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# Defining the Authoritarian Commons

The extant literature on the liberal commons takes as granted secure property rights, freedom of association, and the rule of law, all of which have been the exception rather than the rule throughout human history<sup>1</sup> and therefore fails to explore the origin of the liberal commons (from an illiberal regime). Authoritarianism poses a fundamental challenge to, but also an opportunity to explore the origin of, the liberal commons. This chapter defines the authoritarian commons<sup>2</sup> by examining the tension between authoritarianism and the liberal commons – both theoretically and in the specific context of neighborhood governance in urban China.

## 1.1 From Liberal Commons to Authoritarian Commons

More than two decades ago, Hanoch Dagan and Michael Heller coined the term “liberal commons,” which they envisioned as comprising three spheres: the sphere of individual dominion, the sphere of democratic self-governance, and the sphere of cooperation-enhancing exit.<sup>3</sup> In this liberal commons, the law “can help generate social expectations supportive of trust and cooperation” but only if it operates as a set of background norms and as a safety net.<sup>4</sup> Condominium associations, as Dagan and Heller acknowledged, constitute a typical example of the liberal commons, encompassing condominium owners’ ownership of their individual units, that is, the sphere of individual dominion; their right to make decisions concerning matters beyond the walls of their own apartments but within the building and the surrounding neighborhood, over which they exercise common ownership, that is, the sphere of democratic self-governance; and, of course, their right to exit by selling their units, that is, the sphere of cooperation-enhancing exit.

Dagan and Heller did not investigate the origin of the liberal commons, probably because they assumed the freedom of association and right to vote typical of liberal democracies.<sup>5</sup> Similarly, although several generations of property scholars have written about homeowners and their covenants and communities, they have taken such covenants and communities as given, paying no attention to their origin. The extant literature on homeowners’ associations

(HoAs) focuses on conflicts between homeowner autonomy and legal intervention.<sup>6</sup> It is usually only when homeowner self-governance generates negative externalities that legal intervention is justified.<sup>7</sup>

We cannot, however, take the liberal commons as given. Authoritarianism describes a system in which “all decisions can potentially be made by a single decision-maker, whose decisions are both formally and practically unregulated by law.”<sup>8</sup> In line with this definition, the challenge of authoritarianism is threefold. First, it poses a challenge to secure property rights. Authoritarian regimes are known for their exploitative and extractive nature,<sup>9</sup> and the idea that they would protect property rights has been described as something of a cruel joke.<sup>10</sup> Second, authoritarianism poses a challenge to the freedom of association, the decentralized nature of which seems to be inherently incompatible with the centralized, top-down nature of authoritarianism.<sup>11</sup> Third, the unconstrained nature of power under authoritarianism challenges the rule of law. The conventional view is that authoritarian states are lawless.<sup>12</sup> Although the burgeoning literature on authoritarian legality<sup>13</sup> points in a different direction, it fails to explain why and when authoritarian states do or do not obey the law.

Considering the foregoing tripartite challenge, the term “authoritarian commons” sounds like an oxymoron: If the state’s authority prevails over and penetrates the commons, there is no commons to speak of; if democratic self-governance prevails in the commons, there is no authoritarianism. However, with respect to the aforementioned opportunity that authoritarianism presents for our purposes, we can better understand the origin of the liberal commons if we examine its emergence in an authoritarian regime.

There are two traditions in the economic analysis of property rights: one focuses on the choice of different property forms and the other on the political institutions that define property rights. We can call the former tradition “private property law” and the latter “public property law.” The pioneers of the economic analysis of property rights, as represented by Douglass North<sup>14</sup> and Yoram Barzel,<sup>15</sup> had their own theories of the state that paralleled their theories of property rights. In the past two decades, the economic analysis of property law has focused primarily on the choice of different forms of property rights,<sup>16</sup> with insufficient attention paid to the politics of property rights or the development of various contemporary property arrangements.<sup>17</sup> It is no wonder that Katrina Wyman has advocated for a supply-side theory of property rights<sup>18</sup> and that Roderick Hills and David Schleicher have recently proposed an “institutional turn” in property theory.<sup>19</sup> The theoretical ambition of the exploration of the authoritarian commons herein is to accelerate the institutional turn in property theory by returning the state to the economic analysis of property rights.

Study of the authoritarian commons also has profound implications for our understanding of development, to which both the provision of public goods and services and the establishment of a basic point of entry into the political system at the local level are essential.<sup>20</sup> Recent research by prominent scholars

indicates that authoritarian regimes are effective at managing critical junctures in their countries' development.<sup>21</sup> Growth-favoring authoritarian regimes can be even better at promoting economic development than weak democracies.<sup>22</sup> However, these scholars still hold quite a pessimistic view of democratic development in authoritarian regimes, China, in particular, with a number of prominent legal scholars<sup>23</sup> and economists<sup>24</sup> actually predicting the failure of that country's democratic transition. Like the seemingly oxymoronic nature of the term "authoritarian commons," the democratization of a successful authoritarian regime such as China's party-state is on the face of it a self-defeating mission.<sup>25</sup> Understanding the dynamics of the authoritarian commons and the interaction between state and society in such a setting might help us to understand the role of the authoritarian state in political transition.

## 1.2 Residential Neighborhoods as Commons

Condominium ownership in China consists of the individual ownership of units and the joint ownership of the common areas and facilities in condominium complexes,<sup>26</sup> creating hundreds of thousands of urban commons<sup>27</sup> in Chinese cities. To be clear, Chinese residential neighborhoods under the condominium ownership regime are not open-access commons, "in which anyone at all may use a resource and no one may be excluded,"<sup>28</sup> as described in Garrett Hardin's seminal paper "The Tragedy of the Commons."<sup>29</sup> It is clear in such neighborhoods who shares the power to decide and the right to benefit from the use of the resources therein. At the same time, however, similar to Elinor Ostrom's "common pool resources," the resource system is "sufficiently large ... to make it costly to exclude potential beneficiaries from obtaining benefits from use."<sup>30</sup> Using Carol Rose's terms, it is a commons to insiders and private property to outsiders.<sup>31</sup> What happens to such urban commons? Despite the robust literature on the self-organized management of natural resources, scholars have paid insufficient attention to polycentric governance in the urban context.<sup>32</sup>

Common property rights in China's condominium neighborhoods include not only the right to manage common space and facilities but also the right to govern the neighborhood, including owners' rights to establish their own associations, elect their own committees, and manage such common affairs as maintenance funding, changing management companies and fees, and regulating community members' behavior.

More specifically, there are three aspects of residential neighborhood governance. The first concerns control over the common space and facilities in the neighborhood, such as parking space and elevators. A single parking spot in the megacities under study can sell for up to half a million RMB (about US\$62,500).<sup>33</sup> Parking spaces are thus valuable assets and have been subject to contest both in and out of court, particularly in Shenzhen.<sup>34</sup> Local governments have a direct interest in maintaining control over the common space

in neighborhoods, some of it for use for municipal facilities and, in some instances, for the construction of a municipal road running through a neighborhood.<sup>35</sup> The second aspect of control is building regulations. In Chinese cities, most condominium buildings are towers that are pre-built before buyers move in. The major issue here is the so-called illegal construction, including enclosed balconies and rooftop (built by apartment owners on the top floor) or underground (built by apartment owners on the ground floor) structures.<sup>36</sup> The final aspect is behavior regulation, including the regulation of residents' activities within their own apartments and those in the neighborhood's common space. Examples of the former activities include making nonresidential use of residential apartments, ranging from running a children's play/study group for profit to establishing a corporate office to engaging in paid sexual transactions.<sup>37</sup> Examples of the latter are square dancing in common areas, a common cause of noise complaints, and unleashed dogs that can pose a threat to safety, particularly for children.<sup>38</sup>

All three aspects concern not only homeowners' property rights and daily life but also the major functions of local governments and the state's spatial control. They concern how Chinese homeowners live with one another and with the authoritarian state. In this sense, HoAs pertain to both the social contract among homeowners and that between homeowners and the state. It is no wonder that Chinese people sometimes refer to HoAs as the "government in the neighborhood,"<sup>39</sup> and the covenants passed by homeowners as "neighborhood constitutions."<sup>40</sup> Chinese homeowners establish HoAs through majority resolutions, which also create a covenant, decision-making rules, and elect a homeowners' committee ("HoC").<sup>41</sup> In general, each housing unit has one vote.<sup>42</sup>

All legally established HoAs have gone through democratic election procedures, and the validity of such procedures is regularly contested in local courts.<sup>43</sup> Local governments can hinder and slow down such democratic processes,<sup>44</sup> and occasionally manipulate such processes,<sup>45</sup> but they are not able to force homeowners to vote if homeowners do not believe that the elections are genuine. An example of the government's inability to mobilize homeowners to vote and to participate without giving them authentic autonomy is residents' committees (居民委员会, RCs), which are supposed to be elected according to the Chinese Constitution. However, genuine elections and resident participation are rare.<sup>46</sup>

It is this legally sanctioned right to vote and to form associations that makes HoAs the most exciting form of grassroots democracy in China.<sup>47</sup> As one leading homeowner in Beijing said to me, "One person, one vote" is really implemented in only two situations [in China]: villagers' committees and homeowners' associations ..., in rural China, conventional authority and [clan-like] organizations ... are still powerful and might control villages. The best hope to develop a civil society is through homeowners' associations of the urban middle class."<sup>48</sup>

Theorists from Tocqueville to Putnam generally agree that the daily practice of autonomous associations and democratic decision-making is important to developing and maintaining democracy at the national level.<sup>49</sup> Since the 1990s, scholars and policymakers have applauded village elections in rural China, which have actually turned out to be more complicated than originally, and rather rosily, imagined.<sup>50</sup> Needless to say, such grassroots elections are just the beginning of a long-winded process of democratization.<sup>51</sup> Nevertheless, such election practices and self-governance are particularly valuable in an authoritarian regime to nurture the hearts and minds of citizens for a future democracy.<sup>52</sup> As evidence of their value, my questionnaire survey reveals that homeowners who have actively participated in neighborhood self-governance have greater respect for democratic principles and are more likely to comply with a legally passed majority decision even if they were on the losing side of the voting process, than homeowners who have not.<sup>53</sup>