Land Markets and Land Conflicts in Late Imperial China

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The aim of this paper is to present an outline of secular trends in land markets, land conflicts and land legislation from the Song (960-1279) to the Qing (1644-1911) dynasties. Special attention is paid to the problems of redemption and *zhaotie* (additional price of land paid by the purchaser to the seller), which were the most common causes of land disputes during this period.

After the equal-field system collapsed in the mid-Tang period, land could be sold and purchased almost freely by the people with little governmental interference. However, the apparent free trade of land does not necessarily equate to the concept of property rights in the Western sense. In the first part of this paper, I shall briefly survey how Japanese scholars have discussed property rights in late imperial China.

The free market in land frequently led to conflicts over land sales, especially when the struggle for land intensified and prices were on the rise. Poor sellers would often file suit demanding redemption or *zhaotie* from rich purchasers. Local officials were forced to deal with a number of land dispute cases, which, although trivial, were not easy to judge. New laws were formulated in order to cope with these conflicts. In the second part of this paper, I shall try to show how the attitude of officials in judging lawsuits concerning land sales changed during the period from the Song to the Qing, and explain why this change occurred in the socio-economic trends of this period.

In the third part, I discuss the relationship between the notion of land ownership in comparison with long-term economic growth. Finally, I will try to answer, as far as possible, the questions raised by the organizers of the Conference.

1 Concepts of Land Ownership in Late Imperial China

This section contains a brief survey on the notions of land ownership in late imperial China as the starting point of my discussion (for a more detailed explanation, see [Terada 1989; Terada 1997]). People in late imperial China usually used the following words in order to express types of contemporary ownership.

(1) 'You (有, have)' was a most popular word concerning ownership. For example, 'xiaode you zuyi zhi tian er mu (小的有祖遺之田二畝, I have 2 *mu*s of land inherited from my ancestors)', 'min suo ziyou zhi tian (民所自有之田 the land owned by people', etc.

(2)The word 'ye (業)' or 'chanye (產業)' meant properties, which might be exploited to gain profit such as land or houses. There used to be phrases such as, 'maiyu moumou wei ye (賣與某某爲業, sell it to Mr so-and-so making it his property)' in land contracts from the Song to the Qing period. (3) The word 'zhu(主, master or owner)' was also often used. For example, 'yezhu(業主, owner of property)', 'tianzhu(田主, landowner)', 'yi-tian liang-zhu (一田兩主, two masters to a field)' and so on. (4) More briefly, one could express personal ownership by such words as 'wode(我的, my)', 'wo fuqinde(我父親的, my father's)' and so on. It should be noted that Chinese people had scarcely developed well-defined legal concepts of ownership in the way that Muslim and European jurists had. Nonetheless, such everyday expressions as cited above were considered sufficient for Chinese people to maintain civil order.

After the Song period, 'owners' of land (not to mention other commodities) could freely use, profit from and dispose off their properties. While some officials suggested restricting the free trade in land to check the increase of landless peasants, successive dynasties adopted laissez-faire policies concerning private trade.

According to Kaino Michitaka, one of the leading scholars of legal sociology in mid-twentieth century Japan, Chinese traditional land ownership was 'a right that was abstract, individual, real, unrestricted, absolute and elastic', 'which apparently resembled the concept of property rights in modern codes' [Kaino 1943]. As Kaino states, ownership in traditional China was characterized by its 'free' feature[1]. More detailed analyses, however, revealed other aspects of Chinese traditional ownership. It was the ironical combination of the 'modern' appearance and 'non-modern' features of Chinese traditional ownership that attracted Kaino's attention sixty years ago and has fascinated several scholars of Chinese legal history in post-war Japan.

First, let us examine 'who' was the owner. Who could make decisions about the use, exploitation for profit and disposition of properties? The debate on the ownership of family property was related to this question. In a patriarchal family, which was the most basic type of Chinese family, was family property owned solely by the father as a patriarch or was it collectively owned by family members? According to Shiga Shuzo, 'arguing in terms of legal ascription, family property was obviously owned by the father', while Shiga also draws our attention to the fact that even the father could not violate the rule of equal division of family property by his sons. What was there to prevent him

[1] Actually the main argument of Kaino was not that Chinese land ownership was "modern", but that Chinese land ownership was, in spite of its apparently modern characteristics, not supported by an internal legal consciousness rooted in integrated community. According to Kaino, it was this lack of *genossenschaftlich* spirit that prevented China from developing into a modern society. See Kaino 1943.

from freely dividing family property among his children if he was the owner? This situation is apparently contradictory, but Shiga explains it through the principle of 'fu-zi yi-ti (父子一體, father and sons are one flesh, or, father-son identification)'. According to this principle, the father and sons are not distinct individuals but, ideally speaking, one person. Consequently, there must exist no conflict of interest between a father and his sons. 'The *persona*s of the sons are subsumed by their father, so that the father appears as the sole proprietor of family property, and his ownership is never restricted by the existence of his sons. At the same time, the *persona* of the father is extended to his sons, so that family property must continue to belong to his sons after his death' [Shiga 1967:218-214].

In this situation, a 'person' as a holder of the right to property is not a discrete individual but a part of a perpetual existence continuing forever from ancestors to descendants. As the only lineal ascendant in existence, the father represents this perpetual existence in the family. It is a matter of course that he decides everything related to family property, whose possessor is, in theory, the entire perpetual existence including him. At the same time, the father cannot arbitrarily dispose off family property against the will of this perpetual existence, because his person is subsumed under past ancestors, just as the persons of his sons are subsumed under him.

Another example of the discussion concerning 'who' owned is as follows. It is well known that the notion of 'Wang-tu wang-min (王土王民, king's land, king's people/all land and all people are owned by the sovereign)', which appeared in *The Book of Songs* compiled during the age of Warring States (403-221 B.C.), persisted throughout the imperial period. However, as seen above, land could be traded relatively freely in late imperial China. In a practical sense, people could 'own' land. This seems to indicate that the notion of state ownership of land had already become an empty theory. The following is a summary of how Chinese intellectuals explained this seemingly contradictory situation.

According to the conventional discourse of intellectuals in Imperial China, neither trade in land nor trafficking in humans was known in ancient times because sage kings in those days allotted a portion of land to each household (the so-called jing-tian 井田 or 'well-field' system) to enable everyone to enjoy a peaceful life. 'However, after the "well-field" system was abandoned, people could no longer have a constant occupation. While the rich became as powerful as kings and nobles, the poor had no option but to sell not only their land but also their own selves and their children' (Zhang Luxiang, *Yangyuan xiansheng quanji*, *juan* 19, 張履祥『楊園先生全集』卷 19). Watanabe Shin'ichiro pointed out that the well-field system was one example of the notion of

'fen-tian (分田 division of arable land)' prevalent in ancient China. According to him, the word 'fen-tian' meant small-scale fields held by taxpaying peasants, whose holdings presupposed the entire land controlled by the sovereign as the original situation [Watanabe 1986:111]. With the relaxation of these allotment systems, pieces of land 'divided' by the sovereign gradually began to be traded among peasants, and after hundreds of years, people as a matter of course freely owned and disposed off their lands; this myth of the formation of simultaneous private ownership suggested that the land, which was traded freely, was originally the sovereign's own. Because private ownership originated in the sovereign's ownership, it would lose its logical base without this notion.

The notion of 'wang-tu wang-min' provided not only a logical base to people's property rights but also a moral ground for criticism against the predicament of the day brought about by the excessive development of private ownership. The expanding gap between the rich and the poor goes against the ancient ideal of equal allotment of fields to the people, which was the actual origin of contemporary ownership. This paradox urged concerned intellectuals to advocate reforms towards a return to antiquity. Though these reformist ideas were seldom realised, the notion of 'wang-tu wang-min' maintained its vigour throughout the imperial period as long as people perceived the evil effects of private ownership [Kishimoto 1986].

These brief remarks on the patriarchal authority and the idea of 'wang-tu wang-min' suggest that the 'person' as an owner of land in Imperial China was not necessarily an independent individual who 'has property in his own person', which Locke assumed as the starting point of his argument. Rather, the 'person' in China was regarded as a link in hierarchical human relations, which covered everything under the Heaven. A patriarch subsumed the personality of his children, while his personality was also subsumed by his past ancestors. A landowner, who could control his land at will, was simultaneously one of the people ideally owned by the sovereign. A person who owned property was, in turn, owned by others.

This situation could be regarded as a characteristic of 'Asiatic society', which did not embrace the notion of the 'independent individual'. However, it should be noted that this vertical network of human relations in China was open in character. Neither a person nor a group could exclusively own something, because such a person or group was, in turn, owned by others. The Chinese patriarch, who was obliged to obey external authorities, was by no means an absolute master of his family and servants. Even an emperor must be criticised when he 'mistakes everyone under Heaven for his private property, and falsely regards his revenue as a profit made from it' (Huang Zongxi,

Ming-yi Daifang-lu, 'Yuan Jun', 黃宗羲『明夷待訪錄』原君). It is perhaps because of this open character of human relations in China that historians have often emphasised the laxness of Chinese rural community and the looseness of state control, although they admitted the strength of Confucian moral ethics.

The second question to be discussed in this section concerns 'what' they owned. Did Chinese people believe that they owned, for example, land *per se* or was it something else? Terada Hiroaki tried to answer this question through detailed analysis of the custom of 'yi-tian liang-zhu' (two masters to a field), which was rather widespread in Ming-Qing China. Under this custom, a tenant who had topsoil ownership could freely sell it to others or divide it among his heirs so that he was regarded as another proprietor than the subsoil owner. According to Terada, it was not the land as substance but the land as a unit of profit making that was the object of transaction in Ming-Qing society. The land as a unit of profit-making was called 'ye'. 'Yi-tian liang-zhu' is a situation where two units ('ye') of profit-making (i.e. the tenant's revenue from cultivating and the landlord's through rent-gathering) were formed on a single plot of land and were traded independently. Qing people did not feel it abnormal to have multiple 'ye's on the same land, because 'ye' was not a concept implying exclusiveness or absoluteness [Terada 1983]. Though there were many regions without the 'Yi-tian liang-zhu' system in the Ming-Qing period, it does not mean that land ownership was exclusive and absolute in those areas but indicates that the tenant's right to cultivate had not been regarded valuable enough to be traded as an independent unit.

In the concept of 'ye', one can easily find the same notion of ownership as in 'wang-tu (king's land)' theory. When people began to trade their land after the 'well-field' system was abolished, what they sold was not the land *per se* (because the land was owned by the sovereign) but their right to cultivate and profit from the land. A person who could legitimately cultivate a plot of land allowed another person to cultivate it on his behalf at some price; this process is the same as that of the formation of the custom of 'yi-tian liang-zhu'.

The 'yi-tian liang-zhu' custom reminds of multiple ownership under the feudal regime of medieval Europe, especially since multiple rights were accumulated on the same land. The multiple ownership of feudal society, which incorporated a hereditary system, was regarded as an obstacle to free trade. It should be noted that Chinese multiple ownership was a product of the free economic activity of people. When Japanese scholars researched the land ownership patterns in Taiwan under the Qing a hundred years ago, they pointed out that 'there were found various kinds of relationships in civil matters because people can freely make contracts of any kind'

[*Taiwan Shiho* Vol.1]. As the notion of exclusive land ownership was absent, people could sell any right of profit-making on a piece of land as an independently disposable unit. The land market of late imperial China was very vigorous, and the government permitted this situation as long as the free land market did not cause serious problems.

As vertical human relations infinitely expanded, every individual was restrained by the others, strongly or weakly; this was the arena where Chinese people competed for wealth and power. Order in this arena was maintained through the efforts of both the people themselves as well as the government who 'would adjust human relations from a comprehensive point of view' [Shiga 1984:284].

The government after the Song, unlike that of the Tang, did not prohibit free trade of land. When land disputes occurred, officials in late Imperial China would pass judgements with a view to sustaining and protecting the legitimate ownership of land. Nevertheless, it is safe to say that officials put more emphasis on the adjustment of human relations as a whole than on the realisation of individual property rights. In the sense that the whole society's welfare was placed above individual rights, there were no differences between the Tang and the post-Tang period. The difference was in the way to achieve this goal. While the Tang officials thought that active intervention of the government (for example, land distribution policy) was necessary for people's welfare, officials after the Song found laissez faire policy a more effective and easy way to realise social stability and prosperity.

In the next section, I shall analyse the changes in law and adjudication on land sales from the Song to the Qing period in the context of the trends in land market.

2 Land Market and Land Laws in Late Imperial China

Land Laws in the Late Tang and Early Song Period

The early Tang government enforced the equal-field system, under which, land should be distributed by the government to each household depending on the number of male members in the household. When a man became old or died, the allotted land had to be returned to the government to be re-allotted to another person. People were prohibited from selling and buying land freely under this system.

After the equal-field system collapsed in the mid-Tang period, the government did not intervene in land sales by people. Non-intervention did not necessarily mean positive protection of property rights, but the Tang government was forced to make laws on land ownership to cope with the increasing conflicts and lawsuits over land sales.

We can find a few edicts concerning sales of land issued in the late Tang period. The

first one issued in 822 A.D. provided for the following: In cases of conflicts over adjoining and interlacing lands and sites, if the concerned parties did not appeal to a Court at that time, and after a long time filed a suite with doubtful deeds, then the Court should not accept the cases that occurred twenty or more years ago[2]. Another edict of 824 also contained regulations regarding the time limit of taking a suit:

> Doubtful deeds cause conflicts. Especially after a long time has elapsed, we have no means of investigating the real circumstances; thus, lawsuits will only lead to troubles and harmful effects. Local Courts should not accept the cases in which debts of thirty or more years are disputed and there only exist deeds but no guarantees and evidences[3].

It should be noted that these edicts were trying to prevent the increase of lawsuits by setting time limits for the acceptance of cases. We can refer to them as a 'time limit' type of law. Why did the Tang government issue these laws in succession? The tax reform of 780 (*liangshui-fa)*, in which tax was collected in copper cash, caused a violent deflation that continued for almost forty years. During this period, prices of grains and silk fabrics fell to one fourth or one fifth of those in previous years [Peng Xinwei 1965:344; Chuan Hansheng 1976:143-208]. Though the data on land prices of this period are not available, the land market must have been hard hit by this deflation. In order to resist the intensification of the deflation, the government allowed people to pay tax in real goods after 820. After that, the price of commodities began to rise, and consequently, the land market became active again. We should note that the laws on land and debt conflicts were issued in this period of economic revival. The expanding demand for land must have caused land conflicts, and the government was forced to deal with the increasing number of lawsuits.

These laws enacted by the Tang government did not distinguish conditional sales (*dian* or *huomai*) from outright sales (*juemai*). Conditional sales and outright sales were two important categories in land-trading in late Imperial China. When poor peasants were forced to sell their lands, they often chose conditional sales, in which, sellers could redeem the land after a certain period (usually three or five years) at the same price as they sold it. Though the land prices in conditional sales were cheaper than those of outright sales, most poor people preferred conditional sales so that they could avoid losing their land forever. In fact, a majority of the land disputes in late imperial China

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[2] *Song Xingtong,* juan 13, "Dianmai Zhidang lunjing wuye (典賣指當論競物業)".
[3] *Song XIngtong,* juan 26, "Shouji Caiwu zhe feiyong (受寄財物輒費用)".

were caused due to the confusion between conditional sales and outright sales. Sometimes litigants would consciously cheat over these categories, but the distinction between the two categories in itself was not necessarily very clear in the minds of common people. They often used the word 'mai (sell)' in the contracts, but did not always specify if that sale was conditional (*huomai*) or outright (*juemai*).

In the edict issued in 962, a few years after the founding of the Song dynasty, the emperor ordered as follows:

> From now on, whoever delivered his land or house to others as an object of conditional sale or mortgage can be allowed to redeem it without regard to the period since the original sale or mortgage was done on condition that the original deed exists, the persons concerned or their sons or successors are alive, and there is clear evidence. If there is no reliable deed, and thirty and more years have passed since the original sale or mortgage, then the land or house should not be returned to the former owner, and should be left to the present cultivator's disposition[4].

The main purpose of these edicts was to restrict insoluble lawsuits and to reduce false accusations. In this sense, emperors and officials in the late Tang and early Song seem to have been willing to protect people's property rights, although the concept of property rights was never referred to in these edicts in a positive and explicit way[5].

Land Laws Quoted in the *Qingming-ji*

Now we shall examine how the judges[6] applied these laws when they adjudicated land disputes at the court. The best historical material to show the circumstances of the trials in local courts in the Song is certainly the *Minggong Shupan Qingming-ji* (Collection of Enlightened Judgements by Celebrated Judges) with a preface dated 1261.

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[4] *Song Xingtong,* juan 13, "Dianmai Zhidang lunjing wuye". For the making process of this law, also see *Song Huiyao jigao,* shihuo, 61-56 (宋會要輯稿 食貨 61 之 56).

[5] Philip Huang argues that the Qing code's approach to civil matters was "prohibiting violations of what it considered legal and proper" and "the positive principle was stated only in passing, or buried in an inconspicuous part of the statute, or not stated explicitly at all," but "there can be no mistaking the intended principle." The same characteristics as Huang pointed out as to the Qing code can be found in almost all the land laws in late Imperial China. This is perhaps because the government's supreme goal was not the protection of individual rights (what Huang calls "positive principle") but the achievement of the welfare of whole society. See Huang 1994:145, and Kishimoto 1986.

[6] In late Imperial China, it was administrative officials who worked as judges of local courts. In this paper I use the words "judge" and "official" together, but there is no difference between the two.

The *Qingming-ji* is a casebook of texts of actual decisions made by famous officials in the Southern Song period (1127-1279). This book includes 25 cases concerning conditional sales or mortgage.

In the great majority of these cases (24 out of 25), the accusers were the original owners (i.e. the sellers of the land or house) or their party (for example, descendents or relatives of the sellers), and the judges in most cases (21 out of 24) did not allow the accusers to redeem the land or house on the ground that the original sales were not conditional sales but outright sales, or that a long time had elapsed since the original sale and no witnesses were available.

As some Japanese scholars have already pointed out[7], there were striking differences between the attitude of the Song judges in the *Qingming-ji* and that of Qing officials, who appear in casebooks in the Qing. In the Qing period, local officials seldom quoted laws in their judgement on civil matters and, even if they quoted laws, the legal codes quoted in their judgement were limited to statutes (*lü* 律) and sub-statutes (*li* 例) included in the *Qing code*. Unlike the Qing, Song judges cited various kinds of laws such as edicts (*chi* 勅), ordinances (*ling* 令), regulations (*ge* 格) and specifications (*shi* 式). There existed a volume of laws concerning civil matters in the Song, and these were often quoted by judges in local courts. It appears that Song officials were more legal-minded in civil cases than their counterparts from the Qing.

Among the 25 cases concerning the conditional sale or mortgage of land, 15 judgements include the citations of the sentence of laws by the judges, while in other four cases, the judges made reference to the content of laws, though they did not cite them literally. Summing up, in three-quarters of these cases, the judges made reference to the concrete content of laws[8]. This high proportion of judgements with quotations is striking if seen from the perspective of Ming-Qing historians.

The most frequently cited was the 'time limit' type of law, limiting the period of acceptance to usually twenty years. Though there are some differences among these laws, the representative example is as follows: 'In cases concerning land or houses, those in which the deed is unclear and are more than twenty years old, and the investor or the owner is dead, will not be accepted (凡理訴田宅, 契要不明, 過二十年, 錢主或業主亡者, 不得受理)'. Such a law (hereafter '20 years' law') was cited in ten cases, though the periods of acceptance were not always the same. In two cases, the period was ten years,

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[7] Aoki 1999, and Sadate 1993. Also see the Shiga Shuzo's notion cited in Aoki 1999:19.
[8] According to Liu Hsinchun's research, judges quoted laws in 53 percent of 200 cases concerning civil matters (literally "matters on household, marriage and corvee (戶婚差役)" (Liu 2005:378). If we do research on all the cases included in the *Qingming-ji,* the proportion of judgment with quotation may be much lower. See Aoki 2006:39.

and in one case it was 30 years. In addition, the 20 years' law that can be traced back to the late Tang period was still valid in the Southern Song[9].

Some Chinese historians regard this type of law as 'prescription'[10]. Now let us examine how the judges actually used the 20 years' law, since the fact that they quoted a law does not necessarily mean that they judged strictly according to it. First, we must note that the judges did not always agree on the interpretation of the 20 years' law. The most crucial problem was the relationship between three conditions included in the law, namely, (1) clarity of deeds, (2) period since the original trade, (3) existence of the people concerned (buyer, seller and witnesses). Most judges seem to have connected these three by 'and', but there was a judge who did not agree to this interpretation and insisted that the problem of clearness of evidence, conditions one and three; and the problem of period, condition two, should be separated[11]. It seems that he was aware of the potential contradiction between the 'time limit' principle and the 'clear evidence' principle. According to him, these two problems originally consisted of two separate laws; thus, if either of the conditions was not satisfied, the case should not be accepted. In other words, he asserted that the condition concerning clearness of evidence and the condition concerning period should be connected by 'or' and not by 'and'. The Chinese text of these laws permitted both conflicting interpretations.

This obscurity of the text might be considered as a crucial defect of the law, but most celebrated judges in the Song do not seem to have been too bothered by this problem, for they did not necessarily judge solely according to the law. In most cases concerning conditional sales, falseness of the accusers was so obvious that the judges actually did not need to rely on the law to judge the case. Of course there existed some difficult cases. For example, in one case, a widow accused her brother-in-law by claiming redemption of the house, which she had sold previously; the period of acceptance had expired slightly earlier, and the accused submitted the 'red deed (deed with official stamp)' which proved that the original sale was an outright sale. According to the law, the case should not be accepted. Nevertheless, the judge accepted the case, and 'considering human feeling (人情)' decided that the poor widow should be allowed to redeem the house if she had been living with her grandson in the house right from the day when the original trade was

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[9] As comprehensive studies on civil laws quoted in the *Qingming-ji*, see Niida 1933, Xu Daolin 1970.

[10] Chao Xiaogeng calls it "negative prescription (喪失時效)", and Liu Chunping, Zheng Ding and Chai Rong use the words "time limit of suit (訴訟時效)".

[11] *Qingming-ji,* p.132, Fang Yue's judgment. For more detailed analysis of this problem, see Aoki 2006:14-18.

done[12]. In another case, the accuser claimed the redemption of land and house, saying that the land and house had been sold unlawfully by a relative of his. In this case, the period of acceptance had expired already. Nevertheless, the judge took the following few points into consideration: (1) the accuser, deceived by the seller, might not have a chance to know the facts of the sale until the period of acceptance expired; (2) the accusers' house was contiguous to the house that was sold; (3) there was a tomb of the accuser's ancestors in the land that was sold. Finally the judge, 'considering human feeling', approved a part of the accuser's claim and allowed him to redeem the house and a part of the land including his ancestor's tomb[13].

In these cases the judge did not ignore the law, but the 20 years' law was only one factor in his overall judgement, which took both law as well as human feeling into consideration. In this sense, we cannot presume the judges in the *Qingming-ji* to be legalists, who made their judgement relying exclusively on laws[14]. Nevertheless, the judges of this period regarded it necessary to authorise his judgement by quoting the law. Why, then, did they think in this way?

Some Japanese historians have paid attention to the socio-economic background of the lawsuits included in the *Qingming-ji*. For example, Aoki Atsushi pointed out the regional variation in Song legal culture. According to him, a certain kind of legalism was characteristic of newly developing frontier areas such as Jiangxi (江西), where disputes concerning land ownership intensified with the population growth at that time. He also found a meaningful relationship between the judges' attitude to law and their birthplaces. He points out that a few judges native to Jiangxi 'made frequent and detailed quotations from laws when passing judgement', and suggests this tendency might have been related to the legal culture peculiar to Jiangxi.

In addition to the regional variety, I would like to suggest the importance of the economic trends resulting from monetary factors. Most of the lawsuits related to conditional sales in the *Qingming-ji* were filed during the first half of the thirteenth century. The first half of the thirteenth century was a period of inflation. During the Song-Jin war of 1206-08, the government issued a large quantity of paper money to carry on the war. The excessive issue of paper money still continued after the war, and caused rampant inflation [Chuan Hansheng 1972:325-354]. In one case in *Qingming-ji*, in which the accuser took suit in 1238 claiming the redemption of the land he had sold

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[12] *Qingming-ji,* p.164, Wu Ge's judgment.
[13] *Qingming-ji,* p.165, Wu Ge's judgment.
[14] On this point, there is a conflict of opinions among Japanese scholars. For example, Sadate Haruhito argues that "human feeling" was not so important in the judgment in the *Qingming-ji*. See Sadate 1993.

in 1206, the judge pointed out: 'the land price has doubled now (around 1243), and the prices of *huizi* (paper money) have fallen'.[15] This increase in land prices must have been one of the motives of the accusers for claiming the redemption of the land they had sold before inflation. On the other hand, the buyers would not allow the sellers to buy the land back at the low prices, which prevailed before inflation. It was quite natural that lawsuits on conditional sales of land occurred frequently, and that these cases were not easy to settle because neither of the litigants would give way. The 20 years' law was one of the effective tools for judges to cope with the increase in lawsuits on conditional sales, and to authorise their judgements with state power to win the litigants' submissions.

Land Laws after the Yuan Period

During the Yuan dynasty (1271-1368), prices of commodities rose due to the issuing of a large quantity of paper money. The rise in prices of lands caused land disputes, as clearly pointed out by some regulations included in the *Yuan-dianzhang*. In 1297, an official of Jiangxi province reported:

> In the early years after the Jiangnan regions (the south of the Yangzi River) were incorporated in the territory of our dynasty, people used Zhongtongchao-liang (a kind of paper money whose face value was indicated in *liang*), prices of commodities were low and there were no compulsions or conflicts when people finalised contracts. Nowadays, prices of commodities are climbing rapidly, and prices of houses have risen several-fold. Consequently, the gambling spirit in people is stirred up, and this causes the increase in lawsuits.

To cope with these trends, this official suggested:

> If the government allows the accusers to redeem the lands and houses, the buyers will suffer heavy damages. Because people in Jiangnan are poor and obstinate, they will rashly file suits following these examples. The government should admit the buyers to be legitimate owners, and make them own their lands as before, so that evil people change their *gambling* mind[16].

The fundamental policy of the Yuan dynasty on land disputes was, as suggested in the above citation, to protect the present owner with a view to reducing the lawsuits caused

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[15] *Qingming-ji*, p.315, Wu Ge's judgment.
[16] *Yuan Dianzhang,* juan 19, "Duonian zhaiyuan nan ling huishu (多年宅院難令回贖)".

by the 'gambling spirit' of the people. In 1299, the Yuan government ordered that the cases concerning the transactions of lands during the Song period should not be accepted[17]. In a 1311 edict, too, the Emperor stated that the cases concerning the transactions of lands and houses before 1308 should not be accepted except for those already brought to the court, or those with clear deeds[18]. There is no evidence, however, to show how these laws were used in actual lawsuits.

After the foundation of the Ming dynasty in 1368, the Ming government compiled the Ming code, which was a comprehensive legal code that combined various fields of law and arranged them in a systematic order. Two important statutes were included in the Ming code; the statutes on the 'fraudulently selling another's land or house (盜賣田宅)' and the 'conditional sales of land and house (典賣田宅)'. The former provided that those who fraudulently sell, exchange, pretend ownership to, or encroach upon or forcibly occupy another's land or house, or fake prices or ownership deeds, would be punished. The latter in the first part prescribed punishment for those who conditionally sold or purchased land or a house and did not pay the required tax, and in the second part provided that those who double-mortgaged land or a house should be punished, and that a buyer of a conditional pledge, who refused to allow redemption of the pledged land when the term came due, would be punished[19].

It seems that the 'time limit' type of law, which was prevalent in the Song and Yuan period, disappeared during the first half of the Ming. This type of law was not revived until the late fifteenth century, as rapid rise in prices of land (see Figure 1) caused an increase in lawsuits on land sales. The new law was issued in 1468 and, through some revision, was included in a sub-statute in the Ming code[20]. The new law provided for the following:

> In the cases concerning household effects and lands, if the sale or household division in question was done five or more years before, or, even if within five years, in case there exists clear deed that proves sale or division, then the present owner should be allowed to keep his property as before. Re-division or redemption should not be allowed. The complaints are to be rejected and the documents to be retained.

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17 *Yuan Dianzhang,* juan 19, "Guobo ershiyi-nian yiqian dianmai tiantu (革撥二十一年已前典賣田土)".

18 *Yuan Dianzhang,* juan 20, "Zhuba yinchao tongqian shi Zhongtong-chao (住罷銀鈔銅錢使中統鈔)".

19 For the translation of these statutes, I referred to Huang 1994:145-149.

20 For the process of making this law, see Kishimoto 1996.

This new law (hereafter, 'five-years' law'), however, was not so frequently referred to by Ming officials as much as the '20 years' law' was referred to by Song judges. It may be partly because the period of acceptance in the new law was much shorter than 20 years. The contradiction between the 'time limit' principle and the 'clear evidence' principle was easily discovered because the period of five years was too short to obscure the real circumstances of the original trade[21]. Then, how did the judges after the late Ming adjudicate the cases concerning land sales?

Land Conflicts and Local Adjudication after the Late Ming Period

As mentioned above, we can find striking differences between the Song officials' attitude in dealing with land conflicts and that of their counterparts in the Qing. First, let us examine how Qing officials adjudicated cases concerning conditional sales. An official named Wang Chao'en in his memoir of 1728 criticised the officials at that time as follows:

> When a seller of land or a house sees these estates being improved by the buyer after the sale, he gets envious and often claims redemption or additional payment (*zhaotie*) saying that the original price was too cheap. There is a practice called 'one additional payment and two supplement payments (一找二貼)' in which sellers force buyers to pay money in addition to the original prices. If a buyer refuses, the seller files a suit saying that he was robbed of his land. These abuses are common throughout south-eastern provinces, but most serious in Jiangsu and Zhejiang. When local officials question litigants at the court, they always order the middlemen of the original sale to settle the disputes through composition, saying that 'this is the usual practice of local people', or citing the proverb 'buyers should give way (得業者應吃虧)'. Actually, this manner of local officials is very different from the right method of justice based on valid ground, thus causing an increase in lawsuits and spread of abuses[22].

Wang Chao'en's criticism was not an exaggeration. In fact, one of the distinct characteristics of the Qing local officials' judgements in land dispute cases was to settle

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[21] An example of contending interpretations of this law is found in the dispute between Hai Rui and his political opponents. Hai Rui, famous as one of the most righteous officials in the late Ming, used to allow poor peasants to redeem their land from powerful landowners based on the "clear evidence" principle, but his opponents impeached him on a charge of breaching "time limit" principle. See Kishimoto 1996.

[22] *Gongzhongdang Yongzheng-chao Zouzhe,* Vol.9, p.803.

the dispute by ordering the rich buyer to pay some money to the poor seller as 'additional payment', even though the original sale was proved to be an outright sale and the buyer was legally faultless. We can actually find the proverb 'buyers should give way' in some of the judgements by local officials at that time[23].

The critique of this manner of Qing officials' judging by Wang dated back to the late Ming period. The practice of *zhaotie* began to prevail in the south-east China during the late sixteenth century, when the land market in this area showed signs of revival after the long-lasting rural depression in that century (see Figure 1)[24].

Zhaotie originally meant the payment by the buyer to the seller, when they agreed to change the original conditional sale to an outright sale. Because the prices in conditional sale were usually cheaper than those in the outright sale, and the seller in the conditional sale had the right to redeem the land, it was reasonable for the buyer to pay the sum corresponding to the difference between the price paid at the original conditional sale and the current price that should be paid in outright sale of the land to the seller.

The *Zhaotie* practice that began in the late Ming was not the same as the *zhaotie* mentioned above. In the new *zhaotie* practice, a seller would claim additional payments against the buyer even though the land had previously been sold through outright sale. There was no reason for the seller to claim the additional payment except that he was poor and the buyer was rich. The *zhaotie* in this sense can be regarded as alms that were given by the rich buyer to the poor seller through human relations that were established by the sale of land.

At the beginning, the move to request *zhaotie* showed features of popular unrest. Frightened landowners and officials severely criticised the *zhaotie* movement as a terrible phenomenon. However, this behaviour of requesting *zhaotie* gradually took root in several areas of China as a permissible practice during the period from the late sixteenth to the eighteenth century, when the prices of land were consistently rising, except for a few decades in the latter half of the seventeenth century (Figure 2). In each locality, a certain standard for the sum, frequency and method of additional payment was formed. The author of a local gazetteer of Jiading county (Jiangsu) wrote around 1670 that 'it is a common practice to request an additional payment when the original price was cheap, and to claim redemption if the original sale was not long ago (價賤而添,

[23] For more detailed analysis of this problem, see Kishimoto 1996.
[24] For the beginning of the *zhaotie* practice, see Kishimoto 2006. There is a considerable volume of studies on *zhaotie*. Here I shall give three examples written in English: Macauley 1998, Huang 2001 and Feng 2004.

年近而贖, 亦恆情也)'.[25] The *zhaotie* practice consistently caused land disputes; however, at the same time, it was regarded as an inevitable practice that worked as a buffer to reduce tension between the rich and the poor.

It is understandable that Qing officials favoured this practice as a means of 'softening' their judgements. I am not arguing that they *had to* respect local customs such as *zhaotie,* nor am I saying that they had a tendency to obscure right and wrong. Of course, they could judge in a 'hard' manner without showing paternalistic considerations to the poor. In addition, it was their usual manner to clearly announce who was right and who was wrong. Nevertheless, they also tried to make their judgements more acceptable to the litigants and perhaps to the audience of the trial by, for example, ordering the rich buyer to give a small sum of money as a token of his generosity. Such kinds of judgement might have been seen as natural by people, who were accustomed to the *zhaotie* practice.

As the *zhaotie* type of judgement increased, the 'time limit' type of law gradually disappeared from the officials' judgement. Though the five-years' law was inherited by the Qing code from the Ming code as a sub-statute of the statute 'conditional sale of land and house', few actual judgements referred to this law in the Qing period. In the mid-eighteenth century, two new laws on conditional sale were issued in 1730 and 1753 respectively[26], and took the place of the five-years' law. The aim of the new laws was to distinguish conditional sale and outright sale by making people write the category of sale clearly on the deeds. The 'time limit' principle was referred to in the 1753 law as a temporal remedy, but no longer as a main content of the law[27].

Compared with their predecessors in the Song, the Qing local officials rarely cited or referred to laws in dealing with civil matters, but preferred a *zhaotie* type of judgement, which was not strictly based on laws. Why did this change occur? Were the Qing local officials less legal-minded than the celebrated judges in the Song? Perhaps one reason for this difference was that local practices like *zhaotie* had not developed into a mature form in the Song period. After the late Ming, with the continuous growth and activity of land market, new practices were formed and were gradually recognised by local people as a common behaviour pattern. It might have been natural for Qing officials to take these new practices into consideration, in order to make it easy for local people to accept their judgements. Unlike the Qing officials, the Song officials had no such commonly recognised practices that they could use in their judgement. Therefore, they had to rely

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[25] *Jiating xianzhi* (1673), *juan*4, Fengsu.
[26] The third and the seventh sub-statutes of the statute "Conditional sale of land and house".
[27] I am following Terada 1987 in the interpretation of this law.

on state laws to authorise their judgement, although these laws were not without defects such as the contradiction between the 'time limit' principle and the 'clear evidence' principle.

My argument is that economic growth does not necessarily bring about respect for formal law, and respect for formal law does not necessarily lead to economic growth. Rather, I would suggest, the apparent legalism of the Song judges might have been a reflection of the immaturity of Song local society, i.e. the lack of a common behaviour pattern recognised by local people.

3 Economic Growth and Legal Culture

As seen in the first section, Chinese intellectuals regarded the ancient situation of 'wang-tu wang-min' as the logical starting point for the development of *de facto* private ownership since the end of the Warring States period. There were frequent debates on the state policy limiting large-scale landholding. Some scholars argued for the limitation in order to save landless peasant, while others criticised it saying that the limitation would bring about serious disturbance in the society. It should be noted that the focus of their discussion was not individual rights but the welfare of the whole society. The point in question was which policy would be more effective to realise peace and harmony of society; limitation or laissez-faire? It is safe to say that private ownership was rarely restricted by the governments in late imperial China, but that has little relevance to the notion of the inviolable right asserted against the whole society. Rather, the private ownership of the late imperial period was tolerated as an optimal way of maintaining social order. The attitudes of the judges of the Song and the Qing discussed in the second section might also be easily understood within this framework.

Then, how should we evaluate the influence of this type of notion of ownership on long-term economic change? It is a very difficult question because these notions could, like a versatile tool, be applied to multiple purposes, and especially Chinese intellectuals have displayed their pragmatic genius to use these notions in various ways, such as the brilliant development of the 'socialist market economy' after the 1980s.

Let us take up the notion of the state (or king's) ownership of land. We have examples of this notion in several areas, east and west, modern and pre-modern. These examples show that state ownership of land should not be considered simply as a residue of ancient despotism, but should be understood in relation to the land problems faced by rulers and intellectuals of the day. In other words, their references to the notion of state ownership generally implied criticism of the present situation of land

administration.

In the Chinese case, state ownership was often demonstrated as a basis of policies to restrict the power of landlords and to secure the life of the poor. 'Why can landlords annex so vast an expanse of land, which is the sovereign's own, and enjoy an extravagant life on its profit?' This kind of criticism was familiar to Chinese people throughout the imperial period. The notion of state ownership, therefore, survived as long as the evil of private landownership was perceived. As Mizoguchi Yuzo demonstrated, this tradition of criticism of private ownership might be regarded as one of the intellectual sources of modern land reform, such as Sun Wen's 'Minsheng-zhuyi (the Principle of People's Livelihood)' and the land revolution of the Communist Party [Mizoguchi 1989:12-20].

The notion of 'king's land' was sometimes used by Chinese rulers for confiscation or compulsory purchasing of land, however, such policies usually became the target of criticism. It is interesting that the Confucian literati did not hesitate in such cases to argue for the people's ownership of land and criticize the rulers' greed. It may be safely said that ownership was not regarded by them as the inviolable right of someone, but as a kind of rhetoric for the realisation of general welfare [Kishimoto 1986].

Apart from these social-welfare-oriented types of argument, the notion of state ownership could also be used to strengthen state control of land and of tax revenue. The state ownership of *kharaj* land in the Islamic world may be cited as a typical example of this type. It should be noted that state ownership of land was often advocated in the process of the formation of modern nation-states, especially in non-European countries, which had to promote top-down modernisation in order to survive in the Euro-centred world system. Muhammad Ali's policies of 'land nationalisation' were intended to prohibit cultivators from disposing off or moving away from their land in order to increase tax revenue [Kato 1993:119-129, 137-163]. After his controlling policies proved ineffective, private ownership of agricultural land was introduced by the Egyptian government; however, this process was not the simple abolishment of state ownership, but was intricately intertwined with the traditional notion of the state's right to dispose off its land [Kato 1993:113-225]. Islamoglu demonstrates that the Ottoman Land Code of 1858 should not simply be regarded as a reassertion of state ownership on land or the development of individual ownership of rights. According to him, 'it signified the separation of the ownership claim from the former revenue and use claims, thus establishing it as the singular and absolute claim over land, only to be restrained by the taxation claim of the state. Viewed from this perspective, the status of *miri* (state land) can be said to have been inseparable from a legal-administrative formation of private or

individual ownership rights' [Islamoglu 2000:27]. The Ottoman and the Qing empires shared their efforts to simplify land tenure; however, the Ottoman's effort was far more closely connected with the centralisation of power than that of the Qing [Islamoglu 2001; Macauley 2001].

It is worth noting that the Confucian notion of 'wang-tu (the sovereign's land)' was emphasised by the government in early Meiji Japan as well as in the Korean Empire established after the Sino-Japanese war of 1894-95 [Suzuki 1990; Kim 2000]. The notion that the ruler was the only owner of the land was also used by European colonialists. Raja Brook's attempt in the latter half of the nineteenth century to establish state ownership over Sarawak was only one example of similar efforts exerted by European colonial governments in the archipelago of Southeast Asia. The rationale behind such efforts was the finding of European orientalist studies that there was no private ownership in Asian despotic regimes [Ishikawa 2004]. Thus, the notion of the 'traditional' state ownership could promote both modern state formation and colonisation.

Modern European thinkers often attributed the economic stagnation of Asian empires to state ownership of land, which in their eyes prevented free and active trade among individuals. According to recent studies, however, the notion of state ownership of land was not necessarily a real barrier to free economic activity. Chinese people could freely dispose of their 'ye', just as farmers of the Islamic world could sell their 'tasarruf' at will. Though, under the principle of state ownership of land, 'ye' and 'tasarruf' did not mean absolute ownership but were kinds of usufruct; they could function as *de facto* property rights. Because there was no notion of absolute private ownership in China, various kinds of customary rights could be generated relatively freely depending on the situation. For example, under the 'yi-tian liang-zhu (two masters to a land)' custom, a tenant could dispose his topsoil right at will without consulting the landowner. This custom sometimes caused conflicts and lawsuits over property right; however, on the other hand, it promoted tenants' initiative to improve land under their cultivation.

It should be noted that there were also various types of arguments advocating state (or public) ownership of land in modern Europe. Some thinkers argued for the socialisation of land as a part of anti-capitalist reform to realise social welfare, while others demonstrated the economic rationality of state ownership of land in the light of agricultural capitalists who intended to restrict landowners' control of land [Shiina 1978]. The premises and functions of these modern arguments of state ownership of land were not so different from those of 'traditional' types. In pre-modern empires too, the notion of state ownership functioned as a versatile device to cope with problems of

the day, including an expanding gap between the rich and the poor, landowners' arbitrary control of tenants and decrease of state revenue through decentralisation of powers. It was not merely the irrational residue of oriental despotism. State ownership should not too readily be regarded as 'key to modernisation' or 'obstacle to modernisation', fixing it into a teleological scenario of history.

In this last section, I argued that the seemingly anti-modern notions such as the notion of state (king's) ownership *could* be used in various ways including those promoting modern economic development. However, if the question is what kind of legal tradition *did* enable the 'Great Divergence', then my answer above might be out of context. To this question I can only say, following Max Weber, that pragmatic wisdom is not necessarily the key to this unique breakthrough.

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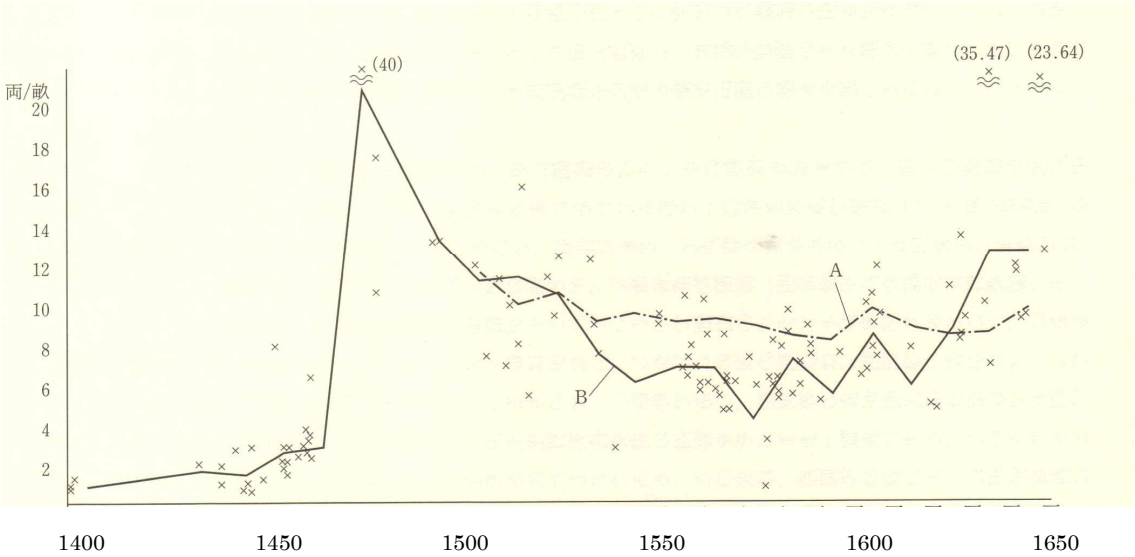
Figure 1 Land Prices in Huizhou(silver *liang* per *mu*)



Notes: Decennial averages of Huizhou land prices.

Sources: A series: Chao Kang and Ch'en Chung'i 1980.

B series: Liu Hehui and Zhang Aiqin 1983.

Figure 2

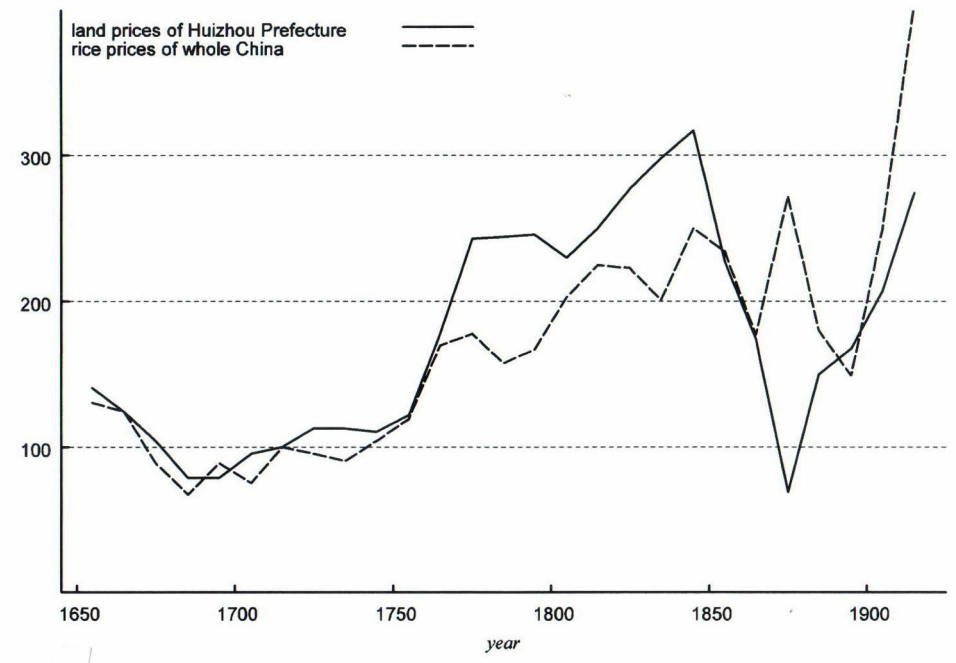


Fig. 2 Decennial indices of rice and land prices in China (1700–1710 = 100). (From Kishimoto 1997: 28.)