means. The rights to the use of land may be transferred according to law.

Journal, 2007, p.167; Shen Weixing, *Wuquan Fa Yuanli (Theories of Property Right Law)*, China Remin University Press, 2008, p.2.

All organizations and individuals using land must ensure its rational use.

Protection of private ownership is provided in Article 13 of the Constitution:

- (1) Citizens' lawful private property is inviolable.
- (2) The State, in accordance with law, protects the rights of citizens to private property and to its inheritance.
- (3) The State may, in the public interest and in accordance with law, expropriate or requisition private property for its use and shall make compensation for the private property expropriated or requisitioned.¹²⁸

In fact, the right to the use of land becomes transferrable after the 1988 amendment to the 1982 Constitution. Until then, there was no constitutional provision on the issue of transfer of land use right.¹²⁹

¹²⁸ English versions of the Constitution, including Articles 10, 11 and 13 are available at <http://www.asianlii.org/cn/legis/const/2004/1.html#A013>, <http://www.lehmanlaw.com/resource-centre/laws-and-regulations/general/constitution-of-the-peoples-republic-of-china.html> and http://www.npc.gov.cn/englishnpc/Constitution/2007-11/15/content_1372963.htm (all last accessed: July 2010). Slight inconsistencies occurred among the different English versions of Articles 10 and 13. To the extent that these inconsistencies existed, the text is adjusted to the Chinese version available at http://news.xinhuanet.com/ziliao/2004-09/16/content_1990063_2.htm (last accessed: July 2010).

¹²⁹ The 1988 constitutional amendment added a clause on transferability of land use right to Article 10. The new clause reads that “(t)he rights to the use of land may be transferred according to law”. For a comparison of the Article 10 in 1982 Constitution and its revised version in the first amendment adopted on April 12, 1988 at the 7th National People’s Congress, see <http://english.peopledaily.com.cn/constitution/constitution.html> (last accessed: July 2010). More details are available in *Zhonghua Renmin Gongheguo Xianfa Zuixin Shiyi Duben* (“Constitution of the People’s Republic of China”: The Latest Book of Commentaries), edited by Zheng Lu (main editor), Yan Jun Xing, Gai Xin Qi, and Zhou Li Quan (associate editors), Hunan People’s Publishing House, 1999, pp.68-70.

Although Article 10 deals with land ownership of the State and explicitly provides for the State's power to expropriate or requisition land for public interest, the same clause is repeated in Article 13 which provides for the protection of private property. This clause did not appear in either of the articles before March 2004.¹³⁰ The message in these 2004 amendments is clear: the State's power to expropriate can overwrite constitutional protection of private property right, however lawful it may be. While articles 9 and 10 are specifically about land, Article 13 is of a wider scope of application, particularly because private property does not legally include land ownership but only land use right and other forms of property rights. The timing of the amendment in 2004 is also interesting given the fact that a high profile case of a group of well connected private business people launched a major lawsuit against the government over expropriation of oil wells by Shaanxi local government only one year earlier.¹³¹

Technically, a private sector economy was not explicitly sanctioned by the Constitution before 1988.¹³² The 1982 Constitution only recognized "individual economy of urban and rural working people, operating within the limits prescribed

¹³⁰ For a comparison between the pre-2004 and 2004 amended versions in English, see <http://english.peopledaily.com.cn/constitution/constitution.html> (last accessed: July 2010).

¹³¹ The case of Feng Bingxian who had been leading a group of reportedly 60,000 investors to protest against the confiscation of oil wells previously licensed to them to extract oil. For some reports on the case, see Washington Post <http://www.washingtonpost.com/wp-dyn/content/article/2005/08/18/AR2005081801688.html> and <http://english.caijing.com.cn/2006-01-09/110031994.html>

¹³² Zheng Lu, Yan Jun Xing, Gai Xin Qi, and Zhou Li Quan (eds), *Zhonghua Renmin Gongheguo Xianfa Zuixin Shiyi Duben* ("Constitution of the People's Republic of China": The Latest Book of Commentaries), Hunan People's Publishing House, 1999, pp.70-73; Xu Zhongde (chief editor), Hu Jinguang (deputy chief editor) et.al. *Xuen fa xue – Zhongguo bufen (Constitutional Law Studies – China*, 2nd edition, Higher Education Press, Beijing, 2005, pp.205-208.

by law” as “a complement to the socialist public economy” and the State “guides, helps and supervises the individual economy by exercising administrative control”.¹³³ Partly as the basic guarantee of this individual economy, the State “protects the right of citizens to own lawfully earned income, savings, houses, and other lawful property”.¹³⁴ The amendment in 1988 introduced the following additional provisions to Article 11 of the 1982 Constitution to address a different type of economy sector, called the “private sector of the economy”:

“The State permits the private sector of the economy to exist and develop within the limits prescribed by law. The private sector of the economy is a complement to the socialist public economy. The State protects the lawful rights and interests of the private sector of the economy, and exercises guidance, supervision and control over the private sector of the economy.”¹³⁵

The reference to “urban and rural working people” was then eliminated in the 1999 Constitutional amendment and the status of “individual, private and other non-public economies” was enhanced to comprising the “major components of the socialist market economy”.¹³⁶ However, the State’s possible mandate to intervene

¹³³ 1982 Constitution, Article 11.

¹³⁴ 1982 Constitution, Article 13.

¹³⁵ <http://english.peopledaily.com.cn/constitution/constitution.html> (last accessed: 2010). Note that the first part of Article 11 remained as it originally appeared in the 1982 Constitution to address the “individual economy” sector. It read:

“The individual economy of urban and rural working people, operated within the limits prescribed by law, is a complement to the socialist public economy. The state protects the lawful rights and interests of the individual economy. The state guides, helps and supervises the individual economy by exercising administrative control.”

¹³⁶ <http://english.peopledaily.com.cn/constitution/constitution.html> (last accessed: 2010). In Zheng Lu et.al, it is argued that the amendment approved by the 2nd session of the 9th National People’s Congress in 1999 combined the provisions on individual sector and private sector of the economy together because the two were considered belonging to the same non-public sector of the economy, shared similar characteristics and were basically the same status in the socialist market economy.

remained explicit as it “protects the lawful rights and interests of individual and private economies, and guides, supervises and administers individual and private economies”.¹³⁷

The latest amendment in 2004 further expands the space for non-public economies to develop in China and reigns in the power of the State to intervene by introducing a stronger concept of legality. The second paragraph of the new Article 11 thus becomes:

The State protects the lawful rights and interests of the non-public sectors of the economy such as the individual and private sectors of the economy. The State encourages, supports and guides the development of the non-public sectors of the economy and, in accordance with law, exercises supervision and control over the non-public sectors of the economy.¹³⁸

However, even before the 1988 Constitutional amendment recognized the existence of a “private” economy,¹³⁹ the General Principles of Civil Law was

However, no explanation is made on the removal of the phrase “urban and rural working people”. The enhancement of their status from being “complements” to “main components” of the socialist market economy is said to be an effort to appreciate and reconfirm the status and importance of these two sectors, i.e. the non-public sector, within Chinese socialist market economy. Zheng Lu, Yan Junxing, Gai Xinqi, and Zhou Liquan (eds), *Zhonghua Renmin Gongheguo Xianfa Zuixin Shiyi Duben* (“Constitution of the People’s Republic of China”: The Latest Book of Commentaries), Hunan People’s Publishing House, 1999, pp.71-73.

¹³⁷ 1999 Constitutional amendment, Article 11, available at <http://english.peopledaily.com.cn/constitution/constitution.html> (last accessed: July 2010).

¹³⁸ <http://english.peopledaily.com.cn/constitution/constitution.html>

¹³⁹ The characteristic of private sector, as distinctive from the individual sector, is in its connection to the issue of employment relationship. In a textbook published by Xu Zhongde et. al., it is written that in China the private sector was eliminated in 1956 and only rapidly recovered in the process of Chinese opening-up in the 1980s. Therefore, the earlier constitutions did not contain provisions on this type of

enacted and came into force on January 1, 1987. The breakthrough in this legislation is its provisions on establishment and operations of the legal person. Although the provisions do not explicitly permit “any” individual citizen to establish a legal entity, it allows for establishment of entrepreneurial legal person in two categorizations: those established by State-owned enterprises and collective-owned enterprises and the others established by a Chinese-foreigners joint-capital business enterprises established in the territory of the People’s Republic of China.¹⁴⁰ By making these legal entities separate from the State and collectives and involving foreign elements into the scheme, the law practically opens up a new zone in which a kind of non-individual economic entity could participate in the market place. This would neither be individual economy nor public economy, hence the concept of a non-public economy that took birth before the amendment of the Constitution in 1988.¹⁴¹

economy. Xu Xhongde (Chief Editor), He Huahui and Wei Dingren (Deputy Chief Editors), *Zhongguo xian fa (Chinese Constitutional Law)*, 3rd edition, China Remin University Press, Beijing, 2006, p.90.

¹⁴⁰ Article 41 of the General Provisions of the Civil Law states: “An enterprise owned by the whole people or under collective ownership shall be qualified as a legal person when it has sufficient funds as stipulated by the state; has articles of association, an organization and premises; has the ability to independently bear civil liability; and has been approved and registered by the competent authority. A Chinese-foreign equity joint venture, Chinese-foreign contractual joint venture or foreign-capital enterprise established within the People’s Republic of China shall be qualified as a legal person in China if it has the qualifications of a legal person and has been approved and registered by the administrative agency for industry and commerce in according with the law.” Full text available at <http://en.chinacourt.org/public/detail.php?id=2696> (last accessed: July 2010)

¹⁴¹ Writing shortly after the adoption of the General Provisions, William C. Jones argued that Articles 26-29 of the General Provisions might have the function of a political statement to encourage “new kinds of individual enterprises” (“individual businesses” as translated in <http://en.chinacourt.org/public/detail.php?id=2696>) to be legally “recognized” and “entitled to legal protection”. These provisions may have added some details to the concept of individual sector of the economy. Jones also argued that the fact the article on “Enterprise Juristic Persons” (“enterprise as legal person” <http://en.chinacourt.org/public/detail.php?id=2696>) was included in a “law passed by the National People’s Congress” may suggest that “the highest

Since the State and collectives legally and practically own and control the land as means of production, it is impossible to have investment or non-public sector economic activities without engaging these two entities in one way or another. In a market economy not until then familiar to the socialist legal system where the State only guided, helped and supervised the economy by “exercising administrative control”, a less paternalistic approach to the relationship between the State as a public entity and the private individuals or entities became necessary. Technically, one way of doing it is to separate the civil law status of the State from its administrative law status in its various forms of interaction with the non-public sector. Enactment of a Civil Code is therefore the next step of the reform. However, due to impossibility to garner broad consensus on the draft Civil Code in 2004, the attention was focused on the Property Law which was finally adopted in July 2007 and came into effect in October of the same year.

In the statement submitted to the Plenary Session on March 8, 2007, Wang Jaoquo, Deputy Chair of the Standing Committee of the National People Congress, explained:

The Property Law belongs to the civil law. One important principle of the civil law is to render equal protection to the right-holders’ exercise of rights. The draft Property Law states “the law protects property right of the State, collectives, private individuals and other right-holders. No organizational unit (tanwei) or individual shall violate it. The Constitution provides that “the State

officials in China, presumably including the Party, have decided to accept a model of society in which discrete entities – persons - make decisions”. He added: “it is a complete rejection of the Maoist model”. William C. Jones, “Some Questions Regarding the Significance of the General Provisions of Civil Law of the People’s Republic of China”, *Harvard International Law Journal*, vol.28, no.2, Spring 1987, pp.327-328.

implements the socialist market economy'. Fair competition, equal protection, and that 'the strong wins and the weak loses' is the basic rule of a market economy. In the condition of socialist market economy, players in the market of diversified-ownership economy operate together in a unified marketplace and develop relationship with one another. All market players shall hold equal status, enjoy the same rights, abide by the same rules and bear the same responsibilities."¹⁴²

But, under the socialist market economy, the State as an agent of the whole people continues to have its particular role to fulfill. So are the many collectives which are agents of people who belong to those collectives. State economy has not been incorporated or absorbed by the market economy. Quite the reverse, the public ownership system leads the whole economic mechanism. Article 7 of the Constitution states:

The State economy, being the socialist economy under ownership by the whole people, is the leading force in the national economy. The State ensures the consolidation and development of the State economy.

In fact, Article 3, immediately preceding the equal protection provision of the Article 4 of the Property Law, elaborates this principle in the context of the civil law relationship between the State and the market economy. It states:

At the primary stage of socialism, the State shall sustain the basic economic system in which the public ownership system dominates and the diversified ownership economies develop together.

¹⁴² Gazette of the Standing Committee of the National People's Congress, March 2007, p.311. Wang quoted an article of the draft, which would later become Article 4 of the Law without any revision. Translation by author.

The State shall consolidate and develop the public-ownership economy; encourage, support and guide the development of the non-public ownership economy.

The State implements socialist market economy and ensures equal legal status and the right to develop of all market players.”

How should Article 3 be interpreted together with Article 4 in this Property Law? Is there any conflict between the two articles in a civil legal order which is supposed to ensure that the State as a market player holds exactly the same legal status as private players? In a somehow related but separate context, Chapter 5 of the Property Law defines the different contents of the three types of ownership, namely the State ownership, the collective ownership and private ownership.¹⁴³ How should this substantive differentiation of ownership be properly understood in the context of equal protection? If it does not affect the principle of equal protection, what justifies the need to have these provisions included in the Property Law?¹⁴⁴ After all, the differences among the three players are already explicitly stated in the

¹⁴³ Articles 45-69, Property Rights Law of the People’s Republic of China, English translation available at http://www.lehmanlaw.com/fileadmin/lehmanlaw_com/laws_regulations/Property_Rights_Law_of_the_PRC_LLX_03162007.pdf (latest access date: July 2010)

¹⁴⁴ These reportedly reflected the differences between Liang Huixing and Wang Liming, the two top experts in drafting this Law. See Qiao Liu, “Chinese Property Rights Law: Old Wine in a New Bottle?”, *LAWASIA Journal*, 2007, pp.167-168. In his book *Wuquan Fa Yenjyu (Studies of Property Law, in Chinese)*, 3rd ed. 2005, pp.281-284, Wang argued with some detail justifications that the different features of ownership are a reality in Chinese socialist market economy. The Property Law, as a law to confirm and protect the ownership relations, has to meet the needs of the existing relationship of different ownership systems. Liang on the other hand said at a conference in Tokyo, August 31-September 1, 2007, that both Article 3 and the provisions on State ownership were included in response to the demands of those who were opposed to the Law at the first place. See Hoshino Eiji, Liang Huixing, et al, *Chukoku Bunkenho wo Kangaeru (Considering the Chinese Property Law, in Japanese)*, Shojihomu, 2008, p.253.

Constitution. The civil legal relationship is rather a matter of what happens when the exercise of the right of the State as the owner of a lot of urban land is hindered by an individual's right to profit from that same piece of land after he/she has rented it from a State institution, say, for a period of 30 years. Obviously, the land's real owner is the State representing the whole people and the institution that exercises this right to ownership is the State Council.¹⁴⁵ The State institution that rented the land to the private entity did so under the instruction of the State Council. Therefore, under the civil legal relationship, this problem can be solved based on an interpretation of the "ownership vs usufruct" relationship. Whether the landowner is the State or the state institution is not really relevant in this civil legal relationship. The relationship between the State and a particular state institution is a matter to be decided by a specific legislation in the field of administrative (organization) law.

Whatever is the justification, the Property Law represents all but China's approaching a market economy which is familiar in a conventional capitalist system. It may be a transition, but not really away from socialism towards capitalism. It is a transition which still strongly embraces the socialist features and rhetoric. When the judge is called upon to decide a case based on a civil law blended with administrative legal provisions, he/she may not feel equally comfortable as his/her counterparts in a different country where civil law contains only rules which make no revelation of the parties' identities. It may be equally perplexing for a party whose roles both as a civil party and a public administrative figure have to be played out at the same forum. What is the appropriate and decent way to behave?

For these reasons, the actual implementation of the Property Law in the coming years will be an important experience for those who use it, apply it and study it. The concept of property right has increasingly found its way into the private sphere

¹⁴⁵ Article 45 of the Property Law.

of socio-economic relations in China. But its origin of being dominantly public in nature retains its shadow over every step of the move. On the other hand, by applying concepts more universally used in other civil codes jurisdictions, the Property Law may open up a new way for informed jurists and practitioners to borrow interpretation techniques from other jurisdictions which may in one way or another turn out to fit the Chinese context. Development of property right as a concept will therefore be able to expand its contents and flexibility to include, but not limit itself to, the experiences available elsewhere.

Some observations

The experience of some former or current socialist countries' transition to a market economy is indeed unprecedented. There is always something that seems familiar in the past experiences of the developed countries and something that seems common across the board among these transitional countries themselves, but a closer look into the situations and contexts of each country can give one a sense of complexity which each country has to face up with. It is fully understandable that there are conservative and progressive elements even among the reformists. It seems to be a continuous process of "trials and errors". Innovations and continuities seem to come side by side for each step taken in the reforms. For the same reason, the different results achieved depend so much on many elements. Then, finally, there may be continuous frustrations caused by the gap between what is intended and what is achievable, the difference between ideology and practice.

Observations of the developing concept of property rights embedded in the legislative experiments of the three jurisdictions throughout the last three decades suggest some patterns of transition which have been taking place so far. The first

issue in this transition is to accommodate the roles of the State into the rules of the market. The three countries have resorted to different approaches during different times and have reached different levels of interactions between the public and private players since their common point of departure in the early and mid-1980s. Cambodia has been most radical in this front since its economic reform was soon followed by a complete reversal of the political regime to a formally western style of liberal democracy and a renewed point of departure, legally speaking, from where it left before the year of 1970. Land disputes in Cambodia these days are no longer caused by unclear definition of State and private ownership, but the failure of the technical conditions to catch up with the new reality and the corrupt and weak administrative elements that are charged to fix these technical conditions. As a result, behind the numerous troubles is a competitive struggle for profits and legal interests between the rich in collusion with the powerful and the poor side by side with the uprising civic organizations. State institutions are simply too weak and incapable to do their jobs properly in settling these fights.¹⁴⁶

In the case of China and Vietnam, the changes have been less radical. But the latter has demonstrated more consistent efforts to dilute State's roles from intervening into the rules of the market. In Vietnam, the popular feelings and perception of the property law reform seem pretty different between people living in the North and those in the South. What is to the North the State's endowment of the right to use land for business is reportedly perceived by people in the South as the State's return of the previous ownership to the original citizens except for those

¹⁴⁶ For some data and case descriptions, see report by LICADHO issued in May 2009, *Land Grabbing and Poverty in Cambodia: The Myth of Development*, <http://www.licadho-cambodia.org/reports/files/134LICADHOREportMythofDevelopment2009Eng.pdf>; Report by the Cambodian Human Rights Action Committee (CHRAC) issued in September 2009, *Losing Ground – Forced Evictions and Intimidation in Cambodia*, (on file with author) and the related press release by the CHRAC, dated 09-10-2009, available at <http://www.chrac.org/eng> (access date July 2010).

who have left their property before Doi Moi, although the document that was actually issued then was identified in a different name called the land-use right.¹⁴⁷ The situation in the rural areas is less promising. That is because of the sequences of land reforms in Vietnam which targeted rural and agricultural land before the Doi Moi period. The concept of land ownership has long been forgotten and cadastral mapping and registration has also been difficult due to the process of collectivization and decollectivization, then the transfers of land from passive farmers to active farmers, all without any clear records.¹⁴⁸ Also added to the problem is the fact that the role of the State remains relatively strong in exercising direct intervention in rural and agricultural land distribution in the name of economic development. Corruption of powerful officials is reportedly adding to the problems of unfair land loss suffered by the rural and urban poor.¹⁴⁹

¹⁴⁷ This is particularly pointed out to me by a land law expert whom I interviewed in Hanoi in 2008. His theory is that it was due to this “misperception” that actually made South Vietnam a place of vibrant economic activities right after the Doi Moi started. Interviews with some businessmen in the South also suggested that they felt safe in investing their properties in business operations after land-use right was officially recognized and the certificate of land-use right began to be issued to residents. For some historical details and empirical data on the North-South differences in agrarian issues, see Michael Watts, “Agrarian Thermidor – State decollectivization, and the peasant question in Vietnam”, in Ivan Szelenyi (ed), *Privatizing the Land – Rural political economy in post-communist societies*, Routledge Studies of Societies in Transition, Routledge, 1998, pp.160-175.

¹⁴⁸ Nancy Wieggersma, *Vietnam: Peasant Land, Peasant Revolution – Patriarchy and Collectivity in the Rural Economy*, St. Martin’s Press, New York, 1988, pp.220-246;

¹⁴⁹ Even official Vietnamese newspapers occasionally carried detail reports on some land problems caused by misbehaviors of local officials. For example, the *Tuoi Tre* (Youth) newspaper ran an article on March 15, 2010, called “Private Pocketing From Public Land” (pp.1, 5), accusing a case of improper land assignment to 174 provincial and communal leaders of the Long An district, who then were entitled to tens of billion *dong* in compensation, and another article “Tens of Households Live in Pollution Awaiting Compensation” (p.6), reporting a case of land expropriation by the competent authorities to make way for the expansion of a sugar factory in mid-2008. The displaced households were yet to

China represents the case of a reform in which the role of the State remains strong and relatively more explicitly so than the case of Vietnam. Ideological elements seem to matter much in every step of the reform. This may partly be because of the confidence it has been able to build up in the rapid growth it has experienced so far. Perhaps, more similar to the problems in Vietnam, the concept of socialist market economy has a very strong impact on the developing concept of property rights in China. The issue of economic development and distribution of wealth, at least in theory, remains dominant in the discussions about the separation of the roles of the State and the rules of the market. This concept can easily work both ways. A grand investment and development project that claims greater distribution of wealth to the rural poor in the form of employment and stable salary can easily be dubbed as a more efficient way of wealth distribution than persistent practices of micro-level land distributions to farmers or less efficient collectives to continue with their traditional land cultivation. Relocation of farmers or smaller business operators in favor of large-scale development projects seems quite logically justifiable in the name of socialist market economy.¹⁵⁰

All being said, one common feature of the three cases is that the experimental nature of the reforms is so obvious that often they were led by practices, in the face of unfavorable legislative provisions, then supported by local or lower-level legislative attempts, before they became fully incorporated into the Constitution as

receive the compensation promised by the relevant quoted company that runs the factory.

¹⁵⁰ However, this should not mean that all development projects are ideologically justified in practice. Jiang, Yeh and Wu have argued with significant data and background information that several land development projects in China have been shaped by local authorities trying to benefit from the ongoing market reforms in defiance of central governmental controls. See Jiang Xu, Anthony Yeh and Fulong Wu, "Land Commodification: New Land Development and Politics in China since

the adopted new policy of the State. It was perhaps this experimental nature of reforms that earned some interesting remarks by scholars and observers in general of the gaps between the law and the practice in these countries.¹⁵¹ However, it is also important to notice, in the timing and the frequent situation of urgency in which these legislative efforts took place, that all these legal and legislative changes have been mainly driven by the evolving rules of the market. They formed the defensive lines taken by the State against the advancing market forces, rather than the regulatory initiatives to tell how the market should be. That the market rules often are let to take the helm until the State reacts to take it back seems more obvious than some observations would suggest otherwise.

the Late 1990s”, *International Journal of Urban and Regional Research*, Vol.33, no.4, December 2009, pp.890-913.

¹⁵¹ Gregory M. Stein, “The Chinese Land Use Right – Is It Property?”, *Probate and Property*, September/October 2007, p.23; Benjamin W. James, “Expanding the Gap: How the Rural Property System Exacerbates China’s Urban-Rural Gap”, *Columbia Journal of Asian Law*, vol.20, no.2, pp.464-465.