Law, Collective Action and Culture: Condominium Governance in Comparative Perspective

Amnon Lehavi*

Abstract

Condominium law reforms are taking place at a growing pace around the world. Such reforms raise particular challenges in transitional economies, in which the need to create the legal infrastructure for multiunit, homeownership-based housing follows complex processes of urbanisation and a transition to some form of a market economy. This article focuses on one of the key challenges of such reforms, that which deals with the ability of homeowners to engage in effective and enduring self-governance of the condominium through the establishment of a homeowner association. In crafting the legal mechanisms that enable condominium governance, lawmakers have an essential normative role of determining the underlying societal values and goals that should guide this type of collective action. At the same time, for such a legal design to be effective, lawmakers must consider the actual congruence between the types of collective action envisioned by the reform and the prevailing cultural orientations, values and beliefs that practically guide everyday interactions in a certain society or parts thereof. Working through the theoretical framework of law, collective action and culture, this article offers a

---

* Atara Kaufman Professor of Real Estate, Radzyner School of Law, and Academic Director, Gazit-Globe Real Estate Institute, Interdisciplinary Center (IDC) Herzliya. Yiqing Li, Qingyu Liu, Mark Novikov and Liana Volokh provided excellent research assistance. For helpful comments and suggestions, I thank Yun-Chien Chang, Lei Chen, John Gillespie, Hang Wu Tang, Cornelius van der Merwe and participants at the 'Condominium Laws and Urban Governance in Asia' conference held at the City University of Hong Kong.

comparative study of condominium law reforms and their subsequent on-the-ground implementation in two prominent economies in transition: China and Russia. It compares these case studies with the development of condominium governance in the United States, seeking to underscore the dynamic relations between private law reforms, collective-action organisations and the prospects for incremental cultural change.

I. Private Law Reform, Collective Action and Cultural Change

This article offers a comparative analysis of self-governance of condominiums. It does so through a theoretical framework that unveils the ties between private law design, the structure of organisations for collective action and cultural orientations, values, and beliefs that practically guide interpersonal interactions in a certain society or group.

The main idea that drives this article is as follows: private law is essentially operated and implemented by private actors in a largely decentralised manner. In particular, private law fields, such as contracts, property and corporate law, focus on creating organisational and legal mechanisms that facilitate various forms of collective action.

This means that on the one hand, in designing the features of a private law theme, such as condominium governance, lawmakers have an essential normative role of determining the underlying societal values and goals that should guide this type of collective action. At the same time, for such a legal design to be effective, lawmakers must consider the actual congruence, or tension, between the types of collective action envisioned by the legal regime and the prevailing cultural orientations, values and beliefs that practically guide interactions in a certain society or parts thereof. To the extent that a private law reform wishes to promote a new type of collective action that is not initially supported by such grassroots forces, it must find ways to enable at least an incremental shift in the relevant cultural traits to facilitate the desired modes of interpersonal collaboration.

This article identifies collective-action organisations, and in particular, homeowner associations ('HOAs'), as both a key locus for the design of private law reforms and a vehicle for potential incremental shifts in the ways people interact and collaborate within such organisations. It argues that such collective-action organisations may serve as 'enclaves', in which the process of cultural change may operate somewhat differently than on a society-wide level. This feature of collective-action organisations may therefore enable lawmakers to promote the cultural adjustments required in order to facilitate the collective action, without aspiring to a full-fledged cultural transition across society.

The challenge of devising private law reforms, while considering their potential conflict with prevailing cultural orientations, is particularly acute in transitional societies. In the context of condominium law reforms, the need to create a legal and organisational infrastructure for multiunit, homeownership-based housing is embedded in a broader process of increasing urbanisation and the transition to some form of a market economy.

Working within this theoretical framework, this article focuses on condominium law reforms in two prominent economies in transition: China and Russia. It compares them with the development of the law and practice of common interest developments, and condominiums in particular, in the United States. In so doing, the article underscores, for each one of the case studies, the ties between legal reform, collective action and culture.

At the outset, a few terminological and methodological notes are in order. The term common interest development ('CID') refers in this article to various types of shared-interest residential developments, such as condominiums, planned unit developments, stock cooperatives ('co-ops') and community apartment projects.[1] Not all forms exist in all countries, and the organisational and legal structure of each type of CID somewhat diverges among different legal systems.[2] The analysis relies, however, on more generic features of CIDs, and condominiums in particular, to describe their general goals and functions. This is done while accounting for differences among legal systems in the design of CID governance entities – in particular, the HOA and its executive board.[3]

The condominium is the most prevalent form of CID across the world. It consists of an 'undivided interest in common in a portion of real property with a separate interest in [a] space called a unit.'[4] The basic legal structure is one by which the housing units are individually owned, whereas the hallways, staircases, elevators etc of the structures, alongside exterior spaces and amenities, are jointly owned by the group of unit owners.[5]

---

1 CIDs are also referred to as 'common interest communities.' See Jesse Dukeminier et al, *Property* (8th ed, Wolters Kluwer, Chicago, Illinois, 2014), pp 937-940.

2 The specific terminology employed in this article refers to California's amended Davis-Stirling Act, which went into force in 2014. See the Davis-Stirling Act, codified in West's Annotated California Civil Code ('Cal Civ Code') s 4100 et seq.

3 The HOA is usually a member-based non-profit corporation or unincorporated association: Cal Civ Code, *ibid*, s 4080. The board is an executive body elected by the HOA members: Dukeminier et al (note 1 above), p 937.

4 Cal Civ Code (note 2 above).

5 Cornelius van der Merwe, 'Introduction' in Cornelius van der Merwe (ed.), *European Condominium Law* (Cambridge University Press, Cambridge, 2015), pp 1, 5.

The legal institution of condominiums developed at different stages and a diverging pace across the world. In Western Europe, early forms of condominiums have been in existence for a few hundred years. The major push toward comprehensive legislation came, however, in the aftermath of the world wars, which caused an acute housing shortage alongside growing popular demand for home ownership. Emerging economies in Southeast Asia followed mostly Australian legislation during the 1960s and 1970s to meet growing local and foreign demand for condominium-type dense developments.[6] Condominiums were introduced in the United States only during the later 1950s and early 1960s, but have since been burgeoning rapidly, as shown in Part II(B) below. Transitional economies have seen more recently the need for the legal design of condominiums in their urban areas,[7] as demonstrated below for China (Part II(C)) and Russia (Part II(D)).

As for the term 'culture', this article resorts mostly to its conceptualisation in the social sciences, and particularly in economics. It brings together two aspects of culture: the first refers to social conventions and beliefs that sustain some equilibrium in repeated social interactions; the other reflects more primeval individual sentiments such as values, preferences and other behaviour-motivating emotions.[8] Thus, for example, Geert Hofstede describes culture as 'the collective programming of the mind that distinguishes the members of one group or category of people from another.'[9] Luigi Guiso, Paola Sapienza, and Luigi Zingales define it as 'those customary beliefs and values that ethnic, religious and social groups transmit fairly unchanged from generation to generation.'[10]

Out of the various measures of culture that have been investigated theoretically and empirically, this article focuses on three cultural dimensions that seem to be particularly relevant for the types of collective action that would apply to condominium governance.

---

6 Carol S Rabenhorst and Sonia I Ignatova, 'Condominium Housing and Mortgage Lending in Emerging Markets – Constraints and Opportunities' (2009) Urban Institute Centre on International Development and Governance Working Paper No 2009-04, pp 9-10, available at http://www.urban.org/publications/411921.html.

7 *Ibid*, p 2. See also United Nations, Economic Commission for Europe, *Guidelines on Condominium Ownership of Housing for Countries in Transition* (June 2003), p 5, available at http://www.unece.org/fileadmin/DAM/hlm/documents/Publications/condo.mgt.e.pdf.

8 Alberto Alesina and Paulo Giuliano, 'Culture and Institutions' (2013) NBER Working Paper No 19750, pp 4-6, available at http://ideas.repec.org/p/nbr/nberwo/19750.html.

9 Geert Hofstede, *Culture's Consequences: Comparing Values, Behaviors, Institutions, and Organizations Across Nations* (2nd ed, Sage Publications, Thousand Oaks CA, 2000), p 9.

10 Luigi Guiso, Paola Sapienza and Luigi Zingales, 'Does Culture Affect Economic Outcomes' (2006) 20 *Journal of Economic Perspectives* 23.

First is the dimension of *individualism versus collectivism*.[11] This spectrum refers to the degree of 'integration of individuals into primary groups.'[12] In individualistic societies, emphasis is placed on personal achievements and individual rights. Collectivist cultures focus on cohesive groups and organisations,[13] with such embeddedness requiring persons to commit to 'maintaining the status quo, propriety, and restraint of action that might disrupt group solidarity or the traditional order.'[14] Importantly, individualism is not viewed as antonymous to collective action. It means, rather, that collective action may be based on a different set of motives than is the case in a collectivist culture. Whereas the latter societies endorse emotional dependence of members on their groups, collective action among otherwise individualistic persons is more 'calculative'[15] – that is, one that recognises the contingent long-term self-serving benefits of collective action.[16]

The second cultural dimension is that of *power distance*. This refers to the 'measure of the interpersonal power or influence' between two or more persons.[17] At the societal level, the concept of power distance is tied to ideas of hierarchy versus egalitarianism. An egalitarian society generally cherishes ideas such as moral equality, social justice and responsibility. A hierarchical social order would focus on respect for the distribution of roles, obedience and deference to superiors.[18] However, hierarchy should not be equated with unwarranted tyranny. Consider, for example, the notion of guanxi in Chinese culture, which deals with the centrality of different circles of personal relationships.[19] While the notion of *gunaxi* relies on social hierarchy and distinctive social roles, it also advocates notions of mutual obligation, reciprocity, goodwill and personal affection.[20]

---

11 See Hofstede (note 9 above), p 225.
12 *Ibid*, pp 29, 209-212.
13 Alesina and Giuliano (note 8 above), pp 8-9.
14 Amir N Licht et al, 'Culture Rules: The Foundations of the Rule of Law and Other Norms of Governance' (2007) 35 *Journal of Comparative Economics* 659 at 662.
15 Hofstede (note 9 above), pp 29, 209-212
16 See eg Robert Axelrod, *The Evolution of Cooperation* (revised ed, Basic Books, New York, 2006).
17 Hofstede (note 9 above), pp 83-84.
18 Jordan I Siegel et al, 'Egalitarianism and International Investment' (2011) 102 *Journal of Financial Economics* 621 at 624.
19 See John Matheson, 'Convergence, Culture and Contract Law in China' (2006) 15 *Minnesota Journal of International Law* 329 at 370-375.
20 *Ibid*, p 374.

Third is the dimension of *social capital*. This refers to features of social organisation, such as trust, norms and networks that can improve the efficacy of society by facilitating interpersonal cooperation. Studies suggest that as with conventional capital, those who have social capital tend to accumulate more; with the result that success in small-scale institutions may enable a group to solve larger problems in more extensive settings.[21]

The primary interest of this article lies in situations in which lawmakers seek to reform private law, and the relevant features of collective action, in response to a certain exogenous change – geographical, political, social, economic, technological etc. In some cases, these changes may have long-term effects on culture.[22] Such cultural shifts may then affect, over time, the content of the legal system.[23] At times, however, the exogenous change may require lawmakers to respond more quickly. This is the case with transitional societies, such as China and Russia, which have introduced market-driven legal reforms. The respective condominium law reforms, introduced in both countries over the past few years, may serve as a particularly vivid example of the potential tension between a legal reform and long-standing cultural attributes. This article identifies the role that collective-action organisations, such as the HOA, may play in mediating between law and culture. These bodies may rely on certain existing traits, dealing with individualism/collectivism, power distance and social capital, while prompting incremental change in other traits.

---

[21] Robert D Putnam, *Bowling Alone: The Collapse and Revival of American Community* (Simon and Schuster, New York, 2000), p 19.

[22] See eg Nathan Nunn, 'Culture and the Historical Process' (2012) 27 *Economic History of Developing Regions* S108 (identifying historical events, such as the use of the plough in agriculture, slave trade or the rise of Protestantism, as leading to long-term cultural changes).

[23] For the influence of culture on the design of law, see Giuseppe Dari-Mattiacci and Carmine Guerriero, 'Law and Culture: A Theory of Comparative Variation' (2015) *Oxford Journal of Legal Studies* 1.

II. The Challenge of Condominium Governance: A Comparative Look

A. Condominium governance: measurements of efficacy

What are the kinds of collective-action challenges that neighbours typically face in residential developments and how are CIDs and condominiums in particular engineered to address them? Such challenges may be roughly divided into the (1) establishment and management of common amenities, such as inner streets or recreational spaces; and (2) control of intra-neighbourhood externalities resulting from the use of the housing units.

As for jointly-owned assets, the challenge of collective action consists of two phases. First is the efficient creation of amenities. For some of these assets, such as inner streets, which may possess the economic traits of public goods – that is, non-excludability and non-rivalry – the existence of reciprocal legal duties of contribution solves the inherent market failure that usually necessitates governmental production and financing through taxes.[24] For 'club goods' such as sports facilities, which can be usually provided by the market in ordinary residential settings, the group provision of such amenities may save on costs.[25] The second phase concerns the ongoing maintenance and improvement of these assets. The authority of the HOA and its board to establish rules of use, alongside the imposition of respective duties on unit owners, serve to guard against underinvestment and overuse.

Beyond the governance of jointly-owned assets, CIDs in some legal systems, as is the case in the United States, may also be authorised to govern several aspects of the design and use of the individual housing units. This form of private ordering comes in addition to, and not in lieu of, public regulation, such as land use controls or nuisance law.

How does one measure the success of CIDs and legal design of self-governance? One way to do so is to study the actual response of CID members to the operation of its governance bodies, either directly by surveys or polls, or indirectly by identifying the scope and essence of legal disputes or other forms of explicit discontent by members.[26]

---

[24] See Richard Cornes and Todd Sandler, *The Theory of Externalities, Public Goods, and* Club *Goods* (2nd ed, Cambridge University Press, Cambridge, 1996), pp 8-10.

[25] *Ibid*, pp 347-356. .

[26] These features are discussed briefly in the following sections for each one of the case studies.

Another technique, which looks to evaluate the aggregate efficacy of CIDs and their internal governance, is one of measuring their effect on property values, as compared with non-CID housing units. Some studies have sought to establish a positive market premium for units located in CIDs, without identifying specific value-making features.[27] In a more robust analysis of the price impact of CID governance, William Rogers argues that a two-thirds to four-fifths voting supermajority for amending the CID's covenants received a higher marginal price than a simple majority or a 90 percent supermajority rule.[28] He also finds that whereas use restrictions in CIDs have a general positive impact on property values, no such impact can be identified for architectural restrictions.[29]

Other writers have been more sceptical about the positive impacts of CIDs' internal governance systems on property values. Some have argued that the premium for CID units is dependent on the style and size of homes and is not due to the organisational structure of the CID, and that architectural restrictions actually hinder sale prices.[30] Some research goes further to argue, mostly in the context of gated CIDs, that any price premium is nothing but a zero-sum scenario or even worse, since CIDs have a negative effect on property values in nearby non-gated developments, meaning that CIDs may simply benefit from a 'snob value' by providing means of socioeconomic segregation.[31]

Moreover, while some aspects of condominium governance may be relatively feasibly compared and ranked – for example, a phenomenon of malfunctioning common amenities would be a sign of ineffective collective action across all systems – the evaluation of many other parameters depends on the factual and normative context of the specific legal system.

Therefore, in evaluating the efficacy of condominium governance in a certain society or parts thereof, one should pay attention to various normative

---

[27] See eg Amanda Agan and Alexander Tabarrok, 'What Are Private Governments Worth?' (Fall 2005) *Regulation* 14 (finding a 5-6% premium for CID units in Northern Virginia).

[28] William H Rogers, 'A Market for Institutions: Assessing the Impact of Restrictive Covenants on Housing' (2006) 82 *Land Economics* 500 ('Rogers 2006'); William H Rogers, 'The Housing Price Impacts of Covenant Restrictions and Other Subdivision Characteristics' (2010) 40 *Journal of Real Estate Finance and Economics* 403 ('Rogers 2010').

[29] Rogers 2006, *ibid*, pp 509-511; Rogers 2010, *ibid*, pp 218-220.

[30] Jeremy R Groves, 'Finding the Missing Premium: An Explanation of Home Values within Residential Community Associations' (2008) 84 *Land Economics* 188 (studying assets in Saint Louis County, Missouri, USA).

[31] Renaud Le Goix and Elena Vesselinov, 'Gated Communities and House Prices: Suburban Change in Southern California, 1980-2008' (2013) 37 *International Journal of Urban and Regional Research* 2129 at 2144-2146.

principles that may typify a certain legal system and should thus be included in its evaluation. For example, is the success of condominium governance measured primarily by maximising the market value of the individual units, and if so, does one focus only on the aggregate value of all units or also on the distribution of value among them? Is broad participation in self-governance a self-standing value envisioned by the condominium law reform and evaluated as such by homeowners? Which types of exclusion in CIDs are considered normatively wrong?

Such questions implicate not only the underlying normative premises of the law, but also the details of the legal design – such as the majority voting requirements for certain types of decisions – and the extent of potential friction between the private law reform and the relevant cultural dimensions, with potential divergence not only across countries but also among cities/regions in a certain country. All of these factors must be accounted for.

B. The United States

Prior to engaging in the case studies of China and Russia, an interesting point of comparison, despite the clear differences, is that of CID governance in the United States.

Based on recent data, 63.4 million Americans live in over 323,000 CIDs. Planned unit developments ('PUDs') and condominiums share almost equally in this burgeoning market.[32] The condominium legal design typically applies to apartment buildings, with detached housing projects usually organised as PUDs.[33] These figures are especially notable because condominium statutes were introduced only in the early 1960s and PUDs numbered less than 500 at that time.[34] In the largest US metropolitan areas, CIDs currently dominate new developments.[35] CIDs also pride themselves on having 1.65 million homeowners serving as non-paid board members.[36]

---

[32] Foundation for Community Association Research, Statistical Review 2012 for U.S. Homeowners Associations, Condominium Communities and Housing Cooperatives (2012) ('2012 Review'), available at http://www.cairf.org/foundationstatsbrochure.pdf.

[33] See Stephen E Barton and Carol J Silverman, History and Structure of the Common Interest Community', in Stephen E Barton and Carol J Silverman (eds.), *Common Interest Communities: Private Governments and the Public Interest* (University of California Press, Berkeley, 1994), pp 3-4.

[34] *Ibid*, p 10.

[35] Evan McKenzie, 'Common-Interest Communities in the Communities of Tomorrow' (2003) 14 *Housing Policy Debate* 203 at 203-204.

[36] 2012 Review (note 32 above).

According to a 2014 survey sponsored by the Community Associations Institute, 70 percent of respondents believe their CID rules 'protect and enhance property values' with four percent viewing them as harmful. The survey also shows general support for the work of elected governing boards and overall satisfaction with the use of assessed fees.[37]

At the same time, 24 percent of respondents reported at least one 'significant issue or disagreement with the association'.[38] One should also consider various reports in the popular press reproving the 'tyranny' of HOAs,[39] as well as some high-profile disputes dealing mostly with limits on uses of the housing units.[40] One such dispute, dealing with a prohibition on the display of the US flag,[41] led to federal legislation forbidding CIDs to 'restrict or prevent' the display of the American flag in the housing units.[42] Other such disputes touch on issues such as the possession of pets,[43] clotheslines[44] or smoking.[45]

---

[37] Foundation for Community Association Research, 'Verdict: Americans Grade their Associations, Board Members, and Community Managers' (2014), available at http://www.caionline.org/2014survey.

[38] *Ibid*.

[39] See eg Kaid Benfield, 'The Tyranny of Homeowners Associations', *City Lab* (The Atlantic), 19 February 2013, available at http://www.citylab.com/housing/2013/02/tyranny-homeowners-associations/4731/; Ward Lucas, *Neighbors At War! The Creepy* Case *against Your Homeowners Association* (Hogback Publishing, Denver, CO, 2012).

[40] For a review of such cases, see eg Dukeminier et al (note 1 above), pp 900-920; Robert C Ellickson et al, *Land Use Controls: Cases and Materials* (4th ed, Wolters Kluwer, New York, 2013), pp 621-639.

[41] For a report of such a dispute in Jupiter, Florida, see CNN Access, 'Veteran Fights for Front Yard Flag', *CNN.com*, 13 September 2003, available at http://www.cnn.com/2003/US/South/09/12/cnna.flag.fight/index.html. For a scholarly analysis of a similar dispute in Omaha, Nebraska, see Gregory S Alexander, 'Property's Ends: The Publicness of Private Law Values' (2014) 99 *Iowa Law Review* 1257 at 1257-1278.

[42] Freedom to Display the American Flag Act of 2005, Pub. L. 109-243, 120 Stat. 572, 4 U.S.C. s 5. Another high-profile dispute, featuring the tension between CID rules and constitutional liberties, concerns political speech. See eg *Mazdabrook Commons Homeowners Ass'n v Kahn*, 46 A. 3d 507 (N.J. 2012).

[43] California has been a prominent jurisdiction, with at least two Supreme Court decisions in the matter: *Nahrstedt v Lakeside Village Condominium Ass'n*, 878 P.2d 1275 (Cal. 1994) and *Villa De Las Palmas Homeowners Ass'n v Terifaj*, 22 Cal 4th 73 (2004).

[44] See Jon Howland, 'Clotheslines Bans Void in 19 States', *Sightline Daily*, 21 February 2012, available at http://daily.sightline.org/2012/02/21/clothesline-bans-void-in-19-states/.

[45] Vivian S Toy, 'Upper West Side Condo Votes to Ban Smoking', *New York Times*, 12 May 2011, A1.

What should be made of the overall success of CIDs in the United States, considering the points of friction that may exist between individual preferences and collective action? Do American CIDs represent a case where the market responded to pre-existing cultural orientations? What role did law-making play in creating the organisational infrastructure for the incredible growth of CIDs? Are there any cultural attributes that have shifted, at least incrementally, as a result of the legal design of CIDs, especially in considering the cultural dimensions of individualism/collectivism, power distance and social capital?

While not all issues can be addressed here, this section makes two main arguments. First, the balance between individualism and collectivism in the organisational and legal design of CIDs has relied from its inception on a clear sense of private collective ordering, distinguished from public ordering, one that had been originally created to benefit homeowners vis-à-vis outsiders while protecting intra-CID property values. CIDs were not structured to promote an ideal of cultural embeddedness or anything close to it.

Second, the normative and legal concept of collective action in CIDs relies on a foundational premise of horizontal governance, one allegedly characterised by small power distance, majority-based governance with no block voting, and accountability. At the same time, the formalisation of the collective action and the strong legal backing by courts in fact somewhat diminish the need for a strong form of grassroots social capital.

To illustrate these points, consider the ways in which markets, law, social structure and cultural dimensions have interacted in the evolution of CIDs. Early forms of CIDs emerged in spotted developments in US cities during the nineteenth century. These were based on an English model, by which high-end residences were built around a private park held in trust for the exclusive use of the unit owners. The covenants also restricted the use of private lands and specified criteria for admission, such as race or religion.[46]

The systematisation of CIDs took hold during the early twentieth century. Evan McKenzie attributes this to the work of Charles S Asher, who headed a group of Progressive Era political scientists and administrators to set up Radburn, New Jersey, as a 'private government', an entity based on private restrictive covenants. The new form of governance relied on the evolution of restrictive covenants in England and later in the United States. This enabled developers to offer homebuyers master-planned comfort, exclusivity and security through a system of covenants, which dealt not only with the common amenities but also with reciprocal rules regarding the use of private units. [47]

---

[46] Barton and Silverman (note 33 above), p 7.

[47] Evan Mckenzie, *Privatopia: Homeowner Association and the Rise of Residential Private Government* (Yale University Press, New Haven, CT, 1994), pp 29-51.

This organisational innovation received substantial tailwind from court decisions, most notably the 1938 *Neponsit* case,[48] which upheld the power of an association set up by the developer to foreclose a lien against owners who failed to pay their assessment, reasoning that such a covenant runs with the land and applies to all subsequent owners. The judicial enforcement of the governing documents and rules enacted by associations, as equitable servitudes running with the land, was also applied to limits on the use of private units.[49]

While explicit racial covenants were invalidated in the 1948 *Shelley v Kraemer* case,[50] developers of CIDs have sought to develop limits on specific types of behaviour that would nevertheless serve as an effective screening mechanism against 'undesirable' groups and thus protect property values. Homogeneity was promoted as instrumental for such goals, further entrenching the prevailing concept of restrictive covenants as intended primarily to protect CID homeowners from external potential threats to property values.[51]

This setting may explain why CIDs were initially accepted by homeowners, and how early organisational and legal tenets of CIDs seem to have corresponded to prevailing cultural orientations and values. Beyond the key focus of CIDs on promoting individual interests, with group rules aimed essentially at serving them, some scholars suggest that the acceptance of such private ordering relied on the prevalence of voluntary associations for governance in early American society,[52] as observed by Alexis de Tocqueville.[53] Tocqueville has famously commended Americans for engaging in civil associations for every aspect of their lives, while adhering to a notion of 'self-interest well understood' – one that requires self-interest to be 'honest' while making 'little sacrifices each day'.[54]

At the same time, the market expansion of a governance model which is initially designed and formalised by the developer, and is carried out mostly by an executive body (board), does not necessarily rely on a strong form of grassroots of social capital, one that would tie voluntary associations to a

---

48 *Neponsit Property Owners' Ass'n, Inc v Emigrant Industrial Savings Bank*, 15 N.E. 2d 793 (N.Y. 1938).

49 Dukeminier et al (note 1 above), p 873.

50 *Shelley v Kraemer*, 334 U.S. 1 (1948).

51 Mckenzie (note 47 above), pp 74-78.

52 See Uriel Reichman, 'Residential Private Governments: An Introductory Survey' (1976) 43 *University of Chicago Law Review* 253 at 257-258.

53 Alexis De Tocqueville, *Democracy in America* (University of Chicago Press ed, 2000), pp 489-492, 500-503.

54 *Ibid*, pp 501-502.

broader vision of public life. Indeed, CIDs do not seem to have played a role in reinstating broader notions of civic republicanism, let alone communitarianism. CIDs are premised on the instrumental role of governance to promote individual interests. Moreover, the fact that developers may offer different templates of CIDs and governance rules, allowing residents to choose the template that best fits them, further promotes the view of CID rules as embedded in a market choice. CID governance is thus seen as instrumental for promoting market-based preferences.

This fundamental view of CIDs has resonated clearly in numerous court cases. As the California Supreme Court reasoned in its *Pinnacle* decision, dealing with a San Diego condominium, the system of recorded covenants and governance 'protects the intent, expectations, and wishes of those buying into the development and the community as a whole by ensuring that promises concerning the character and operation of the development are kept'.[55] The reciprocal nature of governing documents is not viewed as furthering collectivism as a self-standing value or as defining group goals different from the aggregate promotion of private value. It further illuminates the majority-based system of governance. In the *Terifaj* case,[56] the court upheld a majority-approved amendment to a condominium's governing documents. The amendment established a no-pet restriction, applying it also to existing homeowners. The court viewed such a use limit as 'crucial to the stable, planned environment of any shared ownership arrangement'. It read the California Civil Code as settling for simple majority for such amendments, reasoning that such a rule is required to prevent a 'small number of holdouts from blocking changes regarded by the majority to be necessary to adapt to changing circumstances and thereby permit the community to retain its vitality over time'.[57]

The ways in which the organisational and legal design of CIDs was able to both respond to, but also somewhat reorient, market demands and patterns of interpersonal conduct were demonstrated during the 1960s, which featured both the introduction of the condominium as a legal construct and the rapid growth of CIDs across the country.

During that time, big corporations became increasingly involved in the real estate market, implicating not only developers but also institutional investors such as insurance companies. Middle-class consumers, enjoying better access to

---

[55] *Pinnacle Museum Tower Ass'n v Pinnacle Market Development*, 145 Cal.Rptr.3d 514, 524 (2012).
[56] *Villa De Las Palmas Homeowners Ass'n v Terifaj*, 90 P.3d 1223 (Cal. 2004).
[57] *Ibid*, pp 1228-1229.

capital, developed new tastes, including for amenities such as swimming pools or golf courses that could be provided at relatively feasible prices in this increasingly competitive market.[58] As a result, the construction of multiunit buildings organised as CIDs became a desired option. It served the interests of both planners and developers in increased density in view of the decrease in open spaces and the high cost of big-lot land development.[59] It also allowed a growing number of prospective homeowners to enjoy various amenities that did not exist in standard suburban neighbourhoods as well as a sense of organisational stability.[60]

It is against this background that the legal introduction of condominiums, and its embracement as a key paradigm of collective action in housing, moved to the forefront. In 1961, the National Housing Act was amended to authorise the Federal Housing Administration ('FHA') to insure mortgages on condominiums authorised by state law. By 1969, all 50 states had enacted such legislation based on a 1962 FHA model statute, with consequent amendments addressing the growing complexity of condominiums.

Although relatively few condominium projects were developed during the 1960s, as of the 1970s, condominiums began to spread across the country. While part of the timing of the growth has to do with increased tax subsidies to owner-occupied apartments, it can also be attributed to the time necessary for such an institutional innovation to take root.[61] Since then, however, the number of condominiums has been constantly on the rise.

While some advocates of CIDs have labelled them 'revolutionary in changing significantly the way humans live together',[62] the organisational and legal innovation of CIDs should be viewed as requiring at most an incremental cultural adjustment that is relevant to such types of 'calculative' collective action. The organisational and legal reliance of CIDs on forms of contract-based private ordering had a substantial pedigree in the United States. Moreover, the explicit tying of the CID system of governance to the protection of members'

---

58 Reichman (note 52 above), pp 258-260.

59 McKenzie (note 47 above), pp 85-93.

60 See Donald R. Stabile, *Community Associations: The Emergence and Acceptance of a Quiet Innovation in Housing* (Greenwood Press, Westport, CT, 2000), pp 89-97, 105.

61 See Henry Hansmann, 'Condominium and Cooperative Housing: Transactional Efficiency, Tax Subsidies, and Tenure Choice' (1991) 20 *Journal of Legal Studies* 25 at 28-29, 62-63.

62 For a brief analysis of whether CIDs constitute a revolution, see Stabile (note 60 above), pp 221-223.

property values, and the institutional support provided by governmental policies, such as mortgage insurance or tax subsidies, have further allowed homeowners to relatively easily accommodate to a mode of collective action based on restrictive covenants, delegation of powers and potential subjection of some individual liberties to majority governance. The American legal system, through both legislation and case law, played a key role not only in generally enforcing governing documents and CID decision-making, but also in stressing the voluntary basis of the CID governance system. It further advocates the equal legal status of each member and the necessity for broad discretion for the governing bodies by adopting a 'reasonableness rule', 'business judgment rule' etc.[63] This legal infrastructure allowed CID organisations to function generally well based on a moderate level of social capital, an idea – real or perceived – of small power distance, and a pronounced focus on promoting private economic interests.

C. China

To understand the condominium law reform in China, and its implementation on-the-ground so far, it is necessary to place this legal reform in the broader context of economic and legal reforms and other processes of change, which have been taking place in China over the past few decades – an era starting with the reforms of Deng Xiaoping.[64]

Since 1988, the Chinese government has gradually embraced the concept of private property, entrenching it in distinctively-Chinese yet significant ways in the state's constitution, legislation and regulation. This process of change culminated in the legislation of the Property Law of the People's Republic of China in 2007 ('2007 Property Law').[65]

---

[63] See Amnon Lehavi, 'Concepts of Power: Majority Control and Accountability in Private Legal Organizations' (2014) 8 *Virginia Law and Business Review* 1 at 38-42.

[64] See Ezra Vogel, *Deng Xiaoping and the Transformation of China* (Belknap Press, Cambridge, 2011).

[65] 'Zhonghua Renmin Gongheguo Wuquanfa [Property Rights Law of the People's Republic of China], promulgated by the National People's Congress, 16 March 2007 (effective 1 October 2007)' (2007) S*tanding Commission, National People's Congress Gazette* 291 ('2007 Property Law'). An unofficial English version is available at http://www.lehmanlaw.com/resource-centre/laws-and-regulations/general/property-rightslaw-of-the-peoples-republic-of-china.html. For an analysis of the re-evolution of private property, see Mark D Kielsgard and Lei Chen, 'The Emergence of Private Property Law in China and its Impact on Human Rights' (2013) 96 *Asian-Pacific Law and Policy Journal* 94.

In the context of urban land, China has introduced, as of 1994, a comprehensive national housing reform policy.[66] It moved to establish a planned market, one that retains the formal ownership of the land with the state, but creates and legally protects long-term property rights of individuals. Urban lands and real estate developments have become a market commodity, in which private interests and rights play a substantial role.[67] The privatisation of the housing market was intended not only to shift much of the new development to the private sector, but also to gradually relieve the government of the responsibility to maintain residential buildings that were originally built by the state.[68] This step marked, therefore, a clear departure from the previous *danwei* system, in which housing was inherently tied to state employment and its control of all aspects of life.[69]

To understand the magnitude of this change, one should also consider the unveiling of China's first-ever official plan for urbanisation in 2014. The plan views urbanisation as a necessary step for modernisation, one that would shift the focus of the economy from reliance on export to an expansion of domestic demand for products and services as China's future growth engine.[70] The plan sets out an incredibly ambitious goal of moving 100 million villagers to cities, while also granting formal urban status (*hukou*) to another 100 million rural migrant workers already living in cities but hitherto denied access to government services.[71] The mass migration and formal absorption of 200 million villagers into China's urban areas would have to be facilitated, in turn, by the relocation of these new urbanites into condominiums. Condominiums already represent the main type of tenure in China's urban areas.[72] With condominium governance being viewed as a matter of private collective action, one comes to

---

66 For a detailed analysis of the reform, see James Lee, 'From Welfare Housing to Home Ownership: The Dilemma of China's Housing Reform' (2000) 15 *Housing Studies* 61.

67 Lei Chen and Mark D Kielsgard, 'Evolving Property Rights in China: Patterns and Dynamics of Condominium Governance' (2014) 2(1) *Chinese Journal of Comparative Law* 21 at 26.

68 *Ibid*, pp 24-25.

69 See David Bray, *Social Space and Governance in Urban China: The Danwei System from Origins to Urban Reform* (Stanford University Press, Stanford, 2005).

70 Xinhua, 'China Unveils Landmark Urbanization Plan', *People's Daily Online*, 17 March 2014.

71 Ian Johnson, 'China Releases Plan to Incorporate Farmers into Cities', *New York Times*, 18 March 2014.

72 Lei Chen, *The Making of Chinese Condominium Law* (Intersentia, Antwerp, 2010), pp 4-5.

realise the social and cultural challenge. This transition implicates much more than the move from rural life to highly-dense cities. It also embeds a switch from all-inclusive state support to condominium self-governance.

Prior to studying the practical modes of decentralised collective action following these reforms, and the possible incremental cultural changes that these modes may entrench, it is essential to briefly consider some of the formal details of the condominium law reform.

The main piece of national legislation dealing with condominium governance is the 2007 Property Law. Devoting only 14 sections to condominiums, the law sets out general principles by which all registered purchasers of units automatically become members of the management body, which functions through the general meeting and the HOA executive committee. The HOA decision-making is based on majority vote rule.[73]

At the same time, as Mark Kielsgard and Lei Chen show, this national legislation is lacking and inadequate in many aspects.[74] National rules, which also include regulations from 2003, allow owners to replace a management company appointed by the developer. But there is no uniform obligation on developers to organise the first meeting of homeowners. This grants developers leverage in trying to prevent the establishment of the HOA, or to otherwise tie future associations to affiliated management contractors.[75]

Local regulations on condominium governance, which should fill the gaps left by national legislation, also show mixed results in providing an adequate legal basis for effective self-governance by homeowners. At the outset, it should be noted that since local governments were the predecessor landlords of all residential property prior to the reforms, many of them were reluctant to give up control over powers they had. Thus, even after privatisation of property, municipalities sought to maintain control over common amenities in the condominiums and to charge management fees. When private owners eventually gained control over these elements, local governments continued in trying to retain control over the service personnel of management companies. Moreover, the interests of local governments may be aligned with those of developers against the interests of homeowners that seek self-governance.[76]

---

[73] 2007 Property Law (note 65 above), ss 70-83.
[74] Kielsgard and Chen (note 65 above), pp 108-110, 114.
[75] *Ibid*, pp 115-118.
[76] Benjamin L Read, 'Property Rights and Homeowner Activism in New Neighborhoods', in Li Zhang and Aihwa Ong (eds.), *Privatizing China: Socialism From Afar* (Cornell University Press, Ithaca, 2008) pp 41, 45.

That said, many cities, including key ones such as Beijing, Shanghai and Shenzhen, have made significant progress in providing a legal platform for the operation of HOAs. Thus, for example, Beijing now requires developers to convene the first meeting of purchasers upon the sale of 50 percent of the units, even prior to their occupancy. The local law further allows homeowners to bypass the developer and notify the housing authority of their wish to set up an HOA with only five percent of owners' approval.[77]

In addition to HOA formation rules, local regulations have also made progress in enshrining the voting powers of private owners. In cities such as Beijing or Shanghai, owners currently have a vote on all resolutions, including election of the executive council, appointment of a management company or change to use of common amenities. In some cases, such as those dealing with organic changes to the development, these cities require a 66.6 percent double majority of both units and square footage. While such supermajority has the benefit of providing stability, it may still allow for an effective veto power for developers, who retain a substantial block of commercial or residential space. This is especially so because the majorities required in such votes are not of a quorum of a general meeting, but majorities of all units and square footage in the condominium.[78] In this respect too, the legal reform does develop over time, but it still suffers from deficits that may affect, in turn, the pace of the switch to self-governance.

It is now time to consider in more detail the idea of self-governance as an essential feature of the successful operation of condominiums. Some scholars directly tie the theme of governance by homeowners to broader challenges of democracy and human rights in China by framing it under the 'right to democratic governance'.[79] Others offer a more nuanced approach to the merits of self-governance within the contours of private law. They focus on the ways in which private property can create spaces for collaboration among asset owners 'in contrast to state-organized hierarchies that expect obedience'.[80] Both approaches recognise, however, that the initial challenge for homeowners within a particular condominium to organise, so as to promote their interests, is one of confronting formal arguments and cultural practices relying on 'social harmony' – whether voiced by public authorities or by private entities such as developers or management companies.[81]

---

77 Kielsgard and Chen (note 65 above), pp 121-23.
78 *Ibid*, pp 118-126.
79 *Ibid*, pp 105-110.
80 Read (note 76 above), p 42.
81 Chen and Kielsgard (note 67 above), p 16.

This depiction of the challenge of self-governance in Chinese condominiums may illustrate the incremental cultural shift that follows a series of legal reforms, with cultural dimensions of individualism, power distance and social capital gradually influenced by both the formal and educative-symbolic power of reforms. Benjamin Read shows that the formal introduction of private housing, especially in newly-built neighbourhoods, generated among homeowners a compelling interest to spur group action. These forms of collective action rely often on the agency of individual activists and their ability to motivate others to action. Not all the case studies surveyed by Read ended up in success, with frictions among homeowners often hampering effective organisation and dependence on individual leaders making the collective action particularly sensitive. At the same time, in many cases, residents were able to force the setting up of HOAs and replace managerial companies affiliated with the developer, with strategies of protest utilised to encourage broad participation, 'big meetings', and effective communication.[82] These tactics also proved effective in gaining greater support for HOAs among courts.[83]

A recent study by Feng Wang, Haitao Yin and Zhiren Zhou offers a detailed analysis of actual patterns of bottom-up governance in HOAs in Beijing.[84] The two HOA governance bodies established by central government regulations in 2003 were the General Membership – comprised of all homeowners – and the elected HOA Committee. However, the regulations' ambiguous language, as well as their high quorum and majority rule requirements, wakened these bodies' capacity to act.[85] As a result, numerous HOAs in Beijing decided to create two additional types of bottom-up structures to mobilise and institutionalise residents' participation and input: (1) a building/flat captain system, nominated by the HOA Committee or recommended by residents, serving as a conduit of information between residents and the Committee; and (2) a representative assembly, which designates one or more buildings as a 'district' with its own representatives, forming a policy-making body for the HOA that is more effective than the General Membership in working together with the executive HOA Committee. This bottom-up governance has worked to grant continuous legitimacy to the HOA Committee while providing additional human resources

---

82 Read (note 76 above), pp 53-56.

83 Kielsgard and Chen (note 65 above), pp 111-112.

84 Feng Wang, Haitao Yin and Zhiren Zhou, 'The Adoption of Bottom-Up Governance in China's Homeowner Associations' (2012) 8 *Management Organization Review* 559 at 561-563.

85 *Ibid*, pp 562-563.

and formalising participation. Local leadership, accountability and social capital have thus proven essential for success.[86]

Specifically, the stage of securing the ability of homeowners to exercise self-governance by setting up an HOA has often provided a 'spark' for collective action. It was motivated by a growing sense among homeowners that their material individual interests were ill-served by the lack of self-governance. Owners rejected attempts made by coalitions of developers, affiliated managerial companies and local governments, who sought to maintain control and enjoy rents in the development by allegedly relying on the need to maintain 'social harmony'. In so doing, homeowners developed social capital through mechanisms of protest, communication, and participatory decision-making.[87]

This available data on China, while still in the making, offers three key lessons for the condominium law reform and its effect on cultural attributes impacting collective action.

First, the types of homeowner-based collective action, portrayed above, would not have been possible without the legal reform, promoted by the central government, which formally introduced privatisation in the condominium and the general structure of HOAs. It seems safe to say that privatisation of property and the introduction of condominiums as the legal mechanism for governing multiunit housing, have worked to create an explicit sense of individualism among homeowners in China. The growing activism of homeowners in insisting on the actual establishment of the HOA and the rejection of arguments made by developers and management companies about the preservation of 'social harmony' as a reason for inhibiting self-governance, attest to the ways in which individuals understand the role of the HOA as legitimately serving their self-interest.

Similarly, ideas of hierarchy or power distance seem to take a shift within the organisational context of the HOA. Respect for leadership continues to play a role among residents. But such respect no longer relies on mere obedience to social stratification. It is based, rather, on appreciation by residents to the ability of certain individuals within the group to move forward the collective action.

---

[86] *Ibid*, pp 563-564. See also Feng Wang, 'Determinants of the Effectiveness of Chinese Homeowner Associations in Solving Neighborhood Issues' (2014) 50 *Urban Affairs Review* 311 at 331-333.

[87] See Kevin Lo, 'Approaching Neighborhood Democracy from a Longitudinal Perspective: An Eighteen-Year Case Study of a Homeowner Association in Beijing' (2013) 2013 *Urban Studies Research* 1 at 3-4.

Accordingly, the grassroots appointment of 'captains' and a 'representative assembly' points to the recognition among residents of the essentiality of local leadership within the organisation to promote the group's interest. This also attests to the potential gaps that may exist between the formal organisational schemes envisioned by the legal reform and the effectiveness of complementary forms of leadership and authority. The gradual emergence of social capital among residents, including neighbourhood-level trust, even if only for the purpose of establishing the HOA, represents another significant form of a cultural shift. Such a process is particularly remarkable in a city such as Beijing, which may have as many as 1,000 units per HOA.[88]

Second, the specific details of the reform matter and may call for a country/region design that does not simply borrow from other countries. As mentioned, bylaws in Beijing and Shanghai use double majorities, requiring approval of regular decisions by both a majority of the units and of the square footage of the units, with a 66.6 percent double majority required for organic changes to the condominium. Such a legal design of the collective action may be definitely seen as advocating a growing role for the individual and an entrenchment of the idea of calculated collective action with set limits on minority disenfranchisement instead of mere reliance on straightforward collectivism. The particular point chosen along the individual/collective spectrum in this respect may represent current or emerging cultural patterns in a certain locality or region. At the same time, the practical effect of the choice of the specific legal rule, such as the threshold set for majority-based decisions that change the condominium's rules and regulation, may go beyond the normative re-delineation of the role of the individual within such an organisation. It must also be sensitive to other factors affecting the group's interest. As said, a supermajority requirement may be abused by developers, who strategically maintain a stake in the project's housing units to maintain some control over the HOA.[89]

Third, both the legal design and the actual collective action practices face a particular challenge in the transition from the initial stage of collaborating to set up the HOA to the condominium's ongoing management. The evidence here has been mixed. While some HOAs function well over time in serving the material and self-governance interests of homeowners,[90] others are troubled by

---

88 Wang, Yin, and Zhou (note 84 above), p 574.

89 Kielsgard and Chen (note 65 above), pp 123-125.

90 See eg Lo (note 87 above), pp 6-8 (recording high rates of participation in subsequent HOA elections in the Dragon Villas CID project in Beijing, while also pointing to some frictions among homeowners).

internal strife and decline in collective action.[91] It may still take time for HOA self-governance to firmly take root in Chinese culture. This insight should not come as a surprise – an incremental cultural change is just that. It provides an initial basis for collective action, but its entrenchment may take much time.

D. Russia

Moving to the case of Russia, the series of legal reforms leading to the privatisation of housing and establishment of condominiums and HOAs as blueprints for collective action features some similarities, but also key differences, as compared with the case of China. This bears important implications for the prospects of bottom-up reception and cultural shifts that would facilitate the types of collective action envisioned by the legal reform.

As with China, it is essential to study the condominium law reform in Russia in the broader context of processes of change that have been taking place since the fall of the Soviet Union. These developments underscore the ways in which an exogenous change provokes a normative reconsideration of private law values and attest to the challenges of a legal reform in crystallising such a change into a new blueprint for housing governance.

An important caveat is due at the outset. The current Ukraine crisis, subsequent sanctions imposed on Russia by the West, devaluation of the Rouble and the sharp drop in oil prices, may bring about yet another shift in the trajectory of Russia's system of law.[92] To the extent that a key underlying premise of the overall reform in Russia's private law – that is, the ability to attract foreign investment if the legal environment is more hospitable – is no longer valid and becomes more broadly entangled with a change in this country's political-economic strategy, we may expect this change to be manifested in the trajectory of Russia's private law. This, however, would not necessarily alter its condominium law.

After the fall of the Soviet bloc in the late 1980s, the first step taken by the Russian Federation in doing away with Communist concepts and introducing a market economy was to enact special statutes on property and entrepreneurial

---

[91] Read (note 76 above), pp 49-50 (reporting instances that have lead HOAs to a stalemate).

[92] For the grave implications of the Ukraine crisis and subsequent economic and geopolitical developments on Russia's economy, see eg Peter Baker and James Kanter, 'Raising Stakes on Russia, U.S. Adds Sanctions', *New York Times*, 17 July 2014; 'Tipping the Scales', *The Economist*, 3 May 2014 (reporting that the capital flight in the first three months of 2014 alone was thought to exceed $60 billion).

activity.[93] The initial systematic reformulation of civil legislation was undertaken by the 1991 Fundamentals of Civil Legislation of the USSR and Union Republics.[94] Between 1994 and 2006, a new Civil Code was adopted, aimed at full compatibility with market economy principles.[95]

In 2009, however, then-President Dmitry Medvedev declared that '[l]ife does not stand still; Russia has changed, and the property relations the Civil Code regulates have changed too'.[96] He appointed the Council for Codification and Enhancement of Civil Legislation to 'carry out a thorough analysis of our legislation' and offer amendments to the Code.[97] After a high-profile process, the draft law containing about 500 amendments passed its first reading in the state Duma in April 2012; but it was decided later that year to split the amendment process into several phases.[98] Between November 2012 and May 2014, the legislature and the president formally approved into law a series of amendments to the Civil Code, with more amendments designed to be accepted later.[99]

---

93 See William Burnham et al, *Law and the Legal System of the Russian Federation* (5th ed, Juris Publishing, Yonkers, NY, 2012), p 313.

94 No 2211-1, Vedomosti SSSR 1991, No 26, item 733 (31 May 1991), cited in *ibid*, p 313, note 2.

95 For a full English translation of the 1994-2006 Civil Code, see William E Butler (trans. and ed.), *Civil Code of the Russian Federation* (Oxford University Press, Oxford, 2010).

96 States News Service, 'Opening Remarks at Meeting of Council for Codification and Enhancement of Civil Legislation', 7 October 2009, available at http://www.highbeam.com/doc/1G1-216095351.html.

97 *Ibid*.

98 For English-language reports, see eg Natalya Morozova, 'Ongoing Battle to Modernise Russian Civil Law', *Financier Worldwide*, July 2013, available at http://www.financierworldwide.com/ongoing-battle-to-modernise-civil-law/; PricewaterhouseCoopers ('PwC'), 'Civil Code: Reload' (January 2013) 72(1) *PricewaterhouseCoopers Legal Newsletter Russia*, available at https://www.pwc.ru/en/legal-services/news/assets/civil-code-eng.pdf; PwC, 'Civil Code Reform: Step Two' (May 2013) 78(7) *PricewaterhouseCoopers Legal Newsletter Russia*, available at https://www.pwc.ru/en/legal-services/news/assets/civil-code(eng).pdf.

99 See, in chronological order: Federal Law No 302-FZ (30 December 2012); Federal Law No 8-FZ (11 February 2013); Federal Law No 100-FZ (7 May 2013); Federal Law No 142-FZ (2 July 2013); Federal Law No 222-FZ (23 July 2013); Federal Law No 260-FZ (30 September 2013); Federal Law No 35-FZ (2 March 2014); Federal Law No 99-FZ (5 May 2014) (in Russian).

The major driving force behind this massive legal reform has been Russia's desire to improve the legal climate for domestic and international investment.[100] The reform took shape while Russia was awaiting its admission to the World Trade Organization ('WTO'), a process completed in August 2012 after 19 years of negotiations.[101]

Moving specifically to urban housing, and its place in the overall wave of reforms, the privatisation of housing started shortly after the fall of the Soviet bloc with the 1991 Law on Housing Privatization grating Russians a one-time right to free privatisation through a voucher system. This right practically allowed most residents to become owners of the same apartments they had lived in as tenants during the Soviet period. As a result, most existing housing stock in Russia became privately owned within a short period of time.[102]

While the 1991 law also stated that homeowners had a joint financial responsibility for managing common areas, it did not explicitly grant owners collective ownership in them. This led to frequent frictions with local governments that sought to maintain control over the management process. In 1996, the principle of homeowners' collective ownership in the common areas was established by law, but it was not until the 2005 Housing Code (*Zhilishchnyi kodeks*) that this aspect of condominium law was firmly established.[103]

The Housing Code grants homeowners three options for collective management: (1) direct administration by homeowners without forming an association, with the provision of ongoing maintenance done through service contracts; (2) full self-administration through a homeowner association (*tovarishchestvo sobstvennikov zhil'ia – TSZ* (or HOA, to use the English acronym)); (3) appointment of a professional management company, without establishing an HOA. While figures diverge among Russian cities, the HOA has become a significant option. In St Petersburg, HOAs constituted 25 percent of the housing stock as early as 2006.[104] According to data published in 2014

---

[100] See Kambiz Behi and and Edsel Tupaz, 'Admitting Russia to the WTO Will Create Stronger Economic Ties', *Jurist-Sidebar*, 3 July 2012, available at http://jurist.org/sidebar/2012/07/kambiz-behi-edsel-tupaz-russia-civil.php.

[101] Larry Elliott, 'Russia's Entry to WTO Ends 19 Years of Negotiation', *The Guardian*, 22 August 2012.

[102] Rosa Vihavainen, *Homeowners' Associations in Russia After the 2005 Housing Reform* (Aleksanteri Institute, Helsinki, 2009), pp 69-74 ('Vihavainen, Homeowners').

[103] *Ibid*, pp 15, 89-90. For the official version of the Housing Code, including recent amendments passed in July 2014, see the Russian Ministry of Construction's website at http://www.rg.ru/sujet/795/ (in Russian).

[104] Vihavainen, Homeowners (note 102 above), pp 86-87, 98-99.

by the Russian Ministry of Construction, HOAs have been established in 9.6 percent of the nearly two and a half million condominiums that currently exist throughout Russia.[105]

The Russian government's view of the HOA is one of an apolitical association, which is not tied, at least directly, to social protest movements or other forms of political expression.[106] While based on decentralised private collective action, HOAs are seen as non-profit service providers, linking state reforms with market economy. This view has proven significant in the face of growing government restrictions on political and human rights organisations, especially those receiving foreign funding.[107] While the latter measure should definitely not be applauded, it does point to the practical differentiation that may exist between the public sphere and the realm of private law collective action.

This in mind, the Russian case features some key differences from that of China, ones which also tend to challenge the prospects of cultural transition toward collective action.

First, generally speaking, privatisation reforms in Russia have been notably more abrupt, laden at first with severe problems of corruption and the emergence of a small 'kleptocracy' looting former state assets,[108] and then with backlash measures taken during Vladimir Putin's era to reinstate state control over economic development.[109] One of the effects of this turn of events has been the lack of a consistent and stable growth of a middle class in Russia,[110] which is essential for a successful housing reform and a switch to decentralised 'calculative' collective action motivated by individual interests. Thus, while the housing reform was designated at encouraging active consumerism in the

---

[105] 38.24% of condominiums opted for professional management, 40% for service contracts, with 12.16% not yet choosing their mode of governance: see Ministry of Construction, 'Key Directions for Improving the Housing Sector', March 2014, available at http://www.duma.tomsk.ru/files2/26639_effect0414.pdf (in Russian).

[106] Vihavainen, Homeowners (note 102 above), pp 22-23.

[107] *Ibid*, pp 20-23.

[108] See Bernard Black et al, 'Russian Privatization and Corporate Governance: What Went Wrong?' (2000) 52 *Stanford Law Review* 1731 at 1746-1747.

[109] See eg David Lane, 'Russia's Asymmetric Capitalism in Comparative Perspective', in Stephen White (ed.), *Media, Culture, and Society in Putin's Russia* (Palgrave, New York, 2008), pp 199-201.

[110] Vihavainen, Homeowners (note 102 above), pp 84-85; for a report about the state of Russia's middle class, see Alexey Eremenko, 'Russia's Growing Middle Class in for a Scare', *The Moscow Times*, 21 May 2014.

housing market and in the operation of HOAs, it did not have a stable basis to rely on. Obviously, the current financial crisis in Russia might only exacerbate this problem.

Second, in considering the change in private incentives as a result of the reform, and the way in which this may tilt individuals toward developing modes of collective action, it should be noted that during the Soviet era security of tenure was quite high. Rents were low and employment usually guaranteed a secure dwelling for life with eviction being very rare, so that tenants practically viewed apartments as if they were their own.[111] However, as a result of the post-Soviet free privatisation, a class of 'poor homeowners' emerged, many of them pensioners, with no substantial resources besides the apartment.

This has proven to be a major challenge for the ability to organise and maintain a well-functioning condominium, especially in Soviet-era buildings that often require major repairs and other capital expenditures, much due to the fact that during the Soviet era the common areas and amenities have been neglected, treated as 'no man's land'. As a class, such homeowners do not have a major economic incentive, or means, for collective action.[112] Opinion polls held in the late 1990s have generally shown more opposition to reforms among lower-income Russians, including those who became homeowners, with such residents expressing particular concern over future increases in utility tariffs.[113]

Third, and related, in many cities the Russian housing market is dominated by a pre-reform housing stock, with dramatic differences resulting between old and new buildings in regard to internal governance capacity and to both financial capital and social capital. Generally speaking, in new condominiums built in the 2000s, homeowners purchase their apartments in the market and have a similar level of financial resources, with such socioeconomic homogeneity also facilitating social capital despite the often high number of housing units in such condominiums. Moreover, HOAs are already established by the developers during the construction phase, such that homeowners do not have to invest time and effort in setting up the institutional framework. Some of these condominiums are gated, increasing, at least symbolically, the personal stakes in the common assets.[114]

---

[111] Vihavainen, Homeowners (note 102 above), pp 52, 67.

[112] *Ibid*, pp 11-15.

[113] ZIRCON Research Group, Sociological Department, 'Reform in Housing and Communal Services as Estimated by Russians', undated, available at http://www.zircon.ru/upload/iblock/507/Reformy_zhilishhno-kommunalnogo_hozjajstva_v_ocenkah_rossijan.pdf (in Russian).

[114] Vihavainen, Homeowners (note 102 above), pp 127-132, 173-174.

The HOA challenge is much more significant in Soviet-era buildings, typified by a higher degree of heterogeneity, featuring free-privatisation homeowners, purchasers of apartment in the resale market (who may be attracted to such buildings because of location or prestige as is the case with the historic centre of St Petersburg), and tenants in pre-reform stocks of communal apartments who are not formally part of the HOA. These condominiums may be particularly plagued by problems of suspicion by residents for the establishment of an HOA, pressures from external bodies such as government agencies who may wish to take over common areas, free riding in contributing to the upkeep of common amenities, and a low rate of participation in decision-making.[115]

Moreover, residents in Soviet-era buildings face deteriorating physical conditions in many such buildings. According to recent data, about half of all Soviet-era residential buildings in Russia are in need of a major overhaul, at an overall estimated cost of 3.6 trillion Roubles. The federal government, working together with regional and local governments, has established a fund to assist in financing such renovation projects, which have been taking place since 2008. But the overwhelming majority of the work has yet to be carried out.[116] Further, a 2014 survey held among condominium homeowners shows that 41 percent of them believe that the government should bear the costs of capital repair projects, with only 12 percent viewing it as the direct responsibility of homeowners.[117]

That said, empirical studies point to some success in the operation of HOAs – one that may attest to an incremental, even if haphazard and unstable, cultural shift among many homeowners along the dimensions of individualism, power distance and social capital.

Somewhat like the Chinese case, incentives for establishing an HOA were often driven by resistance to external threats, such as governmental agencies and private parties trying to take over common areas or to use them de facto. The land surrounding the structure has been a particular point of contestation, with the formal appropriation of the land by an established HOA allowing it to fence in the land and set up a parking lot, so that parking spots would be auctioned or leased to the condominium's tenants.[118] In this respect, the formal reform

---

[115] *Ibid*, pp 127-129, 222-235.

[116] Ministry of Construction (note 105 above), p 9.

[117] Housing and Communal Reform Fund, Report dated 29 July 2014, available at http://fondgkh.ru/data/2014/07/29/1234445483/ВЦИОМ.pdf (in Russian).

[118] Rosa Vihavainen, 'Common and Dividing Things in Homeowners' Associations', in Oleg Kharkhordin and Risto Alapuro (eds.), *Political Theory and Community Building in Post-Soviet Russia* 139 at 140-142 (Routledge, New York, 2011) ('Vihavainen, Common').

definitely made homeowners better aware of their individual rights and the stakes in switching from a 'no-man's land' dynamics to a 'club good' setting. The value of parking, and the need to take action to secure it, provided a spark for collective action.

These initiatives are being initially pushed by a relatively small number of individuals, who are able to motivate others to join, or at least to gain legitimacy for their actions. Probably not surprisingly, these patterns of practical leadership also typify the ongoing governance of the HOA. Whereas under the Housing Code, the organisation of an HOA is made up of a general meeting, executive board, and an audit committee (members of which are not members of the board and are elected by the meeting),[119] the formal quorum requirements in the Code versus the reality of low participation rates lead to an ongoing reliance on the leadership of the board and the chairperson in particular.[120]

As Rosa Vihavainen shows, chairpersons often tend to have a dominant personality and to gain respect from other neighbours. The result is not one of tyranny, however. Many chairpersons view participatory principles and provision of adequate information to all neighbours as a matter of honour, which is also essential for enjoying ongoing legitimacy. Formal decisions are often made by ballot voting, a process allowed by the Hosing Code, and even when decisions do not follow the formal procedures, pertinent information would be available to homeowners by various modes of communication.[121]

In a way, such dynamics of HOA governance may attest to an interesting shift that the cultural dimension of power distance may take in the context of Russian HOAs. While Soviet times were all about hierarchy and authority, the current actual form of collective action that unfolds in condominiums, against the background of the legal reform, seem to rely to some extent on respect for leadership. At the same time, the legitimacy for such power is conditional on some practical form of accountability to HOA members. This is, of course, not to say that accountability is always the case for HOA governance, with larger-scale associations featuring, at times, lack of openness in decision-making.[122]

---

[119] Vihavainen, Homeowners (note 102 above), pp 89-92.

[120] Fund 'Institute of Urban Economics' (*Fond Institut Economicii Gorada*), 'Analysis of the Practices of Homeowner Associations who Manage Condominiums', 2011, available at http://www.ombudsman.mos.ru (in Russian) (surveying chairpersons of HOAs, who point to low-level participation by homeowners).

[121] Vihavainen, Common (note 118 above), pp 145-148.

[122] *Ibid*, pp 146-47.

In a recent study of Russian HOAs, Ekatarina Borisova, Leonid Polishchuk and Anatoly Peresetsky identify what they term as 'technical civil competence' – being a particular form of social capital that allows tenants to exercise effective control over their governing bodies – as a key variable for the successful operation of HOAs.[123] Based on data survey, technical civil competence is measured by HOA members' self-perception of their involvement in the decision-making process and the ability to have one's voice heard in the process, with a high level of this type of social capital positively affecting the performance of HOAs.[124]

The study further shows that the involvement of a professional management company would tend to have a *negative* effect on technical civil competence, meaning that self-governed HOAs tend to fare better. Members do not evaluate the accountability of governance based on the formal frequency of general meetings and attendance thereof, but focus, rather, on the overall quality of governance practices.[125] Accordingly, while the overall level of technical civil competence across studied HOAs leaves much to be desired, it points to the relevance of such incremental shifts in modes of collective action.

Further observations also point to the importance of bottom-up governance practices in the shadow of formal legal rules, with such practices often aimed at making up for lax statutory or judicial enforcement mechanisms. Such is the case with measures taken by HOAs against the pervasive phenomena of free riding, that is, non-payment of HOA fees.

Once again, the leadership of the board's chairperson may prove to be instrumental in persuading members, while often threatening legal action, to cover their debts at least partially. In one case in St Petersburg, the board explicitly exempted poor pensioners from paying HOA fees, grounding this in retrospective appreciation for their sacrifice during the siege of Leningrad in the Second World War. This decision was aimed at both a practical solution and a symbolic building of trust among the condominium's tenants.[126] Some HOAs also use other measures that can aid both practically and symbolically in the gradual construction of communication, trust and other aspects of social capital,

---

[123] Ekaterina Borisova, Leonid Polishchuk, and Anatoly Peresetsky, 'Collective Management of Residential Housing in Russia: The Importance of Being Social', Working Paper, 2013, pp 29-37, available at http://ssrn.com/absract=2295974.

[124] *Ibid*, pp 17-18.

[125] *Ibid*, pp 22-29.

[126] Vihavainen, Common (note 118 above), pp 151-153.

such as a website, TV channel or even the designing and posting of a flag for the HOA.[127]

Still, the challenges of Russian HOAs are substantial and the condominiums' legal reform may not function effectively across all cities and neighbourhoods. Accordingly, recent years have seen a growing pressure by citizens on local governments to provide rental housing projects that would relieve them of the duty to maintain their buildings.[128] For many across Russia, the top-down design of private ownership and independent condominium governance as ideal types for housing and collective action may simply prove too demanding. Time will tell how the process of HOA self-governance unfolds.

III. Conclusion

This article offers a new theoretical and analytical framework for understanding the challenges faced by homeowners in condominiums and other types of CIDs, by unveiling the intricate relations between private law, organisational structure, and cultural change.

Condominium law reforms cannot be based on boilerplate legislation or simply on borrowing from existing models in other legal systems. Any such reform must account for the deep normative rationales that lie at the basis of private law in a certain society. It should also address the impact of pre-existing cultural values and orientations that practically guide persons in their interactions in a certain society or parts thereof.

In case of incongruence between the reform's normative agenda and pre-existing cultural dimensions within the relevant society, the legal and institutional design of the reform must find ways to facilitate an incremental cultural shift, relying mostly on the role of collective-action organisations and the HOA in particular.

Current evidence from China and Russia attest to the complexity of the implementation of condominium law reforms and to the ways in which the

---

[127] Oleg Kharkhordin, 'Conclusion: Commonality at Different Levels – Infrastructures of Liberty', in Oleg Kharkhordin and Risto Alapuro (eds.), *Political Theory and* Community *Building in Post-Soviet Russia* (Routledge, New York, 2011) pp 208, 210-211; Vihavainen, Common (note 118 above), pp 151-153.

[128] See Elena Somina and Frances Heywood, 'Transformation in Russian Housing: The New Key Roles of Local Authorities' (2013) 13 *International Journal of Housing Policy* 312 at 317-318.

formal legal structure, combined with actual dynamics of collective-action organisations, may serve to narrow the gaps between law and culture. Thus, for example, a cultural dimension such as power distance can be redirected in such organisations, including through well-tailored voting or quorum rules, to allow for leadership-based models, while also ensuring a sufficient level of accountability. The same may hold true for cultural dimensions of individualism/collectivism and social capital. Societies in transition, such as Russia and China, can gradually make condominium governance work. Such incremental processes of change can take place even if these societies do not follow Western models of democracy or are not otherwise rooted in long-standing traditions of civil associations.