The Culture of Private Law

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I. Introduction: The True Challenge of Legal Change

In March 2014, China unveiled its first-ever official plan for urbanization. The plan views urbanization as a necessary step for modernization, one that would shift the focus of the Chinese economy from continued reliance on export to an expansion of domestic demand for products and services as an engine for "sustainable and healthy" growth.[1] 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 public services such as schools and healthcare.[2] To facilitate this unprecedented social planning enterprise, the Chinese government intends to make vast expenditures on infrastructure and public services.[3]

This top-down initiative should be evaluated against yet another dramatic process of change that is taking place in China over the past few decades and which is bound to have

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[1]Xhingua, China Unveils Landmark Urbanization Plan, PEOPLE'S DAILY ONLINE, March 17, 2014.

[2]Ian Johnson, China Releases Plan to Incorporate Farmers into Cities, N.Y. TIMES, March 18, 2014.

[3]Zheng Yangpeng, New Urbanization Plan Ambitious: Analysts, CHINA DAILY, March 18, 2014.

a direct impact on the prospects of the planned mass migration. 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, culminating in the 2007 Property Law of the People's Republic of China.[4]

In the context of urban land, China has introduced, as of 1994, a comprehensive national housing reform policy.[5] 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 thus become a market commodity, in which private interests and rights play a substantial role.[6] A key part of the reform has to do with employing privatization and commercialization in the housing market. This is done 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 and manage residential buildings that were originally built by the state.[7]

Accordingly, in a series of government regulations promulgated in the early 2000s alongside scattered provisions in the 2007 Property Law, China created the legal infrastructure for condominiums and their internal governance and maintenance, chiefly through the establishment of home-

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[4]Zhonghua Renmin Gongheguo Wuquanfa [Property Rights Law of the People's Republic of China], promulgated by the National People's Congress, Mar. 16, 2007 (effective Oct. 1, 2007), 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 291 (hereafter: "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 in China, see Mark D. Kielsgard & Lei Chen, *The Emergence of Private Property Law in China and its Impact on Human Rights*, 96 ASIAN-PACIFIC L. & POL'Y J. 94 (2013).

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

[6]Lei Chen & Mark D. Kielsgard, *Evolving Property Rights in China: Patterns and Dynamics of Condominium Governance*, 2(1) CHINESE J. COMP. LAW 21, 26 (2014).

[7]*Id.* at 24–25.

owner associations (HOAs).[8] Condominiums now represent the main type of tenure in China's urban areas.[9] While the law itself is still very partial, and its official implementation across the country has come across numerous bureaucratic obstacles posed partly by local governments,[10] what seems to have emerged is a new top-down blueprint for private law governance of multiunit housing. This new paradigm of collective action, envisioned by the creation of the legal institutions of condominiums and HOA organizations, is the one that should also facilitate the mass migration and formal absorption of 200 million villagers into China's new urban areas.

It is here that the enormity of the challenge unveils itself. It goes way beyond the social and private costs conventionally associated with any sort of legal transition.[11] The top-down process of urbanization exposes ex-villagers to the full extent of what Ivan Berend has termed the "social shock" of major transformations.[12] In a series of reports in the *New York Times*, Ian Johnson describes how the process of rapid urbanization in China abruptly undercuts traditional Chinese culture, which is rural-based,[13] and how former villagers struggle to adjust to urban life, often pushed to poverty and despair.[14] Many are unable to compete for jobs due to the lack of appropriate skills, tussle to meet the increased costs of urban living, and more generally feel isolated and

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[8]Feng Wang et al., *The Adoption of Bottom-Up Governance in China's Homeowner Associations*, 8 MGM'T ORG. REV. 559, 561–63 (2012).

[9]LEI CHEN, THE MAKING OF CHINESE CONDOMINIUM LAW 4–5 (2010).

[10]*See* text accompnaying *infra* notes 184–186.

[11]*See* Michael P. Van Alstine, *The Costs of Legal Change*, 49 UCLA L. REV. 789 (2002).

[12]Ivan T. Berend, *Social Shock in Transforming Central and Eastern Europe*, 40 COMMUNIST & POST-COMMUNIST STUD. 269 (2007) (describing the collision of traditional and new values in central and eastern Europe, and the cultural shock that results from the process of swift economic and political transitions).

[13]Ian Johnson, In China, 'Once the Villages are Gone, the Culture is Gone,' N.Y. TIMES, Feb. 1, 2014 (hereinafter: "Johnson, Culture is Gone").

[14]Ian Johnson, New China Towns: Shoddy Homes, Broken Hope, N.Y. TIMES, Nov. 9, 2013 (hereinafter: "Johnson, New China Towns").

disoriented, having lost their rural social networks and the safe haven of traditional modes of living.[15]

Condominium housing may prove to be a particularly challenging terrain. Although villagers generally receive an urban apartment for little or no cost in return for their rural holdings,[16] many end up in crowded apartments due to square-feet-per-capita allotment formulas, and reports on poor construction standards abound.[17] Most importantly, current and future urbanites cannot rely on the government to keep up and manage the properties, as was the case under the system of welfare housing provided to state employees. Chinese law now views condominium governance as mostly a matter of private collective action. This reform accordingly requires a major cultural adjustment on the part of otherwise heterogeneous crowds of new urbanites, unaccustomed to systems of private property and formal organizations of self-governance, to facilitate such decentralized collaboration. Whether hundreds of millions of current and future migrants would be able to survive the shock of urbanization and engage in this new type of collective action remains to be seen.

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The abovementioned set of legal reforms is embedded in the specific circumstances of China. Yet it points to a dilemma that is present, to varying degrees, whenever a legal system designs a new set of norms that may have comprehensive social, economic, and cultural impacts. Lawmakers must consider the manner in which new forms of action promoted or mandated by law will be practically carried out by the designated recipients of the norms, and what types of broader-based changes, including ones related

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[15]Ian Johnson, China's Great Uprooting: Moving 250 Million into Cities, N.Y. TIMES, June 15, 2013; Ian Johnson, Pitfalls Abound in China's Push From Farm to City, N.Y. TIMES, July 13, 2013; Ian Johnson, Picking Death over Eviction, N.Y. TIMES, Sep. 8, 2013.

[16]Johnson, Culture is Gone, *supra* note 13 (reporting that 300 households in the village of Lei Family Bridge, in the outskirts of Beijing, received each a new apartment and $50,000-$100,000 in compensation).

[17]Johnson, New China Towns, *supra* note 14 (reporting that many villagers moving to the city of Huaming ended up with less floor space than they had on the farm, contrary to the advertised terms of the program).

to cultural orientations and values, may be required in order to make the legal reform effective.

This theme is addressed to some extent in the public law literature, particularly in the context of constitutional law, whenever constitutions are written anew or amended,[18] or in the study of the interplay between social change and reform in human rights.[19] The ties between legal design and cultural or moral convictions are also explored at times in criminal law and other fields that study non-instrumental obedience to law.[20] The law and development literature—discussed in Part III—identifies the potential effect of preexisting culture on rule of law reforms, but it too focuses on public law aspects of such reforms.[21]

In contrast, the issue of legal reform and cultural change has received scant attention in the private law literature. This is so despite the fact that private law—including for that matter fields such as contracts, property, torts, law of restitution, corporate and business law, private-sector labor law, and some aspects of family law—is a realm that is essentially operated and implemented by private actors in a largely decentralized manner. While fields such as constitutional law, tax law, or criminal law are obviously not only about obedience and passivity by private recipients of legal norms, private law is all about guiding and facilitating what is eventually private action, one that is often premised in voluntary collaboration and association among individuals.

Accordingly, a finer distinction can also be made *within*

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[18] *See, e.g.*, MICHEL ROSENFELD, THE IDENTITY OF THE CONSTITUTIONAL SUBJECT: SELFHOOD, CITIZENSHIP, CULTURE AND COMMUNITY (2010) (discussing the complex interplay between constitutional identity and national, cultural, or religious identity in the context of creating or amending constitutions).

[19] *See, e.g.*, THE PRACTICE OF HUMAN RIGHTS: TRACKING LAW BETWEEN THE GLOBAL AND THE LOCAL (Mark Goodale & Sally Engle Merry eds., 2007) (studying the potential gaps between the formal, largely universal human rights discourse and the practice of human rights that relies on local channels of communications, culture, and institutional structure).

[20] The leading work is TOM TYLER, WHY PEOPLE OBEY THE LAW (2d. ed., 2006) (providing evidence that people obey the law not only because of fear of punishment and retribution, but moreover because they view authority and law itself as morally legitimate).

[21] *See* text accompanying *infra* notes 113–124.

private law. Tort law, for example, may be viewed as creating legal incentives or forms of deterrence for individuals in the way they conduct themselves in the world so as to avoid clashes—physical and conceptual—with others.[22] In contrast, fields such as contracts, property, and corporate law focus on creating mechanisms that will enable *ex ante* forms of collective action. This means that the latter fields of law not only guide individual conduct, but also explicitly aim at creating the legal infrastructure for interpersonal collaboration. Therefore, private law reforms are bound to fail if there is substantial incongruence between the "ideal types"—in Max Weber's terms[23]—of collective action envisioned by law and the actual practices that guide persons in the ways they interact with others.

This Article offers an innovative analysis of the potential tension between private law reforms and existing practices of collective action, and of the means by which such frictions could be at least partially resolved. The notion of grassroots forces that practically affect the nature and scope of interpersonal collaboration is conceptualized here within the framework of "culture." In referring to culture, this Article resorts mostly to terminology employed in the social sciences, and particularly in economics.[24] It brings together two aspects of culture discussed in this body of literature. The first refers to social conventions and beliefs that sustain some equilibrium (or multiple equilibria) in repeated social interactions, and the other reflects more primeval individual

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[22]*See* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 9–13, 58 (1987).

[23]Max Weber used the term "ideal type" (*Idealtypus*) as a conceptual tool, one designated to capture the essence of a certain social phenomenon by identifying and accentuating its dominant features. The word "ideal" does not necessarily point to a normative evaluation of a "best option." *See* RICHARD SWEDBERG, THE MAX WEBER DICTIONARY: KEY WORDS AND CULTURAL CONCEPTS 119–21 (2005).

[24]For an analysis of the growing attention in economics to the concept of culture as a possible determinant of economic phenomena, see Luigi Guiso et al., *Does Culture Affect Economic Outcomes*, 20 J. ECON. PERSPECTIVES 23 (2006) (defining culture as "customary beliefs and values that ethnic, religious, and social groups transmit fairly unchanged from generation to generation") (hereinafter: "Guiso et al., Outcomes").

sentiments such as values, preferences, and other behavior-motivating emotions.[25]

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 regularly envisioned by private law. First is the dimension of individualism versus collectivism.[26] Second is power distance, referring to the "measure of interpersonal power or influence" between two or more persons as "perceived by the less powerful" person(s).[27] Third is the dimension of generalized trust, reciprocity, and interpersonal networks within a certain group or society, often referred to as "social capital."[28]

In studying the impact that preexisting cultural traits may have on the prospects of a successful implementation of a legal reform on the one hand, and on the ability of legal and organizational design to allow for shifts in such traits on the other, the Article rejects an all-or-nothing approach to cultural change. Such an approach would have required an all-embracing congruence between the ideal type of collective action envisioned by law and a corresponding set of cultural traits applied uniformly and harmoniously across all members of society. I argue that in many cases, such a sweeping demand would not only be unattainable due to the slow pace of full-fledged general cultural changes, but also superfluous or unnecessary for the purposes of promoting a particular private law reform.

For example, while collective action in the context of contracts, condominium management, or corporations may be reinforced by—and reinforcing for—forms of broad public participation and civic republicanism in the political arena, it might be useful and often essential to think about

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[25]Alberto Alesina & Paulo Giuliano, Culture and Institutions, NBER Working Paper no. 19750, pp. 4–6 (December 2013), available at http://ideas.repec.org/p/nbr/nberwo/19750.html.

[26]GEERT HOFSTEDE, CULTURE'S CONSEQUENCES: COMPARING VALUES, BEHAVIORS, INSTITUTIONS, AND ORGANIZATIONS ACROSS NATIONS 225 (2d ed. 2000).

[27]*Id.* at 83.

[28]*See* ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 19 (2000).

"incremental" recipes for cultural change. Thus, preexisting cultural concepts of power distance or leadership, if properly channeled and monitored within an organization established by the legal reform, could help to "spark" and then sustain a transparent and accountable joint action. This would be so even if such an ideal type of collective action is not based on a *polis*-like model or otherwise committed to abolishing any form of hierarchy or interpersonal power disparities in a certain society.

Likewise, the design of the role of the individual within an organization of similarly-located stakeholders, such as in a corporation or condominium, would be most likely implicated by the preexisting cultural dimension of individualism/collectivism. This does not mean, however, that a legal reform relying on privatization of property interests and the bundling of persons within a collective-action organization must seek to reshape the entire array of individual/collective social interactions, including on the political level. Thus, for example, if a highly-individualistic society establishes a majority voting rule for a certain type of collective-action organization, such as a homeowner association, the lawmaker should carefully delineate the boundaries of such group control, and clarify if this specific individual/collective tradeoff may also affect other interpersonal settings.

Social capital is yet another cultural dimension that may be critical for assessing the prospects of a successful implementation of a private law reform relying on ongoing collective action. Social capital—and the level of interpersonal trust in particular—may prove dynamic and contingent on the specific nature and scale of personal interaction. Trust levels in a collective-action setting, such as a corporation or a condominium, may thus evolve somewhat differently than in family circles on the one hand, and broader societal or political arenas, on the other. The challenge for lawmakers is both to identify the potential implications of relevant cultural dimensions for the implementation of the private law reform, and to devise legal mechanisms aimed at tipping culture-based interpersonal orientations so as to promote the reform's ideal types of collective action.

The Article focuses on collective-action organizations, such as homeowner associations, corporations, and private-sector labor unions. It identifies them 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 and outside such organizations.

There is extensive literature on the ways in which some of these organizations are able to resort to "social norms," "informal norms," or other forms of private ordering to create an intra-group *substitute* for the state-mandated private law system.[29] My concern here is, however, different. The Article identifies the essentiality of these organizations in facilitating the ideal types of collective action envisioned by the formal legal reform. It investigates strategies that could be employed in the legal design of these organizations. These strategies could rely on certain beneficial preexisting dynamics in such entities, while endorsing required shifts in other prevailing modes of intragroup collective action.

The Article explores, in particular, the instances in which lawmakers introduce a new paradigm of collective action that seeks to respond to exogenous "shocks" (economic, social, political, etc.),[30] but which in turn may also inflict a "legal shock" on the members of society that comprise the recipients of the new norms. This could be the case, for example, in transitional societies, such as China and Russia, which seek to introduce some modes of privatization in a hitherto strictly-centralized economy, with legal reforms envisioning private modes of collective action in fields such as contracts, corporate law, and condominium governance. Such top-down reforms in private law may create a potential friction with—or even a shock for—preexisting cultural orientations, values, and beliefs prevalent in society or parts of it. Since private law is not about passive obedience, but prominently about envisioning and facilitating private forms of collective action, the challenge of adjusting existing cultural orientations to such ideal types is substantial. This is where the

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[29] *See, e.g.*, ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (2000); Lisa Bernstein, *Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. Legal Stud. 115 (1992).

[30] The term "shock" is used in economics to describe a signficant unexpected change, which influences economic activity either positively or negatively. Peter Murrell, Institutions and Transition, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS (Steven N. Durlauf & Lawrence E. Blume eds., 2d ed., 2008).

legal design of collective-action organizations may play a significant role.

The Article proceeds as follows. Part II identifies the various ways in which private law envisions and formalizes ideal types of collective action, and looks briefly at the forces that may initiate legal reforms. It shows how such normative choices play out across various types of collective action and identifies the functional challenges of designing collective-action organizations. This part then addresses the role of default rules in defining the spectrum of ideal types of collective action, while enabling decentralized legal design by private actors.

Part III studies the intricate ties between legal reform and cultural change. It identifies three key cultural dimensions that may have a particularly dominant effect on the actual implementation of legal reforms: individualism/collectivism, power distance, and social capital. It demonstrates how congruence or lack thereof may determine the fate of legal reforms. It then advocates an incremental approach to cultural change, one that seeks to identify effective avenues for such shifts by focusing on the role of multimember organizations.

Building on the insights about private law reform and incremental cultural change, Part IV analyzes the case study of self-governance by homeowners in condominiums and other types of common interest developments. Presenting the collective-action challenges embedded in this field of private law, this part finally returns to the case of Chinese condominiums to inquire if a legal reform can indeed influence culture.

II. Private Law and Ideal Types of Collective Action

A. *Forces of Private Law Reform*

Recent years have seen a reinvigoration of the academic discourse on the essence of private law, and the goals it should promote. The themes explored in the literature deal, for example, with the question of the independence of private law from public law, or whether private law should identify a predominant goal or rather endorse value-pluralism. An elaborate analysis of such dilemmas is unnecessary for current purposes. The general premise of this Article is that lawmakers are entitled to shape the underlying set of norma-

tive values that would guide the various fields and sub-fields of private law.

The authority—not to say, duty—of lawmakers to engage in explicit normative contemplation of moral ideals and other values should not be mistaken for endorsing strong forms of top-down coercion. Private law should not turn individuals into marionettes, but should also advance important ideals of autonomy, privacy, self-determination, etc.[31] This is why the concept of envisioned types of private action and collective action should regularly embrace such key ideals, while also delineating some sort of a *spectrum* of ideal types of action that consequently grants parties substantial leeway to tailor their legal relations. At the same time, lawmakers cannot waive their responsibility to identify the broader vision of society that emerges from the design of private law norms, or resort to a hands-off approach by which "private law is whatever parties say it is, and this will always be validated." Lawmakers must engage in a normative deliberation that defines at least the general boundaries of dos and don'ts. Consequently, because the switch from a moral or political deliberation of values into legal doctrine requires some sort of formalization, lawmakers should identify the ideal types or paradigms of individual and collective action that might serve these goals, and create the legal and organizational infrastructure that will facilitate such types of action.

To properly fulfill the aforesaid normative role, the design of private law should essentially account for processes of change that lawmakers seek to initiate or respond to. Obviously, the multitude of potential changes and their effects on law cannot be fully surveyed here. Natural, geographical, political, social, economic, technological, and other exogenous changes may have multiple implications. As Part III shows, in some cases, these changes may have long-term pervasive effects on cultural orientations, values, and beliefs.[32] Such

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[31] *See* Gregory S. Alexander, *Property's Ends: The Publicness of Private Law Values*, 99 IOWA L. REV. 1257, 1264–67 (2014).

[32] *See, e.g.*, Nathan Nunn, *Culture and the Historical Process*, 27 ECONOMIC HISTORY OF DEVELOPING REGIONS S108 (2012) (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).

cultural shifts may then affect, over time, the content of the legal system.

In other instances, however, the exogenous change may require lawmakers to respond more quickly. This is the case when lawmakers seek to adjust an otherwise unchallenged system of values to changing circumstances. Alternatively, lawmakers may seek to engage in a normative reconsideration of the law as a result of such an exogenous shock.

An example of the former scenario is the revision made to contract and commercial law in the United States and elsewhere to accommodate technological developments such as e-commerce.[33] While the rapid development of digital technology and the Internet has created much debate in the academic literature and the popular press about the future paradigms of the market economy, so far this technological change has not shaken the foundational values of American society, at least in the way such values are reflected in the updated private law doctrines.[34]

As for the latter case, in which an exogenous shock causes lawmakers to explicitly reconsider the normative route of private law, a prominent example concerns the private law reforms that have been taking place after the fall of the Soviet bloc. In assessing the development of private law in former Soviet republics or Soviet-bloc countries, it is noteworthy that each country followed a different path in its transition from a socialist society to some type of a market economy and a corresponding system of private law.[35] These differences reflect both geopolitical decisions (e.g., whether to seek admission to the European Union, as was the case with many Central and Eastern European countries), economic features (with Russia and the Ukraine, for example, originally seeking to reform their system of private law mainly to attract domestic and foreign investments), and moral at-

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[33]For an overview of such changes in American law, see Michael L. Rustad & Thomas H. Koening, *Rebooting Cybertort Law*, 80 WASH. L. REV. 335, 345–49 (2005).

[34]*See* Raymond T. Nimmer, *The Legal Landscape of E-Commerce: Redefining Contract Law in an Information Era*, 23 J. CONTRACT L. 1 (2007).

[35]*See* Péter Cserne, The Recodification of Private Law in Central and Eastern Europe, in NATIONAL LEGAL SYSTEMS AND GLOBALIZATION 45, 47 (Pierre Larouche & Péter Cserne eds., 2013).

titudes (such as the decision of most Caucasus and Central Asian republics to combine European legal models with traditional law—in many cases, Islamic law).[36]

Russia serves as an intriguing case study of a private law reform that followed the political-ideological jolt of the demise of Communism. It underscores the ways in which an exogenous shock provokes a normative reconsideration of private law values and the challenges of a legal reform in crystallizing such change. Importantly, the lingering Ukraine crisis, subsequent sanctions imposed on Russia by the West, devaluation of the Ruble, and sharp drop in oil prices may bring about yet another shift in the trajectory of Russia's system of private law.[37] To the extent that a key underlying premise of the reform—i.e., the ability to attract foreign investment if a reform takes place—is no longer valid and is more broadly entangled with a change in this country's political-economic strategy, we may very well expect such backlashes to find expression in the trajectory of its private law. While one cannot yet anticipate how such future developments will play out, there is much to be learned from reforms that did take place in the post-Soviet era.

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 activity.[38] The initial systematic reformulation of civil legislation was undertaken by the 1991 Fundamentals of Civil Legislation of the USSR and Union Republics.[39] Between

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[36]For an overview of the differences in private law reforms among these countries, see *id*. at 54–62.

[37]For the grave implications of the Ukraine crisis and subsequent economic and geopolitical developments on Russia's economy, see, e.g., Peter Baker & James Kanter, Raising Stakes on Russia, U.S. Adds Sanctions, N.Y. TIMES, July 17, 2014; Tipping the Scales, THE ECONOMIST, May 3, 2014; Jill Treanor, Russian Recession Fears as Economy Shrinks for First Time in Five Years, THE GUARDIAN, Dec. 29, 2014.

[38]*See* WILLIAM BURNHAM ET AL., LAW AND THE LEGAL SYSTEM OF THE RUSSIAN FEDERATION 313 (5th ed. 2012).

[39]No. 2211-1, Vedomosti SSSR 1991, No. 26, item 733 (May 31, 1991), cited in *id.* at 313, n. 2.

1994 and 2006, a new Civil Code was adopted, aimed at full compatibility with market economy principles.[40]

In 2009, however, then-President Dmitry Medvedev declared: "Life does not stand still; Russia has changed, and the property relations the Civil Code regulates have changed too."[41] 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.[42] 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.[43] 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.[44]

The major driving force behind this massive legal reform has been Russia's desire to improve the legal climate for domestic and international investment.[45] The reform took shape while Russia was awaiting its admission to the World Trade Organization (WTO), a process completed in August

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[40]For a full English translation of the 1994–2006 Civil Code, see CIVIL CODE OF THE RUSSIAN FEDERATION (William E. Butler trans. & ed., 2010).

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

[42]*Id.*

[43]For English-language reports on this process, see, e.g., Financier Worldwide, Ongoing Battle to Modernise Russian Civil Law (July 2013), at: www.financierworldwide.com/ongoing-battle-to-modernise-civil-law/.

[44]See, in chronological order: Federal Law No. 302-FZ (Dec. 30, 2012); Federal Law No. 8-FZ (Feb. 11, 2013); Federal Law No. 100-FZ (May 7, 2013); Federal Law No. 142-FZ (July 2, 2013); Federal Law No. 222-FZ (July 23, 2013); Federal Law No. 260-FZ (Sept. 30, 2013); Federal Law No. 35-FZ (Mar. 2, 2014); Federal Law No. 99-FZ (May 5, 2014).

[45]*See* Kambiz Behi & Edsel Tupaz, Admitting Russia to the WTO Will Create Stronger Economic Ties, JURIST — Sidebar, July 3, 2012, http://jurist.org/sidebar/2012/07/kambiz-behi-edsel-tupaz-russia-civil.php.

2012 after 19 years of negotiations.[46] With Russia's private law system being ill-reputed for its over-rigid regulation but weak judicial enforcement, widespread corruption, contra-market approach taken by courts, and political persecution of top businessmen—it was hoped at the time that a fundamental transformation of the Civil Code would reinvigorate Russia's economic activity.[47]

Contract law, property, and corporate governance have been a particular focus of attention in designing the reform of the Russian Civil Code.[48] Importantly, while the general trajectory of the reform was aimed at facilitating a market-friendly environment, the drafting process has seen substantive disputes in translating the general idea of market-oriented private law into particular, ideal types of collective action, mostly in the legal design of business organizations.[49] Such dilemmas—relevant in principle to any private law reform—thus attest to the potential gap between identifying a normative goal and engaging in legal design of different forms of collective action that will promote it. The next section addresses the challenge of designing ideal types of collective action for various types of interpersonal conduct to facilitate the normative agenda of legal reforms.

B. *The Legal Design of Ideal Types of Collective Action*

The legal and social science literature has been long preoccupied with identifying the potential obstacles for cooperation among individuals—such as opportunism, free riding, holdouts, or agent/principal frictions—and the institutional and legal mechanisms that may alleviate such problems. From game theory to New Institutional Economics (NIE), much effort has been devoted to narrowing the gap between the general benefits of collective action and the actual

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[46]Larry Elliott, Russia's Entry to WTO Ends 19 Years of Negotiation, THE GUARDIAN (Aug. 22, 2012).

[47]*See* Behi & Tupaz, *supra* note 45.

[48]For a survey of the first three sets of reforms, dealing mostly with contracts, corporate law, and property, see Yuri Makhonin, CIS Legal Update — September 2013: Summary of Key Changes to the Russian Civil Code (Sept. 25, 2013), at: www.jdsupra.com/legalnews/cis-legal-update-september-2013-summa-24142/.

[49]*See* Financier Worldwide, *supra* note 43.

mechanism-design required to facilitate such collective action.

Obviously, not all types of collective action encounter the same problems or can be remedied by similar organizational and legal mechanisms. Consequently, the task of envisioning ideal types of various modes of collective action and designing the legal framework that will govern each one of them is both *normative* and *functional* in nature.

The *normative* challenge, which starts out with identifying the values or goals that should be promoted in private law, continues with consolidating the set of societal expectations about how persons should treat one another in various contexts of collective action. Such legal design, whether done by a legislator *ex ante* or by a court *ex post*, must consider which types of behavior among transacting parties should be deemed legitimate or even exemplary, and which ones frustrate the normative purpose of collective action.

A prominent example of this normative task concerns the concept of good faith, which diverges substantially among legal systems in identifying and consolidating the set of societal expectations in regard to various forms of collective action. In the Anglo-American legal system, this concept relies heavily on ideas of market economy, autonomy, and individual responsibility, while trying to control against exceptional cases of abuse and opportunism in interpersonal conduct.[50] In contrast, the 1999 Uniform Contract Law (UCL) of China envisions an entirely different normative role for the concept of good faith.[51] Established in Article 6 of the UCL, good faith has been described by Chinese courts and commentators as the "highest guiding principle or the 'royal principle' of the law of obligations." Good faith is considered not only a guiding principle for "people's everyday conduct" but also a "crucial moral precept in China's commercial

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[50]*See* Giuseppe Dari-Mattiacci & Carmine Guerriero, *Law and Culture: A Theory of Comparative Variation in Bona Fide Purchase Rules*, OXFORD J. LEGAL. STUD. 1, 8–9 (2015).

[51]Uniform Contract Law, promulgated by the National People's Congress Mar. 15, 1999 (effective Oct. 1, 1999). A full English translation is available at: http://www.novexcn.com/contract__law__99.html.

practice."[52] Good faith is said to bridge between the changing economic realities of China and its long-standing societal norms, by requiring civil actors to "balance interests between themselves, and balance their interests with those of society, so as to maintain social stability and harmonious development."[53] Accordingly, the good faith principle allows judges to regularly intervene in the content or the performance of the contract, being driven at times by instincts, emotions, and a general sense of justice.[54] As a final note, in the 2012–2014 amendments to the Russian Civil Code, good faith has been formally recognized as a fundamental principle, while being absent from its earlier versions.[55] It remains to be seen how the Russian legal design of good faith will seek to facilitate collective action, compared with the Anglo-American and Chinese approaches.

From a *functional* perspective, the legal design of an ideal type, or a spectrum of ideal types, of some sort of collective action must assess the comparative pros and cons of different models of organizational and legal structures, and decide which ones to validate.

A key example is that of corporations and other business organizations for collective action. The institutional development of these organizations stemmed from recognizing the potential functional benefits of introducing a model of asset governance based on organizational "hierarchy" or "vertical integration" as an alternative to the collective-action models of spot markets or long-term contracts.[56] In view of potential problems with spot markets or contracts, such as incompleteness of contracts, opportunism, or exogenous changes that require adaptation, the vertical integration of resources and

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[52]Wang Liming & Xu Chuanxi, *Fundamental Principles of China's Contract Law*, 13 COLUM. J. ASIAN L. 1, 16 (1999).

[53]*See* Chunlin Leonhard, *A Legal Chameleon, An Examination of the Doctrine of Good Faith in Chinese and American Contract Law*, 25 CONN. J. INT'L L. 305, 309–310 (2010).

[54]*Id.* at 324–26.

[55]Makhonin, *supra* note 48. *See also* Veniamin F. Iakovlev, The Arbitrazh Courts and the New Russian Civil Code, in PRIVATE AND CIVIL LAW IN THE RUSSIAN FEDERATION 99, 102 (William Simons ed., 2009).

[56]*See* Oliver E. Williamson, *The Economics of Governance*, 95 AM. ECON. REV. 1, 1 (2005).

managerial hierarchy within the organization may allow for adaptive, sequential decision-making without the need to "consult, complete, or revise inter-firm agreements."[57]

As for the horizontal axis of the collective action, an organization such as a business corporation resorts to several functional mechanisms in securing reciprocal credible commitments by members (equity investors or shareholders) in return for certain credible benefits. These mechanisms typically include: (1) *transfer of assets*, by which members contribute capital to establish assets owned and managed by the corporation as a separate legal entity in return for nonfixed claims in the form of shares; (2) *delegation to agents*, by which members delegate a key part of their decision-making authority to a representative or professional body, i.e. board of directors and executive management; and (3) *governance by majority*, meaning that members consent to being placed under a regime in which they may contribute to activities to which they individually object.[58]

At the same time, the specific design of a collective-action organization, such as a corporation, also features substantive differences among legal systems. These variances may reflect diverging empirical valuations about the perils of potential abuse of the corporate structure by members or agents, and the legal mechanisms required to monitor them.[59] Moreover, they attest to a different normative evaluation of the underlying goals of the corporation and those whom it should primarily serve.[60] Different countries may thus translate their distinctive visions of the ideal types of collective action into legal norms that govern issues such as repre-

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[57] *See* OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM 56, 78 (1985).

[58] Amnon Lehavi, *Concepts of Power: Majority Control and Accountability in Private Legal Organizations*, 8 VA. L. & BUS. REV. 1, 12–16 (2014).

[59] *See, e.g.*, John Armour et al., Agency Problems and Legal Strategies, in THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 35, 35–45 (Reinier Kraakman et al. eds., 2d ed. 2009).

[60] John Armour et al., Introduction, in THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 1, 28–29 (Reinier Kraakman et al. eds., 2d ed. 2009).

sentation of employees on the board,[61] the legitimacy of a "control premium,"[62] or the extent to which controlling shareholders should be required to act in "entire fairness" or "utmost good faith and loyalty" in corporate transactions prone to self-dealing.[63]

With such features in mind, lawmakers should engage in contemplating the range of legal options that would be available to parties wishing to engage in various types of collective action. Lawmakers should identify the general set of expectations that parties might legitimately have one toward another in each type of collective action, design the ways in which such expectations would be explicitly or implicitly incorporated in the system of private law, decide on the extent of freedom that parties would be granted in deviating from the law's provisions, and create an institutional infrastructure for facilitating such collective action.

C. *Ideal Types, Markets, and Default Rules*

The role of the state in envisioning and designing private law is embedded in broader theoretical questions about the role of the state in society, the interrelations between the public and market spheres, and how the state can empower, and not only limit, individual freedom. The answers to such queries may change across countries as well as across time.

For example, Ralf Michaels and Nils Jansen argue that in Germany, the state is viewed as a creation of society and not as its antinomy, and this relationship remains intact even upon a shift between the public and private spheres in society, such as during the move to the welfare state in the

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[61] *See* Luca Enriques et al., The Basic Governance Structure: Minority Shareholders and Non-Shareholder Constituencies, in THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 89, 100–02 (Reinier Kraakman et al. eds., 2d ed. 2009).

[62] *See* Alexander Dyck & Luigi Zingales, *Private Benefits of Control: An International Comparison* 59 J. FIN. 537 (2004).

[63] *See* Luca Enriques et al., Related Party Transactions, in THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 153, 175 (Reinier Kraakman et al. eds., 2d ed. 2009).

twentieth century.[64] Accordingly, the fact that the state necessarily intervenes in private relations by deciding whether to enforce contracts, property rights, or other matters of interpersonal relations—an observation considered avant-garde when it was made by American legal realists[65]—is almost self-evident in the German legal system. The more pressing question is the extent to which substantive government policies and social values should be incorporated in private law.[66]

In the United States, with its stronger *laissez faire* tradition, the discourse on the legitimacy of state design of private law has been dominated by identifying specific themes that merit intervention by legislation, regulation, or case law. The free market is viewed as the otherwise appropriate source of norms, such that absent a demonstrated "market failure," the state should validate and enforce market practices and preferences.[67] That said, what counts as a market failure is both an empirical and normative question. Thus, the question as to whether a private conduct affecting others amounts to an "externality" that should be legally regulated requires a normative evaluation of the conduct's legitimacy. The same goes for intervention in other issues, such as market power or asymmetric information.

It is here that one has to consider the role of default rules in private law design. Scholars who otherwise advocate a strong version of freedom of contract in various forms of collective action have identified the role of default rules, such as in corporate law, as providing a set of provisions "available off-the-rack so that participants in corporate ventures can save the costs of contracting."[68] More broadly, these writers identify the role of top-down corporate law design as a

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[64]Ralf Michaels & Nils Jansen, *Private Law Beyond the State? Europeanization, Globalization, Privatization*, 54 AM. J. COMP. L. 843, 853–56 (2006).

[65]*See*, e.g., Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927).

[66]Michaels & Jansen, *supra* note 64, at 858–59.

[67]See, e.g., ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 43–47 (5th ed. 2008).

[68]FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 34 (1991).

gap-filler for private contracting. Such gap-fillers are intended to serve—but can always be preempted by—explicit private ordering.[69]

This view of default rules is at odds, however, with the fact that many provisions in corporate law doctrines are mandatory rules, such as the ones governing insider trading and tender offers in many U.S. states.[70] Some freedom-of-contract theorists argue that these rules are not really mandatory since they could be "easily—and legally—sidestepped, or they pose nonbinding constraints because there is no burning demand to deviate from them."[71] Other writers dispute this depiction as being factually incorrect.[72]

The mandatory/default rules dilemma is at times resolved in various legal systems by taking a middle stance, one that allows parties to choose from a given number of options. Thus, for example, French corporate law allows corporations' charters to opt for a two-tier board structure as an alternative to the default single-tier board. This means that this facet of collective action can be based on one of two statutorily-designed structures.[73]

Another type of an intermediate level of choice concerns the expanded menu of the underlying organizational forms. Recent decades have seen a proliferation of business organization forms in the United States and elsewhere. Moving beyond the partnership-corporation dichotomy, state legislation introduced new types of business formats, such as the limited liability company (LLC), limited liability partnership (LLP), and limited liability limited partnership (LLLP).[74] This expansion has been hailed as accommodating the need for flexibility in governance, especially for small- and

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[69]STEPHEN M. BAINBRIDGE, THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE 32–33 (2008).

[70]*See* Melvin A. Eisenberg, *The Conception that the Corporation is a Nexus of Contracts, and the Dual Nature of the Firm*, 24 J. CORP. L. 819, 823–25 (1999).

[71]Roberta Romano, *Answering the Wrong Question: The Tenuous Case for Mandatory Corporate Law*, 89 COLUM. L. REV. 1599, 1599 (1989).

[72]Eisenberg, *supra* note 70, at 823–24.

[73]Armour et al., Introduction, *supra* note 60, at 21.

[74]*See* LARRY E. RIBSTEIN, THE RISE OF THE UNCORPORATION (2010).

medium-scale businesses, eroding burdensome restrictions imposed on firms required hitherto to form as corporations.[75] The various forms of corporate-partnership hybrids arguably enjoy more freedom in tailoring rules of governance on management structure, financial rights, transferability of interests, fiduciary duties, etc.[76] These legal developments thus significantly expand the list of ideal types of collective action. As some scholars suggest, such a design technique allows parties to a business enterprise to 'signal' to potential counterparts the terms they offer and to bond themselves to such terms, while retaining a functional choice as to the specific type of the collective-action organization.

I would suggest, however, that beyond their functional task, default rules or statutory options also play an important normative role, particularly during times of legal reform.

Consider societies in transition, such as China or Russia. A decision to move from a centrally-planned economy to a more market-oriented approach requires lawmakers to inform and educate norm-recipients about the envisioned ideal types of collective action, even if private actors would then be allowed to engage in private ordering.

In this respect, default rules are more than a matter of functional convenience. They serve as an important vehicle for lawmakers to express the underlying values of the legal reform in a concrete manner and to visualize at least some of the ways in which decentralized collective action could take place as a matter of legal practice. Giving a concrete content to the legal reform, even if merely through the use of default rules that could be then contracted away by private parties, serves as a meaningful educational tool in facilitating collective action.

Moreover, the normative enterprise of private law design through the use of default rules that facilitate collective action can also promote a potential incremental shift in preexisting cultural values, beliefs, and orientations, which may otherwise inhibit the implementation of the reform. The

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[75]Joseph A. McCahery et al., A Primer on the Corporation, ECJI Working Paper Series on Law No.198/2013 (March 2013), available at http://ssrn.com/abstract%2200783.

[76]The Economist, The Endangered Public Company: The Big Engine that Couldn't (May 19, 2012).

tension between law and culture and its potential resolution through the design of collective-action organizations and default rules of governance are taken up in the following part.

III. Legal Reform and Cultural Change

A. *The Various Attributes of Culture*

As briefly noted in the Introduction, various disciplines across the social sciences are increasingly engaging in a conceptual and empirical study of culture. While there are diverging definitions and line drawings for culture, it seems that current research largely seeks to integrate two previously identified facets of culture: one dealing with a social equilibrium of shared expectations and beliefs among members of a group;[77] the other with individual values and preferences acquired mostly by intergenerational transfer.[78] The conflation of a theory of social equilibria with a model underlining the set of moral values often acquired individually in early childhood offers a richer concept of culture.[79] This integrated notion of culture addresses the essential individual-social interface in cultural constructs, and it may also better account for the prospects of cultural change.

Thus, Geert Hofstede sees culture as "the collective programming of the mind that distinguishes the members of one group or category of people from another,"[80] whereas Luigi Guiso et al. define it as "those customary beliefs and values that ethnic, religious and social groups transmit fairly unchanged from generation to generation."[81] The idea of shared values and beliefs, which translate into the ways in which "a group of people solves problems and reconciles

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[77]Avner Greif, *Cultural Beliefs and the Organization of Society: A Historical and Theoretical Reflection on Collectivist and Individualistic Societies*, 102 J. POL. ECON. 912, 915 (1994).

[78]*See* Luigi Guiso et al., *Social Capital as Good Culture*, 6 J. EUR. ECON. ASS'N 295, 297–98 (2008).

[79]Alesina & Giuliano, *supra* note 25, at 4–6.

[80]HOFSTEDE, *supra* note 26, at 9.

[81]Guiso et al., Outcomes, *supra* note 24, at 23.

dilemmas,"[82] is prevalent also in other accounts of culture. These studies emphasize not only the essential individual/social interface, but also the key role of cultural traits in ascertaining the nature and scope of collective action.

While elements such as symbols, heroes, and rituals are also viewed as constituting culture,[83] the notion of shared values plays a dominant role in mapping and measuring cultural attributes, especially on the national level. Values are typically defined as "a broad tendency to prefer certain states of affairs over others."[84] Scholars have identified different dimensions of values, with some overlap between them. Hofstede focuses on power distance, uncertainty avoidance, individualism and collectivism, masculinity and femininity, and long- versus short-term orientation.[85] Shalom Schwartz addresses three basic issues that societies deal with, and delineates them along respective continuums: embeddedness/autonomy, hierarchy/egalitarianism, and mastery/harmony.[86] The World Values Survey (WVS) project, which has conducted six waves of surveys between 1981 and 2014, uses a standardized questionnaire with about 250 questions in its most recent version.[87] The WVS findings have been mapped by Ronald Inglehart and Christian Wlezel into two major dimensions of cross-cultural variations: (1)

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[82]FONS TROMPENAARS & CHARLES HAMPDEN-TURNER, RIDING THE WAVES OF CULTURE: UNDERSTANDING DIVERSITY IN GLOBAL BUSINESS 8 (3d ed. 2012).

[83]HOFSTEDE, *supra* note 26, at 10.

[84]*Id.* at 5.

[85]*Id.* at 28–29

[86]*See* Shalom Schwartz, A Theory of Cultural Value Orientations: Explications and Orientations, in MEASURING AND MAPPING CULTURES: 25 YEARS OF COMPARATIVE VALUE SURVEYS 33 (Yilmaz Esmer & Thorleif Pettersson eds., 2007). For these dimensions, see also Amir N. Licht et al., *Culture Rules: The Foundations of the Rule of Law and other Norms of Governance*, 35 J. COMP. ECON. 659, 662–63 (2007).

[87]See the World Values Survey website at: http://www.worldvaluessurvey.org/wvs.jsp. For the official questionnaire of the 2010–14 wave, see: http://www.worldvaluessurvey.org/WVSDocumentationWV6.jsp.

traditional values versus secular-rational values; and (2) survival values versus self-expression values.[88]

In their literature survey, Alesina and Giuliano review these and other measures of culture that have received significant attention in historical and contemporary empirical studies, such as the notion of generalized trust and reciprocity often used as a proxy for "social capital" (discussed in more detail below);[89] the role of family ties; generalized versus limited morality; attitudes toward work and perception of poverty; and religion.[90]

The potential weight of all cultural attributes notwithstanding, this Article focuses on three dimensions of values. These seem particularly relevant for the kinds of collective action typically envisioned by private law reforms and the performance of legal and organizational institutions tasked with facilitating such types of action.[91] Moreover, these value dimensions—individualism versus collectivism; power distance; and social networks, general trust and reciprocity ("social capital")—are also correlated to some extent, such that a shift in one value dimension may implicate the other dimensions.[92]

First, the *individualism versus collectivism* spectrum addresses the degree of "integration of individuals into primary groups."[93] This means that in individualistic societies, emphasis is placed on personal achievements and individual rights. In contrast, collectivism focuses on the life of cohesive groups and organizations,[94] with such embeddedness requiring persons to commit to "maintaining the status quo, propriety, and restraint of action that might disrupt group

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[88]For a definition of these dimensions and current data, see: http://www.worldvaluessurvey.org/wvs.jsp.

[89]See text accompanying *infra* notes 104–108.

[90]*See* Alesina & Giuliano, *supra* note 25, at 6–16.

[91]*See* Mariko J. Klasing, *Cultural Dimensions, Collective Values, and their Importance for Institutions*, 41 J. COMP. ECON. 447, 453–57 (2013).

[92]*See, e.g.*, Alesina & Giuliano, *supra* note 25, at 17 (finding significant positive correlation between individualism and general trust, as well as with generalized morality).

[93]HOFSTEDE, *supra* note 26, at 29, 209–12.

[94]Alesina & Giuliano, *supra* note 25, at 8–9

solidarity or the traditional order."[95] In *The Collective and the Individual in Russia*, Oleg Kharkhordin identifies the core features of individualism in respect for persons, independence, privacy, and self-development—and contrasts them not only with Soviet ideology, but more so, with centuries-old practices.[96]

This literature does not consider individualism as an antonym to the possibility of collective action, but emphasizes rather that it may be based on a different set of motives. Whereas collectivist societies endorse emotional dependence of members on their groups, collective action among otherwise individualistic persons is more "calculative"[97]—one that recognizes the contingent long-term self-serving benefits of collective action. Indeed, when one considers the voluminous work done in game theory, such as Robert Axelrod's seminal work *The Evolution of Cooperation*,[98] it is focused on social, psychological, and formal mechanisms that may facilitate collaboration among actors who are "rational," i.e., seeking to maximize personal gains or to otherwise satisfy individual preferences.

Second, *power distance* refers to a "measure of the interpersonal power or influence" as perceived by the less powerful party in the relationship, but one which is generally accepted by both parties and supported more broadly by their social environment and underlying national culture. Under this account, culture "sets the level of power distance at which the tendency of the powerful to maintain or increase power distances and the tendency of the less powerful to reduce them will find their equilibrium."[99]

At the societal level, the cultural concept of power distance may be understood as the location of interpersonal relationships along the hierarchy/egalitarianism dimension. This

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[95]Licht et al., *supra* note 86, at 662.

[96]OLEG KHARKHORDIN, THE COLLECTIVE AND THE INDIVIDUAL IN RUSSIA (1999) (equating the public process of criticism and "purging" in the Communist party to public confessions in the Orthodox Church).

[97]HOFSTEDE, *supra* note 26, at 29, 209–12.

[98]ROBERT AXELROD, THE EVOLUTION OF COOPERATION (rev'd ed. 2006).

[99]HOFSTEDE, *supra* note 26, at 83–84.

means that an egalitarian society will cherish ideas such as moral equality, social justice, and responsibility, whereas a hierarchical social order would focus on respect for the distribution of roles, obedience, and deference to superiors.[100] This does not mean, however, that hierarchy should be equated with unwarranted tyranny. Thus, for example, the interpersonal notion of *guanxi* in traditional Chinese culture—while relying on social hierarchy and distinctive roles—also advocates mutual obligation, reciprocity, goodwill, and personal affection.[101] Moreover, ideas of power distance, hierarchy, and mutual obligation may find a somewhat different expression in other social or organizational settings.[102] Japanese corporations, for example, are traditionally based on the model of "company community." This means that because constituents pursue a long-term career in the organization, and managers are groomed internally, executives are expected to reward their subordinates by promoting the long-term welfare of the enterprise. Concepts of team effort, intergenerational mentoring, and long-run concerns are thus woven into the otherwise hierarchical structure to nurture a culturally-based sense of social bond.[103]

Third, *social capital* refers to features of social organization, such as trust, norms, and networks that can improve the efficacy of society by facilitating personal cooperation.[104] Robert Putnam argues 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

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[100]Jordan I. Siegel et al., *Egalitarianism and International Investment*, 102 J. FIN. ECON. 621, 624 (2011).

[101]*See* John Matheson, *Convergence, Culture and Contract Law in China*, 15 MINN. J. INT'L L. 329, 374 (2006).

[102]HOFSTEDE, *supra* note 26, at 97–115.

[103]Zenichi Shishido & Takaaki Eguchi, The Future of Japanese Corporate Governance: Internal Governance and the Development of Japanese-Style External Governance through Engagement, in RESEARCH HANDBOOK ON SHAREHOLDER POWER 552 (Jennifer G. Hill & Randall S. Thomas eds., 2015).

[104]For early manifestations of this concept, see JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES 90-1 (1961); JAMES S. COLEMAN, FOUNDATIONS OF SOCIAL THEORY 300-21 (1990).

institutional settings.[105] Some historical evidence points to an evolutionary trajectory of social capital from smaller groups to broader polities.[106] But it should also be noted that social capital may have a darker side of intragroup bonding, leading to intergroup alienation or rent-capturing,[107] and that it may be otherwise unequally distributed across different segments of society.[108]

Much of current literature focuses on the concept of trust and the ways in which its different facets may be interrelated, including in the process of creating social capital. The recent wave of the World Values Survey (2010–2014) explores the levels of trust that respondents feel toward other persons, including "family," "people you know personally," "people in your neighborhood," "people you meet for the first time," "people of another nationality," or "people of another religion," while also asking respondents if "most people can be trusted or that you need to be very careful in dealing with people?"[109] Survey results diverge across countries in absolute numbers as well as in the scope of decline in trust in moving farther away from the innermost circle of family. That said, the level of trust that people have in those that they know "personally" outside of the family circle or in those in their "neighborhood" is typically located at some interim point between high levels of trust in family members and relatively low ones in foreigners. Trust levels toward "most people" highly diverge across different surveyed societies.[110]

Ken Newton and Sonja Zmerli identify three types of trust: *particular trust* (which they attribute to trust in family,

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[105]PUTNAM, BOWLING ALONE, *supra* note 28, at 19.

[106]ROBERT PUTNAM ET AL., MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY (1993) (attributing the better functioning of local governments in central-northern Italy over the south to the growth of free cities as of the twelfth century and the consequent fostering of social capital in this region).

[107]SHEILAGH OGLIVIE, INSTITUTIONS AND EUROPEAN TRADE: MERCHANT GUILDS 1000–1800, 9–16 (2011).

[108]Alesina & Giuliano, *supra* note 25, at 6–8.

[109]*See* World Values Survey Wave 6, 2010–2014, Online Data Analysis of values V24, V102-V107, at: http://www.worldvaluessurvey.org/WVSOnline.jsp.

[110]*Id.*, at Online Data Analysis of value V24.

people one knows personally, and trust in neighbors); *general social trust* (referring to trust toward people one meets for the first time, people of another religion, people of another nationality, and "most people"); and political trust (relating to trust in institutions such as government, justice system, or civil service).[111] Their analysis of the previous round (2005–2007) of the World Values Survey suggests that the three types of trust are associated, but in different ways and to varying extents. They rule out the idea that particular social trust undermines general social trust, and also challenge the theory by which trust in others is a pervasive core personality characteristic. Newton and Zmerli suggest, rather, that particular trust may at times have a positive impact on general social trust and political trust, while also suggesting that aggregate levels of trust in society may affect individual levels of trust in institutions and society.[112]

Thus, while much remains to be explored in assessing the role of trust in a certain culture, and the types of correlation between the different forms of trust, current data seems to point to the relatively dynamic nature of trust as a major feature of interpersonal conduct. Further, this data suggests that intermediate interpersonal circles, such as within neighborhoods or in other midsize social settings, may be particularly prone to shifts in the levels of trust. This feature is thus highly relevant for collective-action organizations.

B. *Culture and Grassroots Absorption of Private Law Reform*

A contemporary discussion of private law reform and cultural change should be first placed within the broader context of the "rule of law" wave of reforms that has dominated policy debates and aid programs as of the 1990s.[113] Billions of dollars have been invested by Western agencies and private donors in legal reforms in Africa, Latin America, Asia, and Central and Eastern Europe, promoting the idea that an improved rule of law will foster economic

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[111] Ken Newton & Sonja Zmerli, *Three Forms of Trust and their Association*, 3 EUR. POL. SCI. REV. 169, 170–73 (2011).

[112] *Id.* at 192–94.

[113] *See, generally*, Thomas Carothers, The Rule of Law Revival, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 3 (Thomas Carothers ed., 2006).

development.[114] As Kevin Davis and Michael Trebilcock note, this view is based on the assumptions that certain features of a legal system may be particularly important for development—with democracy, separation of powers, and freedom of the press featuring prominently—and that meaningful legal reforms can attain these goals.[115]

In the private law context, the most significant wave of reforms dealt with attempts at Western-style formalization of property rights. These reforms have been built on ideas associated with the work of economist Hernando De Soto, who argues that informality of property rights results in "dead capital" that cannot be used for credit, thus inhibiting development.[116] This work also inspired the creation of the International Property Rights Index (IPRI), which purports to show that "with each new year, the link between economic prosperity and property rights protection becomes increasingly clearer."[117]

Empirical studies of such reforms show, however, a more complex picture, often attesting to failures of private law reforms and rule of law programs, more generally.[118] Some studies on property rights reforms in sub-Saharan Africa and other developing countries point to political struggles, tensions between central governments and local communi-

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[114]David M. Trubek, The Rule of Law in Development Assistance: Past, Present, and Future, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 74 (David M. Trubek & Alvaro Santos eds., 2006).

[115]Kevin E. Davis & Michael J. Trebilcock, *The Relationship between Law and Development: Optimists versus Skeptics*, 56 AM. J. COMP. L. 895, 895–98, 905–11 (2008).

[116]Hernando de Soto, THE MYSTERY OF CAPITAL: WHY CAPITAL TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE 46–62 (2000).

[117]*See* Property Rights Alliance, 'International Property Rights Index 2011 Report,' p. 3, available at http://americansfortaxreformfoundation.org/userfiles/ATR__2011%20INDEX__Web2.pdf. For the most recent version of the IPRI index, see: http://www.internationalpropertyrightsindex.org/.

[118]For an evaluation of "skeptical" versus "optimistic" approaches to these reforms based on empirical data, see Davis & Trebilcock, *supra* note 115, at 938–45.

ties, and other forms of governance crises as reasons for such reform failures.[119]

Several writers have focused on the often-hidden costs of formalization, including not only general concerns over social unrest or transition costs, but also the undermining of otherwise functioning informal mechanisms of tenure security and resource use.[120] Other factors, such as corruption, self-dealing, and lack of accountability, have also been shown to play a role in the failure of privatization schemes and private law reforms.[121]

What is the role of culture in fostering or hindering a private law reform? While the literature often refers to the potential impact of social norms or informal enforcement mechanisms on the implementation of formal legal rules,[122] relatively few authors have sought to address more broadly the interrelations between culture and private law reform.

Kenneth Dam refers to several cultural explanations offered in the context of the law and development literature.[123] He comes to the general conclusion that "law and legal institutions introduced, in the name of good governance, into developing countries that are odds with local culture are unlikely to succeed."[124] Dam does not determine, however, what types of cultural traits may pose particular obstacles to legal reforms, and whether a legal change can ever bring about any sort of cultural shifts.

Trying to build a basis for a systematic analysis of these issues, the following paragraphs look at the literature on whether culture shapes the content of private law doctrines.

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[119]*See, e.g.*, SANDRA F. JOIREMAN, WHERE THERE IS NO GOVERNMENT: ENFORCING PROPERTY RIGHTS IN COMMON LAW AFRICA (2011); ATO KWAMENA ONOMA, THE POLITICS OF PROPERTY RIGHTS INSTITUTIONS IN AFRICA (2010).

[120]*See* Michael Trebilcock & Paul-Erik Veel, *Property Rights and Development: The Contingent Case for Formalization*, 30 U. PA. J. INT'L L. 397, 443–52 (2008).

[121]Bernard Black et al., *Russian Privatization and Corporate Governance: What Went Wrong?*, 52 STAN. L. REV. 1731, 1750–77 (2000).

[122]Trebilcock & Veel, *supra* note 120, at 456–59.

[123]KENNETH W. DAM, THE LAW-GROWTH NEXUS: THE RULE OF LAW AND ECONOMIC DEVELOPMENT 60–69 (2006).

[124]*Id.* at 63, 68–69.

Section III.C will then discuss the query that is the focus of this Article: are there also cross-influences, such that a private law reform may bring about cultural shifts.

To start with, some recent works seek to establish a link between certain cultural attributes or values and the design of private law doctrines. Giuseppe Dari-Mattiacci and Carmine Guerriero study the good faith purchaser doctrine across 126 countries, showing substantial differences among them. 29 percent of the jurisdictions fully protect the original owner, 13 percent fully protect the bona fide purchaser, and 58 percent afford the owner an intermediate level of protection, typically by restricting the owner's right to reclaim the stolen good to a term of years, ranging from one to thirty.[125] They attribute these differences to a cultural notion of self-reliance, defining it along two dimensions: regard for hierarchy and emphasis on the individual. Self-reliant cultures are characterized by egalitarianism (i.e., low regard for hierarchy) and individualism, with the corresponding legal systems exhibiting strong owner protection so that the purchaser never acquires ownership of a stolen good. This is contrasted with low self-reliance countries, which strongly protect the buyer. Cultures with mid-level self-reliance provide an intermediate level of protection to the buyer.[126]

More broadly, Amnon Lehavi and Amir Licht examine the relations between the degree of cultural emdeddedness/autonomy and property rights, using the IPRI Index.[127] The analysis finds a clear association and causality between the two variables, so that the more a country's culture emphasizes embeddedness and de-emphasizes autonomy, the less likely it is to protect property rights—in the way the latter are formally captured by the IPRI—in regard to both physical property and even more so to intellectual property.[128]

Wolfgang Breuer and Astrid Salzman find empirical sup-

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[125]Dari-Mattiacci & Guerriero, *supra* note 50, at 2–3.

[126]*Id.* at 15–17.

[127]*See supra* note 117 and accompanying text. The IPRI is a cross-country, comparative, composite index comprising three sub-indices, each of which is also composite. These sub-indices cover legal and political environment (LP), physical property rights (PPR), and intellectual property rights (IPR). *Id.*

[128]Amnon Lehavi & Amir N. Licht, *BITs and Pieces of Property*, 36 YALE J. INT'L L. 115, 139–48 (2011).

port for their hypothesis that in countries with a high emphasis on embeddedness, the legal and institutional features of corporate governance are exercised predominately by an "insider system" of bank relationships and various stakeholders that promote stability. This is opposed to societies that cherish autonomy, and which consequently control firms via market mechanisms.[129]

The literature on this topic is also related to a much broader body of empirical work on whether legal rules and/or local culture dictate economic performance. This voluminous literature need not be fully surveyed here, but one subset of it is of particular interest to the current study, because it may shed light on the potential ties between law and culture.

In their 1997 work, Rafael La Porta et al. identify the importance of cultural beliefs about trust for both pure economic factors such as per capita GDP growth and the efficacy of institutional performance such as judicial efficiency or bureaucratic quality.[130] In his foreword to the influential 2000 book *Culture Matters: How Values Shape Human Progress*, Samuel Huntington argues that culture can explain different economic patterns among developing countries. Thus, in trying to explain why South Korea and Ghana had a similar economic starting point in the 1960s but have since become so different, he suggests that "Koreans value thrift, investment, hard work, education, organization, and discipline" whereas "Ghanaians had different values."[131] In their 2006 empirical work, Luigi Guiso et al. focus on religion and ethnicity as fixed cultural dimensions (as opposed to those features that can be voluntarily acquired, including some forms of social capital). They suggest that these cultural traits shape expectations and preferences—such as trust in others or preference for thrift—which in turn affect economic

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[129]Wolfgang Breuer & Astrid Juliane Salzmann, National Culture and Corporate Governance, in CORPORATE GOVERNANCE 369, 375–76, 382 (S. Boubaker et al. eds., 2012). Other hypotheses linking cultural features to the legal system of corporate governance receive more limited support. *Id.* at 374–89.

[130]Rafael La Porta et al., *Trust in Large Organizations*, 87 AM. ECON. REV. 333 (1997).

[131]Samuel P. Huntington, Foreword, Cultures Count, in CULTURE MATTERS: HOW VALUES SHAPE HUMAN PROGRESS xiii (Lawrence E. Harrison & Samuel P. Huntington eds., 2000).

decisions and outcomes.[132] Mariko Klasing identifies individualism and power distance as key determinants for institutional quality in protecting property rights and fostering bureaucratic efficiency.[133]

In a later series of works, La Porta et al. offer, however, a different consolidating theory of the ties between institutions, legal rules, and economic outcomes.[134] Their key explaining factor is one of "legal origins," referring to the ways in which various countries "have developed very different styles of social control of business, and institutions supporting these styles."[135] The English common law system is said to advocate a general hands-off approach, with the German and French civil law styles said to attribute a key role to the state in ordering social and legal relations and in providing top-down solutions to economic challenges.[136] La Porta et al. do not rule out the potential implications of other factors, such as culture, politics, and history. They argue, however, that legal origins are not merely proxies for other factors, and moreover, that legal origins have a more significant impact than cultural features, such as religion, in accounting for differences in societal institutions and economic outcomes.[137] Law, therefore, is viewed as endowed with a transformative role that has broad effect on society's basic institutions. This leads to the following query, whether such an effect might also apply to culture.

C. *Legal Reform and Incremental Cultural Change*

The different studies about culture, law, and economic outcomes should be evaluated for their ability to account for dynamic processes and for the way in which changes in one factor may influence others, and in particular, whether a legal reform might move culture.

Gérard Roland views culture or social norms as a slow-

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[132]Guiso et al., Outcomes, *supra* note 24, at 29–44.

[133]Klasing, *supra* note 166. The correlation is positive for individualism, and negative for power distance.

[134]Rafael La Porta et al., *The Economic Consequences of Legal Origins*, 46 J. ECON. LIT. 285 (2008).

[135]*Id.* at 287–91, 307.

[136]*Id.* at 309–10.

[137]*Id.* at 309–11.

moving institution and political institutions as more rapidly moving, with legal systems located somewhat in-between.[138] Moreover, the pattern of change for culture is continuous, as opposed to potentially discontinuous or even abrupt political changes, with law located again in-between.[139] Cultural changes are thus good candidates for influencing faster-moving institutions.[140]

Other writers have also suggested that culture, and cultural changes over time, explain the development of political, financial, and legal institutions.[141] David Fisher shows how immigration waves to the American colonies, typified by distinctive Christian affiliations and corresponding systems of values, shaped the colonies' early institutions.[142] The impact of immigration waves and their cultural baggage on the economic and legal institutions of a certain territory has been explored in a number of historical contexts.[143]

But can a legal reform affect culture? While this question has received less attention in the literature, writers addressing the issue can be roughly divided into those who are deeply skeptical about such influence, with others advocating the possibility of some change. The former include Licht et al., who, like Dam, suggest that good-governance legal reforms may be "less compatible" for various cultures in the developing world.[144] Similarly, Uriel Procaccia argues that the failure of the 1990s wave of private law reforms in post-Soviet Russia can be attributed to the persistence of

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[138]Gérard Roland, *Understanding Institutional Change: Fast-Moving and Slow-Moving Institutions*, 38 STUD. COMP. INT'L DEV. 109 (2004).

[139]Roland ties the evolution of culture to that of technology, which may occur in parallel. *Id.* at 116–17. For the view that culture is impacted by technological and other historical changes, see Nunn, *supra* note 32.

[140]Roland, *supra* note 138, at 118.

[141]For a survey of these works, see Alesina & Giuiliano, *supra* note 25, at 22–28.

[142]DAVID HACKETT FISHER, ALBION'S SEED: FOUR BRITISH FOLKWAYS IN AMERICA (1960).

[143]*See* Nunn, *supra* note 32, at 116–18.

[144]Licht et al., *supra* note 86, at 682.

centuries-old theological, cultural, and aesthetic features favoring collectivism and authoritarianism.[145]

Other writers have offered a more nuanced approach, showing how profound political or economic changes—e.g., in the context of the unification of Germany or of increasing participation of women in the labor market[146]—can alter cultural values and preferences, so that a simultaneous legal change can be met over time with better cultural reception.

In a more direct analysis of the potential implications of private law design on cultural values and preferences, Guido Tabellini uses a game theory model to argue that well-functioning legal institutions that externally enforce commitments among distant parties can breed good values, such as generalized morality. In contrast, informal enforcement sustained by ongoing close relations may foster limited morality at the expense of broader cooperative values.[147] Accordingly, societies initially typified by generalized morality will perform better in both legal enforcement and economic cooperation, and vice versa. This leads, however, to the problem of path dependency, in which societies with initial limited morality may place less value on attempts at better law enforcement, with this in turn adversely affecting the potential for lowering the costs of general moral behavior and disseminating good values. This problem can be somewhat alleviated by institutional reforms aimed at guiding economic activity and legal rules toward impersonal markets.[148]

What lessons can be drawn from current research about the prospects of a private law reform in facilitating ideal types of collective action by trying to affect cultural change? While a rapid wholesale transition across all cultural dimensions seems unlikely, and may often be also undesirable

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[145]*See* URIEL PROCACCIA, RUSSIAN CULTURE, PROPERTY RIGHTS, AND THE MARKET ECONOMY (2007).

[146]*See, respectively*, Alberto Alesina & Nicola Fuchs-Schüdeln, *Goodbye Lenin (or Not)? The Effect of Communism on People*, 97 AM. ECON. REV. 1507 (2007); Samuel Bowles, *Endogenous Preferences: The Cultural Consequences of Markets and Other Economic Institutions*, 26 J. ECON. LIT. 75, 75–77, 102–05 (1998).

[147]Guido Tabellini, *The Scope of Cooperation: Values and Incentives*, 123 Q. J. ECON. 905, 908 (2008).

[148]*Id.* at 926–31.

from the lawmakers' perspectives, certain cultural traits may be both particularly relevant to a certain type of collective action and also more prone to respond to legal or institutional design. Thus, while cultural attributes, such as religion or ethnicity, and sets of values and beliefs inherently tied to them may be immutable or very slowly changing,[149] other cultural attributes may prove to be more dynamic, responsive to lawmaking, and more broadly, entailing individual and collective choice.

Accordingly, it may make sense to think about a potential *incremental* shift in cultural traits that may not be equally present across all realms of human conduct. Certain types of collective action, as designed by private law mechanisms, may seek to identify some particular aspects of individualism/collectivism, power distance, or social capital. They may potentially build on certain preexisting cultural features, while trying to create legal and institutional mechanisms to affect the choices and dynamics in regard to other traits. This notion can be conceptualized as the "least drastic change" to a particular cultural dimension that would nevertheless make attainable the envisioned collective action.

As shown above, the idea of incremental cultural change taking place over a relatively limited time, and in response to an institutional or legal change, has some pedigree. More broadly, the idea of cultural mobility as negating an all-or-nothing approach, at least for some cultural traits or dimensions, has been increasingly voiced in the literature. In his introduction to *Cultural Mobility: A Manifesto*, Stephen Greenblatt argues against the alleged axioms of the "fixity and coherence" of culture or the attempts to build one grand narrative in this respect, advocating rather a much more contingent approach to culture.[150]

This might be particularly so in societies that exhibit less cultural uniformity than originally conceived, with such potential complexity also affecting the prospect of incremental changes. Robert Weller argues, for example, that China's

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[149]Guiso et al., Outcomes, *supra* note 24, at 24.

[150]Stephen Greenblatt, Cultural Mobility: An Introduction, in CULTURAL MOBILITY: A MANIFESTO 1–5, 16–17 (Stephen Greenblatt et al. eds., 2009).

cultural legacy is "complex and multiple," containing "elements of centralized state control and elements of market freedom," which in turn accounts for dynamism over the past few decades in cultural dimensions, such as individualism/collectivism or trust and social capital.[151]

While such statements about cultural mobility may not be equally valid across the board, the literature survey offered hitherto not only supports the proposition that some cultural dimensions may be more dynamic than others, but moreover, that some interpersonal contexts may serve as microcosms or "enclaves" in which the process of cultural change may operate somewhat differently than on a society-wide level. I suggest that this could very well be the case with collective-action organizations, such as business corporations, private-sector labor unions, and homeowner associations.

Discussing the role of culture in organizations, Hofstede identifies the ways in which certain cultural dimensions, and in particular individualism/collectivism, power distance, and uncertainty avoidance, stand at the basis of such collective-action entities and explain the actual modes of operation of these entities' governance systems.[152] This is so with respect to both the *vertical* aspects dealing with work structuring, promotion system, or the role of leadership and potential empowerment of employees, and the *horizontal* aspects such as corporate governance among shareholders. Solutions to organizational and managerial problems are culture-based, and organizations must constantly respond to changing conditions and challenges, while relying on such cultural mechanisms. Moreover, organizations are typified by a specific *organizational culture*, meaning that within a national culture, different organizations may have distinctive "collective mental programming," featuring various cultural dimensions, such as "process oriented versus results

[151]Robert P. Weller, Market Development, Political Change, and Chinese Cultures, in DEVELOPING CULTURES: ESSAYS ON CULTURAL CHANGE 215, 218 (Lawrence E. Harrison & Jerome Kagan eds., 2006).

[152]HOFSTEDE, *supra* note 26, at 373–91.

oriented," "loose control versus tight control," or "normative versus pragmatic."[153]

The multiple cultural aspects of collective-action organizations may also attest to their potential dynamism in addressing constant challenges. These collective organizations inherently feature aspects of individualism/collectivism, power distance, and social capital—ones that constantly respond to internal and external changing circumstances. These features also implicate the ways in which a legal design of such organizations may create some sort of a "controlled environment," which need not perfectly abide by general cultural norms that typify entirely decentralized exchange contracts in the market. Put differently, such intermediate level organizations may offer intriguing insights about the ways in which a private law reform may seek to promote new forms of collective action, while accounting for the potential implications of certain cultural dimensions.

Moreover, collective-action organizations, unlike natural persons, are by definition instrumental. They are established and validated by law to promote certain types of action, and their functionality determines their underlying justification. Lawmakers should therefore play a dominant role in trying to actively design the "collective programming" of such types of organizations, and reprogram them when they conclude that such organizations are dysfunctional or that their underlying goals should change. This also means that in designing such organizations, even if merely as default rules, the envisioned collective action should consciously refer to the dynamism of cultural dimensions, such as individualism/collectivism, power distance, and social capital. The next part studies this challenge in the context of common interest developments.

IV. Common Interest Developments (CIDs), Law, and Cultural Shifts

This part illustrates the possible ties between private law reform, organizational structure, and cultural change through a concise analysis of the internal governance of common interest developments (CIDs). The term refers to various types of shared-interest residential developments, such as condominiums, planned developments, stock cooperatives

[153] *Id*. at 319–405.

(co-ops), and community apartment projects.[154] Not all forms exist in all countries, and the organizational and legal structure of each type of CID, as well as the terminology used, somewhat diverge among different legal systems. The analysis in Section A relies, however, on more generic features of CIDs and their key governance bodies—the homeowner association (HOA) and the board[155]—to describe CIDs' general goals and functions, and the motives for legal reforms enabling establishment of CIDs. Section B then returns to the case of China, presented in the Introduction. It illustrates the various ways in which the private law reform dealing with condominiums and their self-governance through HOAs has fared so far, and whether the legal reform can be said to have sparked a change in cultural dimensions that affect the HOA's collective action.

A. *The Self-Governance Challenge of CIDs*

The most prevalent form of CIDs across the world is the condominium, which consists of an "undivided interest in common in a portion of real property with a separate interest in [a] space called a unit."[156] The basic legal structure is one by which the housing units are individually owned, whereas the hallways, staircases, elevators, etc. of the structure (or complex of structures) alongside exterior spaces and amenities such as yards, lawns, inner streets, or sports facilities are commonly owned by the group of unit owners.[157] The condominium legal design typically (but not necessarily)

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[154]The specific terminology employed here refers to California's amended Davis-Stirling Act, which went into force in 2014. For a definition of these various forms in California's Civil Code, see the amended version of the Davis-Stirling Act, codified in West's Ann. Cal. Civ. Code § 4100 et seq.

[155]The HOA is usually a member-based nonprofit corporation or unincorporated association. *Id*. at § 4080. The board of directors is an executive body elected by the HOA members. CID-enabling statutes generally delineate the allocation of powers between these two bodies in making decisions and managing the CID. *See* JESSE DUKEMINIER ET AL., PROPERTY 937–40 (8th ed. 2014).

[156]West's Ann. Cal. Civ. Code, § 4125.

[157]*See* Cornelius van der Merwe, Introduction and Content, in EUROPEAN CONDOMINIUM LAW 1, 5 (Cornelius van der Merwe ed., 2015).

applies to apartment buildings, with detached housing projects usually organized as a "planned unit development."[158]

As a historical matter, 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, but the major push toward comprehensive legislation came in the aftermath of the world wars, which caused an acute housing shortage alongside growing popular demand for homeownership.[159] 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.[160] Condominiums were introduced in the United States only during the later 1950s and early 1960s but have since been burgeoning rapidly.[161] Transitional economies have more recently seen the need for the legal design of condominiums mostly in their urban cores,[162] as demonstrated in the case of China or that of Russia.

What are the kinds of collective action challenges that neighbors typically face in residential developments, and how are CIDs and condominiums in particular engineered to address them? Such challenges may be roughly divided into

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[158]This is at least the case in the United States. Stephen E. Barton & Carol J. Silverman, History and Structure of the Common Interest Community, in COMMON INTEREST COMMUNITIES: PRIVATE GOVERNMENTS AND THE PUBLIC INTEREST 3, 4 (Stephen E. Barton & Carol J. Silverman eds., 1994).

[159]Van der Merwe, *supra* note 157, at 22–23.

[160]Carol S. Rabenhorst & Sonia I. Ignatova, Condominium Housing and Mortgage Lending in Emerging Markets—Constraints and Opportunities 9–10 (Urban Institute Center on International Development and Governance Working Paper No. 2009–04 (2009)), available at: www.urban.org/publications/411921.html.

[161]*See, e.g.*, EVAN MCKENZIE, PRIVATOPIA: HOMEOWNER ASSOCIATION AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT (1994); Uriel Reichman, *Residential Private Governments: An Introductory Survey*, 43 U. CHI. L. REV. 253 (1976); Michael H. Schill et al., *The Condominium versus Cooperative Puzzle: An Empirical Analysis of Housing in New York City*, 36 J. LEGAL STUD. 275, 277–80 (2007).

[162]Rabenhorst & Ignatova, *supra* note 160, at 2; UNITED NATIONS, ECONOMIC COMMISSION FOR EUROPE, GUIDELINES ON CONDOMINIUM OWNERSHIP OF HOUSING FOR COUNTRIES IN TRANSITION (2003).

the (1) establishment and management of common amenities, such as inner streets or recreational spaces, and (2) control of intra-neighborhood externalities resulting from the use of the housing units.[163]

As for commonly-owned assets, the collective action challenge consists of two phases. First is the efficient creation of amenities. For some assets, such as inner streets, which may possess the economic traits of public goods—non-excludability and non-rivalry—the existence of reciprocal legal duties of contribution seeks to solve the inherent market failure that usually necessitates governmental production and financing through imposition of taxes.[164] For "club goods," such as sports facilities, which can be usually provided by the market in ordinary residential settings, the internal group provision of such amenities is a significant cost-cutting device for CID members.[165] The second phase concerns the ongoing maintenance, protection, and improvement of these assets. The authority of the HOA and the board to establish rules of use, alongside the imposition of respective duties on unit owners, serves to guard against underinvestment and overuse.[166]

Beyond the governance of commonly-owned assets, CIDs in some legal systems, as is the case in the United States, may also be authorized to govern several aspects of the physical appearance and use of the 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. Such rules of governance may include aesthetic controls of the external shape and design of the housing units; restrictions on the possession of pets; rules on outside storage of personal items; or other limits on activities not prohibited by

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[163]For a fuller analysis of these realms of collective action, see LEE ANNE FENNELL: THE UNBOUNDED HOME: PROPERTY VALUES BEYOND PROPERTY LINES 67–95 (2009).

[164]Non-excludability means that there is no feasible way to prevent people from enjoying the good even if they refuse to pay for it. Non-rivalry means that the marginal cost of an additional consumer is zero or close to it. *See* RICHARD CORNES & TODD SANDLER, THE THEORY OF EXTERNALITIES, PUBLIC GOODS, AND CLUB GOODS 8–10 (2d ed. 1996).

[165]*Id*. at 347–56.

[166]FENNELL, *supra* note 163, at 45–64.

public regulation. This type of governance is often seen as more controversial in disciplining CID members.[167]

How does one measure the success of CIDs and legal design of internal governance? The first stage in doing so requires an explicit consideration of the values and normative goals that stand at the basis of the legal reform that introduced the legal institution of CIDs. As the following paragraphs show, such features would typically involve the degree of subjective preference-satisfaction among CID residents. But these features may also include other, top-down normative benchmarks, dealing with issues such as social inclusion or the self-standing value of broad participation in collective decision-making.

Then, the question of relevant cultural dimensions must be considered in evaluating the implementation of the legal reform. For this purpose, one needs to identify the potential congruence, or rather friction, between the details of the legal design of CID governance and cultural attributes, such as individualism/collectivism, power distance, or social capital. Thus, one may seek to examine the type of tradeoff between individual pursuits of wealth maximization (or other types of preference-satisfaction) and group discipline as envisioned by the CID legal regime—manifested, for example, in the specific details of its majority voting rule requirements—and the cultural dimension of individualism/collectivism.

Consider, first, how residents may evaluate the efficacy of the CID's legal institution. One way to do so is to study the actual response of CID members to the operation of its governing 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.[168]

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 estab-

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[167] ROBERT C. ELLICKSON ET AL., LAND USE CONTROLS: CASES AND MATERIALS 621–39 (4th ed. 2013).

[168] *See, e.g.*, Foundation for Community Association Research, Verdict: Americans Grade their Associations, Board Members, and Community Managers (2014), at: http://www.caionline.org/2014survey.

lish a positive market premium for units located in CIDs, without identifying specific benefitting features of CIDs.[169] 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.[170] Rogers further suggests that whereas use restrictions in CIDs have a generally positive impact on property values, no such impact can be identified for architectural restrictions.[171]

Other writers have been more skeptical 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 organizational structure of the CID, and that architectural restrictions actually hinder sale prices.[172] Yet others question the efficiency of HOAs, arguing that self-governance bodies may produce and charge too much, whereas professional management could reduce this tendency.[173]

Some research goes further to argue, mostly in the context of gated CIDs, that a 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,

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[169]*See, e.g.*, Amanda Agan & Alexander Tabarrok, *What Are Private Governments Worth?* REGULATION (Fall 2005) 14 (finding a 5–6 percent premium for CID units in Northern Virginia).

[170]William H. Rogers, *A Market for Institutions: Assessing the Impact of Restrictive Covenants on Housing*, 82 LAND ECON. 500 (2006) (hereinafter: "Rogers, 2006"); William H. Rogers, *The Housing Price Impacts of Covenant Restrictions and Other Subdivision Characteristics*, 40 J. REAL ESTATE FINAN. ECON. 403 (2010) (hereinafter: "Rogers, 2010").

[171]Rogers, 2006, *supra* note 170, at 509–11; Rogers, 2010, *supra* note 170, at 218–220.

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

[173]Laura Langbein & Kim Spotswood-Bright, *Efficiency, Accountability, and Private Government: The Impact of Residential Community Associations on Residential Property Values*, 85 SOC. SCI. Q. 640 (2004).

meaning that CIDs may simply benefit from a 'snob value' by providing means of socioeconomic segregation.[174]

The latter argument is tied to a broader criticism of CIDs, pointing to various explicit and implicit exclusionary practices employed by CIDs,[175] and juxtaposing the success of CIDs with the decline of urban neighborhoods and the public sphere.[176] While this aspect is not explored further here, it is significant in evaluating the normative foundations of CIDs, and condominiums in particular, and the overall implications that their legal validation would have on other forms of collective action in the housing context.

Accordingly, in evaluating the performance of condominium governance in a certain society or parts thereof, one should pay attention to other normative principles that may typify a certain legal system, and should thus be included in its overall evaluation. For example, is the success of condominium governance measured primarily by maximizing 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 legal reform, and evaluated as such by homeowners? Are HOAs expected to minimize dependence on the provision of public services? Which types of exclusion in CIDs are considered normatively wrong?

These considerations may obviously go beyond the subjective preferences of residents, but to the extent that these features form a part of the normative design of such ideal types of collective action, these must be taken into account in evaluating the legal reform.

This broad vision of the normative enterprise of establishing CIDs to enable collective action among neighbors in multiunit developments also reflects on the role of cultural

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[174]Renaud Le Goix & Elena Vesselinov, *Gated Communities and House Prices: Suburban Change in Southern California, 1980–2008*, 37 INT'L J. URB & REGIONAL RES. 2129, 2144–46 (2013).

[175]*See, e.g.*, Constance Rosenblum, Co-ops Chill, Condos Don't, N.Y. TIMES, Jan. 26, 2014, at RE1 (describing current trends in the selection processes of HOAs in condominiums and co-ops in New York).

[176]*See* Paula A. Franzese, *Privatization and its Discontents: Common Interest Communities and the Rise of the Government for "The Nice,"* 37 Urb. Law. 335 (2005).

dimensions and the ability of the legal reform to affect incremental shifts in interpersonal dealings, at least within this organizational setting, when there is potential incongruence.

Thus, for example, the legal design of CIDs in a certain legal system in a hitherto collectivist society may seek to encourage unit owners to invest personal effort and financial resources in their apartments, while contributing their share to the upkeep of the common amenities. Such a reform would not only underscore the normative legitimization of the pursuit of individual interest and wealth maximization, but should also work to make clear to CID members the essentiality of individual responsibility, at least in the organizational context of the CID. Accordingly, the notion of group discipline that is inherent to some extent in a CID may need to be contextualized and differentiated from preexisting concepts of collectivism.

Consider, for example, a CID rule requiring a 51 percent majority vote for a certain type of decision concerning the common amenities (e.g., a change in the operational rules of a common sports facility) versus another rule requiring a 90 percent supermajority rule in order to prohibit the possession of pets or the renting-out of units in the CID. Such differentiation may make little sense in a highly collectivist society. But it may make sense—even if requiring an incremental cultural adjustment—in a calculated collective action model, which seeks to balance a need for aggregate efficacy with the preservation of core concepts of autonomy.

Similar dynamics would hold true for the potential implications of the legal design of CIDs on cultural concepts of power distance or hierarchy. This would be especially intriguing in view of the fact that organizations for collective action, such as CIDs, are based both on horizontal interpersonal relations and some notion of vertical governance.

In fact, prevailing cultural concepts of hierarchy may not be entirely antonymous to effective governance, especially in societies that have not yet established a stable bureaucratic structure for such organizations. Personal leadership, and respect by CID residents to self-emerging leaders within the organization who take up formal positions, may actually aid in establishing collective action, provided that there are accountability mechanisms intact. The potential cultural

adjustment, which requires CID residents to both absorb the concept of private horizontal collective action and also avoid excessive manifestations of apathy, shirking, or free-riding, may actually be streamlined by the harnessing of some modified version of respect for leadership within the organization.

Thus, for example, empirical evidence from Russian condominiums shows that the personal traits of the chairperson of an HOA, and in particular the sense of respect for her or his leadership by other condominium residents, may play an important role in mitigating some of the ill-effects of malfunctioning collective action, such as free riding.[177] To the extent that the actions of such leaders are transparent enough through reporting rules and practices, the legal reform of establishing condominium HOAs may benefit from such preexisting cultural traits, while trying to affect change in others.[178]

Finally, the degree of social capital, and the question of trust among neighbors in particular, may also prove to be a key component in the successful implementation of a CID legal reform. The legal design should thus find ways to encourage and safeguard the development of trust, especially in a society traditionally typified by suspicion to persons outside the closest circles of family and friends. Legal mechanisms of accountability and transparency may play a crucial role in this context. To the extent, for example, that the quorum requirement in general meetings may actually seek to refrain from excessive, unrealistic thresholds to avoid stagnation of collective action, straightforward reporting requirements for decisions may aid in the gradual building of trust among CID residents. This "enclave" of collective action may allow for an incremental growth of social capital.

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[177] *See* Rosa Vihavainen, Common and Dividing Things in Homeowners' Associations, in POLITICAL THEORY AND COMMUNITY BUILDING IN POST-SOVIET RUSSIA 139, 140–48 (Oleg Kharkhordin & Risto Alapuro eds., 2011).

[178] The latter challenge manifests itself, for example, in the need to promote a deep sense of individual responsibility among residents. Thus, 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. *See* Housing and Communal Reform Fund, report dated July 29, 2014, at: http://fondgkh.ru/data/2014/07/29/1234445483/&VCY;&TSCY;&ICY;&OCY;&MCY;.pdf (in Russian).

Once again, evidence from Russia attests to the ways in which leaders of HOAs have been able to engage in incremental steps of building some level of social capital among neighbors, despite the major challenges that typify the operation of such organizations.[179] Such steps may include the construction of communication networks, such as a website or TV channel, or the creation of joint symbols, such as designing a flag for the HOA.[180] While far from a full-fledged cultural transition, these incremental steps are no small feat.

These findings show, therefore, that the details of the legal design matter. The formal rules set for self-governance by the HOA should ideally serve as an effective starting point for collective action, allowing homeowners to make cultural adjustments over time.

B. *Back to China: Do Homeowner Associations Spark a Cultural Change?*

It is time to reconsider China's reforms presented briefly in the Introduction. While the commodification of land and legal design of condominiums are still very much a work in progress, some empirical studies already provide intriguing insights about the challenges of collective action. These findings also attest to the ways in which economic and legal reforms may have shifted cultural features—such as individualism, power distance, and social capital—with a particular bearing on internal governance across condominiums.

Prior to studying the practical modes of decentralized collective action following the reform, and the possible incremental cultural changes that these practices may entrench, it is essential to reconsider and somewhat expound on the formal details of the legal reform.

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[179] *See* Ekaterina Borisova, Leonid Polishchuk, and Anatoly Peresetsky, *Collective Management of Residential Housing in Russia: The Importance of Being Social*, 42 J. COMP. ECON. 609, 617–20 (2014) (identifying 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).

[180] Oleg Kharkhordin, Conclusion: Commonality at Different Levels — Infrastructures of Liberty, in POLITICAL THEORY AND COMMUNITY BUILDING IN POST-SOVIET RUSSIA 208, 210–11 (Oleg Kharkhordin & Risto Alapuro eds., 2011); Vihavainen, Common, *supra* note 177, at 151–53.

As mentioned in the Introduction, the main piece of national legislation dealing with condominium governance is the 2007 Property Law.[181] Devoting only fourteen articles to condominiums, the law sets out general principles, by which all registered purchasers of units automatically become members of the management body—functioning through a general meeting and an elected executive board—and decision-making is based on majority rule.[182] At the same time, as Mark Kielsgard and Lei Chen show, the national legislation is lacking and inadequate in many aspects, with such defects liable to reinforce judicial inefficiency, local government conflicting interests, and developer corruption.[183]

Thus, for example, national legislation allows owners to replace a management company that was initially appointed by the developer. But there is no uniform obligation on developers to organize the first meeting of homeowners as soon as possible, with such deficiency granting developers leverage in trying to prevent the establishment of an HOA, or to otherwise tie future associations to affiliated management contractors.[184] The setting up of the timeline for convening the first meeting of the homeowners, and the remedies that facilitate replacement of management firms, are left to local regulation.[185]

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 collective action and 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 privatization reforms, many of them were reluctant to give up control over powers they had. Thus, even after privatization of property, municipalities sought to maintain control over common amenities in the condominiums and charge management fees. When private owners eventually gained control over these elements, local governments continued in trying to retain control over the service

[181] *See supra* note 4.

[182] *See id*, §§ 70–83.

[183] Kielsgard & Chen, *supra* note 4, at 108–110, 114.

[184] *Id.* at 115–16.

[185] *Id.* at 118.

personnel of management companies. Moreover, the interests of local governments may be aligned with those of developers against the interest of homeowners that seek self-governance.[186]

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 fifty 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.[187]

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.[188] In this respect too, the legal reform on the national and local levels develops gradually, but still suffers from deficits that may affect 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

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[186]*See* Benjamin L. Read, Property Rights and Homeowner Activism in New Neighborhoods, in PRIVATIZING CHINA: SOCIALISM FROM AFAR 41, 45 (Li Zhang & Aihwa Ong eds., 2008).

[187]Kielsgard & Chen, *supra* note 4, at 121–23.

[188]*Id.* at 118–26.

"right to democratic governance."[189] 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."[190] Both approaches recognize, however, that the initial challenge for homeowners within a particular condominium to organize, 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.[191]

In fact, to understand both the initial motives for collective action and the practical forms it is taking following the condominium legal reform, it is essential to differentiate between two distinct phases and respective sets of challenges for homeowners. First is securing the ability of homeowners to exercise self-governance by setting up an HOA, often against an unwilling coalition of developers, affiliated managerial companies, and local governments, wishing to maintain control and enjoy rents in the development.[192] Second is establishing collective action mechanisms for ongoing internal governance.

Specifically, the first stage has often proven to provide a "spark" for bottom-up collective action. It is motivated by a growing sense among homeowners, as individuals and as a group, that their material individual interests are ill-served by the lack of self-governance. Owners resist traditional forms of control that relied on externally-generated power distance in the guise of "social harmony." They also develop social capital through informal mechanisms of protest, communication, and participatory decision-making.[193]

On the one hand, such incremental shifts in bottom-up modes of conduct would not have been possible without the

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[189]Kielsgard & Chen, *supra* note 4, at 105–110.

[190]*See* Read, *supra* note 186, at 42.

[191]Chen & Kielsgard, *supra* note 6, at 16.

[192]*See supra* note 186 and accompanying text.

[193]*See, e.g.*, Kevin Lo, *Approaching Neighborhood Democracy from a Longitudinal Perspective: An Eighteen-Year Case Study of a Homeowner Association in Beijing*, 2013 URB. STUD. RES. 1, 3–4 (2013).

legal reform, promoted by the central government, which formally introduced private legal interests in the condominium and the general structure of HOAs. On the other hand, there are still major gaps in implementing the law, because of lacking statutory provisions and hostile practices by developers and some localities, thereby crystallizing the essentiality of HOAs to promote the homeowners' interests.

Also, while the condominium setting is a new terrain for individual homeowners, some of the social and cultural infrastructure for engaging in this type of grassroots collective action for actualizing the right to self-governance has been derived from previous forms of protest and activism, which are related in turn to earlier legal reforms. Such was the case with consumer activism against fraud and other forms of abuse, with individuals and groups increasingly taking their legal battles to courts. The emergence of a large middle class, as a result of previous reforms by central government, played a central role in changing actual patterns of both personal values and interpersonal collaboration.[194] The Chinese term *weiquan* has come to identify popular action aimed at upholding individual rights that were formally granted, but not properly implemented.[195]

These dynamics help to explain the incremental cultural shift that may follow a series of legal reforms, with cultural dimensions of individualism, power distance, and social capital being gradually influenced by both the formal and educative-symbolic power of reforms. As Benjamin Read notes, the emergence of private housing, especially in newly-built neighborhoods, made a difference in the sense that private owners had a compelling new interest to found grassroots organizations and spur group action. Obviously, such forms of collective action do not follow a single pattern. They rely often on the agency of individual activists and their ability to motivate others to action, intergroup dynamics, and many instances of trial and error in choosing strategies for action. Not all case studies surveyed by Read ended up in success, with frictions among homeowners often hampering effective grassroots organization, and dependence on individual leaders making the collective action particu-

[194]Kielsgard & Chen, *supra* note 4, at 113–14.

[195]Read, *supra* note 190, at 42.

larly sensitive. At the same time, in many of these case studies, residents were able to force the setting up of HOAs and replace managerial companies affiliated with the developer, with strategies of protest utilized to encourage broad participation, "big meetings," and effective communication.[196] These tactics also proved to be effective in gaining greater support for HOAs among courts.[197]

A recent study by Feng Wang et al. offers a detailed analysis of actual patterns of bottom-up governance in HOAs in Beijing.[198] The two HOA governance bodies established by central government regulations in 2003 were the General Membership—comprised of all homeowners and in charge of enacting/modifying the HOA governing documents, electing executives, and selecting professional management companies—and the HOA Committee, the executive unit. However, ambiguity in the regulations, as well as high quorum and majority requirements, wakened these bodies' capacity to act.[199]

As a result, numerous HOAs in Beijing decided to create two additional types of bottom-up structures to mobilize and institutionalize 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 and formalizing participation. Local leadership, accountability, and social capital thus prove essential for success.[200]

This current data on China, while still in the making, of-

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[196]*Id.* at 53–56.

[197]Kielsgard & Chen, *supra* note 4, at 111–12.

[198]Wang et al., *supra* note 8.

[199]*Id.* at 562–63.

[200]*Id.* at 563–64. *See also* Feng Wang, *Determinants of the Effectiveness of Chinese Homeowner Associations in Solving Neighborhood Issues*, 50 URB. AFF. REV. 311, 331–33 (2014) (arguing that HOA officeholders'

fers three key lessons for the study of legal reforms and their effect on cultural dimensions affecting collective action.

First, the findings attest to the ways in which intra-organizational dynamics are built on a complex series of incremental shifts that may be motivated by a legal reform, with grassroots reception of such a reform often responding to material and social-ideological "sparks" for collective action, which can be then materialized within a defined group. It seems safe to say that the privatization 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 current 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 organizational 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. Accordingly, the grassroots appointment of "captains" and a "representative assembly" point to the recognition among residents of the essentiality of local leadership within the organization to promote the group's interest. This also attests to the potential gaps that may exist between the formal organizational 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 neighborhood-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

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leadership style, which seeks to promote grassroots participation, aids in resolving problems that many HOAs may have with management companies, such as about adequate provision of services).

remarkable in a city such as Beijing, which may have as many as 1,000 units per HOA.[201]

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 redelineation of the role of the individual within such an organization. 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.[202]

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,[203] others are troubled by internal strife and

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[201]Wang et al., *supra* note 8, at 574 (comparing it with data on the United States, indicating an average of 150 housing units per HOA).

[202]Kielsgard & Chen, *supra* note 4, at 123–25.

[203]*See, e.g.*, Lo, *supra* note 193, at 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).

decline in collective action.[204] It may still take time for HOA self-governance to firmly take root in Chinese culture.[205] This state of affairs calls into question the lingering effects of the legal reform on interpersonal interaction within the HOA's organizational context. Should homeowners in China seek to reorient, without entirely undermining, longstanding ideas of social harmony, group discipline, and stability to facilitate self-governance of condominiums? Or are they rather expected to accentuate individual interests and market incentives to ensure efficiency? Would forms of hierarchy and authority within the HOA remain accountable and transparent to residents, or might we expect a return to old-style forms of centralism as the only way out of a collapse of collective action? Can we expect residents in China's condominiums to comprehensively extend notions of trust and social capital, beyond preexisting networks, to persons within the condominium? Time will tell how these cultural processes unfold in the aftermath of the legal reform.

IV. Conclusion

This Article offers a new theoretical and analytical framework for unveiling the intricate relations between private law, organizational structure, and cultural change. It shows how the development of private law involves complex normative and functional considerations, ones that identify the unique role of lawmakers in envisioning ideal types of collective action and designing the legal regime that will facilitate them, while also granting private parties substantial leeway to tailor their interpersonal legal relations.

At the same time, private law reforms are prone to failure if they do not consider the particular ways in which the envisioned types of collective action correspond to, or rather challenge, preexisting cultural orientations, values, and beliefs among those expected to engage in such collective action. This insight necessitates a nuanced understanding of the specific design principles of the legal reform, the cultural dimensions that are particularly relevant to such types of collective action, and the ways in which various kinds of

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[204] *See, e.g.*, Read 49–50 (reporting such instances that may lead the state of HOAs to a stalemate).

[205] Wang et al., *supra* note 8, at 578 (acknowledging the challenge of maintaining bottom-up governance).

institutions and organizations may mediate between legal reform and cultural change.

The analysis underscores the key role that multimember organizations for collective action, such as corporations or CIDs, may play as "islands" of internal governance in the "ocean" of decentralized collective action,[206] and how such environments may facilitate incremental changes in cultural dimensions such as individualism, power distance, and social capital. The study of condominiums in China provides intriguing insights into the potential, but also the obstacles, for such cultural shifts in the aftermath of legal reform.

A comparative analysis of Chinese condominium law reforms with that of the United States on the one hand, and Russia on the other—a broader task I take on elsewhere[207]—may further attest to the contextual features of such legal-cultural dynamic processes. Accordingly, there is no single blueprint for facilitating collective action within private law. The crux of the matter lies in the interrelations between what a specific private law reform identifies as an ideal type of collective action—the implementation of which would amount to a normative success—and the ability of interpersonal organizations designed to carry out such collective action to utilize, or rather shift, preexisting cultural dimensions.

The lessons learned here may also serve to reorient other pertinent legal issues. Understanding the dynamics between private law and cultural change may prove to be essential not only for national legal systems, but also for current and future attempts at designing supranational private law norms and institutions. Obviously, the challenge of coordinating cross-border legal reforms, collective action, and cultural shifts may prove to be much more daunting, but one that cannot be ignored as a matter of both theory and practice. Confronting this challenge is a job that will have to be left for another day.

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[206]To paraphrase Ronald Coase's view of firms within markets as "islands of conscious power in this ocean of unconscious co-operation." Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 388 (1937).

[207]Amnon Lehavi, *Law, Collective Action and Culture: Condominium Governance in Comparative Perspective*, 23(2) ASIA PACIFIC L. REV. 5 (2015).