PROPERTY CONCEPTS AND INSTITUTIONS IN CHINA: DOES TRADITION ABIDE?

by

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Abstract

The premise of this paper is that in order to understand contemporary concepts and institutions of property in China one needs to be aware of the historical approaches towards the ownership and management of resources and assets. Legal institutions are a reflection of the ideological and material conditions of a society. The persistence or reappearance of these conditions suggests that there may be some similarities between traditional, primarily Confucian, and contemporary post-Maoist property concepts and institutions. This paper explores the social, economic and ideological basis of imperial era concepts of ownership and management of land resources and investigates the interaction between state and society, or the official and private spheres. The research here demonstrates that despite officially held ideas of imperial land ownership, most land effectively was owned by actors within the private sphere by at least the early to mid-Qing. Nevertheless, the concept of ownership emphasized the community as opposed to the individual, and thus the notion of private exclusive rights in resources such as land significantly was minimal. Property institutions frequently resembled trusts or corporations, which were characterized by a separation of ownership and management powers or rights. This does not imply however that the separation was a clear one. Like contemporary uncertainties surrounding the division of ownership and management rights in state enterprises, late imperial institutions did not clearly define how a resource was to be managed. Generally such determinations must be made on a case by case basis.
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Property Concepts and Institutions in China: Does Tradition Abide?

The history of what the law has been is necessary to the knowledge of what the law is.

Oliver Wendell Holmes ¹

The fact is, now we see that a revolution cannot change a nation - its tendencies and qualities and traits. Only the form of power and of property [can be changed] but not the nation itself.

Milovan Djilas ²

I. Introduction ³

A. Linkages Between the Past and the Present

As China has moved to reconfigure its economic system the question of who or what entity has rights or powers to hold, use or control resources and assets has become one of great importance to understanding the current, and gaining an insight into the future, shape of the nation's economy and society. The post-Mao era has

¹ Holmes, Oliver Wendell, The Common Law (Boston: Little Brown, 1881) at 37.
³ Note on Romanization: I have used Pinyin throughout except where I refer or cite to names of writers from Taiwan or materials where the original publication title was transliterated using the Wade Giles romanization approach.

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witnessed the establishment of a variety of new arrangements pertaining to the ownership and management of a variety of resources ranging from rural land to state enterprises. These find expression not only in formal legal instruments such as amendments to the Constitution, the promulgation of a Civil Code in 1986, and the enactment of an ever increasing number of laws and regulations, but also through informal and customary practices by families, communities, business associations, and government agencies from local to national levels. Some observers believe that new formal laws and institutions may facilitate the establishment and entrenchment of institutions of private property thereby guaranteeing that China will follow a capitalist development path.4 Others suggest that the policies of central authorities are evidence that the state merely is reorganising its structures of governance in an attempt to better control society and improve the likelihood of successfully achieving its development goals.5

This paper considers whether property institutions developed under the model of "socialism with Chinese characteristics" may either resemble or perhaps even be influenced by traditional property concepts and institutions. By traditional I am referring to the Legalist and particularly the Confucianist ideas that provided the foundation for late imperial institutions of ownership and resource management. 6

While the substantive laws and formal institutions of post-Mao China are

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4 Cheung, Steven, N.S., Will China Go Capitalist? An Economic Analysis of Property Rights and Institutional Change (London: Institute of Economic Affairs, 1982).


6 When the terms "traditional" and "contemporary" are paired in this paper, I am referring to the late imperial era (late Ming through Qing dynasties) and the post-Mao era, respectively.
distinguishable from those of late imperial times, there is increasing evidence of the influence of traditional ideas upon the practices and procedures of a spectrum of institutions ranging from the state to the family.\(^7\) There also remains some similarities between the material conditions of late imperial China and the post Mao-era, particularly the high population to arable land ratio in a country where the vast majority of persons continue to earn a living through agricultural work.

Impetus for change in the structure of property institutions in the post-Mao era has come in part from the grassroots of society, as well as from the top. Kelliher has attempted to demonstrate that it was the Chinese peasantry that was the driving force behind the ascendancy of market structures and the privatization of resources, particularly land.\(^8\) While he perhaps has underestimated the nature of the dialectic between the leadership and masses, his study generates some


interesting questions. Given his conclusion that peasants and low level officials were instrumental in modifying property institutions, what concepts and practices did they embrace that contributed to the redesign of these institutions? To what extent are their ideas rooted in the past, and what is the degree of continuity with traditional approaches in the possession, management and transfer of resources? Are these ideas derived from or associated with Western style capitalism or Confucianism or some combination of both?

In considering the connection between traditional and contemporary approaches to property I am influenced by the works of a number of sinologists and historians who have found a degree of continuity between the intellectual and social forms of imperial China and the People's Republic. The erosion of central control in the post-Mao era and the ongoing reconfiguration of state-society relations recalls conditions in the late imperial Chinese state. In describing the transformation in the governing approach of the late twentieth century Chinese state, Lucian Pye wrote recently that:

9 Kelliher fails to consider adequately the question of the extent to which the ideas emanating from the peasantry were adopted by officials as their own, who then pursued reform goals to advance their own political interests. On this issue see Shirk, Susan L., The Political Logic of Economic Reform in China (Berkeley and Los Angeles: University of California Press, 1993).

The character of the Chinese state is thus reverting back to the traditional and highly ritualized Confucian state. The PRC state has a long way to go before becoming a Ming state, but it has already gone a long way from its Leninist tradition.\textsuperscript{11}

Traditional modes of thinking are either creeping back or being expressed more openly and thus are more apparent, thereby suggesting a reversal or disintegration of a spectrum of institutions and social relations that the Communist Party had struggled so hard to reform in an effort to erase all vestiges of traditional thought and practice.

Among the institutions targeted most immediately by the revolutionary Maoists as being critical for the destruction of the Confucian patriarchal order and necessary for the transformation to a socialist society were the family and the land holding system, hence the promulgation of the 1950 Marriage Law and the implementation of the Land Reform laws and policies during the period 1946-1952.\textsuperscript{12}

Yet it is in these same areas that the continuity of Confucian and imperial era ideas is perhaps most apparent. Recent research by social scientists reveals that traditional approaches in the ownership and management of land and other assets


held by family members are being practiced, and that even during the most radical periods under Mao's leadership, these ideas and practices never disappeared entirely.\textsuperscript{13} Traditional ideas of family relations and women also are being expressed today at all levels of society.\textsuperscript{14} In some cases social practices conflict with formal laws, such as where males generally inherit the property of their parents, although formal law provides that both males and females have equal inheritance rights.\textsuperscript{15} In other cases amendments to laws and regulations have been made or proposed that reverse revolutionary practices or reinstate traditional ones.\textsuperscript{16}

A number of scholars recently have called to question our understanding of the late twentieth century Chinese state, suggesting that it may be distorted by the excessive focus on revolution.\textsuperscript{17} Philip Huang proposes that scholarship on the


\textsuperscript{15} Ocko, Jonathan, “Women, Property and Law,” supra.

\textsuperscript{16} Among the more surprising legislative amendments proposed recently by some Chinese Communist Party members was the legalisation of prostitution, the eradication of which was one of the Party’s most touted social achievements. See: \textit{Far Eastern Economic Review}, August 4, 1994, at 11.

\textsuperscript{17} See: Esherick, Joseph, “Ten Theses on the Chinese Revolution,” \textit{21 Modern China} 45 (1995) at 69 who writes that “Modern Chinese history has been dominated and distorted by a teleology of revolution.”
twentieth century Chinese state may benefit from conceptualising the pre-1949 and post-1949 period as one seamless era. While Huang has a more limited time frame in mind, I would suggest that bridging the divide in modern Chinese history between the first and second halves of this century marks a significant step towards recognising the continuing influence of pre-twentieth century ideology and institutional structures. This is not to say that the Chinese Communist victory and the subsequent institutions that were established were not a radical break with the past, they most certainly were. Rather it is to suggest that much of twentieth century China was a period of transition, a series of changes from the toppling of the Qing dynasty around 1911 to the end of the Cultural Revolution in the mid-1970s. Whether the post-Mao era will be included in this transition phase is too early to determine. There are some reasons noted above why it may not, in which case we need to understand to what extent the ideas and institutions of the transition phase may be overshadowed by those of earlier eras.

In addition to works by sinologists on the continuity between China’s past and present, I have found some value in the theoretical explorations of the transformations underway in Eastern and Central European nations emerging from Marxist-Leninist based socioeconomic systems. Among these are David Stark’s application of the “path dependency” theory in his examination of four national privatization programs, and a study conducted by Szelényi and his associates on the trajectory of social change in Hungary.


The theory of path dependence was first applied to explain how future technological change is limited by the early technologies employed by a society.21 The historian Douglass North used the concept of path dependence to describe how the selection or development of institutions affects subsequent patterns in economic history.22 Stark has used the concept in his examination and analyses of government directed privatisation schemes in Poland, Hungary, the Czech and Slovak states, and the former East Germany.23 He explains path dependence as follows:

The strength of the concept of path dependence is precisely that it helps to explain outcomes where strategic actors are searching for departures from routines and attempting to restructure the rules of the game. Actors who seek to move in new directions find that their choices are constrained by existing institutional resources. Institutions limit the field of action, preclude some directions, and constrain certain courses. But institutions also favor the perception and selection of some strategies over others. Actors who try to introduce change need resources to overcome obstacles to change. This use of existing institutionalised resources is a principal part of the seeming paradox that even (and especially) [sic] instances of transformation are marked by path dependence.24

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21 A brief discussion on the origins of path dependence theory are set forth in Eggertsson, Thrain, “The Economics of Institutions: Avoiding the Open Field Syndrome and the Perils of Path Dependence,” 36 Acta Sociologica 223 (1993). He cites the work of W. Arthur as being the first to apply the concept of path dependence. See: Arthur, W., “Competing Technologies and Lock-in by Historical Events,” 99 Economic Journal 116 (1989). If we accept that the essence of the path dependence theory is that transformation is conditional upon existing material factors, then it is likely that the concept could be traced back to other works. See for example work done by Monod, Jacques, Chance and Necessity: An Essay on the Natural Philosophy of Modern Biology (New York: Vintage Books, 1972).


24 Ibid. at 19.
Stark found that in each of the four Central European states he examined the transition to a marketized economy was influenced significantly by existing cultural and social elements and forms of state socialism.

The concept of path dependence provides that change is constrained by existing factors. Thus, whether a society seeking or undergoing change ever reaches its destination is conditional on its available resources and the existing institutional barriers and transaction costs involved. This has at least two relevant implications here: (1) how far has Maoist China departed from its traditional past, that is to what extent did three decades of revolutionary class struggle eradicate traditional notions and institutions of property; and (2) how far have the Dengist era reforms diverged from the institutions put in place throughout the Maoist years.

Szelényi’s study is an investigation of the socioeconomic reforms in the Hungarian countryside in the late 1970s and early 1980s focusing on the rising phenomenon known as “embourgeoisement,” (when translated from the Hungarian). Embourgeoisement combines notions of entrepreneurship with those of citizenry, civil society and sense of community. Szelényi is concerned primarily with the entrepreneurial aspects of embourgeoisement, which his empirical data reveals is on

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25 Szelényi, Socialist Entrepreneurs, supra, at 50 - 58.
the upsurge. This finding lends support to his “meta-theory” that the nation is returning to its historical trajectory by travelling along the Third Road. The Third Road is an early twentieth century Central European idea that is critical of “Western-style capitalism” and embraces “Oriental notions of community,” and is characterised by:

family farms and large estates, market competition and bureaucratic paternalism, citizenship and officials’ powers [that] are carefully balanced in order to avoid both the anarchic individualism of its Western and the untrammelled state power of its Eastern neighbours.

Szelenyi sees Hungary’s social and economic development being interrupted by nearly half a century of war, civil unrest and foreign domination, both ideologically and physically through armed occupation. In the current period of reform, Hungary has an opportunity to develop institutions that emerge from its own soil, as it is no longer subject to the foreign and local authoritarian powers that imposed Leninist socioeconomic structures on society.

Despite the many differences in the culture, political institutions and economic systems of China and Hungary, there are some interesting similarities in

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26 Szelenyi identified the qualitative and quantitative aspects of post socialist institutions in the Hungarian countryside through surveys and interviews that he and his associates conducted.

27 Szelenyi terms it a “meta-theory” because he admits that he lacks sufficient and convincing evidence to explain the direction or pattern that the economic and social changes are taking. He notes that there is nothing certain or deterministic about such a development because it is possible that the country could restore its Soviet state socialist institutions or convert to Western style capitalism. Ibid. at 214.

28 Ibid. at 16 and 22.
their current situations. Like Hungary, China is experiencing a resurgence of entrepreneurship and market institutions, and perhaps even the formulation, some would say reemergence, of a civil society. China too experienced social and economic disruptions throughout the early decades of the this century as the result of warlordism, foreign imperialism and civil strife. Although the country has not been subjected to foreign domination since 1949, the leadership embraced an alien ideology that was imposed on the masses from the top down resulting in the radical reformulation of social and economic institutions, particularly those pertaining to


30 There has been much recent scholarship and discourse on the issue of a civil society in China, especially since the translation of Jurgen Habermas’s theoretical work on the rise and nature of civil society in Europe. See: Rowe, William T., “The Problem of ‘Civil Society’ in Late Imperial China,” 19 Modern China 136 (1993); Chamberlain, Heath B., “On the Search for Civil Society in China,” 19 Modern China 199 (1993); Huang, Philip, “Public Sphere’ / ‘Civil Society’ in China? The Third Realm Between State and Society,” 19 Modern China 216 (1993); Gold, Thomas, “The Resurgence of a Civil Society in China,” 1 Journal of Democracy 18 (1990); and Pye, Lucian, “The State and the Individual: An Overview” 127 The China Quarterly 443 (1991). For a perspective on Chinese views on the question of a civil society see: Ma, Shu-yun, “The Chinese Discourse on Civil Society,” 137 The China Quarterly 180 (1994). Prasenjit Duara is reported as holding the view that China is experiencing the reemergence of a civil society, albeit in much more muted form, that disappeared in the early 1900s with popular demands for a strong state in the Republican era. Ma Shu-yun relates that Duara expressed this position at a recent academic conference. Ibid. at 186.
property. This study, like Szelenyi's, considers to what extent the institutional forms that are appearing in a post-socialist society are extracted from or rooted in traditional concepts. Our focus, of course, is on property institutions, rather than the process of embourgeoisment.

B. Background on the Post-Mao Reforms in China

From the founding of the People's Republic of China (PRC) in 1949 up until the late 1970s China had a Soviet type command economy. The state and collectives owned and controlled most real property as well as commercial and industrial enterprises. Central government and Chinese Communist Party (CCP) authorities established production targets, supply quotas, prices and wages for state enterprises and collectives. Capital investment funds were provided to enterprises in the form of interest free grants. Agriculture production was organized into collectives and state owned farms. The raising of private crops and provision of services by individuals was discouraged, and during the Cultural Revolution (1965-1975)

31 It is well documented that economic and social change in China was formulated by the top, the CCP leadership, and imposed at the grassroots level in the 1950s and onwards. Selden, Mark, The Yenan Way in Revolutionary China, supra, and Hinton, William, Fanshen: A Documentary of Revolution in a Chinese Village, supra. While there may have been some popular acceptance of the Marxist-Leninist-Maoist institutions in the two decades after the establishment of the People's Republic, it can be stated with some authority that the CCP did not draw the bulk of its support from the masses based on its blueprints for socialist transformation. Rather the popularity of the CCP was based on its real and/or perceived superiority in resisting Japanese aggression. See: Johnson, Chalmers A., Peasant Nationalism and Communist Power: The Emergence of Revolutionary China, 1937 - 1945 (Stanford: Stanford University Press, 1962).

prohibited. The state obtained much its revenues from industrial surpluses, or profits, through the operative effect of a price scissors scheme. This was achieved by central authorities who set low prices for agricultural, forestry and mineral commodities and high prices for manufactured products.

With the death of Mao Xedong in 1976, two of the leading competing factions led respectively by Hua Goufeng and Deng Xiaoping began reexamining and restructuring a number of institutions in an effort to increase productivity and living standards and modernize and strengthen the country. The Decision of the Third Plenum of the Eleventh Central Committee of the Chinese Communist Party (CCP) held in the December 1978 foreshadowed the sweeping changes that were to occur in China's social and economic system. It described the implementation requirements of the Four Modernizations policy as follows.

Carrying out the Four Modernizations requires great growth in the productive forces, which in turn requires diverse changes in those aspects of the relations of production and the superstructure not in harmony with the growth of the productive forces, and requires changes in all methods of management, actions and thinking which stand in the way of such growth. Socialist modernization is therefore a profound and extensive revolution.\(^{33}\)

By the early 1980s profound and revolutionary changes were clearly evident throughout China's countryside as the relations of production between the majority of the population and the leading rural economic institutions, such as the collective,
Agriculture was de-collectivized and replaced by contract responsibility systems, of which there were two main forms, the contracting of output to households (bao chan dao hu) and the contracting of land to households (bao gan dao hu). These contracting systems gradually returned to the family unit the rights of production and distribution and led to the creation of open markets where surplus output was allowed to be sold freely. Incentives like these resulted in production increases and higher incomes setting the foundation for the development of rural industry. Reform of industry and commerce in the urban areas proceeded at a slower pace, yet proved to be equally revolutionary. Individual enterprises were legalised, and their increased production efficiency and relatively greater profitability presented serious challenges to state owned enterprises. By the late 1980s, state owned


35 The contracting of output to households (bao chan dao hu) and the contracting of land to households (bao gan dao hu) were often not distinguished well in the Chinese media in the late 1970s and early 1980s, and often were referred to as double contracting or (shung bao). In general bao chan dao hu is characterized by the allocation of a fixed amount of land to the household; specified output targets; and collective accounting and distribution. Bao gan dao hu abandoned the work point and collective crop management systems and permitted the retention of surplus output by the household. O'Leary, Greg and Watson, Andrew, “The Production Responsibility System and the Future of Collective Farming,” 8 The Australian Journal of Chinese Affairs 1 (1982) and Ash, Robert F., “Agricultural Policy Under the Impact of Reform,” in Y.Y. Kueh and Robert F. Walker (eds.), Economic trends in Chinese Agriculture: The Impact of Post-Mao Reforms (Oxford: Oxford University Press, 1993).
enterprises were held responsible not only for procuring inputs and hiring labor, but also for their own profits and losses. Faced with a growing credit squeeze, enterprises of all types explored and adopted new methods of raising capital, including the issuance of bonds and shares of stock. As in the agricultural sector, the implementation of the responsibility system in urban based industries has involved the rethinking of ownership concepts and the restructuring of property institutions. The Chinese Communist Party now refers to the model used in the restructuring of these institutions as “socialism with Chinese characteristics.”

C The State of the Field

There is a small but growing body of literature on the subject of property and ownership in post-1978 China. Initial investigations of this period addressed the issue of rural landownership in connection with the introduction of the agricultural

When Chinese officialdom speaks of “socialism with Chinese characteristics” they are, of course, not referring to their past, particularly their imperial history which is considered by socialist ideologues to be an era dominated by “feudalistic” institutions. Rather they are referring to what they conceive of as an essentially new and distinctive socioeconomic system that is neither capitalist nor socialist, but incorporates elements from both in light of the nation's special experiences and conditions. See the “Decision of Third Plenary Session of the 14th Central Committee of the CCP On Issues Concerning the Establishment of a Socialist Market Economic Structure” issued on Nov. 14, 1993, reported in Renmin Ribao [People's Daily], Nov. 17, 1993, at 1; translated and reprinted in China Economic News, Supplement No. 12, Nov. 29, 1993 and translated in FBIS China Daily Report, Nov. 17, 1993, at 22.

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household responsibility contract system. Work continues on this subject as more reliable data continues to be gathered. Recent scholarship addressing this issue has concentrated nearly exclusively on trying to unravel the enigma surrounding the separation of ownership and management rights.

A greater amount has been published on the ownership and control of enterprises. Early studies in this area tended to be descriptive, relating the many significant provisions of new laws and regulations. However, by the late 1980s there was somewhat more analysis and concentration, as research efforts were directed towards understanding the complex interplay between ownership and management in the context of China's economic reforms.


towards issues pertaining to state owned enterprises. This reflected the interest on the part of the international business and financial community in the establishment of stock issuing firms and the development of securities markets, as well as academic curiosity in the intense and sustained debates within China. Hsu has done a particularly good job in chronicling, identifying and analysing the many schools of thought in China on the issue of enterprise ownership and management. Two studies have looked at the issue of property rights and enterprise reform with reference to the provisions and theoretical underpinnings of the 1986 Chinese Civil Code. The most recent writings have focussed on the securitisation (gufenhua) of state owned enterprises and the implications for their possible privatisation.

Economists have analyzed the issues of property rights and disposition of state owned enterprises using mathematical models and theories associated with

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the new institutional school of economics. These works generally concentrate on the rights and responsibilities of enterprise managers operating under the contract management and profit retention systems. These analyses of property institutions often neglect historical events and social relations within China and are based on formalistic definitions of ownership. They also tend to be comparative, discussing Chinese enterprises in light of the privatization efforts underway in Eastern and Central European nations.

The connection between the status of property rights and markets in China is the subject of increasing interest. Some observers emphasize that the transfer of property interests from the government to private hands is evidence of the ascendancy of capitalism and the establishment of a market economy in China. Others stress that the ongoing restructuring of ownership relations primarily involves a downward reassignment of property interests to provincial and local authorities. Finally, a third viewpoint argues that there has been little actual


change in ownership relations and that the central government remains the
dominant actor in property relations through the maintenance of its entrenched
monopolies.\textsuperscript{47} This is not say that all writers on the subject are associated firmly
with one of these categories. Victor Nee, for example, underscores the existence and
importance of a diversity of organisational forms and plurality of property rights in
the Chinese economy.\textsuperscript{48} The limiting factor in many these assessments is that they
tend to focus on the state enterprise and not other forms of resources or assets.\textsuperscript{49}

In his recent article on state enterprise reforms, Wallace Wang briefly notes
that further reform of state enterprises, is dependent on their formal right to hold
independent and tradable property rights in the assets they manage.\textsuperscript{50} It is time to
consider more closely the resources and assets that are the object of ownership by
state enterprises and other entities, rather than limiting the study of property rights

\textsuperscript{47} Cheung, Steven N. S., “Privatization vs. Special Interests: The Experience of
China’s Economic Reforms,” in James A. Dorn and Wang Xi (eds.), Economic Reform
in China: Problems and Prospects (Chicago and London: The University of Chicago
Press, 1990) at 21-32 and Prybyla, Jan S., Reform in China and Other Socialist

\textsuperscript{48} Nee, Victor, “Organizational Dynamics of Market Transition: Hybrid Forms,
Property Rights, and Mixed Economy in China,” 37 Administrative Science Quarterly

\textsuperscript{49} I regard the enterprise as both a vehicle for the ownership, management and
control of resources and assets, such as land, equipment and intangibles (ie: intellectual property, money, etc.) and a resource or asset in its own right, since it is a
thing that is owned, as evidenced by claims of the state, debt instruments, or shares
of stock.

\textsuperscript{50} Wallace Wang, “Reforming State Enterprises in China: The Case for
While earlier studies have examined property rights in rural land, the investigation should be broadened and analyzed in a more comprehensive manner. Recent policy pronouncements by the CCP also suggest that there will be an enhanced need for a broader understanding of the nature and extent of property interests in a variety of resources.52

The current scholarship on property rights and the enterprise has been unable to break through and achieve an understanding of the ownership and management issue. In part this may be due to the fact that Chinese policymakers, officials and scholars have been unable to articulate clearly what they mean by enterprise ownership and management and how these concepts should be institutionalised. Some of these misunderstandings may stem from the use of language or ideas.

51 It is somewhat ironic that most English speaking legal scholars and attorneys writing on property in China have focussed exclusively on the state enterprise, when most Anglo-American property law concentrates on land and other natural resources. This is borne out by the content of law school texts and other treatises on property. See for example: Friedman, Lawrence, A History of American Law (New York: Simon & Schuster, 1973) and Ely, James W. Jr., The Guardian of Every Other Right: A Constitutional History of Property Rights. (New York and Oxford: Oxford University Press, 1992). Likewise, comparative and anthropological studies on property primarily address land and other natural resources, such as minerals and timber. See: Wiber, Melanie G., Politics, Property and Law in the Philippine Uplands (Waterloo, Ontario: Wilfred Laurier University Press, 1993).

52 The Decision of the Third Plenary Session of the 14th Central Committee of the CCP, held in November 1993, explained that China will expand and develop markets for capital, money, bulk agricultural commodities, land use rights and housing. In light of this agenda, it will be increasingly important for market participants to understand the property rights associated with the resources they are exchanging, transferring or acquiring. See the “Decision of Third Plenary Session of the 14th Central Committee of the CCP On Issues Concerning the Establishment of a Socialist Market Economic Structure” issued on Nov. 14, 1993, (hereafter referred to as the “1993 Party Decision”) reported in Renmin Ribao [People’s Daily], Nov. 17, 1993, at 1; translated and reprinted in China Economic News, Supplement No. 12, Nov. 29, 1993 and translated in FBIS China Daily Report, Nov. 17, 1993, at 22.
created by Western capital, corporate or financial interests, as well as Marxist thought, to describe property arrangements rooted in traditional Chinese concepts and institutions. By analysing traditional property concepts and institutions, we may be able to gain some insight into whether they may have some effect upon the restructuring of contemporary institutions. Obtaining an understanding of Chinese notions of property concepts and institutions would have relevance not only to the state enterprise, but also rural and urban real property, and other resources such as mines, woodlands and waterways.53

D. Methodological and Theoretical Issues

1. The Approach of the Study

As mentioned briefly above the basis for drawing connections between traditional and contemporary approaches to the ownership and management of resources is grounded in the similarity of ideological and material conditions. The hypothesis that there may be some continuity in traditional and contemporary property concepts and institutions presumes in part that there are also similarities in ideal and material conditions. While this paper does not explore in detail the empirical evidence to affirm this presumption, there is I believe sufficient preliminary evidence to support it. Material similarities include the geographic conditions, of course; natural resource endowments; a predominantly, yet decreasing, agrarian mode of production; and a large, primarily rural based population. As mentioned above evidence from a number of recent studies and reports reveal that ideological factors comprised of cultural, religious and philosophical elements from traditional times were not eliminated or recast during much of this century to the extent previously believed.

54 The term “material” refers here to such things as geographic conditions; demographic factors including but not limited to population size and distribution (ie. rural versus urban); types and quantities of natural resources; mode of production; and technology known and employed.


56 See the discussion above at notes 10-14.
In considering similarities or continuities in ideal and material conditions between traditional and contemporary times and the influence of these conditions upon property concepts and institutions, there are several issues that I intend to concentrate on in this study. They include the following:

1. The types of institutions and forms of authority involved with, the holding, use and control of resources, and whether these institutions were associated with the official sphere (ie. the state), or the private sphere;

2. The nature of the ideology controlling or influencing those institutions;

3. The character of social and political relations (ie. individual, community, or state) pertaining to the possession, use and control of resources; and

4. Whether a discourse or public awareness emerged concerning property “rights” or the “rights” of the individual to hold and control resources.

If linkages do exist between the past and present, then the answers to these questions may provide insights into the character and form of current evolving economic and social institutions. They may inform us of the range of control and management of property accorded to the private and public spheres, as well as between the individual and the community. Much recent scholarship on property
rights in China has tended to assume that increased resource holding and management by persons or organizations in the private sphere is indicative of free market capitalism with individually based rights of property. The findings here may reveal that decreased state control and management over resources does not translate automatically into individual based property rights characteristic of Western capitalism.

2. Theoretical Frameworks

Analyses of property institutions through an investigation of material and / or ideological factors is hardly a novel approach. What generally distinguishes one study from the next in the use of this approach are the criteria addressed and perhaps more importantly the relative weight accorded to material and ideological factors. In his study of the development of Western law Harold Berman concluded that the nature of law was both material and ideological, and that neither factor was in itself universally decisive.57 This notion serves as a point of departure in the present study. However, first we review some approaches that have been utilised in exploring the material and ideological relationships in the development of property concepts and institutions.

Marx of course is a leading proponent of the view that material conditions, or the “base” as he called it, determine the ideological “superstructure” of a society, and

that law is part of that superstructure.\textsuperscript{58} Marx examined the relationship between material conditions and individually based property rights, or what is generally called private property, in the context of late fifteenth century England.\textsuperscript{59} He argued that the link between capital and private property was forged when the law recognized and enforced the right of a person holding legal title to land (i.e. the landowner or landlord) to claim the agricultural produce grown and harvested by the cultivator. The legal forms and ideology that recognized the right of the landowner to treat the land and its harvests as a commodity was critically necessary for the establishment of capitalism.\textsuperscript{60} According to Marx, laws of property, therefore, are an expression of the economic interests of the dominant class(es) of society.

Tigar and Levy extended Marx's analysis to demonstrate that bourgeoisie notions of property and contract replaced the unstructured ideology of feudalism and


\textsuperscript{59} Marx, Karl, \textit{Capital, Volume 1}, supra at 666-670.

secured the rise of capitalism.\textsuperscript{61} Over a period of several centuries, the bourgeoisie developed a legal ideology aimed at securing their economic and social interests through the development of institutions upholding exclusive, individually based rights of property. These interests, according to Tigar and Levy, stood in opposition to the “anarchy of feudal law, which was either actively hostile to commerce or was simply too incomplete and chaotic to permit predictable reliance upon it.”\textsuperscript{62} In order to legitimate the authority of their legal ideology, which was challenged by the Roman Catholic Church, feudal lords, and other medieval institutions, the bourgeoisie constructed a system of formal legal institutions, personnel, rules and judgments to be utilised and applied in a predictable manner.\textsuperscript{63} Eventually this bourgeoisie legal ideology was brought under the aegis of the state, which reified capitalist notions of absolute and exclusive private property. Tigar and Levy may be viewed as emphasizing the ideological component of property concepts and institutions to a greater extent than Marx.

North and Thomas, drawing upon economic principles associated with the new institutional school and Ronald Coase, have attempted to demonstrate that the rise of individually based rights of property and the legal institutions upholding those rights were essential not only for the development of capitalism, but more importantly, were a prerequisite for the economic growth and advancement of


\textsuperscript{62} Ibid. at 284.

\textsuperscript{63} Ibid. at 280.
Western Europe since the late Middle Ages. They point to how the absolutist monarchies in France and Spain, fearing an erosion of their political and economic base, were reluctant to adjust property rights in favour of individuals, while during the same period, England and the Netherlands, developed institutions enhancing and protecting private property and resource movements in markets. They concluded that the Dutch and British institutions provided incentives for sustained economic growth, including the inducements required to encourage innovation and industrialisation. The lack of such institutions in other historically or currently underdeveloped nations are responsible for inefficient social and economic organization, which impedes growth and advancement.

After his collaborative work with Paul Thomas, North published two other major works expounding a theoretical framework for analysing how historical change is effected by economic and political institutions. North defines institutions to be a "set of rules; compliance procedures; and moral and ethical behavioural norms designed to constrain the behaviour of individuals in the intent of maximising the wealth or utility of principals." A particular set of institutional rules, termed

64 North, Douglass C. and Thomas, Robert, P., The Rise of the Western World - A New Economic History (Cambridge, Cambridge University Press: 1973). Since the publication of this work, North has advocated the analytical tools of the new institutional school of economics, which while distinct from the neoclassical school of thought, shares some of the same assumptions and approaches.


“constitutional rules” operate to “specify the basic structure of property rights and control of the state.” As constitutional rules become better defined and enforced, transaction costs are reduced thereby aiding the development of efficient factor markets in land and other resources.

According to North, institutional rules are made on the basis of the perceived transactional costs of compliance. North’s approach assumes that those persons devising institutional rules have some perception or knowledge of transaction costs, which in itself assumes that there is some basis for identifying and quantifying the transaction costs. This assumption could jeopardize the validity of the results of the investigation and analysis of a society whose inhabitants: (1) do not think, either explicitly or implicitly, in terms of transaction costs, (2) do not act in the rational manner presumed by North so as to minimize their transaction costs; or (3) have no means of properly identifying or quantifying their transactions costs. An additional drawback in analysing property rights in terms of transaction costs is that it directs the focus of investigations and analyses towards markets and other forums for the exchange of resources. As John Rawls reminds us, there is, “no essential tie between the use of free markets and private ownership of the instruments of production.”

Thus, to obtain a broader understanding on the nature and extent of property rights and their effect on the economic and social development of a

68 Ibid. at 203.

69 North asserts that the total cost of production, that undergirds economic development, is composed of the resource factors of land, capital and labor, and that property rights define, protect and enforce these factors. North, Douglass, C., Institutions, Institutional Change and Economic Performance (Cambridge: Cambridge University Press, 1990) at 28.

community or nation, one needs to expand the scope of the investigation beyond the marketplace. Despite these and other flaws, North's works have been applied by several scholars examining the connection between the development of property institutions beyond the European context.\footnote{David Feeny has used North's theory in a comparative investigation of property rights in land in Thailand, India, Burma and the Philippines. See: Feeny, David, "The Developments of Property Rights in Land: A Comparative Study," in Robert H. Bates, (ed.), Toward a Political Economy of Development (Berkeley: University of California Press, 1988), at 272-299. More recently Feeny conducted a more in depth study on economic change and property rights in nineteenth century Thailand. See: Feeny, David, "The Decline of Property Rights in Man in Thailand, 1800 - 1913" 49 The Journal of Economic History 285 (1989). Both these studies demonstrated that rising land values elicited institutional changes that responded to the need for the clarification and enforcement of property rights. Also see: Libecap, Gary D. Contracting for Property Rights (Cambridge and New York: Cambridge University Press, 1989). Libecap's work investigates the formation of property rights institutions in the U.S. The author shows that property right institutions have provided an incentive system that shapes resource allocation in fisheries, timber, range land and minerals.}

Several studies on property rights in traditional and contemporary China have applied North's theoretical framework.\footnote{See: Chen, Fu-mei Chang and Myers, Ramon H., "Customary Law and the Economic Growth of China During the Ch'ing Period," 3 Ch'ing-shi wen-t'i 5:1 (1976). Myers, Ramon, "Customary Law, Markets, and Resource Transactions in Late Imperial China," Explorations in the New Economic History (New York: Academic Press, 1982). Buoye, Thomas, "From Patrimony to Commodity: Changing Concepts of Land and Social Conflict in Guangdong Province During the Qianlong Reign (1736-1795)," 14 Late Imperial China (2) 33 (1993). More recently Myers has applied the analysis of transaction costs and property rights to examine conditions and institutions in contemporary post-Mao China. See: Myers, Ramon, "Property Rights, Economic Modernization During the Economic Reforms," in Ilpyong J. Kim and Bruce L. Reynolds (eds.), Chinese Economic Policy (New York: Professors World Peace Academy, 1988).} Ramon Myers is the leading proponent of North's approach in the China studies field. Working alone and with Chen Fu-mei Chang, he has utilized North's theory in an effort to demonstrate that the development of property rights in late imperial China reduced transaction costs in...
the exchange of land and other resources, thereby hastening the decline of feudalism and stimulating the rise of a commercialised economy, resulting in the growth and expansion of the Qing economy.73

Myers never states clearly what he means by the term property rights in the Chinese context. However, he does inform us that such rights typically arose between two or more individuals, who entered into contractual agreements over the disposition of a resource or asset. Thus, unlike the constitutional rules that North spoke of, whereby property rights arose from state action, Myers sees property rights in late imperial China as being initially the product of customary law. According to Chen and Myers customary legal arrangements checked the inhibitory role of the imperial state in resource transactions and provided an impetus for the expansion of the Qing economy.74 Chen and Myers, therefore, emphasize the role that ideas from the private sphere played in the development of property rights. However, they do not address specifically the origin of those ideas and the dynamics between the private and official spheres.

By focusing on contractual agreements, which by their very nature attempt to define and clarify the terms of a transaction, the findings of Chen and Myers may have overstated the clarity of property rights in land and the other resources examined. Furthermore, the focus on contractual agreements involving individual parties implies that property rights were primarily individual. In neither of his


works does Myers analyze the nature and extent of individual based rights in
resources, rather he assumes that individuals dealing in resources such as land were
vested with absolute rights of property. His conclusion that individually based
rights of property spurred the development of markets, inhibited the role of the state,
and propelled the Qing economy forward is misleading. It fails to address the
dominant ideology of the late imperial state, which generally refrained from
intervening to a great extent in market transactions. The issues of the nature and
extent of resource ownership and management by the public and private spheres in
late imperial China is one that deserves to be addressed in more detail.

The way in which works like North, and Tigar and Levy, analyze the linkages
between law and material society, are according to Sugarman indicative of a simple
functionalist approach, because they assume that law and the state essentially
aligned with, or were a function of, the relations of production.75 Law says
Sugarman neither necessarily mirrors the needs of dominant classes, nor is essential
to certain social and economic ends. Rather, the connections between law and the
economy tend be much more complex and contradictory.76 Proper analysis of these
connections requires consideration of the role and character of society. Once
society and the plethora of social groupings it contains is interposed in the analysis,
then writes Sugarman "it becomes much more difficult to talk of the relation between
law and economy in terms of a close functional fit."77 The appropriate analysis is
one which considers the individual and society in conjunction with law, state, and

75 Sugarman, David, "Law, Economy and The State in England," supra at 255.
76 Ibid.
77 Ibid. at 256 - 257, citing Gordon, R.W., "Historicism in Legal Scholarship," 90
In analysing property concepts and institutions, the dynamics among individual, society and the state must be considered. An absolutist conception of property that provides the private individual or the state with exclusive rights does not comport with the historical record. Sugarman and Neale explain that if such a conception actually had been put into practice it would have slowed the movement away from feudalism in seventeenth century England.\textsuperscript{78} English landholders, regardless of class or ideology, were developing flexible and practical approaches to property rights in response to their needs and concerns. An example of this was the development of the English entail, which placed legal restraints on ownership and use to ensure that land remained in the family for generations to come. As will be discussed later, similar approaches in the form of the charitable estate were devised and implemented by Chinese landed families and lineages of all classes as early as the late Tang and early Song eras when land became freely alienable under imperial law. Rather than being conceived and analyzed as an absolute right, property needs to be looked at as a bundle of rights. Such an approach is employed in this study as will be explained in the next section. Viewed in this manner numerous and varied interests, including those of the individual, community or state, may be located in the same resource or asset, be it a plot of land, a forest or a corporation.

Another approach that has some merit in analysing property institutions is the neoclassical economic approach, which has been used to analyze the evolution

and development of property institutions in historic and contemporary periods. The weakness of the approach is that it fails to address among other things ideological and cultural elements, which are critical to a comprehensive understanding of property concepts and institutions. The utility of the approach stems primarily from its recognition that property institutions arise from the need to address conditions of scarcity.

All societies are confronted with the problem of resource scarcity, either in terms of labor, land, other natural resources, and human constructed resources such as money and credit. Pejovich explains the implications of scarcity for property institutions:

Scarcity is always present.... all human societies must face and resolve two fundamental issues: who gets what and who does what. The former concerns the distribution of goods... the latter concerns production.80

At least since Bentham, Western, particularly Anglo-American, political and economic institutions have addressed resource scarcity through application of the

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principle of utility maximisation. One reason why neoclassical political economists focus their attention on the state and market is because these two institutions are seen as the primary mechanisms effectuating utility maximisation so as to ensure the efficient allocation of resources. It is this narrow focus on policies and institutions of the state towards the market that provides an inadequate account of property concepts and institutions. A number of the works cited above in the discussion of the "State of the Field," Section C, have adopted this focus and analyse property rights in terms of efficiency maximisation. Such analyses and discussions generate distorted understandings of property rights and concepts because they focus almost exclusively on formal legal institutions and organizations such as the state enterprise. The analysis needs to be supplemented by investigations into the social, cultural and other factors affecting the conduct of the state and market, as well as the community and individual. Kemp's criticism of the unbalanced approach to studies of property rights in the context of rural land systems is instructive, he writes as follows:

All too often the study of land tenure in agrarian states is treated either as a dimension of economic organization, or with respect to its more formal characteristics, as pertaining to the sphere of law. With both approaches there is the danger of ignoring or at least

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82 Kindleberger for example states that in the absence of the state, the allocation and use of resources would be determined by the market, while in the absence of the market, resources would be allocated according to political and social criteria designated by the state. See: Kindleberger, Charles, Power and Money: The Economics of International Politics and the Politics of International Economics (New York: Basic Books, 1970) at 5.

83 See notes 39 through 48 above in the discussion of the state of the field.
underplaying the fact that the formation and regulation of tenurial arrangements is an expression of the political order of society.84

This study seeks to combine an analysis of material factors, particularly the effects generated by conditions of scarcity, with an analysis of ideological and cultural factors. The scope of the study will seek to encompass the conduct and practices of the individual and community as well as formal legal structures of the state.

3. Resources to be Examined in This Study

In selecting the resources to be examined, I have identified those that were valued in Chinese society in both traditional and contemporary times and possessed or used by a large number of persons. Resources with high value, but low frequencies of transactions are unlikely to provide us with an accurate perspective on property concepts and institutions. Such items are likely to be handled by a small cross section or elite segment of the public and private spheres. Resources that are used frequently, but lack substantial market value are likely to have few property institutions associated with them. Thus, the selection of resources or assets for this study has been made on the combined basis of the frequency or volume of their use and exchange and on their economic or market value in society, in the neoclassical sense of supply and demand. The economic value of a resource reflects more than just material conditions, it is also an indicator of ideological factors and normative priorities. Resources in demand for either material or ideological reasons typically are surrounded by richer and more detailed customs, rules and institutions that define how they are to be possessed, managed, used and exchanged.

Throughout imperial times and into the early twentieth century among the resources that were both highly valued and exchanged or used in relatively high frequency or volume were land, water, grain, timber (and tree products such as tung oil), tea, textiles (such as silk and cotton), minerals (such as salt, copper, iron, and coal), and money and credit. An actual ranking of these resources according to our two criteria fluctuates according to the specific geographic location and periods of time.

I have chosen to focus on the property rights and institutions pertaining to land and address to a lesser extent several resources integrally related with land: timber, minerals and water. Throughout imperial times land was the most important resource in light of the criteria specified above. Water was a critical

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85 This listing is based largely, but not exclusively, on information from the following sources: Needham, Joseph, Science and Civilization in China (Cambridge: Cambridge University Press, 1965); Elvin, Mark, The Pattern of the Chinese Past (Stanford: Stanford Univ. Press, 1973); and Chou, Chin-sheng, Zhongguo jingji shi [An Economic History of China], translated and condensed by Edward H. Kaplan (Bellingham, WA: Western Washington State College, 1974). The list is restricted to tangible items, with the possible exception of credit, although even that is represented in part by money.

86 In the late twentieth century land continues to be among the most valued, used and frequently exchanged resources or assets in China. See generally: Bell, Michael, et al., China at the Threshold of a Market Economy (Washington, D.C.: International Monetary Fund, 1993). The other significant resource is capital and credit. Nearly three quarters of China's citizens continue to earn a living from agriculture. For these people land continues to be a critical resource. Reform policies now permit the transfer of land use rights under certain conditions, in both rural and urban areas. Transactions in land use rights and housing have fetched record high prices in recent years. See: Sender, Henry, "Just Like Hong Kong," Far Eastern Economic Review, August 12, 1993 at 71 and Wong, Jesse, "China's Residential Real Estate Market Booms," Asian Wall Street Journal Weekly, February 17, 1992 at 2. For rural inhabitants and increasingly urban ones too, housing represents the accumulation of personal savings, and many new institutions are evolving that address property interests in this asset.
resource in the dry land agricultural areas of the north, where it was often in short
supply. In the south shortages of water were not as frequent a problem, but access
to water supplies was still critical for the wetland rice culture. Although wood was
not marketed in great quantities, there was a sustained high demand for it by both
the public and private spheres. Wood was the energy source of choice into the late
nineteenth century and was the primary construction material throughout imperial
times for official buildings, public works, and urban structures. Minerals such as
salt, iron, copper and coal were of critical importance to the state throughout much of
the imperial era. As the second most important source of revenue for the imperial
state since the Tang era, salt came under strict state control. Both copper and
coal increasingly became an important resource as China’s economy became both
more monetised and industrialised during the Qing dynasty.

87 Buck, John L., Land Utilization in China (Chicago: University of Chicago
Press, 1937) at 25.

88 See: Adshead, S.A.M., “Timber as a Factor in Chinese History: Problems,
Sources and Hypotheses,” Proceedings of the First Symposium on Asian Studies
(Hong Kong, 1979).

89 Twitchett, Denis, Financial Administration Under the T'ang Dynasty (Second
Edition), (Cambridge: Cambridge University Press, 1970) and Edkins, Joseph, The
Revenue and Taxation of the Chinese Empire (Shanghai, 1903).

90 Sun, E-Tu Zen, “Ch'ing Government and the Mineral Industries Before 1800,”
II. Fundamental Property Relationships and Concepts

A. The Idea of Property: Defining a Concept and Framing a Method of Analysis

It is important at the outset to define what is meant herein by the terms property and ownership. In defining these concepts not only do I clarify the differences between this study and others that address the issue of property rights, but I also bring to light some of my own assumptions and preconceptions. I have made an attempt to select a definition that will be useful and appropriate in a cross-cultural study. By appropriate, I mean one that is capable of focussing on factors that will aid in our understanding of property concepts.

In observing and analysing a society and culture different from that which one was socialised in, one's findings and conclusions tend to bear the imprint of the values and ideological notions carried by the observer, thus calling into question the objectivity of the study. In pursuing a study of Chinese legal institutions Lubman has urged Western scholars to proceed with caution.

How careful we in the West must be to restrain ourselves from employing our own notions about the nature of legal institutions, . . ., in our study of Chinese institutions. We have no other assumptions to begin with, of course, other than those formed by our own training and immersion in Western law.91

Regardless of what steps Western trained legal observers may take to proceed in an

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neutral and detached manner, they cannot rid themselves of all ideas which are a product of their training and socialisation. Even our attempts to select objective tools and or devise a neutral methodological approach reflects our limitations. Alford encourages us not to be frustrated by this epistemological problem.

The limitations of subjective knowledge should not be taken as a sign of surrender, suggesting that we abandon our efforts at making judgments about other societies because we are unable fully to escape our own values in considering that which is foreign. Rather these inescapable limitations should serve as a reminder of how vital it is that we commence any comparative inquiry by seeking to rigorously identify the values that shape our thinking.92

That is what I do below in defining the notion of property and ownership that is used herein.

Despite the many differences that exist among Western philosophers and writers addressing issues of property, some consensus exists on a basic definition of property. According to Grunebaum such diverse writers as Hobbes, Locke and Marx declared property to be the relationship among persons with respect to things.93 Pejovich similarly found that Roman law, English common law, Marx and the new institutional economics school were all in agreement that property is the relationships among persons that arise from the existence of scarce goods and


pertain to their use. This more restrictive definition suggests that things that lack economic value as determined by some form of market or allocation system are not subject to certain claims, uses or transfers. Pejovich and Grunebaum may not be accurately representing Marx. Current Western Marxists agree that property concerns relations among persons. However, they would disagree that those relations arise or exist with respect to resources, rather such relations derive from the means and conditions of production.

Munzer and Becker each have attempted to describe a legal conception of property by clarifying these social relationships. They do this by combining the Hohfeldian system of "fundamental legal conceptions" with the analysis of ownership put forward by Honoré. Briefly stated the Hohfeldian system of fundamental legal conceptions is composed of four basic elements, each having its respective correlative. Hohfeld arranged these as follows: rights and duties; privileges and no-rights; powers and liabilities; and immunities and disabilities. Hohfeld asserts


95 Contemporary Marxists define property to be the relationships among persons with respect to the means and conditions of production. See: USSR Academy of Sciences, (ed.), Property in the USSR and Countries of Eastern Europe: From Uniformity to Diversity (Moscow: Nauka Publishers, 1990) at 10-11.


that a right held by a person necessarily entails other persons having a duty to respect that right. Privileges are akin to liberties, which result in others being devoid of rights, hence the designation "no-rights." Powers refer to legal powers, whereby one holds legitimate and recognized authority to alter the position of him/herself or others. The correlative here, liability, means that others potentially may have their position altered by the one holding the power. Finally, immunity means that one's legal position cannot be altered or disturbed, and others are subject to the correlative inability to alter or disturb that position.

Honore paired what he termed the "standard incidents of ownership" with Hohfeld's fundamental legal conceptions. Honore identified these "standard incidents of ownership" through an empirical and comparative examination of various legal systems. The standard incidents of ownership are those elements of property that are common to all "mature legal systems." Although Honore does not explain clearly what he means by a "mature legal system," he implicitly includes China. We may interpret Honore to mean that in a legal system such as China's the concept of property is recognized, explicitly or implicitly, as having the incidents of ownership enumerated above. The standard incidents of ownership that may be held by the state or actors within society, including but not limited to individuals, organizations, and corporations, are as follows:

1. the right to possess (which includes the right to exclude);
2. the right to use (that is personal use and enjoyment, distinct from the right to manage);

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3. the right to manage (that is the right to decide how and by whom a resource or article is to be used);

4. the right to derive income (which includes a broad range of benefits such as rents, profits, etc.);

5. the right to the capital (that is the power to alienate, consume, modify or destroy, in whole or in part);

6. the right to security (that is immunity from expropriation);

7. the incident to transmit (that is the transfer of an ownership interest to one's successors);

8. the incident of absence of term (that is the indeterminate length of one's interest in a resource or asset);

9. the prohibition of harmful use (that is the duty to avoid harming others);

10. the liability to execution (that is liability to have a resource taken away to satisfy a debt or judgment); and

11. the residuary character (that is the existence of rules for determining ownership when rights lapse).

Honore concluded that full or liberal ownership can be said to vest in that person who holds the full array of these incidents of ownership. Nevertheless, no single incident of ownership is a necessary or conditional element for ownership. Thus, one may have limited or restricted ownership, of which there are numerous permutations.¹⁰⁰

Munzer integrates the analytic frameworks put forward by Hohfeld and Honore to arrive at a "legal conception of property," which he describes as involving:

a constellation of Hohfeldian elements, correlative and opposites; a specification of standard incidents of ownership and other related but less powerful interests; ... Hohfeld's conceptions are normative modalities. In the more specific form of Honore's incidents, these are

¹⁰⁰ Becker, supra at 21.
the relations that constitute property. Metaphorically, they are the "sticks" in the bundle called property. Notice, however, that property also includes less powerful collections of incidents that do not rise to the level of ownership.\textsuperscript{101}

He explains that this Hohfeldian based conception of property allows for cross-cultural investigations because it enables an analyst to clarify relations among peoples in widely different social settings and legal systems and admits of the numerous variations in the incidents that comprise ownership and the things that can be owned. He supports this claim by citing evidence of the general acceptance of the Hohfeldian scheme in empirical studies conducted by social scientists, as well as its use by anthropologists in their studies of non-Western social and legal systems.\textsuperscript{102}

This conception of property and ownership set forth by Munzer will be utilised in part to aid in the identification of Chinese notions of property interests and rights. When I speak of a "property interest" or a "property right" I am referring to some element or aspect of this integration of the Hohfeldian system of "fundamental legal

\textsuperscript{101} Munzer, \textit{A Theory of Property}, supra at 23.

conceptions” with the incidents of ownership explained by Honoré. When I speak of “ownership” I am referring to some collection of the incidents of ownership identified by Honoré.

There is a danger of course in using these definitions as analytical tools to investigate institutions and practices in China. That is we may become too dependent on them and exclude from our investigation those things that do not comport with these definitions. As William Jones has warned there is the risk in such circumstances that there will be undue attention placed on those concepts and matters that are recognisable and familiar, and thus insufficient concentration on those areas that either were or are of greatest concern and importance to the Chinese.

B. Traditional Property Concepts in China

Throughout the imperial era there was a scarcity of public, positive property law pertaining to interests of the private sector or society. This is true even for later periods when China was experiencing a commercial revolution, and when there was an increasing variety and number of assets and resources that could be held by


the private sphere. The state had a minimal interest in safeguarding the rights of individuals or their organizations. Rather the ruling imperial court was concerned primarily with maintaining social harmony and preserving its own power and legitimacy. These two objectives were integrally linked, for if the state failed in securing the former, it risked losing the mandate of heaven, the moral basis for the emperor’s leadership. It was believed that if social relationships operated properly the interests of the state would be met.

One of the dominant objects of all imperial legal codes was the correct functioning of the five fundamental social relationships prescribed by Confucian ideology (wu lun): ruler and subject, father and son, elder and younger brother, husband and wife, and between friends. Imperial law that did address property issues (i.e. relations between people with respect to things) chiefly was directed to proscribing conduct that threatened or interfered with the stability and harmony of these five important social relationships. This is not to say that there were no other sources of private property law. Below the state level there was a complex array of rules, norms, and customs regulating relations in the

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106 This is a significant difference from the Western experience, which at the time of its commercial revolution, witnessed the publication of much literature addressing the subject of property and the private interests therein. See: Bronowski, J. and Mazlish, B., The Western Intellectual Tradition: From Leonardo to Hegel (New York: Harper, 1960) at Part III.


108 Except for the relationship between friends, the fundamental relationships are vertical in nature, that is one person is considered senior or superior to the other. The critical aspect of these vertical relationships is the duty of respect and honor that the junior member of the relationship owes to the senior. This reflects the Confucian belief that the harmonious maintenance of these relationships would secure the well being of the state and society. Fung Yu-Lan (edited by Derk Bodde), A Short History of Chinese Philosophy (New York: Free Press, 1952) at 21 and 28.
family, lineage, guild, village and broader community, but these frequently reflected
the Confucian norms and values held by the local elites and officials. The most
important social relationships were those involving the family, which served as both
a model and building block for all other institutions including the state itself.

1. The Family and the Individual

The family was regarded as a natural and fundamental social unit, as is
revealed in the following excerpt from the I-Ching.

Heaven and earth existing, all material things then got their existence. All material things having existence, afterwards there came male and female. From the existence of male and female there came afterwards husband and wife. From husband and wife there came father and son. From father and son there came ruler and minister. From ruler and minister there came high and low. . . afterwards came the arrangements of propriety and righteousness.

In this expository on the evolution of the natural world and human society the origins of the world or humankind are not revealed clearly, but it is understood that

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individuals owe their existence to their parents, and that from the family emerged society, the state and the rules governing them. Similar cosmological explanations were offered by the Taoists, who explained that people, like all other things, emerged from the interaction or integration of the two basic types of the vital material force (\(\text{ch} i\)) known as \(\text{y} i\n\) and \(\text{y} a\n\) through the medium of one's parents.\(^{112}\) Rather than looking up to a supreme being or deity, individuals looked up to their parents and ancestors. These philosophical outlooks had an important bearing on property concepts and institutions, for it was the family and not the individual that was considered to be the primary entity endowed with authority to hold and control resources and assets.

The diminished rights of the individual in China derive in part from the belief that father and son were one entity (\(i\ t\i\)), and that the latter had no rights to his physical body. Shiga calls attention to the concept that father and son were also considered one breath (\(\text{t} u\n\text{c} h\i\)). Every man's breath was considered an extension of the breath he received from his father, in keeping with the expression "of divided form but of the same breath" (\(\text{f} e\n\text{n} \ x\i\n\text{t} u\n\text{g} \ c\i\)).\(^{113}\) The origins of this doctrine may be traced to the \textit{Analects}, the six Confucian classics. In the \textit{I \i \i}, one of the Confucian classics, it is written that "the father and sons are one body, the husband and wife

\(^{112}\) Similar cosmological explanations were offered by the Taoists, who claimed that people, like all other things, emerged from the interaction or integration of the two basic types of the vital material force (\(\text{ch} i\)) known as \(\text{y} i\n\) and \(\text{y} a\n\). Rather than owing their existence to the work of a supreme being or deity, individuals are the result of a transformation of heaven and earth or reproduction of male and female. Tu Wei-ming, \textit{Confucian Thought: Selfhood as Creative Transformation} (Albany: State University of New York, 1985) at 45.

are one body, and the brothers are one body." In the *Li Ji* it similarly is written that while the parents are living sons and daughters are not to have independent and separate possession or ownership of property such as land or money. This principle was interpreted by later scholars such as Si Maguang to support the argument that parents had exclusive possession and control over their children's body. He wrote that "the son's body is the body of the father. Even the body of the son is not his possession, not to mention the property." 

The absence of individual ownership over one's body has been an enduring principle as revealed in successive imperial legal codes as well as customary practices. During the early Han parents were justified in murdering their children if they acted inhumanely or had engaged in unfilial behavior. The state had no right to examine the reason given by the parents, nor could it investigate whether the child actually had acted improperly. From the late Han down through the early Song the killing of children and grandchildren was a punishable offence with few exceptions. However with the Confucianization of China's social and legal institutions, parents again were vested with legal authority to take the life of a son or daughter under certain circumstances, such as when they acted in an unfilial manner, from the late

114 Ibid., at 119-120.


Song down to the Qing. In this regard parents effectively had possessory and control interests in their children. While there were cases of parents killing their own child, this act was often not done directly. More commonly parents would request the state to punish a child, which as Ch’ü explains, rendered the government a mere agent of the parents as far as matters of filial discipline were concerned.\textsuperscript{118}

Reflecting popular belief in the provisions of the classics, as well as perhaps the authority of the law, was the practice of treating one’s body with filial respect. This notion became the basis for a common proverb which one still hears today: “Shenti fa fu shou zhi fumu buke huishang” [Body, hair and skin received from parents, should not be harmed]. An individual's body was considered to be a sacred gift from his or her parents. Sons in particular had a duty to maintain good health, continue the family line, eschew suicide, and behave properly to avoid punishment, which not only brought harm to their bodies but shame to their parents. The duty-right correlation in the bodies of children finds support in provisions of the imperial legal code.\textsuperscript{119} Since the Han dynasty there were cases in which amnesties and clemencies were granted to persons sentenced to death, banishment or forced labor if they were an only child. The rationale for this was that the principle of filial piety should not be interfered with so as to deprive a parent or grandparent of support and

\textsuperscript{118} Ibid. at 27.

\textsuperscript{119} Imperial rules on punishment reflect this thinking regarding an individual and his body. Under the death sentences there were two to three forms of execution, strangulation, beheading and death by slicing, in order of severity. While it was recognized that strangulation was more painful than beheading, the former was considered a lower degree of punishment because the body was kept intact, thus bringing less shame to the family as well as allowing the spirit of the deceased to travel to the afterlife. MacCormack, Geoffrey, Traditional Chinese Penal Law (Edinburgh: Edinburgh University Press, 1990) at 101 and McKnight, Brian E., Law and Order in Sung China (Cambridge and New York: Cambridge University Press, 1992) at 447.

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care provided by the child. In all legal codes from Tang down through the Qing there were provisions whereby an offender could appeal or request a pardon or postponement of punishment. After the death of the parent or grandparent whom required support, the convicted child might then be punished or sentenced to death.\footnote{See: MacCormack, \textit{Traditional Chinese Penal Law}, supra at 105 -118; McKnight, Brian E., \textit{The Quality of Mercy: Amnesties and Traditional Chinese Justice} (Honolulu: University of Hawaii Press, 1981); and Ch'\i, Tung-tsu, \textit{Law and Society in Traditional China}, supra at 76-78.}

The beliefs and practices of imperial China stand in stark contrast with the Judaeo-Christian notions underpinning Western property institutions. The Book of Genesis explains that God was a grand creator who ex nihilo made man in his own image and granted him dominion over the earth and its resources.\footnote{\textit{Genesis, Verse 1, Lines 27 and 28 read in part: “So God created man in his own image; in the image of God he created him; male and female he created them. God blessed them and said to them, “Be fruitful and increase, fill the earth and subdue it.” \textit{The New English Bible} (Oxford: Oxford University Press, 1970) at 2.} \footnote{\textit{Genesis, Verse 2, Line 7 reads: “Then the Lord God formed a man from the dust of the ground and breathed into his nostrils the breath of life.” \textit{Ibid.} at 2.} \footnote{See: John Locke, \textit{Second Treatise of Government} (1690) in Peter Laslett (ed.), \textit{Two Treatises of Government}, Second Edition, (Cambridge: Cambridge University Press, 1967) at Section 27.}} It was God who breathed life into Adam, and it was God who owned the body of an individual.\footnote{\textit{Genesis, Verse 2, Line 7 reads: “Then the Lord God formed a man from the dust of the ground and breathed into his nostrils the breath of life.” \textit{Ibid.} at 2.}} Locke seems to have recognized this when he wrote “All the Servants of one Sovereign Master, sent into this World by his order and about his business, they are his property, whose workmanship they are.”\footnote{See: John Locke, \textit{Second Treatise of Government} (1690) in Peter Laslett (ed.), \textit{Two Treatises of Government}, Second Edition, (Cambridge: Cambridge University Press, 1967) at Section 27.} In following the commands of their God believers struggled to bring the land under their control. They also emulated their God by becoming creators themselves, and what they made or removed from a state of nature through their labor labor became their property. This is the Lockean
justification for individually based rights of private property. To subdue nature, transform the earth and exclude others from a piece of it was the ideal. Blackstone, who had an enduring influence on Anglo-American property law, evidently was moved greatly by this notion when he wrote:

There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.\(^{124}\)

In the post-Renaissance West the individual identified to a large degree with the material. It is the power and the right to control a finite piece of the material world that defines and gives meaning to the Western individual.

The Chinese conceived of a different ideal society, one in which the individual identified with the family and revered the head of the household. Under this scheme emerged different norms and rights regarding the possession and control of resources. Father and son were considered a single continuous being. The unity of being in the father and son relation gave rise to a unity in property ownership. As Hsu explains, “whatever the son is the father is, and whatever the one has the other has.”\(^{125}\) Brothers represented an equal portion of their father and thus were equal in status relative to one another, hence the non-recognition of primogeniture. This idea of unity of ownership also applied to husband and wife. These concepts formed the basis for the institution and practice of common or joint family property.

\(^{124}\) Blackstone, Commentaries of the Laws of England (1766) at Book II, Chapter 1, page 2.

\(^{125}\) Hsu, Francis, Under the Ancestors’ Shadow (1964) at 64.
There were three primary characteristics of the institution of joint family property. The first and most important aspect was the pooling of all earnings of each family member in a common household account. Even when a male attained adult status or became married and had children, he was required to remit all his earnings to the head of the household, typically his father or grandfather, but occasionally an uncle or other male relative. The ban on the establishment of an independent household or private account without the consent of the household head was first addressed in the Analects. From at least the Tang dynasty onwards this norm was a standard feature in all dynastic legal codes. To violate this rule was to effectively claim a private and separate right of ownership and control over a resource or asset. Such conduct constituted a severe transgression of filial piety (bu xiao) and was classified as one of the Ten Great Wrongs. Thus, young males living a great distance from home dutifully sent their earnings back to the household head, retaining only that which was necessary to support themselves. The few exceptions recognising the right to private property within the family was a wife’s dowry, as well as the private earnings of females outside of their customary household responsibilities or business transactions. For example the wife of a farmer might have been responsible for selling a portion of the crop in the market,

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126 Some aspects of joint family property were addressed in the Analects. Legge, James, (compiled and edited by Chai, C. and Chai, W.), Li Chi - Book of Rites, supra Volume 3 at 67.

127 The Ten Great Wrongs was a general classification of the most serious offences and egregious breaches of moral conduct. The legal code of each dynasty from the Tang through the Qing contained a list of the Ten Great Wrongs. Although the conduct proscribed by the Ten Great Wrongs was described in a broad general manner, offences grouped under the Ten Great Wrongs often were detailed elsewhere in the Code. For example the Qing Code addressed the issue of joint family property in Article 87, entitled “Establishing a separate household registration and dividing property.” See: Jones, William, The Great Qing Code, supra at 112.

128 Shiga, Shuzo, “Family Property,” supra at 118.
the income from which would be deposited in the family account. In her spare time that wife might have been engaged in the production of handicraft items, the proceeds of which would be under her exclusive control and management.

A second feature of joint family property was the equal distribution of resources and money among family members for their living expenses. From birth to death all family members were included in this distribution. Any surplus remaining was kept within the jointly held household savings or investment account. The annotations to the Ming and Qing Codes provided that all family members had a communal interest in such household property. There is a split in opinion as to who held the right to manage this household property. Some scholars emphasize the communal nature of the property and hold that management was achieved through consensus of a family council, composed of adult members of the household. Others see the household head as exercising exclusive control over the household assets. Management, of course, entails a broad range of rights and responsibilities, thus making a general characterization of the relative rights of family members and the household head difficult. There likely was great variation from one family to the next. One example of this concerns the authority to convey family property.

According to Kim the household head exercised his disposal rights after conferring with other family members, particularly his wife (or wives) and sons, and obtaining some sort of consensus. This conclusion is based in part on research by Noboru Niida, who demonstrated that deeds during the late imperial era often

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129 In the Ming and Qing Codes there are annotations providing that all family members own household property communally. Kim, Hyung I., Fundamental Legal Concepts of China, supra at 104.

130 Ibid.
exhibited the signatures of the father and his sons. Shiga rejects this explanation claiming that it does not prove positively the existence of joint rights of management. He argues that there was no sanction in the absence of joint signatures and urges that such a practice was voluntary but not customary.\footnote{131} This argument by Shiga is weak because he effectively is looking for Niida and others to substantiate their positions by proving a negative. According to Shiga the head of the household had total authority to dispose of household property because other members, including sons, had no rights of disposal relative to their father. He points to the prohibition against the transfer of family property by family members without the consent of the household head. Under late imperial legal codes such conduct was subject to punishment, and any transaction resulting in the conveyance of family property, including mortgages and pledges, could be rendered null and void by the household head.\footnote{132} This evidence merely proves that the absence of consent from the household head was unlawful, it does not demonstrate that the household head had sole rights to convey. This same evidence could be used to support the argument that consent and mutual agreement among all members of the family was the customary practice. Additional evidence may be required before conclusions can be drawn on this point.

The data that Shiga, Niida and Kim relied upon was primarily from surveys conducted in northern China by Japanese researchers shortly before World War II. In responding to the question of who owned household property, the answers were fairly evenly divided between the father as the owner and the family as the owner,

\footnote{131}{Shiga, "Family Property and the Law," supra at 131.}
\footnote{132}{Ibid. at 128-131.}
thus accounting for their different interpretations.\textsuperscript{133} Shiga finds nothing inconsistent about the split of opinion by the Chinese respondents on this issue. He writes as follows:

The reason for this is that household property is a pooling of the fruits of the labor of all members of the household and the means of support of all. Seen from this point of view, it is “everyone’s property.” On the other hand, the one who has legal control over the household’s property is the father. Seen from this point of view, it is the “father’s property.” Between the two expressions there is in reality not the least contradiction.\textsuperscript{134}

This analysis of the ownership and management rights of common family property is essentially the same as those being advanced currently to explain the authority and rights of state owned enterprises relative to the central government.\textsuperscript{135} In many respects the relation is one like that of a trustee to a trust, and the beneficiaries of a trust. With respect to traditional family property, the head of the household held the position of a trustee. He ultimately was responsible for the disposition of the assets in the household account. Without his approval assets could not be purchased, sold or transferred. He had a duty to enhance the welfare of his family, or at least minimize losses and economic shortcomings to the best of his ability.\textsuperscript{136} Finally, he owed a duty to his main wife (di); concubines (shu) if any, and

\textsuperscript{133} Ibid. at 110-111.

\textsuperscript{134} Ibid. at 149.


sons to pass on the assets of the household to them. Late imperial law expressly forbade the head of the household from preventing his main wife and son(s) from receiving their rightful share of inherited family property.\textsuperscript{137}

The favored object of investment for most families was land. In his work \textit{Hung chan suo van} [Remarks on Real Estate] the late Ming / early Qing scholar and official Chang Ying explained that land was the single asset and resource that guaranteed people a viable livelihood and future.\textsuperscript{138}

Only land is a commodity which even after a hundred or a thousand years is always as good as new... Country people who have savings of even ten taels cannot sleep at ease, whereas those whose possessions consist merely of their land worry neither about flood and fire, nor about thieves. Property consisting of thousands of \textit{ch'ing} of land which may be worth ten thousand taels is not trouble for one man to protect. Even if people should have to leave their

\textsuperscript{137} All imperial codes from the Tang down to the Qing had detailed provisions regarding inheritance rules. In general sons born to a main wife were accorded priority over sons born to concubines, and older sons were accorded priority over younger sons. Daughters generally inherited the property of the father in the event there were no sons. For a discussion of imperial law in the Ming and Qing eras on inheritance rules see: Shiga, "Family Property and the Law," supra at 134-148; MacCormack, Geoffrey, \textit{Traditional Chinese Penal Law} (Edinburgh: Edinburgh University Press, 1990) at Chapter 11; Jing, Junjian, "Legislation Related to the Civil Economy in the Qing Dynasty," in Kathryn Bernhardt and Philip C.C. Huang (eds.), \textit{Civil Law in Qing and Republican China} (Stanford: Stanford Univ. Press, 1994) at 50 - 59; Faure, David, "Custom in the Legal Process: The Inheritance of Land and Houses in South China," \textit{Proceedings of the Tenth International Symposium on Asian Studies, 1988} (Hong Kong: Asian Research Service, 1988) at 477- 488; and Jamieson, George, \textit{Chinese Family and Commercial Law} (Shanghai: Kelley and Walsh, 1921). Also see: Fei Xiaotong, \textit{Peasant Life in China: A Study of Country Life in the Yangtze Valley} (London, 1939) at 67- 68 for a Song dynasty case in which imperial authorities entered a judgment, after the death of a man, nullifying a transfer of land he had made during his lifetime and ordering the land to be subdivided equally and distributed to his three sons.

homes because of the ravages of war and rebellion they will return when things have quieted down. There may be nothing left of their houses and stores worth asking about, yet the plot of land which belonged to the Chang family will still belong to the Changs and that which belonged to the Li family will still belong to the Lis.

Even for gentry or wealthy families who shifted greater amounts of their savings into urban real estate or commercial enterprises in the late imperial era, rural land remained one of the more secure investments. While it no longer was a principal means by which to amass great wealth from the mid-Qing onwards, rural land was a reliable means by which to conserve wealth. Elvin explains the economic thinking of the times as follows:

The sensible strategy, and the one that was probably most commonly followed in later traditional China, was to invest a modest proportion of one’s capital in land, which would then serve as a safe reserve fund, but to look for profits elsewhere. In the words of a Nanking merchant, Hsu Huai-ch'üan, ‘we use trade to raise our family up and agriculture to preserve it.’

This way of thinking persisted into the Republican era as demonstrated by research conducted by Fei Xiaotong.

The above excerpts challenge arguments advanced by Ho Ping-ti and others that property rights in land were not secure, because of the lack of official or state legal institutions geared towards protecting the landed property interests of private

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139 Elvin, The Pattern of the Chinese Past, supra at 249.

140 Fei Xiaotong quotes a Jiangsu peasant in the 1930s as follows: “The best thing to give one’s son is land. It is living property. Money will be used up but land never.” Fei Xiaotong, Peasant Life in China: A Study of Country Life in the Yangtze Valley (London, 1939) at 182.
While there undoubtedly was a sparse number of imperial laws addressing private rights of property in land, customary law tended to fill this gap. We will explore this in greater detail below. For now though, it is critical to recognize that a significant portion of imperial era customary law pertaining to the ownership of land was rooted in the institution of the family and the belief that the family had superior status and rights as a collective unit compared to that of the individual. Above the family there were other groups that were involved in the holding, allocation and control of resources that further tended to mitigate the role of the individual as a holder of property rights. Among the more notable of these organizations were the lineage and the guild.

The concepts and institutions of the family and the role of the individual discussed up to now reflect primarily the Confucian ideological influence. In contrast the Legalist school of thought, rooted in the writings of Han Fei-zu and Lord Shang both of the pre-Han era, considered the institution of the family to be a threat to the state. The Legalists advocated that married sons leave the home of their parents

141 Ho, Ping-ti, Ladder of Success in Imperial China, supra at chapter 1, section 3, and Studies on the Population of China, supra at 204-207.

142 The Legalist school posited that good and effective government was obtained by the promulgation of rules and their strict enforcement. Legalists further argued that the effectiveness of any set of rules or body of legislation was commensurate to the punishments to be imposed for violations. This approach reveals one of several fundamental differences between the Legalists and Confucianists over the interpretation of the nature of humans. The Legalists essentially saw the nature of humans in a pessimistic light and urged that behaviour was to be controlled and modified through punishments and rewards. In contrast, the Confucianists saw human nature as being intrinsically good. To cultivate this goodness, the role of the state and the mission of its leaders was to lead by moral example. See: Bodde, D. and Morris, C., Law in Imperial China - Exemplified by 190 Ch'ing Dynasty Cases With Historical, Social and Juridical Commentaries (Philadelphia: University of Pennsylvania Press, 1967) at Chapter 1 and Fung Yu-Lan (edited by Derk Bodde), A Short History of Chinese Philosophy (New York: Free Press, 1952) at 155-165.
and cultivate land as a separate household. Such conduct, as noted above, was considered reprehensible by Confucianists and subject to severe punishment under all late imperial legal codes. Whereas Confucianism posited that individuals were linked naturally to the family, which served as a model institution, the Legalists saw individuals as owing their allegiance to the state, which was considered the preeminent institution.

Early Legalist thinkers sought to develop a state with a strong, centralized government under authoritarian rule, yet one which would command the support of the people. To achieve these goals Legalists developed positivist legal institutions which among other things held all subject individuals as equal before the law. All subjects also were expected to know and understand the law. To achieve this end laws and rules were to be written clearly and concisely and the duties and responsibilities of the individual defined and fixed so as to prevent misunderstanding and disorder. With respect to social relations on the land, this meant that laws would be promulgated to establish the interests and duties of individuals and the state, and that interests in the land would be registered so everyone knew where boundary lines had been demarcated and what rights each individual held. Perhaps reflecting the notion that all individuals were equal before the law, or in pragmatic recognition of the political and social instabilities associated with unequal distribution of wealth, institutions and policies pertaining to the equal distribution of

143 MacCormack, Geoffrey, Traditional Chinese Penal Law, supra at 32.
144 Ibid.
145 Ibid. at 33.
land are more often associated with the Legalists.146

2. A Communal Notion of Property

Institutions such as the family, lineage and guild limited the ability of individuals to use, manage, or engage in transfers of interests in resources and assets. Typically the consent of leading institutional figures, usually senior males such as the head of the household or lineage elders, was required. However, even the household head or a lineage or guild elder, had exclusive freedom to hold and control a parcel of land in an independent or private manner. Unlike the Western and particularly Anglo-American experience, the possession and ownership of a parcel of land was not seen as a means of fulfilling or expressing the inner self. In the West rights of possession and control over material resources were viewed as an extension of the rights in one's body.147 Hobbes saw this as part of the reason for the constant tension among individuals giving rise to a natural state of war among individuals. The notion that a person could achieve satisfaction and a meaningful life solely by possessing material resources was one that was contrary to the values of imperial Chinese society. Confucian norms, for example, held merchants, who commonly measured success in terms of material possessions or wealth, in low esteem, and placed a high value on the accomplishments of scholars and government officials.148

146 Bodde, D. and Morris, C., Law in Imperial China, supra at 28.

147 This idea was expressed by Locke and Hobbes, particularly the latter. See: Bronowski, J. and Mazlish, B., The Western Intellectual Tradition, supra at Part III. For a contemporary account of this idea see: Wheeler, Samuel C., "Natural Property Rights as Body Rights, 14 Nous 171 (1980).

148 Fung Yu-Lan (edited by Derk Bodde), A Short History of Chinese Philosophy, supra at 18.
Up until the late Qing era there were few, if any, philosophical discussions or theoretical works addressing the issue of property rights and individuals. Given the ideological conditions it is understandable why such a connection would not be made. Theories of individual property rights ultimately were not conjured up by Chinese thinkers, but were discovered by them during a period in which contact with the West became unavoidable. When late Qing scholars investigated the philosophical and political theories of the Western thinkers they were mystified and confused with the emphasis placed on the rights of the individual. Nathan informs us that when the political and social reformer Liang Qichao introduced Chinese readers to Hobbes and Rousseau at the turn of this century

he [Liang] treated the notion that humans ever existed outside of society in a state of nature as a curiosity. He expressed shock at the primitive morality of Hobbes's vision of the war of each against all.\textsuperscript{149}

Despite his espousal of liberal republican ideals, Liang never advocated a society in which the interests of the individual were placed before that of the community. Rather, he believed that a distinguishing virtue of human nature was the tendency and ability of individuals to come together and form groups where all individuals unselfishly bettered themselves for the good of the community.\textsuperscript{150}

While the thinking of Hobbes and others like him was alien to China, it is a


disputed point whether Chinese acted in a way that corresponds to the Lockean conception of property. Hyung I. Kim concluded that the social practices in the Yuan, Song and Ming dynasties, regarding possessory interests in land resembled those in the West, and that a Lockean concept of property implicitly was in effect.\textsuperscript{151} Lin Man-houng, in a recent analysis of several works by nineteenth century Chinese scholars, found that their views on rights in land unknowingly exhibited some similarities to those put forward by Locke.\textsuperscript{152} On the other hand, Metzger has argued that the absence of a Lockean tradition in China is evidenced by the fact that the material base for life value in Confucian China did not center on property but on social status.\textsuperscript{153} This view seems to be supported by the practices of lineages, as discussed above. That is the land itself did not serve as a direct means for securing wealth and prestige. Rather, this was obtained by acquiring official degrees. Land served only as an indirect means to assist in securing this goal.

The argument that there was an absence or scarcity of individually based, Lockean type property rights finds some support in language of the imperial era. The word for ownership (suoyou chuan), and by extension the concept it represents,


\textsuperscript{153} Metzger, Thomas A., “Quest for Traditional Values in Modern Chinese Thought,” 73 \textit{China Quarterly} 166 (1978) at 171.
did not exist in China until the early twentieth century. No association was drawn between rights and interests in land or other natural resources until the mid-Qing. Deeds, statutes and other documents from as early as the Tang dynasty, designating an interest in land, to be conveyed by either some inter-vivos transaction or through inheritance, employed words connoting productiveness, but not ownership. Possession of a productive parcel of land was designated by reference to its boundaries and was expressed by the use of words you, meaning to have or to hold, or zhan, meaning to occupy. The person occupying the land was referred to as the tianju, literally the “field master,” or yeju, the “cultivation master.”

Individual rights in material resources composed a small fragment of the imperial legal regime. Law was seen as a means of maintaining social order through rules and customs of propriety, rather then being an instrument for the protection of individual rights. The resolution of a case from the Northern Chi era illustrates the

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154 It appears that this term entered the Chinese vocabulary either shortly before or after the fall of the Qing, and was introduced by Westerners in coastal, urban enclaves. It seems to have come into wider usage during the drafting and subsequent promulgation of the Republican Civil Code. See: Yu, Yuan-ying, Suoyouchuan zhi bianchian [The Evolution of Ownership] (Taipei: Taiwan shangwu yinshu guan yinxing, 1972), republication of original 1932 edition.

155 Buoye, Thomas, "From Patrimony to Commodity: Changing Concepts of Land and Social Conflict in Guangdong Province During the Qianlong Reign (1736-1795)," 14 Late Imperial China (2) 33 (1993).


157 Ibid.

158 Ibid.
weak link between individual rights and material resources. A magistrate called upon to adjudicate a matter between two brothers involved in a decade long dispute over farmland reportedly told them that “the most precious thing in the world is brotherly love, the least precious is a piece of land.” Instead of determining which brother had what rights to the land, the magistrate worked to restore a fraternal bond, which was one of the five fundamental Confucian relationships. The Confucian ideology therefore placed a higher priority on the status of the fraternal relationship, rather than each brother's position, obligations and duties with respect to the land. If the relationship was restored, then presumably the brothers could cooperate in holding and managing the land.

In commenting upon this case John C. H. Wu, the chief drafter of the 1946 Chinese Constitution, wrote that under such social forms and conditions it would have been impossible to develop a rigid body of law in imperial China setting forth individually based rights of property. As we will see however the Confucian ideology of property had to come to terms with substantial material changes in the late imperial era. The increasing scarcity of land resources and commercialisation of the economy and society were powerful forces that challenged dominant Confucian ideas of realtionships among family members, community elders, and ruler and subject.

In the following section we will examine ancient imperial institutions

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160 Ibid.
addressing land ownership, use and control. In doing so it is important to bear in mind the nature and concepts of property that we have discussed thus far and their Legalist or Confucianist roots.
III. Institutions and Practices of Ownership During the Early and Middle Imperial Periods (From Qin to Late Ming)

A. Land

China's first unified empire, the Qin (221 - 207 B.C.), ushered in an era of predominantly private land ownership by encouraging families to acquire and expand their landholdings. There is no evidence that the Qin land policies were based on any firmly held philosophical or ideological tenets, as was the case with their predecessors the Shang and Zhou, who developed and improved, respectively, the qing-tian, or "well-field" system. Rather the Qin apparently were driven by a

161 The qing-tian system originated during the Shang era (1523 - 1028 B.C.) and was modified by the Zhou (1027 - 222 B.C.). Under this system the emperor, in theory and in practice, possessed and controlled all land. Tracts of land were divided into nine equal size squares in three by three matrices, with a communal square in the center surrounded by the eight outer squares, which were assigned to individual households and returned to the state once the head of the household reached an elderly age. All sales and other transactions in land were prohibited. The communal square contained the dwellings of the households and communal fields, the harvests of which in theory were to be remitted to the state as a form of tithe. The ideal well-field system, as later discussed by Mencius, was probably a rarity as land often was divided according to irrigation canals or channels. Furthermore, some arrangements lacked the central public field. In the late Zhou allotments of land became more complex as the state took into consideration the fertility of the land to further ensure that serf households obtained equal amounts of fertile land. Land was classified according to three grades of fertility based on historical accounts of productivity and geographical factors. Within a given administrative area, each household received a specified amount of each grade of land. In an effort to stimulate production, the Zhou also promulgated regulations requiring households to return land to the state that was not cultivated on a regular basis. See: Hulsewé, A.F. P., Remnants of Han Law, Volume I (Leiden: E.J. Brill, 1955); Ho, Ch'ang Chun, Han - Tang qian fengjian tudi soyuzhi xingshi yanjiu [The Forms Taken by Feudal Land Tenure Systems from Han to Tang Times] (Shanghai, 1964); Zhou, Chin-sheng, Zhongguo jingji shi [An Economic History of China], translated and condensed by Edward H. Kaplan (Bellingham, WA: Western Washington State College, 1974); Wan Kuo-ting, "The System of Equal Land Allotments in Medieval Times," In E.T. Sun and J. DeFrancis, (eds.) Chinese Social History (Washington: American Council of Learned Societies, 1956).
pragmatic set of nation-building objectives. They provided incentives for the inward migration of peoples by providing them, along with current citizens, free plots of land and housing.\textsuperscript{162} They dismantled the \textit{qing-tian} system and lifted restrictions on the acquisition and expansion of landholdings, as well as their subsequent sale, lease, transfer and inheritance. These policies expanded the potential revenue base of the state relative to the more limiting \textit{qing-tian} system, which derived revenue only from the harvests of the common squares.

Some scholars view the Qin and succeeding early Han eras as marking the beginning of the institution of private ownership of land in China, others merely see it as an interlude.\textsuperscript{163} Following the Qin recurrent attempts were made to return to a more egalitarian land ownership system. In the middle of the Han era (208 B.C. - 220 A.D.) Wang Mang, known as the “socialist king,” seized power and confiscated large landholdings, thereby returning the state to its earlier status as the largest landholder. The state distributed life estates in parcels of land according to the precepts of the Zhou dynasty well-field system. Wang Mang’s reign was short lived but, others followed who also sought to implement a more egalitarian land system. The most notable and perhaps enduring efforts were made by the Tang (618 - 906 A.D.), who reunified China for the first time since the downfall of the Qin. The Tang


adopted the *jun-tian*, or “equal-field,” land system, and sought to implement it on a nationwide scale.\(^{164}\) While the state held title and controlled sizable tracts of land, there were estates that remained in hands of an elite class that resembled a hereditary aristocracy.\(^{165}\)

The *jun-tian* system, codified in a detailed set of statutes and supporting regulations, provided that all heads of households were eligible to receive from the state a grant of two classes of land: personal share land and lands in perpetuity.\(^ {166}\) Personal share land reverted to the state once the holder reached a specified age, while the latter class of land could be handed down to the descendants of the

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\(^{164}\) The *jun-tian* system was developed by the Wei (221-265 A.D.) and Sui (581-618 A.D.) dynasties. The Tang embraced the *jun-tian* system for a number of philosophical, political and legal reasons. In the transition from Sui to Tang, the later adopted much of the administrative network and legal code of the former, including those pertaining to land. Reconstructed portions of the *Tian-ling* [Land Statutes] and accompanying *Tang-lu Shu-i* [Articles from the Tang Code] relating to land tenure) are set forth in Twitchett, Denis, *Financial Administration Under the T'ang Dynasty* (Second Edition), (Cambridge: Cambridge University Press, 1970) at Appendices 1 and 2.


\(^{166}\) This distinction was based on land use and taxation policies. One of the leading mediums for the payment of taxes in Northern China at the time was silk, and silkworms fed on mulberry leaves. Recognizing that good silviculture practices required a long term outlook, lands held in perpetuity were to be planted with trees, particularly mulberry trees. The *Tian-ling* and *Tang-lu Shu-i* detail the amount of land of each category that a household head was eligible to receive based on factors of age, gender, occupational status and class. Twitchett, *Financial Administration Under the T'ang*, supra at Appendices I and II.
holder. To prevent the accumulation of land through inheritance, grants of personal share land were reduced by the amount of land a person held in perpetuity. A redistribution of land was to be made annually by the county magistrate based on information provided by the village headman. Other than limited testamentary transfers, all other conveyances of state land, including sales, leases and mortgages were generally prohibited.

Although the Tang sought to implement the jun-tian system throughout China, they probably succeeded only in the northern part of the country where their administrative authority was strongest. Even there they faced problems from the beginning of their reign. The state never succeeded in bringing all lands held by the aristocracy under the full possession and control of the state. Secondly, even the distribution of lands subject to the provisions of the jun-tian system was not completely egalitarian, as officials and titled classes were eligible to receive more land than agrarian landholders, while merchants and artisans were assigned to less than

167 The age at which personal share land reverted to the state fluctuated over time and ranged from 60-70 years, but the principle remained constant, namely that once a person reached an elderly age, he or she was deemed to be non-productive and was relieved from the obligation to pay taxes and dispossessed of the right to hold personal share land. However, all persons were allowed a small amount of land in perpetuity for their dwelling and personal garden, and thus did not become completely landless upon reaching an elderly age. Twitchett, Denis, Financial Administration Under the T'ang, supra at Appendices 1 and 2.

168 Twitchett notes that it is doubtful whether the jun-tian system was ever actually implemented in southern China. However, he goes on to explain how archaeological findings at Dunhuang, west of Xian, have revealed that the jun-tian system was administered in accordance with the the Land Statutes and Code during the early portion of the Tang dynasty at northern and western China. Twitchett, Financial Administration Under the T'ang, supra, at 6. Han explains how the Tang land taxation practices resulted in a relatively egalitarian distribution of land and hence wealth. Han Liang Huang, The Land Tax in China (New York: Columbia University and London: Longmans, Green & Co., 1918).
the agrarian class. Shortages of land around key urban areas further complicated efforts to apportion land according to the provisions of the Tang Code.169

The enforcement and maintenance of the jun-tian system depended upon sound and efficient record-keeping by officials and their clerks. Local magistrates lacking the resources for accurate and thorough administration came to rely more heavily on village headman who represented wealthy segments of society intent on accumulating land. The elite had conflicting interests, allegiance to the imperial order and enhancement of their own wealth as private landowners, and the later prevailed.170 Following the An Lu Shan rebellion local and provincial power grew at the expense of the center, where the land registration, allocation and taxation systems were maintained, further accelerating the demise of a the jun-tian system.171 By the late Tang the imperial court tacitly had acceded to a system of private landownership when it modified the method of tax assessment, thereby severing the link that had existed between the taxation and allotment of land under the jun-tian system.172

The rules of the jun-tian system remained in the state legal codes for another

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170 Beattie, Land and Lineage in China, supra, at 7.

171 Twitchett, Denis, Land Tenure and Social Order in T'ang and Sung China (London: Oxford University Press, 1961) at 25.

172 Under the tax system of the early Tang, taxes were assessed on individuals. This was considered equitable among the taxpaying portion of the population (which excluded officials and nobles), since all individuals had similarly sized landholdings. The new tax system, the liang-shui, assessed persons based on the amount of wealth and land they held. While this broadened and equalized the tax base, it disengaged the link between the taxation and land allotment system.
five centuries, until the end of the Song dynasty (961-1278), but they were no longer enforced by the close of the eighth century. Nevertheless, the egalitarian concepts that formed the basis of both the qing-tian and jun-tian land systems remained in the national consciousness. While the Song state theoretically remained the owner of all land, in practice arable land was held by officials, manor lords and to a

173 Twitchett, Denis, Land Tenure and Social Order, supra at 24.

174 Throughout imperial times new dynastic orders often aspired to implement egalitarian policies pertaining to the possession, distribution and taxation of land in efforts to promote and support the ideal of a nation of communities composed of small peasant farmers. However, in order to garner and maintain the support of military leaders and wealthy members of society for the security and material needs of the state, the imperial order permitted them to hold larger tracts of land at lower rates of taxation. These advantages permitted the elite classes to further accumulate wealth, land being the principal form. At the same time the state relied increasingly upon the peasantry to support the imperial family, its extensive interests, and the administrative machinery of the government. Taxation became increasingly regressive, forcing peasant farmers to sell their lands and seek the protection of wealthy landlords. The state often found itself in a weakened position relative to the resources accumulated by large estates, which were able to resist demands made by the state. Under these conditions the peasantry were more susceptible to being recruited into rebellious bands. An imperial regime unable to control both its elites and peasantry risked losing its mandate to rule. Various analyses and theories of dynastic cycles have been put forward by scholars that have focussed on the moral, political and social (population pressures) factors behind change. See: Wakeman, Frederic, Jr., The Fall of Imperial China (New York: Free Press, 1975); Balazs, Etienne, (trans. H.M. Wright) Chinese Civilization and Bureaucracy (New Haven and London: Yale University Press, 1964); Nivison, David and Wright, Arthur (eds.) Confucianism in Action. (Stanford: Stanford University Press, 1959); and Elvin, The Pattern of the Chinese Past, supra.
B. Land Based Resources: Woodlands and Minerals

1. Woodlands

In the early dynastic eras, property concepts concerning woodland areas bore close resemblance to those in arable and settled lands. All woodlands, like all other areas under the heavens, were regarded in theory as belonging to the

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175 The theory of imperial or state ownership has its origins in the Book of Rites, one of the Six Classics, which states that no land was to be sold. Later commentaries by Mencius and other philosophers interpreted this to mean that the emperor was the owner of all land. See: Legge, James, The Chinese Classics, Volume 2 (Oxford: Clarendon Press, 1895) at 228. The Classics also provide that “All land in the world is the property of the Sovereign; all dwellers on the land are the Sovereign’s servants.” Ch’ien states that following the unification of China under the Qin, this idea became an accepted reality, as the imperial household replaced numerous autonomous fiefdoms. Ch’ien, Mu, Traditional Government in Imperial China (Hong Kong: Chinese University Press, 1982), translated by Hsueh Chu-tu and George Totten, at 6.

176 The term woodlands as used here refers generally to all lands that have uncultivated trees, shrubbery or other plant growth on them regardless of the density of that growth due to climatic, geological or other natural condition. The distinction between woodlands and other areas such as grasslands, wetlands, etc. is a technical one involving reference to such types of soil, flora and fauna. The principal focus of our discussion here, however, involves lands that are not settled, cultivated with vegetable, cereal or fruit crops, or used for the purposes of raising livestock. Many of the areas included in my definition of woodlands would be covered in the Chinese word huangdi, or wastelands. This term, which dates back at least to the mid-Qing and remains in wide use today, refers to unsettled or uncultivated lands generally owned by the state. It is used for example in the Land Management Law of the People’s Republic of China, promulgated in June 1986, at Article 17 which lists the types of land areas owned by the state. See: China Laws for Foreign Business (CCH Australia, ¶ 14,715). When I use the term “woodland resources” I am referring not only to timber, firewood and bamboo, but also to such harvested or processed products of the forest, such as tung oil, herbs, edible fungi, resins (for lacquers).
emperor or state. However, unlike the “well-field” land institutions established during the Shang and Zhou eras and modified by subsequent dynasties, woodlands were not partitioned and conveyed out as leaseholds or otherwise allocated on the basis of usufruct rights. Access and entry to woodland areas generally were not restricted, except in the case of imperial preserves and hunting grounds. Thus, in practice most woodland areas were treated as common property areas, whereby anyone could extract, use and market woodland resources. These open access conditions gave rise to a situation known as the “tragedy of the commons.”

The “tragedy of the commons” is a theory that seeks to explain the reasons for the over exploitation, waste, improper use and degradation of common, or commonly owned, resources. These are resources that all members of a community, or the public in general, may access, use and exploit without restriction or limitation. In short, the theory holds that no single community member or person from the public realm will save, protect, or invest in a common resource for the long term, because that person believes, based on experience, that anyone else may use and exploit the resource and that it will likely be taken away or used up.


179 The term “tragedy of the commons” and the classic modern formulation of it are found in Hardin, “The Tragedy of the Commons,” 162 Science 1243 (1968).
in the short term. Thus, planning for and investing in the future generates no return for the individual investor. According to adherents of the theory, the solution to the tragedy of the commons is the privatization of resources, thereby allowing for the exclusive and controlled use by the private owner, who presumably will act with long term interests in mind.\textsuperscript{180}

Although Chinese writers recognized at an early date the problems associated with the unregulated or uncontrolled use of resources they did not consider privatization to be a solution. Mencius, for example, warned of the devastation of floods and erosion that would be brought about by the uncontrolled cutting of forests when he wrote, "[m]ountains empty, rivers gorged, . . Once the skin is gone, where can the hair grow."\textsuperscript{181} To ensure future supplies of forest resources, Mencius instructed that timber should be cut only in limited quantities and at appropriate times. It was the function of government, according to Confucianists like Mencius, to ensure that people complied with moral precepts by setting good examples.\textsuperscript{182} Given this ideological framework and in recognition of the communal aspects of woodland areas, the way to prevent the over exploitation of woodland resources would be for imperial authorities to demonstrate proper and effective methods of using and managing timber resources. As discussed below, the

\textsuperscript{180} For a response to the assertion that privatization is the most beneficial or efficient form of resource management see: Kennedy, Duncan, and Michelman, Frank, "Are Property and Contract Efficient" \textit{8 Hofstra Law Review} 711 (1979-80).


\textsuperscript{182} For a more detailed discussion on the Confucian outlook on law and the views and approaches of opposing schools of thought, such as the Legalists, see: Bodde, D. and Morris, C., \textit{Law in Imperial China - Exemplified by 190 Ch'ing Dynasty Cases With Historical, Social and Juridical Commentaries} (Philadelphia: University of Pennsylvania Press, 1967) at Chapter 1.
Zhou took such steps.

Although they predated Mencius, Zhou rulers closely monitored the management and use of woodland resources. The approaches to woodlands use and management reflected the Legalist principles on which their government institutions were built. One of the leading central state offices at the time, the Ministry of Instruction, which was responsible for land classification, distribution and cultivation, oversaw the work of various agencies dealing with woodlands. Among these were the Commission of Mountain Forests, responsible for managing land use, protecting woodland resources within mountainous regions, and regulating the cutting of timber; and the Commission of Swamps and Marshes, which had a similar mission in lowland areas. Both of these commissions undertook public education campaigns to instruct inhabitants of local areas on proper cultivation, harvesting, and use of timber resources.\(^\text{183}\) In addition the Police of the Foothill Forests and the Police of the Rivers and Streams actively patrolled forested areas and enforced applicable regulations pertaining to the management and harvesting of forest resources. The Zhou also promulgated a number of regulations addressing woodland management that reportedly were effective in preventing the over cutting of timber and damage to woodland areas.\(^\text{184}\) The rationale for this regulatory regime is not well understood, however Menzies

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\(^{183}\) Murphey, Rhoads, “Man and Nature in China,” supra at 322. In addition Menzies reports that while it is rare to find early references on uncultivated lands in government handbooks or administrative manuals, the Zhou Li, a set of administrative rules from the Zhou era, discusses the duties and functions of forestry officials known as the \textit{yu} and the \textit{heng}, responsible for monitoring timber harvesting. Menzies, Nicholas, “Strategic Space: Exclusion and Inclusion in Wildland Policies in Late Imperial China,” 26 Modern China 719 (1992) at 725.

has postulated that they were not for purposes of conservation, but rather to ensure that a steady supply of harvestable timber was available continually for use by the state.  

Early imperial regimes also exercised direct control over woodlands through an institution known as the imperial preserve. The origins of imperial preserves are steeped in legend and religious rituals. By nearly all accounts it was the Zhou who designed and constructed the first imperial preserves by enclosing and fencing in large tracts of land. They believed that this was a virtuous undertaking, benefiting all citizens, since the natural world, with all its wildlife, had been subjected to the control of the emperor. The symbolism of these efforts was not to be underestimated. Careful maintenance and management kept nature in check not only within the imperial preserves, but by extension throughout the entire imperial kingdom, thus safeguarding the mandate of heaven that provided legitimacy to the emperor's ruling authority. Indeed, the Han, who built and maintained the largest imperial preserves in ancient dynastic times, considered such areas to be a representation of the "under the heaven" domain ruled by the


186 Schafer describes several origins. Legend ascribes the imperial parks and preserves to the practices of Huang Di, who devised them as a place for raising dragons. More probable reasons include the use of such grounds as a place for raising animals for religious sacrifices, or as a means of keeping wild animals away from population centres. Schafer, Edward, "Hunting Parks and Animal Enclosures in Ancient China," 11 Journal of the Economic and Social History of the Orient 318 (1968) at 320.
The practical effect of the imperial preserves was to vest in the imperial family and associated privileged groups such as the military exclusive rights to the animal and plant resources of the woodlands. By restricting public access imperial leaders were seen as abrogating traditional privileges of peasants and others to go upon imperial lands to collect firewood and hunt small game. An issue that does not appear to have been addressed in the academic literature is whether the establishment and careful maintenance of imperial preserves by the state provided a positive example of woodland management for the masses to emulate.

The Tang, who were influenced by Taoist and Buddhist principles to a larger extent than their predecessors, constructed and maintained imperial preserves for the express purpose of protecting forests and wildlife through prudent management and conservation techniques. Like their predecessors the royal and privileged classes of the Tang era continued to utilise imperial preserves as their exclusive hunting grounds. However, whereas earlier dynasties emphasized the symbolic aspects of imperial preserves, the Tang were noted for their early articulation and

187 The Han constructed imperial preserves that were hundreds of li in area (One li is approximately equal to one half kilometer.) Over a half a million persons were employed to build and maintain these enclosed areas during the peak of the Han reign. Imperial preserves contained numerous forms of domestic and foreign fauna and flora, which were meticulously arranged and cared for. Ibid. at 333.

188 Ibid. at 322.

promotion of the material benefits associated with woodland management and regulation. To a greater extent than any of their predecessors, the Tang effectively linked the conservation of natural resources with the promotion of human welfare. State management and control over woodland areas was seen as benefiting not only the state, but all of society, in both an economic and ecological sense. The state acted to protect and develop resources that had commercial value and established conservation and watershed protection areas to ensure adequate and pure water supplies.190

The policies and institutions of the Tang were supported by a well developed body of codified laws and regulations, which were administered and enforced more strictly than in most other previous or subsequent eras. The Tang adopted and improved upon the precepts contained in the Zhou classic, Yueh Ling [Monthly Ordinances], for the protection and conservation of woodland areas and other natural resources.191 Among these were rules prohibiting the cutting of trees in watershed areas and prescribing punishments for anyone damaging trees or committing acts of arson either in imperial preserves or other forested areas, regardless if negligently caused.

While all dynasties down to the Qing maintained imperial preserves, they were not as active as the Tang in controlling access to woodland areas and

190 An example of a Tang government program to protect natural resources for commercial benefit is the protection of oyster beds, which led to the revival of the pearl industry. This is described in Schafer, Edward H., “The Pearl Industries of Ho-p’u,” 72 Journal of the American Oriental Studies 156 (1952).

191 According to Schafer, the Yueh Ling had a greater influence on the laws and ethics of the Tang era than either Buddhist or Taoist teachings. See: Schafer, “The Conservation of Nature,” supra at 289.
managing and regulating the use of woodland resources, despite the fact that later imperial rulers modelled their legal codes and many of their institutions on the Tang.192 Several factors may be responsible for this, including increasing population pressures on the land, particularly from the Qing onwards; the rising commercialisation of the economy from the seventeenth century onwards, and the gradual privatization of land resources following the erosion of the jun-tian system. We will revisit these issues later.

2. Minerals

The issue of whether mines and mineral wealth should be held by the state or by the private sector was debated periodically throughout early imperial times. Han dynasty Confucianists advocated private ownership of mines on the grounds that individuals should be able to earn a livelihood and profit from their own work with minimal state interference. They were opposed to the idea of the state organising and directing laborers to work in officially owned and managed enterprises. The Legalists rejected these arguments and urged an activist role for the state so that it could strengthen itself through the profits obtained from mineral wealth. They believed that the state and its imperial officials could manage the nation's mineral wealth more responsibly than individuals, and pointed to the ill effects of large private accumulations of mineral wealth, as evidenced by the following passage from the Han dynasty classic, Yan Tie Lun [Discourses on Iron and Salt]:

A common person knows that if he has precious goods, he should store them in a box and hide it in a secret location. What about the mountains and seas possessed by the emperor... If the government allows the people to produce and buy and sell salt and iron they will grow rich and strong from their profits... their influence will become great and the state may not be able to overcome them.193

Ultimately, early Han leaders accepted the position of the Legalists and decreed that the state was to hold and control all mines. They established a government monopoly, the Iron and Salt Commission, which possessed, managed, and operated mines and salt production sites (known as salt pans) and sold the processed materials. This institutional arrangement was contrary to Han policies regarding land resources which allowed for private or individual ownership. By the late Han, however, state monopolies over mining operations had weakened and were gradually disbanded.

Although it is fairly well known that a significant amount of mining and mineral production occurred between the Han and the Tang eras there is little information available on the subject of mine and salt pan ownership, control or management.194 What little information is available suggests that there was minimal state or official control or regulation until at least the early Tang


194 The technical achievements from early imperial eras are described in Needham, Joseph, Science and Civilization in China (Cambridge: Cambridge University Press, 1954). See Volume 3, Section 23 on Geology and Volume 3, Section 36 on Mining and Metallurgy.
That the state relinquished its ownership and management role over mines and salt pans between the late Han to the Tang may have reflected in part the ongoing "Confucianization" of social, economic and legal institutions. In the absence of state organised labor schemes, it would seem that most operations were small, a supposition that seems to be borne out by descriptions of ancient mining techniques.

Whether mines were the subject of common ownership arrangements or were brought under the control of local, wealthy and powerful elites is not clear. It is likely that some combination of the two occurred depending upon specific locations and perhaps even the richness of a mine. Thus, there may have been groups or organizations that held officially or formally recognized ownership rights in a mining site, which was encroached upon by numerous other persons or groups who

195 Elvin, for example, reports that in response to the copper money shortage in the Qin Dynasty, imperial authorities decreed that anyone who opened up abandoned copper mines was to be accorded rights of "permanent ownership." Elvin, Mark, The Pattern of the Chinese Past (Stanford: Stanford Univ. Press, 1973) at 153. Twitchett relates that at the beginning of the Tang era there were no government monopolies over salt or iron production, nor were there any taxes on the sale of these commodities.


treated the site as common property, extracting and selling mineral wealth.198 There apparently was both a great demand and supply for various types of minerals as large numbers of mines were routinely worked until exhaustion.199 Schafer argues that this overworking of mines is evidence of the absence of government regulatory institutions or measures during this period.200

In an effort to increase state revenues the Tang imperial authorities in 721 A.D. decided to resurrect the Han institutions and administrative practices for the monopoly distribution and taxation of salt. For several decades thereafter there were ongoing disputes as to whether these new institutions were to be managed and administered by regional or central authorities, and if by central authorities, whether by the Salt and Iron Commission, the Department of Public Revenue, or

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198 This would be similar to current conditions at many mining sites in present day China. The occurrence of encroachment by local interests and households on state and collectively owned mines is presently a matter of much concern in China. See Zhang, Xia “State and Local Mines Need Better Team Work,” China Daily, January 31, 1994 at 4. In his study of contemporary mining ventures Xu Tao discusses the issues of encroachment and vaguely defined mine ownership rights. He relates the following report appearing in Renmin Ribao, February 3, 1990 regarding the Shikuanshan antimony mine in Hunan, the largest such mine in the world.

[the mine] is troubled by local ventures who invaded its territory to share in the wealth. More than 130 private and collective units and thousands of miners moved into the area, interfering with the existing state mining enterprise. These local ventures... simply mined out any ores that were in sight, aiming for a fast return at minimum cost.

... Unless this situation can be controlled in a short time, the world famous antimony deposit... will be exhausted in a few years.


200 Ibid. at 289.
Board of Finance. These bureaucratic struggles reveal that imperial officials were less interested in controlling and managing the source and production sites and more concerned over the control of revenues from the sale and taxation of salt. The competing government offices apparently knew based or presumed (it is not clear which) that ownership of unprocessed salt was vested in the state, and specifically the emperor. Therefore, arguments presented by competing offices sometimes were framed in terms of superior stewardship ability. For example, in one of the petitions submitted by the Salt and Iron Commission noted that "the profits from the mountains and marshes . . . appertain to the emperor," and went on to explain its capabilities in protecting and managing the mineral wealth belonging to the emperor.

From the mid-Tang down to the late imperial era a mixed system of public and private mine ownership and mineral production existed, during which time different regimes promulgated policies emphasising and affecting the role of either the state or private sectors. As mentioned above, the imperial state generally was less concerned with issues pertaining to mine ownership and much more interested in regulating mining enterprises and controlling the disposition of the mineral wealth once it was extracted and processed, an outlook that seems to have persisted

202 Ibid. at 55.
203 Ibid. at 55.
down to the late imperial era. Prior to being opened up for production, mines, salt pans, and drill sites might have been located on either private lands or state owned "wastelands," but were often brought under private control by the start of production. Minerals located on privately held lands apparently were regarded as belonging to the person(s) holding title to the land, subject to the right of the state to intervene, which it occasionally did. The fact that the state could intervene freely suggests that in theory the state was considered the theoretical owner of mineral wealth or that the title holder merely had some form of usufruct rights and not full ownership. With respect to state owned lands, prospectors apparently were allowed to explore and prospect upon them, but before they could be opened

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206 This is a view that one finds expressed in Balasz, Etienne, (trans. H.M. Wright) Chinese Civilization and Bureaucracy (New Haven and London: Yale Univ. Press, 1964) at 44 - 46.
up for exploitation, permission of local and state authorities generally had to be obtained.\textsuperscript{207}

A brief account of the salt industry in the Tang and Song eras will serve to illustrate the policies described above. The salt industry is selected here because it was an important component of the economy, and because there is a relatively large amount of material that has been published describing its many aspects. A number of the principles and approaches regarding ownership of production sites in the salt industry were carried over to other mineral industries, particularly those that were considered economically or strategically important, such as copper and iron.\textsuperscript{208} It is important to bear in mind, however, that the salt industry was under monopoly management, while other mineral industries though not monopolised, were subject to production controls and special taxes. Thus, the government institutions regulating and managing salt differ from those pertaining to copper and other minerals.

With the reestablishment of the salt monopoly under the Tang, central authorities, the Salt and Iron Commission and the Department of Public Revenue,

\textsuperscript{207} von Glahn, Richard, \textit{The Country of Streams and Grottoes}, supra and Sun, E-Tu Zen, “The Copper Industry of Yunnan,” supra at 121. This approach also seems to have persisted down to the late imperial era, see: Sun, E-Tu Zen, “Mining Labor in the Ch’ing Period,” in A. Feuerwerker, et al. (eds.) \textit{Approaches to Modern Chinese History} (Berkeley: Univ. of California Press, 1967).

were responsible for managing production and distribution. This was a highly complex matter that has been explored in detail by a number of scholars.\textsuperscript{209} What is important for our discussion here is the fact that the these central authorities, through their local administrative offices, established production quotas that all salt producers and processors within the administrative zone were required to comply with. The actual production sites and their operation were in private hands, but subject to rigid and sometimes brutal control by specially trained civil servants, and in some cases military personnel, supervising the manufacture, storage, distribution and accounting of salt.\textsuperscript{210}

In the salt producing coastal regions, production units containing about twenty households each were set up and guarded by imperial troops. All production output including that above the officially established production quotas was turned over to the state in return for payment as provided for in state regulations.\textsuperscript{211} The households within each production unit were socially stratified. Higher class households owned the salt producing pans and fields as well as the outlying marshes which provided reeds for the fuel necessary for the salt making process; while the lower classes actually were engaged in the labor


\textsuperscript{210} On the civil administration see Worthy, Edmund, “Regional Control in the Southern Sung Salt Administration,” supra. On the role of the military see Yoshida, Tora, \textit{Gendai seien gijutsu}, supra at 38.

\textsuperscript{211} Yoshida, Tora, \textit{Gendai seien gijutsu}, supra at 41.
intensive, multi-step salt making process.\textsuperscript{212} As these production units were vast in area, the upper class owners had a substantial investment. What is not known is the nature and extent of their ownership rights in these areas. While the lands apparently were inheritable, it is not clear whether they could be sold or mortgaged.\textsuperscript{213} As the state closely controlled production, the conversion of salt pans and fields to other uses probably was not permitted. Thus, while wealthy private households held possessory, income and limited transfer rights in the salt production fields, most other aspects of ownership in the production fields and salt pans effectively were controlled by state authorities.

In contrast to the coastal production areas, salt production in Sichuan during the Song era was less strictly regulated.\textsuperscript{214} While the state's interest in Sichuan salt was the same as elsewhere in the empire, the securing of a stable source of revenue, it permitted private production and marketing outside of six small state owned production sites operated by convict labor.\textsuperscript{215} In the early eleventh century a device known as the lofty pipe well (\textit{zhuotong jing}) was invented which greatly

\textsuperscript{212} Ibid. at 42 and Worthy, Edmund, "Regional Control in the Southern Sung Salt Administration," supra.

\textsuperscript{213} Even the use of land for household agricultural purposes was limited by local administrative officials. Ibid. at 44.

\textsuperscript{214} This was due to several reasons, including but not limited to the facts that Sichuan was not recognized as a province in the early Song dynasty rather it was an autonomous economic region; the geographic conditions, and the relative distance from major population centres at the time. Sichuan essentially was considered to be a frontier area and of less importance economically and politically. Finally, salt production in the early Song was lower than in coastal regions, but not insignificant compared to other inland regions.

increased output of salt brine and brought about a dramatic increase in illegal sales of salt above regional quota levels. Imperial authorities quickly responded by appropriating the lofty pipe well technology and prohibiting its further use. However, as the lofty pipe well could be easily concealed the ban was ignored, and Sichuan soon acquired a surplus of salt which it began exporting northwards. In the mid to late 11th century the state, finding its interests at risk in other salt production regions, decided to establish a monopoly on the production and sale of all Sichuan salt. While the state permitted the use of the lofty pipe well, all production was to be turned over to the administrative authorities in a manner similar to that which existed along the coast. For a variety of reasons, the monopoly system collapsed within less than two decades, and the state removed itself from the production and marketing of salt.

From the mid-Tang through the late Song the overriding concern of the state in salt and most other minerals was with the distribution and marketing of the processed material. The legal institutions of the state hardly addressed issues pertaining to ownership of mineral production sites or unprocessed minerals in the ground. Imperial authorities operated under the assumption that the state or the emperor had ultimate control and ownership of mineral lands, and that the state could intervene to secure its interests whenever necessary. This it did in the case of

216 The lofty pipe well (zhuotong jing) was a derrick device fitted with bamboo pipes and an iron drill bit, which was capable of reaching to depths in excess of 150 meters. This technology was a revolutionary improvement over the manually operated bucket and chain well system. As a result of reduced labor costs and higher outputs the new technology increased the profit margins for persons with an ownership interest in the salt brine production sites. von Glahn, Richard, The Country of Streams and Grottoes, supra and Zelin, Madeleine, “Capital Accumulation and Investment Strategies in Early Modern China: The Case of the Furong Salt Yard,” 9 Late Imperial China 79 (1988).

the Sichuan salt fields. However, the state backed down from wresting control of production sites from private owners, after two decades, a relatively short span of time. This reluctance of the state to become too closely involved in the operations on the ground may reflect the increasing dominance of Confucian thinking in official circles from the late Tang onwards. Schwartz explains the relevance of Confucianism to the commercial sphere as follows:

While Confucianism did not favor great intervention into the realm of the commercial sphere, as this was considered to be the domain of merchants, a category that was held to be inferior, it did allow for intervention, such as in the case of "state monopolies based on collaboration of 'government merchants' and the state." 218

Thus, central authorities did not believe that it was proper for government to intervene at the level where production took place. Once materials and resources entered the stream of commerce, the state would act, administer, and regulate to ensure that its material interests, primarily the procurement of revenue, was achieved. 219 The lack of state action in addressing more clearly the ownership of minerals and the lands in which they were found gave rise to a growing body of customary law as mineral production increased with a growing population and the demands of an advancing economy. 220

220 Zelin, Madeleine, "Capital Accumulation and Investment Strategies in Early Modern China," supra.

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C. The Development of New Social Relations on the Land:  
The Emergence of Landlordism

Over a period of several hundred years the actions taken by imperial rulers to preserve social harmony contributed to the development of new social relations on the land.221 As land distribution became less equal with the demise of the juntian system, so too did relations between landholders and field workers. The late Tang and early Song witnessed a rise in the incidence of a special class of landless persons, often referred to as “tenant-serfs” or “servants” and composed of tian pu (farm servants) and di ke (field helpers), who worked the fields of manor owners and smaller landholders.222 Most servants during this period were long term contracted positions with restrictive rights of mobility. As a result of widespread labor shortages servants frequently abandoned their master landholder and settled elsewhere in search of a better livelihood. This situation resulted in unstable relations not only between masters and servants, but also among masters vying to secure labourers. A master would attempt to coerce or force servants into long term working agreements, but these tactics were often undone by the actions of other masters who would entice or force servants to leave a former manor for a new

221 A double standard did exist, however, with respect to lands held by the imperial family and officials. As will be explained later, their estates continued to be operated by persons with a status essentially the same as servants.

222 Estimates as to the proportion of tenant-serfs or servants that made up the general population vary from half to three quarters. These peoples were not serfs in the European sense of the word, since Song law provided them with (1) formal rights of equality with untitled landowners; and (2) the right to register as ke hu, or independent households, as opposed to nu pu (slaves or bondservants) who were dependent and subordinate to their master landholder. Chao, Kang and Chen, Chung-yi, Zhongguo tudi zhidu shi [The History of Chinese Land Institutions] (Taipei, 1982) at 392.
one. In a series of decrees in the eleventh and twelfth centuries the Song state addressed this situation.\textsuperscript{223} The imperial decree of 1030 granted servants the right to leave a manor upon notice after harvest time, while the decree of 1153 provided servants with the option to leave lands transferred or mortgaged by their master, but prohibited the new master from abrogating the cultivation rights of the servant. Servants typically produced for their master, and their own family, which was regarded as a separate economic unit. An official ruling in 1184 barred masters from engaging in the poaching or smuggling of servants.

These laws improved the bargaining status of servants and ushered in practice of more well defined tenure contracts between masters and servants thereby setting the foundation for the formation of a true tenant class. Generalisations about the erosion of the master - servant land relations and the rise of landlordism and tenantry as the dominant land institution, are difficult to make due to great temporal and geographical variations. Although the issue continues to generate much debate a growing number of scholars concur that the dispersion of land holdings became widespread sometime during the late Ming or early Qing.\textsuperscript{224} A similar pattern of dispersion occurred with regards to many of

\textsuperscript{223} Ibid. at 400.

\textsuperscript{224} Elvin, Mark, "The Last Thousand Years of Chinese History - Changing Patterns of Land Tenure," 4 Modern Asian Studies 97 (1970); Chao, Kang, "New Data on Land Ownership Patterns in Ming - Ch'ing China - A Research Note," 40 Journal of East Asian Studies (4) 719 (1981); Fu, Yiling, Ming qing nongcun shehui jingji [Rural Society and Economy in the Ming and Qing] (Hong Kong: Sanlian Shudian, 1961); Li, Wenzhi, "Ming qing shidai de fengjian tudi suoyouzhi" [The Feudal Landowning System of the Ming Qing Era], 8 Jingji Yanjiu 67 and 9 Jingji Yanjiu 55 (1963); and Masaaki, Oyama, "Large Landownership in the Jiangnan Delta Region During the Late Ming-Early Qing Period," in Linda Grove and Christian Daniels (eds.), State and Society in China - Japanese Perspectives on Ming - Qing Social and Economic History (Tokyo: Univ. of Tokyo Press, 1984) at 101-163.
the more valuable urban residential structures and commercial facilities, such as shops and mills, which had been held and either used or leased by the state.  

The demise of the manor based economy was spurred by imperial rulings in the Ming and Qing restricting slavery. In the early Ming the maintenance of slaves by anyone without an official title or office was outlawed. This of course did not put an end to the practice, but many landowners formally complied by converting their slaves into long term servants. Early Qing rulers recognized that the manorial system had become a source of social instability and took positive steps to finally dismantle the institution. In the early 1680s Emperor Kangxi approved a memorial from the Governor of Anhui Province that barred the sale and transfer of indentured workers by masters who had sold land. Forty years later Emperor Yongzheng issued a decree freeing servants and converting them to commoners.

The gradual dissolution of slavery and serfdom resulted in more people having some form of interest in the land, either as an owner or as a tenant. Coinciding with these new relationships on the land was the rise of a

\[225\] Shiba explains that most real estate in urban areas in Ningbo in Tang and Song eras was owned by the state and leased to private individuals through an official real estate office known as the loudian wu. By the Ming most urban real estate in Ningbo was possessed and managed by private parties. Shiba, Yoshinobu, “Ningbo and its Hinterland,” in G. William Skinner (ed.), The City in Late Imperial China (Stanford, Stanford Univ. Press, 1977) at 419. Also see Twitchett, Financial Administration Under the Tang, supra at 21.

\[226\] Wei, Jinyu, “Ming Qing shidai tiannung di nungnu diwei” [The Serf Status of Tenants in Ming-Qing Era], 5 Lishi yanjiu 120 (1963) at 128.

\[227\] Masaaki, Oyama, “Large Landownership in the Jiangnan Delta Region,” supra at 130.
commercialized economy, evidenced by the formation and extension of new markets for a vast array of resources including land. Sales and leases of land parcels increased as the economic interests of people became more varied. Many rural elites who had held large tracts of land found that other investments and undertakings, such as urban real estate, commercial enterprises and money lending, offered higher returns than the leasing of rural land. These urban based interests lured landlords out of the countryside bringing about an increased incidence of absentee landlordism. Peasants too found alternative sources of income. Spence describes the many new patterns of social relationships on the land in the late Ming and early Qing era as follows.

China's rural diversity meant that “landlords” could not be entirely distinguished from “peasants.” For every wealthy absentee landlord living in one of the larger towns, for example, there might be scores of smaller-scale local landlords living in the countryside, perhaps renting out some of their land or hiring part-time labor to till it. Similarly there were millions of peasant proprietors who owned a little more land than they needed for subsistence, and they might farm their own land with the help of some seasonal labourers. Others, owning a little less than land than they needed for subsistence might rent an extra fraction of an acre or hire themselves out as casual labor in the busy seasons. And in most peasant homes, there was some form of handicraft industry that connected the rural family to a commercial network.

By at least the late 1600s dispersion of land was leading slowly to the development of a complex array of new relations among the state, landlords and...
tenants. These new patterns on the land are associated with the end of manorialism, or what some term feudalism, and the emergence of a pre-capitalist or capitalist era. A full discussion of that issue is beyond the scope of this paper, suffice it to say that there is a fair degree of consensus among historians that throughout most regions of China there was little evidence of manorialism or feudalism beyond the late Ming or early Qing period.230

230 See: Elvin, Mark, The Pattern of the Chinese Past (Stanford: Stanford University Press, 1973) at 235 and Chao, Kang, "New Data on Land Ownership Patterns in Ming - Ch’ing China - A Research Note," 40 Journal of East Asian Studies (4) 719 (1981) at 720. A number of historians in China writing from a Marxist perspective have argued that the Qing dynasty perpetuated feudalism throughout much of China’s countryside, preventing the appearance of capitalism until the twentieth century.
III. The Late Imperial Era (From Late Ming Through the Qing)

A. Material and Ideological Factors Affecting the Evolution of Property Concepts and Institutions

1. Material Scarcity and the Evolution of Property Rights

A number of material factors in late imperial Chinese society affected property concepts and institutions. Among the more significant of these was the unprecedented rise in population, which increased twice as fast as the cultivated land acreage, resulting in high population densities and land shortages. 231 Several recently published scholarly works discuss the environmental degradation, in the form of deforestation, soil erosion, siltation and flooding, that accompanied or resulted from the high population densities on the land. 232 An additional material change in the Qing era was the increased commercialisation of the economy and society, which contributed to the recognition or at least treatment of land as a

231 Ho found that the Chinese population increased from 100 million in 1685 to 300 million in 1790. Ho, Ping-ti, Studies in the Population of China, 1368 - 1953 (Cambridge: Harvard University Press, 1959) at 281. Perkins estimates the population increased from 100 million in 1650 to 400 million in 1850. Perkins, Dwight, Agricultural Development in China: 1368-1968 (Chicago: Aldine Press, 1969) at 16. While grain supplies generally followed the upward population trends, the studies by Ho and Perkins indicate that the country may have been approaching Malthusian limits.

commodity. All these material facts may have and likely did influence the evolution of property concepts and institutions.

Several scholars who have examined the evolutionary nature of property rights in land and other natural resources in Western societies, particularly in North America have concluded that scarce supplies of a resource are a critical factor leading away from communal notions of property and towards the establishment of private rights of property in a resource. Buoye stands out as an example of one who has studied the relationship between scarcity of land supplies and property rights in the context of late imperial China. He concluded that limited supplies of high quality arable land was a “sufficient condition to create strong incentives to alter the existing structure of property rights in land.”


235 Buoye, Thomas, “From Patrimony to Commodity: Changing Concepts of Land,” supra. I am not aware of any other scholars who have examined the issue of property rights and resource scarcity in the context of late imperial China, with the possible exception of Kang Chao’s study, Man and Land in Chinese History, supra which seeks to explain the reasons for certain forms of land tenure in light of population growth.

After introducing Yandle's model on the evolution of property rights I will discuss the strengths and weaknesses of the approach and its applicability to the present study.\textsuperscript{237} My purpose is neither to prove nor disprove an evolutionary theory of property rights, rather I want to consider what effect the occurrence of resource scarcity may have had on the development of property rights.

Yandle argues that when there are sufficient supplies of a resource there seldom are rules or institutions that have an allocative function or regulatory role with respect to that resource.\textsuperscript{238} In such event the resource is treated as common property, whereby all persons or economic agents may have access to the resource, use it and exploit it.\textsuperscript{239} This often gives rise to the "tragedy of the commons," a phenomenon that was briefly mentioned above.\textsuperscript{240} According to Yandle when supplies of the resource diminish to such an extent that conditions of scarcity are prevalent, disputes erupt among competing users, who "call on the political system to redefine rights or to define property for the first time, so that wealth of one group or another will be enhanced"\textsuperscript{241} Political authorities respond by allocating access and limited use rights to the resource. However, because the government has the recognised power and authority to control rights to the resource and revoke any licenses or other rights conveyed out, the resource is owned by the government and

\textsuperscript{237} Yandle, Bruce, "Resource Economics: A Property Rights Perspective," supra

\textsuperscript{238} Ibid. at 8.

\textsuperscript{239} Yandle presumably is referring to formal state institutions and positive rules. He overlooks the possibility of the existence of customary rules, which effectively may regulate access and use.

\textsuperscript{240} See pages 72-74 above.

\textsuperscript{241} Ibid. at 4.
hence is public property. At some point when the cost of government or public administration of the resource begins to exceed the costs associated with the identification of private rights, there is a transition to a private property rights regime. Private property is characterized by personal and exclusive rights in the possession, use and transfer of a resource. Yandle admits that determining and describing the point of transition from public to private property is "neither simple nor completely settled." The value of the resource as determined by market factors play some role. Additional factors to be considered in determining the transition point include the number of grantees that have been issued rights of use, income, and transfer or alienation in the resource; the conduct and policies of the government; and the conduct of those who have no rights in the resource. Finally, Yandle explains that as long as the value of the rights in the resource outweighs their enforcement costs the resource will remain under private ownership, otherwise the resource again may come under public or common ownership. This presumes that the existing economic, political and ideological system remains relatively static.

The theoretical framework utilised by Yandle, Buoye and others cited above assumes the existence of relatively free and unregulated markets, with accurate pricing mechanisms. Additionally, these works presume that cost minimisation,

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242 According to Yandle, "History bears out the fact that natural resources have not always moved quickly from common access to private status. There always seems to be a historical way station, a period of transition, where a public body manages the resource." Ibid. at 6.

243 Ibid.

244 Ibid. at 8.

245 Ibid.
or utility maximisation, is a key motivating factor in human conduct. Thus the effects of historical, social or political factors in the allocation of property rights or the transition processes are downplayed or in some cases ignored.\textsuperscript{246} Yandle's work in particular assumes the existence of utility maximising actors who behave out of self interest and presumably take no action with respect to promoting or preserving the interest of the community. Buoye utilised a theoretical framework based on North's theory of structure and change in economic history which emphasizes the role of economic and political institutions much like Yandle's approach. As discussed above, North's theory is based in part upon Ronald Coase's work on transaction costs.

Earlier in the paper we discussed how individuals in traditional China did not act solely out of self interest, but rather sought at least on occasions to promote and preserve the interests of family, lineage, village and guild. It is beyond the scope of this paper to explore the issue of whether conduct or actions taken on behalf of a group or community actually constituted a selfish act in that it would affect one's reputation or standing in the community. We might presume here that when an individual acted to further the interests of a family or community group, the collective or group was the primary beneficiary, and thus persons did not act solely out of self interest, but also were interested in an altruistic sense of furthering the aims of the collective or group.

In later sections of this paper we will examine the extent to which increased shortages of land in the late imperial period may have influenced the development of property concepts and institutions. We also will consider to what extent notions of private property rights may have appeared, and if so whether a connection

\textsuperscript{246} Buoye and Libecap do consider these factors to a greater extent than Yandle.
existed between these private or individual notions of property and the increased scarcity of land resources.

2. The Ideological Framework

Along with material factors the ideological framework upon which a society rests plays a significant role in determining the content of property concepts and form of institutions. Sovereign and subject, officialdom and society in late imperial China shared many similar ideas of property and how relations among people should be structured with respect to limited resources. Some would argue that the prevailing or dominant ideological framework is a construction or expression of the ruling group or class within a society, which imposes its ideas upon subordinate classes, or establishes and maintains those ideas through hegemonic processes and structures. To a large extent, this may be an accurate statement. Subordinate groups in late imperial Chinese society shared and embraced Confucianism and other philosophical views held by officialdom and local elites.

The works of Berman and Sugarman emphasize that legal concepts and institutions are the product of an interaction between the upper and lower


248 Feuerwerker, Albert, State and Society in Eighteenth Century China: The Ch'ing Empire in Its Glory (Ann Arbor: University of Michigan Center for Chinese Studies, 1976) at 11-13. I adopt the same broad definition of Confucianism that Feuerwerker develops, namely “the entire body of Neo-Confucian thought that descended from Confucius and Mencius as it was written and argued about” by various schools of thought. Ibid. at 13.
stratums of society. If so, then late imperial property institutions were influenced not only by ideas that emanated from above, but also from the practices and beliefs of the rural masses. For example, popular religion which “in a sense was the ideology of the peasant masses, overlapped only partially with the ‘great tradition’ [of Confucianism] which was the creation and salvation of the upper classes.” Whether ideas were imposed from above or sprung from below has important ramifications for analysing and understanding how legal institutions became established and evolved. As discussed above, this study takes the view that it is important to consider the ideas and practices of both the official and private spheres in order to obtain a thorough and accurate understanding of the nature and role of legal concepts and institutions in a society.


250 Feuerwerker, Albert, State and Society in Eighteenth Century China, supra at 12. Feuerwerker’s main concern is the role of elite values, but he does admit that peasant values played an influential role at times. The following passage, which is a continuation of the above quote should serve to clarify his position on this point.

Although gods and rituals may have differed from and sometimes even clashed with imperial Confucianism, even to the extent of inspiring large-scale rebellion in the name of the Buddha Maitreya, the cause was less often that the basic social values of the elite were at odds than that the ruling class had failed to live up to its own ideals which it had convinced the ruled to believe were also theirs.

Thus, Feuerwerker emphasizes the determinative role of ideas and values that are developed and emanate from above by the ruling class. I am not entirely convinced that the ideology of the elite is necessarily so hegemonic or determinative, although I agree that it is greatly influential. For a contemporary variant of the ideas springing up from below to affect institutional change in notions or property rights, see Kelliher’s account of how the peasantry brought forth notions of private property rights in post Maoist China. Kelliher, Daniel, Peasant Power in China, supra.

251 See above at page 32-33.
To establish the degree to which the rural masses were influenced or motivated by ideas from above or below is a difficult one which is beyond the scope of this paper. Thus, we cannot say here to what extent Daoist and Buddhist principles of acceptance and harmony embraced by subordinate groups achieved the same effect as the accommodation of those ideas by the dominant class in its effort to establish its hegemony. It is perhaps sufficient at this point to say that the Confucian thought of the dominant class played a very significant role in the way rural masses looked at the world and conducted themselves, but not necessarily a controlling or determinative one. Confucian ideology was instrumental in the formulation, implementation and regulation of property concepts and institutions. Under the influence of Confucianism the official or dominant perspective of the state posited the central principles and institutions of ownership. The Confucian classics and their later interpreters such as Mencius, for example, established and justified the notion of imperial ownership of all lands throughout the empire.\(^{252}\) The concept of the mandate of heaven, that the emperor ruled all below while the gods controlled the heavens, further reinforced the principle of the emperor's supreme ownership.

3. **Institutions of State and Society:**

*Responses to Material and Ideological Conditions*

The remainder of this study focusses on the way in which state and society, or the official and private spheres, addressed and responded to material and ideological conditions. In this sub-section we examine briefly the interests of the

\(^{252}\) See note 175 at page 72 above.
official sphere and introduce two institutions that played an important role in state and society relations as they pertain to land ownership: the gentry (shen-shi) and lineages. Thereafter, we examine various incidents of ownership in land and associated institutions of state and society in an effort to gain an understanding of the essence of property ownership and management.

(a) The State

The idea that the state, personified by the emperor, owned all arable fields, woodlands and other lands was an enduring one which echoed down into the twentieth century. However, a number of the legal institutions based on that idea did not persist as long. The jun-tian system did not survive beyond the late Tang, and the imperial legal codes regulating and administering the jun-tian system disappeared several hundred years afterwards. Nor is it clear, as we shall see, whether late imperial law and legal institutions succeeded in upholding the notion of imperial ownership in a different form. With the increased incidence of landholding in the private sphere and the growing numbers of land transactions by a larger proportion of society, the practices and institutions of the state and society increasingly evidenced the belief that individuals, families, lineages and entities other than the imperial court or associated privileged elites could hold an ownership interest in land. By the mid-Qing, although the belief in imperial ownership of all lands was not openly refuted or challenged, there was little evidence that it was as widely recognized or bore much practical relevance as compared to earlier eras.

Despite the diminished role of the late imperial state as a holder of land

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253 Jamieson, George, *Chinese Family and Commercial Law* (Shanghai: Kelley and Walsh, 1921) at chapter 5.
resources, it continued to have the capability, albeit a lessened one, to exert its authority through either moral suasion or the use or threat of force to secure its interests. The interests of the state in land resources remained fairly constant throughout late imperial times, and the approaches used to secure those interests changed only slightly in face of the relatively rapid changes in socioeconomic and political conditions from the seventeenth century onwards. The two main objectives of the late imperial state in the regulation of land were the maintenance of social harmony and stability, and the enhancement of agricultural productivity, and thus by extension the wealth of the state and society. To secure these objectives the state sought to: (1) extract income through tribute, taxation and other levies on the land or its resources and products to finance its expenditures; (2) clarify the distinction between public and private land; (3) assign interests in land and determine tax liabilities; and (4) promote and sustain agricultural land uses and the development of agrarian communities. Once the state was satisfied that it had secured its interests it did not seek to intervene further in the possession, management and use of the land. This reflected both the limited material capabilities of the state and the dominant Confucian ideology that the state should not interfere unduly in the affairs of individuals and the community. Schwartz explains the practical and ideological basis for the limited intervention of the late imperial state as follows:

The imperial authorities lacked the communications and other technology to bring about or impose the type of order witnessed in modern totalitarianist regimes, which are capable of controlling and shaping the lives of individuals at the grassroots. An alternate or additional reason may be that “the main line of Confucianism” was opposed to the concept of “aggressive state intervention in every domain of society” and instead envisioned the ideal of exemplary spiritual and educational influence of the ruling class.255

The limited presence of the state in the regulation and management of land transactions and other matters was met by a growing body of customary law, which addressed a rising number of issues pertaining to the way in which land could be held, used, and transferred by individuals, families and other associations.256

(b) The Gentry (Shen-shi)

Coinciding with the easing of official restrictions on land transfers in the late Tang and early Song eras was the rise of the civil exam system under which scholars sought degrees qualifying them for placement in official positions in the


256 The size and capabilities of the government and administrative apparatus of late imperial state did not keep increase as the population grew. Throughout the empire all provincial, prefectural and local officials generally were faced with smaller budgets and staff, yet held responsible for administering to larger areas, as office jurisdictions were expanded and government territorial divisions merged. This occurred both in urban and rural regions. With respect to our discussion above, district magistrates particularly were overburdened. Many simply lacked the time and resources to ensure that imperial laws would be enforced or disputes adjudicated. See: Skinner, G.William, “Introduction: Urban and Rural in Chinese Society,” in Skinner, G. William (ed.), The City in Late Imperial China (Stanford, Stanford Univ. Press, 1977) at 18-21 and Ch’ü, T’ung-tsuo, Local Government in China Under the Ch’ing (Stanford: Stanford University Press, 1962).
government bureaucracy.\textsuperscript{257} Although not all degree holders entered the
government bureaucracy, anyone that was conferred a degree or received one
became a member of an elite class known as the gentry (shen-shi).\textsuperscript{258} Thus there
were two groups that constituted the gentry—the official-gentry (shen) and the
"scholar-gentry" (shi). The official-gentry (shen) were employed by the state and
served in various levels of government depending upon the rank of the degree
held.\textsuperscript{259} The scholar-gentry (shi), which considerably outnumbered the official
gentry (shen), held no official posts but played a special role in maintaining social
harmony in their rural home areas, and in acting as intermediaries between the

\textsuperscript{257} Tang imperial leaders developed a civil bureaucracy, staffed by scholar
officials, for the express purpose of checking the domineering influence of
aristocratic officials. Entry into the civil bureaucracy was dependent on obtaining
a scholarly degree, which generally required successful passage through the
education and examination system. See: Twitchett, Denis., \textit{The Birth of the
Chinese Meritocracy: Bureaucrats and Examinations in T'ang China} (London:
China Society, 1976) and Lo, Winston Wan, \textit{An Introduction to the Civil Service of
Sung China: With Emphasis on its Personnel Administration} (Honolulu:
University of Hawaii Press, 1987).

\textsuperscript{258} The civil bureaucracy and the gentry (shen-shi) changed over time. Our
discussion here focusses on the Qing era. For more on the relationship between
scholarly degree holding officials and the gentry (shen) in the Qing era see: Ch'ü,
T'ung-ts'uo, \textit{Local Government in China Under the Ch'ing} (Stanford: Stanford
University Press, 1962) at 168-190. Some writers have argued that the civil
bureaucracy and examination systems of the Ming and Qing eras constituted a
meritocracy giving rise to a fluid social class structure, which provided no
guarantee that landed wealth would remain in the family for more than two to
three generations, especially in the North where small landholdings predominated.
See: Ho, Ping-ti, \textit{The Ladder of Success in Imperial China: Aspects of Social
Mobility, 1368-1911} (New York: John Wiley and Sons, 1962) at 257 and Elvin,
Mark, \textit{The Pattern of the Chinese Past}, supra at 258.

\textsuperscript{259} In the Qing era degrees demonstrating progressively higher proficiency in
scholarly learning such as, licentiate (shengyuan), provincial (juren) and
metropolitan (jinshi), the highest degree conferred, theoretically were to be
awarded to successful examinees. There were instances when degrees were
obtained by recommendation or purchase. This was more common in the Qing when
the state sought to raise additional revenue through the sale of degrees. Ch'ü,
Tung-ts'uo, \textit{Local Government in China Under the Ch'ing}, supra.
lower strata of society and officialdom, primarily by representing the interests of the local community to which they belonged.\textsuperscript{260}

Traditionally rooted in the countryside, the outlook and beliefs of the scholar-gentry (shi) were influenced by the material conditions there as the following passage reveals.

The scholars were usually landlords, and the farmers were the peasants who actually cultivated the land. These were the two honourable professions in China. . . . Although the "scholars" did not actually cultivate the land themselves, yet since they were usually landlords, their fortunes were tied up with agriculture. A good or bad harvest meant that their reaction to the universe and their outlook on life were essentially those of the farmer. In addition their education gave them the power to express what an actual farmer felt but was incapable of expressing himself. This expression took the form of Chinese philosophy, literature and art."\textsuperscript{261}

The perspectives of the gentry (shen-shi) contributed greatly to the shaping of the norms, values and institutions of society. By at least the late Ming, however, the scholar gentry (shi) had become disconnected fairly substantially from their rural


roots and increasingly linked to urban areas and commercial activities. As will be discussed at greater length below, this change in the material aspects of their lives affected social and legal relations in the countryside, the conception of interests in land, and the evolution of property institutions.

(c) Lineages

The subject of lineage organization, management and development is a complex one that has been studied intensively by a number of scholars. It is beyond the scope of this paper to delve into a detailed discussion of the land holding and

262 Fumu relates how seventy percent of the population of Suzhou in the early 1600s, then a leading urban center, was populated by officials and various degree holders. Fumu, Susumu, “Late Ming Urban Reform and the Popular Uprising in Hangzhou,” (Michael Lewis, trans.) in Johnson, Linda Cooke, (ed.), Cities of Jiangnan in Late Imperial China (Albany: State University of New York Press, 1993), at 47-79. For additional treatment on the connection between the gentry and urban areas see other selections in Johnson’s work, particularly Santoangelo, Paolo, “Urban Society in Late Imperial Suzhou,” (Adam Victor, trans.) at 81-116; Skinner, G. William, “Introduction: Urban and Rural in Chinese Society,” in Skinner, The City in Late Imperial China (Stanford, Stanford Univ. Press, 1977) at 253-274; and Chang, The Income of the Chinese Gentry, supra. Also see page 88 above.

263 There was a complex dynamic at work in the late imperial era regarding the role of material and ideological factors and the way they affected legal institutions of property. It is difficult if not impossible to identify whether one factor was determinative and the other dependent. For example, the gentry and other groups in society (peasant, merchant and artisan) responded to changed material condition in different ways, and those responses seemingly altered ideas and institutions of property. It is not clear whether the gentry as a dominant class altered their thinking and modified existing notions and institutions of property, or whether they sought to preserve the legal institutions that had been established under traditional Confucian thought. If the later, then we might conclude that ideology played a more significant role in the structuring property institutions, if the former we might conclude that material factors were more influential. Wright for example argues that the ideology of the gentry changed significantly during the late imperial era, and that the class actually split over the issue of whether to revive, or conserve, Confucian thought, or jettison it. See: Wright, Mary C., The Last Stand of Chinese Conservatism: The T‘ung-Chih Restoration, 1862-1874 (Stanford: Stanford University Press, 1957).
management rules and practices of lineages. The discussion here briefly explores the basis and nature of the communal or corporate character of lineage land holding and management. The family unit was an idealised social form in traditional China, and Confucianism held that it should serve as a template upon which to structure and regulate most other relationships in society. The lineage corporation and charitable estate originating in the Neo-Confucian Song era are examples of how the form of the family unit was extended.

Lineages are corporate groups celebrating ritual unity based on descent from a common ancestor. Lineages frequently held title or indirectly controlled numerous types of lands and estates, including charitable estates (yizhuang), ancestral estates (zu tang), ritual land (jitian), scholar estates, and service land (yitian). These lands were donated or otherwise provided to the lineage by constituent family members and held collectively. Some types of lands, as their names imply, were used for religious or ritual purposes, such as ancestor worship, temples and cemeteries. Other lands were held for profit making ventures, leased out to lineage members themselves or more commonly to persons outside the lineage. Profits generated from these and other lineage enterprises were distributed or reinvested. In some regions, particularly in the southeastern coastal provinces, lineages controlled fifty percent or more of all arable lands. Such extensive control only was achieved in the Qing era. For many other areas lineages held a small fraction of the land, but had a significant role in social and economic


As discussed above there was a loosening of restrictions on the transfer and inheritance of land in the late Tang and early Song dynasties. While this opened up opportunities for the amassing of wealth by a larger segment of society, in practice the establishment of large and enduring estates by commoner households in late imperial times proved to be a difficult task. In large part this was due to the partible inheritance rules that progressively diminished the landholdings of males that would eventually become household heads. Thus, while some families were fortunate to accumulate some capital, they were unlikely to acquire a sufficient quantity to pass onto and ensure their offspring a similar or higher standard of living.

Early scholarly investigations into lineages posited that they were established to minimize the effects of dissipated wealth resulting from partible

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267 Beattie and Huang both observed, in Anhui Province and Northern China, respectively, that inheritance practices played a critical role in rural mobility patterns, preventing rich households from maintaining their status for more than two generations. According to Huang, in a single generation a family could be driven from wealthy to poor peasant status. See: Beattie, Hilary, Land and Lineage in China, supra at 88 - 111 and Huang, Philip C., The Peasant Family and Rural Development in North China (Stanford: Stanford University Press, 1985) at 78. Similar observations have been made in the southern China where lineage organizations were more widespread and common. See generally: Freedman, Maurice, Chinese Lineage and Society, supra.
inheritance. Through lineage organizations resources were pooled and practices developed that tended to restrain land transfers thereby protecting member families from the vagaries associated with pressures of downward mobility.

This was often accomplished by establishing or funding private schools, from profits generated by lineage landholdings and enterprise, to prepare promising young male lineage members for the civil service exams. This was seen as a means of enhancing their chances for entry into the privileged gentry class (shen-shi), which in turn provided a platform for protecting and further advancing lineage and family interests in land and other matters.

In this way through their collective interests in land the welfare and status of all lineage members potentially was promoted.

One common approach by which many lineages sought to achieve this goal was through the establishment and maintenance of charitable estates. In his analysis of one of the most successful charitable family estates, the Fan Clan Estate, Twitchett explains how, Fan Zhongyan, the founder of the estate must have been influenced by the land administration practices of Buddhist monasteries, which had accumulated large tracts of land through donations and its innovative


269 Comparisons are often drawn between the corporate lineage and the use of the entail among the English elite from the mid 1600s through the 1800s. Both institutions were used to preserve property for future generations from transfer and division.


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management systems. Particularly noteworthy were the arrangements by which land was held communally and passed on through the generations thereby providing monasteries with a secure land base. Fan Zhongyan also may have been impressed with the way in which monasteries were able to compound their wealth and ensure a sufficient livelihood for the monkhood. Fan's charitable estate, designed to emulate these virtues, was structured along corporate type lines, whereby families held shares or interests in resources that were managed by a respected and wealthy elder male. In time this model institution was copied by families of varying degrees of wealth throughout China, but predominantly in the southeast. In northern China corporate lineages were less prominent and influential as they were often subordinate to the village. Rawski has shown that households in the north could, however, secure similar levels of wealth and prominence in the absence of corporate lineages.

Recent scholarship has argued that lineages intentionally were arranged as corporate structures rather than institutions evolving from discovered kinship


272 Ibid. at 105.


ties. That is a group of men would deliberately determine who within a defined locality to include as members in the corporate lineage and justify this according to an arranged genealogy. This is not to say that the genealogy was false, but rather that it was constructed in an effort to demonstrate the common roots of the members. This would serve to increase group loyalty and cooperation. Members of the lineage cooperated in conducting business with others who shared a collective identity based on descent, that was cemented by social and cultural activities such as the maintenance of common grave sites and ancestral halls. Regardless of their structural origin, the goal behind the formation of the lineages was uniform, to advance the social and economic interests of its members through the collective ownership of land and other resources.

Like household held land, lineage lands were subjected to a number of restrictions against their alienation. There has been much written on the subject of lineages in southern China. From this we find that lineages maintained a high degree of control and management over the lands and other land based resources in or around their villages. In many cases the lineage rules prohibiting transfers of interests in land to persons outside the lineage effectively


prevented newcomers from settling permanently in the village. Palmer explains the situation near Hong Kong in the late Qing as follows:

Each of the major lineage villages kept the village surroundings under its exclusive control, not permitting anyone of a different surname to own land within this domain and rarely tolerating even short term leases of such holdings to outsiders. Any lineage that allowed members to alienate to outsiders land located within the main area of land holding would not have survived long... As a result, rights and duties relating to such land were informed by a recognition that this property was invaluable not only as a productive resource, but also as part of a strategically important territory. Thus, there was strict enforcement of lineage rules stipulating that land should be alienated within the lineage and could only be disposed of to outsiders after other members had failed to take up their options - a rare occurrence in the case of land situated within the immediate environs of a large scale lineage village.278

Research on lineages in North and Central China has demonstrated that while they were smaller and less complex, they controlled interests in land and functioned similar to southern lineages.279 Lineages in the these regions typically had preemptive rights to purchase any land that one of its members desired to sell and the authority to annul a sale if any lineage member failed to provide the lineage with priority rights in a transaction.

Further paralleling household rules on land, were lineage land management

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systems. Lineage managers were typically the most prominent and wealthy males in the descent group. In exercising their management authority over the way lands were used, lineage managers influenced the economic and political affairs of the village and community. Knowing the degree to which such managers were motivated or guided by the interests of the broader community, their lineage or their own personal interests would provide additional insights into the nature of property rights in the late imperial era. That is, if lineage managers exercised control rights over lineage land solely to promote their own interests, rather than that of the lineage, this would indicate a less communal and more individualistic attitude towards property. It remains unclear to what extent managers acted in the common interest and whether the benefits that flowed to them coincided with benefits provided to the lineage and community, or were solely the result of self interested undertakings.


281 According to Rubie Watson’s research the wealthy who served as estate managers were the ultimate beneficiaries while others received little material benefit and tended to be alienated from management. This only provides a partial answer to our question posed above. See: Watson, Rubie, “Corporate Property and Local Leadership,” supra at 247.
B. Possessory Interests in the Land

1. State Land Holdings in Late Imperial Times

The lands that the imperial state formally retained possession of in the late Ming and early Qing included guanzhuang (imperial or official estates) and guantian (imperial or official lands). Imperial estates were comprised of lands containing imperial palaces, administrative and commercial buildings, manors and parks. These were primarily located in and around the capital and at other important government centers. Imperial estates containing manors typically were worked by serfs and were allocated to members of the extended imperial family and selected government and military officials.\(^{282}\) Restrictions on their sale, merger and lease were intended to ensure that they remained subject to state possession and control. However, with the rising commercialisation of the economy, manor holders frequently sold their lands or entered into mortgage or other credit arrangements that resulted in the transfer of these lands into private hands.

The early Qing were most strict in enforcing restraints on the alienation of official estates, particularly in connection with their institution of qidi (bannerlands). Bannerlands, located primarily in the northern part of the country, were estates granted to the ruling Manchu military officials and troops. These lands constituted a small fraction of the total arable land in the country, but amounted to nearly a third of the land area in Zhili province (present day Hebei.

\(^{282}\) It was common practice for each new imperial order to confiscate landholdings and redistribute them to their loyal followers. Late imperial regimes were no exception in this regard. Powelson, John “Property in Chinese Development,” supra at 170-171.
province, which surrounds Beijing). Qing central authorities closely monitored land titles and repeatedly attempted to prevent the transfer of Manchu bannerlands to Han Chinese. A century after coming to power, the Qing Board of Revenue confiscated lands that had been alienated and established a trust for bannermen grantees lacking funds to redeem their lands. In the 1850s the law prohibiting alienation of bannerlands was repealed in recognition that it was not consistently observed or enforced. By the early 1900s most bannerlands had been transferred into the hands of private individuals.

Official lands (guan tian), included lands which were held by or contained facilities or institutions characterized as: public / civil (min) or state or official

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284 Li, Wenzhi, “Qingdai qianqi de tudi zhanyou guanxi” [Land Relations in the Early Qing], 5 Lishi Yanjiu 75 (1963).

285 Han, Liang Huang, The Land Tax in China, supra at 68.

286 Li, Wenzhi, “Qingdai qianqi,” supra at 93 and Han, Liang Huang, The Land Tax in China, supra at 68.
Official lands also included so-called waste lands (huang di), which were comprised of all forests, wetlands, beaches and generally all other areas that were not built upon or under cultivation. A leading example of an official (guan) land institution is the Mulan Weichang, or Mulan Enclosure, an exceptionally large imperial preserve, established by the ruling Manchus shortly after they seized power in the mid-1600. The Mulan Enclosure was situated in the border area between the Manchurian homeland of the ruling elite and northeastern China and was reserved for the exclusive use of Manchu military and officialdom. As Menzies explains the Mulan Enclosure adhered to the traditional concept of earlier but smaller imperial parks and enclosures.

[The Mulan Weichang] used vegetation and animals to create a microcosm of the Imperial order. In symbolic terms, it represented a physical manifestation of the unifying power of the emperor and as such, it was essential to preserve the natural, rural setting, and

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287 The translation of the word “min” as public or civil needs to be clarified here, because some scholars translate it as “private” while others translate it as “peoples.” Feuerwerker, for example, explains that the term “min-tian” means privately owned fields, while Kroker takes the same term to mean the “people’s fields.” Feuerwerker, Albert, State and Society in Eighteenth Century China: The Ch’ing Empire in Its Glory (Ann Arbor: University of Michigan Center for Chinese Studies, 1976) at 80-81 and Kroker, Edward, “The Concept of Property,” supra at 127. Rowe explains that the min conveys the sense of popular or communal. He also points out that the word gong or “public” had replaced min to describe the three categories of managerial responsibilities for urban projects in Hankow in the late Qing, the other two being guan or “official” and si or “private.” See: Rowe, William T., “The Problem of ‘Civil Society’ in Late Imperial China,” 19 Modern China 136 (1993) at 321. This interpretation is closer to what I mean in translating min as public / civil. In the text above, the min institutions that I am referring to privately run schools open to the public or temples owned by religious orders that were open to the community.

288 The Mulan Enclosure covered an area of ten thousand square kilometres, located in present day Liaoning, Jilin and Heilongjiang Provinces. Menzies, Nicholas, “Strategic Space: Exclusion and Inclusion in Wildland Policies in Late Imperial China,” 26 Modern China 719 (1992) at 724.

289 Ibid. at 725
to prohibit settlement within the Enclosure.\textsuperscript{290}

The Mulan Enclosure also functioned as a strategic barrier, blocking entry into the Manchurian homeland, and thereby effectively preserved the ethnic and cultural identity of the Manchus.\textsuperscript{291} During the early portion of the Qing era the entire Mulan Enclosure remained under state ownership, and prohibitions on entry into or passage through the area were upheld in a strict manner. As the ruling Manchus gradually absorbed Han culture and became detached from their own, the strategic and symbolic significance of the Mulan Enclosure diminished, and the land was turned over to the private sphere and utilized largely to agricultural uses.\textsuperscript{292}

Public (\textit{min}) institutional land primarily included lands conveyed to schools and religious institutions for temples and tombs, subject to a reversionary interest

\textsuperscript{290} Ibid.

\textsuperscript{291} Manchu officialdom and elites regularly gathered in the Mulan Enclosure to participate in traditional rituals and customs. Ibid.

of the state.293 The Qing state collected rent and tax on these public lands and imposed restraints on their alienation. According to Han Liang Huang the total amount of land held by such institutions in the late Qing constituted a small percentage of all land.294 This assessment is corroborated by Palmer's study, which found that public land held by imperial authorities in Xinan county in Guangdong Province amounted to less than one percent of the arable land.295

2. The Conversion of Interests in the Land: The Expansion of a Private Sphere of Ownership

This section explores the means by which formal possessory rights in land shifted from the state or official sphere to the private sphere during the late imperial era. This process began of course with the collapse of the jun-tian system in the late Tang and early Song. However, it accelerated during the late imperial

293 These religious institutions largely were for Confucian sites, since the Daoists, but particularly the Buddhists, controlled large tracts of their own land held under officially recognized land titles. The Buddhists accumulated much land through donations and as a result of their lending and pawnbroking services, which were the earliest credit institutions in China. By the late Tang, Buddhist monasteries were the largest landowners after the state. Although much of this was confiscated during the persecutions in the late 800s, the Buddhists regained much of their land during the Song. Yang, Lien-sheng, “Buddhist Monasteries and Four Money Raising Institutions in Chinese History,” 13 Harvard Journal of Asiatic Studies 174 (1950) at 176; Twitchett, Denis, “Monastic Estates in T'ang China,” 5 Asia Major 123 (1956) at 141. Also see: Chen, Kenneth, Buddhism in China: A Historical Survey (Princeton: Princeton University Press, 1964) and Twitchett, Denis, “The Monasteries and China's Economy in Medieval Times,” 18 Bulletin of the School of Oriental and African Studies 526 (1957).

294 Han Liang Huang, The Land Tax in China, supra at 73.

era for several reasons related to the ideological and material conditions discussed above. Among these were: (1) the rapid growth in population that posed threats to social stability due to overcrowding on the land,296 (2) Confucian ideals that posited that an agrarian way of life was a superior one leading to social harmony and prosperity; and (3) the fiscal system of the late imperial state, which as discussed below was dependent heavily upon agricultural land for its revenue. Thus, central authorities were moved by several factors in promoting the development and reclamation of arable lands. In addition, when Qing authorities abandoned their tax and land registration reform plans in the early seventeenth century and settled on a program of limited state intervention at the local level, the private sphere effectively was provided the opportunity to retain all surplus production beyond officially fixed tax quotas.297 This provided an incentive to expand and intensify production, which led to the opening up by the private sphere of woodlands and wetland areas for agricultural uses.

In the contemporary post-Mao era we see some of these same material and economic factors motivating central authorities to grant the private sector possessory rights in land while officially retaining title to the land.298 In rural areas grain harvests remain vitally important to central authorities for economic reasons as well as for maintaining social stability in urban areas, where the state seeks to maintain low prices and steady supplies of grain and other food staples.

296 Buoye, Thomas, "From Patrimony to Commodity," supra.

297 Perdue, Peter, Exhausting the Earth, supra at 76-77.

Grain production expanded rapidly in the late 1970s and early 1980s when the rural land use reforms were implemented, leading to the intensification and expansion of agricultural production.\textsuperscript{299} In the urban sector, the granting of land use rights has been pursued by authorities because it provides much needed revenue and is seen as a means of enhancing the growth of the economy, in part by creating conditions favorable to foreign investment.\textsuperscript{300}

The late imperial state both promoted and acquiesced in the conversion of official lands (\textit{guan tian}) to the private sphere. By acquiesce I mean that the state did not take sufficient action to prevent the transfer (by sale, mortgage or other means) of state held lands to the private sector despite formal prohibitions on such transfer, such as the conversion of Manchu bannerlands mentioned above and the migration and settlement into restricted areas described below.

One means by which the state deliberately was involved in the conversion of lands was through grants of land to individuals, such as meritorious officials, military officers and wealthy elites, as well as institutions such as ancestral estates

\textsuperscript{299} See the sources cited in notes 37 and 38 at page 16 above.

A more institutionalised method by which land was turned over to individuals was through the *tun-tian* (militia colony) system. *Tun-tian*, were self-sufficient communities of militia, and/or former officers and troops. Originating with the Han and enduring down to the Qing *tun-tian* were established in frontier and border areas, and to a lesser extent in internal or central locations, to enhance national security and prevent civil unrest. In return for their obligation and service in aiding the state when periodically called upon, militia members assigned or associated to *tun-tian* units were granted plots of land by imperial authorities.

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301 These grants are to be distinguished from awards and gifts of land provided to loyal imperial troops following the establishment of new dynasties which were essentially a division of the spoils of war. See: Powelson, John P., “Property in Chinese Development: Some Historical Comparisons,” in James A. Dorn and Wang Xi (eds.), *Economic Reform in China: Problems and Prospects* (Chicago and London: The University of Chicago Press, 1990). The distinction is that the “spoils of war” lands were generally located near the capital or major provincial cities and remained under the ownership of the state. See: Huang, Philip C., *The Peasant Family and Rural Development in North China* (Stanford: Stanford University Press, 1985) For a description of land grants or conveyances by the imperial state to individuals and institutions see: Palmer, Michael J., “The Surface-Subsoil Form of Divided Ownership,” supra.

302 In the early Tang, nearly one thousand *tun-tian* settlements, each containing up to several hundred troops, were established across the northern and western frontiers. These served the defensive purpose of securing lands from Turkic, Mongol and Tibetan speaking peoples and a financial one of supporting the armed forces of the state. The Tang also promoted the development of non-strategic *tun-tian* for the sole purpose of bringing additional lands under cultivation and raising revenues. Such undertakings were in the nature of a state business enterprise. Twitchett, Denis, “Lands Under State Cultivation Under the Tang,” 5 *Journal of the Social and Economic History of the Orient* 162 (1959) at 175. The institution evidenced little change over a millennium. Menzies relates how Yan Ruyu, a Qing general, described *tun-tian* as an anachronistic device but advocated its usefulness in pacifying the Qinling Highland area in Shaanxi Province in the early nineteenth century. Menzies, Nicholas, “Strategic Space: Exclusion and Inclusion in Wildland Policies in Late Imperial China,” 26 *Modern China* 719 (1992) at 728.
There were several conditions that typically ran with granted *tun-tian* lands. These included restraints on alienation beyond an immediate family member of the militia grantee, and obligations to comply with the land use management decisions of central authorities. Key state organs, such as the Board of Works and Board of War determined and prescribed, through the issuance of administrative decisions, how *tun-tian* lands were to be utilized and managed. Such matters as the types of crops to be planted, whether and how irrigation systems were to be constructed, the supply of materials and equipment, and other particulars relating to the raising and harvesting of crops all were decided by imperial officials in the capital or key provincial cities. The overriding concern of central authorities was to see that the land was successfully converted to agricultural uses so as to ensure that *tun-tian* lands and their inhabitants did not become dependent on far off and costly sources of supply.

The decisions on land use were relayed down to local *tun-tian* field commanders, who in turn passed instructions on to local militia grantees. As militia grantees initially had limited rights in the land that had been granted to them, it may be concluded that they did not have exclusive ownership of the land. However, once self sufficiency was achieved most granted land apparently was no
longer subject to strict management by central authorities. Furthermore, as security concerns diminished restrictions on the alienation of granted lands were no rigidly enforced. Therefore, ownership of tun-tian land gradually became vested in the militia member who originally had been granted the land or in his successor grantee(s).

The security provided by imperial troops and the work they performed in preparing the land for crops frequently attracted civilian followers. The migration and development of civilian communities near military establishments was not always desired by the state. Not only did civilian developments interfere with military operations, but it also was not uncommon for disputes to erupt between military personnel, who had cleared and sometimes irrigated lands, and civilians who would squat on or assert false claims to these lands. During the Qing

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303 I have not located any information that reveals when central authorities discontinued exercising their management function over tun-tian lands. However, as discussed below the surface rights in many of these lands were alienated from Song onwards, thus suggesting that the center did not exert a continuous management function over any given area for a lengthy period of time. Li, Wei, “Shi lun Songdai xibei tun-tian de jige wenti” [A Discussion of Several Questions on Song Dynasty Tuntian in the Northwest] 1 Zhongguo shihui jingji yanjiu 20 (1988) According to Perdue, more than half of the tun-tian land at the Tonggu garrison in Hubei province had been conveyed away by the original militia grantees in the late Ming and early Qing era. Perdue, Peter, C., Exhausting the Earth: State and Peasant in Hunan, 1500 - 1850 (Cambridge, Massachusetts: Council on East Asian Studies Harvard University, 1987) at 89.

304 Ibid.

305 Will explains how civilian settlement was considered an obstacle by the state as it constructed a long defensive barrier of rivers and lakes in the central Yangzi River basin during the reign of the Southern Song. Will, P.E., “State Intervention in the Administration of a Hydraulic Infrastructure: The Example of Hubei Province in Late Imperial Times,” in Stuart Schram (ed.), The Scope of State Power in China (London: School of Oriental and African Studies, 1985) at 305.
when land shortages became more common the expansionary aims of *tun-tian* were expressed more frequently.\(^{306}\) Nevertheless, the issue of whether and when civilian settlements should be encouraged in areas occupied by military colonists remained a sensitive matter, which generated considerable political debate.\(^{307}\) Some officials were opposed to civilian settlements in such areas for ethical reasons, arguing that it was wrong for the state to send families into potentially dangerous areas. There was concern not only for the safety of civilians, but also their welfare, as food supplies were limited and unclaimed land was not yet cultivable. Others contended that a civilian presence would better secure the area thereby eliminating the possibility of armed conflict. Proponents of civilian settlements also argued that productivity levels would rise thereby eliminating the potential of food shortages for the military.

Settlement and conversion of land also occurred in frontier and hinterland areas in the absence of military related operations. Some migration and land settlements occurred as a result of officially directed and sponsored incentive schemes designed to reduce overcrowding,\(^{308}\) while others occurred in the absence of any state action as people sought out new land and settled by their own means.

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\(^{306}\) Jiang, Taixin, “Qing chu ken huang zhengce ji diquan fenpei qing kuangdi kaocha,” [An Investigation of the Policy of Opening Wildlands and Problems of Land Tenure During the Early Qing], 5 *Lishi Yanjiu* 167 (1982).

\(^{307}\) Hua, Li, “Qianlong nianjian yimin chuguan yu Qing qianqi Tianshan beilu nongye de fazhan” [Emigration Beyond the Great Wall in the Qianlong Era and the Development of Agriculture North of Tianshan in the Early Qing], 4 *Xibei shidi* 9 (1987); and Xu, Bofu, “Qingdai qianqi Xianjiang diqu de mintun” [Civilian Colonies in Xianjiang During the Early Qing Dynasty], 2 *Zhongguo shih yanjiu* 85 (1985).

\(^{308}\) Rawski, Evelyn S., “Agricultural Development in the Han River Highlands,” 3 (4) *Ch'ing-shih wen-ti* 63 (1975) at 71.
even if that meant defying imperial prohibitions on trespass or settlement. The insular Ming regime discouraged internal migrations and the settlement of frontier lands by civilians because it was believed that areas lacking a government presence were breeding grounds for banditry and civil unrest. Ironically, banditry actually increased in settled areas as poor and landless people were recruited by rebel groups and private armies, thereby contributing to the weakening and collapse of the Ming regime.

After restoring government services and administrative offices, prefectural and provincial officials in the newly established Qing regime began expressing their concern to central authorities over the rising population and dwindling supplies of land. They petitioned central authorities to lift prohibitions on the conversion and reclamation of state lands in densely settled coastal, delta and interior lowland regions. Typically such petitions were framed as suggestions for actions that should be taken to assist the poor and landless in order to preserve social harmony. The new Manchu regime, ever sensitive about potential insurrections


310 Perdue, Peter, C., Exhausting the Earth, supra at 58-59. For a more detailed discussion of this issue see Parsons, James, Peasant Rebellions of the Late Ming: Dynasty in Decline (Tucson: University of Arizona Press, 1970).


312 Buoye and Eng each relate how local Guangdong officials sought tax exemptions for small plots reclaimed from hillsides and sandy soils along coastal areas and river banks. Buoye, Thomas, "From Patrimony to Commodity," supra at 42 and Eng, Robert Y., "Institutional and Secondary Landlordism," supra at 8-9. Perdue describes how Hubei officials took similar actions, see Perdue, Peter, C., Exhausting the Earth, supra at 67-79, particularly at 72.
generally responded favourably to these suggestions and requests. State land development schemes were established and formalised in a series of imperial edicts from the mid-1700s to the mid-1800s that: (1) authorized programs of cash loans to assist small farmers in meeting their costs in developing new fields; (2) provided tax exemptions on newly opened lands for a specified number of years; (3) prohibited landlord speculation through the improper use of reclamation permits; and (4) imposed regulations barring officials from exacting bribes and illegal fees when new settlers attempted to register their land.\footnote{Guo, Songyi, “Qingchu fengjian guojia kenhuang zhengce fenxi,” [An Analysis of Early Qing State Policy of Land Reclamation], 2 Qing Shi Lun Cong 111 (1980).} In some regions central authorities also promoted the development of new irrigation and flood control systems. Provincial authorities were known to supplement central policy decrees with more detailed laws and regulations to further guide and assist land reclamation work by the peasantry.\footnote{Palmer, Michael J., “The Surface-Subsoil Form of Divided Ownership, supra at 20-21.} These often included relaxed land registration and taxation requirements.

Individuals, households or lineages that settled, worked and paid taxes on a parcel of state land for a period of three years theoretically were regarded as the new rightful owner of the parcel and were to be provided a deed by the local district magistrate evidencing their officially recognized right to possess, use and transfer that parcel.\footnote{Jamieson, George, “Tenure of Land in China and the Condition of the Rural Population,” 23 Journal of the China Branch of the Royal Asiatic Society 59 (1888) at 75.} From the Song onward imperial law required all cultivated land to be registered at the yamen, or office of the district magistrate. Local officials
applied a red seal to all registered deeds and land sale contracts, which came to be known as a red deed (hongqi). Settlers and others who were granted land by the state received red deeds. Those persons who occupied public or private lands, but failed or neglected to register with the district magistrate and pay taxes due were subject to punishment and forfeited any interest or investment made in the land.\textsuperscript{316} This provision effectively prevented the acquisition of ownership title by adverse possession.

Also from the Song era onwards a transfer tax was levied on all land conveyances. The transfer tax rate varied over time starting as high as twenty percent of the value of the land conveyed in the Song and dropping to a low of several percent in the Qing.\textsuperscript{317} While there were monetary penalties and punishments that could be imposed upon anyone failing to register conveyances of land, it was very common for people to forgo registration primarily in order to avoid paying the transfer tax.\textsuperscript{318} As a result there were many unrecorded deeds that came to be known as white deeds (baiqi) since they lacked an official red seal. Lands held under a white deed generally were considered less valuable as there was no official recognition of ownership, however rights of ownership were

\textsuperscript{316} The specific provision in the Qing Code addressing this issue is Article 96, Wrongfully Cultivating and Sowing Public or Private Lands. See: Jones, William C., The Great Qing Code (Oxford: Clarendon Press, 1994) at 119.

\textsuperscript{317} Perdue, Peter, C., Exhausting the Earth, supra at 137 and Palmer, Michael J., “The Surface-Subsoil Form of Divided Ownership, supra at 25.

\textsuperscript{318} Palmer, Michael J., “The Surface-Subsoil Form of Divided Ownership, supra at 26 and Perdue, Peter, C., Exhausting the Earth, supra at 137.
recognized and upheld under customary law.\textsuperscript{319} White deeds were found throughout most regions of China from at least the seventeenth century down to the mid-twentieth century.\textsuperscript{320}

Attendant to the right of possession is the right to security, or what Hohfeld termed the immunity from expropriation. To say that the state no longer held a possessory right in a parcel of land means that it did not have authority to occupy, or exclude other persons from occupying or using, the land without compensating them. According to Schwartz "the full Lockean legal definition of private property or 'property rights' never became established, [in the late imperial era] and property was certainly subject to confiscation."\textsuperscript{321} It is not clear from this whether compensation was provided, but the implication is that the rights of the state preempted those of the individual landowner. If the late imperial state routinely did not compensate individuals, then one might conclude that the state retained possessory rights in all lands, based on the exercise of its exclusionary powers. The


\textsuperscript{320} See: Chinese Ministry of Justice, Zhongguo Min shang shi xiguan diaocha baogao lu [Report on the Investigation of Chinese Civil and Commercial Customs] (Beijing, 1930), which discusses the occurrence of red and white deeds in each province and prefecture.

historical record is inconsistent and sparse as to whether the state provided compensation when it took possession of privately held land. In commenting on the practices of the Qing state, Jamieson states as follows:

The Government officials do not hesitate to annex private land when it is required for public works, and usually without compensation. But these isolated cases are probably due more to the despotic nature of government than to any theory that the Crown is supreme landlord and can resume its grant at will. 322

A contrary finding to this is found in Rowe's study of Hankow, where he informs us that the state nearly always provided compensation at a rate negotiated between the parties when it exercised its power of eminent domain. 323 It is not clear, however, what bargaining power a typical landholder had vis-a-vis the state, and whether the landholder could obtain compensation approaching an amount either equal to the market value of the site, or approximating what the landholder believed was a fair and satisfactory amount. Rowe goes on to explain that while local officials were authorized to acquire or condemn properties for public purposes, they often refrained from doing so to avoid social disruption and lawsuits. 324 If the state behaved as Rowe explains, then one could conclude that the state had limited possessory rights in land in late imperial times.

According to Wright private landowners neither assumed nor believed that there were inherent guarantees associated with the possession of land. For

322 Jamieson, "Tenure of Land in China," supra at 62.


324 Ibid at 162.
wealthy and influential families the possession and accumulation of landholdings necessarily engendered social responsibility.325 Thus, if land was confiscated to promote social stability or harmony, it might have been regarded as inappropriate for a landholder to seek compensation. The degree of restraint exercised by the landowner in not seeking compensation presumably depended in part on the size and value of the land confiscated. One might expect that smaller landholders were more reluctant to give up their interests in a parcel of land, since it may have represented a significantly greater proportion of total family savings and future earning capacity. At the same time their ability to extract a reasonable settlement with officials was significantly less. However, those people who believed that they or others like them had been treated unfairly or unreasonably by the government might become potential a source of social instability. The state's understanding or recognition of this point may be one reason why, as Rowe noted, local officials tried to refrain from exercising their eminent domain authority. A related problem here was whether officials seeking to appropriate a private interest in land were acting in a proper official capacity or merely attempting to promote their own private interests under the masquerade of a public or official purpose.326 The presence of a provision in the Qing Code addressing such conduct suggests that the improper taking of land by officials may have been a problem.327

325 Wright, Mary C., The Last Stand of Chinese Conservatism, supra at 7-8.


327 See: Article 93, Section 5 of the Qing Code, entitled “The Theft and Sale of Fields and Houses” in Jones, William C., The Great Qing Code, supra at 118.
(a) The Conversion of Woodland Resources

Many of the lands that were conveyed to or settled by persons, households, or other groups either as a result of positive state actions, such as *tun-tian* colonies or migration incentive schemes, or in the absence of any state action or program were in an undeveloped, natural condition or close to it as the result of long abandonment. Outside of delta or wetland areas many these lands also were densely forested. However, they were settled primarily for their potential value as arable fields, not for the value of any woodland resources they might contain. There were several reasons for this. First, state policy emphasized the raising of basic grain and staple crops such as rice, wheat and maize. Local officials discouraged tree farming and related forestry pursuits, and were known to warn people not to abandon agriculture for the “more profitable, but less secure trade” in forestry. Second, because initial agricultural yields in frontier settlement areas often did not generate sufficient income for tax payments owing to the state, new


329 However there were cases in which Han settlers sustained themselves by cultivating and harvesting woodland resources. Averill describes how in the highland areas of Jiangsu and Sichuan Provinces during the late Ming and early Qing, some settlers, particularly from Guangdong and Fujian, utilized their newly claimed land for the purpose of raising Cunninghamia trees, a species of fir that was highly valued for its versatile uses. These people brought their “marketplace habits” with them, established commercial enterprises, and supplied distant places with forest products. Averill, Stephen, “Shed People and the Yangtse Highlands,” supra. at 95.

settlers frequently clearcutted the land and marketed the timber. Where trees could not be easily shipped out as lumber, entire hillsides were burned down and the remaining ashes were carried out. Both these reasons reflected the more immediate material interests of local officials in obtaining tax revenues from grain producing land, and the ideological outlook of the Confucian state, which placed a high value on settled agriculture.

There were, however, specific instances in which the imperial state conveyed rights or licenses in the timber on the land, rather than in the land itself. One example of this was when timber rights in the woodlands of the Mulan Enclosure were sold off by imperial authorities in the late 1800s. A second example is where the central authorities granted logging concessions in the Qinling Mountain Range in central Shaanxi Province in the early 1800s. There Qing leaders encouraged timber merchants from Xian and Hanzhong to open up and convert the Qinling range to agricultural land. The timber merchants were to be compensated by their earnings from timber sales. However because most

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331 Osborne, Anne, “The Local Politics of Land Reclamation in the Lower Yangzi Highlands,” 15 Late Imperial China 1 (1994) at 4-5; Perdue, Peter, C., Exhausting the Earth, supra at 166-168; Averill, Stephen, “Shed People and the Yangtse Highlands,” supra at 95; and Rawski, Evelyn S., “Agricultural Development in the Han River Highlands,” 3 (4) Ch'ing-shih wen-t'i 63 (1975) at 71-73.

332 Perdue, Peter, C., Exhausting the Earth, supra at 36.

333 Menzies, Nicholas, “Strategic Space: Exclusion and Inclusion in Wildland supra. at 725.

334 Shaw, Norman Chinese Forests Trees and Timber Supply, supra at 45-49

merchants considered the markets for timber too distant, the capital requirements too great, and the threat of bandit attacks too likely there was no outright clearing or extensive harvesting of trees in the Qinling Range during the Qing era.

3. Dual Ownership

Under the system of dual ownership or "two lords to one field" (yitian liangzhu), rights of ownership in a parcel of land were divided providing one party with surface or topsoil rights (tianmianquan) and another party with bottom or subsoil rights (tiandiquan). The system was not limited to arable land, it also

336 Menzies, Nicholas, "Strategic Space: Exclusion and Inclusion in Wildland supra at 68-72. The Qinling range, was one of the few areas in China that had a sizable sustainable growth forest up until the early part of this century. The area ultimately was subjected to extensive logging during the 1940s when refugees from the Japanese occupation converted the land to grain cultivation. See: Vermeer, Eduard, Economic Development in Provincial China: The Central Shaanxi Since 1930 (Cambridge and New York: Cambridge Univ. Press, 1988) at 138.

337 There were a number of terms to describe the two forms of ownership in land, reflecting the various temporal and geographical origins of the system These included the skin of the earth (dipi) and the bone of the earth (digu), or skin of the field (tianpi) and bone of the field (tiangu). See: Hoang, Peter, "A Practical Treatise on Legal Ownership," 23 Journal of the China Branch of the Royal Asiatic Society 118 (1888) at 123 and Kroker, Edward, "The Concept of Property in Chinese Customary Law," 7 Transactions of the Asiatic Society of Japan, 3rd Series, 123 (1959) at 128. The dual ownership system was abolished by the Land Reform Law promulgated by the Chinese Communist government in 1950. The concept seems to have lived on in the minds of some, as illustrated by a case in which a claim was submitted to Hong Kong authorities in 1968 by a Cultural Revolution refugee to land on nearby Mawan Island, lying within Hong Kong jurisdiction. The claimant presented a genuine Qing dynasty red deed, retained by his family for over a century, evidencing its superior rights to the subsoil. In line with earlier British decisions on similar such cases, the claim of the refugee was disallowed. See Palmer, Michael J., "The Surface-Subsoil Form of Divided Ownership in Late Imperial China: Some Examples from the New Territories in Hong Kong," 21 Modern Asian Studies 1, at 13, note 27 (1987).
was applied to define property relations in urban land and buildings, woodland resources, mineral resources, mountain and "wasteland" areas, and aquaculture facilities.

Dual ownership in arable lands is regarded by some as a form of landlordism or a condition of permanent tenancy, whereby the holder of the subsoil rights, received "rent" from the holder of the topsoil rights. Watson goes so far as to state that the dual ownership system "verged on servitude, reminiscent of an earlier form of estate serfdom." While the dual ownership system was closely associated with landlordism, it may be an oversimplification to equate these two


342 Palmer, Michael J., "The Surface-Subsoil Form of Divided Ownership," supra at 96.


344 Watson, James, supra. at 162.
Each land holding system provided for different types of rights and obligations and hence gave rise to different forms of ownership interests.

A distinguishing factor in landlord tenant relationships was the limited tenure of the tenant. In contrast, under the system of dual ownership both the "topsoil owner," or holder of topsoil rights, and "subsoil owner," or holder of subsoil rights, had permanent rights to possess, use, manage, sell, mortgage, devise and derive income from the same parcel of land. Neither the subsoil nor topsoil holder had a right to interfere with or terminate the rights of the other, except generally where the topsoil owner failed to make timely payments to the subsoil owner. Under some arrangements, however, the rights of a topsoil holder were so strong that failure to make payments of "rent" was not a sufficient basis for the subsoil holder to terminate the rights of the topsoil holder. In addition to these customarily recognised legal rights, there were economic advantages that accrued to topsoil holders that were not available to tenants. The amounts paid by a topsoil holder or a subsequent grantee to a subsoil holder was generally lower and much more stable, sometimes even fixed, as compared to the higher more fluid rents paid by tenants to their landlords.

345 It was more common for the topsoil holder to be equated with tenancy status and the subsoil holder to be regarded as the landlord equivalent, however this was not universally the case. See: Chen, Fu-mei Chang and Myers, Ramon H., "Customary Law and the Economic Growth of China During the Ch'ing Period," 3 Ch'ing-shi wen-t'i 5:1 (1976) at 17. The study of Chen and Myers deals primarily with southern coastal China and Taiwan.

346 Ibid.

A number of scholars that have examined the dual ownership system often have attempted to determine whether it was the subsoil or topsoil holder that more closely approached the status of the landowner. Buck, Rawski, Watson and Bernhardt are among those that have concluded the status of a subsoil owner so closely resembled a landlord as to be tantamount to an unitary landowner. Freedman and Hayes each have drawn opposite conclusions, finding that the dual ownership system provided the topsoil holder with the "privileges of an "owner" and a high degree of "independence." A definition of land ownership is revealed expressly or implicitly in these analyses. Bernhardt, for example, defines ownership on the basis of which rights holder was responsible for payment of taxes. This corresponds with the conception held by Qing officialdom, as formal title was associated with the obligation to pay land tax under imperial state law.

While officialdom and perhaps local gentry (shi) members drew a connection between the obligation to pay land tax and ownership of a parcel of land, this nexus may not have been so critical to the conception of ownership held by the growing mass of peasant landholders. As we know from the widespread existence of white

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348 Buck, John L., Land Utilization in China (Chicago: University of Chicago Press, 1937) at 20-24; Zelin, Madeleine, "The Rights of Tenants in Mid - Qing Sichuan," supra.; Rawski, Evelyn S., Agricultural Change and the Peasant Economy of South China (Cambridge: Harvard University Press, 1972) at 18-26; and Watson, James, supra. at 159 - 163.


351 Bernhardt, Kathryn, Rents, Taxes and Peasant Resistance, supra. at 25.
deeds and the dilapidated land recording system, many rural landholders intentionally or negligently failed to record their interests in land. One of the origins of the dual ownership institution rests with the practice of avoiding the land transfer and registration tax, a custom that is connected with the use of white deeds in land conveyance. The following passage from Palmer explains the linkage:

Where an unofficial transfer of land took the form of a sale a white deed (baiqi), written on plain paper and unstamped, was used. The vendor, if he held a red deed, continued to be liable for the tax. The new subsoil holder made an annual payment to him in order to meet the tax bill although this indirect payment of tax was forbidden in law, and as we have already seen, in many cases the claim to hold a red deed was a spurious one. Alternatively, the transfer could take the form of a perpetual leasehold (yongjiu zuyue) which, in this situation, functioned as a hidden sale and, because it, too, contravened imperial taxation and registration requirements, was also illegal in terms of imperial law. The perpetual lease was often a parol contract but when the transaction was evidenced in writing then the terms were, like the hidden sale, drawn up on plain paper and the deal remain unregistered. However the conveyance took the form of a lease in order to ensure that the purchaser kept up the annual payments due to the vendor or lessor who continued to be liable for the imperial land taxes.352

These schemes to avoid taxation suggest that rural landholders may have drawn a connection between ownership and taxation that differed from the official conception. The notion that payment of taxes bore directly on a determination of ownership, while understood, may have been disregarded, as other factors such as the right or capability to hold and use land and pass it on to younger generations may have been regarded as more indicative of ownership. Furthermore, the notion of permanency associated with the holding of land by successive generations

within family or lineage group was based on religious practices of ancestor worship and was a crucial element in the idea of ownership.353

By categorically ascribing ownership to either the topsoil or subsoil holder past scholarship may be interpreting Chinese customs and concepts according to contemporary approaches, and thus may be overlooking the meaning and purpose of the institution of dual ownership. It may be better to consider adopting a perspective that conforms more closely with the reality of the custom. The term yitian liangzhu, “two lords to one field,” suggests that topsoil and subsoil holder each saw themselves as having a sufficient magnitude of rights in the land to amount to the level of ownership typically associated with unitary land ownership. Which party actually held a preponderance of rights under a dual ownership situation was most likely determined by a spectrum of factors ranging from social status, political position, economic power, and the degree of dependence upon the other party holding rights in the land.

In his analysis of dual ownership Palmer essentially concluded that proprietary rights in a dual ownership situations could not be rigidly compartmentalised, as he explains in the following passage.

the surface - subsoil division of proprietary rights was adapted to define relations in a wide variety of economic and social contexts, so it was necessarily an abstract and flexible concept. This was reflected in the parol nature of many of the contracts employed under the surface - subsoil type of divided ownership. . . . Moreover, because it provided only a minimal contractual basis for agreements between surface and subsoil holders so this method of splitting proprietary rights encouraged both sets of parties to

353 On the influence of religious ideas on concepts of property rights and ownership see Schurmann, H. Franz, “Traditional Property Concepts in China,” supra. at 510 - 512. The ethical and religious ideas of family continuity and rights upholding permanence of land holding were closely associated.
evaluate their relations in markedly subjective terms. This was particularly evident in those parts of the region where the holders of production rights were in a relatively independent position and considered that they 'owned' the land which they worked subject only to the continued payment of the tax.354

Thus, rather than attempting to assign dominant ownership status to one category or the other, it may be more useful to analyze relationships of ownership on a case by case basis.

Having put forward this perspective it is important to understand that late imperial state law disapproved of the confusion and complexities that customary land law offered up and generally regarded the holder of subsoil rights to be the full "owner" or more properly the occupier (yezhu) and the holder of topsoil rights to be a tenant (dianhu). In some parts of China provincial governments formally prohibited dual ownership in cultivated lands and barred land contracts from establishing subsoil and topsoil rights.355 This official position appears to have stemmed solely from practical concerns, rather than any ideological opposition to the concept of dual ownership. The rationale of the state was to avoid complicating the registration of interests in the land so as to simplify record keeping and tax collection matters. As discussed below, officialdom was so perplexed and overburdened with the collection of taxes that it did not need any further confusion and obstacles to compound its already insurmountable problems, which the formal recognition of dual ownership interests surely would have accomplished.

354 Palmer, Michael J., "The Surface-Subsoil Form of Divided Ownership," supra at 97.

355 For example the Fujian Provincial Code of 1730 barred dual or split ownership. See: Yang, Guozhen, "Shilun Qingdai Minbei Minjian di Tudi Maimai" [Discussion of Private Land Sales Contracts in Northern Fujian in the Qing Era], 1 Zhongguoshi Yanjiu 29 (1981) at 33.
Despite official pronouncements and formal legislation, the imperial authorities did recognize and tacitly accept the institution of dual ownership, as district magistrates adjudicated matters involving dual ownership and allowed the practice to continue.\textsuperscript{356} Their reasons for doing so were to ensure that social harmony was preserved. Restructuring or disbanding the customary practice of dual ownership probably would have created unnecessary friction and resentment. Furthermore, the system may have had significant material benefits not only for both topsoil and subsoil holders, but also the state, as it resulted in the increased productivity of the land, as well as mineral and woodland resources.\textsuperscript{357} Without the dual ownership system, it is likely that there would have been a higher incidence of both limited land tenureships and landless persons. This in turn might have increased social tensions in the countryside and decreased agricultural yields which were so necessary given the rapidly rising population of the time.

\textsuperscript{356} Ibid. Also see: Buoye, Thomas, "From Patrimony to Commodity," at 50.

C. Income Claims and the Control of the Land

Given Confucian ideals positing that the nation should be composed primarily of landholding families pursuing agrarian based livelihoods, and that the official sphere should not become entangled too closely in the commercial sector\textsuperscript{358} it is understandable why imperial authorities looked to agricultural land as a key source of revenue\textsuperscript{359} The financial health of the state during much of the late imperial era

\textsuperscript{358} Fung Yu-Lan (Derk Bodde, ed.), A Short History of Chinese Philosophy, supra at 17-22.

\textsuperscript{359} Significantly, urban real estate was exempt from taxation from the late Song to the late Qing. It was not until the 1880s that taxes on some forms of urban land and buildings were reintroduced. See: Edkins, Joseph, The Revenue and Taxation of the Chinese Empire (Shanghai, 1903) at 80-83. There were throughout imperial times other taxes such as a head tax and a household tax, but these were related to landownership. In addition there were taxes levied on the salt monopoly and a number of other commodities including iron, tea, liquor, and copper. On the issue of sources and methods of taxation throughout imperial times and the emphasis placed on the taxation of arable lands see: Huang, Ray, Taxation and Governmental Finance in Sixteenth Century Ming China (Cambridge: Cambridge University Press, 1974); Wang, Yeh-chien, Land Taxation in Imperial China, 1750-1911 (Cambridge, Mass, 1973); Ch’ü, T’ung-ts’u, Local Government in China Under the Ch’ing (Stanford: Stanford University Press, 1962); Hsiao Kung-ch’uan, Rural China: Imperial Control in the Nineteenth Century (Seattle: University of Washington Press, 1960); Han Liang Huang, The Land Tax in China (New York: Columbia University and London: Longmans, Green & Co., 1918); and Edkins, Joseph, The Revenue and Taxation of the Chinese Empire (Shanghai, 1903).
was linked directly to the harvests of major crops such as grain.\textsuperscript{360} As a result of this dependency the state sought to maximise the amount of land under agricultural production to increase its revenues. The importance that the state attributed to the collection of revenue from arable lands is evidenced in part by a provision in the Qing Code which prohibits, without good cause, registered arable land from lying fallow.\textsuperscript{361} For all such lands that were not cultivated, the landholder, in addition to possible corporal punishment, was to pay an amount equal to the taxes that would have been levied had a crop been harvested.

The state and the various classes of tenants and landlords all competed against each other for a share of the limited income generated by harvests from the land. At the same time each participant in this triangular relationship was dependent on the other in restraining and checking the third. Thus, for example, local elites and peasants might cooperate in concealing taxable lands from state officials, or alternately at various times the state tilted in favour of either tenants or landlords.

\textsuperscript{360} Arable land taxes generally were the major source of revenue for the state throughout most of the imperial era. However, the proportion of tax revenue from the land did drop considerably throughout the Qing, so that in the mid-1700s nearly three quarters of all tax revenues came from the land tax, but by the early 1900s this figure stood at thirty-five percent. Wang, Yeh-chien, \textit{Land Taxation in Imperial China}, supra at 80. The state placed far less emphasis on the extraction of revenues from the marketplace, commercial activities, or upon artisans, merchants and traders. Confucian thought posited a limited role for government, particularly in the commercial sphere so as not to interfere with people’s livelihoods. The tension with the Legalist school of thought, which advocated a more activist role for the state, was never too distant. The Confucianist ideology, however, generally prevailed throughout the late imperial era. This reinforced the notion that arable lands should be taxed rather than commercial enterprises. On ideology and governance see: Watt, John, \textit{The District Magistrate in Late Imperial China} (New York: Columbia University Press, 1972) and Schwartz, Benjamin I., “The Primacy of the Political Order,” supra.

\textsuperscript{361} See Articles 97 of the Qing Code in Jones, William C., \textit{The Great Qing Code} (Oxford: Clarendon Press, 1994) at 119-120.
over matters involving land rents. The right to derive income from a resource is one measure of the nature and extent of ownership in that resource. When income from a resource is diminished through taxation, rent or other extractions it indicates that other actors have a property interest in the resource.\textsuperscript{362} In the first part of this section the discussion will focus on the dichotomy between the official and private spheres over income claims to the land. Later we will look at situation within the private sphere.

A number of writers seeking to determine whether land was publicly or privately owned in imperial China have based their conclusions in whole or in part on the nature and level of taxation by the imperial authorities. For example in answering the question as to whether the ownership of land vested in the people or the Qing emperor Jamieson wrote that a practical answer depended on:

\begin{quote}
the degree of interference which the Government reserves to itself in dealing with the land and the greater or less latitude it allows its subjects in the disposition of their holdings. To some extent it would depend on the amount which the Government exacts as land tax relatively to the gross procedure; if large enough to be called a fair rent or full rent there would be little or nothing left for the cultivator to call his own, and the land would properly be said to belong to the
\end{quote}

\textsuperscript{362} According to theorists from the new institutional school of economics the level of taxation levied on the holder of a resource and other transfer payments to be an accurate and meaningful measure for determining whether a resource is publicly or privately owned. Thus, when government taxation siphons off most of the income a resource holder earns or derives from that resource, that resource is considered to be publicly owned. See: Pejovich, Svetozar, The Economics of Property Rights: Towards a Theory of Comparative Systems (Dordrecht, Boston and London: Kluwer Academic Publishers, 1990); Alchain, Armen, “Some Economics of Property Rights,” in Alchain, A. Economic Forces at Work (Indianapolis, Liberty Press, 1977) at 127-149; and Campbell, John L., “Property Rights and the Economic Activity of the State,” 55 American Sociological Review 634 (1990).
Government, the cultivator being a mere tenant.\footnote{363} He concluded that while all land in theory belonged to the emperor, in reality it belonged to the people as private subjects. This was based on his observations and data, which revealed that most land was held, used and transferred by individual landholders without significant state intervention, and that the land taxation rate was on average quite light.\footnote{364}

A second school of thought, composed of such scholars as Hulsewé, Chao Ya-shu and others, consider land taxes to be the equivalent of rent paid to the emperor.\footnote{365} This approach is based in part on the idea that the Chinese term \textit{fu} or \textit{sui}, translated as “tax,” actually means the products from the land that are contributed or given to the emperor. Instead of a tax where the state implicitly recognises the right of the taxpayer to hold or possess the land, \textit{fu} or \textit{sui} is more akin to a tribute made by the cultivator or land user in recognition of the permission


\footnote{364} Jamieson specifically found that the land tax generally ranged from three to five percent of the gross produce of the land. Ibid. at 62. Han Liang Huang came to a similar conclusion in his study of imperial land taxation policies. Han Liang Huang, \textit{The Land Tax in China}, supra at Chapters 7-10. It should be noted that their data are based on late Qing dynasty tax statistics and is not representative of taxation rates in the Qing era. Wang shows that there was much greater regional disparity in tax rates during the Qing, and found that taxes were somewhat higher. Wang, Yeh-chien, \textit{Land Taxation in Imperial China, 1750-1911} (Cambridge, Mass, 1973) at Chapters 3 and 5.

bestowed by the emperor to use the land. Thus, the relationship of the cultivator to
the emperor is conceived as being more like that of a tenant to a landlord.

Both of these approaches have certain weaknesses and limitations. The
notion that taxes were equivalent to rent paid to the emperor overlooks or
inadequately explains such facts as the deeding of land from the imperial
government to families and institutions in the private sphere and the recognition of
ownership interests in land held by landlords. Both approaches tend to oversimplify
the entire tax collection process and do not address adequately the extraction of
income from landholders through so-called customary exactions known as lou-gui,
which included additional surtaxes, gifts, bribes and favors, as well as the illegal
"squeeze" money, all which were not provided for in official tax regulations or
accounting records. 366 A more comprehensive view of income interests or "rights"
in land suggests that no bright line existed between the public and private realms.
Rather, there was a mix of some of the characteristics of common, public and private
property rights described by Yandle.

When the Qing ascended to power in the mid-1600s they were faced with the
task of restructuring the land tax system, because the Ming lijia system of land
taxation and the associated liangzhang system of gentry / landlord community
leadership were no longer functional. 367 Many of the economic interests of the
landlords had shifted out of the countryside and into urban areas in response to the

366 Feuerwerker, Albert, State and Society in Eighteenth Century China, supra at
19 and 91-92.

367 For more thorough treatment of the Ming lijia system see: Huang, Ray,
Taxation and Governmental Finance in Sixteenth Century Ming China (Cambridge:
Cambridge University Press, 1974).
rising commercialisation and monetarisation of the economy. District magistrates formally took over the tax collection responsibilities that had been held by gentry and wealthy landholders under the *lijia* system. However, central authorities of the Qing regime soon realised that they could not administer effectively the tax collection system without accurate information on land ownership and the cooperation of the rural elite.

One of the essential functions of local government under the Confucian ideological framework, as far as tax collection was concerned, was the maintenance of accurate records describing the size and location of each family's landholdings for the purposes of ensuring that taxes were collected and revenues maximised. With the collapse of the Tang era *jun-tian* land system, imperial authorities in the late Song began maintaining cadastral land registers, to aid in the identification and location of tracts of land under cultivation or in private hands. The territorial expansion of the empire, a growing population, partible inheritance rules and free markets in land all exacerbated the problems of maintaining accurate records on land ownership, especially given technological and economic restraints. By the late Ming era, central authorities were no longer able to maintain reliable land registration.

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369 The Southern Song developed a system that served as a model for the highly accurate "fish scale registers" (*yulin qingce*) later developed by the Ming. The Ming cadastral surveys were composed of (1) *yulin qingce*, which contained detailed information and data on the shape, size, area, location, borders, land usage, and fertility levels of lots and a history of ownership including tenantry records; and (2) the "yellow registers" (*huangce*), which contained population data. See: Wei, Qingyuan, *Mingdai huangce zhidu* [The Yellow Register System in the Ming Dynasty] (Beijing: Zhonghua shuju, 1961); Ho Ping-ti, *Studies on the Population of China, 1368-1953* (Cambridge: Harvard University Press, 1959) at 101-135; Wang, Yeh-chien, *Land Taxation in Imperial China*, supra; and Chao, *Man and Land in Chinese History*, supra at 66-70.
When the Qing ascended to power in the mid-1600s they attempted to update the nation's land registers as part of their tax reform program. They never succeeded in doing so despite repeated attempts over a period of several decades because they met with enormous opposition at the local level, particularly from the gentry and other large landholders, in almost all regions of the country. Spence describes the situation faced by central government bureaucrats who were sent to the middle Yangzi River provinces by Emperor Yongzheng in the 1720s to update the land registers.

The malfeasance they found was incredible, and the examples of false and overlapping registrations so complex that they despaired of ever unravelling them. In some cases, the auditors found, landowners had divided their holdings under literally hundreds of false names, confident that in each of these tiny units the tax liability was so low that no magistrate would take the time to chase up arrears. The auditors' attempts at on the spot examination were met by delays, hostility, blocked roads, cut bridges, even riots and physical assault. Those imprisoned for questioning were often rescued by jail storming crowds. Coded logbooks confiscated by the auditors showed how, generation after generation, local financial clerks had exempted wealthy families from nearly all their tax obligations in return for payoffs. Yet even with this evidence, the auditors still found it hard to pin down the guilty parties and even harder to collect more than a small percentage of the ten million taels they found was owed from the area to the government.

Despite formal legal institutions and enforcement mechanisms concerning land registration and tax payment, and intense efforts by the central government to achieve the aims of Qing law through political means, by the middle of the Yongzheng

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370 Ibid.
reign imperial authorities abandoned their plans to reform the land registration and tax collection system.\textsuperscript{372} While a number of provincial and local land surveys were conducted, they generally were considered incomplete or inaccurate.\textsuperscript{373} As a result the Ming cadastral survey of 1578 remained the only authoritative national land register until the latter half of the twentieth century.\textsuperscript{374}

The eventual capitulation of imperial authorities in face of the intransigence of the private sphere over the registration of land holdings represented a significant turning point in state-society relations in the management and control of the land. The group or class benefiting most from this was the scholar gentry (shi). Keeping lands out of reach of central taxation authorities provided incentives to private sphere landholders and tenants to bring larger amounts of land under agricultural production.\textsuperscript{375} While the income claims of the state, or the land taxation rates levied upon the private sphere, were relatively low in the late imperial era, central authorities were nevertheless able to obtain sufficient amounts of revenue until faced with internal rebellions and foreign aggressions of the mid-nineteenth century onwards.\textsuperscript{376} However, low levels of taxation hampered the efforts of local

\textsuperscript{372} For example the Qing Code provided that it was a punishable offence for anyone to conceal or submit false or inaccurate information on the registration of land or on the transfer of an interest in land could be punished. See Articles 90 and 95 of the Qing Code in Jones, William C., \textit{The Great Qing Code} supra at 114-115 and 118-119.

\textsuperscript{373} See: Chao, \textit{Man and Land in Chinese History}, supra at Chapter 4.

\textsuperscript{374} Ibid.

\textsuperscript{375} Perdue, Peter, C., \textit{Exhausting the Earth}, supra at 75.

\textsuperscript{376} Wang, Yeh-chien, \textit{Land Taxation in Imperial China}, supra; Wright, Mary C., \textit{The Last Stand of Chinese Conservatism}, supra at 184-189 and Wakeman, Frederic, Jr., \textit{The Fall of Imperial China} (New York: Free Press, 1975).
government to provide services ranging from the construction and maintenance of
public works to social welfare programs such as famine and flood relief. As discussed
below, the gentry (shi) and other local elites were called upon to provide financial
assistance in these matters. In providing funds to public projects, the power of
the scholar-gentry (shi) as a group was enhanced because it played an increased role
in deciding how and where monies would be spent in local communities. Thus, the
Qing era gentry (shi) came to play a larger role not only in determining how income
from the land would be apportioned between the official and private spheres, but also
in controlling how land was managed and used.

Without an accurate land registry and given the reluctance of Qing authorities
to betray Confucian ideals of limited government a system of revenue collection
emerged whereby officials and non-official intermediaries were involved in the
collection of land tax revenues. The formal state system of revenue collection was
supplemented by local customs and procedures officially sanctioned by central
authorities, whereby non-official actors were relied upon to assist in collecting
revenue for the state. This process of revenue extraction resulting in the expansion
of the private sphere has been described by Duara as “dual brokerage,” consisting of
“entrepreneurial” and “protective” brokerage systems.

377 Zelin, Madeleine, The Magistrate’s Tael, supra; Rowe, William T., Hankow:
Conflict and Community in a Chinese City, 1796-1895 (Stanford: Stanford
University Press, 1989); and Ch’ü, T’ung-tsu, Local Government in China Under the
Ch’ing, supra.

378 For an insightful look at the role of the gentry in local level water control
projects and the relation to land management see Schoppa, R. Keith, Xiang Lake -
Nine Centuries of Chinese Life (New Haven and London: Yale University Press,
1989).

379 Duara, Prasenjit, Culture, Power and the State, supra at 42-43 and 56.
brokerage, is where non-official actors, such as the lowly runners employed by
yamens and other more respected commoners, earned a living wholly or in part from
extractions obtained in efforts to collect taxes on behalf of the official sector.
Protective brokerage typically involved local elites, such as the scholar-gentry (shi)
and wealthy landowners, in a process that is better known as "engrossment" or bao-
lan. Feuerwerker succinctly describes this widespread practice as follows:

In the haggling process which determined the actual payments
made, the more influential local elite -- the "great households" (ta-hu)
-- were in favorable positions to avoid some or all of the customary
surcharges and most of the illegal squeeze by underlings. As a
consequence the "small households" (hsiao-hu), that is the non-
gentry taxpayers, paid at much higher effective rates per unit of
land. . . . Poorer households, as a consequence, sometimes made
arrangements with the more wealthy to have the latter pay taxes on
their behalf at the more favorable rates which the wealthy could
negotiate; the wealthy took a middleman's profit in the
transaction.

Entrepreneurial brokers passed some moneys that they extracted from landholders
on to state officials and retained the rest for themselves.

380 Although yamen runners were hired by the office of the district magistrate,
their earnings were derived almost exclusively from all sorts of infamous degenerate
activities ranging from forced extractions to manipulation of of scales when weighing
tax monies. Therefore, I place them in the category of a non-official, public sector
personnel. See: Ch'ü, T'ung-tsu, Local Government in China, supra at 67-70; Mann,
Susan, Local Merchants and the Chinese Bureaucracy, supra at 14; and generally
Duara, Prasenjit, Culture, Power and the State, supra and Zelin, Madeleine, The
Magistrate's Tael, supra.

381 Feuerwerker, Albert, State and Society in Eighteenth Century China, supra at
92.

382 The local official sphere benefited also from these entrepreneurial extractions,
and were in fact dependent upon them as central authorities extended insufficient
amounts for local operating expenses and salaries. See: Ch'ü, T'ung-tsu, Local
Government in China, supra. Feuerwerker writes that this resulted in a shifting of
the "center of gravity" of local officialdom into the realm of the public sphere.
Feuerwerker, Albert, State and Society in Eighteenth Century China, supra at 68.
Estimates on the amounts retained by entrepreneurial brokers vary considerably, reflecting in part the variability over time and space, and are probably difficult to determine with much certainty. Bernhardt's figures are interesting because they inform us of the amount of non-official extractions in terms of the proportion of the annual harvest, which represents the income obtained from the land. She states that in the mid-1700s the extra surcharges on a tax bill in the Jiangnan area could amount to about twenty percent of the officially assessed tax, which made it equivalent to about eight percent of the value of an annual harvest.383

Of the funds passed on to local officials by entrepreneurial brokers some portion remained at the local level. Rowe explains how the budgets of district magistrates typically distinguished between official government accounts based on revenues acquired from the land tax controlled directly by central authorities and local administrative accounts known as *gongjian* or *gongxiang*. The latter were sourced from "surplus land tax collections held over from previous years, non-regularised local exactions, and private of official contributions" used for "local community projects such as road and irrigation work repairs."384

In a similar manner the income extracted through protective brokerage ultimately was expended in such ways as to benefit the public domain or local

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383 Bernhardt, Kathryn, *Rents, Taxes and Peasant Resistance*, supra at 44. Feuerwerker states that these extraction could be equivalent to half of the officially assessed tax rate. Feuerwerker, Albert, *State and Society in Eighteenth Century China*, supra at 91. For additional estimates on the expenses incurred in collecting taxes and the amounts retained at the local level as a result of illegal squeeze transactions during the Qing see: Whitney, Joseph B., *China: Area, Administration, and Nation Building* (Chicago: University of Chicago Press, 1970).

community. Initially, the moneys extracted by local gentry and wealthy landowners might be considered private in nature, benefiting only themselves. However, one needs to take a slightly longer view to see that this income was returned to the community, and hence took on a public character. Sometimes at the urging of the state and other times voluntarily gentry and large landholders made substantial monetary contributions to public works projects and social welfare programs.

The reasons for this system are traced back to the Confucian ideological foundations of society and the limited governmental institutions built upon it. Under the Qing Code local gentry officials were responsible for ensuring that such public works as flood control projects, roads, bridges, and irrigation canals were properly maintained and subject to punishment if they were not. As central authorities in the late imperial era provided little or no funds for these projects, local officials, district magistrates in particular, were required to provide funding either through their supplementary salaries or call upon local gentry and wealthy landowners to furnish material support. The contributions made by local elites were often quite large, which suggests that some of the income through their own landholdings may have supported the public sphere in addition to their gains.

385 Although I do not have any figures on what proportion of money taken by gentry and wealthy landowners came back to the community, we can assume probably that it was not insubstantial because of the extent to which these same people were called upon to contribute to fund and support a wide range of public projects and services.

386 Ch'ü, T'ung-tsu, Local Government in China Under the Ch'ing, supra at 182-185.

387 Ibid.
Mann has applied the Weberian notion of liturgies to explain how local elites performed public services at their own expense on behalf of the state. She describes how the late Qing state increasingly took steps to encourage the gentry to ensure the security of their own land by transferring their part of their wealth to the community. The following passages from an edict issued by Emperor Yongzheng in 1731 sheds light on this situation. Nearly a decade after he initiated his land registration reform he appealed to the gentry to be generous in assisting other members of their community by explaining that it was in their best interests as leading landowners to do so.

That property is one of life’s five blessings is thus demonstrated for us in the family patterns of local literati and degree-holders. The state in turn loves and protects you people. How can you not then be mindful of diligently pursuing what is good in order to ensure that your families continue to prosper? . . . How can you do this? Certainly not by living extravagantly and squandering money. On the other hand, stinginess and frugality will not suffice either. The Book of Rites says that the high official or nobleman teaches the people through the use of three basic structures: filial piety and friendship, cordial relations and marital ties, and benevolence and philanthropy. From this passage we learn that distributing material relief (philanthropy) [sic] is as important as filial piety and friendship...

388 Sun provides the example of the Wu family in the Pearl River delta area in the late 1700s and early 1800s. The family made three large donations of money totalling 133,000 taels for the construction of dikes. Sun, E-tu Zen, “The Changing Landscape of the Canton Delta in the Ch’ing Period,” in Selected Essays in Chinese Economic History (Hong Kong: Institute of Advanced Chinese Studies and Research, 1981) at 196-197.

389 Mann, Susan, Local Merchants and the Chinese Bureaucracy, supra at 12-18. Although the focus of Mann’s study is on relations between merchants and the state, she explains how land tax management effectively shifted from the state to local level in response to the limitations of the state administrative bureaucracy.
If wealthy households continue to be miserly and covetous and compete constantly with those below them for resources and land, they may yet be able to coexist peacefully during times of peace and prosperity. But in the past during periods of want, when the poor have organized uprisings, the first targets have always been the wealthy families who have not shown compassion and benevolence to them in the past. Only after the harm has been done will official laws call for an investigation of such cases, . . .

It is on this account that I exhort every wealthy household to be constantly vigilant, even in peacetime, in dispensing relief and aid to the poor. . . If the wealthy help the poor in emergencies like this, the poor will be moved by their concern. During ordinary times they will come to help each other in adversity and prosperity; and when a crisis comes, they can rely on mutual protection and assistance. . . Is this not the ideal way for a wealthy household to protect itself? 390

This transfer of wealth, often acquired as we have seen through the extraction of income from small landholders in the private sphere, was intended to help the state achieve its two most important objectives, social stability and enhancement of social welfare. As the emperor made quite clear, the failure of local elite to do so could place their rights in land at jeopardy.

Within the private sphere landholders or land users had certain legal assurances of their income claims and control of their land. Imperial law formally protected rights to rents and harvests and provided some rights of exclusion. 391 The Qing Code contained a number of provisions outlawing theft, wrongful occupation

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390 Mann, Susan, Local Merchants and the Chinese Bureaucracy, supra at 17-18.

391 The issue of rent will be discussed in some additional detail in the next section.

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and sale of land, as well as theft and destruction of crops. While these measures all had a primary purpose of protecting or advancing the income rights of the state they also had the effect of creating and to some extent protecting the income rights of landholders and land users in the private sphere.

Bodde and Morris have explained that the Qing Code was essentially penal and administrative in nature. Rights established under the Qing Code were not recognized as running horizontally but rather vertically. That is to say, people did not have enforceable rights against another. If a person violated a provision of the Code, a complainant would petition local officials, who would then determine whether to prosecute the accused. In the adjudication of disputes the role of the government courts was to ensure that the interests of the state were protected and advanced. It is for this reason that the provisions of the Qing Code might be seen as establishing greater evidence of the income rights of the state.

Recently, Huang has written that the late imperial Chinese legal system did recognize private property rights in land and played an important role in civil matters through the adjudication of land related property rights disputes. Such rights were not stated positively, nor did they establish guarantees against the

See Article 93 of the Qing Code in Jones, William C., The Great Qing Code, supra at 117. This article also addresses such other resources as mines, lakes and wastelands.

See Articles 96, 98 and 99 of the Qing Code in Jones, William C., The Great Qing Code, supra at 116-120.

powers of the state, however they did act to delineate acceptable conduct between persons with respect to interests in land by proscribing certain types of conduct. Huang states as follows:

To be sure, the [Qing] code did not engage in an abstracted discussion of “rights over things” or of “ownership,” . . . nor spell out in detail great varieties of ownerships and conditions, with specific stipulations on each, as a modern civil code in the European continental tradition . . . Yet there can be no mistaking the obvious though unspoken positive principle intended: namely that the law would protect against violations of the legitimate ownership of land or house. That principle was what became the crucial operative guide in the actual workings of the legal system.”

The legal principles established under the Qing Code were then applied by district magistrates in civil disputes. Again Huang writes as follows:

On land-related matters, . . . , the crucial parts [of the Code] include the unmistakable principle of property rights (and, by extension, the right to collect rent), stated not positively but negatively in terms of punishable violations of those rights.

Thus, while the primary purpose of the Qing Code was to establish and uphold the interests and rights of the state, actors within the private sphere came to benefit through the application of the principles and provisions of the Qing Code in a developing body of late imperial civil law. I am not sure that I would go so far as Huang does in stating that there was an “unspoken positive principle intended.” An alternate way of viewing this is to consider the actions of the district magistrate as an enforcement of customary law justified through the application of Qing Code principles, which the magistrate was required to do. Additional research would have to be conducted on this issue before drawing any firm conclusions. We do know,


396 Ibid. at 175.
however, that customary law did come to play an influential role in the establishment of rights and settlement of disputes in the late imperial era, and that the district magistrates frequently applied customary law in the settlement of disputes between parties in the private sphere.397

There was no clear division between the claims of the state and landholders with respect to income from and control over arable land. Landholders had few, if any, legal assurances defining the limits of their obligation to remit a portion of their income from the land and preventing the state or others from intervening, thus perhaps perpetuating the belief of imperial ownership of all lands. While there were official statements and indexes as to taxation rates, there were many additional demands and obligations that burdened landholders. This was true for both large and small landholders, gentry and commoner, although the nature of the demands and the relative burden differed. Contrary to what the Yandle model predicts, the increased scarcity of land in the late imperial era did not lead definitively to an increase in private rights in income to land. Rather there was a blurring of the line between the official and private realms as the gentry assumed a role that was governmental or civil in nature. Some have seen this as evidence of the development

397 See Perdue, Exhausting the Earth, supra at 140-143 and Buoye, Thomas, "From Patrimony to Commodity," supra at 46-54.
D. The Management of Land Transactions and Usage

The previous two sections have surveyed how the private sphere came to acquire possession and title to larger amounts of land and checked the extent of state extraction of income from the land. This section investigates (1) the role of the official and private spheres in the management of land transactions and usage; and (2) whether under the material conditions of the late imperial era the nature of management rights in land could be characterised as collective, emphasising the interests of the family, lineage and community, or individual. By management rights I am referring to the power and duties associated with the authority to decide how land could be used including whether and how interests in land could be transferred. We begin with a brief background on land transactions.

398 Under this interpretation there emerged a tripartite division in the structure of late imperial society: the state or official (guan) sphere, the public (gong) sphere, and the private (si) sphere. The public (gong) sphere has been defined by Rankin as follows:

[T]he term here, “public” retains a considerable communal element but refers more specifically to the institutionalised, extra-bureaucratic management of matters considered important by both the community and the state. Public management by elites thus contrasted with official administration (guan), and with private (si) activities of individuals, families, religions, businesses, and organizations that were not identified with the whole community. Public was a working term used without need of explanation, that implied a different relationship to the government from those of the other two categories.


399 This was discussed above at page 42 in the description of the incidents of ownership set forth by Honoré.
Although the state permitted the free and total alienation of land, the dominant institutions of society, such as families, lineages and guilds, discouraged it. The absence of state intervention in the land market led to the development of an array of different land transactions under customary law. While there was considerable variability over time and space with respect to specific practices, procedures and rules for land transactions, the basic forms and principles were similar in most respects. Among the most common forms of land transactions besides leasehold arrangements were the unconditional or absolute sale (mai) or (juemai), the conditional sale (dianmai), and the dian, a type of pledge which sometimes is translated roughly as a mortgage.

Unconditional sales particularly involving lands held by families and lineages were so uncommon that in the event of doubt or misgivings surrounding the nature of

While the imperial state attempted to monitor all land transactions for the limited purposes of keeping its tax records current, it frequently was ineffective in doing so. Thus, for example, the state rarely intervened to promote distributional justice or control rents and prices, except in a limited and indirect way, such as through policies designed to expand supplies of arable land.

See: Chinese Ministry of Justice, Zhongguo Min shang shi xiguan diaocha baogao lu [Report on the Investigation of Chinese Civil and Commercial Customs] (Beijing, 1930), which summarises the various forms of transactions on an individual prefectural and provincial basis during the late Qing.

the transaction, it was presumed not to be a conditional sale.\textsuperscript{403} Thus even the so-called “dead sale” (\textit{simai}) agreements which explicitly provided for an unconditional sale and total alienation of rights and interests in the land could be annulled, and the land recovered, or “brought back to life” (\textit{simai huotou}), by the original vendor.\textsuperscript{404} Conditional sales were arrangements whereby the purchaser obtained the full right to use the land and retain any income derived from it, but only for an indefinite period of time until the seller redeemed the land at the original conditional sales price.\textsuperscript{405} In contrast, \textit{dian} agreements prescribed a definite redemption period. In the event the \textit{dian} maker was unable to make full payment to recover the land at the originally agreed sum, title to the land was transferred to the \textit{dian} purchaser.\textsuperscript{406}

Some of the the ideological roots of management and ownership of land were reflected in the practice of \textit{dianmai} and \textit{dian}. Land ownership was conceived as being more than an economic matter, and thus the management of land was not concerned solely with maximising its productivity and profitability. There was a spiritual, almost religious significance to holding, using and being able to devise land. Schurmann points out that this was due in part to ideas concerning the duties towards ensuring the well being of future generations and practices of ancestor

\textsuperscript{403} Jamieson, George, \textit{Chinese Family and Commercial Law}, supra at 99.


\textsuperscript{405} McAleavy informs that the “price” in \textit{dianmai} transactions was sixty to eighty percent of the value obtainable in absolute sales. McAleavy, Henry, “Dien in China and Vietnam,” 17 \textit{Journal of Asian Studies} 403 (1958) at 410.

worship which called for the retention of land where forbearers were buried. Buoye describes the economic and ideological dimensions of land ownership in light of the prevalence of redeemable land transactions as follows.

The right to redeem land sales can be seen as evidence of both the economic and psychological importance of land ownership in rural society. It allowed the original owners of the land and all their descendants to retain a claim on the land. In this way it also illustrated the depth and significance of the family as a bedrock institution of China's society and economy. Theoretically, any family member had a right to redeem the land. The loss or erosion of the right to redeem land sales was not merely an economic issue, it also struck at the ethical foundations of Chinese society.

The prevalence of conditional and redemptive transactions underscores the collective and familial nature of land management rights. Had there been exclusive individual based management rights there might have been a higher incidence of absolute sales and the complete alienation of land.

In China the individual always has been attached to the collective: the family, lineage, and village, upon which he or she was dependent for harmony and strength. While the individual might hold, use and extract income from a resource, in short own the resource, it often was the collective that managed the resource, determining how it would be used to advance the welfare of the group and whether if at all interests in the resource would be leased or otherwise conveyed.


408 Buoye, Thomas, "From Patrimony to Commodity," supra at 47.

409 Perdue, Peter, Exhausting the Earth, supra at 137.

away. Collective management ensured the continuance of this harmony and strength through the conservation of income generating resources. As discussed earlier the leaders of these collective groups such as the family patriarch or the lineage elders acted as trustees. They had a duty to preserve the principal of the trust (i.e., the land), and enhance or promote the welfare of the beneficiaries of that trust, the future generations. Interests in land generally were transferred only to obtain money for needs considered critically important in the Confucian tradition such as, education, weddings, and funerals, or to cover costs in times of poor harvests. In most transactions there was always the intent and hope that the land would be recovered, and to further ensure that this was the case interests in land often were conveyed only to other lineage members or villagers. Even during a time of rising land scarcity and increased commercialisation of the economy preemptive and conditional type transactions, though often strongly challenged and

411 See pages 54 and 55 above.


413 Palmer, Michael J., “The Surface-Subsoil Form of Divided Ownership,” supra at 100-101 and Duara, Duara, Prasenjit, Culture, Power and the State, supra.
resisted continued to be utilised, albeit in modified form.\textsuperscript{414} Thus, while there were pressures tending towards the commodification of land and the expression of more individualistic conduct with respect to land management, the dominant ideology and legal institutions ensured the continuity of Confucian management approaches.

While the official sphere intruded relatively little in matters pertaining to land transactions, it took an active interest in managing the use of the land. The official sphere recognized that the private sphere had obtained some degree of possessory, usufruct and income rights in land, but it was less willing to recognize, confer or yield its powers of land use management. Nevertheless, the late imperial state did not engage in micro-management to the degree that the twentieth century communist state did, although there were instances when it came close, such as when imperial central authorities prescribed the investments, cropping methods and other particulars in the management of \textit{tun-tian} land.

Earlier it was pointed out how imperial law required all arable land to be used for the raising of crops, and how local officials that failed to ensure this requirement

\textsuperscript{414} With rising land prices, more people exercised their redemptive rights causing frequent and sometimes violent conflict. Several recent works have looked at the rising frequency of disputes associated with late Qing land transactions. Buoye, Thomas, "From Patrimony to Commodity," supra and Macauley, Melissa, "Civil and Uncivil Disputes in Southeast Coastal China, 1723 - 1820," in Kathryn Bernhardt and Philip C.C. Huang (eds.), \textit{Civil Law in Qing and Republican China} (Stanford: Stanford Univ. Press, 1994). While there may have been an increasing commercialised nature to land transactions and a limited discourse on the rights in land associated with land transactions, there was no fundamental change in the nature of land management. The household head and lineage members continued to exercise trustee type powers in managing land in such a way to advance the interests of the group. While there were incidents in which individual household or lineage members sought personal profits, they were punished according to the precepts of the Qing Code, which forbid transactions in land without the approval of the household head or lineage elders. See: Osborne, Anne, "The Local Politics of Land Reclamation in the Lower Yangzi Highlands," 15 \textit{Late Imperial China} 1 (1994).
was met were subject to punishment. This provision was designed to fulfil the objectives of the state, which were the maximisation of revenues based on the taxation of cropped land and the promotion of stable, settled agrarian communities. To further guarantee these objectives were met the state attempted to exercise its powers of land use management to the greatest extent possible given its limited resources. Thus, as we have seen imperial authorities promoted and assisted in the development of arable lands in frontier areas as well as in the interior following the Qing conquest. The state provided incentives for the reclamation of woodlands and wetlands and aided in the construction of water control and irrigation systems. In regions where there were no additional lands that could be reclaimed efficiently or without significant damage to the environment, the state encouraged more intensive agricultural methods through the introduction of double cropping methods and new hybrid varieties.

The private sphere was not always receptive to a state that intervened in the management of resources. The dynamics between state and society in this regard might be best understood with reference to a model put forward by Skinner. He explains that late imperial community relations with the state fluctuated between open and closed modes. In an open mode there was a higher degree of cooperation between the community and the state, whereas the closed mode was marked by a confrontation as weakened central authorities faced assertive and recalcitrant landholders and local elites, who resisted and foiled official attempts to intervene in

415 See page 135 above.

416 Perdue, Peter, Exhausting the Earth, supra at 112-119.

local affairs. We saw an example of this closed mode conduct in the previous section on the extraction of income, where the private sphere resisted efforts by imperial authorities to reform the land registration system. Where communities were settled, linked to markets and free from the dislocations of natural disasters and civil strife, they preferred to exercise their own will and keep the state at bay.

The approach taken by the private sphere in the management of land usage was one which emphasized the interests of the collective, be it the village or the combined interests of lineages within some defined geographical area, in maintaining social harmony and prosperity. In his review of late imperial Chinese land institutions, Kroker described the communal characteristics of land use as follows:

Property is deemed to be definitely in the service of the general public. This appears to be so particularly where a clear distinction is made between public and private interests . . . his [the owner of a field] rights are limited. The extent of that limitation is left to the discretion of the village community. It is as if property were considered to have its ultimate reason not in the single individual, not in the family, but in the whole community as such.

Within the communities of the private sphere it was lineage elders and the gentry (shi) who primarily rendered decisions on such issues of land use management as whether particular woodlands or wetlands were to be reclaimed or where dikes and other water control facilities might be located and how they were to be

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418 For a contemporary account of this see: Hao, Jia and Lin, Zhimin (eds.), Changing Central-Local Relations in China: Reform and the State Capacity (Boulder: Westview Press, 1994).

419 Perdue, Peter, Exhausting the Earth, supra at 165.

An episode during the early nineteenth century in a community in the highlands bordering Anhui and Zhejiang provinces illustrates the way in which local community leaders devised a solution to limit the further environmental degradation brought on by the conversion of woodland areas to arable land. In an attempt to preserve a sense of community and maximize material benefits lineage elders conveyed their mountain lands to a privately run academy. As Osborne relates

They [the lineage elders] agreed to turn over the lands to the Academy, which would then receive rents and pay the taxes. The lands would be rented out for the production of timber, firewood, bamboo and so on; other uses would be forbidden. With such limited land uses legitimised, and rentals to specific (local) [sic] individuals openly undertaken, illicit reclamation would be easy to detect and halt. Furthermore, the contributions to the Academy continued the fine traditions of local support for scholarship. Thus the public benefited by the support of the Academy, and individuals could profit from their sales of firewood.422

There was another motive for this action by lineage elders, and that was to limit their liability in the face of a state regulation making them liable for any further development of mountain woodland areas by more junior member of their lineage.

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There had been rogue members of the area lineages that occasionally leased out lands on an illegal and covert basis. An alternative solution might have been to privatise the lands in issue, thereby making each individual lineage member liable under the new regulation. However, that would have run counter to the idea of fostering a sense of community and towards the promotion of individual based interests and exclusive management of the land, an approach that was antithetical to the Confucian based ideals of late imperial Chinese society.

The gentry (shi), some of whom were concurrently lineage elders, also had a strong voice in matters affecting land management because they had a significant degree of control over resources and funds. Local officials such as the district magistrate often were dependent upon the gentry and in some cases were coopted by them. Gentry leadership was evident particularly in flood and irrigation management projects. As noted above they determined were dams, canals, dikes and other structures were to be built and thus determined what lands would be inundated with water, too dry or yield the best harvests. Their decisions, though cast in the rhetoric of the public good, may have masqueraded for their own private interests. Distinguishing public from private interests is something that must be done on a case by case basis and even then one might not be able to arrive at a determination. Clearly there was a recurrent blending of public and private interests.

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423 Lineage elders donating lands to the academy actively supported the passage of the state regulation in opposition other interests in the community that favoured development despite the relatively immediate adverse environmental effects. Ibid.


425 Schoppa, R. Keith, Xiang Lake, supra at chapter 9.
in the management of resources. 426 Similarly wealthy merchants had an influential voice in land management. Schoppa discusses how a wealthy clan of tile and brick makers contributing much to the welfare and employment of the community determined the fate of Xiang Lake, its infilling and demise, as well as the welfare and economic pursuits of the community. 427

Finally, gentry and wealthy elites played a critical role in resolving conflicts among land holders and users within local communities, as well as between communities themselves. Villages or regions frequently vied against each other over desirable or sustainable land use practices. Upstream areas encroaching on public lands and reclaiming lowlands had negative consequences for downstream regions, which might be deprived of water in times of shortages and flooded when water was

426 The question of where the rights of the public sphere end and those of the private sphere begin also has become an increasingly difficult and confusing one to answer in contemporary China. As the Far Eastern Economic Review reports foreign investors have become increasingly frustrated with the situation:

Interaction with government departments has become a puzzling mix of public and private interests. Staffers routinely play multiple roles and carry several name cards stating their official affiliations their private ones. Lawyers report that when they contact the tax bureau to ask about changes in the law, for example, they are advised to contact the bureau's consulting company. "We are then asked to pay US$15,000 up front to find out how to comply with their tax rules." ... In the absence of laws, there are rules and then clarifications. And because these often appear contradictory ... it seems that there are no rules at all, just the arbitrary interpretation or whim of the official asked.


427 Schoppa, R. Keith, Xiang Lake, supra at chapter 9.
channelled downstream at times of abundance. In this way, the rights one held in the land and its proposed use was affected by the community in which the land was located. Some communities, with their gentry families or lineage groups, were more powerful and could command greater influence with county or prefectural officials, thus affecting the way in which others used their land. The negotiated settlements or political solutions arrived at by these competing interests, either within the community, or among communities, effectively constituted a form of customary law of land use management.

Rowe, William, "The Fankou Dam Controversy," supra, provides an example of a case in which the state had to intervene to settle a dispute that violently tore communities apart regarding the use of land, specifically whether it was to be flooded to form a lake.

Schoppa, R. Keith, Xiang Lake, supra; Perdue, Peter, "Water Control in the Dongting Lake Region," supra; and Rowe, William, "The Fankou Dam Controversy," supra.
V. Conclusion

This study was based on the thought that insights into traditional ideas and institutions of property may be of assistance in analysing and understanding the current restructuring of property institutions in China. Starting from the proposition that law is an expression of the ideals and material conditions of a society, and that property essentially is an expression of social relations, the hypothesis was put forward that there may be some continuity between traditional and contemporary property concepts and institutions. The implied assumption here is that there may exist similarities in the ideological and material conditions of the past and present. Recent studies suggest that there is some validity in this assumption because Confucian ideas are being expressed generally in matters pertaining to social relationships, and specifically in the practices and institutions of rural land ownership and management.430 In addition to these premises there were several others that were adopted. Among them was that an analysis of property institutions and concepts must address and consider the dynamics among the individual, society and the state. Therefore, the analytical approach of the study had to account for a spectrum of different actors and interests. For this reason we adopted a definition of property put forward by Munzer that integrated the analytic frameworks of Hohfeld and Honoré.431 Recognizing that this definition was based on Western notions of rights that likely did not correspond to Chinese notions of property, it was explained that as an analytical device it would on balance serve to

430 See the reference to the works of Cohen, Ocko and Judd at page 6, note 13 above.

431 See above at page 41-43.
enlighten more than distort ideas and institutions of property and ownership in traditional China. The materials researched and relied on here were nearly all secondary sources, and of those the majority were English language based, with perhaps the remaining ten or fifteen percent being Chinese sources and several translations of Japanese scholarly works.\textsuperscript{432}

This study has illuminated several key themes of traditional Chinese concepts and institutions of property. Chief among them is the central role of the community, as opposed to the individual. The two leading schools of legal thought in traditional China, Confucianism and Legalism, both placed the community above the individual. The primacy of the community did not create the need for the establishment of a discourse on the rights of the individual. This is not to say that the notion of private property did not exist, it did; private property (\textit{si cai}) was a legal category from the late Song onwards under both imperial and customary law. However, the word \textit{si} held a negative connotation of selfness, suggesting detachment from the community.\textsuperscript{433} The Chinese tradition considered such conduct as somewhere between inhumane and unnatural. While it was recognised that the individual may

\textsuperscript{432} The weaknesses and drawbacks of relying heavily upon secondary sources is recognised here. A superior work would have delved more deeply into the details of empirical data rather than read off facts from secondary sources. As Sugarman explains "theories of law, society and economy are best developed, through continual and close involvement with empirical sources." Sugarman, David, "Law, Economy and the State," supra at 258. The primary purpose of this study was to satisfy my own curiosity and interest in this topic and explore issues and areas for future in depth study, rather than prove or disprove a hypothesis or provide a new theoretical framework for the interpretation of empirical data. Thus, a broad brush approach seemed preferable, allowing me to visit a wide range of places, eras and characters as opposed to narrowing the stage and concentrating on a limited time, place and set of personalities.

\textsuperscript{433} Schurmann, H. Franz, "Traditional Property Concepts in China," supra at 511.
have self interests, they were to be channelled in such a way as to serve and advance the interests of the community. On this Liang Qichao wrote as follows:

The individual cannot survive alone in the world. Society thus arises, and the individual manages his existence in collaboration with his fellows. . . . One who is good at pursuing his own interests will first see to the interests of his collectivity, and then his own interests will be advanced along with it.434

The property institutions of imperial China thus were designed to advance the interests of the collective, and not to promote or secure those of the individual. This outlook was expressed clearly during the Maoist years and has been recast today in a tone that sounds like Western capitalism, but which may be uniquely Chinese. When Deng Xiaoping asserted that to get rich is glorious, it is unlikely that he was elevating the interests of individuals above the community or state, though that may be the effect in part. Rather, he probably hoped that by providing individuals with the right to derive income from resources and assets the state and the community would prosper along with the individual. The individual is not to gain at the expense of the collective, hence the state retains significant powers of management over such means of production as urban and rural land and the state enterprise.

Under the influence of Legalism the interests of the collective were considered to be secured and advanced by legal institutions that deterred rebellion and strengthened the state. This was achieved in part by declaring all subjects to be equal before the law and providing strict and certain punishments for all those who failed to obey. Rights to hold property were equalised too, and thus the early imperial era qing-tian system sought to confiscate the large landed estates of the elites and

434 Liang Qichao, "The Sources of China's Weakness Lie in Restrictions Intended to Prevent Abuses," (1896) as quoted by Andrew Nathan in "Sources of Chinese Rights Thinking," supra at 139.
redistribute usufruct rights in state owned lands to the masses, much like the communes and collectives of the Maoist era. There exist certain similarities between Wang Mang and Mao Xedong with regards their efforts to establish institutions for the equal distribution of land and wealth. Wang Mang was a high official in the Han era who seized power in 9 A.D. in an attempt to prevent the spread of large landed estates controlled by powerful elites. He reinstated the qing-tian system modelled upon the Zhou era systems of land ownership. His severe methods of leadership were not continued beyond his reign.

435 There exist certain similarities between Wang Mang and Mao Xedong with regards their efforts to establish institutions for the equal distribution of land and wealth. Wang Mang was a high official in the Han era who seized power in 9 A.D. in an attempt to prevent the spread of large landed estates controlled by powerful elites. He reinstated the qing-tian system modelled upon the Zhou era systems of land ownership. His severe methods of leadership were not continued beyond his reign.

436 Shue, Vivienne, The Reach of the State, supra at chapter 3.
their interests and not those of the individual. While officialdom formally clung to the belief of state ownership of all lands and land based resources, the facts suggested that the private sphere came to acquire some degree of ownership.

This study suggests that the traditional notion of ownership entailed primarily the right or power to hold, use and extract income from a resource or asset. The right and power to manage or control a resource or asset became attenuated sufficiently from ownership, because management rights generally vested either with the community or specifically were concentrated at a higher level, often removed from those persons or entities that possessed, used or derived income from a resource. Thus, we find the lands of grown children being managed by the household patriarch; and household property subject to the decisions of the lineage or village. Again these institutional arrangements grew out of the notion that the individual was subservient to the interests of the collective.

These institutional arrangements underscore that traditional notions of property in China did not emphasize rights of exclusions. Except to a limited degree as exemplified by provisions outlawing the theft of crops or illicit transfers of land, rights of exclusion were not an important element of ownership. This perhaps is the single greatest factor distinguishing Chinese from Western, or more specifically Anglo-American, concepts of property. The right to exclude was what Blackstone found to be the most critical characteristic of property:

There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any
other individual in the universe.437

Because of the diminution of the exclusion element in Chinese notions of property, it has been difficult to ascribe ownership to a particular entity, be it within the official or private sphere. The discussion on the practice and institution of dual ownership was illuminating in this respect.

Under the dual ownership system, each party had an ownership interest in a resource, however, neither party had the absolute right to exclude the other. Where neither party clearly holds a right of exclusion it becomes difficult utilizing Western constructs of property to delineate ownership. Ownership of a resource, that is the right to hold, use and derive income from it, may have been less important than the appurtenant management powers. With the institution of dual ownership, a determination of the relative strength of the management powers of the topsoil and subsoil holders had to be made on a case by case basis looking at such factors as their economic, social and political position. To determine who manages and ultimately controls a resource today, be it a parcel of urban land or a state enterprise a similar analysis would need to be conducted.438 Management and control not ownership has been a determinative factor in the use and disposition of

437 Blackstone, Commentaries of the Laws of England (1766) at Book II, Chapter 1, page 2. The notion of exclusion continues to be emphasized by American courts, see: Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 at 435, where the U.S. Supreme Court explained that the right to exclude is the most valuable element of property.

438 This statement seems rather obvious, particularly in light of such recent matters as the land use rights of McDonald's in Beijing, which were revoked recently by the municipal government. See: “Doing Business in China: The McDonald's Flap,” 16(10) East Asian Executive Reports at 10 (1994). McDonald's may have had rights to hold and use a parcel of land across from Tiananmen Square, but those rights were neither exclusive not subject to its sole management and control.
resources in China. As Elvin explains in his review of Chinese land tenure, ownership was not the central issue of the 1949 revolution, rather it was the control of land.\textsuperscript{439}

Under Western notions of property, management and control are so integrally connected with the right to exclude that there is no dichotomy between ownership and management, except in the case of property belonging to a corporation or trust. Within a corporation ownership and management are separate, the holders of shares are the beneficial owners, but the managers act as administrators of a trust.\textsuperscript{440} In many respects, late imperial ownership institutions such as the family, lineage or community councils governing woodland areas, were arranged much like a corporation or trust. Rights of possession, use and income in lands and other resources were held by members and evidenced by shares. However, it was the ruling patriarchs of the institution that were endowed with authority to make decisions on the management and disposition of the resource. This authority was established and recognised by the norms of Confucianism.

The five fundamental Confucian relationships (\textit{wu lun}) played a critical role in ordering social relations and by extension property relations. The relation between subject and ruler was defined and regulated by official institutions. Thus, imperial law was concerned primarily with safeguarding and advancing the property interests of the state. The three relationships pertaining to the family: father-son, husband-wife, and older and younger brothers, also were addressed by imperial codes and customary law. The state was interested in the regulation of these relationships as

\textsuperscript{439} Elvin, Mark, "The Last Thousand Years of Chinese History - Changing Patterns of Land Tenure," \textit{4 Modern Asian Studies} (2) 97 (1970) at 118.


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they pertain to the ownership and management of property because it was believed their proper functioning was necessary for the maintenance of social harmony and the betterment of society's material welfare.

The relationship least addressed by imperial law was that between friends. Perhaps because of the absence of a defined hierarchy and the inattention of imperial law to horizontal relationships within society, property relations between persons or entities of equal status, be they adjoining landowners or neighbouring villages, were intensely politicised. Ownership interests were contingent on the economic and political positions of the respective holders and users of the resource. This may be the reason why casual observers assert that property law does not and has not existed in China. The current conversion of a system of state ownership of resources to one in which the private sphere holds, uses and derives income from resources cannot be expected to eliminate the uncertainties that surround property relationships between relative equals. The nature and extent of rights and powers to hold, use and derive income from a resource or asset are addressed by a growing body of legislation and administrative regulations. However, existing law is less clear on delineating powers and rights to manage resources and assets. The management of land, enterprises and other resources must continue to be determined with reference to the relative status and position of the parties involved.
VI. Bibliography


Buoye, Thomas, "From Patrimony to Commodity: Changing Concepts of Land and Social Conflict in Guangdong Province During the Qianlong Reign (1736-1795),” 14 Late Imperial China (2) 33 (1993).


Ch'ien, Mu, (Chu-tu Hsueh and George Totten, trans.) Traditional Government in Imperial China (Hong Kong: Chinese University Press, 1982).


Edkins, Joseph, *The Revenue and Taxation of the Chinese Empire* (Shanghai, 1903).


Entenmann, Robert, "Sichuan and the Qing Migration Policy," 4 *Ch'ing shih Wen t'i* (3) 5 (1980).


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Fu, Yiling, *Mingqing nongcun shehui jingji* [Rural Society and Economy in the Ming and Qing] (Hong Kong: Sanlian Shudian, 1961).


Guo, Songyi, “Qingchu fengjian guojia kenhuan zhengce fenxi,” [An analysis of Early Qing State Policy of Land Reclamation], 2 *Qing Shi Lun Cong* 111 (1980).


Han, Hengyu, “Shilun Qingdai qianqi diannong yongdianquandeyoulaijijiixingzhi” [A Discussion of the Origins and Nature of Perpetual Lease Rights in Early Qing Tenant Farming], 1 *Qing Shi Lun Cong* 37 (1979).


Ho, Changchun, *Han-Tang chian fengjian tudi soyouzhi xingshi yanjiu* [The Forms of Feudal Land Tenure Systems from Han to Tang Eras] (Shanghai: 1964).


Huang, Philip, “Public Sphere / Civil Society in China? The Third Realm Between State and Society,” 19 *Modern China* 216 (1993).


Huang, Ray, Taxation and Governmental Finance in Sixteenth Century Ming China (Cambridge: Cambridge University Press, 1974).


Jamieson, George, Chinese Family and Commercial Law (Shanghai: Kelley and Walsh, 1921).


Jing, Junjian, "Legislation Related to the Civil Economy in the Qing Dynasty," in Kathryn Bernhardt and Philip C.C. Huang (eds.), Civil Law in Qing and Republican China (Stanford: Stanford University Press, 1994)


Johnson, Linda Cooke, Cities of Jiangnan in Late Imperial China (Albany: State University of New York Press, 1993).

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Li, Wenzhi, “Ming qing shidia de fengjian tudi suoyouzhi” [The Feudal Landowning System of the Ming Qing Era], 8 JingjiYanjiu 67 and 9 JingjiYanjiu 55 (1963).

Li, Wenzhi, “Qingdai qianqi de tudi zhanyou guanxi” [Land Relations in the Early Qing], 5 LishiYanjiu 75 (1963).


McKnight, Brian E., Law and Order in Sung China (Cambridge and New York: Cambridge University Press, 1992).

Menzies, Nicholas, “Strategic Space: Exclusion and Inclusion in Wildland Policies in Late Imperial China,” 26 Modern China 719 (1992)


Osborne, Anne, “The Local Politics of Land Reclamation in the Lower Yangzi Highlands,” *15 Late Imperial China* 1 (1994).


Rowe, William T., “The Problem of 'Civil Society' in Late Imperial China,” 19 Modern China 136 (1993).

Rowe, William T., “The Public Sphere in Modern China,” 16 Modern China 309 (1990).


Tu, Wei-ming, Confucian Thought: Selfhood as Creative Transformation (Albany: State University of New York, 1985).


Wakeman, Fredric, Jr., The Fall of Imperial China (New York: Free Press, 1975).


Watt, John, The District Magistrate in Late Imperial China (New York: Columbia University Press, 1972).

We, Xiangxiang, Zhongguo Minshi Xiguan Da Quan, [A Compendium of Chinese Popular Customs], Series 6, Volume 1 of Zhongguo Xiandai Shilao Congshu, (Taibei: Wenxing Shudian, 1962).

Wei, Qingyuan, Mingdai huangce zhidu [The Yellow Register System in the Ming Dynasty] (Beijing: Zhonghua shuju, 1961).


Xia, Xiangrong, Li, Zhongjun, and Wang, Genyuan, Zhongguo gudia kuangye kaifa shi [The Development of the Mining Industry in Ancient China] (Beijing: Dizhi, 1980).


Yang, Xiaokai; Wang, Jianguo; and Wills, Ian, Economic Growth, Commercialization, and Institutional Changes in Rural China, 1979-1987 (Clayton, Australia: Monash University, Department of Economics, 1990).

Yen, Chungping, Ching Dai Yunnan Tung Cheng Kao [A Study of the Copper Administration in Yunnan During the Ching Dynasty], (Shanghai: Wen Hai Chubanshe, 1957).


