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978-1-107-06682-3 - Resolving Land Disputes in East Asia: Exploring the Limits of Law

Edited by Hualing Fu and John Gillespie

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PART I

Theorizing land disputes in socialist Asia

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Resolving land disputes in East Asia

Exploring the limits of the law

JOHN GILLESPIE AND HUALING FU

Introduction

Land disputes are increasing in East Asia as economic and demographic growth intensifies the demand for farmland and urban spaces. Nowhere is this more evident than in China and Vietnam. Reforms that brought socialist Asia into the globalized economy and returned private property have also sparked intense competition between farmers and residents with outsiders, such as private developers and government agencies. In China and Vietnam, industrial parks, transport infrastructure, and new residential developments are encroaching on farmland, sparking increasingly violent clashes with farmers. China alone experienced more than 500 daily land disputes and protests in 2011,¹ with the Wukan village insurrection, discussed in Chapter 6 in this book, making newspaper headlines around the world.

From a legal perspective, the proliferation of land disputes is puzzling, because it is occurring at the same time as governments in China and Vietnam are clarifying property rights and improving formal dispute resolution institutions, such as the courts. Rather than promoting uniformity, order, and predictability, the authors in this book reveal that law reforms have produced mixed results. Land claims and property rights often conflict, producing unpredictable and multi-layered dispute resolution processes. Highly ambiguous and contested patterns of land access persist in these countries. Consequently, courts and administrative agencies, such as grand mediation, struggle to use property rights to

¹ See Max Fisher, "How China Stays Stable Despite 500 Protests Every Day," *The Atlantic*, January 5, 2012, available at: www.theatlantic.com/international/archive/2012/01/how-china-stays-stable-despite-500-protests-every-day/250940.

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find lasting solutions to land disputes. Far from state legal processes dominating, no single actor or set of regulatory traditions can gain the upper hand in many land cases.

Taiwan and Hong Kong have been added to this study because they furnish valuable comparative insights into how closely related, but significantly wealthier, societies have enlisted the law to resolve land disputes. These regions are connected to China and Vietnam through shared neo-Confucian values and, perhaps more significantly, a common pre-colonial system of land regulation (discussed in Chapters 3, 10, 12, and 14). This system, which was perfected during the Tang Dynasty in China, linked central imperial governance with village control over land. As Chapters 8 and 11 reveal, echoes of this system are found in the customary land systems found in rural China and Vietnam, and, more surprisingly, in highly developed urban spaces in Taipei and Hong Kong (Chapters 13 and 15). These findings connect with other socio-legal studies about advanced industrial countries that show how state land systems are interwoven with informal land systems.²

Authors apply different disciplinary approaches to understand how state agencies and communities imaginatively interact to conceptualize and resolve land disputes. They explore if legislative, judicial, and administrative reforms are capable of resolving land disputes, or if more fundamental reforms are required? This approach contrasts with studies that focus exclusively on either the role of property rights and state institutions or on local communities. Authors search for solutions to land disputes in the dynamic interaction between the relevant actors.

Mapping the causes of land disputes in East Asia

Land disputes and the political economy

Much has been written from a political economy perspective about the origins and nature of land disputes in socialist Asia.³ Although this

² For a discussion about regulatory land communities, see Robert C. Ellickson, “Unpacking the Household: Informal Property Rights around the Hearth,” *Yale Law Journal*, 116 (2006), 226 at 271–276; Amnon Lehavi, “How Property Can Create, Maintain or Destroy Community,” *Theoretical Inquiries into Law*, 10(1) (2008), 43 at 52–65.

³ See, generally, Y. T. Hsing, *The Great Urban Transformation: Politics of Land and Property in China* (Oxford University Press, 2010); George C. S. Lin, *Developing China: Land, Politics and Social Conditions* (London: Routledge, 2009); Peter Ho, *Institutions in Transition: Land Ownership, Property Rights and Social Conflict in China* (Oxford University Press, 2005).

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literature differs in detail, there is a broad consensus about the demographic and economic forces underlying land conflicts in this region. Population⁴ and industrial growth have produced historically unprecedented levels of urbanization, necessitating the continuous conversion of rural land for urban development.

At the time of its founding six decades ago, urbanization in the People's Republic of China (PRC) was little more than 10 percent. By 2011, for the first time in Chinese history, more people lived in urban than rural areas.⁵ In the thirty years since economic reforms began, urbanization has grown from 15 percent to 50 percent, adding an additional 500 million urban dwellers.⁶

The scale of urbanization in China is unprecedented. For example, at the height of US urban renewal projects during the New Deal period in the 1930s, Pittsburgh's Golden Triangle and Lower Hill redevelopments displaced 28,000 residents. The number of displaced people due to construction projects in the PRC is estimated to have reached a staggering 50 million, including 17 million due to the construction of dams.⁷ In 2003 alone, 180,000 Beijing residents were resettled. "This is human upheaval on a scale seen previously only in time of war or extreme natural catastrophe."⁸ Government policies in China are set to shift a further 250 million farmers to cities by 2025.⁹

Vietnam exhibits a similar, although proportionally, smaller urbanization trajectory. In the last twenty years, the urban population has risen from 15 percent to 30 percent, and it is expected to reach 45 percent in the next twenty years.¹⁰ Reflecting higher levels of wealth and economic

⁴ At 0.47 percent per annum, the population growth in China is considerably slower than the 1.04 percent in Vietnam. See United Nations Sources, available at: www.tradingeconomics.com/vietnam/population-growth-annual-percent-wb-data.html.

⁵ See Bloomberg News, "China's Urban Population Exceeds Countryside for First Time," January 17, 2012, available at: www.bloomberg.com/news/2012-01-17/china-urban-population-exceeds-rural.html.

⁶ See United Nations, "World Urbanisation Prospects, the 2012 Revision," Population Database, available at: <http://esa.un.org/unup>, last accessed February 28, 2013.

⁷ Huang Dongdong, *Development, Resettlement and Governance* (Beijing: Law Press, forthcoming).

⁸ Thomas Campanella, *The Concrete Dragon: China's Urban Revolution and What it Means for the World* (New York: Princeton Architectural Press, 2008), p. 166.

⁹ See Ian Johnson, "China's Great Uprooting: Moving 250 Million into Cities," *New York Times*, June 15, 2013, available at: www.nytimes.com/2013/06/16/world/asia/chinas-great-uprooting-moving-250-million-into-cities.html?pagewanted=all&r=0.

¹⁰ See United Nations, "World Urbanisation Prospects, the 2012 Revision."

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development, the urbanization rate in Taiwan is 75 percent.¹¹ As a city-state, Hong Kong has for more than a century maintained high urbanization levels.¹²

The patterns of land disputes between China and Vietnam share similarities and significant differences. In both countries, farmers fight with each other for scarce farmland. Despite the process of urbanization in both countries, land disputes in rural areas among farmers remain a serious issue, although the patterns of dispute may fluctuate according to the employment of the migrants in the cities. China and Vietnam are also experiencing large-scale conversion of rural land to urban and industrial use – leading to clashes between farmers and developers. To gauge the scale of land acquisition, between 1995 and 2005, Chinese cities increased in land area by 59 percent.¹³ In Vietnam, the area of farmland taken over in the last decade reached 1 million hectares, greater than the 810,000 hectares redistributed during the socialist land reforms in the 1950s.¹⁴

And there are significant differences between China and Vietnam. As Xin He discusses in Chapter 7 in this book, urban renewal projects have become a major source of land disputes in China. Vietnam has not yet accumulated the wealth needed to replace poor quality housing stock on a significant scale. But, in both countries, increasing numbers of land-taking disputes in peri-urban and rural areas are being experienced. Faced with high urban densities, housing and industrial developers have little option but to expand into farmland.

In what Annette Kim¹⁵ termed fiscal socialism, local governments in China and Vietnam used their urban planning controls to compel private developers to provide public services and amenities that could not be financed from government budgets. Local governments

¹¹ See National Statistics of the Republic of Taiwan, June 2013, available at: www.stat.gov.tw/mp.asp?mp=4.

¹² In the 1950s, Hong Kong was 85 percent urban reach, and close to 100 percent urban by 1990. See United Nations, “World Urbanisation Prospects, the 2012 Revision.”

¹³ See Lin, *Developing China*, p. 180.

¹⁴ See Vu Tuan Anh, “Land Issues in the Process of Implementing the 1992 Constitution,” *Vietnam Economic Review*, 216 (2012), 16–27.

¹⁵ Annette Kim, “A Market Without the ‘Right’ Property Rights: Ho Chi Minh City, Vietnam’s Newly-Emerged Private Real Estate Market,” *Economics of Transition*, 12(2) (2004), 275–305; Jieming Zhu, “Local Developmental State and Order in China’s Urban Development During Transition,” *International Journal of Urban and Regional Research* (2004), 424–447.

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used their extensive powers over land allocation to recruit private developers to realize state planning schemes. The large increases in land value generated by fiscal socialism were sufficient to pay for roads, pavements, utilities, and even schools. Fiscal socialism, however, could function only if farmers were paid low rates of compensation for their land.

As the authors have observed, it is the unequal sharing of rapid economic growth and, in particular, the increasing economic divide between rural and urban populations that have animated many land disputes in socialist Asia. Many of the land-takings have taken place in the peri-urban and urban fringe areas where the interface between wealthy urban and poorer rural communities is most evident. Tensions are further exacerbated when rural communities see their land taken for private developments, such as golf courses and luxury apartments, rather than for public purposes that might benefit the public and the nation.

As Jie Cheng observes in Chapter 4, tax raised by local governments from land sales increased exponentially after 1994 when a tax-sharing system began, further propelling demand for farmland. She cites a report prepared by the Chinese Academy of Social Science in 2010, showing that the percentage of tax revenue from land sales increased from 3 percent in 1998 to 11 percent by 2008. This amount further increased by an astonishing 63 percent in 2009. The report concluded that pressure to increase tax income is a potent force driving land-takings in China. With tax revenues in decline and expenditure on the rise, local governments face the hard choice of making more land sales or falling into deep debt.

Land disputes and social cleavages

Land disputes are not only attributable to economic and demographic factors, but they are also anchored in historical contests that reflect long-standing beliefs and practices. As the authors in this book observe, many conflicts occur at the intersection of major social cleavages, such as claims by a resurgent Catholic Church for the return of land seized by the revolutionary government in Vietnam, and claims by farmers for their spiritual connection to village altars and cemeteries. Land disputes are also influenced by less visible, but nonetheless potent, everyday acts of resistance to state power. As Mark Seldon and Elizabeth Perry observed in relation to China:

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These take such forms as private acts of evasion, flight and foot dragging, which, in the absence of manifestos or marches, may nevertheless effectively enlarge the terrain of social rights.¹⁶

Authors in this book add the additional insights that legal challenges through administrative petitions and court litigation pressure state officials to justify their actions, and, in the process, open new ways of conceptualizing and asserting private and community property claims. Authors also describe how social media not only mobilizes public opinion, but is also a key source of inspiration and instruction for land claimants, and is reshaping the interaction between land users and state regulators.

Growing numbers of land disputes

Statistics concerning land disputes in China and Vietnam are fragmented, making the precise identification of trends problematic. There is, nevertheless, a broad consensus that the number and complexity of land disputes in China and Vietnam is growing. Details are provided in the chapters introducing China (Chapter 3) and Vietnam (Chapter 10). To set the scene, a longitudinal survey conducted by Landesa in China shows that the number of land-taking cases has increased every year since 2001 when the study began.¹⁷ The survey also found that, in 2011, farmers were, on average, offered compensation rates of US\$17,850 per acre, about 10 percent of the US\$740,000 per acre that state authorities received for the land. It is unsurprising that the dissatisfaction rates among farmers eclipsed the satisfaction rates by a margin of two to one.¹⁸ This discontent has translated into numerous, sometimes violent, land disputes in China.¹⁹

According to statistics prepared by the Government Inspectorate in Vietnam, there were 700,000 land complaints from 2009 to 2012, and more than 70 percent concerned compulsory land acquisition.²⁰

¹⁶ Mark Seldon and Elizabeth Perry, "Introduction: Reform, Conflict and Resistance in Contemporary China," in Elizabeth Perry and Mark Seldon (eds.), *Chinese Society: Change, Conflict and Resistance* (London: Routledge, 2010), p. 3.

¹⁷ See Landesa, "Summary of 2011, 17-Province Survey Findings: Insecure Land Rights the Single Greatest Challenge Facing China's Sustainable Development," April 26, 2012, Research Report Landesa, p. 2.

¹⁸ *Ibid.* ¹⁹ See Fisher, "How China Stays Stable Despite 500 Protests Every Day."

²⁰ See VNS, "Red Tape Leads to Property Disputes," *Viet Nam News*, September 19, 2012, available at: <http://vietnamnews.vn/politics-laws/230281/red-tape-leads-to-property-disputes.html>.

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Conceptualizing land disputes

This book explores the idea that land disputes are socially constructed. The way in which land disputes are conceptualized profoundly influences not only what is considered to be a dispute, but also the appropriateness of dispute resolution forums and outcomes. In their seminal article “The Emergence and Transformation of Disputes: Naming, Blaming and Claiming,” William Felstiner, Richard Able, and Austin Sarat observed that, in attributing blame, actors shape the trajectory of disputes.²¹ For example, if actors believe they are only partially to blame, then they are unlikely to escalate grievances into claims or disputes. Felstiner *et al.* concluded that disputes are rarely ordered by uncontested sets of norms and practices; but rather they are socially constructed from different conceptual frameworks.

Taking this idea further, scholars in a wide range of fields, such as socio-legal studies,²² sociology,²³ and economics,²⁴ argue that the tacit assumptions and norms in which people are embedded, shape the conceptual frameworks they find compelling. According to Felstiner *et al.*, it is to these frameworks that actors turn when attributing blame in disputes. A core question considered in this book is whether land disputes are more easily resolved when the main actors, both state and non-state, share conceptually compatible frameworks and generally agree about the cause of the dispute and the appropriate outcomes. Conversely, do negotiations break down and disputes become intractable when actors lack compatible frameworks for determining blame and redress?

Particularly in rapidly transforming societies,²⁵ such as socialist-transforming Asia, diverse educational, economic, and social experiences generate differences in the distribution of knowledge. This fragmentation of knowledge produces a diversity of conceptual frameworks. As the case

²¹ See William Felstiner, Richard Able, and Austin Sarat, “The Emergence and Transformation of Disputes: Naming, Blaming and Claiming,” *Law & Society Review*, 15(3/4) (1980), 631–654.

²² See, generally, Susan Silbey, “After Legal Consciousness,” *Annual Review of Law and Social Science*, 1 (2005), 323–368; Lawrence Lessig, “The Regulation of Social Meaning,” *University of Chicago Law Review*, 62(3) (1995), 958–961.

²³ See Peter Berger and Thomas Luckmann, *The Social Construction of Reality* (New York: Anchor Books, 1966), p. 65.

²⁴ See Avner Greif, *Institutions and the Path to the Modern Economy* (New York: Cambridge University Press, 2006).

²⁵ See Jerrold Long, “Private Lands, Conflict and Institutional Evolution in the Post-Public Lands,” *Pace West Environmental Law Review*, 28(3) (2011), 670–789.

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studies in this book demonstrate, the most intractable land disputes seem to occur at knowledge boundaries found, for example, at the peri-urban interface between globally connected cities and farming communities.

Drawing on the authors' studies, it is possible to identify three main frameworks used to conceptualize land disputes in socialist Asia. In practice, the actors involved in disputes rarely rely on just one framework and often interweave ideas from one framework into another. Before discussing the ramifications of this blurring and hybridization, we discuss the three main conceptual frameworks below.

Seeing like a state

James Scott argues that the process of simplification, codification, and standardization – much of what land laws, cadastral plans, and land titles do – is an essential aspect of governing modern states.²⁶ Because societies more often than not comprise “a reality so complex and variegated as to defy easy short-hand description,” states must first transform societies into “neat constructs of science” before they can govern.²⁷ This regulatory technology enables states to govern without fine-grained knowledge about everyday practices – to govern at a distance on a large scale. To recreate the modernist ideal of orderly planned cities and industrial agriculture, governments throughout East Asia imported European planning schemes and land titling systems.²⁸

A central aspect of modernist land management is governance through codification and abstraction. This transformation assumes a shift from particularism to universalism, and from substantive to procedural justice. Authors in this book query if this transformation uniformly applies to China and Vietnam (see Chapters 8, 9, and 11).²⁹ Although

²⁶ See James Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (New Haven, CT: Yale University Press, 1998), pp. 11–22.

²⁷ See Scott, *Seeing Like a State*, pp. 11–22.

²⁸ See, generally, Anan Ganjanapan, “The Northern Thai Land Tenure System: Local Customs versus National Laws (Ching Mai Province),” *Law & Society Review*, 28(3) (1994), 609–622; Franz von Benda-Beckmann and Keebet von Benda-Beckmann, “Property, Politics, and Conflict: Ambon and Minangkabau Compared,” *Law & Society Review*, 28(3) (1994), 589–607.

²⁹ See also William Hurst, Mingxing Liu, Yongdong Liu, and Ran Tao, “Reassessing Collective Petitioning in Rural China: Civic Engagement, Extra-State Violence, and Regional Variation,” (2010) APSA 2009 Toronto Meeting Paper, 2009, revised 2013, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1448983.