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THE COSTS OF COMPLEX LAND TITLES: TWO EXAMPLES FROM CHINA

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For thousands of years, Chinese customs and law typically have directed an owner of land, when transferring it, to retain a right to reclaim it in the future. Prior to the Communist Revolution of 1949, the pertinent rules were provided by the custom of *dian*, which emerged in ancient China and was formally recognized in legal codes as early as the Ming Dynasty (1368-1644). Dian provided the seller of a tract of land the option of buying the tract back many years later at the original sale price. When the seller died, this right of redemption descended to his heirs. Current Chinese policies also prohibit the outright sale of land. Since the 1980s, when China began to dismantle many of the collectivist policies characteristic of the Mao era, the government has authorized the conferral of land use rights on private individuals and entities. But Chinese law does not permit the national government, or a village collective, to transfer use-rights in perpetuity.[1] Instead, a private land interest is limited to a fixed-term, for example, 40 years in the case of urban commercial land.

Someone who possesses land under either of these arrangements holds it subject to a *future interest*.[2] In the case of dian, the future interest is the former seller's right of redemption. In the case of a fixed-term contract, the future interest is the reversion that will return ownership to the transferor when the fixed term expires. Under both these land-tenure arrangements, a current possessor of land is aware that the owner of the future interest can, at some point in time, oust him from the land. Legal policies that complicate land titles in this way tend to result in both the misuse of land and too little investment in land improvements.

China's economy has suffered, and potentially will suffer, from these sorts of land practices. In 1600, according to some historians, residents of the densely populated Yangtze Delta region[3] were roughly as prosperous as the English.[4] All analysts agree, however, that by

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[1] In Anglo-American law, an owner of perpetual land rights is said to have title in *fee simple*.

[2] This is the phrase applied in Anglo-American law to property interests that do not include a right of current possession.

[3] At that time, most farms in the Yangtze Delta consisted of small paddies within which a farming household planted wet rice in the spring, and, after the rice harvest, a crop of winter wheat. Philip C.C. Huang, *Review: Development or Involution in Eighteenth-Century Britain and China*? 61 J. ASIAN STUD. 501, 506 (2002).

[4] *See* KENNETH POMERANZ, THE GREATER DIVERGENCE: CHINA, EUROPE, AND THE MAKING OF THE MODERN WORLD ECONOMY (2000); Robert C. Allen, *Agricultural Productivity and Rural Incomes in England and the Yangtze Delta, c.1620–c.1820*, 62 ECON. HIST. REV. 525, 532 (2009)

1900, the people of China generally were far less well off than most residents of Western Europe. Drawing heavily on the pioneering work of historians Philip Huang[5] and Taisu Zhang,[6] I argue in this essay that the dian tradition may have significantly contributed to China's relatively poor economic performance during both the Qing Dynasty (1644–1912) and the Republican period (1912-1949).[7] I also offer comments on contemporary land issues. The current Chinese government is aware of many of the problems that fixed-term contracts create and is debating legal reforms that would compel the automatic renewal of these contracts. In the absence of sensible reforms, I predict that the continuation of the fixed-term contract approach will seriously impair China's economic prospects.[8]

I. THE ADVANTAGES OF SIMPLE LAND TITLES

(implying that during the Yangtze Delta's "Golden Age" c.1620, agricultural output per day worked was greater than it then was in England). The proposition that the great divergence did not begin until after 1800, however, has drawn sharp criticism from commentators who assert that it was evident centuries earlier. *See* Stephen Broadberry & Bishnupriya Gupta, *The Early Modern Great Divergence: Wages, Prices and Economic Development in Europe and Asia, 1500–1800*, 59 ECON. HIST. REV. 2 (2006); Nico Voigtländer & Hans-Joachim Voth, *Why England? Demographic Factors, Structural Change and Physical Capital Accumulation During the Industrial Revolution*, 11 J. ECON. GROWTH 319, 344 (2006).

[5] PHILIP C.C. HUANG, CODE, CUSTOM, AND LEGAL PRACTICE IN CHINA: THE QING AND THE REPUBLIC COMPARED 71-98 (2001).

[6] Taisu Zhang, *Property Rights in Land, Agricultural Capitalism, and the Relative Decline of Pre-Industrial China*, 13 SAN DIEGO INT'L L.J. ___ (2011). The page numbers cited are those in the version available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1792061).

[7] Historians have offered varying theories of why England, for example, was able to surge ahead of China after 1600. Some stress factors such as England's superior access to coal, the resources of England's colonies, weak internal governance during the Qing Dynasty, and rapid population growth in China. I steer clear of these debates and concentrate on land tenure practices, the only topic on which I may have some comparative advantage.

[8] China currently confronts many other critical land law issues, including the legality of land transfers and mortgages, and the amount of compensation to be paid when land is requisitioned. The issue of the extension of fixed-term land-use contracts, while important, may be no more pressing than some of these other issues.

To illuminate the problems that dian and contemporary leasing practices both create, I start with a brief introduction to the basics of land tenure. To prosper, a nation must incentivize its people to use land appropriately, for example, to grow the most suitable crops, to conserve soils, and to build appropriate structures. In a totalitarian state, government bureaucracies control most of these decisions. In a liberal state, by contrast, the multitude of individuals, households, and firms that privately own land mostly control how their parcels are used. Instead of micro-managing land, the state focuses primarily on the foundational tasks of establishing and enforcing the rules of the game, in particular, property law, contract law, and association law.[9]

Private property in land has been a prominent feature of Chinese culture for thousands of years.[10] Moreover, subject to constraints such as dian, private landowners in China have generally been entitled to sell and otherwise alienate their lands. The Shang Yang reforms of 356 B.C.E., for example, promoted land alienability, and sale documents of private lands have been found as far back as the Han Dynasty (206 B.C.E.–220 C.E.).[11]

In ancient China and countless other precommercial civilizations, local populations embraced private property in land because they found it to be a simple and effective way to incentivize a household to make the best choices about the use of the land under its control.[12] When a private farmer is entitled to keep a crop he grows, for example, he is automatically rewarded for choosing the best crop to plant, planting at the right time, weeding, applying fertilizer, fallowing a field when appropriate, and so on. State and village agricultural

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[9] For the sake of simplicity, I omit discussion of various challenges that must be addressed when private ownership of land is widespread. These include the externalities, negative or positive, that may emanate from a private land-use decision, and landowners' needs for public goods.

[10] *See* Kenneth Pomeranz, *Land Markets in Late Imperial and Republican China*, 23 CONTINUITY & CHANGE 101, 107 (2008) (asserting that the "vast majority" of land was privately held from the Ming Dynasty (1368–1644) through the Republican period.

[11] Hugh T. Scogin, Jr., *Between Heaven and Man: Contract and State in Han Dynasty China*, 63. S. CAL. L. REV. 1325, 1338-46, 1354 (1990). Land sales were occurring in both Mesopotamia and Egypt well prior to 2000 B.C.E. Robert C. Ellickson & Charles Dia. Thorland, *Ancient Land Law: Mesopotamia, Egypt, Israel*, 71 CHI.-KENT L. REV. 321, 376-77 (1995).

[12] *See* Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. (Papers & Proc.) 347 (1967); Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315 (1993).

collectives have rarely been as productive as private farmers, primarily because collective production weakens the link between work and reward.[13] China has relearned this basic lesson the hard way. In 1981, the central government's approval of the Household Responsibility System helped enable villagers to abandon the collectivist agricultural practices that had mired them in poverty.[14]

As noted, dian transactions and fixed-term contracts are examples of the temporal division of land ownership. One party has a present interest, which provides a right of current possession, and one or more other parties own future interests. Legal systems permit the division of ownership across time because, in many instances, arrangements of this sort are advantageous to all involved. Instead of owning a farm outright, for example, a farmer might actually prefer to pay a share of the crop as rent to a landlord. This temporal division of ownership enables a farmer to shift to the landlord some of the risks of crop failure, and may enable the efficient supply of specialized inputs, for example, the tenant's provision of field labor, and the landlord's provision of irrigation.[15]

By contrast, both dian and fixed-term contracts generally divide up land ownership in a wasteful manner. The value of each of the parts, when summed together, is less than the value of the undivided whole. Many legal systems have rules that are designed to prevent damage from the inefficient splintering of ownership interests. The Anglo-American law of private property, for example, includes doctrines, such as waste and the Rule Against Perpetuities, which attempt to mitigate the mischief that potentially may arise from the temporal division of property ownership.

In general, time-divided titles are least likely to create problems when there are only two temporally defined interests, both are easy to value, and both are owned by individuals who trust one another. To illustrate, suppose that a rice farmer in the Yangtze Delta were to have one-year remaining on the lease of a paddy from a landlord whom he trusts. Suppose

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[13] *See* FREDERIC L. PRYOR, THE RED AND THE GREEN: THE RISE AND FALL OF COLLECTIVIZED AGRICULTURE IN MARXIST REGIMES (1992); *see also infra* note 91.

[14] See Zhu Keliang et al., *The Rural Land Question in China: Analysis and Recommendations Based on a Seventeen-Province Survey*, 38 N.Y.U. J. INT'L L. & POL. 761, 769-70 (2006). The first steps toward the decollectivization of rural land commenced in 1978 under Deng Xiaoping. On these early events, see JONATHAN SPENCE, THE SEARCH FOR MODERN CHINA 657-58, 677-78 (1990).

[15] *See* DOUGLAS W. ALLEN & DEAN LUECK: THE NATURE OF THE FARM: CONTRACTS, RISK, AND ORGANIZATION IN AGRICULTURE (2003).

further that during the growing season, a severe rain storm were to damage a portion of the paddy wall, threatening the farmer's crop. The farmer could either work for one week to make a low-quality repair to the wall, or two weeks to make a high-quality repair. The cheaper repair would keep the wall functional for one year, but not thereafter. The two-week repair, by contrast, would last indefinitely. Assume that the high-quality repair would be the more efficient choice, that is, the repair that both the renting farmer and his landlord would individually choose if either of them were to own the land outright. Because only one year remains on the tenant farmer's lease, however, he might be expected to choose to repair the wall on the cheap. But if the tenant and landlord were to know and trust one another, this inefficient outcome would be unlikely. For example, after discussing the problem, the landlord might agree to compensate the tenant for the additional costs entailed in a high-quality repair. Or the tenant might simply choose to spend two weeks on the repair, in the hope that the trustworthy landlord, after the tenant told him about these efforts, would later renew the lease on more advantageous terms.

In other scenarios, however, a cooperative outcome is less likely. The tenant might distrust the landlord, or rarely encounter him. Instead of there being just one future interest, there might be several, as there would be if the landlord had already granted several other farmers one-year leases on the same paddy for specific ensuing years.[16] In the worst case, some of the owners of future interests would be unborn, for example, abstractly identified male descendants of the owner of the present interest. Or, the landlord might be an untrustworthy bureaucratic institution. Under any of these scenarios, the tenant, unable to readily bargain with the holder of the future interest, might choose the inefficient one-week repair. Dian gave rise to this risk, and so does a fixed-term land contract.

II. CHINA'S DIAN TRADITION

Kenneth Pomeranz, in his influential but controversial book, *The Great Divergence*, asserts that "overwhelming majority of land in all parts of China was more or less freely

[16] When too many stakeholders are empowered to veto proposed uses, the splintering of ownership rights can give rise to the underuse of land. See Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998) (developing the seed of an idea planted by Frank I. Michelman in *Ethics, Economics and the Law of Property*, *in* 24 NOMOS 3, 6 (1982)).

alienable"[17] during the Qing Dynasty, the period during which China fell behind England. Pomeranz correctly asserts that much land in Western Europe was fettered during that era with entails and other encumbrances that would have slowed land transfer.[18] In England, however, land titles generally became simpler and more alienable after 1600 on account of the continuing decline of, for example, entails and open-field villages.[19] In China after 1600, by contrast, the works of Philip Huang and Taisu Zhang reveal no steady trend toward the simplification of land tenure. Following Zhang, I stress the possible negative influence of the custom of dian on the Chinese economy during Qing and Republican times. (Other complexities of Chinese land tenure may also have been pertinent. For example, entitlements to rented agricultural land commonly were divided between a tenant who "owned" the topsoil, and a landlord who owned the subsoil.[20]) My assertions about dian are tentative, both because the historical record available in English is thin and ambiguous, and because it is reckless to

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[17] POMERANZ, *supra* note 4, at 71; *see also* Pomeranz, *supra* note 10, at 136. Reviews sharply critical of many of Pomeranz's claims in this book include Robert Brenner & Christopher Isett, *England's Divergence from China's Yangzi Delta: Property Relations, Microeconomics, and Patterns of Development*, 61 J. ASIAN STUD. 609 (2002), and Huang, *supra* note 3.

[18] POMERANZ, *supra* note 4, at 73-80.

[19] On the development in England of the "common recovery," a unilateral procedure for "docking" an entail, see A.W.B. SIMPSON, AN INTRODUCTION TO THE HISTORY OF THE LAND LAW 129-38 (2d ed. 1986). On the gradual enclosure of open-field villages in England, see Ellickson, *supra* note 12, at 1391-92, and sources cited therein. Early English law severely constrained land transfer. In the first centuries after the Norman Conquest of England in 1066, a vassal who wanted to alienate an interest in land needed the consent of both his lord and his own eldest son (or other heir apparent). 2 WILLIAM BLACKSTONE, COMMENTARIES *287. By enacting the Statute Quia Emptores, 18 Edw., c. 1 (1290), Parliament provided a key early endorsement of the principle of land alienability.

[20] *See* HUANG, *supra* note 5, at 99-118; Pomeranz, *supra* note 10, at 131-36; To maintain topsoil rights, a tenant typically had to pay rent, perhaps nominal in amount, to the landlord. On the possible interaction between dian and topsoil rights, see *infra* text accompanying notes 56-59. Several other features of land tenure in China may also have inhibited land transfers during Qing and Republican times. One was the importance in some regions (but not the Lower Yangtze, see Zhang, *supra* note 6, at 20) of land ownership by family lineages. *See* SUCHETA MAZUMDAR, SUGAR AND SOCIETY IN CHINA: PEASANTS AND TECHNOLOGY AND THE WORLD MARKET 217-30 (1998); Pomeranz, *supra* note 10, at 113-15. Another was the reluctance of landlords, perhaps out of a desire to evade taxes, to own parcels lying near one another. *See* Zhang, *supra* note 6, at 50-51.

generalize about the laws and customs in a nation as large and diverse as China, especially over many centuries.

A. The History of Dian

Pomeranz asserts that dian did not "emerge" until the mid-Ming period (c.1500 C.E).[21] This understates the ancient roots of the custom. The Chinese character representing dian appeared as early as the Shang Dynasty (1600–1046 B.C.E.).[22] The legal code of the Song Dynasty (960–1127 C.E.) made informal reference to the dian tradition, and the Ming code formally referred to it.[23] While it could be said that dian "matured" during Ming times, it had emerged long before.

According to Zhang, a solid majority of land transfers during Qing and Republican times were dian transactions.[24] The nature of dian interests varied. I first introduce a variety — what I call "strong-form dian" — that would have seriously impaired the efficiency of land allocation in China. In a subsequent section, I briefly describe weaker variations of dian that may in fact have been more prevalent.

B. Strong-Form Dian

The dian custom, as noted, gave the seller of a parcel of land the option of repurchasing it — redeeming it — at a later date. When dian was strong-form, this right of redemption theoretically lasted indefinitely.[25] When the seller died, the right to redeem descended to his heirs.[26] In addition, according to both custom and Republican Supreme Court

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[21] Pomeranz, *supra* note 10, at 123-24.

[22] *See* Zhao Ya, The History of Dian and Its Contemporary Impact (LL.M. Thesis, Zhengzhou University, 2007), translated and summarized by Shitong Qiao in an e-mail message to the author, Oct. 12, 2011).

[23] *Id.*; Zhang, *supra* note 6, at 23 n.151.

[24] Zhang, *supra* note 6, at 48. In some instances, the seller would remain in possession (*see* Pomeranz, *supra* note 10, at 124, 128), suggesting that in these instances the "sale" actually was a mortgage substitute.

[25] Zhang, *supra* note 6, at 26.

[26] Huang provides a lengthy catalogue of dian disputes in HUANG, *supra* note 5, at 71-99. None of these revolved around the question of *which* heir held the entitlement to redeem. The

decisions, the redeemer had to pay back only the sum that the original buyer had paid to the original seller.[27] This buy-back price was not adjusted upward to account for either a general rise in land values or inflation of the currency.[28] Under strong-form dian, a land seller thus could benefit from an appreciation in land values while bearing little or no downside risk.

From an economic development perspective, a crucial issue is whether the redemption price was adjusted upward to account for the value of the buyer's post-sale land improvements, such as new dikes, irrigation canals, or buildings. Huang and Pomeranz think that the answer is unclear.[29] For several reasons, however, I follow Zhang in assuming that a strong-form dian redeemer would *not* have to compensate a buyer for improvements.[30] Huang cites an 1868 case in which a redeemer asserted that this indeed was the proper rule.[31] It is also noteworthy that the amount of compensation was rarely contested in the cases that Huang and Zhang discuss — a hint that that there was a simple answer to this question. Most important, the structure of actual dian transactions suggests than a redeemer did not owe compensation for improvements. Land sale contracts involving dian commonly included a clause granting the buyer what Zhang calls a "guaranteed usage period" (*xian*) that extended a specified number of years after the date of the transaction.[32] It is estimated that subjecting a parcel of land to dian reduced its market value to 60 to 80 percent of its value without dian

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nonappearance of this issue suggests both that Chinese inheritance law was clear during the pertinent centuries, and also that the social bonds among members of a redeeming family tended to be tight.

[27] *See* HUANG, *supra* note 5, at 91 (describing Republican Supreme Court decisions issued in 1915 and 1945); Zhang, *supra* note 6, at 23.

[28] *See* HUANG, *supra* note 5, at 91.

[29] HUANG, *supra* note 5, at 74-75; Pomeranz, *supra* note 10, at 124.

[30] Zhang repeatedly states that the redemption price was pegged at the original sale price. *See, e.g.*, Zhang, *supra* note 6, at 23, 26.

[31] HUANG, *supra* note 5, at 82-83.

[32] Zhang, *supra* note 6, at 23. Zhang persuasively argues that both Huang and Pomeranz have misconstrued the meaning of these xian periods. *Id.* at 23 n.154, 28. In contemporary China, a fixed-term contract conferring land-use rights similarly starts off a new possessor with a longish initial time-horizon.

(i.e., if sold outright).[33] During non-inflationary times at least, if the rule was that a redeemer had to compensate the buyer for the value of improvements, it is unlikely that this price discount would be so great.[34]

Could a seller waive dian redemption rights, presumably in return for the buyer's agreement to pay a higher sale price? As noted, some land sale contracts included a guaranteed usage period, which essentially did waive dian rights during the first years after a sale. But when dian was strong-form, waivers of rights in later time periods were not permitted. According to Zhang, the dian custom generally forbade a seller either to completely waive redemption rights, or to waive them beyond some specified end-date, for example, thirty years after the date of the original sale.[35] The grip of the custom of unending and nonwaivable dian was so strong that Qing magistrates declined to enforce statutes and regulations through which the state had attempted to establish end-dates (e.g., 11 years, 30 years) for redemption rights.[36]

Huang presents a case from Suzhou in the Yangtze Delta that illustrates what appears to be strong-form dian in action.[37] In 1663, Sang, the seller, gave Shen, the buyer, dian title to a parcel of land in return for 4 taels of silver. Dian traditions would have given Sang the right to redeem at that exact price. Possibly to secure prospective guaranteed-usage-periods, the Shen lineage made additional payments to the Sang lineage of 4 taels in 1680, 2 taels in 1701, and 2 taels in 1716. In 1730, the Qing state adopted legislation that sought to limit a buyer's post-sale payments to a dian seller to a single payment. This law may have had some effect,

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[33] *See* HUANG, *supra* note 5, at 74 (60-70 percent in North China); Zhang, *supra* note 6, at 48-49 (around 70 percent in North China, up to 80 percent in Lower Yangtze and South China).

[34] In addition, if Chinese landowners were to have favored a system that automatically compensated a buyer for the value of improvements made, they might have supported a custom that would have entitled a land seller to retain a right of first refusal. Under that approach, if an improving buyer were to receive a purchase bid from a third party (a bid that would reflect the value of the improvements), the seller would have entitled to reacquire the land only by matching that bid. But dian conferred on a seller a right to redeem, not a right of first refusal.

[35] *See* Zhang, *supra* note 6, at 26-27; *but see* Pomeranz, *supra* note 10, at 127 (implying that an outright sale was always an option).

[36] *See* Zhang, *supra* note 6, at 24, 30-36.

[37] HUANG, *supra* note 5, at 90.

because, according to court records, in 1733 the Shen lineage made a final payment (*zhaotie*) of 2.4 taels to the Sang lineage.

C. The Costs of Strong-Form Dian

Strong-form dian, had it indeed prevailed during Qing and Republican times, would have significantly impaired economic growth in China.[38] Four sorts of potential costs warrant highlighting.

First and foremost, the dian tradition, which required a land seller to retain a right of redemption at the original price, would have greatly discouraged a land buyer from conserving soils and improving the transferred land.[39] Land buyers certainly were aware of this problem, because, as noted, they often insisted on a guaranteed usage-period during which they could amortize some of the costs of relatively permanent land improvements. Nevertheless, a dian sale brought in on average only about 70 percent of the proceeds of an unconditional sale.[40] This figure suggests that buyers, in noninflationary times, recognized that many land improvements would generate benefits that would last beyond the guaranteed usage period. A dian buyer would have to choose between either not making these improvements, or making them and running the risk that the holder of the redemption right would either threaten redemption, or, less commonly, actually redeem, in order to capture much of the improvements' value. Because a seller could not fully waive strong-form dian rights, ex ante the parties had no way of bargaining around this problem.

Second, strong-form dian, by introducing complexity and uncertainty, would have increased the transaction costs of land transfers and title disputes. As a result, a larger fraction of China's scarce human resources would have been devoted to the tasks of negotiating dian contracts ex ante and resolving dian disputes ex post. Dian appears to have been a major

[38] *But see* POMERANZ, *supra* note 4, at 70-73 (doubting that dian created major difficulties); Pomeranz, *supra* note 10, at 103 (similar).

[39] *See* Zhang, *supra* note 6, at 9, 47; *cf.* HUANG, *supra* note 5, at 89 (quoting Guomindang lawmakers' statement that dian was "hinder[ing] the development of the country").

[40] *See supra* note 33 and accompanying text.

source of grief. A significant amount of the historical evidence regarding the institution comes from records describing the prosecution of homicides arising out of dian disputes.[41]

Third, these transaction costs would have been the equivalent of a tax on land transfers, and thus reduced the volume of land sales. The historians who have studied dian typically portray dian sellers as competent farmers who had encountered financial distress.[42] This doubtless is accurate in many instances. But a small farmer who was not in financial distress might want to sell simply because a buyer who could better manage the farm had offered a purchase price that would generate gains from trade for both the seller and the buyer.[43] The selling farmer might be, for example, aged, disabled, or relatively inept at farming, and also lacking in close kinfolk with agricultural skills as good as the buyer's. By raising the transaction costs of land transfers, strong-form dian therefore would have inhibited the transfer of China's agricultural lands to abler managers.

Fourth, strong-form dian would have discouraged an agricultural entrepreneur from trying to assemble small adjacent plots to create a large farm whose operation would give rise to efficiencies of scale. In the Yangtze Delta during Qing times, the average farm included only 1-to-2 acres (6-to-12 mu).[44] In many settings, the coordinated construction of paddy walls, dikes, and irrigation systems to serve these tiny fields would have given rise to efficiencies of scale. It is also possible, as Zhang asserts, that a "managerial farm" entailing supervision of hired labor on a much larger tract (characteristic of England at the time), would

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[41] *See* THOMAS M. BUOYE, MANSLAUGHTER, MARKETS, AND MORAL ECONOMY: VIOLENT DISPUTES OVER PROPERTY RIGHTS IN EIGHTEENTH-CENTURY CHINA 167 (2000) (reporting that 92 of 300 homicides arising out of property disputes were provoked by "redemption/sales" issues).

[42] See, e.g., HUANG, *supra* note 5, at 73 (stating that "peasants usually sold their land out of necessity for reasons of survival"); Zhang, *supra* note 6, at 46 & n.325 (citing numerous sources); cf. HUANG, *supra* note 5, at 88 (quoting Guomindang lawmakers' statement that dian was "a strong point of our country's morality of providing help for the weak").

[43] *See* Ellickson, *supra* note 12, at 1375-80. Pomeranz doubts that "the most talented farmer" would obtain a much higher crop yield from a given plot than would a "less-skilled farmer." POMERANZ, *supra* note 4, at 70-71. Even if the distribution of talent were to be that compressed, which is far from certain, factors such as a farmer's health, industriousness, and capacity to make land improvements might significantly affect relative crop yields.

[44] *See* Brenner & Isett, *supra* note 17, at 620.

have been a relatively efficient form of farm organization in China.[45] Faced with a custom of strong-form dian, however, a would-be land assembler might decide against attempting an assemblage. Too many potential redeemers would have the power to threaten to ruin a completed assemblage by extracting a key parcel.[46]

D. Varieties of Weak-Form Dian

In many contexts, the law and custom of dian differed from the form just portrayed. The leaders of Ming, Qing, and Republican governments at times all adopted legislation and regulations aimed at weakening the practice in order to spur economic growth, enhance tax revenues, and stem violence arising out of dian disputes.[47] Some laws authorized a seller to sell land unconditionally — that is, to waive all redemption rights ex ante.[48] Others attempted to establish a maximum length for the redemption period. The 1929 Republican Code, for example, set a limit of thirty years after the date of the initial sale.[49] And some legal measures aimed to restrict a dian seller to the receipt of only one additional transfer payment (*zhaotie*) from a dian buyer.[50] As noted, however, magistrates did not necessarily pay heed to statutes and regulations that cut back on customary dian rights.[51]

The *custom* of dian, however, may itself have been less "strong" than the prior discussion suggests. In certain times and regions, dian may have applied more firmly to, or perhaps only to, patrimonial lands that either included or were adjacent to the gravesites of the

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[45] *See* Zhang, *supra* note 6; *see also* Huang, *supra* note 3, at 515.

[46] *See* Zhang, *supra* note 6, at 47.

[47] *See* Pomeranz, *supra* note 10, at 130, 138-39 (implying that the Qing state opposed dian in part because dian disputes led to violence); *supra* note 41.

[48] See HUANG, *supra* note 5, at 72, and Zhang, *supra* note 6, at 28 (both discussing the Qing Code of 1730). The earlier Ming Code also recognized the possibility of an outright sale.

[49] *See* Zhang, *supra* note 6, at 36; see also *id*. at 28-30 (describing Qing attempts to limit redemption rights to 11-to-20 years after the initial sale). Because these laws fell far short of abolishing dian, they may have legitimized aspects of the custom. *See* HUANG, *supra* note 5, at 74, 77.

[50] *See* HUANG, *supra* note 5, at 75-76; *see also* Zhang, *supra* note 6, at 23.

[51] *See supra* text accompanying note 36.

seller's ancestors, and not to, for example, nonpatrimonial lands of absentee landlords.[52] In at least a few counties, local norms set an informal end-date on the exercise of redemption rights.[53] Although Huang states that redemption rights theoretically were perpetual, in the handful of dian disputes that he discusses, the largest gap he mentions between a dian sale and a claim of redemption is 77 years.[54] And, in that particular instance, the great-grandson who was claiming redemption rights settled for receipt of the wheat crop currently growing on the land.[55] This outcome suggests perceived weaknesses in his claim.

The Chinese institution of virtually permanent tenant topsoil rights also may have mitigated, in some instances, the economic costs of dian.[56] Topsoil rights first appeared during the Song Dynasty (960-1279), spread widely, and persisted into Qing and Republican times, when they drew hostility from legal reformers in part because they impeded tax collection.[57] The carving-out of separate topsoil rights, by further complicating land tenure, on balance may have inhibited China's economic growth. But this is far from clear. In situations where topsoil rights were essentially perpetual, a tenant farmer considering improvements or conservation measures would plan with an infinite time-horizon, the economic ideal.[58] In a society saddled with dian, topsoil rights thus may have been an adaptive second-best institution that on balance stimulated improvements to agricultural land.[59] The interrelationship, positive or negative, between dian and topsoil rights appears to be a fruitful topic for future research.

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[52] *See* HUANG, *supra* note 5, at 79-81 (noting relative strength of redemption rights affecting gravesites); Pomeranz, *supra* note 10, at 129 (asserting that landlords rarely negotiated to retain redemption rights); *see also supra* note 24 (suggesting that some dian "sales" were actually mortgage substitutes).

[53] *See* Zhang, *supra* note 6, at 26 n.179.

[54] HUANG, *supra* note 5, at 78-79.

[55] HUANG, *supra* note 5, at 78.

[56] See *supra* note 20 and accompanying text.

[57] *See* HUANG, *supra* note 5, at 100, 107-18.

[58] *See* Ellickson, *supra* note 12, at 1368-71.

[59] For discussion of investments in land improvements by tenants holding topsoil rights, see HUANG, *supra* note 5, at 117-18, and Pomeranz, *supra* note 10, at 105-06, 134.

E. Why Did the Custom of Dian Emerge and Endure?

Zhang persuasively argues that by Qing times the dian tradition was hampering China's economic growth.[60] In prior work, I advanced the hypothesis that the norms of members of a closely knit group tend to enhance the welfare of the group's members.[61] Zhang asserts that the persistence of dian is evidence that tends to disprove this hypothesis.[62] I agree. Although all of China has always been far too large to be regarded as closely knit, the residents of a particular rural area commonly have intimate and enduring relations. I am indeed puzzled that, under those social circumstances, they seem to have so rarely cast aside a custom that was holding them back.

In Huang's elegant phrase, dian exemplified "the precommercial ideal of permanence in landholding."[63] China is hardly the only society to have honored this ideal. Many ancient societies embraced a tradition that both tied family members to a patrimonial estate and bestowed on selected family members nonwaivable rights to redeem that land from creditors or buyers.[64] The Israelites' Holiness Code, for example, baldly states that "Throughout the land that you hold, you shall provide for the redemption of the land."[65] In a precommercial society, as opposed to a commercial one, nonwaivable redemption rights have fewer costs and greater benefits. Costs are lower because, with the near absence of trade, specialized labor, and advanced technologies for improving land, the disadvantages of tying up land in a family are smaller. Benefits are greater, in part because a precommercial state is likely to be relatively inept at providing defense and social insurance. Redemptive rights help to keep rural social networks closed by impeding land purchases by strangers, who tend to be less reliable allies in times of trouble.[66] Enduring patrimonial estates also provide a crude form of insurance. It is harder for members of a household to dissipate the soils of a land parcel than

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[60] Zhang, *supra* note 6, at 10, 52, 54.

[61] See ROBERT C. ELLICKSON, ORDER WITHOUT LAW 167-83 (1991).

[62] Zhang, *supra* note 6, at 10, 53-54.

[63] HUANG, *supra* note 5, at 71.

[64] *See* Ellickson & Thorland, *supra* note 11, at 400-01.

[65] *Lev*. 25:24; *see also, e.g*., 1 *Kings* 21:3, where Naboth refuses to sell his vineyard to King Ahab, saying "The Lord forbid that I should give you my ancestral inheritance."

[66] *See* Ellickson & Thorland, *supra* note 11, at 387-93; *see also* Zhang, *supra* note 6, at 52 (stating that dian may have contributed to social stability and cohesion).

to squander the purchase money they receive from a land sale. The right to redeem ancestral land therefore can be viewed as a paternalistic method of assuring the availability of at least some resources to the descendents of members of landholding families.[67]

It thus is not surprising that dian emerged in ancient China. The puzzle instead is why China, after it had commercialized, was so slow to cast off this precommercial norm. After 1600, England persisted in its continuing quest to eradicate encumbrances, such as restraints on alienation, entails, and open-field villages, that had been rigidifying its land markets.[68] Why didn't China, then enjoying its Golden Age, continue as briskly down that same path? Over the course of the eighteenth century, the dian tradition did weaken in China.[69] But the tenacity of its grip endured until the revolutionary government took over in 1949. During the first half of the twentieth century, for example, Guomindang authorities felt compelled to laud aspects of the ancient custom.[70]

Several significant social, political, and cultural differences between China and England may help explain why China would have had a harder time throwing off a precommercial tradition. China is far larger in both area and population, conditions that may make its nationwide norms sticker. China also is a far more ancient culture. The entails that England had to weed away, for example, dated only from 1066, two thousand years after dian had taken root. China's long tradition of strongly centralized governance, including, for example, its venerable system of national examinations, may have contributed to the rigidity of its norms.[71] Conversely, the gradual emergence of democratic institutions in England may have given that nation greater capacity to institute effective legal reforms. Finally, Confucianism, which features norms of filial piety and the veneration of elders, may have

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[67] *See* Ellickson & Thorland, *supra* note 11, at 390; *see also* Pomeranz, *supra* note 10, at 124 (interpreting dian as an expensive form of insurance against destitution). *See also infra* text accompanying note 92 (discussing the analogous contemporary Chinese policy that ties a rural household to a particular village by means of a registration permit)

[68] See *supra* note 19 and accompanying text.

[69] *See* Pomeranz, *supra* note 10, at 122 (citing Buoye, *supra* note 41, at 181-82).

[70] *See supra* note 27 and accompanying text & note 42.

[71] *See* KARL A. WITTFOGEL, ORIENTAL DESPOTISM: A COMPARATIVE STUDY OF TOTAL POWER (1957) (a classic source on the roots of centralized Chinese governance); SPENCE, *supra* note 14, at 229 (describing the national examination system).

helped underpin a nonwaivable norm of land redemption, especially in instances where patrimonial land was adjacent to ancestral gravesites.[72]

III. THE CHINESE GOVERNMENT'S CURRENT POLICY OF LIMITING PRIVATE LAND-USE RIGHTS TO A FIXED NUMBER OF YEARS

In China today, urban land is owned by the national government and rural land by some form of village collective. Since 1978, these landowners have increasingly been transferring fixed-term possessory rights to private parties. As mentioned, the transferor of a fixed-term contract retains a reversion, that is, the right to repossess at the end of the term. This retained future interest is analogous to a seller's right to redeem under dian, and creates similar risks of short-sighted land management by the owner of the possessory interest.

A. Urban Land-Use Contracts

When urban land is involved, a state contract confers private rights to use a specific parcel of land for a fixed time period. When the intended use is commercial, Chinese law permits a maximum term of 40 years; when industrial, 50 years; and when residential, 70 years.[73] To obtain land-use-rights, an urban contract holder may have to pay the state a lump sum in advance.[74]

As the years pass, a contract holder, especially one considering land improvements, is likely to become increasingly concerned about several issues:

- whether the holder could compel the state to extend the length of the term;
- if so, the dates on which the holder could first and last apply for such an extension;
- what charges, if any, the state could exact when authorizing an extension; and

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[72] *See* Pomeranz, *supra* note 10, at 126 (stating that it would be "blameworthy" to lose land "entrusted to you by your ancestors").

[73] *See* Gregory M. Stein, *Mortgage Law in China: Comparing Theory and Practice*, 72 MO. L. REV. 1315, 1321 (2007). The source of these various maximum periods is Article 12 of the Interim Regulations of the PRC on Grant and Transfer of Urban State-Owned Land Use Rights, promulgated by the State Council and effective as of May 1990.

[74] Stein, *supra* note 73, at 1323.

- in the event that the state would not agree to extend the term, whether it would have to compensate the holder for improvements made to the land.

Contemporary Chinese law and practice on all these issues is unsettled.[75] The 2007 Property Law purported to clarify land rights by providing for the automatic renewal of any fixed-term contract on land used to build houses.[76] For two reasons, however, this provision will not bring peace of mind to the holders of these sorts of contracts. First, the 2007 Property Law did not address the third issue listed above, namely, the charges that the state is entitled to impose as a condition for granting a contract renewal. In the absence of a bearable ceiling on renewal charges, a contract holder's right to renew lacks teeth. Second, even if statutory provisions were to be truly protective, a contract holder might doubt that Chinese courts would enforce the holder's statutory rights over the objections of government officials.

China's practice of conferring private land-use rights in this manner threatens to impair its rate of economic growth. Consider the perspective of the owner of a profitable private factory built in reliance on a 50-year land-use contract signed in 2000. The date is now 2047 and the owner still is not certain that the state will renew the contract. The factory owner might act in a short-sighted manner by, for example, skimping on basic maintenance. And, years before, the owner might have stopped making long-lasting improvements to the manufacturing facility, in part because uncertainty about contract renewal would have made capital investors and mortgage lenders reluctant to finance those improvements. In the direst scenario, if current policies continue, the health of every private industrial, commercial, and residential enterprise in China will fade as its fixed-term land contract winds down.

This picture certainly is overly grim. There are only two owners of temporal interests, namely the person or entity that holds the contract, and the state agency that owns the reversion. These two parties usually could communicate without difficulty and, if they trusted one another, could easily negotiate a cooperative solution before the contract began to cause trouble.[77] They could agree in mid-term, for example, to extend the contract term. In reality, however, the two parties may not trust one another. The owner of the private land-use rights, for example, might possibly view state agents as inept or corrupt. If so, the policy of using fixed-term contracts will increasingly cause trouble in urban China.

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[75] *Id.* at 1324-35, especially note 32.

[76] 2007 Property Law, art. 149.

[77] *See supra* text accompanying note 16.

B. Rural Land-Use Contracts

Farmers' contract rights are significantly less secure than the rights of their urban counterparts. In the case of arable land, the usual term of a village cooperative's contract with a farm household is relatively short, 30-years.[78] Many of these contracts were signed in the late 1990s.[79] Unless village cadres soon undertake to extend the terms of these contracts, farming households will begin to manage their fields in a short-sighted manner.

But the shortness of the contract term is not the primary title risk that a farm household bears. Unlike an urban land contract, in practice a rural land contract typically does not confer the right to use *particular* fields in a village, but only the right to use *some* arable land, which cadres periodically reallocate to households, primarily on a per capita basis.[80] During the past three decades, cadres in a large majority of Chinese villages have adopted the practice of "readjusting" land holdings among member households.[81] A "small" readjustment affects only a few fields, perhaps to take into account changes in the number of residents in particular

[78] The 30-term term for arable land seems to have first appeared in various state decrees issued in the mid-1990s. Robin Dean & Tobias Damm-Luhr, *A Current Review of Chinese Land-Use Law and Policy: A "Breakthrough" in Rural Reform?* 19 PAC. RIM L. & POL'Y J. 121, 128 (2010). The Land Management Law of 1998 explicitly confirmed that 30 years was the proper period. Zhu et al., *supra* note 14, at 771-72. Article 20 of 2002 Rural Land Contracting Law and article 126 of the 2007 Property Law both repeat the 30-year figure. A 2005 survey found that over half of Chinese villagers had some form of written land-use contract. Zhu et al., *supra*, at 787-92. About 90 percent of these contracts indeed specified a 30-year term. *Id*. at 790.

[79] Zhu et al., *supra* note 14, at 788. To obtain rights to use arable land, a farm household actually needs two documents: a contract signed by village officials, and a certificate approved by provincial officials. *Id*. For information on the contents of these documents, see *id*. at 790.

[80] *See id*. at 777 n.33. Readjustment is a defining characteristic of a so-called "repartitional village," of which the *mir* of czarist Russia is perhaps the most discussed example. *See* Robert H. Bates & Amy Farmer Curry, *Community Versus Market: A Note on Corporate Villages*, 86 AM. POL. SCI. REV. 457 (1992), and sources cited therein.

[81] Zhu et al., *supra* note 14, at 775 (reporting, prior to 2006, one or more readjustments in 74.3% of villages, and two or more in 55.0%). On readjustments generally, see *id*. at 770-72, 775, 792-96 & 828-29.

households.[82] A "big" readjustment, by contrast, reshuffles many or most of the pairings between households and fields.[83] A survey carried out in 2005 by the Rural Development Institute (RDI) suggests that a typical villager would have experienced a big readjustment roughly once every ten years.[84] Big readjustments plainly foster wasteful land practices. Why improve a rice paddy if tomorrow your village may take it away?[85]

Recognizing this risk, in both 2002 and 2007 the Chinese government approved strongly-worded statutory provisions designed to help protect a farm household, during the term of its 30-year contract, from losing a field as a result of a readjustment.[86] History indicates, however, that many village cadres do not comply with directives from Beijing. The authors of the 2005 RDI survey concluded, for example, that almost one quarter of the villages in its sample had carried out an "illegal readjustment."[87] Because China lacks a judiciary capable of ruling against the interests of the politically powerful, farm households have few means of legal recourse.

C. What Is to Be Done?[88]

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[82] *Id*. at 770

[83] *Id*.

[84] This rough estimate is based on figures provided in *id*. at 775 tbl. 2. Additional RDI data on the frequency of big and small readjustments are presented in Brian Schwarzwalder, et al., *An Update on China's Rural Land Tenure Reforms: Analysis and Recommendations Based on a Seventeen-Province Survey*, 16 COLUM. J. ASIAN L. 141, 167-69 (2002).

[85] *See* Zhu et al., *supra* note 14, at 807-10 (marshaling sources that indicate the positive effects of secure titles on investment in land improvements).

[86] Article 27 of Rural Land Contracting Law of 2002 forbids the readjustment of contracted land, except under "special circumstances as natural disasters." The same article also states that a village cooperative, in its contract with a farm household, can waive its right to readjust. Article 130 of 2007 Property Law provides that a contracting village organization "may not adjust during the term," but then provides for an exception in the case of a natural disaster.

[87] The villages in the survey numbered 1,773. Zhu et al., *supra* note 14, at 768. Of these, "probably 423 . . . have conducted illegal readjustments." *Id*. at 794.

[88] The temporal dimension of land ownership is the only issue addressed in this section. China also confronts other pressing issues of land law. See *supra* note 8.

Deng Xiaoping's vision of a socialist China clearly recognized the need to incentivize improvements by decentralized land users. The Central Committee's "Document Number 1," issued in 1984, states in part:

> Extending the period for which land is contracted will encourage peasants to increase investment, conserve the natural fertility of their land and practice intensive farming. In general, the period for which land is contracted should be more than 15 years. Where production is of a developmental nature or takes longer to be realized—for example fruit growing, forestry or the reclamation of barren hillsides and wasteland—the period should be even longer.[89]

The Chinese government then was, and still is, fully aware that making property rights more secure will help further unleash the remarkable creativity and energy of the Chinese people. As the clock ticks down on current fixed-term contracts, contract holders, financiers, and government economic officials can be expected to push ever more intensely for some sort of reform.

Most boldly, China could jettison the fixed-term contract approach altogether, and authorize perpetual grants of urban and rural land to private parties.[90] This would promote better land stewardship by lessening the short-sightedness that is risked when the temporal division of ownership is mandated. In virtually all of the world's most prosperous nations, perpetual private land rights are routine. The Chinese government's resistance to outright private ownership of land may be a vestige of a fantasy that Marx and Engels, two young men devoid of rural experience, famously championed in 1848.[91]

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[89] Quoted in SPENCE, *supra* note 71, at 700.

[90] *See also* Zhu et al., *supra* note 14, at 834 (urging China to consider granting perpetual private land rights).

[91] In *The Communist Manifesto*, Marx and Engels called for "the abolition of private property in land" and the "centraliz[ation of] all instruments of production in the hands of the State." Karl Marx & Friedrich Engels, *The Communist Manifesto*, *in* KARL MARX: SELECTED WRITINGS 221, 237 (David McLellan ed., 1977). During the first few years after 1949, China's new revolutionary government nonetheless largely tolerated a "land-to-the-tiller" program under which former tenants expropriated the rural lands of landlords for their own use. *See* Zhu et al., *supra* note 14, at 764-66. As the 1950s progressed, however, the state increasingly took Marx and Engels' prescription literally and compelled farm households to join cooperative agricultural enterprises. This effort culminated in 1958–61with the disastrous Great Leap Forward, when the government collectivized most remaining private land holdings and placed local farm cooperatives under the direction of larger organizations.

Some government officials, however, may oppose perpetual private land rights, especially in rural areas, for more pragmatic reasons. The full privatization of land would disrupt China's current system of providing a minimum level of social insurance to rural households. Currently, each household is registered in a particular village, which is obligated to periodically allocate to registered households, but no others, some share of the village's lands. Because these land rights are inalienable, a household cannot sell its holdings and squander the proceeds. As a result, resident members of a registered household, when they become old or feeble, are assured of having an asset of some value.

Providing social insurance is indeed an essential function of government. But China's current system is highly wasteful. It encourages a villager to pursue a life of traditional farming on tiny plots of land, and not to seek a better life in a city. Per capita income in China's rural areas currently is less than one-third of income in its urban areas.[92] This disparity is a recipe for social unrest. Making the land titles of poor farmers more secure and alienable would free up the nation's workforce, and increase prosperity in the hinterland by stimulating land improvements and enhancing agricultural productivity. Because the current system does function as a system of social insurance, albeit a highly inefficient one, these land reforms would have to be accompanied by some form of tax-supported aid to the elderly and disabled.

Currently, the conferral of perpetual urban and rural land rights may not be politically feasible. If it is not, the Chinese government should consider less bold legislative steps for making private land titles more secure. It could require, for example, every contracting authority, when the term of a land-use contract has half elapsed, either to renew the contract or to agree to compensate the contract holder, at the end of the lease, for the market value of improvements. Just as crucially, the government should consider setting a ceiling on the charges that a contracting authority is entitled to impose as a condition of contract renewal. In many instances, the state would be justified in exacting some monetary payment to compensate it for relinquishing a portion of its valuable reversionary rights. But, in the absence of a legislative ceiling on this renewal charge, a statutorily proclaimed right to renew might be meaningless.

See id. at 768-69 (placing estimates of the resulting deaths at 15–30 million); SPENCE, *supra* note 71, at 578-83; Justin Yifu Lin, *Collectivization and China's Agricultural Crisis in 1959-1961*, 98 J. POL. ECON. 1228 (1990).

[92] *See* Zhu et al., *supra* note 14, at 764-66.

The histories of both dian and the current fixed-term contract policy illustrate the mischief that may arise when land is possessed in the shadow of a future interest. Both histories also illustrate how ineffectual law can be in the face of well-entrenched custom.[93] During the Qing Dynasty, magistrates continued to honor the dian tradition despite statutes and regulations that had been adopted to limit it.[94] Currently, many village cadres continue to readjust rural land holdings despite laws that forbid that practice.[95] In its efforts to clear its land titles, China would benefit from having judges with both the power and inclination to enforce national legislative mandates over the wishes of regional or local authorities. As long as China continues to confer complex time-limited land rights, its lack of an independent judiciary will be a particularly worrisome. When law makes private land rights perpetual, informal social norms soon bolster these entitlements. One of the many advantages of a simple system of perpetual private land rights is its lesser dependence on the existence of effective courts.

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[93] *See* Frank K. Upham, *From Demsetz to Deng: Speculations on the Implications of Chinese Growth for Law and Development Theory*, 41 N.Y.U. J. INT'L L. & POL. 551 (2008-2009) (contending that development specialists tend to exaggerate the influence of the "law on the books").

[94] *See supra* text accompanying note 36.

[95] *See supra* text accompanying notes 80-87.