

## **Resolving Land Disputes in East Asia: Exploring the Limits of Law**

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### **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,<sup>1</sup> 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,

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

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 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.<sup>2</sup>

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

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

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.<sup>3</sup> Although this literature differs in detail, there is a broad consensus about the demographic and economic forces underlying land conflicts in this region. Population<sup>4</sup> 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.<sup>5</sup> In the 30 years since economic reforms began, urbanization has grown from 15 percent to 50 percent, adding an additional 500 million urban dwellers.<sup>6</sup>

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<sup>3</sup> See, generally, Y. T. Hsing, *The Great Urban Transformation: Politics of Land and Property in China* (Oxford: Oxford University Press, 2010); George Lin, *Developing China: Land, Politics and Social Conditions* (London and New York: Routledge, 2009); Peter Ho, *Institutions in transition: Land ownership, property rights and social conflict in China* (Oxford: Oxford University Press, 2005).

<sup>4</sup> 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 <http://www.tradingeconomics.com/vietnam/population-growth-annual-percent-wb-data.html>.

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

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

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.<sup>7</sup> 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."<sup>8</sup> Government policies in China are set to shift a further 250 million farmers to cities by 2025.<sup>9</sup>

Vietnam exhibits a similar, although proportionally, smaller urbanization trajectory. In the last 20 years, the urban population has risen from 15 to 30 percent, and it is expected to reach 45 percent in the next 20 years.<sup>10</sup> Reflecting higher levels of wealth and economic development, the urbanization rate in Taiwan is 75 percent.<sup>11</sup> As a city state, Hong Kong has for more than a century maintained high urbanization levels.<sup>12</sup>

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

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<sup>7</sup> Huang Dongdong, *Development, Resettlement and Governance* (Beijing: Law Press, forthcoming, 2014).

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

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

<sup>10</sup> See United Nations, "World Urbanisation Prospects, the 2012 Revision," Population Database, available at <http://esa.un.org/unup/> (last accessed February 28, 2013).

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

<sup>12</sup> In the 1950s, Hong Kong was 85 percent urban reach, close to 100 percent urban in 1990. See United Nations, "World Urbanisation Prospects, the 2012 Revision," Population Database, available at <http://esa.un.org/unup/>.

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.<sup>13</sup> 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.<sup>14</sup>

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 Kim<sup>15</sup> 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 used their extensive powers over land allocation to recruit private developers to realize state planning schemes. The large increases in land value generated

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<sup>13</sup> See George Lin, *Developing China: Land, Politics and Social Conditions* (London and New York: Routledge, 2009), p. 180.

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

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

by fiscal socialism were sufficient to pay for roads, pavements, utilities, and even schools. Fiscal socialism could only function, however, if farmers were paid low rates of compensation for their land.

As 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 also they are anchored in historical contests that reflect longstanding beliefs and practises. As

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:

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.<sup>16</sup>

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 also is 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.<sup>17</sup> The survey also found that, in 2011, farmers were, on average, offered compensation rates of USD\$17,850 per acre, about 10 percent of the USD\$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.<sup>18</sup> This discontent has translated into numerous, sometimes violent land disputes in China.<sup>19</sup>

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.<sup>20</sup>

### **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 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.<sup>21</sup> For example, if actors believe they are partially to blame, then they are unlikely to escalate grievances into claims or disputes. Felstiner, Able, and Sarat concluded that disputes are rarely ordered by

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<sup>17</sup> 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.

<sup>18</sup> *Ibid.*

<sup>19</sup> See Fisher, “How China Stays Stable Despite 500 Protests Every Day.”

<sup>20</sup> 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>.

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

uncontested sets of norms and practises; 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,<sup>22</sup> sociology,<sup>23</sup> and economics,<sup>24</sup> argue that the tacit assumptions and norms embedded within people shape the conceptual frameworks they find compelling. According to Felstiner, Able, and Sarat, it is these frameworks that actors turn to 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,<sup>25</sup> 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 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.

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

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

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

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

Drawing on the authors' studies, it is possible to identify three main frameworks used to conceptualize land disputes in Socialist Asia. In practise, 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.<sup>26</sup> 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.<sup>27</sup> 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.<sup>28</sup>

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

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

<sup>27</sup> See Scott, *Seeing Like a State*, pp. 11–22.

<sup>28</sup> See generally Anan Ganjanapan, “The northern Thai land tenure system: local customs versus national laws (Ching Mai province)” (1994) 28(3) *Law and Society Review* 609–622; Franz von Benda-Beckmann and Keebet von Benda-Beckmann, “Property, politics, and conflict: Ambon and Minangkabau compared” (1994) 28(3) *Law and Society Review* 589–607.

uniformly applies to China and Vietnam (see Chapters 8 9, and 11).<sup>29</sup> Although they point to increased codification, the case studies also show the ongoing importance of interpersonal relationships, the treatment of each land dispute as *sui generis*, and as a consequence, the lack of general principles that apply predictably and systematically to every case. In Chapter 4, Jie Cheng makes the additional point that litigants are most likely to win land cases by challenging the exercise of official powers rather than questioning procedural defects. All of this suggests that “seeing like a state” takes on a different form in socialist East Asia than in western Europe.

Scott also notes that officials are not content with merely promoting state governance; in “seeing like a state,” they displaced rival modes of regulation. For example, officials use laws to define boundaries of control and discredit or omit practises that were considered inconvenient or resistant to control. Nowhere was this approach more obvious than in the Soviet land planning introduced into China and Vietnam during the 1960s.<sup>30</sup>

Revolutionary governments in Europe and Asia sought to sweep away backward traditional cultures that had become associated with class oppression and feudalism. Marx followed a well-established European intellectual tradition that depicted Asian societies in undifferentiated ways as “semi-barbarians,” portrayals that generated socialist antipathy, or at least indifference, to neo-Confucian and “feudal” culture.<sup>31</sup> To varying degrees, governments in China and Vietnam believed that a universal “proletarian

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<sup>29</sup> 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](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1448983).

<sup>30</sup> See Yehua Dennis Wei, “Planning Chinese Cities: The Limits of Transitional Institutions” (2005) 26(3) *Urban Geography* 201–221.

<sup>31</sup> Karl Marx, “Otechestvenniye Zapiski,” (1887), reproduced in Shlomo Avineri, “Introduction,” in Shlomo Avineri (ed.), *Karl Marx on Colonialism and Modernization* (New York: Doubleday, 1969), p. 6.

culture” would link the working classes in different countries, and “Asiatic” and “feudal” modes of production would dissolve in the face of this unifying force.<sup>32</sup>

Soviet planning drew directly from the same intellectual traditions as the “city beautiful” movement that shaped land governance in Europe and North America.<sup>33</sup> Soviet land planners enjoyed close links with French *urbanisme*, which emphasized large-scale urban redevelopment and long-lasting streetscapes. What the Soviets found attractive about Baron Haussman was his penchant for re-engineering the physical landscape to change social behavior. When integrated into Soviet central planning, this utopian planning became even more rigid than in Europe. Soviet planners insisted that economic and social planning could only be understood in Marxist-Leninist terms, which defined out-of-existence private markets and other modes of self-regulation. Following Soviet practises, land planning in China and Vietnam took place at stratospheric levels of abstraction that dismissed customary land regulation as unbounded, inefficient, and potentially subversive.<sup>34</sup>

In both China and Vietnam, the technology of land governance declined after the revolution. As Phung Minh, a French-trained land surveyor, recalled in his memoirs, skills and technical competencies eroded during the high-socialist period (1954–1986) when professional cadastral mapping effectively ceased in Hanoi. He depicted housing and land management during this period as arbitrary and haphazard.<sup>35</sup> And he thought

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<sup>32</sup> See, for example, Truong Chinh, “Marxism and Vietnamese Culture” report delivered to the Second National Cultural Conference, July 1948, reproduced in *Truong Chinh Selected Writings* (Hanoi: The Gioi Publishers, 1994), pp. 251–252.

<sup>33</sup> See Scott, *Seeing Like a State*, Chapter 4; William Logan, “The Russians on the Red River: The Soviet Impact on Hanoi’s Town Scape 1955–1990” (1995) 47(3) *Europe-Asia Studies* 443–468.

<sup>34</sup> See Wei, “Planning Chinese Cities: The Limits of Transitional Institutions.”

<sup>35</sup> See Phung Minh, *40 Nam Quan Ly Nha Cua O Ha Noi* (40 Years of Housing Management in Hanoi), unpublished paper, Hanoi, October 16–17, 1998.

that the culture of revolutionary resistance did not generate respect for rule-based land management, because revolutionaries sought to subvert state power structures.

Reinforcing this antipathy toward the technology of regulation, many senior cadres who migrated to Hanoi from rural areas after 1954 were unfamiliar with, even contemptuous of, the title by registration system operating in former colonial centers.

Following economic reforms in the 1970 and 1980, governments in China and Vietnam once again turned their attention to the technology of land governance (see Chapters 3 and 10). They upgraded cadastral planning and land-titling technologies to render land holdings intelligible and secure. Although the governments in these countries now tolerate private markets and other modes of self-regulation, they continue to insist on state land management. Reforms have ensured that state officials will continue to manage the property rights regime and private property markets.

There is another distinctly modernizing feature of land law and planning. As Michael Lief<sup>36</sup> observed in relation to peri-urban China and Vietnam:

[t]he expansion of urban administrative structures into formerly rural settings is understood to be an effort not only to regulate urbanization, to bring villagers' spontaneous activities in line with the laws of the state, but to rein in their frontier lawlessness more broadly, to "civilize" the countryside.

In short, state regulation aims to displace the "local personalism of traditional village practices," which must be wiped away before villagers can join modern society.

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<sup>36</sup> See Michael Lief, "Peri-Urban Asia: A Commentary on Becoming Urban" (2011) 84(3) *Pacific Affairs* 531.

This “seeing like a state” mindset has influenced the way policy-makers and land officials conceptualize land disputes. Authors (see Chapter 4) in this book show that officials blame land disputes on unclear laws and incomplete procedures. If formal legal structures are not at fault, then officials attribute failings to administrative shortcomings or outright corruption. Officials also blame the public for lacking “legal consciousness” and circumventing land laws and procedures. Underlying this diagnosis is the assumption that states are the optimal regulators, and that state laws and regulatory technologies should displace informal land practices.

The case studies about Taiwan and Hong Kong provide a glimpse into what can happen when societies judicialize and democratize. In both countries, governments “see like states” in planning land and housing developments, but their instrumental powers are checked by courts and more recently by democratic processes. In Hong Kong, courts from the early days of the colony played a prominent role in resolving land disputes by balancing competing property rights (see Chapter 14). More recently, democratic reforms in both countries have encouraged public participation in every stage of the land-planning process and enabled civil protests to pressure officials into recognizing customary land entitlements and preventing developers from compromising land rights.

### **Economic development and property rights**

#### ***Recycling property rights***

Belief in the capacity of property rights to promote economic development and social stability in East Asia is not new. In 1880, the French Colonial Inspector of Native Affairs in Vietnam opined that:<sup>37</sup>

The establishment of property ownership will be the prosperity of the country: the rights to sell, to buy, to mortgage – to execute all the conveyances of property will augment the country's wealth in circulating the capital which is now frozen by many cultivators.

Similar arguments were made to support the introduction of property rights in the PRC and by the British in Hong Kong.

Far from unlocking the wealth of indigenous cultivators, property rights during the period of colonial domination secured wealth for foreign investors and local elites.<sup>38</sup> The accumulation of estates made possible by land titling dispossessed large numbers of farmers, resulting in subsistence incomes as tenants and wage laborers.<sup>39</sup> The inequities generated by the private enclosure of land excited social unrest throughout the colonial period and is considered by many historians as the single most important catalyst for socialist revolution in China and Vietnam.<sup>40</sup>

Revolutionary land policies in these countries could hardly have differed more from colonial property rights. A core objective of Marxist-Leninism was to replace private

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<sup>37</sup> Jean Louis Bassford, *Land development policy in Cochin China under the French (1865–1925)* (Ann Arbor: University Microfilms International, 1984), pp. 129–130.

<sup>38</sup> See Chapter 12 An Overview of Taiwanese Land Law and Dispute Resolution in this book; Martin Murray, *The Development of Capitalism in Colonial Indochina (1870–1940)* (Berkeley: University of California Press, 1980), pp. 132–140.

<sup>39</sup> See David Biggs, “Property and Poverty in Southern Vietnam,” in Hue-Tam Ho Tai and Mark Sidel, *State, Society and the Market in Contemporary Vietnam* (London: Routledge, 2013), pp. 15–32.

<sup>40</sup> See Edwin E. Moise, “Land Reform and Land Reform Errors in North Vietnam” (1976) 49 *Pacific Affairs* 70–92 at 72.

property rights with state and collective ownership. The Chinese Constitution of 1954 followed this line by providing for people's ownership of land (see Chapter 3). In order to appease the capitalist South, both the 1946 and 1960 Constitutions in the Democratic Republic of Vietnam retained private land ownership. Following victory over the South in 1975, the post-reunification 1980 Constitution of the Socialist Republic of Vietnam adopted the Soviet formulation of people's ownership and state management of land.<sup>41</sup>

Karl Marx, and Frederick and Engels dismissed legally protected property rights in the West as bourgeois instruments "for the mutual guarantee of their property and interests."<sup>42</sup> To displace "bourgeois" property rights, Soviet theorists conceptualized land as a "special commodity" or public good. In contrast to "bourgeois" property, land in Soviet theory was not a tradable commodity and could not be used for private exchange and personal advantage.<sup>43</sup> Party elites in both China and Vietnam followed this Marxist-Leninist trope until market reforms in the 1970s and 1980s unleashed housing and land markets (see Chapters 3 and 10).

Early post-Mao reforms in China (1978–1982) and *doi moi* (renovation) reforms in Vietnam (1979–1986) focused on agricultural decollectivization and market opening. In both countries, individual household contracts gave farmers control over the management, output, and marketing of agricultural production in exchange for payments in the form of crops and labor to the village, and taxes to the state. This household

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<sup>41</sup> 1980 Constitution of the Socialist Republic of Vietnam, art. 20.

<sup>42</sup> Karl Marx and Frederick Engles, *The German Ideology* (New York: International Publishers (R. Pascal ed., 1960 [1846]), p. 59.

<sup>43</sup> The writings of Soviet legal academics were influential during this period in China and Vietnam. See, for example, see Pa-Ven Sko-Mo-Ro-Kho- Nop 1961 "Phap Luat Xo Viet Bao Ve Quyen Loi Dan Su" (Soviet Law Protecting Civil Rights) (2) 42–44.

responsibility system effectively ended decades of state collectivization in favor of private agricultural production.

Responding to pressure from below, in 1993, the Chinese state extended the term of household contracts from 15 to 30 years, and in 1998 for an additional period of 30 years. Throughout this period, land use rights in agricultural land remained with the village authorities, giving them significant management powers over land use and disposal. The Rural Land Contracting Law 2002 continued this policy by conferring land use rights on households, rather than on individuals. The Law's primary purpose is to prevent large-scale arbitrary reallocations of land and to allow transfers of land between households. Generally, farmers have two land use rights over rural land. The first is the right to contract out the land for agricultural production, and the second is the right to use land to construct a residential homestead. Attempts to individualize rights over agricultural land in the Land Law 2007 were blocked, ensuring the retention of strong state management powers over rural land rights. A recent survey conducted by Landesa found that only 36.7 percent of farmers surveyed held the land contracts and land use rights stipulated by the law.<sup>44</sup>

Land reforms in Vietnam took a different trajectory.<sup>45</sup> Vietnamese farmers are now allotted individualized land titles, but as the case studies discussed in this book show, this reform has not appreciably improved their bargaining position compared to that of Chinese farmers. Rather than retaining the household responsibility system and land contracts, the Land Law 1988 established individual land use rights for agricultural land

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<sup>44</sup> See Landesa, "Summary of 2011 17-Province Survey Findings," p. 2.

<sup>45</sup> See generally Benedict Kerkvliet, "Agricultural Land in Vietnam: Markets Tempered by Family, Community and Socialist Practices" (2006) 6(3) *Journal of Agrarian Change* 285–305.

in Vietnam. Responding to bottom-up pressure, the state has incrementally increased the rights attached to land. For example, the Land Law 1993 gave farmers rights to transfer and mortgage agricultural land use rights, but limited land tenure to 20 years, leaving farmers with little residual value to trade. In practise, farmers have few opportunities to mobilize their land use rights against the state in land-taking cases—effectively nullifying their legal advantage over Chinese farmers.

### *Neo-liberal property rights*

International pressure from foreign governments, international donor agencies, and foreign investors has also shaped internal debates about land reform in China and Vietnam. Reprising colonial enthusiasm for property rights, international donors such as the World Bank have been especially vocal in advocating transparent and robust private property rights. Donors were influenced by Harold Demsetz's<sup>46</sup> assertion that private property is the solution for resource tragedies. According to Demsetz, the privatization of property off-sets negative social costs, such as exclusion from natural resources, because the individual pursuit of self-interest increases overall social welfare. This classical economic notion that societies are better-off when people can reap what they sow dates back to the classical economics of Adam Smith. The World Bank has added the neo-liberal economic objective of minimizing government oversight and maximizing Coasian bargaining between private property holders.<sup>47</sup>

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<sup>46</sup> See Harold Demsetz, "Toward a Theory of Property Rights" (1967) 57 *American Economic Review* 347.

<sup>47</sup> See Ronald Coase, "The Problem of Social Cost" (1960) 3 *Journal Law and Economics* 1–44.

More recently, New Institutional Economic (NIE) theorists added weight to Demsetz's claim by arguing that legally protected property rights are essential for economic development.<sup>48</sup> Douglass North<sup>49</sup> famously claimed:

the inability of societies to develop effective, low-cost enforcement of contracts is the most important source of both historical stagnation and contemporary underdevelopment in the Third World.

By the early 1990s, international donors seized on NIE theory to stress the importance of institutions—especially stable property rights—in promoting an orderly transition from socialism in China and Vietnam.

Hernando de Soto,<sup>50</sup> a leading exponent of this view, invoked the metaphor of a bell jar to explain the difference between registered and unregistered property rights. Those within the bell jar enjoyed state protection of their registered property rights, while he opined that those outside the bell jar must fend for themselves. The assumption underlying this metaphor is that state regulators and courts protect property rights more effectively than community-based, self-regulatory systems. Supporters of de Soto urged developing countries to upgrade their land regulation systems by replacing customary informality with land management technology.<sup>51</sup>

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<sup>48</sup> See generally Oliver Williamson, *The Economic Institutions of Capitalism* (New York: The Free Press, 1985).

<sup>49</sup> See Douglass C. North, *Institutions, Institutional Change and Economic Performance* (Cambridge: Cambridge University Press, 1990), p. 54.

<sup>50</sup> Hernando de Soto, *The Mystery of Capitalism: Why Capitalism Triumphs in the West and Fails Everywhere Else* (London: Black Swan, 2000), pp. 47–62.

<sup>51</sup> See Asian Development Bank, “The Impact of Land Markets on the Poor: Implementing de Soto,” Hanoi: Making Markets Work Better for the Poor Discussion Paper 3, 2004.

Other theorists are less certain than de Soto that “with each new year, the link between economic prosperity and property rights protection becomes increasingly clearer.”<sup>52</sup> They criticize de Soto for drawing too sharp a distinction between state-backed property rights and self-regulation.<sup>53</sup> In their estimation, it is questionable whether systems based on inalienable property rights provide the most effective mechanism where there is ambiguity about access to land and the resolution of disputes.<sup>54</sup> Property rights, they maintain, do little to change disparities in wealth and power that animate many land contests.

Adding to the mounting criticism, still other scholars<sup>55</sup> argue that donors underestimated the regulatory role of informal institutions, such as family and business networks, in maintaining and stabilizing domestic regulatory systems. They point to the high-growth periods in North East Asia, especially in China and Vietnam, where formal property rights played a marginal role in economic development.<sup>56</sup> Donald Clarke argues that “it is impossible to make the case that formal legal institutions have contributed in an important way to China’s remarkable economic success.”<sup>57</sup> If anything, economic success has fostered the development of law, rather than the reverse. Rapid economic

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<sup>52</sup> See Property Rights Alliance, “2012 Report International Property Rights Index,” p. 3, available at <http://www.internationalpropertyrightsindex.org/>.

<sup>53</sup> See Alan Gilbert, “On the Mystery of Capitalism and the Myths of Hernando de Soto: What Difference Does Legal Title Make” (2002) 24 *International Planning Review* 1–19; Jonathan Manders, “Sequencing Property Rights in the Context of Development: A Critique of the Writings of Hernando de Soto” (2004) 37(1) *Cornell International Law Journal* 177–198.

<sup>54</sup> See also Leah M. Trzcinski and Frank K. Upham, “The Integration of Conflicting Donor Approaches: Land Law Reform in Cambodia” (2012) 20(1) *Journal of International Cooperation Studies* 129–146.

<sup>55</sup> See Donald C. Clarke, “Economic Development and the Rights Hypothesis: The China Problem” (2003) 51 *American Journal of Comparative Law* 89–111; Manders, “Sequencing Property Rights in the Context of Development;” Frank K. Upham, “From Demsetz to Deng: Speculations on the Source” (2009) 41(3) *New York University Journal of International Law and Politics* 522–602.

<sup>56</sup> See Katharina Pistor, “The Standardization of Law and its Effect on Developing Economies” (2002) 50 *American Journal of Comparative Law* 101; John Ohnesorge, “Law and Development Orthodoxies and the Northeast Asian Experience,” in Gerald McAlinn and Caslav Pejovic (eds.), *Law and Development in Asia* (London: Routledge, 2012), pp. 7, 16–30.

<sup>57</sup> See Clarke, “Economic Development and the Rights Hypothesis.”

development continues to thrive today despite ongoing shortcomings in the statutory protection of private property.<sup>58</sup>

### ***Fuzzy property rights***

China and Vietnam listened to advice from international donors and then proceeded to develop their own unique land rights systems. For specifics, refer to Chapters 3 and 11 in this book. Party leaders in both China and Vietnam refused to countenance a return to private land ownership, and instead created land use rights that, in some circumstances, convey tenure rights, such as unlimited duration, transfer, and mortgage rights that resemble full ownership. A movement away from the socialist notion that land is a “special commodity” toward individual land rights has advanced incrementally in both countries. This transition reflects intense internal debates about the continued role of the state in managing the economy and land. As Frank Upham argues forcefully in Chapter 2, in the long-term, economic growth depends on the possibility of shifting property rights to those who have the ability to put resources to more effective use.

Despite more than two decades of legislative reforms, the terms ambiguity and “fuzziness” are often used to describe property rights in China and Vietnam, or for that matter, any legal right. Katherine Verdery<sup>59</sup> coined the term “fuzzy” to describe the forms of property rights found in post-socialist Europe. The transition out of socialism, Verdery observed, did not entirely transform the institutional structures and epistemic settings that supported socialism. On the contrary, the transformation changed some structures but left

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<sup>58</sup> See Ronald Gilson and Curtis Milhaupt, “Economically Benevolent Dictators: Lessons for Developing Democracies” (2011) 59(1) *American Journal of Comparative Law* 227–288.

<sup>59</sup> See Katherine Verdery, “Fuzzy Property Rights, Power and Identity” in Michael Burawoy and Katherine Verdery (eds.), *Uncertain Transition: Ethnographies of Change in the Postsocialist World* (Lanham: Rowman and Littlefield Publishers, 1999), pp. 53–81.

others relatively intact. In consequence, the property rights that emerged contained a complex mixture of private rights and collective obligations that differed from one context to another—leading Verdery to describe them as “fuzzy property rights.”

Verdery’s observations are not limited to Europe, or in fact to a transformation out of socialism. The authors in this book narrate many examples where the transformation of socialism in China and Vietnam has generated fragmented institutional and epistemic structures that have generated fuzzy property rights. As we will see in the next section—about China—fuzzy property rights are not only found where village land practises suppressed under socialism percolate up to the surface following decollectivisation. The state itself creates fuzzy property rights by treating state-owned or controlled enterprises differently from other sectors.

Authors in this book have also observed state officials using fuzzy property rights in land-taking and compensation cases. Especially in China, the vague land use rights issued to farmers following decollectivization have aggravated land grabs by officials.<sup>60</sup> Fuzzy property rights provide political and legal justification for predatory land-grabbing and serve as effective tools to silence farmers who have lost their land. Fuzzy property rights also give courts considerable discretionary powers in deciding private land claims against citizens and the state. As John Gillespie observed in relation to housing disputes in Hanoi:

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<sup>60</sup> See Robin Dean and Tobias Damm-Luhr, “A Current Review of Chinese Land Use and Policy: A ‘Breakthrough’ in Rural Reform?” (2010) 19(1) *Pacific Rim Law and Policy Journal* 121–159.

Judges quickly exhaust the possibilities of statutory land rights and legal doctrines and either push cases back to state officials or use ‘reason and sentiment in applying the law’... a type of situational justice, to resolves cases.<sup>61</sup>

Authors also reveal a close connection between politically sensitive cases and party intervention (see Chapters 4, 5, 9, and 11). Although the details differ from case to case, in general it falls to party organizations at provincial and central levels to resolve highly sensitive land-taking cases. Under the direction of the party, courts creatively interpret or entirely disregard property rights to secure predetermined outcomes.<sup>62</sup> In these cases, every aspect of property rights is fuzzy.

In other circumstances, fuzzy property rights are the source of considerable creativity where judges, officials, and mediators use conceptual ambiguity to find flexible solutions to land disputes that are not otherwise available in law. For example, in Chapters 6, 8, and 9, the use of grand mediation in China is discussed, which brings the party, state officials, and disputants together to explore extra-legal methods of dispute resolution. Chapter 11 shows how provincial party leaders in Vietnam take advantage of fuzzy property rights to circumvent ineffective legal procedures and negotiate directly with land claimants.

The chapters on Taiwan and Hong Kong provide a useful counter-narrative to Socialist Asia. Colonial powers brought property rights and a judicial system capable of enforcing them to these countries. For example, Japanese colonizers introduced a land-titling

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<sup>61</sup> John Gillespie, “Exploring the Limits of Judicial Review in Urban Land Disputes in Vietnam” (2011) 45(2) *Law and Society Review* 241–275 at 243.

<sup>62</sup> For a discussion of this practise in Vietnam, see Mark Sidel, “Property State Corruption and the Judiciary: The Don Son Land Case and its Implications” in Hue-Tam Ho Tai and Mark Sidel (eds.), *State, Society and the Market in Contemporary Vietnam* (London: Routledge, 2013), pp. 103–122.

system to Taiwan, which, subject to various modifications, provides the basis for a rights-based land system today (see Chapter 12). In Hong Kong, the British imported English land laws, courts, and judges. And as Chapters 15 and 16 show, more than a decade after decolonization, litigation provides a viable means of resolving most types of property disputes.

What these countries clearly demonstrate is that capitalism and democracy, or at least, liberal political values, play a major role in protecting property rights in society. Yet, even in highly developed legal systems, property rights become fuzzy when they collide with customary land claims.

### **Community conceptualizations of land disputes**

So far we have focused on state-based conceptualizations of land disputes. What makes this book distinctive is its multi-actor focus; it not only considers state regulation, but also decenters the analysis<sup>63</sup> by considering what other actors think about land disputes. Decentered analysis provides a valuable corrective to state mythologizing that only central authorities possess regulatory solutions to land disputes. It also sheds light on the remarkable resilience of community land regulation, which continues to flourish despite unprecedented economic development and globalization in East Asia. The importance of community governance to ethnic minorities is well known;<sup>64</sup> what is less well

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<sup>63</sup> For a discussion about decentering regulatory analysis, see Julia Black, “Regulatory Conversations” (2002) 29(1) *Journal of Law and Society* 163–196.

<sup>64</sup> See generally Kerstin Andersen, “Communal Tenure and the Governance of Common Property Resources in Asia”, Land Tenure Working Paper 20 in Food and Agriculture Organization of the United Nations, 2011, pp. 2–5; World Bank, “Village Justice in Indonesia: Case Studies on Access to Justice, Village Democracy and Governance” (Washington DC: World Bank, 2004).

documented and understood is the vital role it plays in urban, peri-urban, and rural centers in East Asia, and elsewhere.<sup>65</sup>

Far from being a fringe phenomenon, studies show that, in some developing countries, more than 80 percent of the population lives under community land systems.<sup>66</sup> For example, an International Finance Corporation survey puts the level of land transactions taking place outside the state land tenure system in Hanoi at over 75 percent.<sup>67</sup> Similarly high levels of unofficial land use are reported in rural and urban areas in China.<sup>68</sup>

Chapters 13, 15, and 16 show customary land systems flourishing in highly developed Asian cities, such as Hong Kong and Taipei. In fact, community land systems play a significant role in regulating land and housing disputes in most cases discussed in this book.

Some authors in this book partially attribute the resilience of community governance to personal choice—in some circumstances, people prefer community governance to state regulation. In other cases, it is explained by necessity; where there is limited penetration of or poorly performing state institutions, people turn to community systems to determine what they can and cannot do with their land. Other authors ascribe the resilience of community systems not only to preference or necessity, but also more importantly to the interdependence between state and community systems (see Chapters 11 and 13). They

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<sup>65</sup> Richard Ford, “Law’s Territory: A History of Jurisdiction” (1999) 97 *Michigan Law Review* 843–930; Mariana Valverde, “Seeing Like a City: The Dialectic of Modern and Premodern Ways of Seeing in Urban Governance” (2011) 45(2) *Law and Society Review* 277–312.

<sup>66</sup> See Stephen Golub, “A House without Foundations,” in T. Carothers (ed.), *Promoting the Rule of Law Abroad: In Search of Knowledge* (Washington DC: Carnegie Endowment for International Peace, 2006), pp. 105–136.

<sup>67</sup> See Stoyan Tenev, Amanda Carlier, Omar Chaudry, and Quynh-Trang Nguyen, *Informality and the Playing Field in Vietnam’s Business Sector* (Washington, DC: International Finance Corporation, 2003), p. 68.

<sup>68</sup> See Samuel Ho and George Lin, “Emerging Land Markets in Rural and Urban China: Policies and Practices” (2003) 175 *The China Quarterly* 681 at 696–698.

argue that differences between these regimes are often overstated, and that informality and formality describe regulatory styles or technologies, rather than binary cleavages between separate modes of governance. This argument connects with the previous discussion about fuzzy property rights occurring where different regulatory systems overlap.

Before proceeding further, it is necessary to define what is meant by the term “community governance.” Recent scholarly analysis of communities has focused on geographically proximate groups that share some common connection other than physical proximity.<sup>69</sup> Community in this sense involves an element of belonging and intra-community empathy, mutual commitment to shared values and norms, and collaboration in the pursuit of common goals.<sup>70</sup> As Robertson observed, “being embedded in a background context of beliefs, practices, goals, etc. is what makes perception of anything possible, and is also what gives that perception its ‘shape.’”<sup>71</sup> Community governance is inter-subjective, in the sense that shared understandings about the optimal way to regulate land are generated largely within epistemologically compatible social or organizational groups.

Taking this concept further, others argue that community governance is possible in groups that lack any physical proximity.<sup>72</sup> Members of these virtual communities may knowingly or even unknowingly share common epistemological frameworks that orient them toward common understandings about access to land and dispute resolution. Virtual

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<sup>69</sup> See Monica Colombo, Cristina Mosso, and Norma De Piccoli, “Sense of Community and Participation in Urban Contexts” (2001) 11 *Journal of Community and Applied Social Psychology* 457 at 458–459.

<sup>70</sup> See Amitai Etzioni, “Creating Good Communities and Good Societies” (2000) 29 *Contemporary Sociology* 188.

<sup>71</sup> See Michael Robertson, “Picking Positivism Apart: Stanley Fish on Epistemology and Law” (1999) 8 *Southern California Interdisciplinary Law Journal* 401 at 417.

<sup>72</sup> See Black, “Regulatory Conversations,” at 174.

communities not only encompass actors who share common interests in land, but also might include members of the public who are united through the mass media and especially social media.

Rather than identifying communities by their degree of mutuality, theorists believe it makes more sense to mark out boundaries between communities.<sup>73</sup> Factors that differentiate communities include different validity claims, sets of epistemologies and tacit understandings, as well as different levels of attachment and identification with the community. What this suggests is that land communities are distinguishable according to their cohesiveness and epistemic understandings of land regulation.

In sum, land communities differ in the way in which they embed property relationships in wider sets of social, political, and economic relationships. “Embeddedness” is used here as a metaphor to indicate the relative extent to which property relates to legal, social, and economic domains. Different degrees and kinds of embeddedness are illustrated in the four land communities discussed below.

***One: Traditional land communities***

Traditional communities are comprised of close-knit groups that organize around consolidating ideologies, religions, or village traditions and employ comprehensive internal norms to validate their community.<sup>74</sup> They are sometimes functionally or physically insulated from society, although some members of these communities might

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<sup>73</sup> See Brian Tamanaha, *Realistic Socio-Legal Theory* (Oxford: Oxford University Press, 1998), pp. 170–172.

<sup>74</sup> See generally Andersen, “Communal Tenure and the Governance of Common Property Resources in Asia.”

engage with the outside world.<sup>75</sup> The recent origin or hybrid nature of regulatory traditions does not diminish their potency. As Benedict Anderson reminds us, “invented traditions and ‘imaged communities’ are just as authentic to villagers as traditions with an ‘objective’ historical provenance.”<sup>76</sup> Communal land tenure, where communities or villages have well-defined, exclusive rights to jointly own and/or manage land, is a feature of some, but certainly not all, traditional communities. In China and Vietnam, communal land tenure is mostly widely practiced in remote areas, especially in the mountainous zones settled by ethnic minorities.<sup>77</sup> Nevertheless, some authors (Chapters 8, 9, and 11) show that traditional communities also flourish in highly developed rural and even urban locales.

Franz and Keebet von Benda-Beckmann<sup>78</sup> observed that traditional communities typically “treat property relations as only one aspect or strand of more encompassing categorical relationships, in which kinship relations, property relations and relations of political authority are largely fused in a many-stranded or multiplex relationship.” In other words, property relations remain embedded in relational and/or spiritual practises and have not yet re-embedded in legal relationships. Traditional communities remain a common form of social organization in rural China and Vietnam, and the community structure continues to shape the way in which land disputes are resolved and the degree to

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<sup>75</sup> See Robert C. Ellickson, “Unpacking the Household: Informal Property Rights Around the Hearth” (2006) 116 *Yale Law Journal* 226 at 271–276.

<sup>76</sup> See Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* 2nd ed. (London: Verso, 2006), pp. 9–35.

<sup>77</sup> Although China and Vietnam are signatories to the *United Nations Declaration of Indigenous Peoples’ Rights* of 2007, they recognize ethnic minorities as disadvantaged groups, but do not recognize indigenous land rights. See Andersen, “Communal Tenure and the Governance of Common Property Resources in Asia,” 6.

<sup>78</sup> Franz and Keebet von Benda-Beckmann, “Multiple Embeddedness and Systemic Implications: Struggles over Natural Resources in Minangkabau since the Reformasi” (2010) 38 *Asian Journal of Social Science* 172–186 at 175.

which state law may be involve in dispute resolution (see Chapters 7 and 11). Consider the Đông Dương villagers, discussed in Chapter 11, who invoked moral and spiritual claims to land that conflicted with the exclusive property rights recognized by the Vietnamese Land Law 2003.

Revolution and modernization have exposed many villagers to the outside world, resulting in spontaneous urbanizing with or without state support and guidance. Authors show how people create their own urban transformation by replacing agriculture with small businesses and rental accommodation, for example. Through this transformation, property relationships are changing to accommodate new conditions but remain embedded in personalistic village connections.

### ***Two: Spontaneous land communities***

Spontaneous land communities arise when residents who live in the same area, or citizens connected through the mass and/or personal media, come together to oppose land developments (see Chapters 5, 7, and 11).<sup>79</sup> Spontaneous communities differ from traditional communities in that they lack strong organizational structures and coherent sets of regulatory traditions that are capable of galvanizing collective resistance. As the case studies in this book show, spontaneous land communities organize collective action around agents of change. These entities play a crucial role in coordinating collective action, filtering and constituting ideas, and keeping people connected.

Although most spontaneous land communities discussed by the authors (see Chapters 8, 9, and 11) were physically connected to a geographical location, the growing use of

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<sup>79</sup> See generally Nguyen Quang Vinh and Michael Leaf, “City Life in the Village of Ghosts: A Case Study of Popular Housing in Ho Chi Minh City” (1999) 20(2) *Habitat International* 175–190.

blogs, social media, and Weibo in particular, is creating virtual communities. Bloggers are often more prepared than the official media to test the boundaries of party-state narratives. The Osin blog in Vietnam, for example, linked the resolution of land disputes to party legitimacy, thus holding Vietnam's leaders accountable for socio-economic problems. In China, Weibo has developed a virtual polity in which claims were made, judgments were made, and punishment was delivered, all by citizens independent of state power in the real world.

What is different about spontaneous land communities is the multiple embeddedness of property relations. Since members of these communities cannot invoke village customs or practises to legitimize their claims, they are less likely than traditional communities to embed property in relational or spiritual connections. Instead they attempt to link property rights to a wide range of political, economic, and legal relationships. For example, spontaneous communities discussed in this book drew on socialist revolutionary arguments to legitimize their "rightful resistance" to land claims by capitalist investors (see Chapters 5, 7, and 11). They also embedded property in economic relationships based on employment and the commodity value of land. In China, spontaneous land communities used the courts as platforms to advance their claims (see Chapters 3, 4, and 8). In Taiwan (see Chapter 12) and Hong Kong (see Chapter 14), spontaneous land communities framed their complaints in the language of property rights and successfully prosecuted their claims through the courts and public protests.

### ***Three: Planned land communities***

Planned land communities are created by land developers to resolve collective action problems that crop up for residents living in close proximity in high-rise apartments or

gated communities. Under Chinese Property Law, home-owners in gated communities are required to create home-owners associations (HOA) to manage common property within the community on behalf all home-owners. HOAs have become one of the most active groups protesting about property and in challenging arbitrary corporate and government powers. They promote democratic decision-making within gated communities and social networking between HOAs.<sup>80</sup>

In contrast to the other land communities, residents living in planned communities are brought together by a formal set of legal conditions incorporated into governing documents.<sup>81</sup> As a consequence, their property claims are primarily, although not exclusively, embedded in legal relationships. As the discussion in Chapter 11 shows, members of planned communities also draw on political connections to advance their claims.

#### ***Four: State land communities***

State agencies, judges, and associated land professionals, such as lawyers, are not generally considered members of a community; nevertheless, like other land communities, they embed property in particular sets of relationships. As previously discussed, in adopting modernist approaches to land management, states throughout East Asia have disembedded property from relational connections. They have passed laws that categorize property holders, property objects, rights, duties, and rules for the appropriation and transfer of property rights. Legal property rights are meant to trump political, economic, and personalistic relationships. But, as the authors make clear,

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<sup>80</sup> Benjamin L. Read, "Democratizing the Neighborhood? New Private Housing and Home-Owner Self-Organization in Urban China" (2003) 49 *The China Quarterly* 31–59.

<sup>81</sup> See generally Choon Piew Pow, "Securing the 'Civilized' Enclaves: Gated Communities and the Moral Geographies of Exclusion in (Post-) Socialist Shanghai" (2007) 44(8) *Urban Studies* 1539–1558.

especially in China and Vietnam, law-based property rights and planning processes are interwoven with political and personalistic relationships—creating “fuzzy property rights.” The intervention of party politics as well as collusion and corruption suggests that, in practise, as distinct from legal theory, property rights have yet to disembed from political and relational connections. This gap between the assertion of legal autonomy made by the state and practise on the ground undermines the legitimacy of state land communities in the eyes of farmers and other land users.

A key difference between Taiwan and Hong Kong, on the one hand, and China and Vietnam on the other hand, is the extent to which state land communities have detached property rights from political, economic, and personal relations. This relative autonomy translates into court protection of property rights and the civil space for land protests in Taiwan and Hong Kong.

### **Intersecting land communities**

Land disputes are often characterized as clashes between modernity and tradition; however, the multi-embeddedness of property rights discussed above suggests shortcomings with this view. Most land communities discussed in this book drew from modernity and tradition to legitimize their property rights. Disputes revolved around differences in the emphasis communities placed on legal, political, social, and economic aspects of property relationships. Different emphasizes resulted in different understandings about what constituted socially just and fair dispute resolution processes and outcomes.

In most disputes in China and Vietnam, no single land community, including the state, was sufficiently powerful to displace rival understandings about land disputes. In this

polycentric regulatory environment, lasting settlements are most likely to occur where land users and state agencies negotiate together in relatively unmediated dialogues to find common ground. In Taiwan and Hong Kong, the state land community has largely, but not entirely, displaced rival modes of property regulation. Courts, as a corollary, play a major role in resolving land disputes.

### **The social dimensions of land disputes**

As Frank Upham points out in Chapter 2, rapid economic development in China, Vietnam, and elsewhere creates winners as well as losers. Since land is a scarce and highly valuable commodity, land expropriation and the resulting demolition and relocation create tangled webs of financial, social, and psychological harm. Losers in East Asia and elsewhere do not go quietly, and their grievances are a major source of conflict that involves individual and community stakeholders.

In China and Vietnam, where land must be converted and expropriated for economic development purposes, land-taking is highly contentious, not just because it affects the economic interest of individuals and communities. Upham notes that, “land not only has economic value; it also constitutes the basis for social relations through the creation of individual, group, and community identities.” Land disputes are also contentious because they shape political, social, and legal institutions and the political economy.

Land expropriation is a core component of the economic growth policy in China and Vietnam, and the party-state, authoritarian at its core, proves to be highly efficient in achieving its developmental agenda. In China, land appropriation takes place at great speed and through simple procedures. Unsurprisingly, this authoritarian efficiency generates disputes and conflict on a massive scale. The party-state, while aware of the

complications, has been trying to submerge land disputes in mediation for ad hoc resolution to achieve short-term social harmony. Mediation may preempt social contention in the short-term, but it does not resolve underlying conflicts, and in the long-term, the process may generate more conflict than the original dispute. According to Upham, mediation may be damaging in two unique ways. First, mediation encourages “expressive violence” among the weaker parties, or “mob culture” of a sort, to counter the powerful developers and the government. Secondly, mediation creates a parallel system that is independent of, and competes with, formal judicial institutions and procedures. In the long-term, it undermines the legitimacy of law and the political system. Land expropriation creates tremendous social trauma that may not be avoidable in economic transition, but a better-designed dispute resolution system that is transparent, participatory, and responsive may reduce the harm and produce long-term stability.

### **Country case studies**

This book is divided into four sections that deal with case studies in China, Vietnam, Taiwan, and Hong Kong. Each country section begins with a chapter introducing the history of land regulation and its connection to contemporary land disputes. The introduction is then followed by chapters providing detailed cases studies about land disputes.

#### ***China narrative***

In Chapter 3, Chen Lei traces the evolution of China’s land tenure system in both rural and urban areas. His chapter sets a historical and institutional context in which the current land law and policy operate. After identifying the defining characteristics of China’s land tenure system and pointing out the major problems that generate land disputes, the

chapter offers a concise discussion of the recent overhaul of the legal and regulatory framework for land dispute resolution, with a special focus on contentious expropriation of land and the resulting issue of fair compensation. Chen concludes that Chinese law and legal institutions are offering enhanced protection of property rights and creating more meaningful substantive and procedural limits on state powers.

In Chapter 4, Cheng Jie puts the legal system to the test by offering a focused study of land-taking cases adjudicated in Chinese courts. Through a meticulous examination of 200 court cases that apply the Land Management Law, Cheng presents powerful evidence to illustrate the limited role of courts. Cases reveal that courts struggle to balance state interest in expropriation and individual entitlement to land and to provide meaningful protection for the evictees' land entitlements. Although the courts are more neutral and offer better protection of land rights in civil disputes between two equal private parties, the courts defer to government authorities in adjudicating the authorities' disputes with private parties. Because of their constitutional and political status, courts can only play a limited role in contentious land disputes, tipping the scale decisively toward the interests of the collective and the state. Cheng concludes that, without achieving the necessary level of judicial independence and other institutional change, the capacity of the courts in offering effective land dispute resolution in China is highly constrained.

In Chapter 5, Eva Pils goes beyond the positive law and formal legal framework for land disputes. She explores the contrasting conceptions of land rights in the context of land expropriation. For Pils, the expropriators, including developers, and the government standing behind them, and evictees, including their supporters and sympathizers, form two radically different perspectives on land rights. From a statist perspective,

expropriation of land is essential for China's continuous economic growth, and given public ownership of land in the socialist system, is legally and morally justifiable. But, from the perspective of evictees and their representatives, expropriation, as it has been practiced in China, is predatory, corrupt, and in any event fundamentally unfair. The current property regime and the politics of expropriation have generated inevitable and often irreconcilable disputes that are bound to recur.

In Chapter 6, Hualing Fu uses the famous Wukan protest against the predatory land-taking as a case study to illustrate the potential of successful political mobilization in protecting property rights. The Wukan protest highlights a commonly observed irony in China that the government encourages citizens to settle their disputes through law, but at the same time creates multiple barriers to block citizens' access to justice for meaningful legal remedies. In the end, frustrated citizens whose land is taken without proper compensation abandon the law and take the matter into their own hands. In the process, the citizens realize that, if they speak unequivocally and act collectively and firmly, their collective action increases the likelihood for the government to take its own law more seriously. Thus, there emerges the alternative of a mobilization-based trajectory in which people organize themselves and act forcefully on specific social and economic issues. Organized protest creates better opportunities for dialogue between protesters and the government and for reaching a mutually beneficial result of channeling contentious land disputes back to legal institutions for effective resolution.

In Chapter 7, He Xin provides a more positive interpretation on the potential of courts to offer effective protection of property rights in housing demolition cases. Ordinarily, land disputes are characterized by power disparity between the parties. The disputes take place

largely between private citizens as plaintiffs and powerful developers and the government behind them as defendants, and as such, courts are not able to act fairly and effectively to correct the regulatory capture. However, the balance tips toward the plaintiffs when the plaintiffs act collectively and forcefully in and outside the courts to generate enough political pressure so that judges are forced to rule according to law. Public protest within the framework of law, as He frames it, can enhance transparency, accountability, and judicial independence, and as He concludes, the court can be used as an effective public forum for social and legal development.

The two subsequent chapters offer empirical evidence to illustrate the limits of state law in resolving land disputes in rural areas. In Chapter 8 *Courts and Political Stability: Mediating Rural Land Disputes*, Hau Shao and Susan Whiting explore the enhanced role of mediation in solving rural disputes and the impact of the extensive use of mediation on the legal system in general and on the courts in particular. Through sample surveys and in-depth interviews, the authors examine the degree to which mediation undermines the ability of the courts to provide predictable and determinant legal norms to guide dispute resolution and inadvertently emboldens villagers to use violence. Farmers prefer formal rules and courts to solve high-stakes disputes, but political constraints prevent the courts from developing the capacity to offer effective remedies. These authors conclude that the unchecked and unprincipled use of mediation undermines the function of the legal system and creates popular dissatisfaction.

In Chapter 9, Changdong Zhang and Christopher Heurlin explore the reasons why courts are timid in handling disputes through extensive field work on rural land disputes. The authors point out that local government officials prevent disputes reaching courts to hide

corrupt practises from their superiors. For example, officials push land disputes through mediation and use their administrative authority to block access to courts. The paradox is that imposed mediation may block farmers' access to courts but cannot close off access to justice. Frustrated with the process and end result, farmers contest mediation and take their cases to the streets. Mediation as it is practiced in rural China provokes farmers and generates the very problem it tries to resolve.

### *Vietnam narrative*

In Chapter 10, Toan Le and Nguyen Hung Quang show how cycles of adoption and reception have shaped land laws in Vietnam. First, the Chinese, and then the French, left their laws. Revolutionary land management practises borrowed from Maoist China and the former Soviet Union replaced, but did not entirely displace, the previous land regimes. More recently, Vietnam embarked on another cycle of borrowing, this time attempting to create private land use rights that commodified land. The authors argue that the rapid increase in land disputes in Vietnam has arisen not only from increased pressure on farmland, but also from a clash in the epistemic understandings between state officials and developers, on the one hand, and farmers, on the other hand, about who should have access to land and on what conditions.

In Chapter 11, John Gillespie draws on a series of cases studies to examine why land disputes have proliferated in Vietnam at the same time as the state is perfecting property rights and formal dispute resolution agencies. He examines three disputes that reflect the previously discussed traditional, spontaneous, and planned land communities. In each case study, he shows that the state legal regime has not displaced pre-existing self-regulatory practises. For example, state land use rights did not recognize or extinguish

farmers' spiritual and moral claims to land circulating in the traditional Đông Dương village. The findings from the case studies point to a plurality of land regulation,<sup>82</sup> where the state is only one of many regulators seeking to control access to land. In each case study, the state lacked the power to unilaterally impose its solutions on the land users and needed to cooperate with the other land communities to find mutually acceptable outcomes. As in China, however, land users had few opportunities to press their case through either formal state forums or via public discourse. It was only by staging civil disobedience campaigns that they leverage a position on the negotiating table.

### *Taiwan narrative*

In Chapter 12, Po-Fang Tsai and Duan Lin show that the Taiwanese land regime is constructed from different legal systems—the new overlying and interweaving with the old. Imperial Qing Dynasty land laws that aimed to pacify the local population were replaced by Japanese colonial laws during the late nineteenth century. Like the French colonial laws in Vietnam and the English colonial laws in Hong Kong, the Japanese laws were modeled on Western land title rules that abolished the link in Imperial Chinese law between group status and land rights. The colonial laws also centralized land control, a process that facilitated the creation of a new landlord class. Finally, the land laws separated administrative and judicial functions. For the first time, land disputants were given the option of taking their grievances to the courts for resolution. Unlike the Vietnamese, the Taiwanese did not abrogate their colonial legal system. After decades of

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<sup>82</sup> For a discussion about legal pluralism in East Asia, see Jane Collier et al., “Editors’ Introduction” (1994) 28 *Law & Society Review* 417–428; Andrew J. Harding, “Comparative Law and Legal Transplantation in South East Asia: Making Sense of the ‘Nomic Din’,” in D. Nelken and J. Feest (eds.), *Adapting Legal Cultures* (Oxford: Hart Publishing, 2001).

gradual consolidation and reform, the court system is now sufficiently independent from the executive arm of government to effectively adjudicate land-taking cases.

In Chapter 13, Po-Fang Tsai and Duan Lin go on to show how formal state apparatus, such as administrative mechanisms and the courts, deal with disputes over land used for ancestor worship. When the Chinese Nationalist Government recovered Taiwan in 1945 and started to apply modern Chinese civil law to Taiwan, ancestor worship land lost its legal status and was treated as common property. This change in legal status disrupted the personal relationships underlying this traditional practise and generated numerous land disputes. In an attempt to rectify this problem, the government introduced the Ancestral Worship Property Ordinance 2007, which once again recognized the legal status of ancestral worship property. But, as Po-Fang Tsai and Duan Lin narrate, the Ordinance has not resolved disputes because it does not adequately reflect the fluid and contextual relationships that govern this type of property. What the authors demonstrate is that, although formal state institutions can regulate most land disputes, they lack the flexibility to deal with nuanced relational property interests, such as ancestral worship property, which do not neatly fit within the narrow parameters of property law.

### ***Hong Kong narrative***

In Chapter 14, Say Goo explores how the English land law system took root and flourished in Hong Kong. He describes an entire system transfer. The English colonists not only brought land laws, but also the entire institutional trappings, including judges, lawyers, educational system, and even the judicial architecture, of the English legal system. Over time, the law spread beyond the colonial elites and came to govern most land transactions. But the English law did not entirely displace pre-existing regulatory

practises. It did not apply to the villages and farmland of the New Territories and co-existed in an uneasy relationship with a thriving unofficial housing market.

In Chapter 15, Say Goo takes up this story about the plural land systems in Hong Kong. To avoid disputes with land users in the New Territories, the colonial administration allowed the construction of new houses for male children during the nineteenth century. This initiative, which was formalized as the small house policy in 1972, recognized customary land practises that predated colonization. But, with the large population growth in the New Territory coupled with rapidly increasing land values, the policy currently threatens the integrity of land-planning schemes. What the study shows is that land law provides no effective solutions to complex resource disputes arising from land scarcity. Ultimately, the residents of the New Territories relied on the powerful Heung Yee Kuk association to voice their concerns through public discourse and political processes.

Contrasting with the uncertainty surrounding the small house policy, courts routinely deal with disputes over Tso and Tong ancestral worship land. Here, the common law courts have shown their capacity to work customary practises into the formal legal rules governing the ownership and management of this kind of property.

In Chapter 16, the connection between land disputes and political discourse reappears as Alice Lee discusses the regulation of unauthorized buildings and structures in Hong Kong. For decades, authorities in Hong Kong turned a blind eye to unauthorized buildings constructed on rooftops and other available spaces in the city. Faced with a rapidly increasing population and prohibitively expensive housing prices, authorities tacitly accepted unauthorized buildings as a means of housing the urban poor. This

relaxed regulatory approach changed following revelations of building violations during the 2011 elections. Intense media scrutiny of the candidates, itself a product of increasing democratization, spilled over into an official rethinking about the regulation of unauthorized buildings.

This link between democratization and land disputes is also evident in the discussion about the Mei Foo Sun Chuen estate. In this case, neighbors complained that a 20-story housing development was being constructed on land set aside as a buffer-zone between existing apartment towers. Members of protest organizations staged a “lie-down” protest to prevent construction and to mobilize media support to campaign against the project. Mass civil disobedience provided an effective mode of communication when protestors lacked legal forums for expressing their views.

It is instructive to contrast the Taiwanese and Hong Kong cases with the Chinese and Vietnamese cases. Taiwanese and Hong Kong courts routinely resolve land disputes that clearly fall within the parameters covered by the land law. But, where disputes escalate beyond simple legal questions about the validity of ownership or control and involve issues such as the small house policy or complex planning issues about environmental amenity, then disputants need to organize and mobilize to influence public policy. Recent democratization in Taiwan and Hong Kong has relaxed controls over the formation of protest organizations and the use of civil protest, leveling the playing field against state-backed developers in ways that the legal protection of property rights cannot achieve.

## **Conclusions**

In rapidly urbanizing and developing societies, such as China and Vietnam, land pressures and ongoing disputes are inevitable. Land-taking creates ongoing and contested

relationships between state agencies, developers, and land users. Without clear legal authority, unequivocal juridical foundations or irrefutable land compensation strategies, agreements will break down and be reshaped through fresh conflicts until a new consensus is reached. Dispute resolution is therefore highly dynamic, and land disputes are rarely settled once and for all.

The case studies reveal the complexity of land disputes and the importance of decentering the analysis to consider what all of the relevant actors think. We have also seen that conflicts are socially constructed. Even when there is agreement about compensation, for example, disputes may continue if actors form different views about what constitutes fair and reasonable access to land. The findings further show how emotion transforms disputes and puts solutions based on pragmatic dialog out of reach. The case studies show that governments in China and Vietnam infrequently take steps to reduce the emotional intensity of disputes before outbreaks of civil disobedience and violence. For example, grand mediation in China, which is the main government response to proliferating land disputes, has proved relatively ineffective in reducing the scale and intensity of conflicts. When land-taking is perceived as a mere conspiracy between the power and money, there is little trust for local state institutions, legal or otherwise. Especially in an age when social media rapidly spreads information about land disputes, land users form clear views about the justice and appropriateness of land-taking and compensation and are difficult to manipulate through state-managed mediation and litigation.

Suppression may produce short-term results in land-grabbing, but it is likely to backload social tension and conflict to a future date. Behind China's authoritarian efficiency is a hidden social havoc that is surfacing slowly but resiliently. A more consultative and

accommodative approach that is inclusive of the voices of all stakeholders in decision-making and goes through proper procedures reduces tension and violent conflict and produces more peaceful expropriation and resettlement. Procedural justice matters for East Asians as much as it matters for Westerners.

Land disputes are often polycentric involving multiple parties fighting for the same interest and multiple institutions jointly offering solutions. As such, they are ill-suited for traditional court-centered litigation, and judicial reasoning does not offer the best options for land dispute resolution. This is especially true in countries like China and Vietnam where the courts are weak and cannot act effectively and independently on highly politicized issues such as land-taking. Dependence breeds corruption, and corruption undermines trust. In addition, legal rules and procedures in China and Vietnam are too “fuzzy” to provide sufficient guidance for dispute resolution. As is often the case in China and Vietnam, the courts eagerly push land-taking cases away for political resolution.

Lasting settlements are most likely to occur where land users and state agencies negotiate together in relatively unmediated exchanges. This dialogue may occur where informal connections link the social organizations representing land users with party and government agencies. Without these linkages, social organizations often lack effective ways of making local party-state agencies accountable to land users. Low-level political participation in policy implementation is possible in China’s and Vietnam’s authoritarian system, but institutional channels for resolving land disputes are rigidly restricted. Tight state management of formal dispute resolution has the unintended consequence of driving land users into non-institutional channels. Frustrated land users organize themselves to

demonstrate their dissatisfaction, and with the support of the wider community, as well as public and social media, they sometimes force the government to compromise.

There are signs of a more “responsible and responsive” state emerging in China and Vietnam. The Wukan reforms point to a renewed interest in grass-roots democracy as a means of opening dialogue that might resolve disputes intractable to mediation and court actions. Settlement is most likely to occur where land users have the power to deliberate with state officials on a relatively equal footing. For this to happen, land users need to organize and mobilize their resources, which, together with domestic and international support, may force the state and developers to the negotiation table. Political mobilization at the grass-roots level may, over time, force the state to take its own laws and procedures seriously in handling land disputes.

Finally, it is unrealistic to rely entirely on dispute resolution to mitigate land disputes. Fiscal measures, such as removing the benefits of land sales and taxation, can reduce the incentives for local government to take land and pay low compensation. Urbanization may be inevitable, and land disputes are bound to increase, but responsive fiscal policies, effective anti-corruption enforcement, and enhanced social welfare might alleviate the growing pains that economic transition may inflict on developing nations and their people.