Highlights (each bullet max. 85 characters incl. spaces)

Debunking the Chinese unitary state via legal pluralism: Historical, indigenous and customary rights in China (1949-present)

- Moots that states are inherently inconsistent, contradictory and legally pluralist
- Uses notions of legal pluralism and semi-autonomous field to debunk Chinese state
- This is achieved by examining ownership over land during period of over 70 years
- Shows struggle of Chinese state over historical, indigenous and customary rights
- Finds incremental process towards recognition of parallel legal orders in state law

Debunking the Chinese unitary state via legal pluralism: Historical, indigenous and customary rights in China (1949-present)

Abstract

In the literature on legal pluralism, there is minimal attention paid to the state – apart from being generally conceptualized as a unitary entity vis-à-vis an otherwise legally pluralist society. However, this perspective has been critiqued by a modest, yet growing, group of scholars. In furthering the debate, this article postulates that states are constituted by competing semi-autonomous fields and are thus, to varying degrees, inherently inconsistent, contradictory, and pluralist in nature despite the superficial conveyed imagery of unity. To substantiate this thesis, the article: 1) equally applies the concepts of legal pluralism as hitherto applied to issues such as historical rights, indigenous peoples, and customary law; 2) employs this exercise to deconstruct what is perhaps one of the world's most archetypal unitary states: the Peoples' Republic of China. As a strongly, centralist state governing an substantially socio-culturally and ethnically diversified society, China provides a noteworthy case of the workings of what is termed "state legal pluralism". To demonstrate this, the article examines a critical right (ownership) around an equally critical resource (land). This is achieved with reference to different, coexisting legal orders that are considered highly sensitive and potentially explosive in China: historical, indigenous, and customary rights. The analysis is based on a comprehensive review of laws and policies, National People's Congress reports, verdicts of the Supreme People's Court, (local) regulations, and court cases. It covers a period exceeding 70 years from 1949 to 2020. The data analysis ascertains that the different organs of the Chinese state constitute competing semi-autonomous fields that, at times, put forward rules in flagrant contradiction with state law up to the point of upholding pre-revolutionary, *private* land ownership.

Keywords: State legal pluralism; semi-autonomous field; historical land rights; ethnic and customary law; normative ambiguity; China

1. Introduction

> "The mainstream literature on legal pluralism (…) tended to be framed quite narrowly, excluding state legal pluralism and other matters internal to a state legal system, such as competing schools of interpretation, polycentricity, and even conflicts of laws" (Twining, 2009: 515).

In the general perception, China is a strong, centralist, and autocratic state. It has been described as striving for "totalitarian control (…) of a sort that has never been attempted in previous human history" (Fukuyama, 2020: 1 and 3). At the same time, however, one can question whether any state – be it democratic, developmental, or authoritarian – can achieve legal unity to the degree as to be monolithic in nature. It is mooted here that the modern Chinese nation-state is no exception. This article interrogates this thesis and, in so doing, rethinks what Woodman (1998: 52) critiqued as the "usual conceptions of deep legal pluralism" assuming "that state law is a well-defined, consistent whole which can be one, clear part of a plural situation".

Against this backdrop, perhaps there should be a brief word of warning. If the reader is searching for information on how Chinese law affects historical claims, indigenous peoples, and customary institutions, this paper is probably going to disappoint as this is not its focus. Contrarily, if the reader is interested in the internal struggles of the Chinese state over historical claims, indigenous peoples, and customary institutions and how these struggles have subsequently spawned competing, inconsistent, and downright paradoxical rules at various levels, the reader is encouraged to read on. In sum, what this paper aims for is not to demonstrate how the state influenced society but rather how the Chinese state itself has been split over the question of how to deal with society.

Some define the concept of state legal pluralism in a constrained context as consisting of the "different legal orders that are *recognized* by the State as being *part of its laws*" (Himonga, 2010: 25) (emphasis added) or as the situation in which "the sovereign (implicitly) commands (…) different bodies of law for different groups in the population" (Griffiths, 1986: 5). This is *not* the definition that will be adhered to in this paper. Here, a broad interpretation of state legal pluralism is used as proposed by Shahar (2008: 441):

> "[T]he pluralism, heterogeneity and internal dynamics that characterize complex state legal systems," otherwise known as "the polycentricity and heterogeneity of state law."

Legal pluralism has emerged as a useful and insightful tool in the analysis of regulatory systems around the world regardless of whether these originate from the Global South or Global North. However, from its inception, legal pluralism has been proposed as a lens to study *non-state* legal orders rather than that of the state. In fact, legal pluralism began as a vehement critique of unitarism as the dominant ideology of the modern nation-state that "law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions" (Griffiths, 1986: 3). This emancipatory effort did not only ascertain the relative strength and value of non-state legal orders, it also successfully launched a steady stream of research on customary laws, historical rights, and indigenous institutions.

Over the years, however, a growing group of scholars has signaled the disadvantageous aspects of that success: for one, it has caused a disciplinary rift by which the non-state became the terrain of mostly anthropologists and sociologists while everything that is state law was left to lawyers. Furthermore, it led to overemphasizing the autonomy of non-state legal orders inasmuch as it caused overestimating the state's power in defining and constituting legal orders, including its own. Yet, when contemplating this at an ontological level, an inevitable question arises: Is there any reason to believe that pluralism would stop at the conceptual boundaries we construct or imagine of the state or of society? Woodman (1998: 38) believed it would most certainly not:

> "[I]f state law pluralism be seen as a type of legal pluralism, as I suggest, it seems preferable to include all instances of diversity in state law in the category. Thus we might classify every state legal order (and every other legal order) as internally pluralist."

The conceptual construction of the state as internally consistent and socially impermeable coupled to the diversion of (socio-anthropological) research towards the "non-state" is – theoretically, methodologically, and empirically speaking – a missed opportunity. It is a missed opportunity for the field of legal pluralism to apply its tools and concepts to a subject it has once opposed and constructed into an ideal-type concept that it is not: the monolithic,

unitary state. In this context, it might be important to remember Shahar's (2008: 430 and 435) rallying call:

> "The study of legal pluralism within the boundaries of state law was virtually monopolized by legal scholars, while the study of non-state legal orders was left to social scientists", yet, "the time is ripe for discarding this superficial division of labor and adopting a unified, general framework of legal pluralism."

This article's aim is to do precisely that and to employ legal pluralist analysis to deconstruct a textbook example of a unitary state, the People's Republic of China. The sheer size and regional diversity of China, in terms of its population, economy, culture, ethnicity, and local histories would make this undertaking a doomed effort in the context of a single paper. For this reason, we will concentrate on a particular case – land ownership – that is believed to be sufficiently important and focused to demonstrate the choices and outcomes of Chinese state action while being exemplary for meaningful extrapolation to other sectors, issues, or assets.

To date, little is known about legal pluralism *within* the Chinese state. There is research on the legal orders that co-exist with the state legal order, such as that on indigenous rights (Hathaway, 2016; Kaup, 2018), yet the analysis does not begin from the rules of the state itself, statutory law included. However, to gauge the meaning of legal pluralism *within* the state, there is no way around the law when describing in minute detail how Chinese law and other rules promulgated by different state organs mutually compete, conflict, and contradict.

This paper aims to compensate for some of the deficiencies above, with the silent hope or, perhaps distant aim, of recording the existence and evolution of Chinese state legal pluralism as it is currently unfolding. For this purpose, the paper is structured around the following set of research questions:

1) What are the main parallel legal orders in China and the state laws that are supposed to govern them?
2) What is the past and present stance of the Chinese state towards recognizing parallel legal orders in statutory law?
3) What normative ambiguities exist between the state's concept of post-revolutionary land ownership as a fact versus the rules engendered by other state semi-autonomous fields?

The analysis encompasses the entire period of the Communist nation-state, from its establishment in 1949 until the near present.

When mentioning legal pluralism over land rights, there is substantial confusion as one often thinks of customary *and* indigenous rights; the terms are used interchangeably (WIPO, 2013: 2). Moreover, customary rights, in turn, are also considered as rules that have been established through *long* usage (Rowton-Simpson, 1976: 220) and therefore equated with historical rights. However, as the following sections will demonstrate, historical, indigenous, and customary rights are *not* the same even though they may overlap.[1] In addition, religious rights also constitute a distinct, albeit overlapping, area (e.g. the Muslim Uyghur which, in China, are governed under concurrent rules of ethnicity, custom, and religion). Due to a limitation of space, religious rights will not be discussed here, and the paper will solely focus on three sources of legal pluralism that challenge the Chinese state's hegemony:

- History, or the historical, recorded rights as signified by a cut-off date;
- Indigeneity, or the indigenous rights of native inhabitants or "first nation" peoples;
- Custom, or the customary rights of non-codified norms of a local community.

[1] For instance, as demonstrated in Section 5, sometimes custom, indigeneity, and history overlap.

The above definitions are not arbitrary but follow from the way that *Chinese statutory law* interprets concepts of history, indigeneity, and custom and how that interpretation is used to either deny or recognize these rights. Thus, the legal-anthropological discussions about how these definitions could be or have been used to co-opt, assimilate, or delegitimize legal orders will not be discussed.

The paper is based on an analysis of primary, historical, and contemporary Chinese sources hitherto unavailable in English such as reports of the National People's Congress, rulings by the Supreme People's Court, interpretations of laws and regulations, and government notices. Additional sources were used such as records of court cases, legal queries by citizens and farmers, lawyers' commentaries, and specialist blogs.[2] Throughout the article, statutory laws have been referred to with the title and year in which they were proclaimed or revised. As such, they can be easily retrieved while there can be little confusion about the used version of the law. Other state documents such as national and local decrees, notices, suggestions, and administrative regulations are listed separately in the reference list.

To the best of the author's knowledge, this paper constitutes one of the first studies on the topic; in its capacity, it may make it may make a contribution to the understanding of the functioning of parallel legal orders in the Chinese state and to the way in which legal pluralism could be meaningfully extended to conceive and understand the state at large. Apart from the introduction and conclusion, the main body of the article is divided into five sections. The first of these describes the theoretical foundations and methodology of the paper. The remaining three sections deal, in turn, with one parallel legal order, respectively, historical rights, indigenous rights, and customary rights.

2. Theoretical positioning and methodology

2.1. State or "weak" legal pluralism?

There has been significant debate over the concept of legal pluralism with much of it directed at the "legal" rather than the "plural" or the question of whether one should call "normative orders other than state law, or not recognised as law by the state, nevertheless 'law'" (von Benda-Beckmann, 2002: 38). In furthering a wide reading as opposed to a narrow interpretation of law as solely pertaining to the state, scholars have made a distinction between "strong" legal pluralism (broad interpretation) vis-à-vis what is, slightly condescendingly, termed "weak" legal pluralism (narrow interpretation) (Griffiths, 1986).

This article maintains that this distinction is not insightful nor is it necessary. In this context, one may remind oneself of De Sousa Santos' (1995: 89) comment that "there is nothing inherently good, progressive or emancipatory about legal pluralism" regardless of whether it is narrowly or broadly interpreted. In fact, the co-existence of legal orders are as omnipresent *outside* the state, as *within* it, and the locus of their existence should not detract from one's academic curiosity about it nor from its value as an object worthy of study in and of itself (see e.g. Dworkin,1986; 1977). As Twining (2009: 493 and 497) aptly remarked:

> "[S]tate legal pluralism is not unimportant or uninteresting as some socio-legal scholars have suggested" and "where to draw the line between legal and non-legal phenomena – is susceptible to workable and sensible solutions in particular contexts.

[2] When legal or government texts are cited, the original Chinese (in transliterated *pinyin*) is added behind crucial passages. For reference use, blogs and online posts have been saved and archived by the author.

> At least for most purposes of empirical study, nothing much turns on where or even whether one sets boundaries to the legal."

At this point, a few words are needed about "legal polycentricity" which is a concept used synonymously with state legal pluralism and, at times, in addition to or as part and parcel of it (Twining, 2009: 515; Woodman, 1998: 54). The general idea, which is of Nordic origin (Patersen and Zahle, 1995), is of some use in that it also asserts the co-existence or mutual contradiction of different legal orders in state law. Having stated that, it has been criticized for different reasons. Shahar (2008: 434) regards it as merely a reproduction of "Griffiths' ill-conceptualized distinction between a 'strong' legal pluralism of social scientists which transcends the boundaries of state law and a 'weak' legal pluralism of legal scholars which is encapsulated within these boundaries." Woodman (1998: 54) feels that the term erroneously suggests "that there has been substituted for one, monolithic structure a number of centres" while "there is little reason to assume that the centres thus identified will themselves operate as minor monoliths". In this context, and for conceptual clarity, the concept will not be used here; state legal pluralism will be employed.[3]

2.2. First vantage point: State semi-autonomous fields

Legal pluralism, regardless of whether it is applied to the state or to society, can equally teach us crucial lessons about how rules emerge, shape, and are shaped by human behavior and intentions. Yet, what is needed is a similarly rigorous operationalization of its key concepts in studying the state as these were earlier applied to study society. For this reason, let us examine the concept of the legal order and, particularly, the semi-autonomous field.

The "plural" in legal pluralism entails the co-existence of legal orders, each engendered by separate communities of socio-legal actors. Stated differently, whereas the legal order refers to the rules *per se*, their genesis and transformation over time and space is propelled forward by communities of actors that govern and *are* governed by these rules. As indicated by Moore (1978: 55-56), these rules are driven by the:

> "[S]emi-autonomous social field", that possesses "rule-making capacities, and the means to induce or coerce compliance" albeit "set in a larger social matrix which can, and does, affect and invade it."

The difference between studying legal pluralism as it features within the state, society, or both (Figure 1, Box $A_{0\text{-}1}$) is nothing more (nor less!) than a vantage point or analytical lens that requires a different operationalization of that which one analyses. In the case of non-state legal pluralism, studies have operationalized this vantage point by, for instance, analyzing the customary laws that govern village irrigation or Sharia courts.

Contrarily, in the case of state legal pluralism, much of that operationalization still needs to be completed. In this respect, Shahar (2008: 419) observed:

> [W]hile students of legal pluralism have put much effort into providing a definite, decisive answer to the question 'what is law?', they have paid very little attention to the equally important question 'what is the state'?"

[3] For similar reasons, the concept of polycentric governance as applied to the study of the commons and defined as a form of governance whereby multiple "decision-making centers take each other into account in competitive and cooperative relationships and have recourse to conflict resolution mechanisms" (Carlisle and Gruby, 2019: 927) will also not be used in this article.

To some, it may seem odd to ascertain that the different organs of the state can be regarded as semi-autonomous fields. Is it that we are too accustomed to the idea of the "unitary state" to recognize that its constitutive elements are, indeed, semi-autonomous and, to paraphrase Moore, capable of producing rules that impinge on others while being impinged on by others in and outside of the state? Coglianese (2019: 1) disagrees and proposed to equally use and apply the concept of the semi-autonomous field to the state:

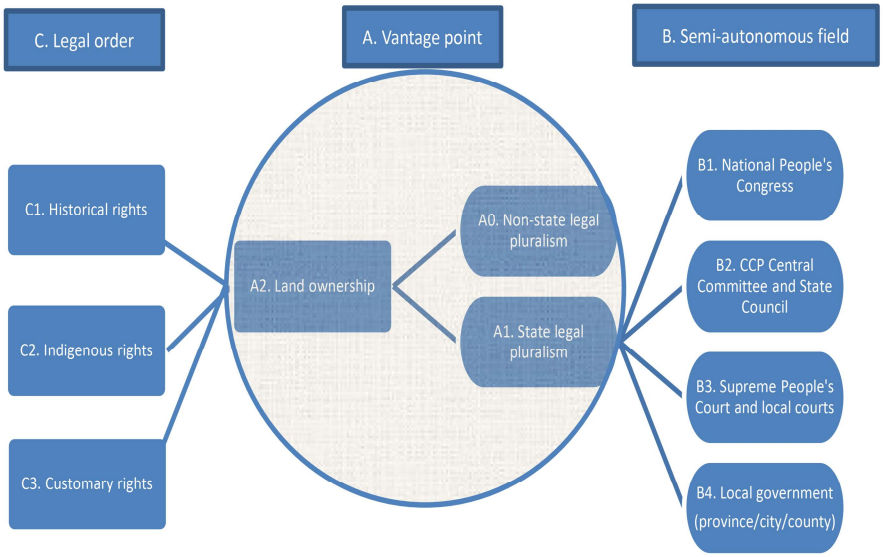
> "The best notion of the administrative state borrows from anthropologist Sally Falk Moore's notion of the semi-autonomy of law, leading to the conclusion that administrative agencies are semiautonomous institutions."

This paper moots that the minute description of the state organs and the rules they produce will reveal to us the various competing, at times fully contradictory, semi-autonomous fields of the state. It must be noted that there is an inescapable implication or way to validate the presence of semi-autonomy, i.e. the phenomenon that Bennion (2001) has dubbed "normative ambiguity": opposing sets of norms in a single system. Further along in this contribution, we will see various poignant examples.

To operationalize the research on state legal pluralism, the paper distinguishes four semi-autonomous fields in the Chinese state, each with their own rule-making capacities, that may mutually compete, contradict, and interact (Figure 1, Box $B_{1\text{-}4}$):

1) The National People's Congress (NPC);
2) The Central Committee of the Chinese Communist Party (CCP-CC) and State Council;
3) The Supreme People's Court (SPC) and local courts;
4) Local government (i.e. provincial, municipal/prefectural, and county).[4]

Figure 1: Analytical framework for state legal pluralism applied to China



[4] The county is the lowest level of local government. Although the state is represented at lower levels (township, administrative village, and natural village), these are self-governed collectives (i.e. not on the state's payroll). The situation is different in the cities where the (sub)district is still local government, and the neighborhood committee (equal to the natural village) is a self-governed collective. For more information, see (Chen, 2019; Teufel Dreyer, 2015; Saich, 2010).

Source: Illustrated by author

Ad B_1. The NPC is the highest legislature and organ of state power. It elects members of the state council (including the president), and the president of the Supreme People's Court. The NPC has voted down no law yet is able to significantly revise or hinder the passage of it.[5] Moreover, much of the internal debates over controversial issues are visible, not through the full NPC that only meets once a year, but through meetings of the NPC Standing Committee and specialized committees (such as on economy or environment). Paradoxically, the NPC Standing Committee is constitutionally endowed with the power to interpret the constitution and the laws it makes (making it a player and referee in one).[6]

Ad B_2. Whereas the CCP and the Chinese Government are separate entities, there is overlap at the highest level with members of the CCP Central Committee concurrently taking up key positions in the State Council. For instance, the General Secretary of the Communist Party is traditionally also the President of China while the Premier has always been a member of the Standing Committee of the CCP Central Committee Politburo (China's *de facto* ruling governing body, today consisting of seven members). Major policies are also often jointly promulgated in the name of the CCP Central Committee and the State Council.

Ad B_3. The SPC is China's superior appellate forum. The court structure consists of a four-level (national, provincial, municipal/prefectural, and county), two-hearing trial process. The SPC is empowered to issue judicial interpretations (*sifa jieshi*) as guidelines to trials that have nation-wide legal effect, yet with a triple caveat:

1) The *authority* for interpretation which is insecure as this is stipulated through parliamentary resolution (NPC Standing Committee, 1981) and not by law;
2) The *understanding* of interpretation which is read in a narrow sense as a textual explanation rather than in a broad sense as pertaining to amendments, improvements, and additions to the law;
3) The *effect* of interpretation which is fragmented over: i) the SPC; ii) the Supreme People's Procuratorate (comparable to, e.g. US Department of Justice); iii) the NPC Standing Committee which has final power of judicial interpretation and the power to interpret the constitution.

Ad B_4. Local government. In the Chinese context, there is – similar to other nations – a persisting tension between central and local government translating into local protectionism, symbolic legal enforcement, and regional experimentation with rules that run ahead of state law (e.g. section 5 on customary rights). In this context, local governments often constitute a source of interference in local courts' adjudication. To protect their industries and firms or shield themselves from liability, local governments attempt to exert influence on judges.

Although this article examines legal pluralism from the viewpoint of the state (Figure 1, Box A_1), some information about the way that citizens and farmers gain access to the legal system is necessary. Taking the case of farmers as an example, their means of making grievances known includes (in order of escalation): 1) mediation through the village committee; 2) calling national government hotlines (i.e. 12336 of the Ministry of Natural Resources for land-related cases); 3) petitioning (from the county up to the national level); 4) filing a court-case; however, as farmers often lack legal and financial resources and feel that state organs lack independence, they also resort to: 5) civil disobedience (ranging from peaceful sit-ins to mass demonstrations) (Yang and Ho, 2019).

[5] For instance, the 2007 Property Law took 13 years before it was adopted and had two different drafts while the final draft before adoption had been revised seven times.
[6] Stipulated in Article 67 of the Chinese Constitution.

2.3. Second vantage point: Land ownership

Apart from using the Chinese state as an analytical lens, this article has a second perspective: land ownership (Figure 1, Box A_2). Again, as in the case of the semi-autonomous field, it will be considered here as a vantage point, a concept to channel the attention and gaze of one's study. The attentive reader will note that this article uses the term "ownership" in addition to "property". This is a conscious choice as the civil law concept of ownership as an ideal-type, all-inclusive, and supreme right (Van den Bergh, 1996: 172) describes the Chinese state's envisaged unitary context for land more appropriately than a "bundle of rights" (Demsetz, 1967), a "social relation" (Hann, 1998), or a "right to a benefit stream" (Bromley, 1992).[7] Moreover, as an idealized concept, it also more clearly reveals in what ways empirical realities differ from what the state seeks through ownership as a "supreme right". In effect, by contrasting the state's clear-cut, civil law concept of absolute ownership to the unsystematic actuality of what can be found in the field, the latter's complexity is better understood.[8]

There are good reasons to use land as a focal point. Land is a critical resource that provides the basic necessities for humankind. Its importance transcends culture, society, or differences in economic development and is the reason why the power over land – in which ownership has a key role to play – is essential for any state irrespective of its political system. Land ownership gains even more significance in the Chinese context due to its 20th century history of wars, revolutions, and political campaigns. In fact, China's land ownership cannot be seen separately from its turbulent history during which the ownership of land (and the construction on top of it) has gone from private property to full nationalization and collectivization and back once again to (partial) privatization in a span of mere decades (see Figure 2).

Figure 2: Chinese land history very briefly

[7] Yet, in any legal system, there are encumbrances on ownership (Sonius, 1963: 19).

[8] Note that China's legal framework consists of a mix of elements from mostly civil law interspersed with bits of common and Socialist law. For instance, when addressing land rights, Chinese law uses the term "property" (or *wuquan*) in conjunction with "ownership" (*suoyouquan*) yet, instead of "lease" (*dianquan*), considered feudalist, the politically correct "contract right" (*chengbaoquan*) is used.

Source: Illustrated by author[9]

After the fall of the Qing dynasty empire in 1911, the early republic under Nationalist rule introduced a new legal system grafted on to Japanese civil law which, in turn, was borrowed from the 1900 German Civil Code (Percy, 1989). Under this system, there was private, public, and common property (such as for nomadic herdsmen, forest tribes, and Buddhist monasteries). Yet, although *formally* unified, China continued to be torn by conflicts with warlords and an open civil war between Communists and Nationalists that were only temporarily halted due to the Japanese occupation. As a result, the Nationalist Government never established *de facto* control over the country, greatly impeding the implementation of a nation-wide legal framework.

The situation endured until 1949 with the establishment of the People's Republic when the country was finally united under single rule since over a century of wars, rebellions and

[9] Figure 2 is a simplified rendering and does not include the exceptions in ownership rights, e.g. land lease for forest in the countryside can be up to 70 years. However, the figure does convey the general principles of Chinese land ownership.

uprisings. As part of Socialist ideology, private land was seized and redistributed from the class of "rich and middle peasants" to "poor peasants and landless tenants" during the land reform from 1950-1952. It was subsequently collectivized into the hands of rural cooperatives (later renamed People's Communes) in 1956. Around the mid-1980s, the communes were dissolved and households were allowed to privately lease land from their successors, the collectives, which heralded a return to private farming (even though land remained collectively owned). In the minority areas, forests were nationalized in 1950 while grassland ownership was, surprisingly, left undisturbed. Grassland's nationalization was considered too sensitive as it constitutes the nation's largest land resource and is exploited by vast numbers of indigenous peoples. Thus, nationalization was postponed until 1982.

In the cities, a similar trajectory was followed; due to the vested economic interests of the capitalist class, it was deemed unwise to nationalize land ownership right from the start. Over the years, however, it was first encumbered through a state rental housing scheme (forcing landlords to rent out property against state-fixed prices), subsequently seized through violent house raids during the Cultural Revolution, and eventually legally nationalized in 1982. In approximately the same period as the beginning of private lease in the rural areas, private land lease was allowed in the cities.[10]

As a result of the historical twists and turns, Chinese land rights today can, in practice, be summed up as:

- Dual land ownership: state-owned (represented by the State Council) in the cities and collective-owned (village or township) in the countryside;
- Land can be *leased* by legal persons for a term between 30 and 70 years (depending on the type and location, i.e. in the cities or the countryside);[11]
- Land and the construction on top (i.e. buildings and built structures) have divided ownership; the former is state or collectively owned while the latter can be privately owned;
- There are two exceptions: 1) military land, minerals, and natural resources are state-owned; 2) natural resources can be recognized as collective property if they are located in the vicinity of or have been in long use by agricultural collectives.

2.4. The dominant legal order and its alternatives

From our second vantage point follows the necessity to define the legal orders that coexist with the dominant order of statutory land ownership that the Chinese state uses as its unitary ideology. It is these alternative legal orders that impel the Chinese Communist Party and government – however committed to or reluctant to relinquish unitarism they may be – to eventually acknowledge pluralism to varying degrees. The following legal orders are distinguished (and, once more, the paper limits itself to studying these orders as they arose and are enshrined in state law): 1) historical rights; 2) indigenous rights; and 3) customary rights (Figure 1, Box $C_{1\text{-}3}$).[12]

To illustrate the coexistence of the various legal orders, they will be collocated with the main dogma that the Chinese Communist Party and government try to instil nation-wide:

[10] Urban land lease initially occurred non-commercially beginning in 1981 and on a commercial basis starting in 1987. For a full description of land ownership history in China, see (Ho, 2005; 2017: 19, Figure I.3).

[11] The maximum terms are, respectively, 30 years for agricultural land; 50 years for grassland; 70 years for forest; 70 years for urban residential land; 50 years for urban industrial land; 50 years for urban land for education, science and technology, culture, health and sports, comprehensive and other purposes; 40 years for urban land for commerce, tourism, and leisure.

[12] Here defined as a set of rules that are perceived as credible, just, and functional by the majority of those governed by them.

> "Urban land is owned by the state. Land in rural and suburban areas is owned by collectives, except for that which is owned by the state as prescribed by law" (2019 Constitution, article 10).

This principle has been in place since 1982 and is repeatedly stated in various laws and regulations ranging from the constitution down to local county rules. It suggests that the revolutionary collectivization and nationalization of land and all that is on top are established facts. *Ergo*, there is no ownership of land or housing that may be claimed on historical, indigenous, or customary grounds as existing before the land reform in the countryside *and* before the cultural revolution in the cities.

Subsequently, we will see how each of the legal orders affects and is affected by, invades, and is invaded by different semi-autonomous fields and the "larger social matrix" in which they are embedded. For this purpose, the legal orders are broken down into the sets of rules of each semi-autonomous field:

- For the NPC (in hierarchical order, high to low): the Constitution (*xianfa*); Basic Laws (*jiben falü*); Ordinary Laws (*putong falü*); and Resolutions (*jueyi*);
- For the CCP Central Committee and State Council: Regulations, Provisions and Measures (respectively, *tiaoli*, *guiding*, and *banfa*); Notices (*tongzhi*); Suggestions (*yijian*); Ministerial Regulations, Decrees (*ling*), Opinions (*yijian*);
- For the SPC and local courts: Judicial Interpretations (*sifa shiyi*); Replies (*pifu*); and Opinions (*yijian*);
- For local government: the various rules are similarly termed as those for central government but provided with a prefix of the level of proclamation. E.g. "Jiangsu Provincial Government Provisions" (Chen, 1992: 88-90; Zhang, 2014).

In the following sections, we will discuss the alternative legal orders around land ownership beginning with historical rights.

3. First legal order: Historical rights

Historical rights or *lishixing quanli* are understood in China as concerning the rights to disputed territory, such as with regard to the Spratly Islands or Aksai Chin, governed under international rather than domestic law (Dupuy and Dupuy, 2013; Zou 2001). However, when closely examining land-related laws, it becomes obvious that China does recognize *domestic* historical rights based on a cut-off date. This reading of historical rights is comparable to other countries.[13]

China has set the limit for (written) historical rights for the countryside at the beginning of the land reform in 1950 while the limit for the cities is ambiguous, although one could argue it follows from the revision of the constitution in 1982 when urban land was officially nationalized. Stated differently, all property rights that predate 1950 in the countryside and (no later than) 1982 in the cities are considered invalid. Based on the above, historical rights are defined here as "the *recorded* rights as signified by a *cut-off date*". In the following sub-sections, we will review these rights respectively for the countryside and the cities.

3.1. The countryside: Land to the tiller

[13] For instance, the Netherlands limits the recognition of historical rights, based on textual sources, to the year of introduction of its civil code in 1838 (Ketelaar, 1978).

After the establishment of the PRC, a land-to-the-tiller movement was launched, stretching over two years after the proclamation of the 1950 Land Reform Law. The land reform movement took a violent turn as a result of which numerous landlords were "struggled against" and executed (Madsen, 1991: 624; Ho, 2005: 5-6). Land reform signalled the end of the customary and Nationalist ownership structure as it had existed up to the late Imperial and Republican eras,[14] a principle enshrined in the Land Reform Law:

> "The land deeds prior to the reform of the land institutions are without exception invalidated (*yilü zuofei*) (article 30)."

However, when the People's Communes were disbanded in the mid-1980s and land could be privately leased from the collectives, former landlords wondered whether there was any chance of reclaiming seized property. This was especially the case when they (or descendants) held titles proving their ownership before 1950.

The landmark case that contested the year 1950 as the cut-off date for historical rights is the Supreme People's Court judgement on Sun versus Daduo Township (SPC, 1990a). In this case, Daduo Township (Jiangsu Province) seized a 16-room building from the Sun family, the head of which (Sun Haixiang) was labelled a landlord. The building had *not* been titled under Sun's name during the land reform in 1950, contrary to a four-bedroom house. However, after the land reform, the Sun family rented it out until collectivization in 1956 after which the Daduo Township Government occupied the building.

This situation lasted until 1982 when the Sun family reoccupied the building from the township, maintaining it had not been confiscated in 1950. After a trial at the county court that ruled that the building was property of the township followed by an appeal at the prefectural court which upheld the previous ruling, the case was referred to the provincial court.

At this point, the provincial court began to act as a semi-autonomous field trying to proclaim rules that are contrary to the Chinese state's dogma that all pre-revolutionary property rights have been invalidated. While some judges felt that the building should be recognized as collective property, others, however, critically deviated from this view. Two reasons were furnished:

1) Based on the available titles, it could *not* be established whether the building had been confiscated in 1950; in addition, the building had been rented out by the Sun family until 1956, who thereby exercised their ownership. Thus, even though it had been occupied by the township, this did not entail that its original *private ownership* had changed;
2) Under civil procedural law, the plaintiff – i.e. the township – has to provide evidence; however, as both the evidence of whether the building was confiscated in 1950 and the evidence about the manner in which the building was occupied by the township were inconclusive, the township's claim of collective ownership must be dismissed.

As the provincial court could not reach unanimity, the case was finally referred to the Supreme People's Court which ruled against:

> "Sun Haixiang was designated a landlord during Land Reform while his land permit only registered the four-bedroom house under his name. The other building should be regarded as confiscated" (SPC, 1990a).

[14] Note that the land reform concerned rural land (which concerned the overall majority of the Chinese people at the time) whereas the property rights in the cities were left untouched until 1982.

One might generally not regard a provincial court as a semi-autonomous field. However, the fact that it proposed recognizing pre-revolutionary land ownership is significant as it directly challenges the Chinese state's prevailing ideology and legal order. As such, it demonstrated considerable agency in and by itself. Markedly, the SPC's decision only *seemingly* maintained the land reform as the boundary to assess historical claims to rural land.

Why seemingly? Because of a double reason. One, the SPC did open up the possibility for compensation of rural ex-ownership, thereby paradoxically recognizing the historical rights of ex-owners (in the case of Sun vs Daduo Township). Two, the NPC, the top rule-making, semi-autonomous field in the Chinese state, created normative ambiguity by upholding two contradictory laws: one from the past, and another from the present. In effect, 36 years after the NPC had annulled all titles before 1950, it adopted the Land Administration Law which neither mentions the validity of historical titles nor reconfirms the land reform's legality. Both reasons will be explained in section 3.3.1.

3.2. The cities: Raids and Cultural Revolution

Contrary to historical land rights in the countryside, urban land rights *lack* a clear cut-off date. This section explains the reasons for this. Even before Communist forces toppled the Nationalist Government, a military decree was issued by the highest leadership not to upturn urban land ownership (Chinese People's Revolutionary Military Commission, 1949).[15] A few months later, the principle to uphold private ownership in the cities was codified in the nation's *de facto* first constitution (Common Program of the Chinese People's Political Consultative Conference, 1949, article 3). Rather than through immediate seizure, urban land reform unfolded in steps:

1) Encumbering land and housing ownership through forced rental beginning in 1956;
2) State-induced but *non-codified* confiscation of housing (1966-1976);
3) Formal nationalization of urban land (but not of housing) in 1982.

In the same year as the collectivization of rural land, the Chinese state launched the 1956 Socialist Transformation of Urban Private Rental Housing (known as the "Socialist Transformation"), a policy through which private home owners were forced to rent out their property against a fixed rent. The CCP Central Committee (1956: 4) required:

> "[U]sing state rental and public-private management and other means against private urban housing (…), in effect, to use fixed rent to gradually change its ownership within a given period".

The year 1966 marked the beginning of the Cultural Revolution during which China's urban youth was mobilized, and the infamous "Red Guards" raided landlords' houses (as well as other property such as Buddhist temples, mosques, and churches). The Cultural Revolution, which ravaged Chinese cities all over the nation, resulted in what is likely the world's largest ever expropriation of urban property.

However, after Chairman Mao's death, which marked the end of a decade of turmoil, the Chinese nation was left in confusion: did the State Rental Housing Scheme legally change the ownership of urban property?

In the spring of 1982, the State Agency for Urban Construction made a remarkable announcement implying the recognition of *private* land ownership:

[15] As its Article 7, it stated: "urban land and housing cannot be handled in the same way as rural land issues".

> "According to the spirit of the Constitution, there are *various ownership systems* for urban real estate" (State Agency for Urban Construction, 1982: 1; emphasis added).

Just over a half year later, China's revised constitution was adopted which ended the confusion with the rule:

> "Urban land is state-owned" (Article 10).

However, did it really? We will find that it did not.

3.3. Temporal legal pluralism: Doing justice to ex-owners?

Let us recapitulate what has been discussed in the preceding sections as it demonstrates an important form of legal pluralism, yet in a *temporal* sense. Adhering to Griffiths' definition of legal pluralism as the "presence in a social field of more than one legal order" need not imply that legal orders are engendered by semi-autonomous fields in a spatial sense. It can also entail that the legal orders stem from different times and are caused by the shifts in norms over the decades as laws evolve.

It is precisely this "temporal legal pluralism" that challenges and vexes China's legal framework today. Handed down from the past is the legal order that prescribes the expropriation of private land and housing. For rural land rights, this is codified in the 1950 Land Reform Law; for the cities, there was no NPC law but only a 1956 directive by the CCP Central Committee, confirmed by the SPC in 1964. Today, the legal orders propelled by the semi-autonomous fields that impinge or, as stated by Moore, "affect and invade" upon the legal order from the past, differ between rural and urban rights. For the former, there is some margin of freedom for compensation while that is largely absent for the latter. This is caused by a difference in *today's* legal orders of the cities versus that of the countryside.

3.3.1. Compensating rural ex-owners

When the NPC adopted the 1986 Land Administration Law that superseded the 1950 Land Reform Law, it mentioned *nothing* about the validity of titles prior to 1950. At the same time, neither did the new Land Administration Law (Article 57) *invalidate* the Land Reform Law which theoretically means it is still valid today.[16] Indeed, the Supreme People's Court confirmed the year 1950 as the cut-off date yet paradoxically allowed for compensation of past rural expropriations, thereby silently recognizing ex-ownership. In this regard, the Supreme People's Court (1990) requested (in Sun vs Daduo Township):

> "[O]ne needs to consider historical reasons, as well as the Sun family's living conditions and other practical conditions; these should be suitably dealt with" (SPC, 1990a: 1).

Another possibility apart from compensation to ex-owners is to equally (or proportionally) divide the disputed assets between contesting parties. The SPC (1985: 1) chose this solution in the case of Wu CS versus Xinbin Town Collective Food Store in which unambiguous historical titles were absent and ruled:

[16] Nothing has changed in successive revisions of the Land Administration Law until its latest revision in 2019.

> "[I]t is appropriate to divide the ownership of the house between Wu CS and the Xinbin Town Collective Food Store."

As a result of the above, the Chinese internet and social media are teeming with questions from concerned farmers (or citizens with rural ties) whether Republican (or older) titles can be used as proof to claim property confiscated during the land reform.[17]

3.3.2. Compensating urban ex-owners

Another sign of the clash between the legal order of the past vis-à-vis that of the present is visible in the 1982 constitution. When the NPC adopted this major piece of legislation, it decreed that henceforth urban land was state-owned. Simultaneously, the constitution remained silent about the ownership of all that was on top of the land, thereby creating normative ambiguity. Two years later, the CCP Central Committee and State Council (1984), declared that urban (and rural) property of overseas Chinese should be reinstated upon their return to China.[18]

However, *within* the Chinese state, there were organs seeking to formalize and legitimize past urban expropriations. As the state organ that had assumed *de facto* ownership over the expropriated property, the Ministry of Urban-Rural Construction and Environmental Protection (1985) issued a notice stating:

> "Private rental houses that have been incorporated into the Socialist Transformation shall all belong to the state."

The Ministry explained its underlying rationale:

> "[D]isputes continuously occur due to requests for the return of houses that have entered the [Socialist] Transformation, and are being sued in court."

This posed a Catch-22 with profound implications: on the one hand, there was the issue of social justice to victims of revolutionary expropriations; on the other hand, there was the reality that expropriated property now operated as social housing for the urban population. In effect, recognizing the property of ex-owners would entail denying the right to shelter for millions of citizens.

In an unusual query on the interpretation of the constitution, the SPC (1990a: 2) asked the State Land Administration (which has *no authority* for judicial interpretation, let alone, constitutional review):[19]

> "After the 1982 Constitution stipulated that 'urban land is state-owned', does the ownership of urban housing land ***and*** of the housing on top of it – originally owned by individual citizens – automatically change into a use right?"

The State Land Administration confirmed the first question but did not provide an answer to the SPC's explosive query of whether "the housing on top of" the land" was also nationalized (State Land Administration, 1990: 1). With this decision, the central government perpetuated one of the most significant ambiguities around China's urban property.

[17] See, for instance, (Guangdong Duzhe, 2019; c726x4714ip55, 2014).
[18] In fact, the Land Reform Law allowed special treatment for the property of overseas Chinese (Article 24).
[19] Constitutionally speaking, the SPC should have turned to the NPC Standing Committee.

Due to the scale of potential claims coupled with its impact on planning, the recognition of historical claims in the cities is heavily constrained.[20] Compared to claims by rural ex-owners, the courts have accepted few cases on the compensation of urban ex-owners.[21] However, a growing group of Chinese scholars has become more vocal on the issue and has called for a reconsideration of policies (Cheng, 2013; Yang, 2012; Zhang, 2010).

4. Second legal order: Indigenous rights

4.1. Applying terra nullius to indigeneity

The word "indigenous" (or *tuzhu*) in the sense of occurring *natively* in a region does not feature in Chinese law. This omission may seem insignificant as Chinese law *does* recognize "minority nationalities" (*shaoshu minzu*), yet this wordplay is important and not unintentional. To demonstrate the logic behind Chinese law, this article deliberately uses the definition of indigeneity as referring to "the indigenous rights of native inhabitants or 'first nation' peoples."

Although China paradoxically voted in support of the 2007 United Nations Declaration on the Rights of Indigenous Peoples, it does not acknowledge land ownership "by reason of traditional ownership or other traditional occupation" (Article 26.2, UN Declaration on the Rights of Indigenous Peoples). China's stance is that it has been a multi-national state for thousands of years with the Han-Chinese being one of a total of 56 nationalities and is thus different from other countries.

China's refutation of indigenous rights follows from its earlier choice to apply *terra nullius* (i.e. the principle that land is legally unoccupied) when determining the ownership of land and natural resources at the establishment of the PRC. Although the 1950 Land Reform Law was *not* applicable to the ethnic areas (Article 36), this did not stop the expropration of natural resources. In 1950, forests were declared to be state-owned (Land Reform Law, Article 18) while waters were nationalized four years later (1954 constitution, Article 6). However, both forests and waters were not *terra nullius* but claimed by indigenous peoples. For instance, the Lolo (*Yi* in Chinese) and Evenk (*Ewenke*) inhabited the forests of, respectively, Southwest China and former Manchuria while the Gin (*Jing*) and the Nanai (*Hezhe*) traditionally used onshore waters for fishing in, respectively, Guangxi and Heilongjiang.[22]

The notable exception was grassland for which the Chinese state surprisingly upheld traditional communal ownership over the pastoral areas. One can see why. The grasslands have customarily been inhabited by significant numbers of indigenous peoples including the Uyghur, Mongols, Tibetans, and Kazakh. Moreover, the grasslands constitute China's largest land resource the consequence of which the territory occupied by these peoples is also significant.[23] Lastly, in these areas, the Chinese state has historically faced enormous challenges in governing indigenous peoples against the backdrop of larger geo-political and military interests such as in Xinjiang, Mongolia, and Tibet.

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[20] According to a government study, it was found that private housing amounted to over 50 percent of the total immovable stock in seven out of ten of surveyed major cities before the implementation of the state rental scheme (Beijing, Tianjin, Shanghai, Jinan, Nanjing, Wuxi and Suzhou) (CCP Central Committee, 1956: 1).

[21] Some examples are (W***, 2019; which deals with a sub-urban case, located in Beijing's Fengtai District) and (Ford, 2010; about a traditional courtyard in the centre of Beijing), yet this case never made it to court.

[22] Note that the ethnic minorities have been referred to with the name with which they are known internationally with the Chinese name in brackets.

[23] Of the national land area, 40.9 percent is constituted by grasslands and 31.9 percent by forest. See Graph 1.1: Distribution of land area in China in 2010 (State Statistical Bureau, 2011: 12-2).

Due to these factors, the nationalization of the pastoral areas was considered too sensitive, and formal grassland nationalization was delayed by more than three decades (1982 revised constitution, Article 9). This is not to say that the dispossesion of the indigenous peoples in the pastoral areas did not occur. Yet, over time, it unfolded in a more covert manner under the banners of modernization and sustainability such as through resettlement programs, grazing bans, and the pasture contract system (Williams, 1996; Yeh, 2005; Ho, 2016, 2000a: 374). Nationalization of the pastoral areas was ultimately pushed forward by the need for a more expedient exploitation of the vast mineral resources underneath. Powerful proponents, not least and remarkably Vice President Wu Lanfu, a politician of *Mongolian* descent, and Hu Ziying, Member of the Standing Committee of the China People's Political Consultative Conference pushed the measure forward (Xu, 2003: 645 and 679). The latter maintained:

> "It should be stipulated that all land is state-owned (…). The mines exploited by the state are all located under the grassland (…), if you dig away one tree, you have to give 1,000 RMB to the farmer. That cannot be" (Hu cited in Xu, 2003: 679).

Although China does not recognize indigenous rights, it has accorded 55 peoples the status of "minority nationality" as opposed to the Han Chinese majority. Under this rubric, there are two provisions that matter legally (albeit not necessarily in practice):

1) Minority nationalities have "the freedom to uphold or change own customs", a principle that has been in place since the establishment of the PRC (1949 Common Program of the Chinese People's Political Consultative Conference, Article 53) and recently reaffirmed (2018 Constitution, Article 4);
2) Authorities in localities self-governed by nationalities have the authority to determine the ownership and use rights of grassland and forest under their jurisdiction (1984 Law for Regional Autonomy of Nationalities, Article 27).[24]

As we will see in the next section, the government of a local town somehow managed to take these two provisions literally and escape the unitary dictum of the state ownership of grassland. It is a case that will take us to a place located high up in the mountainous pastures of the Qinghai-Tibet Plateau.

4.2. A belated Land Reform and a quake

In the morning of 14 April 2010, the small but thriving town of Jiegu (Gyegu in Tibetan) in the Qinghai Province was levelled by a 7.1 scale earthquake. It took the lives of 2,698 people with another 270 missing. The disaster caused Jiegu, the administrative seat of the Yushu Tibetan Autonomous Prefecture, to make national headlines. In contrast, something that became apparent during the rebuilding of the town was carefully kept out of the media: Mao's Land Reform had never reached the town.[25] Stated differently, for the longest period ever since the establishment of the PRC, Jiegu's land (and all that was on top) had remained firmly in private hands.

The local government's consequential decision to forego of the land reform and preserve pre-revolutionary ownership of land and housing only became evident when nature struck over six decades later. After the quake, the town had to be rebuilt from its very foundations,

[24] This principle is not reiterated in other laws such as the 1985 Grassland Law and the 1984 Forest Law.

[25] In fact, so far, only one media report has been identified that specifically mentions this fact (Xu, 2011). As also confirmed by Zhu Jiajie, urban planner, China Academy for Urban Planning and Design, interview, 28 June 2015.

necessitating a fundamental restructuring of its original spatial planning. However, when the planners attempted to commence the reconstruction work, they encountered a virtual minefield. Negotiations had to be initiated with an overwhelming number of private owners who not only held full ownership to their houses but also to their lands.

To picture an idea of the magnitude: of a total of 10,446 plots in the town, 97.9 percent was privately owned homestead land (Chen et al, 2010: 2). To complicate matters, a substantial proportion of the townsfolk had used their homestead for a wide variety of business and religious activities which, over time, had become their main source of livelihood. In effect, most land in Jiegu was *not* exclusively used for housing but had been converted for mixed uses including street shops, offices, courtyard houses (inhabited by several families), and small Buddhist family temples (Yao, 2012). Attempting to rebuild the town from such a fragmented and diversified ownership structure was not only an administrative nightmare, it amounted to no less than a belated Socialist Land Reform.

Let the magnitude of the Jiegu case sink into our minds. The state and collective ownership of land is a *key* ideological pillar of the Chinese state that is codified in numerous laws, not in the least the nation's 1982 constitution until the most recent revision thereof of 2018. Against this backdrop, how could a small town have gone "against the Socialist grain" in a strong, centralist state such as China where the means of production – land, labor, and capital – had been nationalized and collectivized as part of Marx-Maoist orthodoxy? It was its ethnic composition (over 93 percent Tibetans from a total of 35,000 souls) coupled with its very remote, high-altitude location thousands of kilometers away from Beijing that emboldened local authorities to decide against the land reform.

The deputy head of the prefectural Communist Party Bureau described the situation in the prefecture euphemistically as:

> "Yushu (…) directly transitioned from a semi-slave/feudal society towards a socialist society [without the stage of capitalism]. After this change in social form, its land system had not been reformed. (…) Many people's land is ancestral, and the titles record it as private property [*xiede jiu shi siyou*] (Xu, 2011: 87).[26]

5. Third legal order: Customary rights

This article has stringently separated historical, indigenous, and customary rights from each other. The reason for this is to demonstrate that these rights are distinct areas in Chinese law even though they critically overlap on the ground. In China, the area where indigenous and historical rights come crashing together is custom.

With this in mind, let us consider the competing semi-autonomous fields around the third and final legal order. Customary law has for long been acknowledged by Chinese jurists, yet the term "custom" (*xiguan*) did not enter law until the second half of the 2000s. A marked change in the recognition of custom in the Chinese legal framework occurred with the adoption of the 2007 Property Law. This piece of legislation stipulated for the *first time* in modern Chinese history that, when dealing with adjacent property relations (e.g. the right of way, when a land plot can only be reached by crossing someone else's land):

> "If there are no provisions in laws or regulations, these may be dealt with in accordance with local custom" (article 85).

[26] Here it is implied that, without the capitalist stage in which the proletariat is exploited by the bourgeoisie, the peasantry thus never had to rise up and overthrow the landlords and rich peasants through land reform.

Further stipulations on custom were codified in 2017 when the General Rules of Civil Law were passed by the National People's Congress (NPC) which stipulate that, for civil disputes:

> "[C]ustoms may be applied, which shall not be contrary to public order and good customs" (article 10).

Both provisions have been included in the 2020 Civil Code (Articles 10 and 289) which also added a rule on usufruct: in the absence of legal contracts, this may be transferred according to custom (Article 321). It is uncertain how the principles on the use of custom for adjacent property, civil disputes, and usufruct can be applied to customary claims. Many of these pertain to disputes between the collective versus the state or the individual versus the state and are *not* ruled by the Civil Code but by public law.

The situation in the forests of former Manchuria which largely comprises the present provinces of Heilongjiang, Jilin, and Liaoning may serve as an example of the acuteness of customary disputes in China. Simultaneously, it demonstrates that local government may act as a semi-autonomous field drafting rules that contradict state law. Lastly, it illustrates that customary disputes not only relate to indigenous peoples but also involve the Han-Chinese.

To begin with the indigenous peoples, the forests of Manchuria have been home to the Evenk (also known as the Tungus), a small indigenous tribe of several tens of thousands who led lives as hunter-gatherers and reindeer herders.[27] Over time, (and reminiscent of the American Wild West), the "Chinese Wild East" or Manchuria was also occupied by Chinese colonists who cleared the forests for sedentary agriculture. They arrived as settlers in search of new, fertile lands or as "militia-farmers" through state-supported programs. To safeguard national security, the Chinese imperial and contemporary states promoted the colonization of the frontier through military farms (*tunken shubian*). This system dates back as early as the Western Han dynasty (206 BC – 24 AD) (Ho, 2000a: 351-54) and includes today's military farms in Xinjiang and the regimental forest corporations in Heilongjiang.

The situation changed dramatically when the Manchurian forests were nationalized in 1950, leaving the Han-Chinese *and* the few Evenk communities suddenly enclosed in state territory. Forest nationalization became a source of numerous conflicts in China's Northeast and an issue that featured prominently during the revision of the Land Administration Law in the 1990s. The reaction of Heilongjiang Province to the National People's Congress' debates on the topic stated:

> "The problem of village land enclosed in forest (…) has resulted in the nation's most serious land disputes. (…) After the establishment of the PRC, a stream of an estimated 10 million migrants from within the Great Wall settled in Heilongjiang. Many of them reclaimed and colonized wasteland in state forests and formed settler villages" (Heilongjiang Provincial Government, 1998: 352).

In the absence of national regulations on customary law, the provincial government adopted a pragmatic approach: collective property was to be recognized provided that a land ownership or use permit had been issued by the county or higher-level government. If not, it would be considered state property.

[27] During the last census in 2010, the total Evenk population in China numbered approximately 30,000 people (China Statistical Bureau, 2011) with an approximate equal number living across the border in Siberia. Note that we only deal with the Manchurian forests here and not the grasslands and plains that were inhabited by other indigenous (formerly nomadic) peoples such as the Manchu, Mongol, and Oroqen. The Manchurian forests can be found in all three Chinese provinces of Jilin, Liaoning, and Heilongjiang.

Heilongjiang also adopted the same approach for customary rights for grasslands (Shi, 1996: 45). Apart from the approach of recognizing customary rights when lower governments had already issued a land permit, provincial-level governments followed three approaches: 1) leave ownership unspecified and thus maintain the status-quo (e.g. Qinghai); 2) formalize long term collective use as collective ownership (e.g. Inner Mongolia, by which "long term" was left to local government to define); and 3) recognize collective ownership when grassland is located adjacent to the village (e.g. Xinjiang) (Ho, 2000b: 246-7).
The first approach, however, did not quite solve the problem. As the Heilongjiang Government wrote to the NPC:

> "According to the policies of that time, this reclaimed land is considered collectively owned and is currently leased and cultivated by farmers. In some cases, land permits have been issued. In other cases, settler villages existed before and were enclosed into [state] forest area after the establishment of the PRC" (*ibid*.: 352).

Complicating matters even further was the fact that the ownership permits to land, forest, and grassland were separately issued by three departments: the Ministry of Land Resources, the Ministry of Agriculture, and the State Forestry Agency. As the latter believed that forest was essentially state property while the former would judge the actual land use, this often resulted in the Kafkaesque situation that collective property would be recognized by one department but denied by another (*ibid*.: 352).

6. Conclusion: Debunking state unitarism

> "There was no serious discussion among anthropologists of the notion of state law pluralism. While legal anthropologists took account of the existence of state law, none of their studies focused exclusively on that area of activity" (Woodman, 1998: 30).

6.1. Normative ambiguities of the Chinese state

Woodman's observation above is, unfortunately, still valid today. The neglect of the state is the result of legal pluralism's success in drawing attention to the value and strength of non-state regulatory systems as scientific objects in and by themselves. However, as Shahar (2008: 434) stated, "Students of legal pluralism can learn from the debate among political scientists on the definition of the state – the need to highlight not only the heterogeneity, pluralism and contradictions that are external to state law, but also those that are internal to it." This article sought to do exactly that using the concepts and analytical tools of legal pluralism to deconstruct the state and its laws and, in doing so, to make a critical contribution to the field. To this end, the research chose two vantage points – land ownership and the Chinese state – while proceeding in two steps.
One, it started by making an inventory of the main parallel legal orders in China – i.e. historical, indigenous, and customary rights – and the laws that are supposed to govern it. From the inventory, it becomes evident that the Chinese state aims to portray an image of post-revolutionary land ownership as an indisputable fact. Stated differently, land reform in the countryside and the Socialist Transformation and Cultural Revolution in the cities have unequivocally, inevitably, and irreversibly resulted in the expropriation of landlords, rich peasants, and the bourgeoisie as well as the abolition of private and communal ownership as it existed prior to these campaigns.

Two, it demonstrated that this image of post-revolutionary ownership as a fact is at odds with certain rules as engendered by competing semi-autonomous fields within the state. These constitute what eminent jurist Bennion (2001) coined "normative ambiguities" or opposing sets of norms in a single system. For each of the parallel legal orders governing historical, indigenous, and customary rights, poignant examples were presented.

In the case of historical rights, we saw in Sun vs Daduo Township how a provincial court acted as a semi-autonomous field by proclaiming rules that directly challenge the Chinese state's dogma that pre-revolutionary ownership has been invalidated. Even more significant is the ambiguity that vexes urban land ownership since the moment the NPC adopted a version of the constitution that leaves undefined whether the raids of the Red Guards only confiscated the land or also the housing on top. It led to a highly unusual query by the SPC for a legal interpretation by the Chinese Government (usually, *vice versa*), a question that, at the time and still today, has been left unanswered.

In the case of indigenous rights, we focused on a small Tibetan town ravaged by a devastating earthquake. The significance of the lawmaking of a remote town nestled in the mountainous pastures of Qinghai only became known to the world *after* it had been leveled by a devastating earthquake. When rebuilding the town, urban planners stumbled upon a virtual minefield of property issues, more particularly, the widespread prevalence of pre-revolutionary, *private* land ownership. To discover private land ownership in a state founded upon the Maoist-Leninist ideology of the public ownership of land is mind-boggling, to say the least. Yet, once more, it is testimony to the semi-autonomy of the various institutions within the Chinese state and, as such, underscores the existence of state legal pluralism.

In the case of customary rights, we learned how, after the nationalization of the forests in former Manchuria, not only traditional nomadic tribes but also Han-Chinese colonists suddenly became trapped in state terrain without recognition whatsoever of their communal land claims. It became the source of protracted, fierce, and numerous land disputes necessitating the provincial government to do what Chinese law could not: recognize customary rights on certain conditions. It was a historical precedent decades before the first stipulations on custom entered Chinese law in 2007.

6.2. Back to pluralism in three dimensions

What can be learned from all of the above? Let us consider this question along a triple dimension: empirically, methodologically, and theoretically.

Empirical dimension. For one, the analysis has ascertained that, even in the case of an archetypical unitary, centralist entity such as the People's Republic of China, the state is no monolith. In effect, this article has documented *and* demonstrated the internal struggles of the Chinese state over historical claims, indigeneity, and custom. Moreover, it has also shown how these struggles engendered competing, conflicting, and contradictory rules over land ownership at various levels of administration. Thus, differently than the majority of studies on legal pluralism, this research is *not* concerned with the way that societies may self-organize to initiate, promote, and enforce rules in parallel with the state. Neither is it concerned with the question of how the state and its laws influence society. Yet, what it is concerned with is to ascertain how the Chinese state itself is heavily divided over the issue of how to deal with parallel legal orders in society.

Methodological dimension. The very litmus test to validate whether a discipline or field of research can broaden its object of study from one to another is constituted by the question of whether it can apply its instrumentarium to that object. Extrapolating this to legal pluralism, one must be able to apply its concepts as meaningfully to the state as it has been applied to the

non-state or, as Shahar (2008: 435) duly noted, we need to use "the same analytical and disciplinary tools within state law and outside it." For this reason, the article constructed an analytical framework (see: Figure 1) by consistently employing the main elements of the theory – the legal order, normative ambiguity, and semi-autonomous field. It is believed that this study has effectively demonstrated the scientific value and explanatory power of using the legal pluralist toolbox on the state.

Theoretical dimension. There is a dual and profound theoretical ramification if one can prove the semi-autonomy of the state's constitutive organs in the sense that they produce and enforce rules upon their members while being affected by a larger matrix of which they are part, as Sally Falk Moore argued:

1) The impermeable boundaries that legal pluralism originally constructed around the state to study the non-state will no longer hold. Stated otherwise, the "line between state and society is not the perimeter of an intrinsic entity, which can be thought of as a freestanding object or actor" (Mitchell, 1991: 79) but is rather the spatio-temporally constructed outcome of social actors' interactions that is continuously negotiated, renegotiated, and renegotiated, *ad infinitum*;
2) One must acknowledge that the state is intrinsically and inherently a legally pluralist entity. As VanderLinden (1989: 152) astutely remarked, "A system characterized by semi-autonomy (…) is necessarily pluralistic. It can never pretend to reach its ideal, declared or not, to enclose its members in a single regulatory order."

   Some feel challenged by the idea of a legally pluralist state and perhaps even more so in the case of China. Yet, what one needs to be reminded of is that pluralism – regardless of whether that exists within the state or outside it – is *never* a binary matter (pluralist versus unitarist) but that it is actually a spectrum of accommodations to diverse realities from, on one end, convoluted and transient regimes having sway (until clarified, re-centralized, and ultimately, codified) to, on the other end, distinct legal regimes persisting over several decades.[28]

Let us close this writing by reminding ourselves that there is no state that can escape from the specter of pluralism, and it would be illusionary to think that states can. Popular imaginations of strongly centralist, autocratic states fall beside the messy realities of how statutory rules mutually compete, conflict, and contradict. It is hoped that this article may serve as a testimony of the relevance of legal pluralism as a theoretical concept to analyze how states function, thereby establishing state legal pluralism as a new subject of study for those skeptical of closed, universal, and ahistorical conceptualizations of the state in general and of the Chinese state in particular.

List of acronyms

CCP	Chinese Communist Party
CCPCC	Chinese Communist Party Central Committee
NPC	National People's Congress
PRC	People's Republic of China
SC	State Council
SPC	Supreme People's Court
SPP	Supreme People's Procuratorate

[28] In this sense, while there is evidence of state legal pluralism in China, it has also featured in a constrained, determined way. China today is a far way off from being a "fully" pluralist polity that reflects the interests of minority groups in maintaining their independent historical, indigenous, and customary traditions.

UN	United Nations
US	United States
WIPO	World Intellectual Property Organization

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