

Governing the Post-Socialist Transitional Commons:
A Case from Rural China

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Abstract

When the collective declines, who manages the collective-owned land? When the socialist state fails, who possesses the state-owned river? This paper concerns the governance of land and natural resources that are still owned by collectives or the state in rural China. No effective community governance has evolved in rural China to fill the authority vacuum left by the People's Commune system. As a result, such land and natural resources became real commons. I use the term "transitional commons" to indicate both the crucial influence of transitional political legal environment in their emergence and evolution and the transitional character inherent in their nature. Transitional commons are often in crisis: The tragedy of the commons occurs when the cost of exclusive use is too high. When the benefit of exclusive use exceeds the cost, contesting property claims arise over the common resources. I argue for an integrated approach to govern the transitional commons from the ground. Successful management of the transitional commons requires more than choosing the right property institution. A capable state and a well-functioning community are necessary to make the property institution, whichever it is, work. Rule of law is necessary to define the basic structure of a society and to guarantee the normal operation of the community self-governance. Self-governance can increase social capital for the local community to develop local consensus on property arrangements.

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INTRODUCTION

When the collective declines, who manages the collective-owned land? When the socialist state fails, who possesses the state-owned river? The weakness of the state and thinness of social capital in post-socialist countries have generated extensive discussion,¹ but not in the scholarship of property rights and commons. Although the “external environment” has been singled out as an element in various models for governing the commons, specific study in this aspect is still needed. The focus in existing literature has remained on the internal structure of the governance mechanism or the bundles of property rights.² It is still unclear how the external political legal environment impacts the emergence and evolution of the commons.³ This question is critical to the governance of natural resources in post-socialist countries experiencing political and legal changes.

¹ See, e.g., BUILDING A TRUSTWORTHY STATE IN POST-SOCIALIST TRANSITION (Janos Kornai & Susan Rose-Ackerman eds., 2004); CREATING SOCIAL TRUST IN POST-SOCIALIST TRANSITION (Janos Kornai et al. eds., 2004).

² See, e.g., ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990); HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIMUPHS IN THE WEST AND FAILS EVERYWHERE ELSE 153-206 (2000); Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998); Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L.J. 549 (2001).

³ See Arun Agrawal, *Sustainable Governance of Common-Pool Resources: Context, Methods, and Politics*, 32 ANNU. REV. ANTHROPOL. 243, 250 (2003). I found only one paper that has a similar topic to my research. See Thomas Sikor, *The Commons in Transition: Agrarian and Environmental Change in Central and Eastern Europe*, 34 ENVTL. MGMT. 270 (2003).

This paper concerns the governance of land and natural resources that are still owned by collectives or the state in rural China.⁴ In the People's Commune period, land in rural China was truly collectively owned and managed.⁵ After the People's Commune system collapsed in the early 1980s, rural China is still collectively owned in name, but each rural household has acquired use rights to a plot to live and several pieces of land to farm with the establishment of the Household Responsibility System ("HRS").⁶ However, scholarship has long overlooked that substantial part of rural land and natural resources not distributed, and were supposed to be continually managed by the collectives or the state. Unfortunately no effective community governance has evolved in rural China to fill the authority vacuum left by the People's Commune system. As a result, such land and natural resources became real commons. I use the term "transitional commons" to indicate both the crucial influence of transitional political legal environment in their emergence and evolution, and the transitional character inherent in their nature. Transitional commons are often in crisis: The tragedy of the commons occurs when the cost of exclusive use is too high. When the benefit of exclusive use exceeds the cost, contesting property claims arise over the common resources. Different property claims prevail in different situations, resulting in temporal property arrangements. The temporary

⁴ The collective usually refers to the village or sub-village entity. See Loren Brandt et al., *Land Rights in Rural China: Facts, Fictions and Issues*, CHINA J., Jan. 2002, at 67, 73.

⁵ For more details about the collective ownership under the People's Commune system, please see Greg O'Leary & Andrew Watson, *The Role of the People's Commune in Rural Development in China*, 55 PAC. AFF. 593, 593 (1982).

⁶ See, e.g., Justin Yifu Lin, *The Household Responsibility System Reform in China: A Peasant's Institutional Choice*, 69 AM. J. AGRIC. ECON. 410 (1987).

nature of property arrangements is further strengthened by the uncertain political and legal environment in which commons is embedded.

I first realized the existence of transitional commons in my exploration of the tragedy of the commons to *Dianpai* River, one of the numerous small rivers in rural Hubei of Central China, in the summer of 2008. There was tragedy of the commons to the river water resources. But to my surprise, different property claims arose to the land on both banks of the river. The three different destinies of the river water and the two riverbanks aroused my interest. From then to the summer of 2010, I visited *Dianpai* River again several times to investigate the reasons for their different destinies. This research is based on my fieldwork about *Dianpai* River.

In part I, I discuss in detail how the governance of *Dianpai* River collapsed when Chinese rural society experienced a great transformation. I discuss the evolution of property arrangements over the river in Part II with an emphasis on the basis for different property rights claims. In Part III, I develop a model for analyzing transitional commons, identifying the crucial factors that affect the rise and survival of property rights claims.

In Part IV, I explore how to overcome the crisis of transitional commons. I argue for an integrated approach to govern the transitional commons from the ground. First, community distinctions mean that no external uniform resolution works for all transitional commons. The effort to build an ideal property institution nationwide cannot avoid the tragedy of the transitional commons on the ground. A decentralized approach, with respect for institutional diversity, is essential to overcome the crisis of the transitional commons. Second, the successful management of the transitional commons requires more than choosing the right property institution. A capable state and a well-functioning community are necessary to make the property institution, whichever it is, work. To achieve this, I argue for

rule of law for “order without law,” and building social capital through self-governance of the local community. Rule of law is necessary to define the basic structure of a society and to guarantee the normal operation of the community self-governance. Self-governance can increase social capital for the local community to develop local consensus on property arrangements. The formal institutions are the foundation of the development of local rules.

I. COMMONS IN TRANSITION: AFTER COLLECTIVIZATION, ENDURING MARKETIZATION

A. Traditional Governance:

“Heaven is high and the emperor is far away”

Before the establishment of the Communist regime, the state had never succeeded in directly controlling rural China. The distance between Chinese emperors and their subjects was characterized by the idiom “Heaven is high and the emperor is far away.” With this kind of gap between the rulers and the ruled, seemingly dictatorial rulers in fact ruled by allowing rural self-governance.⁷ With considerable autonomy from the state, the local community itself maintained internal order and settled disputes between its members.⁸

In the pre-1949 period, *Dianpai* River was not yet in existence. In Songzi County, Hubei Province of Central China, there were only several medium-sized irregularly-shaped lakes and Songzi River, a branch of the Yangtze River, which flowed alongside the lakes. Songzi River and the lakes were the main sources of drinking water and fish for villagers in the surrounding areas. The villagers lived mainly on farming,

⁷ FEI XIAOTONG, *FROM THE SOIL: THE FOUNDATIONS OF CHINESE SOCIETY* 113 (Gary G. Hamilton & Wang Zheng trans., University of California Press 1992).

⁸ MICHAEL TAYLOR, *COMMUNITY, ANARCHY, AND LIBERTY* 35 (1982).

but fished in the lakes and the Songzi River occasionally. The simplicity of fishing instruments and the small population limited fishing to a sustainable level. While land was privately owned, the lakes were kept as commons. There were no written rules on the use of lake water, the management of which depended on the authority of lineages and social norms based on villagers' mutual familiarity.

Before 1949, lineages were very developed in this area. Surviving lineage books, ruins of ancestral shrines and elders' memories about lineages evidence the past existence of traditional authority in the area. Lineages and sub-lineages formed the basic divisions that managed administrative and other public activities of rural society.⁹ A complete lineage kept a book to record its members, had its own rules to regulate the behaviors of its members, and owned and operated ancestral shrines.

Moreover, social norms based on mutual familiarity played an important role in regulating rural people's behavior. The basic unit of Chinese rural society was the village, members of which could belong to one or more lineages. Residents in the same village constituted an "acquaintance society (*shuren shehui*),"¹⁰ a society based totally on familiarity, which developed from frequent and repeated interaction occurring over a long period of time.¹¹ In an

⁹ See PRASENJIT DUARA, *CULTURE, POWER, AND THE STATE: RURAL NORTH CHINA, 1900-1942* 87 (1988).

¹⁰ See Fei Xiaotong, *supra* note 7, at 41. "Acquaintance society" is a more precise translation of *shuren shehui* than "society without strangers."

¹¹ As Fei Xiaotong said, Traditional rural China was a society where people lived from birth to death in the same place. Every child grew up in everyone else's eyes, and in the child's eyes everyone and everything seemed ordinary and habitual. Life in traditional rural society was very parochial. Villagers restricted the scope of their daily activities; they did not travel far; they seldom made contact with the

acquaintance society, formal laws play very limited roles. Instead, rites and customs defined what was acceptable and not acceptable in the villagers' daily interactions.¹² Because villagers lived and worked in the same village, any use of the water that may significantly reduce water quality would be censured by other villagers. For example, if a villager discharged a lot of waste into the lakes, other villagers would view him as “*quede*” (lacking morality). Informal social sanctions against a villager with a bad reputation would make his livelihood difficult.¹³

B. Mao's Collectivization: the Almighty Party-State

Mao's collectivization eliminated private property, and transformed traditional peasants into members of the People's Commune.¹⁴ An important purpose of collectivization was to build a system in which the party-state was the sole exclusive

outside world; they lived solitary lives; they maintained their own isolated social circle. *See* Fei Xiaotong, *supra* note 7, at 41.

¹² *Id.*, at 43.

¹³ In private retaliation, each individual (or family) tacitly promises to retaliate against injury or noncontribution to public goods. And a variety of informal social sanctions may be made against those who do not contribute to the collective good: shaming, gossip, and ridicule, accusations of sorcery and witchcraft, and ostracism and withdrawal of reciprocal aid. *See* Taylor, *supra* note 8, at 82-89. Daniel Little actually gave a very similar example in discussing this point: “members of a closed community who consistently pollute the water supply will be detected, and social disapprobation will result.” DANIEL LITTLE, UNDERSTANDING PEASANT CHINA 44 (1989).

¹⁴ For general discussion about Mao's collectivization, *see* YU JIANRONG, YUECUN ZHENGZHI [POLITICS OF YUE VILLAGE] 259-282 (2001); WU YI, CUNZHI BIANQIAN ZHONG DE QUANWEI YU ZHIXU [AUTHORITY AND ORDER IN THE EVOLUTION OF VILLAGE GOVERNANCE] 86-101 (2002).

authority.¹⁵ Therefore successful collectivization must first destroy the socioeconomic and cultural basis of traditional authority, the lineage. The socialist education movement of the same period portrayed the lineage as incompatible with communism and to be discarded.¹⁶ The state also deliberately mobilized the masses to destroy the symbols of the lineage, such as ancestral shrines.¹⁷ As a result, the authority of lineage became severely curtailed, if not completely eliminated.

Chairman Mao did not, however, succeed in replacing the traditional intimacy between villagers with socialist comradeship. Even in the People's Commune period, social norms based on familiarity in traditional rural society played an important role in regulating villagers' behaviors.¹⁸ One explanation is that the prohibition of free migration and elimination of market economy in the Maoist period strengthened rather than weakened the parochialism and closeness of Chinese rural society.

In the 1950s, the Yonghe People's Commune was established in what would later become Nanhai Township in Songzi County. Two brigades, Yongfu("Y") and Lajiadu ("L"), both operating under the aegis of the Yonghe People's Commune,¹⁹ jointly governed the lakes that would later

¹⁵ Shen Yansheng, *Cunzheng de Xingshuai yu Chongjian* [*The Decline and Reconstruction of Village Governance*], ZHANLUE YU GUANLI [STRATEGY AND MANAGEMENT], Dec. 1998, at 1, 11; Wu Yi, *Id.*, at 95.

¹⁶ See Liang Zhiping, *Xiangtu Shehui zhong de Falv yu Zhixu* [*Law and Order in Rural Society*], in XIANGTU SHEHUI DE ZHIXU, GONGZHENG YU QUANWEI [ORDER, JUSTICE AND AUTHORITY IN RURAL SOCIETY] 415, 418 (Wang Mingming & Wang Sifu eds., 1997).

¹⁷ *Id.*, at 418-9.

¹⁸ *Id.*, at 420.

¹⁹ The people's commune consisted of three echelons: the commune, the production brigade and the production team. The reforms initiated in 1978 by Deng Xiaoping dismantled the communes. Generally, the

become *Dianpai* River. Each brigade sent one member to guard these lakes. Large-scale private fishing was prohibited. Instead, the brigades organized fishing in the lakes at the end of every year and distributed the fish to all the members.

Dianpai River was a fruit of the People's Commune system. From the winter of 1978 to the spring of 1979, the Songzi County government organized the peasants to construct a pumping station and *Dianpai* river, which would connect the lakes with Songzi River so as to prevent the lakes from flooding the farmlands in the summer.²⁰ Between the lakes and Songzi River are Y Village and L village, with *Dianpai* River as a boundary in the middle. It was not clear which entity should be responsible for the management of the river. When everything was publicly owned, any state agency appeared to have authority to stop villagers' improper use of the river. Such agencies included the two brigades, which could regulate affairs within their own jurisdictions, the pumping station, which had authority to ensure that the river remained passable as a complementary canal, and other agencies that had authority over other aspects of the river. The Brigade of Y village, for example, planted trees on the left riverbank in the name of preventing soil erosion.

township (*xiang/zhen*) replaced the commune, the village (*cun*) replaced the brigade, and the villagers' group (*cunmin xiaozu*) replaced the production team. See e.g., Peter Ho, *Who Owns China's Land? Policies, Property Rights and Deliberate Institutional Ambiguity*, 166 CHINA QUART. 394, 404-5 (2001).

²⁰ See SHUILI JU SHULI ZHI BIANXIE ZU, SONGZI SHUILI ZHI [HISTORY OF WATER ADMINISTRATION IN SONGZI] (1985).

C. Deng's Marketization: Unorganized Homo Economicus

The overreaching of the state in rural China proved to be costly, inefficient, and unsustainable.²¹ In 1983, the Yonghe People's Commune was dismantled, and the Nanhai Township was established. The brigades were dismantled, and Villagers' Committees (VC) were organized.²² According to Chinese law, VC is a self-governance organization that

²¹ See ZHANG LETIAN, GAOBIE LIXIANG: RENMIN GONGSHE ZHIDU YANJIU [FAREWELL IDEAL: STUDY ON PEOPLE'S COMMUNE] 415-46 (1998).

²² The earliest villagers' committees emerged in the Guangxi Autonomous Region in 1980. Formed without the knowledge of the local authorities, these organizations were created by village elders, former cadres and community-minded villagers. The intention was to address a decline in social order and a broader political crisis as production brigades and teams stopped functioning at the grass-roots level. Within months, local officials had reported this development to the central government. The National People's Congress (NPC) leaders encouraged experiments with this new form of organization. In 1982, VCs were written into the constitution as elected mass organizations of self-government (article 111). See China: Village Committee Elections: First Steps on a Long March, http://aceproject.org/ace-en/topics/es/esy/esy_cn (last visited December 11, 2010). For the nationwide decommunization, please see, e.g., Vivienne Shue, *The Fate of the Commune*, 10 MOD. CHINA 259 (1984).

manages the public affairs of the village.²³ In contrast to the commanding relationship between the commune and the brigade in the People's Commune era, the newly restored township, —the lowest governmental unit, only guides the VC. VC is not a level of government and its members are not governmental officials. Unfortunately the self-governance of villagers was not well guaranteed. The party branch at the village level was granted power to “play the role of leading nucleus.” (*fahui lingdao hexin zuoyong*)²⁴ Through the top-down party system, the county and township government could intervene in and in most times actually exercise effective control over village affairs. The VCs, under the lead of the party branch, have essentially become an arm of the local government. At the same time, the local government provides almost no financial and human resources to VCs

²³ Article 2 of the Organic Law on the Villagers' Committee of People's Republic of China (hereinafter OLVC): “The villagers committee is the primary mass organization of self-government, in which the villagers manage their own affairs, educate themselves and serve their own needs and in which election is conducted, decision adopted, administration maintained and supervision exercised by democratic means.

The villagers committee shall manage the public affairs and public welfare undertakings of the village, mediate disputes among the villagers, help maintain public order, and convey the villagers' opinions and demands and make suggestions to the people's government.”

²⁴ Article 3 of OLVC: “The primary organization of the Communist Party of China in the countryside shall carry out its work in accordance with the Constitution of the Communist Party of China, playing the role of leading nucleus; and, in accordance with the Constitution and laws, support the villagers and ensure that they carry out self-government activities and exercise their democratic rights directly.”

because they are not a formal level of the bureaucratic system. As a result, VC is an impotent hand.²⁵

Deng's marketization reform proved to be much more successful than Mao's People's Commune in modernizing rural China. Marketization has transformed a closed rural society built on the mutual-familiarity of villagers into an open society of significant mobility. Traditional connections based on mutual familiarity, while still playing a role in the management of village affairs, have been greatly weakened by Deng's marketization reform.²⁶ Market forces have penetrated rural society and distanced people from traditional opinions and values, transforming many peasants into businessmen or migrant workers, who prefer business rules to rural customs.²⁷ Material benefits frequently overcome familiarity in villagers' relationships. Many villagers make their living in big cities as migrant workers, and only go back to their villages during the Chinese spring festival. Thus the interactions and familiarity between villagers have greatly decreased. Business and migrant workers, who have taken on market values, care less about other villagers' opinions than their forefathers, because such opinions are not as important

²⁵ See e.g., Xiang Jiquan, *Duanque caizheng xia de xiangcun zhengzhi fazhan: Jianlun zhongguo xiangcun minzhu de shengcheng tuojing* [*Political Development under the Financial Shortage in Rural China: A Reflection on the Logic of Chinese Rural Democratization*], ZHONGGUO NONGCUN GUANCHA [CHINA RURAL SURVEY], June 2002, at 50.

²⁶ See He Xuefeng, *Shichang Jingji xia Nongmin Hezuo Nengli de Tantaoyao* [*Peasants' Ability to Cooperate under Market Economy*], TANSUO YU ZHENGMING [EXPLORING AND FREE VIEWS], Sept. 2004, at 18; He Xuefeng & Liu Tao, *Zai Xiangtu Zhongguo yu Xiandai Zhongguo zhijian* [*Between Rural China and Modern China*], ZHONGGUO TUSHU PINGLUN [CHINA BOOK REVIEW], April 2009, at 79, 83.

²⁷ See, e.g., YUNXIANG YAN, *PRIVATE LIEF UNDER SOCIALISM: LOVE, INTIMACY, AND FAMILY CHANGE IN A CHINESE VILLAGE, 1949-1999* (2003), Chapter 6 and 7.

to their survival. Such people are more likely to ignore other villagers' interests in their use of the river. For example, in olden times other villagers' censure would effectively deter villagers who discharge waste into the river. Now those villagers who only stay in the village for one or two months every year simply do not care about such censure. They only care about how to find jobs in cities, or how to make more money through their hard work in urban factories, to which the village community does not matter at all. Thus the village community has very limited influence over these people with respect to the use of the common river.

Neither Y village nor L village along the river is entirely free from the impact of marketization, although L village has experienced the impact much more significantly. A big rural market was next to L village and many villagers have been proprietors for a long time. L village has also exported migrant workers much earlier than Y village.

D. State-Owned Commons

The 1954 Chinese Constitution provided for state-ownership of rivers. This provision has been kept despite frequent changes to the macro political and legal system in the early history of the People's Republic of China.²⁸ Even when the HRS replaced the People's Commune in the management of rural land, ownership of rivers in rural China remained with the state. In the People's Commune period, state-ownership of rivers could be exercised through the bureaucratic hierarchy of the People's Communes. However, when the state retreated from the countryside, state-ownership became much more an ideology than a real right to land. State-owned rivers became commons.

²⁸ See Article 6 of 1954 Chinese Constitution, Article 6 of 1978 Chinese Constitution, Article 9 of 1982 Chinese Constitution, Article 81 of Principles of Civil Law of People's Republic of China (1987), Article 46 of 2007 Chinese Property Law.

Theoretically state's grassroots bureaucracy, including the county and township-level governments, can still exercise the state's ownership rights. I have found in my field study, that the Songzi (county-level) and Nanhai (township-level) governments are neither able nor willing to manage a small rural river such as *Dianpai*. At the county level, the Bureau of Water Administration (BWA), the Environment Protection Agency (EPA), and the Bureau of Agriculture (BOA) are the main agencies that have legal authority to regulate the use of the river. However, none of them takes their respective responsibilities to the river seriously. I first went to the BWA, where the officials told me that river management was an environmental issue and should be the responsibility of the EPA. Then I went to the EPA and was advised to query the BOA because it was a rural river. At the office of the BOA, the officials tried to help me contact the BWA.²⁹

At the township level, I contacted the deputy head of the government responsible for water administration through personal connections, and he told me frankly that no management plan over small rural rivers ever existed. The most likely explanation is the lack of resources on the part of the township-level government. Within Nanhai Township, there are nine rivers of similar size, spreading over an area of 171.3 square kilometers. There should be at least one head of the township government and five deputy heads, but when I went to the township office building on a business day, I could not find even one formal official to talk to. None of them was in office that day.

²⁹ I got access to the county officials in the three bureaus through personal connections. I could see from my conversations with them that they were sincere in communicating with me. The officials also looked up official archives relevant to the management of Dianpai River for me. But all the documents I got were dated back to the construction of the pumping station and the River in the People's Commune period.

On the whole, when the state retreats from the countryside, its local regime is neither able nor willing to exercise state-ownership, turning the state-owned resources into commons. At the village level, the traditional authority and connections that used to regulate villagers' exploitation of common resources have declined due to the shocks of both the People's Commune movement and the later marketization. The VCs have not been able to effectively manage the river due to lack of financial resources and authority among villagers. Real commons emerged in the post-socialist transition of rural China.

II. PROPERTY RIGHTS CLAIMS TO THE TRANSITIONAL COMMONS

A. The Rise of Property Rights Claims

The rise of property rights claims over the riverbank land was a classic Demsetzian process, triggered by the increase in its value.³⁰ In the 1990s, after more than a decade of wealth accumulation, the villagers developed a trend of building new houses.³¹ The trees planted by Y Brigade in the name of preventing soil erosion suddenly became valuable as the need for timber rose. Most of the trees had died or withered due to lack of care, and the vacant riverbank land was open for cattle grazing. Some trees in front of villagers' houses, however, got care from the villagers and grew up. When these villagers needed timber to build houses, they

³⁰ According to Demsetz, the emergence of new property rights takes place in response to the desires of the interacting persons for adjustment to new benefit-cost possibilities. See Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967).

³¹ Building a new home is widely recognized as the most important achievement in the life of a Chinese peasant.

found no reason why they could not cut down riverbank trees planted just about ten meters from their doors. Such property rights claims to the trees were never especially asserted, but the villagers gave mutual recognition to each other's claim. Every villager knew that the trees were planted by the village (brigade at that time) in the state-owned riverbank, but such knowledge did not prevent them from cutting down those trees. No villagers protested such exploitation. The VC could not and did not take any substantial actions to stop the exploitation of trees "belonged to the villagers collectively."

The villagers of Y did not make further use of the riverbank land until the mid-1990s, when farming became very costly as agricultural taxes and fees on the farmland reached their peak.³² According to several villagers, their

³² VCs collected agricultural taxes for the government, which were distributed between the central government and local (province, prefecture, county and township) government. VCs collected fees for their normal operation and to provide public goods. In reality, the government collected too much agricultural taxes that Chinese peasants could bear. VCs were often not able to collect enough money to pay the taxes to the government, not mention the money needed for providing public goods. Readers might wonder how the taxes and fees could reach the peak when the state retreated in the post-Socialist period. The answer is the state shirked its responsibility to provide public goods, but did not give up exploiting resources from the peasants. In other life, although the State lost its ability to penetrate into villagers' daily life with the dismantling the People's Communes, it is still able to extract resources from the countryside. The burden of taxes and fees aroused wide resistance in rural China in the mid-1990s. For more details about agricultural tax burden and rural resistance in China, *See, e.g.,* Ray Yep, *Can "Tax-for-Fee" Reform Reduce Rural Tension in China? The Process, Progress and Limitations*, 177 CHINA QUART. 43 (2004); Lu Xiaobo, *The Politics of Peasant Burden Reform in China*, 25 J. PEASANT STUD. 113, 117-121 (1997); *See also* Zhou Feizhou, *Cong Jiquxing Zhengquan dao Xuanfu xing Zhengquan: Shuifei Gaige dui Guojia*

agricultural investment, including fertilizer and agricultural tax and fees, often exceeded the farmland's output during those years.³³ Villagers had to find other ways to support themselves, and looked to the cultivation of the riverbank land. Although the riverbank land was not especially fertile, it was never counted as taxable land and thus more profitable to cultivate. Cultivation of the riverbank land increased gradually. At the beginning, only a few villagers planted some crops (including wheat, cotton, and rape, etc.) randomly on the riverbank. After two or three seasons of impressive harvest without substantial interventions from the villagers' committee or any other institutions, more and more villagers devoted time and money to cultivate the riverbank land. The villagers' faith in their property rights over the riverbank land became stronger year after year through repeated use. Indeed, such faith even exceeded the villagers' faith in their property rights over their farmland, because the farmland was subject to occasional redistribution.³⁴

yu Nongmin Guanxi zhi Yingxiang [Rural Fee Reform and the Changing Relationship between State and Peasant], SHEHUI XUE YANJIU [SOCIOLOGICAL STUDIES], June 2006, at 1.

³³ This phenomenon was also reported in other provinces of China. *See, e.g.,* Cao Zhoufeng, *Tudi heyi biancheng le nongmin de fudan? [Why has land become burden to peasants?]*, ZHONGGUO GAIGE [CHINA REFORM], Nov. 2001, at 41.

³⁴ Such faith was highlighted by several villagers who chose their own field in the bank as the tomb place for the old of their families. From the middle 1990s until now, three of five old people in Village Y who passed away were buried in the riverbank field at last. The traditional Chinese culture emphasized to guarantee the dead ancestor's peace in land, which means moving grave from one place to another would offend the ghost of the dead and bring bad luck to the living. So the villagers are very serious about the location of tomb place and would definitely prefer to bury the dead families in their own land. In addition, burying ancestors in their own land makes villagers much more

Property rights claims that arose over the bank on the other side of the river differed from those recounted above, but the process was still consistent with the Demsetz thesis. In the mid-1990s, there was also random cultivation of the land, but mostly by old and poor villagers. Their cultivation was not as continuous, extensive and successful as that in Y village. The riverbank land in L village could essentially be viewed as being open to all until 2000, when it was grabbed by a local bully, Mr. H, for large-scale cash tree planting. Mr. H, well-known for his cruelty and talent in speculation, was a successful proprietor in the rural market next to L village. He had engaged in several different kinds of business, such as running restaurants and retailing chemical fertilizer. Stimulated by the booming timber market, he decided to invest in planting cash trees. The riverbank land was an excellent place to implement his plan. The legal basis of Mr. H's possession of the land was dubious, but his use of the land provoked no objection from the township government or the VC. By 2008, the saplings he had planted had already grown into big trees. The success of Mr. H's investment was unquestionable. Some villagers viewed it as an illegal occupation of state-owned land, but they did nothing other than complaining casually.

The exploitation of the land on both sides of the river generated significant economic gains, which caught the attention of the state-owned pumping station. The station asserted its ownership over the whole riverbank land by arguing that the river had been designed as a complementary canal to the pumping station. However, the station did not

convenient to offer sacrifices to ancestors during festivals, which is often carried out before ancestors' tomb. So, the tombs on the riverbank field can be viewed as a symbol of private property. It means that, in the mind of the villagers the ownership of the riverbank field belongs to them forever, just as that of the bones of the ancestors who has been sleeping under the field until the end of the world.

take substantial actions to realize its assertion, and only a small portion necessary for the normal operation of pumping machines fell into its control.

In the following, I will discuss the bases of the above property rights claims in detail. In addition, the absence of property rights claims over the river water resources will be briefly described.

B. Egalitarianism

Egalitarianism is a tenet of traditional Chinese agrarian morality. According to Confucius, a nation or a family needs not worry about scarcity, but does need to worry about unequal distribution.³⁵ The concept of egalitarianism continued to influence Chinese behaviors. In the Maoist period, the Communist Party aimed to eliminate inequality in China, which obviously strengthened Chinese belief in egalitarianism. Although Deng's reform encouraged "a small portion of people to become wealthy first," egalitarianism still has substantial moral weight in Chinese society, to different degrees in different places and situations. In rural society, despite the fact that the traditional authority and custom have been greatly weakened by both Communism and the Marketization, egalitarianism still significantly affects villagers' behaviors. For example, He Xuefeng found in his field studies peasants care much more about their relative situation to others than their absolute situation.³⁶

The emergence of property rights in Y village demonstrates the dominance of egalitarianism.³⁷ Villagers

³⁵ THE ANALECTS OF CONFUCIUS 115 (Burton Watson trans., Columbia University Press 2007).

³⁶ HE XUEFENG, SHENME NONGCUN, SHENMEN WENTI [WHAT IS COUNTRYSIDE, AND WHAT IS ITS PROBLEM] 172-6 (2008).

³⁷ An example I got in the field study can illustrate such logic of villagers' behaviors. There was an unsuccessful effort of the villagers' committee of Y to build a public water supply system. The original plan

generally think that “nobody should enjoy more than me” when it comes to the use of common resources. The distribution of the riverbank land in Y village has conformed to egalitarianism. Although no authority or written rules regulated the rise of property rights claims to the vacant riverbank land, there were no serious disputes or conflicts among villagers in the whole process. Each household got the exclusive right to the land in front of their home. For lands to which no household was adjacent, each household got a piece in equal size.

C. “*Might Makes Rights*”

According to Umbeck, all private ownership rights are ultimately founded upon the ability to forcefully exclude potential competitors. Force, not fairness, determines the distribution of wealth in a society.³⁸ Umbeck’s hypothesis

had been that each household should share equally the cost of construction and operation of that system. All the villagers would have benefited a lot from such a system if successfully built. Most villagers had made the initial payment. However, this system failed finally because the majority was frustrated by a few who did not pay. They felt it was unequal and refused to pay the remaining sum. The final result was that many households built their own system to get clean underground water for drinking, the total cost of which went far beyond that of a public water supply system.

³⁸ John Umbeck, *Might Makes Rights: A Theory of the Formation and Initial Distribution of Property Rights*, 19 *ECON. INQUIRY* 38, 57 (1981). Zerbe and Anderson hold a different view and emphasize that cultural concepts of fairness served to create property norms and institutions. See Richard O. Zerbe Jr. & C. Leigh Anderson, *Culture and Fairness in the Development of Institutions in the California Gold Fields*, 61 *J. ECON. HIST.* 114 (2001). In the following part of this paper, I explain the differences of property arrangements in Y and L villages. One reason is the difference in cultural norms, which might prefer fairness to efficiency and might also prefer the opposite.

seems inconsistent with the egalitarian distribution of riverbank land in Y village, but finds ample support in what happened to the riverbank land in L village.

Mr. H, a villager of L and also a proprietor, had a well-known reputation as a bully for his brutality. He believed in the power of violence and never hesitated to use it when necessary to pursue what he viewed as justice.³⁹ His father was a chief cook of the People's Commune government and had extensive connections with local officials. He was also a long-term leader of an informal gang of jobless young people, the major business of which is to "get rid of trouble for people".⁴⁰ His restaurant was one of the best in the local market and a popular destination of L village's VC members. His grabbing of the riverbank land faced no intervention from the VC.

According to Mr. H, he signed a contract with the VC to use the riverbank land for ten years. For the three-mile-long strip, the contract fee is 2000 RMB per year.⁴¹ The gross income of growing crop trees on the land, according to the calculations of Mr. H, will be more than 600,000 RMB at the end of the contract term.⁴² It was unreasonable for the VC to charge so little for a business of great profit. Mr. H's explanation was that this investment was his idea and helped get rid of the VC's trouble of how to effectively manage the riverbank. Only Mr. H, a man with credible private violence, could exercise effective management of the riverbank. There was also a wide-spread rumor that he bribed the VC members to get their acquiescence. Whether a contract existed or not,

³⁹ Interview with Mr. H, in L village, Nanhai Township, Songzi County, Hubei, China (Aug. 21, 2010).

⁴⁰ *Id.*

⁴¹ I was not able to see the contract in my two-day-visit to the village in the summer of 2010. But Mr. H promised to show it to me next time I went there.

⁴² Interview with Mr. H, *supra* note 39.

Mr. H's might in the local community was the key to his successful exclusive use of the riverbank land of L village. Other villagers were unable to unite together to resist his exclusive possession. His wealth and brutality deterred potential dissenters.

Mr. H would be able to reap a big profit from his wise investment. His exclusive possession for ten years, despite its suspicious origin, strengthened his claim to the land. Mr. H's might seems to make rights for him. However, the principle that might makes rights is far from accepted in Chinese society. Might-based rights, although very prevalent in China, are still in the gray zone of legitimacy.

Like Mr. H, people with might often try to justify their rights by claiming efficiency.⁴³ It is true that private exclusive use is often much more efficient than the former state-ownership. This justification, however, has not been widely accepted by the Chinese populace for various reasons.⁴⁴ Mr. H's might-based rights can exist only as long as he can forcefully exclude those who do not agree.

D. Historical Connections

The Communist past is an inescapable inheritance of the transitional commons. Historical connections established in the Communist period can also be a basis of property rights claims.⁴⁵ Here the pumping station had such

⁴³ See, e.g., Andrew Sheng, Geng Xiao & Yuan Wang, *Property Rights and 'Original Sin' in China: Transaction Costs, Wealth Creation, and Property Rights Infrastructure*, in *POLICY REFORM AND CHINESE MARKETS: PROGRESS AND CHALLENGES* 97 (Belton M. Fleisher Eds., 2008).

⁴⁴ *Id.*

⁴⁵ In Russia, a wide variety of state and quasi-state organizations were the main actors in the privatization process and claimed property rights to the state-owned real estate. See Heller, *supra* note 2, at 635-39.

historically based claims. The station justified its claim by recalling that the river was built as a complementary canal to the pumping station in the People's Commune period. The fruits of the people's labor should be managed by the state-owned pumping station. Due to its limited ability to realize its rights claim, the pumping station ultimately only controlled a small part of the adjacent riverbank land.

Although the pumping station did not succeed, historical connections could be a strong basis of property rights. Transitional commons were state-owned in the Communist period. Their creation and operation as part of the planning economy often involved the efforts of more entities and people than now. In other words, they were "fruits of the people's collective effort." Any private property rights claim to them can be easily labeled as stealing the people's wealth. In contrast, the claims by governmental entities, such as state agencies and state-owned enterprises, seem to be ideologically sound. In a state like China, where the socialist ideological orthodoxy has not been completely discarded, historical connections also have some limited moral strength. In addition, governmental entities that claim rights to these transitional commons often had prior connections with them, which increase the credibility of their claims.

However, the governmental entities are not working to benefit the public or the state, but instead to promote their own separate interests.⁴⁶ For example, the pumping station, although still state-owned, had to provide on its own the salary and benefits of its employees. It charged for its pumping services. Its rights claim to the riverbank land was not actually for better management and operation of the river and the pumping station, as asserted, but rather to seize potential benefits from the cultivation of the riverbank land.

⁴⁶ See, e.g., Wong K K & Zhao X B, *The Influence of Bureaucratic Behavior on Land Apportionment in China: The Informal Process*, 17 ENVIRON. PLANN. C 113 (1999).

In my interview with the manager of the pumping station, he did not even try to disguise this real intention. As he said, the villagers had no right to possess the riverbank land, and all the uses of the riverbank land should be authorized by the pumping station. The alleged authorization power was just a pretext for charging the villagers.

E. Tragedy of the Commons

In contrast to the various property rights claims to the riverbank land, no similar claims arose regarding the use of the river water and the fish resources. A classic tragedy of the commons took place.

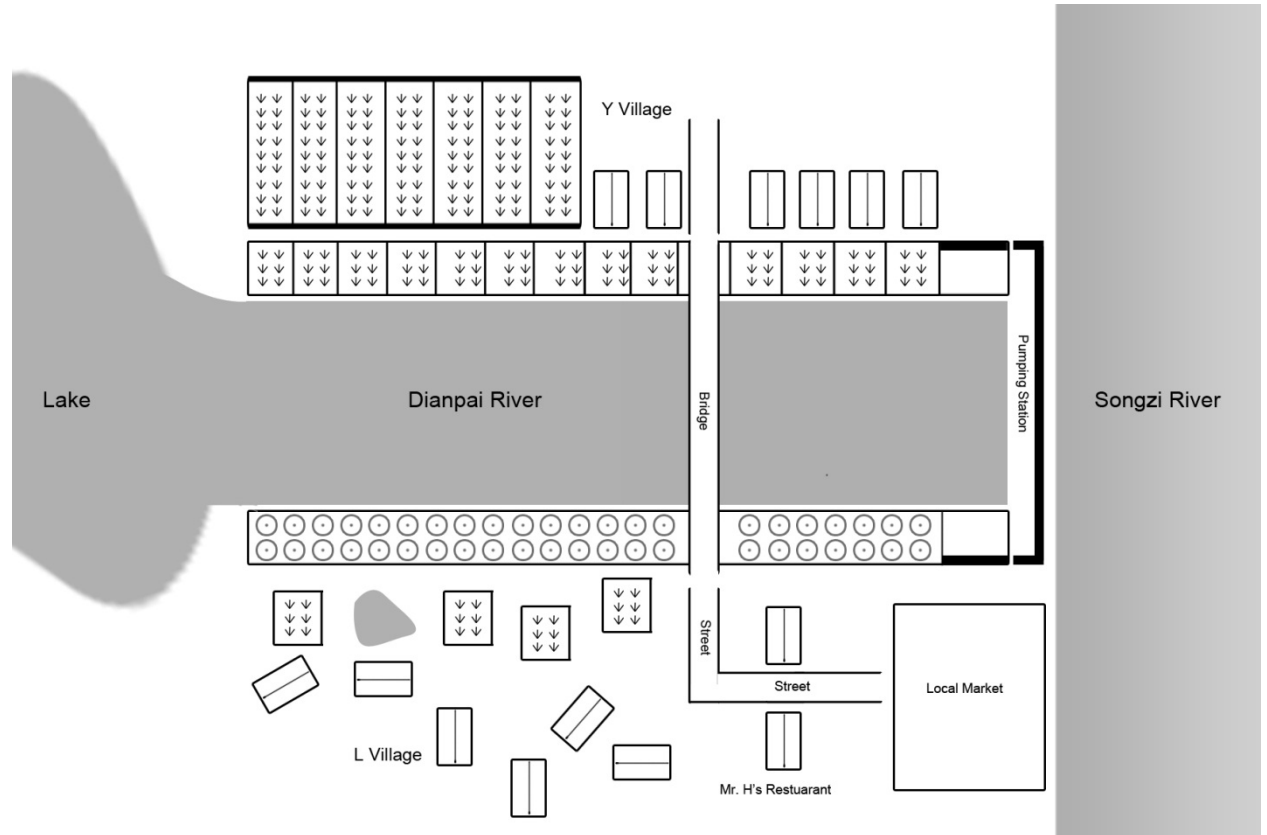
With no public garbage-disposal facilities in the area, the river water became a dumping ground for villagers to discharge production and household wastes. Everyone could discharge waste into the river and the cost of deterioration was shared by all. A rational villager found that his share of the loss of discharging waste into the river was less than the cost of purifying his waste before releasing it. Because everyone would have the same cost-benefit calculation, the villagers were locked into a system of “fouling their own nest.”⁴⁷ The river water, as a result, was seriously polluted.

For the same reason that the river water was polluted, fish resources were exhausted due to overfishing. The villagers fell into a vicious competition to fish, using destructive fishing instruments.⁴⁸

⁴⁷ Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1244, 1245 (1968).

⁴⁸ Villagers spread the fishing net from one side of the river to the other, and as a result, any fish of significant size swimming along that part of the river cannot escape. In the three-mile-long river, there were fourteen sets of such fishing nets.

The diagram below is a visual representation of the facts I have described above.⁴⁹



III. A MODEL FOR ANALYZING TRANSITIONAL COMMONS

In this section I explore the reasons for the different destinies of the river water and the two riverbanks. Drawing

⁴⁹ Google Map of this small area in rural China is unavailable. In my visits to Songzi County, I failed to find a map that could show the river and the two villages clearly.

upon existing models,⁵⁰ I classify variables that affect the governance of commons into four categories: (i) the characteristics of the common resources, (ii) the community and the people that exploit the resources; (iii) the relationship between common resources and human exploiters; and (iv) the external political and legal environment to which the human exploiters are subject. Transitional commons are distinct from other kinds of commons because of the disintegrated local communities that govern them and the changing external political legal environment to which they are subject. I shall next describe the variables in my model in relation to their application to the *Dianpai* river system.

A. *Characteristics of the Common Resources*

Resource characteristics, such as size, mobility, divisibility, and their potential uses, determine the potential

⁵⁰ Different models of exploring the institutional arrangements over common resources have been developed, which identify a series of variables that influence the success or failure of common resource management. However, as Agrawal has pointed out, scholars of commons have discovered far more variables that potentially affect resource management than is possible to analyze carefully. Agrawal's review of the three most careful studies of the commons found that Wade, Ostrom, and Baland & Platteau jointly identify 36 important variables relevant to the successful management of common resources. If one eliminates the common variables across the three studies, 24 different variables still remain. Further, because the effects of some variables may depend on the state of other variables, any careful analysis of the commons needs to incorporate interaction effects among variables. As a result, scholars confront tremendous analytical problems in using their models. See Agrawal, *supra* note 3; Ostrom, *supra* note 2; JEAN-MARIE BALAND & JEAN-PHILIPPE PLATTEAU, HALTING DEGRADATION OF NATURAL RESOURCES: IS THERE A ROLE FOR RURAL COMMUNITIES? (1996); ROBERT WADE, VILLAGE REPUBLICS: ECONOMIC CONDITIONS FOR COLLECTIVE ACTION IN SOUTH INDIA (1994).

exploitative methods, and place inherent constraints on their management. Previous empirical studies of commons always concentrate on a single resource, such as forestry, water, fishery, or lobster.⁵¹ My study, on the other hand, comprehensively explores an entire river resource system, which includes water, fish, and riverbank land, thus allowing me to measure how the resource characteristics variable affects resource management. The opposite outcomes of the riverbank land and the river resources are testaments to the importance of resource characteristics in governing the commons.

First, resource characteristics affect the costs and benefits of the exclusive use of that resource. If the cost of exclusion is high and the benefit is trivial, the probability of developing exclusive property claims will be low, and the probability of a tragedy of the commons will be high. If the cost of exclusion is low and benefit is substantial, the opportunity for profit will drive exploiters to find ways of exclusive use. In the *Dianpai* river case, the cost of exclusive use of land is much lower than that of water or fish. The riverbank land can be easily divided into small pieces with boundaries clearly defined.⁵² A villager can easily detect

⁵¹ See e.g., Ostrom, *supra* note 2, 58-87, 143-81; JAMES M. ACHESON, CAPTURING THE COMMONS: DEVISING INSTITUTIONS TO MANAGE THE MAINE LOBSTER INDUSTRY (2003).

⁵² Informal fences, such as a tree and even just several stones, define the boundaries between plots. For outsiders they do not necessarily know the boundaries between different plots, but do know clearly the boundary between public land and crop plots by seeing the crops planted. No complicated fences of (barbed or smooth) wire are needed because the number of big livestock in wild is very limited. The situation is different from the American west in the writing of Anderson and Hill. See Terry L. Anderson & Peter J. Hill, *The Evolution of Property Rights: A Study of the American West*, 18 J. L. & ECON. 163 (1975).

trespasses to his land. In contrast, it is difficult to achieve exclusive use of a part of a three-mile-long river. The only feasible way seems to be to gain control over the whole three-mile-long river. The cost of monitoring and defending the exclusive use will be very high, because it is much more difficult to detect and prevent fishing and discarding wastes into the river than to stop others from squatting on the riverbank land.⁵³ The benefit of exclusive use of land is also much higher than that of water or fish. Land is the basic need for peasants, who rely almost entirely on land to make a living. The dense populations in the villages along the river make land a scarce resource. Fish, on the other hand, is just a luxury item for most villagers. Only several villagers make their living by fishing. In a rainy area full of lakes, water is much less valuable than land.

Second, resource characteristics affect the exploiters' evaluation of the risk of exhaustion. The deterioration of water and extinction of fish took place gradually. Any single instance of fishing or discarding wastes into the water did not bring significant and immediate damage to the river, but the accumulation of such behaviors would unavoidably lead to the destruction of the river water resources. The tragedy is not just the result of a collective action problem involving the villagers' inability to cooperate effectively, but also a consequence of the limited rationality of human beings, which tends to value immediate gains much more than losses in the far future and ignore the latter.⁵⁴ The possibility of

⁵³ Development of technology might reduce the prohibitively high cost of exclusive use attributed to resource characteristics. *See* Anderson & Hill, *Id.*

⁵⁴ "A person is apt to regard a marginal change as more momentous when the change occurs around a reference point than away from it." Robert Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.- KENT L. REV. 23, 36 (1989).

resource depletion in the future is not enough to encourage villagers to change their behaviors and establish either effective collective management or private individual rights over the river.⁵⁵ From the villagers' perspective, inaction or maintaining the status quo is the best choice until the resources are completely destroyed. In contrast, a plot of land cannot be cultivated by many villagers at the same time. A villager must either grab a plot or lose it. The welfare effect of such a choice is significant. Inaction means that he will lose the plot. A villager therefore has strong incentives to claim his rights over the land, through either might or consensus with other villagers. Short-sightedness of human beings is always a factor, but its negative impact is much more significant in the exploitation of resources that deteriorate gradually.

B. Community and the People that Exploit the Resources

One of the biggest accomplishments of the scholarship on commons is to successfully shift the research focus of overcoming the tragedy of the commons from the choice between the leviathan and the market to the self-governance of the local community.⁵⁶ There has been abundant research on communal governance of common resources.⁵⁷ However,

⁵⁵ Short-sightedness is a symbol of bounded willpower. See Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1479 (1998); Richard Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551, 1555 (1998).

⁵⁶ See Ostrom, *supra* note 2.

⁵⁷ See e.g., NATIONAL RESEARCH COUNCIL, *THE DRAMA OF COMMONS* (2001); JEAN-MARIE BALAND & JEAN-PHILIPPE PLATTEAU, *HALTING DEGRADATION OF NATURAL RESOURCES: IS THERE A ROLE FOR RURAL COMMUNITIES?* (1996); ROBERT WADE, *VILLAGE REPUBLICS: ECONOMIC CONDITIONS FOR COLLECTIVE ACTION IN SOUTH INDIA* (1994); Ostrom, *supra* note 2.

existing empirical studies often assume that, the communities are well-structured and have well-functioning institutions, clear community rules, or at least explicit social norms regarding the management of the commons. What scholars have to investigate in these cases is simply whether the institutions, rules or norms function effectively or why they do not function effectively. The local communities surrounding the *Dianpai* River, however, are communities without any well-functioning institutions or explicit norms regarding the river. To understand how property rights claims arose and survived in such communities, we need to investigate the communities' internal power structures, population composition, and value preferences.

The rise and survival of a property claim depend largely on the position of the claimer within the power structure of that local community. This position is critical to the claimer's ability to and cost and benefit of making exclusive use of the common resources.⁵⁸ The difference in property arrangements over the two riverbank lands is a good illustration. The overwhelming private power of Mr. H plays an important role in the exclusive use of the riverbank land of L village. Mr. H is a very distinct figure in the community of L village, with no analog in the community of Y village. Mr. H is a hybrid of entrepreneur and bully.⁵⁹ Only Mr. H has

⁵⁸ See Demsetz, *supra* note 30.

⁵⁹ He is strong, smart, and very sensitive to social and political change. Unlike ordinary villagers, he tries different businesses and travels around, never hesitating to take a profit opportunity. He believes in the power of wealth and violence rather than law and rules. He keeps good relations with villagers' committee members and local government officials. He has been in jail before, which actually strengthens his influence in the gangs. He frequently resorts to violence, but never abuses it, in his words, "not violating the common sense of the local community." He realized the profitability of planting crop trees on the riverbank land and invested resources to put this idea into practice.

both the intelligence and the power to cultivate the riverbank land exclusively. Without him, the riverbank land on the side of L village would have been kept as a commons or randomly cultivated by the peasants. Mr. H's unique position in the local power structure decides the property arrangement over the riverbank land of L village. No individuals in Y village could mobilize resources like Mr. H has done to exclude all other villagers from using the riverbank land on the side of Y village.

The different population compositions and value preferences of the two villages also contributed to the different property arrangements. The impact of marketization was much more significant in L village than in Y village.⁶⁰ More L villagers were proprietors and migrant workers, whose behaviors were likely closer to those of a homo economicus. These more rational villagers preferred efficiency to equality and might have more sympathy with Mr. H's efficiency justification than the villagers of Y. Their emergence as a group also increased the heterogeneity of the village community. Wealth and power were more concentrated than in Y village. Greater mobility brought by migrant workers further weakened the coherence of the village, increasing the cost of collective action.⁶¹ Under such circumstances, Mr. H successfully claimed the whole riverbank land in L village without suffering substantial objection. In contrast, the wealth and power in Y village were still broadly and equally distributed. The traditional value of egalitarianism was relatively influential. As a result, mutual recognition of claims to equal possession was the most efficient resolution for Y villagers. Mr. H's doctrine of "might makes rights" would encounter much more resistance

⁶⁰ See Part IC of this paper, at 10.

⁶¹For impact of mobility on community coherence, see ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 204-15 (2000).

in Y village than in L village because the egalitarianism had much more moral weight in Y village.

C. Relationship between Common Resources and Human Exploiters

The relationship between transitional commons and human exploiters include both physical and socioeconomic aspects. The physical relationship between transitional commons and potential users, such as their geographical relationship, is an important factor in deciding the cost of exclusive use of the common resources. The socioeconomic relationship, such as the socioeconomic value of the transitional commons to potential users, decides the incentives for exclusive use.

The different geographical relationships between the river and potential users in the two villages can explain the different property claims to the two riverbanks. The distances of the villagers' homes to the riverbanks differ: in Y village, the distance is only several paces; in L village, it is about 800 meters. Moreover, the Y villagers' houses and distributed farmland are lined up parallel to the riverbank; the L villagers' houses are spread out randomly. Such differences mean that the cost of defining and defending claims to the riverbank land is much higher in L village than in Y village.

With the proximity of Y villagers' homes and farmland with the riverbank, Y villagers' daily activities around their houses and distributed plots naturally extended to the riverbank, through which they got water for irrigation and drinking. Villagers established a closer relationship with the specific part of riverbank land neighboring their houses or distributed land. This natural connection was mutually recognized among villagers and provided a convenient and easy blueprint by which property rights could be recognized. Generally peasants in Y village got the plot of the riverbank land adjacent to their houses or distributed farmland. The Y villagers' daily activities around their claimed plots

facilitated the monitoring of and effective deterrence to potential violators. Any other property arrangements inconsistent with such natural connections would incur great monitoring cost. Mr. H did not take over the riverbank land in Y village. The difficulty in monitoring and stopping neighboring villagers' trespass was one reason. According to Mr. H, "it's unreasonable to stop people loitering around their houses or going through the bank land to the river."⁶²

In contrast, there was no such connection between the riverbank and villagers in L village. As a result, it was much more costly for the villagers to define any claimed rights to a plot of riverbank land. A L villager would incur extra time and energy in monitoring potential violators. The higher cost of exclusive use of the riverbank land in L village could only be overcome through economies of scale. That was partly why Mr. H succeeded in seizing the whole riverbank land for planting cash trees. Fragmentary cultivation of part of the riverbank land in L village could not generate enough profits to offset the relatively higher cost of defining and protecting the claimed property rights. Mr. H's investment in the riverbank land not only reduced the cost of exclusive use per unit, but also generated more profits to offset the cost.

Another reason for the different property arrangements over the two riverbanks is the different socioeconomic value of the riverbank land to villagers in the two villages. As introduced above, L village underwent more extensive and deeper marketization and had larger population of proprietors and migrant workers, who made their living mainly from non-

⁶² Interview with Mr. H, *supra* note 39. According to Ellickson, "A key advantage of individual land ownership is that detecting the presence of a trespasser is much less demanding than evaluating the conduct of a person who is privileged to be where he is." But in the case of easement, it would also be difficult to detect whether a person has overstepped the boundary of his easement. See Robert Ellickson, *Property in Land*, 102 YALE L. J. 1315, 1327 (1993).

agricultural activities. The riverbank land was much less important to them than to ordinary peasants. As a result, Mr. H's exclusive use of the whole riverbank in L village encountered much weaker resistance than if it would have in Y village.⁶³

The land's relatively lower socioeconomic value to the pumping station also explains its reluctance to take any substantial action to realize its property rights claim to the riverbanks. Not only had it not claimed property rights to the riverbanks before the villagers' cultivation, even after, the value created was still too limited to prompt substantial action from a state-owned entity like the pumping station.

D. External Political and Legal Environment

The transitional commons is a product of the changing external political and legal environment. The sensitivity to the external environment can be easily discerned in the management of transitional commons. Transitional states are often still struggling for a balance between the market and the state. The political and legal system is still in an experimental stage. The property regime has not been solidified. Mutually contradictory principles direct the transitional process, depending on the specific time and situation. The macro external environment constitutes the context of the drama of the commons, and defines the possibilities of property claims that can arise from the commons. Any changes in the external environment would affect the decisions of resource exploiters.

⁶³ This is different from Demsetz's example, in which private property rights emerged in response to the raised fur value caused by the European fur trade. In his case, fur was equally valuable to all Indians. In my case, the lower evaluation of the land by the majority of L village reduced Mr. H's cost of excluding them and promoted the emergence of private property. *See* Demsetz, *supra* note 30, at 351-53.

In the case at hand, China's gradual reform has undergone a tortuous process. The market economy was only officially recognized as such in 1993, nearly fifteen years after the initiation of the 1978 reforms. One year later, the standing committee of the People's Congress incorporated the making of a property law into its legislative plan. It was not until 2004 that the Constitution was amended to guarantee respect for private property.⁶⁴ The new Chinese Property Law came into effect in 2007, highlighting the disputes about market and private property in China instead of resolving them. Private property accumulated in the reform years is attacked as being stolen from the state and the people.⁶⁵ Rapid wealth concentration has aroused popular animosity towards private entrepreneurs. Nevertheless, liberal economists continue to call for further privatization and deregulation in the national economy with scant regard to specific situations. China has been moving in the direction of a market economy, but under the shadow cast by its collectivist past. The disputes in the macro external environment have not only persisted on the ideological level, but also affected the specific decision-making processes of individuals and entities in managing the resources formerly controlled by the state.

It is fair to say that the story of the *Dianpai* River exemplifies the transitional process of China's political and legal system. The evolution of property arrangements over the river resources has paralleled the development of a market economy in China. The emergence of the property rights

⁶⁴ The amendment says "*legally obtained private property of the citizens shall not be violated.*" See Article 13 of XIAN FA (2004).

⁶⁵ See e.g., Li Nan, *Siyou Caichan Qingxi Ruxian, Caifu Yuanzui Youdai Qiujie* [Constitutional Protection of Private Property and the Original Sin of Wealth], XINWEN ZHOUKAN [NEWS WEEKLY], Jan. 5, 2004, available at <http://news.sina.com.cn/c/2004-01-05/18172552266.shtml> (last visited August 13, 2011).

claims over the riverbank land in Y village in the mid-1990s accompanied the official recognition of the market economy. H's successful exclusive use of the whole riverbank land in L village would not have been possible without the progress China had made in recognizing and protecting private property in the following years. It was in 2004, the year when a constitutional amendment guaranteed the protection of private property, that Mr. H went to the village committee members and the pumping station to seek their *de facto* acknowledgement of his exclusive control over the riverbank land. In my interview with him, he demonstrated familiarity with and sensitivity to the changes in China's external political legal environment.

IV. WHITHER THE TRANSITIONAL COMMONS?

A. The Crisis of the Transitional Commons

Most writings on the commons implicitly define successful institutions as those that last over time, constrain users to safeguard the resource, and produce fair outcomes.⁶⁶ No such institutions exist to govern the transitional commons. As a result, the tragedy of the commons occurs when the cost of exclusive use is too high. When the benefit of exclusive use exceeds the cost, property claims arise over the common resources. However, this equation by nature changes over time. The temporary nature of property arrangements is further strengthened by the uncertain political and legal environment in which commons is embedded. Moreover, the distribution of resources is decided by the power structure within the local community, thus fairness cannot be

⁶⁶ Arun Agrawal, *Common Resources and Institutional Sustainability*, in *THE DRAMA OF THE COMMONS* 41, 44 (National Research Council ed., 2002).

guaranteed. The crisis of the transitional commons can be illustrated through the *Dianpai* River case.

Due to the absence of any effective management, the quality of river water deteriorated seriously and the fish became almost extinct, which was a classic tragedy of the commons. Contested claims exist as to the riverbank land of L village. Mr. H maintained his exclusive control by his advantageous position in the local power structure. However, “the strongest,” in Rousseau’s oft-quoted phrase, “is never strong enough to be always the master.”⁶⁷ In a community of any complexity, the power structure is always a dynamic and changing process.⁶⁸ The unequal distribution of resources brought about by Mr. H’s exclusive use of the riverbank land of L village furthered the vulnerability of his property claim. The changing and unpredictable political and legal environment in China renders any property claims to the river resources uncertain, survive in the local community or not. For example, it is not inconceivable that one day the local government will decide to protect state-ownership, and help the pumping station to recover its control over both riverbanks.⁶⁹ In a sum, the transitional commons is in a state

⁶⁷ JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 8 (1920).

⁶⁸ SAMUEL P. HUNTINGTON, *POLITICAL ORDER IN CHANGING SOCIETIES* 9 (1968).

⁶⁹ The current restoration of state-ownership in coal, oil, and steel industries can be a footnote of this possibility. In Shanxi, the province government shut down all small private coal mines in the name of safety, which were forced to merge into big state-owned coal mines. See Xu Yiping, *Zheshang Shangshu Zhi Shanxi Meigai Weixian [Zhejiang Merchants Petitioned that the Coal Industry Reform in Shanxi Was Unconstitutional]*, available at <http://news.163.com/09/1110/10/5NOJE8OA000120GR.html> (last visited August 13, 2011). In Shandong, Shandong Steel, an inefficient company owned by the province government acquired Rizhao Steel, a private profitable company. See, e.g., Ye Tan, *Kuisun Guoqi*

of resource deterioration, unequal distribution and potential conflicts.

Three ways have been proffered to avoid “the tragedy of the commons:” private property, public ownership, and as Ostrom showed, community governance. According to Ostrom, these three ways are alternatives to each other and one or the other should work out. It is widely held that the general approach adopted in transitional countries is to choose the best way and impose it nationwide from above. Unfortunately, none of the three ways are likely to overcome the crisis of the transitional commons. The reason is that transitional commons emerge because of the failure of state and the disintegration of local community. Whatever the property regime, no property rights can be defined and enforced effectively in this situation. In contrast, I propose (1) a decentralized way to deal with the transitional commons problem; and (2) an integrative approach to govern the transitional commons.

Pingshenme Neng Binggou Yingli Guoqi [How Can An Inefficient State-Owned Enterprise Acquire A Profitable Private Enterprise], available at

<http://finance.ifeng.com/topic/news/rzgt/news/opinion/cjpl/20090805/1041412.shtml> (last visited August 13, 2011). In Shaanxi, private oil companies were expropriated by the local county government and private entrepreneurs were arrested in their struggle against the expropriation. *See Shaanbei Shiyou Shijian [Shaanbei Oil Incident]*, <http://zh.wikipedia.org/wiki/%E9%99%95%E5%8C%97%E7%9F%B3%E6%B2%B9%E4%BA%8B%E4%BB%B6> (last visited August 13, 2011).

For a comprehensive comment on the trend of the restoration of state-ownership, please *see* Xie Peng, *Guojin Mintui: Jidang 2009 [Surging 2009: The State Moved Forward and The People Drew Back]*, <http://www.infzm.com/content/39154> (last visited August 13, 2011).

B. Community Differences and Institutional Diversity

Each common resource system has its own distinctive features, either in the resource characteristics, the local community of exploiters, or the relationship between them. It is almost impossible for the state government to gain the local knowledge of various communities. The information cost is too high. What's more, the distinctive features of local communities mean that no single solution, even if it is the best institution theoretically, exists for the governance of all common resources. Community differences and institutional diversity have received wide recognition in scholarly discussions on the management of the commons, and they have been considered in many countries' commons-related policy-making.⁷⁰ However, the influence of conventional thinking is so powerful that it is worthwhile to deepen and strengthen our understanding of community differences and institutional diversity through empirical studies.

In the case of China, collectivization and marketization have impacted villages differently, as we have seen from the comparison between the two villages along the *Dianpai* River. The community structure and micro-politics also differ from village to village, as a result of varying factors such as tradition, custom, incidents, economic development, and population mobility, etc. Traditional and official authorities have declined to different degrees in different communities. Different degrees of coherence can exist, even within the same area, as in my case study, which directly influences the ability of the villagers to self-govern.⁷¹ Various property claims to the transitional commons that arise depend on specific situations. There is no general rule as to which kind of property claims should be recognized or rejected. Private property may be easily accepted in one village while widely

⁷⁰ Agrawal, *supra* note 3, at 246.

⁷¹ See LILY L. TSAI, ACCOUNTABILITY WITHOUT DEMOCRACY: SOLIDARY GROUPS AND PUBLIC GOODS PROVISION IN RURAL CHINA (2007).

resisted in another.⁷² This is not to mention the substantial differentiation between the south and the north, the west and the east, in geographic, economic, political, and almost all other aspects that influence the management of natural resources. In Ostrom's words, the capacity of individuals to extricate themselves from various types of dilemma situations varies from situation to situation.⁷³

Chinese scholars have raised contested proposals to govern the rural common resources, which generally fall into three categories: private, communal and government property. Privatization and governmental control are the two prescriptions easily recommended by scholars to manage the commons.⁷⁴ The centralization advocates presume that a central authority must assume continuing responsibility to make unitary decisions for a particular resource.⁷⁵ In the specific situation of rural China, this proposal requires the building of powerful grassroots governments in rural China to fill the void created by the decline of the traditional authority and custom and the post-communist retreat of the state.⁷⁶ The privatization advocates presume that a central authority should parcel out ownership rights to the resource and then allow individuals to pursue their own self-interests within a set of well-defined property rights.⁷⁷ As Ostrom commented,

⁷² See Zhou Pei, *Nongcun Shequ Fazhan Daolu yu Moshi Bijiao Yanjiu: yi Huaxi Cun, Nanjie Cun and Xiaogang Cun Weili* [Comparative Study of Different Models of Village Community Development], NANJING SHEHUI KEXUE [SOCIAL SCIENCE IN NANJING], Oct. 2000, at 59. See also DU RUNSHENG, ZHONGGUO NONGCUN TIZHI BIANGE ZHONGDA JUECHE JISHI [AUTOBIOGRAPHY OF DU RUNSHENG: THE HISTORY OF REGIME CHANGE IN RURAL CHINA] 116- 20 (2005).

⁷³ Ostrom, *supra* note 2, at 14.

⁷⁴ See *Id.*, at 8-15.

⁷⁵ *Id.*, at 14.

⁷⁶ See He, *supra* note 36, at 167- 83.

⁷⁷ See Ostrom, *supra* note 2, at 14.

both of these proposals accept as a central tenet that institutional change be externally imposed on the individuals affected.⁷⁸ Even the supporters of communal property are no exception on this point. Instead of taking community distinction and institutional diversity seriously, they seek to justify the superiority of communal property on a theoretical and abstract level by arguing for its advantages in scale economy and risk-spreading.⁷⁹

These external resolutions suffer from several common limitations. The biggest one is that they assume a unified solution for all common resources, be it public control or privatization. However, instead of there being a single solution to a single problem, many solutions exist to cope with many different problems.⁸⁰ Local diversities generally exist. Imposing a uniform solution incompatible with a specific situation would make its implementation very difficult and costly. The collapse of People's Commune in rural China⁸¹ and the failure of developing countries in building private property regimes⁸² are evidence of the costs. In addition, imposing reform from above would inhibit the development of self-governance of the local community. This has been demonstrated by the many failures of governing the commons. For example, Acheson found that top down management policies worked against developing effective

⁷⁸ *Id.*

⁷⁹ See HE XUEFENG, DIQUAN DE LUOJI: ZHONGGUO NONGCUN TUDI ZHIDU XIANG HECHU QU [THE LOGIC OF LAND RIGHTS: WHITHER CHINA'S RURAL LAND REGIME] (2010).

⁸⁰ See Ostrom, *supra* note 2, at 14.

⁸¹ See Zhang, *supra* note 21, at 415- 47.

⁸² See De Soto, *supra* note 2, at 153- 206.

rules, which led to cheating, a “gold rush mentality” and overexploitation in the New England ground fishery.⁸³

Also, these external resolutions ignore the risk of hasty nationwide institutional reform. “Getting the institutions right” is a difficult, time-consuming, conflict-invoking process.⁸⁴ It is a process that requires reliable information about time and place variables as well as a broad repertoire of culturally acceptable rules.⁸⁵ These premises are not present. Different from the commons in a stable society, transitional commons are often in a rapid evolutionary process. General consensus about property arrangements over the commons has not emerged, which makes it difficult to decide the proper property arrangements for them. Moreover, from the macro perspective, the political and legal system of transitional states is still unsettled. Any institutional reform is “rebuilding the ship at sea.”⁸⁶ It would be much more prudent to wait for the results of local experiments of different property arrangements before replacing them with one theoretically workable resolution. New institutional arrangements do not work in the field as they do in abstract models unless the models are well specified, empirically valid and the participants in a field setting understand how to make the new rules work.⁸⁷ So, even if unified reform proved to be ultimately necessary, it would be more prudent to do it

⁸³ James Acheson, *Rational Choice, Culture Change and Fisheries Management in the Gulf of Maine*, in 24 RESEARCH IN ECONOMIC ANTHROPOLOGY 133 (Donald Wood ed., 2002).

⁸⁴ See Ostrom, *supra* note 2, at 14.

⁸⁵ *Id.*

⁸⁶ See JON ELSTER ET AL., INSTITUTIONAL DESIGN IN POST-COMMUNIST SOCIETIES: REBUILDING THE SHIP AT SEA (1998).

⁸⁷ See Ostrom, *supra* note 2, at 14.

after the full development of local informal institutional arrangements.⁸⁸

In short, because of community distinctions, no external uniformed resolution works for all transitional commons. The effort to build an idealistic property institution nationwide cannot avoid the tragedy of the transitional commons at the local level. A decentralized approach, with respect for institutional diversity, is essential to overcome the crisis of the transitional commons.

C. Governing the Transitional Commons: An Integrated Approach

The top-down approach aside, one important question remains: how are the transitional commons to be governed from below? Three choices come naturally: State, Communal and Private property.⁸⁹ Unfortunately in a country of weak government and disintegrated community, none are viable options.⁹⁰ The choice of state property is a typical centralized approach, the limitation of which I have discussed in the previous part. Moreover, in the situation of the transitional commons, the state is weak and struggling to support itself. Its symbolic existence in rural areas is not strong enough to sustain direct control over the local commons. The success of communal property relies on the existence of community, in which local norms of mutual trust and reciprocity help regulate members' behaviors and manage the commons.⁹¹ In

⁸⁸ This is actually a successful experience of China's economic reform. See BARRY NAUGHTON, *GROWING OUT OF THE PLAN: CHINESE ECONOMIC REFORM, 1978-1993* (1995).

⁸⁹ David Feeny et al., *The Tragedy of the Commons: Twenty-Two Years Later*, 18 *HUM. ECOL.* 1 (1990).

⁹⁰ About state weakness in China, see Wang Shaoguang, *The Problem of State Weakness*, 14 *J. DEMOCR.* 38 (2003).

⁹¹ For characteristics of a successful community, see Taylor, *supra* note 8, at 26-33.

rural China, traditional communities have collapsed under the attack of collectivization and later marketization. New communities have not developed. Peasant communities have disintegrated into atomized individuals, acting out the logic of collective action and competing with each other towards the tragedy of the commons. For private property, no credible authority or mechanism exists to define and enforce rights. Individuals may fall into endless conflicts with each other over the ownership and distribution of commons resources. In the absence of third-party control, a group of isolated exploiters cannot establish any stable institutions, including private property.

The successful management of the transitional commons requires more than choosing the right property institution. Whichever institution chosen, a capable state and a well-functioning community in the institutional infrastructure are necessary to support it. The remaking of Leviathan in rural China does not mean the revival of Mao's all-mighty government in rural China. Instead, I define a capable state as a state that can protect individual liberty of choices rather than making choices for the people. Neither is the reconstruction of a well-functioning community a return to the traditional peasant community. Such natural order has gone forever.⁹² A heterogeneous village of significant mobility needs more organized institutions than before.⁹³ To achieve the objects of state-making and community reconstruction, we need (1) rule of law to respect and protect the development of "order without law" in rural China; (2)

⁹² DOUGLASS NORTH, JOHN JOSEPH WALLIS & BARRY WEINGAST, VIOLENCE AND SOCIAL ORDERS: A CONCEPTUAL FRAMEWORK FOR INTERPRETING RECORDED HUMAN HISTORY (2009).

⁹³ See Huntington, *supra* note 68, at 10-1. ("Men are often reluctant to give up the image of social harmony without political action. But the truth is that the degree of community in a complex society depends on the strength and scope of its political institutions.")

building social capital through self-governance of villagers. Below I discuss in more detail this integrative approach.

1. Rule of Law for “Order without Law”

The first question is whether the state and law is necessary in developing local property arrangements. Ellickson found in California that norms instead of legal rules are the basic sources of entitlements.⁹⁴ Voluntary order can be developed and work well in the absence of law. Scholars studying common resource management also favor local property arrangements.⁹⁵ Their studies of local resource management provide many cases of successful local management of common-pool resources.⁹⁶ In their view, the community is an integral and indispensable part in governing the common resources.⁹⁷ Resource users often create by themselves institutional arrangements and management regimes that help them define the rights and govern the commons effectively.⁹⁸ In contrast, titles promulgated by a centralized authority unaware of local conditions often make the situation worse than continued dependence on local-level common property rules.⁹⁹ To these scholars, property rights without law are not only possible, but also necessary in some situations. On the other hand, many legal scholars believe that property rights are inseparable from law. As Bentham

⁹⁴ ROBERT ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 52 (1991).

⁹⁵ See Agrawal, *supra* note 66, at 43- 4.

⁹⁶ See e.g., National Research Council, *supra* note 57; Baland & Platteau, *supra* note 57; Wade, *supra* note 57; Ostrom, *supra* note 2.

⁹⁷ See Agrawal, *supra* note 66, at 43.

⁹⁸ *Id.*

⁹⁹ C. Ford Runge, *Common Property and Collective Action in Economic Development*, in *PROCEEDINGS OF THE CONFERENCE ON COMMON PROPERTY RESOURCE MANAGEMENT* 31, 34 (National Research Council ed., 1986).

said, “[p]roperty and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases.”¹⁰⁰ Holmes and Sunstein call a right a “child of law.”¹⁰¹ Posner takes “right” to mean “a claim or entitlement normally enforceable through courts or equivalent agencies.”¹⁰²

There are similar discussions in the Chinese scholarship on village governance. Some scholars are critical of the penetration of the state and the market into the rural society, and instead argue for the importance of traditional customs and local rules in village governance.¹⁰³ Some of their studies rely on Ellickson’s “order without law” to criticize the effort of formal institution-building in rural society, but pay no attention to the limits of social norms.¹⁰⁴ In contrast, other scholars argue that the decline of traditional authority and local rules is unavoidable in the modernization of the state.¹⁰⁵ Rule of law and a formal property system should be established from above in the rural

¹⁰⁰ JEREMY BENTHAM, *THE THEORY OF LEGISLATIONS* 52 (1978).

¹⁰¹ STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* 17 (1999).

¹⁰² Richard Posner, *The Cost of Rights: Implications for Central and Eastern Europe---and for the United States*, 32 *TULSA L. J.* 1, 2 (1996).

¹⁰³ See e.g., SULI, *FA ZHI JI QI BEN TU ZIYUAN* [THE RULE OF LAW AND ITS LOCAL RESOURCES], *ZHONGGUO ZHENGFA DAXUE CHUBANSHE* [PRESS OF CHINA UNIVERSITY OF POLITICAL SCIENCE & LAW] (1996).

¹⁰⁴ See Suli, *Wuxu Falv de Zhixu* [Book Review: *Order without Law*], *HUANQIU FALV PINGLUN* [CASS JOURNAL OF FOREIGN LAW], Feb. 2004, at 118.

¹⁰⁵ These scholars would find Eric Posner their comrade. According to him, “The general trend over hundreds of years has been away from partnerships between law and social norms, and toward the rule of pure law.” ERIC A. POSNER, *LAW AND SOCIAL NORMS* 218 (2000).

society.¹⁰⁶ They argue for either privatization of rural land or a strong presence of the state in rural society-- even nationalization of rural land.¹⁰⁷ The newest amendment of the Organic Law of Villagers' Committee reflects this view, which tries to strengthen the control of the state over the VCs.¹⁰⁸

Local property arrangements and formal institutions are not mutually exclusive. Local property arrangements based on the consensus of the governing community, of course, have their advantages over rules promulgated by a centralized government. This voluntary order, however, still needs the recognition and endorsement of the state. As Ellickson's research reveals, we should respect "the order without law," while, at the same time, sticking to the critical role of law in

¹⁰⁶ See e.g., WANG HUNING, DANGDAI ZHONGGUO CUNLUO JIAZU WENHUA [THE LINEAGE CULTURE IN CONTEMPORARY CHINESE VILLAGES] (1991); ZHANG JING, JICENG ZHENGQUAN: XIANGCUN ZHIDU ZHU WENTI [PROBLEMS OF RURAL LEVEL GOVERNANCE IN CHINA] (2000); Xu Yong, *You Nengren dao Zhifa: Zhongguo Nongcun Jiceng Zhili Moshi Zhuanhuan* [From Rule by Man to Rule by Law: The Transformation of Grassroots Governance in Rural China], HUAZHONG SHIFAN DAXUE XUEBAO [JOURNAL OF CENTRAL CHINA NORMAL UNIVERSITY], Aug. 1996, at 1.

¹⁰⁷ For a brief summary of the discussions, see Cai Jiming & Fang Cao, *Dui Nongdi Zhidu Gaige Fangan de Bijiao Fenxi* [Comparative Study of Rural Land Reform Proposals], SHEHUI KEXUE YANJIU [SOCIAL SCIENCE RESEARCH], Aug. 2005, at 28, available at http://www.usc.cuhk.edu.hk/wk_wzdetails.asp?id=5113 (last visited Apr. 29, 2010).

¹⁰⁸ Wang Weibo, *Cunmin weiyuanhui zuzhifa ni qianghua cun dangzhibu lingdao yin guanzhu* [The New Organic Law of Villagers' Committees Tries to Strengthen the Leadership of the Party], available at <http://www.chinanews.com/fz/2010/07-15/2404366.shtml> (last visited December 11, 2010).

defining the basic structure of a society.¹⁰⁹ In a state with the rule of law, self-governance of the local community is usually recognized by the formal system. The formal laws, including criminal, constitutional, and many other laws, also guarantee the normal operation of the community self-governance by preventing and punishing violation of individual liberty and basic rules of a society. The state often leaves the choice of property arrangements over commons to relevant individuals and gives official recognition to it. For example, the U.S. Supreme Court struck down a number of state attempts to regulate home behavior and the composition of co-occupant groups.¹¹⁰ Generally, the state does not interfere with local property arrangements, but instead provides acquiescent recognition to such arrangements. This type of state recognition promotes the predictability and stability of local property arrangements. The formal institutions are the foundation of the development of local rules.

“Most organizations in all societies function with the explicit support of the state.”¹¹¹ The calamity brought about by Mao’s all-mighty state has made any effort of state-building in rural China dubious. But it is necessary to remake Leviathan in rural China. As Walter Lippmann said, “there is no greater necessity for men who live in communities than that they be governed, self-governed if possible, well-governed if they are fortunate, but in any event, governed.”¹¹² These words apply in a far greater extent to transitional countries, where the community is fragmented and where political institutions have little power.¹¹³

¹⁰⁹ See ROBERT C. ELLICKSON, *THE HOUSEHOLD: INFORMAL ORDER AROUND THE HEARTH* 13-22 (2008).

¹¹⁰ *Id.*, at 116.

¹¹¹ North, Wallis & Weingast, *supra* note 92, at 7.

¹¹² Walter Lippmann, *New York Herald Tribune*, December 10, 1963, p.24, as cited in Huntington, *supra* note 68, at 2.

¹¹³ Huntington, *supra* note 68, at 2.

Rule of law for “order without law” is different from the Maoist comprehensive penetration into the countryside. It just means the uncertainty rooted in transitional commons should be eliminated through formal institutional solutions. The state should respect the local property arrangements, but should also provide official recognition to such arrangements, in order to rid them of their transitional nature. Governments are established to secure rights, including property rights.¹¹⁴ The state cannot just pretend to overlook what is happening in the far countryside and comfort itself by calling the anarchy “order without law.”¹¹⁵

In the case of the transitional commons, local consensus on property arrangements has generally yet to be formed. Conflicting property rights claims to the transitional commons cannot co-exist forever. Yet it does not mean that the state should make property arrangements for the local community, nor does it mean that there is nothing for the state to do. The role of state is to guarantee the real self-governance of the local community, through which local consensus on the property arrangements can be achieved in the long run. The role of the state and law in the self-governance of the local community will be discussed in the following part.

2. A Liberal Community: Building Social Capital through Self-Governance

There are different proposals to address the disintegration of traditional community. One way is to revive tradition. But this atavistic notion could only succeed if history was reversed, modernization undone, and the level of human organization reduced to family and hamlet.¹¹⁶

¹¹⁴ See The Declaration of Independence: “That to secure these rights, Governments are instituted among Men.”

¹¹⁵ See Ellickson, *supra* note 94, at 284.

¹¹⁶ See Huntington, *supra* note 68, at 10-1.

Traditional Chinese villages were closed and homogeneous, within which power was broadly dispersed and members had continuing face-to-face interactions with one another, thus trust was developed and worked well, conducive to cooperation.¹¹⁷ However, this pastoral life has gone forever. Both Mao's collectivization and Deng's marketization are part of the effort to modernize traditional rural China. Successful or not, the closed villages have been opened to the state and the outside world. Increasing mobility and heterogeneity of population have broken the close-knitness of traditional Chinese villages. The question is whether a community can be kept close-knit, but not closed. A close-knit community requires that (1) power is broadly dispersed; (2) members have continuing face-to-face interactions; and (3) members actively participate in the public affairs of the community. Are such requirements possible in an open community of significant mobility and heterogeneity? If yes, how can we realize such a possibility?

The answer is simple: a liberal community of self-governance. A liberal community is a voluntary association free from both external and internal coercion, which requires both the self-refraining and endorsement of the state power. Externally the supreme power of the state tends to encroach on the autonomy of the local community.¹¹⁸ To prevent external coercion requires the self-restriction of the state

¹¹⁷ In other words, traditional Chinese villages were close-knit communities. For definition of a close-knit group, *See* Ellickson, *supra* note 62, at 1320.

¹¹⁸ *See* ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 60 (1945). ("The immunities of townships, which have been obtained with so much difficulty, are least of all protected against the encroachments of the supreme power. They are unable to struggle, single-handed, against a strong and enterprising government.")

through constitutional arrangements.¹¹⁹ This might be difficult, especially in an authoritarian state, but is necessary to make a community close-knit. People participate actively in public affairs of the community only when they feel they are free to do so, and that their participation makes a difference. Otherwise, as Tocqueville commented on the democracy in New England townships, “without power and independence a town may contain good subjects, but it can have no active citizens.”¹²⁰ Only when the community is independent and free will members be incentivized to participate in its public affairs, a process that gives them the opportunity to have continuing face-to-face interactions.¹²¹ Internal coercion comes from the heterogeneity of the community. Human beings are born to be unequal in physical and mental strength. This inequality can be greatly magnified by the market economy.¹²² A community member with significant social and economic advantages over others tends to coerce other people to his or her will.¹²³ With “one person, one vote,” members of a liberal community are given equal rights in participation and decision-making, offsetting their physical, social or economic inequality. The state should also

¹¹⁹ In Eric Posner’s words, “to refrain from interfering with the internal governance of the community.” Posner, *supra* note 105, at 215 (2000).

¹²⁰ Tocqueville, *supra* note 118, at 66- 7.

¹²¹ The ideal type of a liberal community is Tocqueville’s New England Township:

“The native of New England is attached to his township because it is independent and free: He takes a part in every occurrence in the place;; he acquires a taste for order, comprehends the balance of powers, and collects clear practical notions on the nature of his duties and the extent of his rights.” Id., at 68.

¹²² See, e.g., Dwayne Benjamin, Loren Brandt & John Giles, *The Evolution of Income Inequality in Rural China*, 53 ECON. DEV. CULT. CHANGE 769 (2005).

¹²³ WU YI, XIAO ZHEN XUAN XIAO [A SMALL TOWN OF CHAOS] (2007).

make and enforce laws that protect individual liberty and safety from private coercion and guarantee each member's free voting rights. Community-level democracy is a way to make sure that power is broadly dispersed in a heterogeneous community, with the purpose of making the community close-knit.

A liberal community is also a community with free exit, which is at the core of the idea of voluntary associations.¹²⁴ Free exit not only provides a way to escape from internal coercion, but also makes sure that "people who join are people who trust."¹²⁵ First-party control would be much more effective in a society that people can control their own membership.¹²⁶ In this sense, free exit (and the accompanying horizontal mobility) would increase rather than decrease the social capital of a liberal community. In contrast, as we have seen in the case of Chinese traditional villages, mobility brought by the market economy greatly weakens the close-knitness of a traditional close community. The reason is that in those communities, members rely on "particularized trust" to communicate with each other and to participate in public affairs. "Particularized trust" means the type of trust that exists only between people who are close to each other; people outside the closed networks are viewed with suspicion.¹²⁷ It often takes a long time for an individual to develop his or her own closed network. Thus, it is difficult to sustain particularized trust in a community with great

¹²⁴ See Dagan & Heller, *supra* note 2.

¹²⁵ Kenneth Newton, *Social Capital and Democracy*, 40 AM BEHAV SCI 575, 577 (1997).

¹²⁶ An actor who imposes rules and sanctions on himself is exercising first-party control. There is broad agreement that the overall system of social control must depend vitally on achieving cooperation through self-enforcement. See Ellickson, *supra* note 94, at 126.

¹²⁷ ERIC M. USLANER, *THE MORAL FOUNDATIONS OF TRUST* 21- 50 (2002).

horizontal mobility. But in a liberal community, the self-governance mechanism is the source of trust and provides a credible platform for members to interact with each other. They learn to participate by participating on this platform, through which inter-personal trust can be developed.¹²⁸

In sum, self-governance can make an open community close-knit by promoting the broad disperse of power, by providing a credible mechanism for individual members to communicate with each other, and by transforming silent subjects to active citizens. People trust and participate because it is a liberal community.

VC in rural China was designed to be an institution of self-governance by peasants, rather than a level in the governmental hierarchy.¹²⁹ But at the same time, the party branch at the village level was granted power to “play the role of leading nucleus.”¹³⁰ Through the top-down party system, the county and township governments can interfere with villagers’ self-governance, and most of the time, actually exercise effective control over village affairs, including the election of VC members. As a result, the village-level self-governance organization, under the lead of the party branch, became a hand of the local government. Conflicts between villagers and VC members occurred frequently before the abolishment of agricultural tax, which had greatly jeopardized the stability of rural society.¹³¹ After 2000, when the local government no longer needs VCs’ help with administrative affairs and tax-collecting, they disappeared from the public space of villages.¹³² Both

¹²⁸ CAROLE PATEMAN, *PARTICIPATION AND DEMOCRATIC THEORY* 105 (1970).

¹²⁹ See Part IC of this paper.

¹³⁰ Article 4 of 1998 OLVC.

¹³¹ See e.g., Yep, *supra* note 32.

¹³² See Zhou Feizhou, *Cong Jiqu xing Zhengquan dao Xuanfu xing Zhengquan: Shuifei Gaige dui Guojia yu Nongmin Guanxi zhi Yingxiang*

problems seem to be very different from each other, but actually share the same origin: the villagers' committee is not a real self-governing institution. Due to the lack of legitimacy, it cannot represent villagers in public affairs, coordinate collective action of villagers, or arbitrate their disputes. Instead, it often deteriorates into an instrument that the powerful villagers utilize to exploit other members of the local community.¹³³ The transitional commons emerge partly because no real self-governance mechanisms exist to coordinate villagers' behaviors. The VC did not succeed in changing the situation. The terrible financial situation of VC is just an indication of its inability to overcome the logic of collective action: because the VC does not really represent villagers, it cannot make a credible promise that its money will be properly used for public purposes. As a result, no villagers would take the risk and invest in it.

The real solution is to let villagers govern themselves and make a village a liberal community free of both external and internal coercion. This requires the reform of the current Organic Law of the Villagers' Committee (OLVC).¹³⁴ First,

[*Rural Fee Reform and the Changing Relationship between State and Peasant*], SHEHUI XUE YANJIU [SOCIOLOGICAL STUDIES], June 2006, at 1.

¹³³ Tan Tongxue, *Xiangcun Huihua de Lujing yu Shehui Jichu: Yi Hunan mou Xian Jin Yin Zhen wei Li* [*The Graying of Rural China: Case Studies of Two Townships of Hunan*], SANNONG ZHONGGUO [PEASANT CHINA], No. 8 (2006); Chen Bofeng, *Xinnongcun Jianshe bixu ezhi Xiangcun Huisehua Qushi* [*Prevent Graying of Rural China*], SANNONG ZHONGGUO [PEASANT CHINA], No. 8 (2006).

¹³⁴ For a comprehensive proposal on the revision of the OLVC, please see Xiong Wei, *cun min wei yuan hui zu zhi fa xiu gai xu yao lun zheng de 22 ge wen ti* [*22 Problems to Discuss in the Revision of the Organic Law of Villagers' Committee*], <http://blog.qq.com/qzone/622006594/1288940453.htm> (last visited June 3, 2011).

the relationship between village-level party branch and VC should be changed. As a self-governance institution, VC should be the supreme power organ of the village and should not be subject to the lead of any other institutions. The village-level party branch may monitor, but not lead the activities of VC.¹³⁵ Second, the government (of township or any upper level) should refrain from intervening in internal affairs of a village, especially village elections. With the relationship between VC and village-level party branch being changed, the external coercion from the government can be greatly weakened.

At the same time, the government should also enforce laws that prevent external and internal coercion in village affairs, especially in village elections.¹³⁶ Elections have been

¹³⁵ Unfortunately the 2010 amendment to the OLVC went in the opposite direction. In the 1998 OLVC, the party branch was to play a role of “leading nucleus” (*ling dao he xin*), which was not explained. (Article 3 of the 1998 OLVC) In the 2010 amendment, the role of leading nucleus is specified—to *lead* and support the villagers’ committee. (Article 4 of the 2010 OLVC)

¹³⁶ Such as, Article 11: “The chairman, vice-chairman (vice-chairmen) and members of a villagers’ committee shall be directly elected by villagers. No organization or individual may designate, appoint or replace any member of a villagers’ committee.”

Article 17: “If a person is elected as a member of a villagers’ committee by violence, threatening, deceiving, bribing, forging ballots, falsely reporting the number of ballots or other illegitimate means, his/her election shall be invalidated.

If a person, by violence, threatening, deceiving, bribing, forging ballots, falsely reporting the number of ballots or any other illegitimate means, hurdles villagers’ exercise of the rights to elect and to stand for election and thus disrupts the election of a villagers’ committee, villagers have the right to report against him to the people’s congress and the people’s government of the township, minority ethnic township or town, or to the standing committee of the people’s congress and the

implemented in many Chinese villages and many problems arose, which leads some to argue that grassroots democracy might not work for Chinese peasants.¹³⁷ Those problems originated either from the external coercion of the government, such as designating VC candidates and denying some dissenting villagers' candidacies, or from internal coercion of influential individuals, who used their wealth or violence to disrupt villagers' free voting.¹³⁸ These problems do not disprove the utility of self-governance. Instead their existence calls for real self-governance of villagers under and protected by rule of law. The government should refrain from intervening in village self-governance and protect the free voting rights of villagers against private coercion.¹³⁹

To make a village a liberal community also requires free exit rights of villagers, which consist of freedom of movement and free alienation of real property in the village. The corresponding *hukou* (household registration) system and property laws should be revised to grant villagers free exit rights. As previously discussed in the Dianpai River case, many villagers work in big cities for more than ten months each year. Without rights to exit the villages and to become a legal resident of the cities where they work, they are

people's government at the county level or the competent department thereof, and the people's government at the township or county level shall be responsible for investigating the matter and handling it in accordance with law."

¹³⁷ See e.g., Daniel Kelliher, *The Chinese Debate over Village Self-Government*, CHINA J., Jan. 1997, at 63.

¹³⁸ Guan Xiaofeng, *Min Zheng Bu: cun wei hui xuan ju hui xuan he bao li xing wei zeng duo* [Ministry of Civil Affairs: Bribery and Violence Increase in Elections of Villagers' Committees], <http://news.qq.com/a/20070710/000430.htm> (last visited June 28, 2011).

¹³⁹ See e.g., Qingshan Tan & Qiushui Xin, *Village Election and Governance: do villagers care?*, 16 J. CONTEMP. CHINA 581 (2007).

irresponsible stakeholders in both places, decreasing social capital and causing social problems, including the crisis of transitional commons discussed in this paper. Reform of property laws is necessary to realize villagers' free exit rights. This does not necessarily mean privatization and free alienation of rural land, but instead means letting the local community choose the property arrangements they like. In case that a communal property is chosen, villagers should at least be free to alienate their share in the communal property.

A freely-elected villagers' committee will play a central role in managing public affairs, including governing the commons. A liberal community will be able to provide a public forum for villagers to discuss with each other about the ownership and distribution of resources. Villagers will be able to make credible promises to each other under the institutional framework of the liberal community. Therefore they could find some way together to overcome the crisis of the transitional commons. In Y village, villagers might desire to consolidate, formalize and legalize their individual occupation of the plots on the riverbank. In L village, individual entrepreneurs could be encouraged and respected as far as they do not become a source of coercion to other members of the community. Mr. H's might-based rights will not be recognized unless he can get his actual possession of the riverbank land accepted by other villagers, either by compensation to the community or investing in the improvement of the river ecological system. In both villages, VCs can provide a forum for villagers to discuss the rules and norms, and the cooperation between the two villages and the pumping station regarding the use of the river water resources. Expectably, a cooperative mechanism governing the use of the common resources may come out as a result of increasing social capital.