Institutions in Transition

Land Ownership, Property Rights, and Social Conflict in China

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You cannot rely on law to rule the majority of the people; for the majority of the people you have to rely on cultivating [the right] habits. . . . I took part in establishing the Constitution, but I do not remember it. Every one of our [Party] resolutions is a law; when we hold a meeting, that's law too.

(Mao Zedong, 1958)[1]

What Happened to the Team's Land?

In Chapter 1 it was argued that the current tenure system for agricultural land is credible and accepted by the authorities and the rural populace, and the institutional arrangements that have made this possible were explored. For this reason, the chapter concentrated on policy and law-making at the national level, leaving aside the process of implementation at the grass roots. It was argued that the restraint that the central government exercised in leaving land rights ambiguous—the creation of 'intentional institutional ambiguity'—is the main explanation of how the agricultural land tenure system functions. It is important to realize that the central state's actions sanctioned and perpetuated rather than created the present indeterminacy of land rights. But one critical issue was left unaddressed: why has collective land ownership become unclear even though Party regulations stipulated that land is owned by the lowest collective level, that is, the production team? This is the starting point of the present chapter.

But first it would be helpful to make some clarifications about the unit of land ownership in China. It is important to remember that the natural village has been, and continues to be, the basic unit of land ownership from Republican times to the present. The 'natural village', however, is a traditional concept and—as Feuchtwang noted—refers to 'villagers' senses of what is local and long-standing, whatever the documented evidence of actual continuity'.[2] The term does not appear in modern Chinese law, even though it is frequently used in official and unofficial texts. For reasons of tax administration, both the Republican and Communist governments attempted to delimit village boundaries, leading to the frequent redrawing

[1] Stuart R. Schram, 'Mao Tse-tung's Thought from 1949–1976', in Roderick MacFarquhar and John K. Fairbank (eds.), *Cambridge History of China: The People's Republic, Part 2: Revolutions within the Chinese Revolution 1966–1982* (Cambridge University Press, Cambridge, 1991), p. 51.

[2] A good description of the difference between traditional and state concepts related to place is given by Stephan Feuchtwang, 'What is a Village', in Eduard B. Vermeer, Frank Pieke, and Woei Lien Chong (eds.), *Cooperative and Collective in China's Rural Development: Between State and Private Interests* (New York: M. E. Sharpe, 1998), pp. 47, 59–60, 61–6 (about the administrative village).

of village boundaries, renaming of villages, and merging of hamlets into larger territorial units. Collectivization with a three-tier system of basic administration—the people's commune, the production brigade, and the production team—and decollectivization in the mid-1980s have complicated the situation. With exceptions due to shifts in administrative units and regional differences,[3] the commune has become the present township/town (*xiang/zhen*), the brigade the administrative village (*xingzhengcun*), and the team the natural village (*zirancun*) and villagers' group (*cunmin xiaozu*). Note that the brigade and the administrative village are administrative units controlling natural villages, yet are simultaneously natural villages themselves. As such they claim ownership to land within the traditional village borders, which will be demonstrated in this chapter.[4]

To return to our central question: why has collective ownership become unclear even though it was clarified in Party regulations? I will argue that, although the natural village—in its capacity as the production team—held formal land ownership, it possessed no real power over land. Instead, control over land ownership rested with the commune and higher administrative levels (the county and above). This implied that, in the event of land requisition, the natural village was unable to safeguard its interests in the land its inhabitants lived on and tilled. There are three main reasons for this.

The first is the incoherent legal framework and the absence of a rule of law during the collective period (1956–78). As we will see, in the drive for economic development land was frequently requisitioned from the team and brigade without any formal procedures being followed or proper compensation provided. In many cases, the word of higher-level cadres was law: once their approval was secured—and that could take the form of oral commitments—economic projects such as the construction of a silk farm, water reservoirs, or plantations could proceed. In addition, under collectivism the legal framework was weak and inconsistent. For land requisition, the only formal rules in existence were the Measures on Land Requisition for State Construction proclaimed by the State Council on 6 January 1958. These measures were in effect during the entire collective period and were replaced only in 1982, with the State Council's Administrative Regulations for Land used for Building Construction in Villages and Towns and the Regulations for Land Requisition for State Construction. The 1958 measures had been proclaimed before the establishment of the people's communes and pertained to land requisition for state projects

[3] For example, such exceptions occurred if the former commune consisted of two levels rather than three. As also written in article 2 of the Sixty Articles: 'The organization of the commune can consist of two levels: the commune and the team; but it can also consist of three levels: the commune, the production brigade and the production team.' See CCP, 'Nongcun Renmin Gongshe Gongzuo Tiaoli Xiuzheng Cao'an' ['Revised Draft of the Work Regulations of the Rural People's Communes'] 27/9/1962, in Zhongguo Renmin Jiefangjun Guofang Daxue Dangshi Yanjiushi (ed.), *Zhonggong Dangshi Jiaoxue Cankao Ziliao* [Reference and Educational Material on the History of the CCP], Vol. 23 (Beijing: Guofang Daxue Chubanshe, 1986), p. 137.

[4] There is to date no evidence that administrative villages also claim ownership to the larger territory under their jurisdiction, which includes several natural villages.

Plate I: **A private land and house ownership certificate issued during Land Reform to a certain farmer Zhang Yunqing of Zhangpai Village, Qingyun County, Shandong Province, dated 1 April 1951.**

alone. As a result, the few stipulations about the 'cooperatives' (*hezuoshe*) did not take into account land requisition from and within the commune.[5]

Second, China has never established a nationwide land cadastre. The central government's first effort in this direction at the time of decollectivization did not include the natural village, the basic unit of land ownership. In the history of the People's Republic there were two important events that had an impact on the land holdings of the natural village: Land Reform in the 1950s and the Four Fixes Movement (*Si Guding*) in 1962. The Supreme Court and the Ministry of Land Resources still consider these two events the basis for the assessment of land title.[6] However, Land

[5] Articles 8 and 9 of the '1958 Measures on Land Requisition for State Construction'. See Hongyi Xiang (ed.), *Tudi Quequan Shiyong Shouce* [A Practical Manual for the Assessment of Land Title] (Beijing: Zhongguo Dadi Chubanshe, 1996), p. 110.

[6] See, for example, the review of the Supreme People's Court on 'The Use of Policies and Laws for the Land Dispute between the Villagers' Committee and the Villagers' Group'

Reform and the Four Fixes Movement did not provide a sound basis for a national cadastre. During Land Reform villagers had been issued with land titles, but not on a systematic basis (see Plate I). In addition, an unknown number were lost or destroyed in the subsequent years of political and social upheaval. The name of the Four Fixes Movement refers to the granting of permanent ownership of labour, land, animals, and tools to the production team in 1962. Its formal basis was provided by the Sixty Articles.[7] In principle, the team's land was supposed to be surveyed and registered as it had gained ownership, but, again, this never occurred.

The final reason for the villages' lack of control over land is related to the recognition of (historical) customary rights. As in other developing countries, Chinese village communities face a great challenge in having their customary land rights recognized by the state as they are generally unwritten.[8] On a different level, the problem of recognition pertains to a cultural confrontation: between a rapidly industrializing society moving towards the rule of law and an agrarian society based on a tradition of the 'rule by man'.[9] The academic controversy over the term 'customary law' reflects the intangibility and fluidity of customary tenure. Motion defined customary law as 'unwritten law established by long usage'[10] but that immediately gives rise to the question: how long is long?

In England, custom has legal force only if it has existed for so long that 'the memory of man runneth not to the contrary'. Curiously, the limit of human memory was fixed at the date of the accession of Richard I in 1189.[11] In the Chinese context such an arrangement is bound to be contested if only because of the very *recent* shifts in land ownership. The

and the 'State Land Administration's 1989 Regulations on the Assessment of Land Ownership and Use Rights', in Xiang (ed.), Manual for the Assessment of Land Title, pp. 293, 312–15. The 1989 Regulations take 1962 as the standard. This is the year when the Four Fixes Movement was carried out, for which the Sixty Articles provided the formal basis.

[7] Note that the original idea of the Four Fixes was to grant the production team permanent use , but not ownership, of labour, land, animals, and tools. Article 18 of the 1961 draft of the Sixty Articles states: 'The production brigade must give labour, land, animals and tools in fixed [permanent] use to the production team and have these registered.' Article 17 stipulated that 'all land . . . within the limits of the production brigade is owned by the production brigade'. By the time the revised draft of the Sixty Articles was finally issued by the Central Party Committee on 27 September 1962, the team had been given land ownership. See also 'Nongcun Renmin Gongshe Gongzuo Tiaoli Cao'an' ['Draft of the Work Regulations for the Rural People's Communes'], March 1961 in Zhongguo Renmin Jiefangjun Guofang Daxue Dangshi Yanjiushi (ed.), Reference and Educational Material on the CCP, Vol. 23, p. 454.

[8] A large body of literature is available on this issue, captured under key words such as 'common property resource management', 'common pool resources', and 'legal pluralism'. See, for example, Daniel W. Bromley, *Making the Commons Work: Theory, Practice and Policy* (San Francisco: Institute for Contemporary Studies Press, 1992); Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge: Cambridge University Press, 1990); and Joep Spiertz and Melanie G. Wiber (eds.), *The Role of Law in Natural Resource Management* (The Hague: VUGA, 1996). A recent and interesting study on land rights in Surinam from the colonial period until today is *The Rights of Indigenous Peoples and Maroons in Suriname* (Copenhagen: International Work Group for Indigenous Affairs, 1999) written by the jurists Ellen-Roos Kambel and Fergus MacKay.

[9] The Chinese discussion on the 'rule by man' is described in Ronald C. Keith, *China's Struggle for the Rule of Law* (New York: St Martin's Press, 1994), p. 12.

[10] A. W. Motion cited in R. Rowton Simpson, *Land Law and Registration* (Cambridge: Cambridge University Press, 1976), p. 220.

[11] *Ibid.*, pp. 220–1.

spontaneous and government-supported colonization of land provides an illustration. A major obstacle to the establishment of a cadastre during the Republican era and period of the People's Republic was so-called 'ripe wasteland' (*shuhuang*)—reclaimed and abandoned or untaxed 'black land'. In the regions that had suffered turmoil from armed conflict and natural disasters, peasants were forced to leave their land. When peace and social order were restored, the land was reclaimed, either spontaneously because former or new owners started to till the land or under large government reclamation schemes. However, the reclamation of abandoned land was not without problems. As the Ningxia Province[12] Reclamation Head Office reported: 'reclamation is relatively easy to extend . . . But procedures [to regain ownership rights] will be extremely difficult. It is feared that this cannot be done overnight.'[13] The recolonized land frequently failed to enter the tax registers, which certainly did not imply that the new settlers and villages did not claim ownership to it.

A general problem with the recognition of customary land tenure is the state's misconception of its nature and frequent denial of its existence. In traditional rural societies, land was generally regarded as belonging commonly to the social group, be it a tribe, village, lineage, or family. In addition, such communal belonging is hard to define in terms of Western (civil) law: the recordable, absolute, and all-inclusive right of ownership.[14] It is for this reason that anthropologists introduced the concept of property as a 'bundle of rights' or the more abstract notion of a 'social relation'.[15]

No better illustration of the conflict between Chinese state and customary law can be imagined than the legal predicament of forest, grassland,

[12] At the time Ningxia Province was one of China's typical frontier regions as it was much larger in size than at present and encompassed great parts of Inner Mongolia (former Suiyuan Province) and Gansu.

[13] A detailed account of land reclamation in a frontier region is given in Peter Ho, 'The Myth of Desertification at China's Northwestern Frontier', *Modern China*, Vol. 26, No. 3, pp. 359–66 (the quotation from the Land Reclamation Head Office is on pp. 362–3). An example of a village that started as a spontaneous settlement by one family is described in Peter Ho, 'China's Rangelands under Stress: A Comparative Study of Pasture Commons in the Ningxia Hui Autonomous Region', *Development and Change*, Vol. 31, No. 2 (March 2000), pp. 385–412, at p. 402. See also Flemming Christiansen, 'New Land in China, 1900–1937: State Intervention and Land Reclamation', *Leeds East Asia Papers*, No. 10 (1992), pp. 61–5.

[14] As Van den Bergh notes: 'Ownership is the supreme right, there can be no rights which would not be contained in ownership. Ownership is abstract: its content cannot be described by enumerating single powers, and none of these powers needs to be legitimized specifically, or related to an acceptable social purpose. Ownership is absolute: apart from what the law expressly forbids the owner may do whatever he likes, he can exclude everybody else from influencing the goods, everybody else is obliged to abstain from breaching his ownership rights, the owner is the supreme ruler over his goods.' Govaert C. J. J. Van den Bergh, 'Property versus Ownership: Some Cursory Notes', in Spiertz and Wiber (eds.), *The Role of Law in Natural Resource Management*, p. 172.

[15] Hann cites Hoebel for a textbook anthropological definition: 'Property, in other words, is not a thing, but a network of social relations that governs the conduct of people with respect to the use and disposition of things.' C. M. Hann, 'The Embeddedness of Property', in C. M. Hann (ed.), *Property Relations: Renewing the Anthropological Tradition* (Cambridge: Cambridge University Press, 1998), p. 4. Rowton Simpson gives an exhaustive listing of the distinctive features of customary tenure. See Rowton Simpson, *Land Law and Registration*, pp. 223–5.

and wasteland ownership created by the 1954 Constitution. Most of China's forest, grassland, and wasteland is located in the frontier zones and inhabited by ethnic minorities that use these natural resources in common under unwritten, customary arrangements. In addition, settler communities have moved into these areas under the instigation of Republican and Communist governments that wanted to colonize the frontier. Under the 1954 Constitution forest, grassland, and wasteland were formally nationalized. Village communities of ethnic minorities and Han settlers now found themselves in national territory without recognition of their common property. The addition of the 1982 Constitution that these natural resources can also be owned by the collective if so stipulated in law did not clarify the issue because it is precisely the formal title to land that these communities lack.[16]

A second strand of thought that runs through this chapter is the argument that the historical legacy captured in the aforementioned three reasons for the villages' lack of control over land plagues China's land administration today. We will see that this legacy becomes obvious in land ownership disputes that are brought to court. Over the years, an increasing number of legal documents have been published, of which Anthony Dicks has remarked that 'few are more interesting than the growing body of reported decisions by courts'.[17] This is exactly the reason why this chapter has opted for a rather unusual methodology in the social sciences basing the analysis mainly on a review of translated legal cases. Detailed court cases might be tedious to read, in particular for the non-legal specialist. Yet I chose to translate these court cases from Chinese into English because they are unique. To date, there are no English translations of court cases that record Chinese land disputes.

China's legal culture is far from what Western jurists value. It is characterized by the fragmentation of law, the dependency of the courts on local government, and the subordination of law to policy: in other words, the distinction between the judicial and administrative powers is blurred.[18]

[16] These problems are noted in 'Remarks on the ''Land Administration Law (Revised Draft)'' by Relevant Departments, Several Experts and Grassroots Units of Heilongjiang Province', in Renda Fazhi Gongzuo Weiyuanhui (RFGW) (ed.), *Zhonghua Renmin Gongheguo Tudi Guanlifa Shiyi* [An Interpretation of the Land Administration Law of the People's Republic of China] (Beijing: Falü Chubanshe, 1998), p. 352. See also Peter Ho, 'The Clash over State and Collective Property: The Making of the Rangeland Law', *The China Quarterly*, Vol. 161 (March 2000), pp. 245–6.

[17] Anthony R. Dicks, 'Compartmentalized Law and Judicial Restraint: An Inductive View of Some Jurisdictional Barriers to Reform', in Stanley B. Lubman (ed.), *China's Legal Reforms* (Oxford: Oxford University Press, 1996), p. 82.

[18] Dicks (*ibid.*, p. 84) noted that '[o]ne of the results of the diversity of law-making and law-finding authority within the same legal system is excessive fragmentation, not merely of legislative, judicial and administrative jurisdiction, but ultimately of the law itself, with the potential further risk of conflicts of law and jurisdiction'. Clarke remarked that '[i]t is not simply some vague notion of respect for local leaders that makes courts reluctant to go against their wishes. There is a very specific institutional basis: the dependence of local court personnel upon local government at the same level for their jobs and finances.' Donald C. Clarke, 'The Execution of Civil Judgments in China', in Lubman (ed.), *China's Legal Reforms*, p. 71. And Albert Chen observed a violation against Montesquieu's principle on the separation of legislative, executive, and judicial powers: '[T]he principle of the supremacy of state law as against the edicts, policy documents and exhortations of the

It is in this context that the Chinese courts have to perform a complex juggling act with conflicting and often unverifiable claims, intervention by the local government, and a faint hope of rectifying past wrongs. In dealing with land disputes, Chinese judges have to administer justice while working with laws that are intentionally shrouded in institutional ambiguity. Villages and individual farmers have become victims of land theft by higher administrative levels. But dispensing justice is not easy, as considerable investments have been made in the stolen land over time, while new customary land claims have emerged, making it all the more difficult to 'simply' return the land to the original owner. All this we learn from the court cases covered in this chapter.

The cases have been grouped in such a way that each section (although with some overlap) illustrates one of the three reasons why the natural village lacked control over land: the incoherent legal framework and the absence of the rule of law; the lack of land registration; and the problems related to customary tenure. The case descriptions are revised translations drawn from the two-volume *Encyclopedia of the New Land Administration Law* edited by Liu Xinhua, and the compilation of administrative cases released by the Supreme People's Court in 1997.[19] A translator should not revise, but is professionally obliged to render in another language the intended meaning of the source text. However, at this point I was confronted with texts that not only teem with details that are completely irrelevant for those interested in land issues, but also contain a great number of mistakes and inconsistencies. I was therefore obliged to render the original sources in a strongly revised version.

The cases recorded here date from the early 1990s. Since then, two prominent developments have taken place in the legislation on land: (*a*) the proclamation of the 1998 Revised Land Administration Law and (*b*) the replacement of the 1989 State Land Administration's Suggestions on the Assessment of Land Titles (hereafter 'the 1989 Suggestions') with the 1995 Regulations on the Assessment of Land Ownership and Use Rights (hereafter 'the 1995 Regulations').[20] Where necessary, the legal

Chinese Communist Party and the orders, directions and instructions of senior officials has not yet been firmly established in constitutional theory . . . The effect of these factors has been to blur the distinction between law and policy.' Albert Hung-yee Chen, *An Introduction to the Legal System of the People's Republic of China* (Hong Kong: Butterworths, 1992), p. 77.

[19] Xinhua Liu (ed.), *Xin Tudi Guanlifa Quanshu* [Encyclopedia of the New Land Administration Law], Vols I and II (Beijing: Zhongguo Wujia Chubanshe, 1998); Zuigao Renmin Fayuan (ed.), *Renmin Fayuan Anli Xuan—Xingzheng Juan: 1992–1996* [A Selection of Cases from the People's Courts—Volume for Administrative Cases: 1992–1996] (Beijing: Renmin Fayuan Chubanshe, 1997). Legal terms have been translated according to Shutong Yu and Jia Wen (eds.), *Xin Han-Ying Faxue Cidian* [A New Chinese–English Law Dictionary] (Beijing: Falü Chubanshe, 1998). Material covered in the original cases that were irrelevant to the verdict of the court has been omitted or included in footnotes.

[20] See the State Land Administration's 1995 Regulations on the Assessment of Land Ownership and Use Rights, in Jianhong Sun (ed.), *Tudi Quanshu Shiwu Zhinan* [Practical Compass on Land Title] (Beijing: Zhongguo Dadi Chubanshe, 1998), pp. 282–93, and the State Land Administration's 1989 Suggestions on the Assessment of Land Titles in Zhongguo Tudi Guanli Zonglan Bianji Weiyuanhui (ZTGZBW) (ed.), *Zhongguo Tudi Guanli Zonglan* [An Overview of Land Management in China] (Beijing: Falü Chubanshe,

implications of these new rules on the specific case under review will be discussed.[21] Note that the State Land Administration in this chapter refers to the Ministry of Land Resources, which it became in 1998. Despite the legal and socio-economic developments since the early 1990s, it may be assumed that the six cases are typical of land disputes in China, many of which have only recently been brought into the open through petition and lawsuit.[22]

Economic Development Needs No Land Requisition

The law cases in this section[23] illustrate two points. First, under collectivism the 'theft of land' was possible because the legal framework was incomplete and inconsistent. In the first lawsuit this even leads the local government to attempt to deny the possibility of land ownership by the natural village altogether. In the next case, the ambiguity in the legal framework causes the court to resort to regulations of uncertain legal status, which stipulate issues not yet resolved at the national level. Second, land requisition from the village during the collective period was effected by administrative rather than legal measures. For purposes of economic development, land from the natural village could be easily expropriated by the commune and higher administrative levels. In addition, appropriate compensation for economic loss was seldom given.

To meet the need for water, Shiqiao Commune in Hubei Province built a small water reservoir in 1959, which was expanded one year later. In 1963, the party branch of the Provincial Bureau of Water Conservancy issued a directive ordering the transfer of the reservoir's ownership and capital assets to the county. De facto, the reservoir and its land became state property. In 1965, the Bureau of Water Conservancy planned another expansion of the reservoir and requested land from the county. Through oral communication the head of Xiangyang County determined that 210mu of land of the Third Villagers' Group of Hongdao Administrative Village should be requisitioned. To date, none of the formalities for land requisition has been fulfilled.

The requisition resulted in a series of conflicts between the villagers' group and the state water reservoir. In March 1993 the county government

1992), pp. 68–71. The terms 'tudi quanshu' and 'tudi suoyouquan' have been respectively translated as 'land title' and 'land ownership'. Note that 'title' refers to the formal document with which, within a given legal system, certain rights can be proven to a tract of land. The title is not necessarily issued by the state; for example, there are also customary titles issued by native peoples. Yet the general problem for native peoples is that they claim rights to land without title.

[21] References in the Chinese sources to the 1989 Administrative Litigation Law have been omitted out. These pertain to the procedures of litigation and are irrelevant for our analysis that focuses on land administrative laws and regulations.

[22] According to Li and O'Brien, formal petitions from the rural populace have increased dramatically over the past ten years. See Lianjiang J. Li and Kevin J. O'Brien, 'Villager and Popular Resistance in Contemporary China', *Modern China*, Vol. 22, No. 1 (1996), pp. 28–61.

[23] Cases drawn from Zuigao Renmin Fayuan (ed.), Cases from the People's Courts, pp. 334–40 (second case) and 341–7 (first case).

issued a document which marked the land as a 'disputed area'. This strengthened the villagers' group in its conviction that the land was indeed its property, and it started to petition the authorities. A month later the county bluntly ruled that the land was state-owned according to the 1989 Suggestions. In a lawsuit the villagers' group claimed that the county ruling was illegal and should be annulled. The county requested that the plaintiff's claim be dismissed 'to safeguard the correct enforcement of the state's laws'.[24] Of specific interest is the county's claims that the villagers' group *by law* could not enjoy collective ownership and thus was not entitled to act as a legal person, and that such a role belonged to the administrative village under which jurisdiction the villagers' group falls.

The court, however, decided that the villagers' group *could* own land. This decision was based on the State Land Administration's interpretation of article 8 of the 1986 Land Administration Law: 'The land originally owned by the team belongs to the farmers' collective of the agricultural collective economic organization of the corresponding villagers' group.' The court read this interpretation as meaning that 'there are two kinds of collective land ownership: ownership by the villagers' committee *and* ownership by the villagers' group' (emphasis added).[25] The court nullified the county's ruling that the disputed land was state-owned, because the 1989 Suggestions had not been appropriately used. Article 8 of the 1989 Suggestions stipulates that the collective's land is state-owned if it had been used by state institutions before the proclamation of the 1962 Sixty Articles and not so far returned. But as the disputed plot was appropriated in 1963, this rule did not apply. Article 8 also stipulates that the collective's land is state-owned if it was used between 1962 and 1982 and a land transfer agreement signed or formal approval obtained by the county government.[26] However, the county head had given only an oral commitment, while no requisition procedures had been followed. Therefore, the court decided that the land should be returned to the villagers' group.

A second case, related to the first, concerns a dispute between a commune and three brigades. In 1975 Shifo Commune in Shandong expropriated a

[24] Cases drawn from Zuigao Renmin Fayuan (ed.), Cases from the People's Courts, p. 343.

[25] *Ibid.*, p. 344.

[26] The original text of article 8 reads: 'If before the proclamation of the Work Regulations for the Rural People's Communes in September 1962 (hereafter: Sixty Articles), state institutions, urban collective institutions, and collective farms of overseas Chinese, used land originally owned by the farmers' collective (including individual land prior to cooperativization), which has not been returned to the farmers' collective in the period after the proclamation of the Sixty Articles until the present, it is state-owned. If after the proclamation of the Sixty Articles in September 1962 until the proclamation of the Regulations for the Requisitioning of Land for State Construction in May 1982, state institutions and urban collective institutions used land originally owned by the farmers' collective, it is state-owned under one of the following conditions: 1) after an agreement or any other relevant document has been signed for the transfer of land; 2) if it has been used after approval from the county people's government; 3) if compensation or settlement of labour force has taken place; 4) if it has been donated by the farmers' collective; 5) if the farmers' collective enterprise has become state-owned. In all other cases, the farmers' collective land . . . must be returned to the farmers' collective or the then current procedures for the compensation of land requisition must be followed.' See article 8, Suggestions on the Assessment of Land Titles, in ZTGZBW (ed.), Overview of Land Management in China, p. 69.

total of 170mu from Xulou, Weihai, and Qianchenhai Brigades to set up a pig farm. Typically, no land requisition procedures had been followed. Since 1978 the three brigades had petitioned the commune authorities to return the land and compensate them for financial losses. An agreement was signed between the commune and the brigades in 1980. The agreement stipulated how much land had been requisitioned and at what price. It also determined that the land ownership belonged to the pig farm, but would be sold back to the brigades at the purchase price if the farm were to be closed down. The brigades were paid partly in cash and partly in kind. With the demise of Shifo Commune and subsequent change to a township in 1983, the pig farm was also closed. From then on, the land was used for forestry. In 1990 the trees were felled and one-third of the land was leased for agriculture to farmers from Hanzhuang village for a period of thirty-five years. Immediately, disputes erupted between the township and the three administrative villages. The county government intervened on several occasions. In 1988 and 1991 directives had been issued stating that the land was owned by the township (*gui xiang suoyou*). In the end, the villages filed a case against the township and county governments.

The villages claimed that the land was theirs because the commune had requisitioned the land without their consent and the land use had been changed, whereas the 1980 agreement stipulated that the ownership was to be sold back if the farm was closed down. The county invoked the 1989 Suggestions to prove that the land belonged to the township. According to these regulations, a change in the level of collective land ownership is possible for the establishment of enterprises (however, at the national level there is no agreement over this issue). For land in use between 1962 and 1982 this is effected if an agreement has been signed (excluding land lease); approval from the county, township, and village authorities has been obtained; or the ownership structure of the user has changed (article 14).[27] As an agreement had been signed and compensation paid, the land ownership should belong to the township, the county claimed. The township authorities added that land use had not changed at all: its former forestry activities were geared to animal husbandry, while the farm had not been dissolved: the director, the buildings, and the pigsties were still there.

[27] The original text of article 14 reads: 'If before the proclamation of the Sixty Articles, land is in use by entrepreneurial units of the township (town) or village, it is owned by the farmers' collective of the respective township (town) or village. If it is used after the proclamation of the Sixty Articles in September 1962 until the proclamation of the State Council's Administrative Regulations on Town and Village Construction Land in September 1982, it is owned by the farmers' collective of the respective township (town) or village under one of the following conditions: 1) after an agreement has been signed for the use of land (not including lease); 2) if it has been approved by the county, township (commune) and village (brigade), and an appropriate land adjustment or compensation has been given; 3) if the nature of the entrepreneurial unit of the township (town) and village has been lawfully altered. If entrepreneurial units of the township (town) and village have occupied land with other than aforementioned means, or used the aforementioned means but presently use the land irrationally, for example, leaving land idle, transferring land, and so forth, it must be entirely or partly returned to the original farmers' collective of the village or township, or be handled according to relevant regulations.' See Suggestions on the Question of the Assessment of Land Titles, in ZTGZBW (ed.), Overview of Land Management in China, pp. 69–70.

Also, the lease for agriculture was permitted, the township stated, as it owned the land.

The county court yielded to pressure from the local government and ruled that the disputed land belonged to the township. The villages appealed to the intermediate court of Liucheng Prefecture. The intermediate court annulled the verdict of the lower court and decided that the ownership of the disputed land should be allocated to the three villages. This decision was taken on three grounds: (*a*) the three villages' land had been appropriated without formal approval and the correct procedures being followed; (*b*) land use had been changed with the demise of the farm and the lease for agriculture; and (*c*) the law had been inappropriately applied to sustain the 1988 and 1991 county directives that vested land ownership in the township.

The legal twilight zone of the past has created the courts' present dilemmas. A major problem is the nature of collective ownership. As explained in Chapter 1, collective ownership is intentionally left undefined in law because of the central government's fear of widespread social conflict: 'intentional institutional ambiguity'. The land ownership of the team (natural village) has therefore been in limbo since the start of the economic reforms. In particular, in the urbanized, coastal regions, legal indeterminacy is used to deny land ownership by the natural village. For example, during the revision process of the 1998 Land Administration Law, Zhejiang Province suggested altering the land tenure structure stipulated in the Sixty Articles and abolishing the natural village's land ownership.[28]

It is the old debate over the level of collective land ownership that also divided the central leadership during the early 1960s: should land ownership be granted to the lowest collective level or to the next highest level? Zhejiang Province reasoned that collective ownership by a higher level would facilitate urban and spatial planning. However, the village would then be completely denied the possibility of contesting forced land requisitions. With the current boom in land prices and frenzy of real estate development, there is a significant danger that the legal rights of the natural village and its inhabitants will be violated if the natural village is not vested with the authority to represent collective ownership. For these reasons, the central government has called for the creation of new institutions, among them a rural land registry.

Against this backdrop, the first case is nothing less than a landmark. We see that Xiangyang County uses the ambiguity in the law to delegitimize the Third Villagers' Group's claim to be the legal owner of land. For this reason, it is important that the court interprets the law as meaning that the villagers' group *can* enjoy ownership to land, not merely the right to its use and management. If Xiangyang County had eventually brought the case to the Supreme People's Court, it would have become a crucial test of the legal and political limits of China's land tenure. Yet, in the light of the legislative restraint exercised by the central government on this

[28] 'Remarks on the ''Land Administration Law (Revised Draft)'' by Relevant Units and Personnel of Zhejiang Province', in RFGW (ed.), An Interpretation of the Land Administration Law, p. 366.

issue, one wonders whether the present land rights system is ready for such a test.

Legal rules are lacking also in areas other than ownership. As a result, courts have no option but to rely on administrative measures of unclear legal status. This problem arises in the second case. The main question here is whether the land appropriation from the three villages by Shifo Commune can count as an act of land requisition. According to Chinese law, land is requisitioned for purposes of *state* construction whereby collective land ownership is turned into state ownership. In fact, under the past *and* current legal framework this is also the sole condition under which the nature of collective ownership can be changed. In other words, there are no legal rules under which the various collective levels can transfer ownership of land.[29] For this reason, the 'land requisition' by the commune was illegal. Furthermore, the 1980 agreement whereby land ownership would be sold back to the original owners in case the enterprise was dissolved was also unlawful, as it envisaged *a sale of encumbered land ownership*.[30] Since its 1988 revision, the Constitution allows only the non-commercial transfer of the use right to rural land, although Chinese jurists and politicians expect that the free sale (and mortgage) of rural *use rights* will at some stage also be incorporated in law. Although this issue is still hotly debated, the latest amendment to the Land Administration Law is silent about it. This is problematic given that the appropriation of land for township and village enterprises is widespread in rural China. The court cannot but resort to interpreting administrative regulations issued by the executive branch of the state—the 1989 Suggestions. However, as these have not been reviewed, debated, or enacted as law by the NPC, or issued by the State Council as binding rules for implementation (*shishi tiaoli*), nobody knows their exact legal implications.[31] In fact, the rules applied here do not even have the status of an administrative regulation (*guizhang*) but are merely 'suggestions'.

No Cadastre, a Disaster!

The cases in this section[32] illustrate the issues related to China's lack of a land registry, or 'cadastre'. The attentive reader will note that the cases discussed also concern customary tenure. The customary rights problem,

[29] See '1958 Measures on Land Requisition for State Construction'; '1982 Administrative Regulations for Land used for Building Construction in Villages and Towns'; and the '1982 Regulations on Land Requisition for State Construction', in Xiang (ed.), Manual for the Assessment of Land Title, pp. 108–28.

[30] About this, a Chinese jurist remarked that, at the time of the transfer, the Sixty Articles were still valid, which stipulated: 'The land owned by the production team . . . can by no means be rented or sold' (article 21). See Liu (ed.), Encyclopedia of the New Land Administration Law, Vol. I, p. 900 (in which this case is also described).

[31] According to Dicks, the administrative regulations or guizhang are 'falling short of the status of "law" '. Dicks, 'Compartmentalized Law and Judicial Restraint', in Lubman (ed.), *China's Legal Reforms*, p. 106.

[32] Case drawn from Liu (ed.), Encyclopedia of the New Land Administration Law, Vol. I, pp. 909–13 (second case) and 990–2 (first case). In the first case, the names of the villages and county have not been given in the original Chinese source. For this reason, they are referred to as X and Y Villages, and Z County.

however, is most apparent in the clash between state and collective property. The two cases here relate to disputes between rural collectives. For this reason, this section limits the discussion to the registration of land titles. An effective and efficient land policy needs ownership to be clarified and collective land registered. As Rowton Simpson remarked:

> Land records . . . are of great concern to all governments. The framing of land policy, and its execution, may in large measure depend on the effectiveness of 'land registration', as we can conveniently call the making and keeping of these records.[33]

Yet land registration should not be an end in itself. It is an instrument that is an integral part of sound land administration, but it cannot automatically produce rational land use and development. For land registration to be effective it should be placed in the wider context of the strengthening of state institutions, legal and political reform, and the establishment of a well-functioning land market. However, land registration in China has never been completed because of the intentional actions by the central state to uphold 'institutional ambiguity', as shown in Chapter 1. The lack of land title registration poses great problems for the judiciary when it has to adjudicate in land disputes, as the two cases recorded below demonstrate.

In 1992, X Village filed a lawsuit against Y Village in a dispute over 257mu of land located on the Daozhai Mountains between the two villages. In Republican times, this land was used as a military depot by the Nationalist army. Before collectivization X Village used this land for marginal activities, but it became the common property of both villages during the 1950s. In 1966 the prefecture wished to construct a silk farm on the common land. A requisition certificate was signed between Y Village and the silk farm, but none with X Village because no agreement could be reached. Some time later, X Village consented to the expropriation, for which it received a financial compensation of 1,000 RMB. In 1980 the county government planned a new county capital and requisitioned land, including that of the silk farm. The county informed the two villages of the forthcoming expropriation, which they understood as renewed requisition—in other words, the villagers believed they were still the owners of the tract. The villages appealed to the county to recognize their ownership and grant them appropriate compensation. The county ignored the requests and proceeded with the construction, whereupon a group of thirty farmers from Y Village demolished the new buildings. After two years of conflict, the county appointed an investigation team, which concluded that the land had been requisitioned in 1966 with the agreement of both villages. Therefore, they were not entitled to dispute the ownership of the area or to demand compensation.

But Y Village was not that easily put off, and it kept appealing to the authorities. In 1985 the county issued a notice stating that the land rights of the disputed plot had always been unclear. Therefore, the land should be divided equally between the two villages and once more requisitioned against compensation. The conflict between the villages and the county

[33] Rowton Simpson, *Land Law and Registration*, p. 3.

then turned into a boundary dispute between the two villages. In court, X Village claimed ownership to the land on the basis of the texts of two stone stelae (one from the Kangxi period and another engraved in 1922). Y Village argued that even before liberation it had used the land for animal husbandry, agriculture, and brick production. The court adopted the county's 1985 notice and ruled that the land was commonly owned by X and Y Villages because written land titles were lacking, meaning that the land had to be equally divided among the two villages and re-requisitioned. X Village appealed to the prefectural court, which ruled that, by recognizing the villages' dual ownership to the disputed land, the county had illegally returned the land to the original owners, when in fact it was state-owned. According to the 1986 Land Administration Law the 'collective land that is requisitioned by the state for construction is owned by the state; the unit that uses the land [in this case the silk farm] only enjoys the right to use'.[34] Therefore, the county's land appropriation of the land from the silk farm was a matter of changing use rights, not ownership (an issue we encountered in the previous section). The villages' claims to ownership and compensation were declared unfounded.

The following case is a fascinating account of the struggle over rights to newly formed land. The case is so interesting because, to my knowledge, it is the first documented case on riparian rights in China. What are riparian rights? Suppose a tract of land borders a river or lake and the title mentions the body of water as part of the boundary. The owner may then claim so-called riparian rights. These usually include the use of the water for boating, docking, fishing, and swimming. As Frank Emerson Clark wrote in his authoritative 1939 *Fundamentals of Law for Surveyors*: 'Once a tract of land acquires riparian rights, any land that is added to the shore line becomes a part of the tract.'[35] However, when the land is not registered, as is the case in China, then 'water bodies [can] make especially troublesome boundaries' because they 'shift as streams meander, lake levels fluctuate, and coasts erode'.[36]

Bolin and Xiaqu are two villages located on the northern bank of the Weihe River and south to the Shanghai-Lanzhou railroad in Gansu Province. Along the river there used to be a stretch of common land that was jointly cultivated by farmers from the two villages. After a big flood in 1954[37] this land was submerged. During the Four Fixes Movement in 1962 Bolin and Xiaqu exchanged two plots of land of equal size situated north of the railway track. The boundary between the plots was the 305 landmark east of the Jiashigou Canal. As the land south of the rail had been washed away by the flood, nothing was agreed on its boundaries. In 1972 Xiaqu built a dam upstream. The dam diverted the course of the Weihe River

[34] Article 24 of the 1986 Land Administration Law in Nongyebu Zhengce Tigai Faguisi (ed.), *Nongyefa Quanshu* [Encyclopedia of Agricultural Laws] (Beijing: Zhongguo Nongye Chubanshe, 1994), p. 557.

[35] Frank Emerson Clark cited in Mark Monmonnier, *Drawing the Line: Tales of Maps and Cartocontroversy* (New York: Henry Holt and Company, 1996), p. 123.

[36] *Ibid.*, p. 126.

[37] The original text states 1984, but the text is corrupt as it later talks about 1954. From the context it is also clear that the year 1954 is meant here.

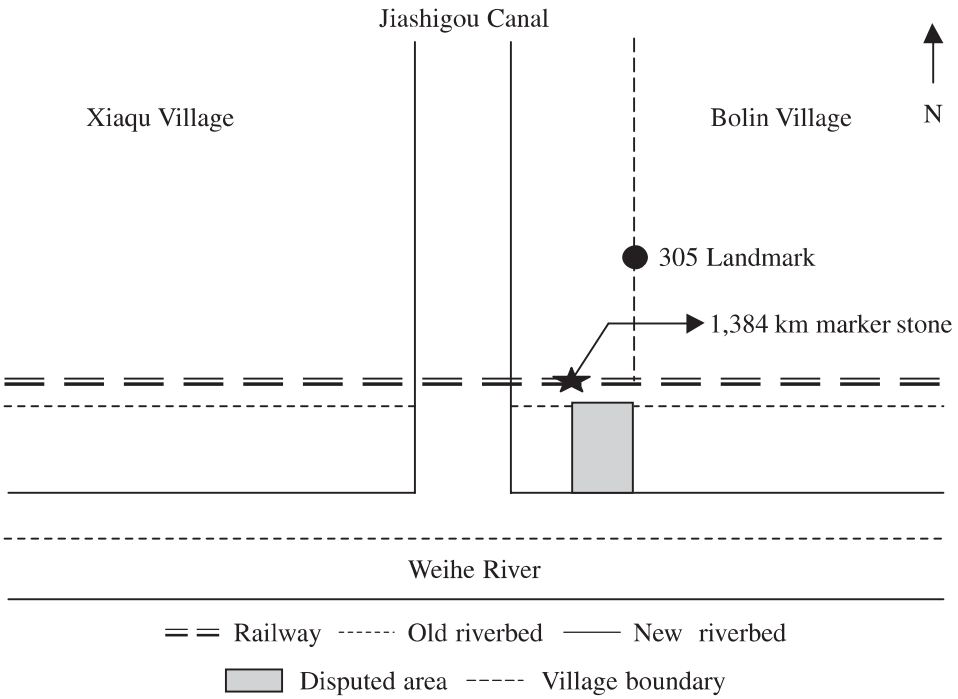

Figure 3: **Schematic map of a dispute over riparian rights.**

Source: Drawn by Zhao Heng.

southwards and a stretch of wasteland surfaced on its northern bank. Xiaqu claimed that the boundary of this land should follow the boundary north of the railroad: the 305 landmark east of the Jiashigou Canal. Bolin maintained that the boundary should be the 1,384km marker stone of the railroad. Neither of the two villages could furnish any written evidence to support its claims (see Fig. 3).

In 1990 Xiaqu Village filed an administrative litigation with the Beidao County government. A year later, the county pronounced: 'Through examination of maps of land requisition for the Shanghai-Lanzhou railroad before the founding of the People's Republic and through on-site investigation, it is confirmed that the boundary between the two villages at the time of the Four Fixes Movement ran from Jiashigou to the north of the railroad . . . '[38] For this reason, the county decided that the boundary north of the railway would also apply to the new land south of the railway. The land east of the 305 landmark would be allocated to Bolin, the land west of it to Xiaqu.

Bolin did not submit and took the case to the county court. Bolin claimed that the boundary laid down in documents from the Republican period was not a fair standard for demarcation:

> The Weihe River is not a stream that can be fixed to its river bed. Some years it flows southwards, some years northwards, flooding and damaging arable land. As early as during Land Reform, cooperativization and collectivization, this tract was foreland, yet river bed during floods. . . . [U]sing maps . . . that date from before the founding of the PRC cannot explain the natural changes of thirty years.[39]

[38] Liu (ed.), Encyclopedia of the New Land Administration Law, Vol. I, p. 910.
[39] *Ibid.*, p. 911.

The court confirmed the evidence put forward by Bolin Village that 'before 1954 there was land south to the railroad and east of the 1,384 kilometer marker stone of the Shanghai-Lanzhou railroad, which was commonly tilled by Xiaqu and Bolin Villages'. But the court also stated that 'the title to this disputed land has never been determined since Land Reform or the Four Fixes Movement in 1962'.[40] The verdict of the Beidao government, which determined that both villages held title to the land, was annulled and the county was ordered to pay the legal costs.

In both cases, the local government attempted to find a fair solution to land disputes arising from long-term use without clear ownership. In the first case, the county proposed to reverse the unclear past requisition through renewed requisition with equal financial compensation for each village. However, this action only led to a new dispute over the boundaries between the villages. Several issues were at stake. First, as the prefectural court also noted, the silk farm was by law not entitled to act as a legal person because it enjoyed only the use right to land and not ownership. The requisition should have been handled by the prefecture as the representative of the state. Second, after requisition the change in land titles from collective to state ownership should have been registered with the county, as the then current regulations also determined.[41] Third, it goes without saying that this conflict could have been avoided if land titles had existed from the start. In a case where the plaintiff's evidence consisted of only stone stelae without detailed boundary descriptions and maps, while the defendant merely resorted to oral history, the county's ruling was probably the best option.

In the second case too the local government was attempting a Solomon's judgement. Yet this conflict was far more complex than the first: the disputed land alternately was submerged and resurfaced; and it was commonly tilled by two villages, neither of which could prove title. As Monmonnier rightly remarks: 'Riparian principles sometimes seem grossly unfair, especially when a river's arbitrary wandering creates big winners and big losers.'[42] In this sense, the current case was also a legal test case; its complexity brutally exposed the legal shortcomings over newly formed land that must be addressed to safeguard the interests of the state, the collective, and the individual.

The first question in this case is: who holds the ownership to land that accrues from shifting river flows? Some Chinese jurists argue that it should be the state, not the collective.[43] They invoke two legal rules. According to the 1950 Land Reform Law, 'the land for protective water storage and dykes on both sides of rivers . . . may not be allocated' (article 26). In the same vein, the 1988 Administrative Regulations on Rivers stipulate for flood control that 'the land added for the realignment and consolidation of

[40] Liu (ed.), Encyclopedia of the New Land Administration Law, Vol. I, p. 912.
[41] Article 14 of the 1958 Regulations on Land Requisition for State Construction, in Xiang (ed.), Manual for the Assessment of Land Title, p. 111.
[42] Monmonnier, *Drawing the Line*, p. 124.
[43] Liu (ed.), Encyclopedia of the New Land Administration Law, Vol. I, p. 913.

rivers is state-owned' (article 18).[44] On closer inspection, these legal rules do not apply, as they concern land that has been specifically designated or added for water conservancy. The tract disputed by Bolin and Xiaqu was land that was naturally formed through a change in the river's course. And this is a typical case of riparian rights: a void in China's present legal system.[45] One of the solutions adopted by courts in the United States is to label such radical shifts 'avulsion'. Thus, property and political boundaries can be left intact wherever possible.[46]

The second fundamental problem here is the lack of written evidence that could be used as a standard in adjudication. For its judgement, Beidao County could rely only on maps from the Republican era. And here we chance upon a critical issue in China's land registration, because the use of historical documents to prove title is not uncontested. As the commentary on this case stated: 'The Beidao government used land material of the old system [society] as evidence to arbitrate in a land dispute forty years after liberation. We feel that a verdict on such a basis is wrong.'[47] According to law, the legal basis for the assessment of land titles is Land Reform and the Four Fixes Movement, as 'all land deeds before Land Reform are invalid'.[48] In addition, the 1989 Suggestions stipulate that 'urban land and land that has not been allocated to farmers during Land Reform through the issue of a land deed, including arable land, forest, waters, waste mountains and sandy beaches, and so forth, are state-owned'.[49] This regulation has remained unchanged in the successor of the 1989 Suggestions, namely, the State Land Administration's 1995 Regulations on the Assessment of Land Ownership and Use Rights.[50]

There are great difficulties in taking land deeds issued during Land Reform and the Four Fixes Movement as the norm for collective ownership today. The registration of land titles during Land Reform was fragmentary, whereas many such titles were lost over time. Moreover, during Land Reform the land was generally distributed to individual farm

[44] See article 26, 1950 Land Reform Law, in Sun (ed.), Practical Compass on Land Titles, p. 110; and article 18, 1988 Administrative Regulations on Rivers of the PRC, in Xiang (ed.), Manual for the Assessment of Land Title, p. 136.

[45] In Qing times this was more clearly stipulated, as the government stipulated time and again that newly emerged land along rivers, creeks, and the coast was state property. See also Liu Jinzao, *Qingchao Xuwenxian Tongkao* [A Continued Encyclopedia of Documents of the Qing dynasty] (Shanghai: Shanghai Commercial Press, 1936 reprint of 1921 edition), p. 1904. With thanks to Eduard Vermeer.

[46] A typical dispute over riparian rights occurs when a river forms the boundary between two plots. The centre line or the line of the fastest current is then regarded as the theoretical boundary. But as long as the river does not change its course there is little incentive to determine the exact dividing line, and when it does disputes have already erupted. In our case, the situation is different as the land emerged between two villages on the same side of the river. Monmonnier, *Drawing the Line*, p. 128.

[47] Liu (ed.), Encyclopedia of the New Land Administration Law, Vol. I, p. 913.

[48] See article 30, 1950 Land Reform Law, in Sun (ed.), Practical Compass on Land Titles, p. 111.

[49] Article 1, Suggestions on the Question of the Assessment of Land Titles, in ZTGZBW (ed.), Overview of Land Management in China, p. 69.

[50] See article 4 of the State Land Administration's 1995 Regulations on the Assessment of Land Ownership and Use Rights, in Sun (ed.), Practical Compass on Land Titles, p. 282.

households and not the village as a whole. All privately owned rural land was transferred—on a 'voluntary' basis—to the collective when the Higher Agricultural Production Cooperatives were set up in 1956.[51] The Four Fixes Movement should have led to the registration of the production team as the basic owner of land as the Sixty Articles stipulated.

However, as the recorded cases demonstrate, systematic land registration was the exception rather than the rule. The illegal requisition of village land by higher administrative levels led to further ambiguity over the rightful ownership to collective land. For these reasons, the state called for the first nationwide registration of collective land in 1984 which, due to the minefield it uncovered, halted at the level that mattered most: the natural village. It is certain that, during the establishment of a national cadastre, China cannot avoid taking into account the historical claims that predate Land Reform and the Four Fixes Movement. Claims by customary tenure, discussed in the following section, are even more complicated.

Customary Rights, Silent Rights?

The terms 'customary rights'[52] or 'traditional land tenure' invoke a dim and distant past—something that has existed for so long that 'the memory of man runneth not to the contrary'.[53] Yet the two cases reviewed here show that entitlements do not necessarily have to date back centuries ago to be called 'customary', but might equally have evolved over only a few decades. Moreover, customary entitlements are—in the Chinese context—often associated with the rights of ethnic minorities, such as the forest rights of mountain tribes in Yunnan or the traditional grazing arrangements of Mongols and Kazakhs—but again, not necessarily so. The cases demonstrate that customary rights may be defined as the rights that have evolved at the grass roots in the absence of or alongside state law. In the near future, China will encounter great difficulties in assessing customary land titles because of their unwritten nature. The challenge to the Chinese state is to grant a fair recognition of such claims that can satisfy both state and collective interests rather than simply to suppress them.

The following case was not decided in court but arbitrated by the Shaanxi Provincial Bureau of Land Administration. In 1984, Beiying Village occupied 361mu of steppe from a farm of the Air Force Telecommunication College. The village claimed this land was ancestral steppe (*zuyi tandi*).[54] According to the village authorities, farmers had tilled and afforested the land in the past, as recognized in a land permit issued during Land Reform. In addition, the village furnished land tax statistics and a clarifying map drafted by the Goutai Administrative Region in 1951

[51] Article 13, Exemplary Regulations on the Higher Agricultural Production Cooperatives, in *ibid.*, p. 131.

[52] First case drawn from Liu (ed.), Encyclopedia of the New Land Administration Law, Vol. I, pp. 1039–41. Second case drawn from Zuigao Renmin Fayuan (ed.), Cases from the People's Courts, pp. 450–4.

[53] A. W. Motion, cited in Rowton Simpson, *Land Law and Registration*, p. 220.

[54] Literally 'sandy land inherited from the ancestors'. The term *tandi* literally means 'sandy land' but is best translated as 'steppe' or 'sandy waste'.

(by which Beiying Village was administered at the time). The material demonstrated that Beiying Village paid tax for over 500mu of steppe, which included the disputed land. Lastly, the village referred to a map of the Yellow River Water Conservancy Committee that showed the disputed plot falling within the jurisdiction of Xianyang and not Xi'an City, to which the Air Force's farm belonged. The farm, on the other hand, claimed that the disputed tract had always been public land (*gongdi*) and was commonly used by the Shaanxi Province financial, forestry, and educational departments. In 1951 the land was transferred to the farm for use, with the consent of the Shaanxi Provincial Bureau of Agriculture. The transfer of the use right was formally approved by the Shaanxi and Xi'an Party Committees in 1965. In addition, the farm's archives produced a series of land use maps dating from 1954, 1960, 1963, and 1964 which assessed the boundaries of the farm. The maps were drafted by the Agricultural Surveyor Team of the Shaanxi Bureau of Agriculture.

The Shaanxi Bureau of Land Administration ruled that the disputed land was state-owned, while the Air Force's farm held the use right. Beiying Village had to be penalized for the illegal occupation of land. But, in view of the village's considerable investments in afforestation, no redress was imposed. Instead, the Air Force's farm had to pay 20,000 RMB for the fruit trees, which it would then own. The verdict was based on the following considerations: (*a*) the land permit issued during Land Reform, which the Beiying village authorities mentioned, was not found in the archives; (*b*) the land tax statistics and accompanying map did not indicate whether the disputed tract was part of the land for which tax was due; nor was it clear whether the village paid taxes for land owned or leased; (*c*) since the map of the Yellow River Water Conservancy Committee was drafted for the construction of the Sanmen Gorges Reservoir and not for the assessment of administrative boundaries, it could not be admitted as evidence; and (*d*) the farm's claim that the use rights were formally transferred in 1965 could be corroborated.

The second case, too, concerns a land dispute between a village and a state institution. On the western side of Mount Zechongqiao in Liuzhou City (Guangxi Province) lies a forest of around 550mu that is contested by the Sanmenjiang State Forest Farm and Niucheping Village of Liudong Township. No title of the land has been assessed since Land Reform. Under the instigation of the township head and team leader, villagers sowed pine seeds on the mountain hill in 1953 and planted tree saplings the following year. In 1955 a part of the land was used by the villagers for shifting cultivation. In that same year, workers of the state forest farm planted fir trees on the land. The trees were carefully maintained and protected by villagers and foresters. In 1960, the East-is-Red Commune (later Liudong Township) carried out a general survey of the afforested land and had it registered as property of Niucheping Brigade.[55] Three years

[55] The original text speaks of Liudong Brigade and Niucheping Team. However, the text later mentions Niucheping as a brigade that administers the fourth, sixth, and seventh production teams. It is likely that after the Great Leap Forward the East-is-Red Commune was decreased in size. That is the reason why Liudong Brigade became a commune and

later, after the proclamation of the Sixty Articles, Niucheping Brigade granted ownership of the forest to the fourth, sixth, and seventh production teams (*huafen gei xiaodui suoyou*).[56] During the same period the state forest farm strengthened its claims to the land. In response to regulations of the provincial forest bureau, the disputed plot was included in the farm's regional planning of 1954 and 1963. In addition, the Forest Mapping and Survey Institute drew maps of the area in 1973 and 1984.

Towards the late 1970s, the trees had matured and conflicts erupted over the mountain forest. For years the conflict lingered on despite repeated mediation by the Liuzhou City Government. In 1991 the city authorities issued a verdict that assigned half of the tract to Niucheping Village and the other half to the state, while the use rights were granted to the state forest farm. The Sanmenjiang State Forest Farm did not accept the verdict and filed a suit against the city government. The farm claimed that peasants from Niucheping had illegally felled trees on the land since the end of the 1970s. Not only was the plot included in the farm's regional planning, but the farm was still formally responsible for forest protection on Mount Zechongqiao. On these grounds, the Sanmenjiang Forest Farm contested the 1991 verdict of Liuzhou City that attempted to appease both the village and the forest farm by dividing the land equally between them. The defendant, the Liuzhou City government, retorted that the title to the forest had never been assessed, although the land was used and managed by both claimants. Because the claimants could not furnish any evidence to prove title, the city government requested the court to sustain its verdict to 'prevent a continuation and worsening of the conflict'.[57]

The court judged that both the 1960 land title registration of Niucheping and the forest farm's 1954 and 1963 regional planning were illegal because they had not been approved by the county government and relevant departments. For this reason, the Liuzhou City verdict was sustained by the court and deemed 'factually clear, and [supported by] a correct use of the laws and legal procedures'.[58] A later appeal to the higher court by the village and the state forest farm was dismissed.

The typical land resources claimed by customary right include forest, grassland, and wasteland—which is not say that there are no customary claims on agricultural land.[59] The greater part of these resources are located in the frontier zones and inhabited by ethnic minorities that use the resources in common under customary regulations. Moreover, in those areas traditionally occupied or colonized over time by Han peasants, forest, grassland, and wasteland are generally common property, owned and used by the village community.[60] With the proclamation of the 1954

Niucheping became a brigade under its jurisdiction. See Zuigao Renmin Fayuan (ed.), Cases from the People's Courts, p. 452.

[56] *Ibid.*, p. 452. [57] *Ibid.*, p. 452. [58] *Ibid.*, p. 454.

[59] For examples of customary rights on agricultural land in Kenya and Indonesia, see H. W. J. Sonius, *Introduction to Aspects of Customary Land Law in Africa: As Compared with Some Indonesian Aspects* (Leiden: Universitaire Pers, 1963), pp. 14, 32; M. de Muinck, 'Onteigening in de Nederlandsche Koloniën' ['Requisition in the Dutch Colonies'] (Groningen: PhD Dissertation, 1911), p. 5.

[60] One needs to think only of the colonization of state forest reserves in former Manchuria by rural collectives. An instance of a recently developed common property of

Constitution, forest, grassland, and wasteland were formally nationalized, unless collective ownership could be proven, which implied that the burden of proof lay with the collective. The opposite applies to rural land, which is considered collective unless state ownership can be proven. This principle forms the legal basis for state and collective ownership and has been enshrined in the 1954 Constitution and its amendments to date.[61]

The administrative measures proclaimed by the State Land Administration take the Constitution's basic principle of legal proof for state and collective ownership one step further. The 1989 Suggestions and the 1995 Regulations stipulate that land that has not been *legally* (that is, according to the 1950 Land Reform Law and the Sixty Articles) allocated to farmers during Land Reform and the Four Fixes Movement is state-owned.[62] The problem is that the common property aspect of customary entitlements is frequently regarded by the state as 'nobody's property'. Therefore, during Land Reform and the Four Fixes Movement titles to forest, grassland and wasteland were only rarely issued to farmers and collectives, especially as the (local) state considered these natural resources national property since 1954. In other words, from the viewpoint of the state, forest, grassland, and wasteland are regarded as state-owned unless otherwise proven. From the viewpoint of Chinese villages, this land is owned by the community, which faces the impossible task of proving that decades of land use is sufficient to establish a 'customary right'. The two cases in this section present the issue in all its starkness.

Both Beiying and Niucheping Villages claim wasteland on the basis of land use before Land Reform. The steppe and forest farms—as state representatives responsible for the management and development of national resources—challenge the villages' claim and maintain that the disputed area is state-owned. Exactly how this land has become state-owned is unclear, because no official land requisition has been carried out. It is certain, however, that state institutions have often invested considerable human and financial resources in land development. So simply reinstating the village's ownership of land that is claimed by oral history is not an option. But again, a glance at the 1989 Suggestions and 1995 Regulations shows how potentially explosive the situation is. The stipulation that land is state-owned unless registered as collective during Land Reform and the Four Fixes Movement provides the state with a powerful instrument to dismiss all customary land claims. If this rule were to be rigorously applied it would become a seed-bed for ongoing social conflict. It is no surprise that the newly Revised Land Administration Law has

forest is described by Emily T. Yeh, 'Forest Claims, Conflicts and Commodification: The Political Ecology of Tibetan Mushroom-Harvesting Villages in Yunnan Province', *The China Quarterly*, Vol. 161 (March 2000), pp. 264–78.

[61] A chronological listing of the Constitution's stipulations on natural resources is given in Wenzheng Shi, *Caoyuan yu Caoye de Fazhi Jianshe Yanjiu* [Research of the Construction of a Judicial System for Rangeland and Pastoralism] (Hohhot: Neimenggu Daxue Chubanshe, 1996), pp. 37–8.

[62] Article 1 of the State Land Administration's 1989 Suggestions on the Assessment of Land Titles and the State Land Administration's 1995 Regulations on the Assessment of Land Ownership and Use Rights. Xiang (ed.), Manual for the Assessment of Land Title, pp. 312, 351.

shrouded this issue in vagueness rather than adopting the stipulations of the 1995 Regulations.

In dealing with customary entitlements, the judiciary and the executive walk a fine line between social justice and safeguarding the state's interests. The solutions adopted by the courts and local governments in the two cases described above surely refrain from using the extreme measures available under the 1989 Suggestions and 1995 Regulations. Instead, the formal verdicts are a veiled recognition of villages' customary claims. In the first case, the local government attempts to effect some sort of retroactive land requisition by demanding financial compensation from the state farm. However, it is doubtful whether this compensation comes anywhere near the real value of the requisitioned land. In the second case, the local government and the court steer a middle course through an equal division of the disputed land between the village and the state farm.

Caught between Historical Heritage and Social Justice

This chapter sought to answer the question why collective land ownership has become unclear even though formal ownership was vested by Party regulations in the production team. It was argued that the natural village, in its capacity as the team, possessed no real power over land. Actual control was exercised by the commune and higher administrative levels. Through the review of lawsuits, three main reasons for this situation were identified: the inconsistency of the legal framework and the absence of a rule of law during the collective period; the lack of a cadastre; and the state's difficulties in recognizing customary tenure. These three reasons represent a historical legacy that affects China's land administration and jurisdiction even today.

How can the (local) government and courts strike the right balance between unclear historical land claims and social justice? It requires steering carefully through a minefield of irreconcilable interests: villages' land has been 'stolen' because of a weak legal culture, while those that profited have invested considerable resources in the 'stolen goods'. Yet this is an overly simplified picture, as for decades land has been used and developed by governments *and* villages, precisely because ownership is unclear. From this perspective, both state and collective are victim and culprit. For the People's Republic there will be no easy answer to this complex matter and, in this respect, it finds itself in the same boat as those governments that struggle with indigenous and pre-colonial land claims.

The Chinese government needs to consider several critical issues if it wishes to establish institutions that can sufficiently protect the rural weak while at the same time ensuring stable economic growth. As we saw in Chapter 1, the ambiguous legal framework around property rights has allowed the cropland tenure system to function as a social security system. On the other hand, this institutional ambiguity—particularly in the wealthier and increasingly urbanizing areas—has also tempted local governments to deny land ownership to the natural village altogether. This is a matter of serious concern and threatens the long-term credibility of

land property rights. In locations where land prices are booming and land ownership cannot be verified beyond doubt or dealt with in a fair manner, the central state must primarily choose to safeguard the legal interests of the weakest: the villages and farmers. The first case discussed shows how the courts can play a crucial role in establishing jurisprudence that confirms the natural village as the basic legal owner of land—as included in the Sixty Articles. To date, however, procedures for the establishment and the status of case law are still weak. This remains an area for further strengthening.

A second problem that spawns from unclear land laws and regulations is related to the level of collective ownership and changes therein. Under the past and present legal framework, the level of collective ownership cannot be changed. But during the collective period it was not uncommon for the team's land to be requisitioned for the establishment of collective enterprises of the commune or brigade. Many current township and village enterprises were established in this way. Over time it became increasingly unclear which collective level could claim ownership to the land on which the enterprises were built. The 1998 Land Administration Law provides no decisive answer to this question, which is why the State Land Administration proclaimed rules of its own: the 1989 Suggestions on the Assessment of Land Titles.[63]

The legal cases reviewed in this chapter show that the 1989 Suggestions are frequently used by the judicial and the executive authorities in the arbitration of land disputes. However, the use of these administrative regulations is problematic. They fall short of the status of law as they have not been reviewed or passed by the NPC. Moreover, they are also not 'rules for implementation' as issued by the State Council to provide binding rules for legal interpretation by the courts (as is common also in other civil law countries).[64] The 'suggestions' also do not belong to the regular set of administrative documents issued by ministries and state departments.[65] Probably for these reasons, the Suggestions were upgraded in 1995 to Regulations on the Assessment of Land Ownership and Use Rights. The use of administrative regulations of unclear legal status for the adjudication of fundamental issues that should have been stipulated in law is bound to create problems. It is evident that the National People's Congress during a future revision of the Land Administration Law can no longer avoid a debate on a new institutional design of collective ownership.

Although the government halted—with reason—the registration of rural land in the mid-1990s, land titling cannot and should not be avoided in the long run. As processes of urbanization and commercialization sweep through the Chinese countryside, the recording of property rights becomes inevitable in the industrialized society. On the establishment of a national

[63] The State Land Administration has also released a large collection of administrative questions and answers on land title issues as a sort of prejudicial procedure. Those included in Xiang (ed.), Manual for the Assessment of Land Title, pp. 398–459, date from 1989 to 1996.

[64] For example, in the Netherlands such 'rules for implementation' are issued by the law-making authority, and are called *Memorie van Toelichting* [Memoire of Explanation].

[65] See also Chen, *Introduction to the Legal System of China*, pp. 88–90.

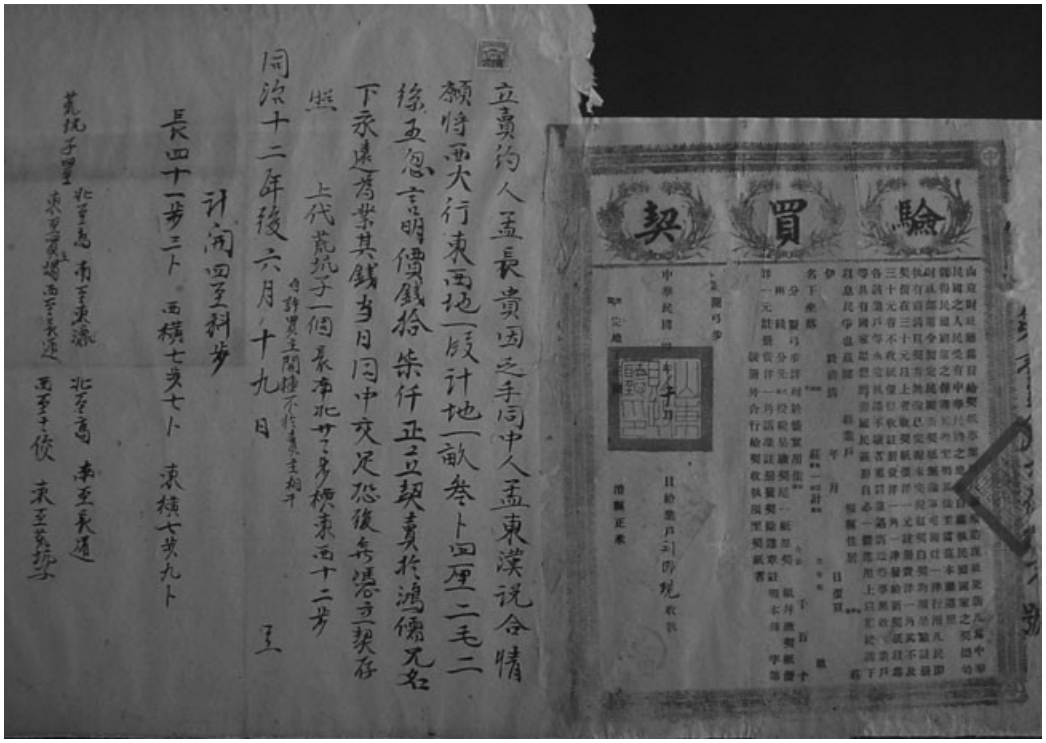

Plate II: **A Qing dynasty land ownership certificate from Qingyun County, Shandong Province.**

On the left-hand side is the handwritten original dating from 19 June of the twelfth year of the reign of the Tongzhi emperor (1873). On the right-hand side is the renewed version of the certificate issued in October of the fourth year of the Chinese Republic (1915) when local authorities engaged in land titling. The small stamp on top of the document is proof that administrative fees have been paid.

land cadastre, a solution must be found for the assessment of title on the basis of historical claims. Under current law, the validity of claims is limited to land deeds issued after Land Reform and the Four Fixes Movement. The Chinese government has chosen this path in order to avoid the social conflict over past ownership that has broken out in other transitional economies in eastern and central Europe. On the one hand, China's strategy of privatizing land property rights through lease rather than by reinstating former owners has successfully avoided raking up disputes over pre-socialist property similar to those in Hungary, Albania, and the former German Democratic Republic.[66] On the other hand, the

[66] In dealing with the legacy of the former German Democratic Republic (DDR), the German authorities proclaimed the Agricultural Adjustment Law during the early 1990s. The law explicitly addresses issues of previous ownership in two ways. First, the law stipulates the return of land and capital shares to the original owners or their successors from whom property has been seized after 1949. Even landowners who had left East Germany were entitled to land holdings. Second, members of the cooperatives—also known as LPGs (*Landwirtschaftliche Produktionsgemeinschaften*)—have a valid claim to the collective property of the farm on condition that it has a positive value after debt clearance. In the final days of the DDR, Prime Minister Hans Modrow ordained that full ownership be granted to the LPG farmers and their heirs. The Kohl administration, however, reversed this measure in 1992. In reaction, around 70,000 former LPG members and their descendants filed a case at the European Court for Human Rights in Strasbourg, which in January 2004 ruled that the decision by the Kohl administration was unlawful. In addition, the German government was ordered to provide suitable financial redress to the expropriated victims. At the time of

critical question is whether the state can maintain its disregard of historical claims in the long run. A national cadastre needs to be established sooner or later, even though the regions that are still dominated by traditional agriculture, strong customary rights systems, and subsistence farming might need to be (temporarily) exempted. Yet, when titling is to proceed, claims to historical rights cannot be completely brushed aside. In many village communities people are still aware of pre-socialist boundaries. As we saw earlier in this chapter, in a dispute between two villages over land in the Daozhai Mountains one village furnished text material dating from the Qing dynasty and Republican era as evidence of its claim. As we can see from Plate II, this is no isolated case. Many more pre-socialist land claims could be revived when land registration is carried out in China's countryside.

The recognition of historical claims is intertwined with the extent to which the state takes seriously villages' territorial claims under customary tenure. The present legal principle that forest, grassland, and wasteland are state-owned unless proven collective property might prove untenable in the process of title recognition and registration. The common ownership of these natural resources—not necessarily limited to a single village community—and the unwritten character of customary rights make them difficult to authenticate. Laying the burden of proof with the collective can lead to the abuse of state power, as it is a strong legal instrument with which customary claims can be brushed aside. The attempts by the State Land Administration (and present Ministry of Land Resources) at a further codification of the principle of 'state-owned unless proven collective' have created a potentially explosive situation. The local government and the courts walk a fine line between the protection of the state's interests and meeting the collectives' demands for social justice. Yet the cases reviewed here show that the local government and the courts were capable of making independent judgements. Their verdicts could be regarded as veiled recognitions of customary claims without sacrificing economic interests.

On these issues, the central government presently had adopted a rather passive stance by intentionally leaving them undefined in law. By upholding such 'intentional institutional ambiguity' it hopes to provide sufficient leeway for local experimentation with new property arrangements, while simultaneously avoiding widespread social conflict. If local practices have proven feasible they can subsequently be institutionalized. As the economic reforms progress and agrarian China undergoes an inevitable commercialization, the number of land claims will rise disproportionally. These will prove a veritable test for the Chinese judiciary and executive authorities.

writing, the German government is still studying the possibility of a higher appeal. See Michel Kerres, 'Hof voor Mensenrechten: Onteigening in ex-DDR onrechtmatig' ['Court for Human Rights: Expropriation in former DDR unlawful'], *NRC Handelsblad* (23 January 2004), p. 5.