

USER RIGHTS OR OWNERSHIP: THE NATURE OF LAND RIGHTS IN IMPERIAL CHINA – USING TAIWAN DURING THE QING PERIOD AS A CASE STUDY

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Most scholars studying Chinese legal history or traditional land tenure in imperial China are of the view that private land ownership emerged in China just before the Qin Dynasty (221 BC) and existed throughout the period of pre-modern China, based on the alienability and inheritability of land during this period. Another school of thought finds that in imperial China, private land title holders had only the right to "cultivate and manage" land, because of the traditional concept that "all land under the heaven belonged to the king". This paper examines private title holders' rights over land and the nature of the imperial government's land rights during the last imperial period in China. Using the English Common Law concept of land tenure as an analytical tool, and through the case study of the Taiwan land tenure during the Qing Dynasty, this paper argues that, just like the English concept of fee simple which was land title holders holding land of the Crown, private title holders in imperial China also enjoyed a right that in essence was ownership, only subject to the government's ultimate title.

L'analyse développée par l'auteur portent sur la nature juridique et l'étendue des droits de propriété privée dans la Chine impériale. La plupart des chercheurs qui étudient l'histoire du système juridique de la Chine ou plus précisément celle des droits fonciers traditionnels dans la Chine impériale, s'accordent à reconnaître que le droit de propriété privée est apparue en Chine juste après la dynastie Qin (221 avant JC). Ce concept qui devait rester en vigueur jusqu'à la période moderne de la Chine, reposait sur le principe de l'inaliénabilité de la terre d'une part et sur l'absence de transmission héréditaire d'autre part. A l'inverse une autre partie de la doctrine (encore minoritaire) estime que dans la Chine impériale, les titulaires de droits de propriété foncière, ne disposaient seulement que du droit de cultiver et d'entretenir la terre, et ce par application de l'adage que 'toutes les terres qui se trouvent sous le ciel appartiennent au Roi'. En utilisant comme grille d'analyse les

principes dégagés par la Common Law anglaise, l'auteur s'intéresse plus particulièrement à la nature juridique des droits fonciers tels qu'ils étaient en vigueur à Taïwan durant la dynastie Qin. Ce faisant, l'auteur démontre que durant la période impériale, le régime des droits fonciers privés dans cette partie de la Chine, présentait des similitudes avec celui en vigueur dans la Common Law. En effet, bien que la propriété foncière appartenait soit à la Couronne soit à l'Empereur, les titulaires des droits qui s'y attachaient pouvaient dans les deux cas, s'analyser comme des droits de propriété pleine et entière.

I INTRODUCTION

There exists some confusion as to the nature of land holding in imperial China. The main school of thought is that private land ownership emerged in China just before the Qin Dynasty (211 BC) and existed throughout the period of pre-modern China.¹ Some Japanese legal scholars in the early 20th century, however, were of a different view. Studying the land law of Taiwan during the Qing period (1684-1895), these Japanese legal scholars found that in imperial China, private land title holders had only the right to "cultivate and manage" land, because according to the traditional Chinese concept "all land under the heaven belongs to the king", all land in China belonged to the imperial court.² Some contemporary legal scholars in Taiwan also argue that there was no concept of "ownership" in the traditional Chinese legal system, and the term "yezhu" 業主, which refers to registered land title holders, denotes some kind of business operation, rather than land ownership.³ How can a system be understood so contradictorily? What exactly were the rights of the land title holders and the imperial government respectively?

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- 1 For example, see Zhao Gang and Chen Zhongyi *Zhongguo tudi zhidu shi* [History of the Chinese land tenure] (Lianjing, Taipei, 1982), at 19; Chen Guyuan *Zhongguo fazhi shi* [Legal History of China] (Zhongguo shudian, Beijing, 1988, facsimile copy of Shangwu Yinshuguan, 1934), at 327.
- 2 See Linshi Taiwan Jiuguan Diaochahui *Taiwan sifa* [Private law of Taiwan] Vol 1 (Chinese translation, Taiwansheng wenxian weiyuanhui, Taizhong, 1990, original first published in 1910), at 52. Also see Taiwan Sheng Guanxi Yanjiuhui *Taiwan guanxi jishi* [Records of customs of Taiwan] vol 1B (Chinese translation, Taiwansheng wenxian weiyuanhui, Taizhong, 1984), at 181.
- 3 See Wang Tay-sheng *Taiwan falishi gailun* [Introduction to the history of laws of Taiwan] (4ed, Yuanzhao, Taipei, 2012), at 77 and 79.

This paper examines private title holders' rights over land and the nature of the government's land rights during the Qing dynasty, the last imperial period in China. It uses an analytical framework that was developed in English Common Law jurisdictions, namely, the distinction between ownership of seignory and ownership of land, or in other words, the separation of the Crown's ultimate title and ordinary proprietary rights.⁴ Originating from the English feudal land tenure system, the Common Law assumes that the Crown owns all land, and that "all land whatsoever is held, mediately or immediately, that is directly or indirectly, of the Crown".⁵ Private land owners do not have an absolute title to the land, rather all land titles are held of the Crown in fee simple. Fee simple is not absolute ownership as allodial title is, but it is not mere user rights. It is in essence ownership subject to the Crown's ultimate title.⁶

Using this framework, this paper examines the Qing government's acquisition of ultimate title once a territory was incorporated into the administration, and private title holders' rights and the government's powers over land. It uses Taiwan as a case study, as Taiwan was annexed by the Qing government in 1684 and Chinese settlement of Taiwan mainly occurred after the annexation. Although some aspects of land tenure might have varied in different areas of China, the basic land holding system was consistent across the empire. Therefore the nature of private title holders' land rights in Taiwan were materially the same as those in mainland China, and a study of the government's and private title holders' respective land rights in Taiwan will illustrate the system in imperial China.⁷

Part II of this paper examines the Qing government's gradual establishment of administration and ultimate land title over Taiwan. Part III demonstrates the procedure of acquiring land in Taiwan during the Qing period and examines the nature of proprietors' rights. Part IV analyses the nature of government's ownership through examination of the government's public power of taxation and forfeiture, as well as the government's position as a private land owner. Part V discusses the

4 See AWB Simpson *A History of the Land Law* (2ed, Clarendon Press, Oxford, 1986), at 48.

5 *Ibid.*, at 1.

6 *Ibid.*, at 47, suggests "to conceive of the tenant in demesne as the 'owner' of the land, and to treat the interest of the lords in the land as *iura in re aliena*".

7 Land title holders' rights in Taiwan in some cases were also complicated by the existence of and interaction with aboriginal land rights, but the focus of this paper is on the relationship of land rights between the government and land title holders. Aboriginal land tenure during the Qing period is the subject of my PhD study, and this paper does not elaborate on aboriginal rights beyond what is necessary.

evolution of the traditional Chinese concept of "all land belongs to the king" over the millennia, and compares this with the English notion of the king owning all land. This paper argues that the traditional Chinese concept of "all land under the heaven belongs to the king" had evolved to indicate the government's ultimate title, which means that the government was the source of land rights, and that it did not own all land within its reign as a private land owner. What land title holders had was not mere user rights, but land ownership. However this ownership was not absolute, instead it was to some extent similar to the English concept of fee simple.

II THE EMPIRE'S "DOMAIN" AND GOVERNMENT'S TITLE TO LAND

According to international law, sovereignty to a territory could be obtained through conquest, cession or occupation. Once sovereignty is established over a territory, the Crown in Common Law obtained an ultimate title over the land, subject to the existing aboriginal claims.⁸ In pre-modern China, there was no notion of "sovereignty", rather the imperial court's right to govern was referred to as a territory "entering the domain" (*ru bantu* 入版图).⁹ This part outlines the process of Taiwan entering the domain, and demonstrates that once territories entered the domain, the government claimed an ultimate title to the land.

A Taiwan "Entering the Domain"

Taiwan is about 400 kilometres from north to south, and about 145 kilometres from west to east at its widest.¹⁰ Mountain ranges run from the north to the south, occupying half to two-thirds of the island.¹¹ To the west of the mountain ranges are fertile plains, and to the east of the mountains are patches of lowland.

Taiwan was settled by various Austronesian-speaking groups thousands of years ago. Early Chinese records referred to the island later known as Taiwan, and

8 See *Mabo v Queensland (No 2)* [1992] HCA 23, Brennan J, in particular, para 51; *Ngati Apa v Attorney-General* [2003] NZCA 117, Elias CJ, at paras 25-29.

9 To the Qing government, a territory's entrance to the domain was not entirely the same as the modern concept of sovereignty, as the dispute between the Qing government and Japan over eastern Taiwan in 1874 demonstrated. This is a topic worthy of separate discussion, and this paper simply avoids using the term "sovereignty".

10 *The Republic of China Yearbook 2013* (Executive Yuan, Taipei, 2013), at 10 ("*ROC Yearbook*"). It is about one seventh the size of New Zealand.

11 *ROC Yearbook*, *ibid*, indicates the mountain ranges to be half of the island's area. Hung Chien-Chao *A History of Taiwan* (IL Cerchio Iniziative Editoriali via Gambalunga, Rimini, 2000) at 1, indicates two-thirds.

Chinese merchants and fishermen were present in Taiwan by the 1340s.¹² In the 17th century, before the annexation by the Qing government in 1684, Taiwan was occupied first by the Dutch and the Spanish, and then by the Ming dynasty loyalist Zheng family.¹³ The Dutch East India Company had a base in the present day Tainan and controlled the southwest part of Taiwan from 1624-1662. The Spanish were present at the northern tip of Taiwan from 1626 to 1644. The Ming dynasty loyalist Zheng Chenggong drove out the Dutch in 1662, and the Zheng family ruled Taiwan for over 20 years (1662-1683). The Dutch recruited Chinese labourers from mainland China to work on the farms, but the settlement was small, centring on the Dutch base at the southwest of Taiwan.¹⁴ The Zhengs established a formal Chinese style government, and encouraged Han Chinese migration to Taiwan. Zheng rule, like Dutch control, focussed on the southwest part of Taiwan, although the power base was somewhat bigger. By the end of Zheng rule, there were about 120,000 Chinese on the island, as well as about 100,000 aborigines.¹⁵ Some aboriginal villages near the administration centre, Anping (present day Tainan), also submitted to Zheng authority. Chinese settlements were mainly in the southwest, although a few existed in the middle and north of the western plains.¹⁶

In 1683, the Zheng regime surrendered to the Qing court, which formally annexed Taiwan in 1684. After annexation, Taiwan became a prefecture under Fujian province, with three counties under it. Taiwan county was based at the traditional administrative centre of the Dutch and the Zhengs. The land of Taiwan county was well developed and settled by Chinese communities.¹⁷ To the south of Taiwan county was Fengshan county, and to the north Zhuluo county. Together the

12 See Inō Kanori *Taiwan wenhuashi* [A history of Taiwan culture] (Chinese trans Rev ed, Taiwan Historica, Taipei, 2011, original text published in 1928) Vol 1, Part 1.

13 For recent scholarship on occupation and administration of Taiwan before the Qing annexation, see Tonio Andrade *How Taiwan Became Chinese: Dutch, Spanish and Han Colonisation in the Seventeenth Century* (Columbia University Press, New York, 2008).

14 See Song Tsêng-chang *Taiwan fuken zhi* [History of pacification and reclamation in Taiwan] (2ed, Taiwan sheng wenxian weiyuanhui, Taizhong, 1997), at 26.

15 See John Robert Shepherd *Statecraft and Political Economy on the Taiwan Frontier, 1600-1800* (Stanford University Press, Stanford, 1993), at 96. William Campbell *Formosa under the Dutch* (Kegan Paul, Trench, Trubner & Co, London, 1903), at 64, indicates there were 100,000 aborigines in 1654, as estimated by the then Dutch Governor of Taiwan Nicholas Verburg.

16 See Song, above n 14, at 43-45.

17 See Chen Wenda (ed) *Taiwan xianzhi* [Gazetteer of Taiwan county, 1720] (Taiwan Wenxian Congkan 103, Taiwan Yinhang, Taipei, 1961), at 54. The Taiwan Wenxian Congkan is a series of documents and works published by Taiwan Yinhang between 1957 and 1972. It will be referred to as TWWX hereafter.

three counties covered the whole western plains, but administration did not effectively extend to all areas, and a significant area was still under aboriginal control.¹⁸ During the first century of Qing rule, the government received submissions from aboriginal villages.¹⁹ By the end of the Yongzheng reign (1723-1735), over 100 aboriginal villages had submitted; and during the Qianlong reign (1736-1795), in total over 200 aboriginal villages were under the Qing rule.²⁰ Thus the government gradually extended the areas of control as the number of submitting villages increased.

After a major Han rebellion in Taiwan in 1722, the Zhu Yigui uprising, the government erected barriers along the foothills to prevent unruly Han settlers from entering the mountains, and thus created tangible and enforceable boundaries between the areas that were within and outside the domain. By the end of the Qianlong reign, the western plains were well under the government's control and were principally settled by Han Chinese. Most of the central mountain ranges and east to the ranges remained aboriginal territories and were outside the Qing government's domain for nearly 200 years. The exception was Gamalan (present day Yilan), a plains area situated at the northeast corner of Taiwan. At the end of the Qianlong reign and the beginning of the Jiaqing reign (1796-1820), settlers opened up thousands of *jia* 甲 of land in Gamalan.²¹ Both the settlers and aborigines petitioned government officials to establish formal administration over the area. After much discussion, Gamalan was "incorporated into the domain" and the sub-prefecture of Gamalan was established in 1810 (Jiaqing 15).²²

As foreign threats mounted against China, particularly after the Opium War in 1840, maritime defence once again became a major issue. The government and officials discussed bringing aboriginal territories under control, so as to defend effectively the island from foreign invasion.²³ Officials investigated areas of land

18 A fact well recognised in Xie Jinluan "Hazilan jilue" [Brief notes on Gamalan], in Ke Peiyuan (ed) *Gamalan zhilue* [Gazetteer of Gamalan, 1847] (TWWX 92), at 171.

19 For examples, see Zhou Zhongxuan (ed) *Zhuluo xianzhi* [Gazetteer of Zhuluo county, 1717] (TWWX 141), at 31. Also see records in *Qingshizong shilu xuanji* [Selection of veritable records of the Yongzheng emperor] (TWWX 167), at 7, 9-11, and 47.

20 See Song Tsêng-chang "Qingdai Taiwan fukén cuoshi zhi chengxiao jiqi yingxiang" ("The Results and Influences of Ch'ing's Policy to Pacify Taiwan with Reclamation") 1979(1) *Taiwan Wen Hsien* 142, at 146 and 148.

21 One *jia* is about 0.97 hectares.

22 See *Gamalan zhilue*, above n 18, at 9-11.

23 See indications in a memorial by the Fujian-Zhejiang governor in 1841, collected in *Tai'an huilu jiaji* [Collection of Taiwan documents series A] (TWWX 31) at 161-167.

suitable for development and settlement in aboriginal territories. They found four fertile areas that had not been developed: Shuishalian, Qilai, Xiuguluan and Beinanmi. Shuishalian located in Zhanghua county and was occupied by submitted aborigines, but previous governments had forbade Han settlement and land development in the area. The other three areas "[had] not entered the domain" as the aborigines had not submitted.²⁴ In the end the government decided that it was better not to open up those areas.²⁵ During the late Tongzhi reign (1862-1874), Qing officials admitted that "out of the 3,000 *li* of area in Taiwan, only about 2,000 *li* has entered the domain".²⁶

It was not until 1875 that the imperial court finally decided to incorporate the aboriginal territories. This was prompted by the Japanese invasion of the southeast part of the island in 1874, following the killing of Riukiu shipwrecked crews by some non-submitted aborigines in 1872. The Japanese government invoked concepts of international law and expressly challenged the Qing government's sovereignty over the aboriginal territories.²⁷ Japan later withdrew its troops after much negotiation and payment of an indemnity by the Qing court, and as a result the Qing government decided to bring the aboriginal territories under its control. In the following two decades, the government employed military force as well as bribery to induce aborigines to submit. The local administrative structure was adjusted and expanded with new counties and sub-prefectures being established. Taiwan was promoted to the status of a province in 1887. Thus the Qing government attempted to extend administration over the whole island, and Taiwan completed the process of "entering the domain".

B The Government Acquired Absolute Title

The government's claim of title to land lay in its assumption that it could make use of the land as it pleased once a territory entered the domain. This was

24 Ibid.

25 Ibid.

26 See Wang Kaitai (ed) *Fujian Tongzhi Taiwan Fu* [Gazetteer of Fujian province, Taiwan prefecture, 1871] (TWWX 84), at 432. *Li* was a distance measurement, but could also be used to measure areas.

27 See documents collected in *Tongzhi jiawu ribing qintai shimo* [Accounts on the Japanese invasion of Taiwan in 1874] (TWWX 38) and *Jiawu gongdu chaocun* [Remaining documents on the 1874 event] (TWWX 39). Also see Chang Lung-Chih "From Island Frontier to Imperial Colony: Qing and Japanese Sovereignty Debates and Territorial Projects in Taiwan, 1874-1906" (PhD diss, Harvard University, 2003), at 51-58.

manifested mainly in its power to grant land titles to subjects, in terms of land that was under cultivation, as well as land that was still in a wild state.

Upon annexation, the government granted titles to the cultivators who had been tenants of the Zheng period landlords. By the end of the Zheng rule, there were about 10,000 *jia* of government land (*guantian* 官田), from which the Zheng government extracted rents as landlord.²⁸ About 20,000 *jia* were "official land" (*wenwu guantian* 文武官田), which were developed by officials in their private capacity and by other private entrepreneurs.²⁹ Tenants of official land paid rents to landlords who then paid land tax to the government. There were also about 40 military farms, which were developed and farmed by the Zheng soldiers. After the annexation, the military farms fell into waste, but some government land and official land tenants remained on their land. The Qing government allowed tenants of government land and official land to register their interests in the land.³⁰ The landlord class in the property ladder was removed, and the tenants paid tax directly to the government. Thus the government exercised its power to grant land titles to users.

The government also encouraged development of waste land. As Taiwan was annexed for strategic considerations, security on the island was paramount. The government restricted migration to Taiwan, and for most of the time prohibited development of aboriginal land, to eliminate conflicts among the peoples and reduce the possibility of rebellions. However local officials also called for development of waste land. The first magistrate of Taiwan county Ji Qiguang (1682-1683), seeing that "from south to north grass land [was] wild and vacant [*huangwu* 荒蕪]", recommended the government have people develop them into "fertile land" (*worang* 沃壤).³¹ A Taiwan Circuit Intendant in the late Kangxi reign (1662-1722), Chen Bin (1710-1714), who was protective of aboriginal rights over their traditional hunting grounds, nevertheless advocated agricultural development

28 See Ji Qiguang "Zaichen Taiwan shiyi wen" [Further discussion on Taiwan matters], in *Taiwan xianzhi*, above n 17, at 231; *Zhuluo xianzhi*, above n 19, at 85-86.

29 Ibid.

30 See Fan Xian (ed) *Chongxiu Taiwan fuzhi* [Revised gazetteer of Taiwan prefecture, 1747] (TWWX 105), at 182.

31 Ji Qiguang "Tiaochen Taiwan shiyi wen" [A discussion on Taiwan matters] in *Taiwan xianzhi*, above n 17, at 228.

of "vacant land" (*kuangdi* 旷地) – lands that were not effectively controlled by the aborigines.³²

A more radical officer, Lan Dingyuan, recommended that the government decree that the aborigines develop their non-cultivated land into agricultural land within one year, failing which the government should open up the land for settlers to develop.³³ Both Chen and Lan appeared to think that the government had rights and powers over all land within the domain, despite their different views towards aboriginal land. While Lan assumed the government had the power to grant any land for private development, Chen thought the government should exercise its power in a way that while allowing development of waste land, would restrain settlers from developing aboriginal land.

In any case, soon after the annexation, land development permits were issued, and new land was registered for taxation. In 1685 alone, 2,565 *jia* of newly developed land was registered.³⁴ In the following years, more land was added to the register. Soon officials found that "fine farms" (*liangtian* 良田) had replaced once wild waste land or even aboriginal hunting grounds.³⁵

From time to time, officials were explicit that once a territory entered the domain, they had title to the land. Ji Qiguang argued that "once [the territory] entered the domain... every inch of land belonged to the Emperor [*wangtu* 王土 literally "king's soil"]".³⁶ In 1848, Taiwan Circuit Intendant Xu Zonggan stated that "once they submitted, the aborigines are our subjects, and their land is our land".³⁷ Another Circuit Intendant in the late Qing years, Xia Xianlun, in his direction to one of his subordinates, made it clear that "all land in Taiwan is

32 See Chen Bin *Chen Qingduangong wenxuan* [Selected works of Chen Bin, 1765] (TWWX 116) at 13. A Circuit Intendant was the highest ranking officer in Taiwan before Fujian governor became stationed in Taiwan in 1884 and Taiwan was made a province in 1887.

33 Lan Dingyuan *Pingtai jilue* [Records of the pacification of Taiwan, 1723] (TWWX 14), at 54.

34 Gao Gongqian (ed) *Taiwan fuzhi* [Gazetteer of Taiwan prefecture, 1694] (TWWX 65), at 115.

35 See Huang Shujing *Taihai shicha lu* [Records of a tour on duty to Taiwan, 1726] (TWWX 4), at 65.

36 Ji, above n 28, at 232. The context of this comment was directed to land tax, but it nevertheless demonstrated his conviction about the government's title over land.

37 See Xu Zonggan "Yi Shuishalian liu fandi qingshe tunding shu" [A recommendation to establish aboriginal camps in the six villages in Shuishalian], in Ding Yuejian (ed) *Zhitai bigaolu* [A collection of essential documents on governing Taiwan] (TWWX 17) 272, at 279.

government land (*guandi* 官地).³⁸ That the government had an ultimate title over all land within the domain was the general conviction held by officials, and it was seen as a well-established tradition that did not need to be explained or argued. Under this general principle, aborigines' customary land rights were protected as was deemed appropriate, and subjects of the emperor could acquire land titles from the government.

III PRIVATE LAND TITLES

A Land Grants by the Government

Anyone could apply to the local government for a land development permit.³⁹ Regulations of the Ministry of Revenue required that upon receiving the application, the local government had to give public notice for five months. After five months if no one objected, a land permit could be issued.⁴⁰ The holder of a land development permit was called "*kenhu*" (垦户 literally the "developer"). The format of permits might vary, but a permit usually listed the land in question, the boundaries and the name of the *kenhu*, and stipulated that once the land was fully developed, it should be registered for taxation within the required time. An application for a permit and a development permit (quoted below) illustrate the process of land grants. The application for a permit was made in 1685, with the annotation of the local official at the end:⁴¹

Applicant Shen Shaohong [is filing this petition] for the matter of a notice of land development. In the north circuit there is a parcel of waste land in Luyecao, [which] was a military camp during the Zheng period. It is a reasonably broad area, and no one has applied for development before. [I] petition your honour to approve me to appoint Li Ying as manager and to recruit tenants to develop [the land], and [I] will start paying land tax after the period of three years. [I] further petition your honour to notify the Taiwan Circuit Intendant that within the four boundaries listed, Li Ying is authorised to go to Luyecao and build a house there, recruit tenants to develop the

38 Letter from Taiwan Circuit Intendant to the Hengchun county magistrate, 1875, collected in *Taiwan sifa*, above n 2, Appendix Vol 1A, at 42.

39 Although in reality only few people had the connection or knowledge to make applications. See Li Wenliang *Qingdai nan Taiwan de yiken yu keja shehui (1680-1790)* [The land development and Hakka community in southern Taiwan during the Qing dynasty] (National University of Taiwan Press, Taipei, 2011), at 49.

40 *Qinding hubu zeli* [Imperial approved regulations of the Ministry of Revenues], vol 7, at 22.

41 Collected in *Qingdai Taiwan dazhu diaocha shu* [Collection of large rent documents in Qing Taiwan] (TWWX 152), at 1 ("*Dazu diaocha*").

land as my inheritable property for ever [*yongwei shiye* 永为世业]. Thus is my humble request.

[boundaries]

In the [vacant] day of the 10th month of the 24th year of the Kangxi reign

Waste land development. By order from the superior, it has been approved for a permit to be issued with speed, so that [the applicant] can recruit tenants and make arrangements as soon as possible. Once the land is fully developed, [it] should be registered for tax according to law.

A land development permit of 1708 reads:⁴²

...according to *kenhu* Zhan Sheng's application, there is a parcel of waste land measuring over 10 *jia* at Damao Meizaikeng Liaokou, [boundaries]. According to the investigation of the interpreter Xie Zhang and others, there is no violation [to aboriginal land rights],⁴³ and a permit should be issued. Therefore, giving *kenhu* Zhan Sheng permission to develop the land as applied and pay land tax, this permit is issued.

Given in the [vacant] day of the fourth month of the 47th year of the Kangxi reign.

Permits conferred rights to develop land and did not confer rights over land as such. If permit holders did not develop the land within the stipulated time, they could lose the right to develop and others could apply to develop the land instead.⁴⁴ Land development permits were the prerequisite for land title. Anyone who developed lands without a permit risked not being recognised as a proprietor, as the land could be granted to someone else. Once the land was fully developed, the permit holder had to register the land for taxation. When applying for registration, a permit holder had to submit the permit as a proof and a title certificate was issued upon registration. The registered tax payer was called "*yezhu*", the owner of *ye*.

There was basically no restriction on the rights of *yezhu*. They could develop the land and cultivate it or alienate the title. Their rights were infinite in time, and

42 Ibid.

43 An interpreter was a person who knew the aboriginal language and was appointed by the government to aboriginal villages to assist with village affairs and official matters. It was a usual process that government officials investigated whether the land concerned encroached on aboriginal land before issuing permits.

44 For example, see a land development permit issued in 1888 (Guangxu 13), collected in *Taiwan sifa*, above n 2, Appendix 1A, at 235.

could be inherited by their descendants from generation to generation. *Yezhu* enjoyed a right that even the Japanese scholars had to admit "[in] nature was no different from ownership".⁴⁵ The most common action taken by *yezhu* was to give the land to someone else to develop and manage in return for the payment of annual rent, which was in fact re-granting the land title, as will be demonstrated below.

B Yezhu's Re-grants

Theoretically, only when land was fully developed did it become *ye*.⁴⁶ In a modern context, the word *ye* has a range of different meanings, such as industry, occupation and property.⁴⁷ In the context of land rights during the Qing dynasty, the legal meaning of *ye* is subject to debate. Commentators argue that *ye* means "land in which labour and capital have been invested", or "[business] management".⁴⁸ Thus *yezhu* means the person who has "real control" or cultivation and management rights over such land or business operation.⁴⁹ In reality, a land development permit often covered too large an area of land for the permit holder to personally develop, sometimes as big as a few thousand *jia*. Permit holders were allowed to recruit tenants to develop the land, as the 1685 application, quoted above, shows. In practice, permit holders often parcelled out the land, and through a "development deed" (*geiken pi* 给垦批) gave pieces of land for tenants to develop. The permit holder might or might not invest capital in the land development, as the parties saw fit. Whether the permit holder invested capital or not, he was the *yezhu*. There had been cases where a person applied for development permits over land that had been developed by someone else. In such cases the person who developed the land ended up becoming the permit holder's tenant and had to pay rent to the permit holder.⁵⁰ In this regard, *yezhu* was none other than the person who was granted the right to develop land, which the *yezhu* might in turn grant to someone else who became the real *kenhu*. In providing wild land for tenants to develop, the

45 As admitted in *Taiwan sifa*, above n 2, at 150.

46 See Azuma Yoshio "Qingdai Taiwan zhi tudi suoyou xingtai" [Land owning system in Taiwan during the Qing period] in *Taiwan jingjishi chuji* [A first collection of the economic history of Taiwan] (Taiwan yanjiu conkan 25, Taiwan yinhang, Taipei, 1954) 86, at 95.

47 See Martin H Manser (ed) *Concise English-Chinese Chinese-English Dictionary* (2 ed, Oxford University Press, Oxford, 1999), at 519.

48 See Azuma, above n 46, at 95. Also see Wang, above n 3, at 79.

49 See Azuma, *ibid.* Also see *Taiwan sifa*, above n 2, at 52.

50 Inō, above n 12, Vol 2, at 329. Also see Li, above n 39, at 7 and 23.

yezhu usually granted a perpetual lease to the development tenants, and only retained a right to a kind of ground rent.

A land development deed in 1732 illustrates the extent of the respective rights of the *yezhu* and the development tenant:⁵¹

The person recruiting tenants, *yehu*⁵² Li Chaorong, has bought a parcel of waste land at Datu, [specific location and boundaries].⁵³ Now [*yezhu*] recruited [developers' names] to take up the lease and develop [the land]. [The developers] offered 65 taels of sub-soil silver [*puyin* 埔銀], are willing to bring their own draft oxen and farm tools and build irrigation canals, and will develop and cultivate [the land] as their own perpetual property [*yongwei jiyè* 永为己业]. The annual return [*huali* 花利] is 15% of the total produce, following village precedents. Once the land is fully developed as paddy land... the rent [*zu* 租] is eight *shi* [of grains] per *jia*.⁵⁴ [The developers will] transport [the grains] to the harbour for payment [of rent]. [The agreement is reached by] both parties' free will, [and neither party] dares to repudiate in the future, or to request for increase or decrease [of rent]. [The developers] dares not delay or reduce the payment. If there are any arrears or insufficient payment, [the *yezhu*] will resort to the officials to enforce the payment. Lest oral agreements do not form evidence, a tenancy deed is given.

The sub-soil silver is received this day and acknowledged.

In the [vacant] day of the 10th month of the 10th year of the Yongzheng reign.

Tenancy Deed, given by Li Chaorong

In this deed, the *yezhu* did not invest in the land development. It is clear that the *yezhu* was not necessarily the person who invested labour and capital to develop a piece of wild land, or the person who had real control and management rights over the land, but rather the person who was granted title to the land. The *yezhu* then gave the land to the development tenant for use, who paid a lump sum and an annual rent, invested in the development of the land and had perpetual rights over the land. The lump sum paid was called "*puyin*", or "*pudi yin*" 埔底銀, as more commonly used. *Pu* 埔 refers to undeveloped land, and *pudi* 埔底 refers to sub-soil.

51 *Dazu diaocha*, above n 41, at 60-61.

52 *Yezhu* (the owner of *ye*) was also called *yehu* 业户 (the person who has *ye*).

53 It was rare that a *yezhu* would sell the title rather than recruiting tenants. Therefore the purchase referred to here was likely to be from the aborigines.

54 *Shi* is a measurement of capacity. One *shi* is about 103.6 litres.

The distinction of sub-soil and top-soil originated in the mainland China. The distinction was artificial, as they did not really relate to the sub-soil or surface, rather they referred to the different level of rights enjoyed by development tenants and *yezhu*. However the lump sum that tenants usually paid for the right to develop waste land was seen as purchasing the sub-soil, and the tenants were called the owner of the sub-soil (*tiandi zhu* 田底主), while the *yezhu* was called the owner of the top-soil (*tianmian zhu* 田面主). The *yezhu* was also called "large rent holder" (*dazu hu* 大租戶), and the development tenant "small rent holder" (*xiaozu hu* 小租戶). This was because, after developing the land, the developers usually subleased the land to someone else who was the actual cultivator. The sublease usually was a short term or periodic tenancy, and it was the development tenants who had real control over land. This was called the system of "one field, two owners" (*yitian liangzhu* 一田兩主).⁵⁵

Small rent holders had substantial rights over land. They could use the land as they pleased without being interfered with by the *yezhu*. For example, they could lease agricultural land to someone else for building a house.⁵⁶ The extent of their independent rights was such that they could even damage the land so that it was no longer suitable for production.⁵⁷ Even if they did not pay the rents and the *yezhu* seized the land, the *yezhu* had to return the land once the rents were recovered.⁵⁸ The small rent holder could also alienate the leasehold without consulting the *yezhu*. Therefore the rights of small rent holders over land were not restricted in any way, as long as they continued paying rents to *yezhu*.

The rent was fixed in perpetuity, either by a percentage or a fixed quota. The rates were largely consistent across Taiwan, unless in exceptional circumstances such as where the land quality was poor. The rent was 15% of the total harvest where a percentage was adopted. If it was by fixed quota, it was usually eight *shi* per *ji*.⁵⁹ These were the customary rates adopted in most large rent agreements. It

55 For the origin and development of the "dual ownership" system in the mainland China and in Taiwan, see Tai Yen-hui "Qingdai Taiwan zhi daxiaozu ye" ("The Ta-tsu and Siao-tsu (Obereigentum und untereigentum) of Taiwan in Ching Dynasty") 1963(4) *Taipei Wen Hsien* 1-47.

56 See *Taiwan Guanxi Jishi*, above n 2, at 192.

57 In this case the small rent holders would be obliged to buy out the large rent rights. See *ibid*.

58 For an example, see a land development deed of 1893 (Guangxu 19), collected in *Dazu diaocha*, above n 41, 128-129.

59 See land development or large rent lease deeds collected in *Dazu diaocha*, *ibid*, in particular, ch 2.

was almost like the service or fee that tenants paid their lords in the feudal grants in the English system, although in Taiwan the relationship was contractual rather than feudal, and the parties were on equal footing, at least legally.

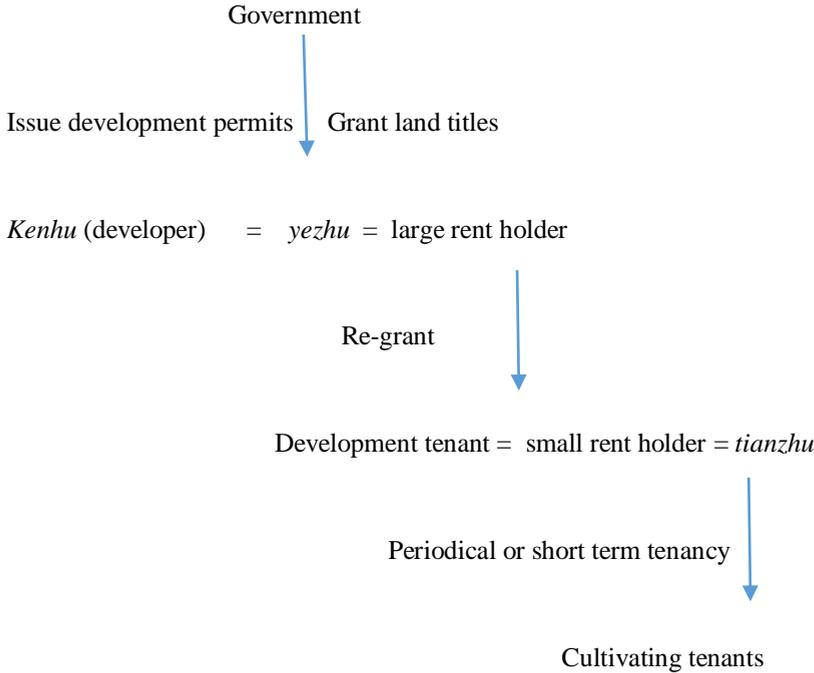
Land development deeds given by *yezhu* usually specified that the land was given to the development tenants as their "perpetual property", as shown in the above deed. Eventually, small rent holders were referred to as "field owners" (*tianzhu* 田主), to distinguish them from the *yezhu*.⁶⁰ When *yezhu* sold their rights in land, they usually specified that it was "sale of rent [collection rights]", while sales by small rent holders were called "sale of land".⁶¹ No wonder small rent holders' rights were recognised as proprietary rights, while large rent rights were regarded as creditors' rights or as a charge on the small rent rights.⁶²

In summary, the government granted land titles to *yezhu*. *Yezhu* were free to develop and cultivate lands themselves, or to grant them to development tenants and receive fixed percentages or fixed amounts of rent. Such rent was recognised as large rent. After opening up the land, development tenants were free to cultivate the land themselves or to sublease it to short term or periodic tenants. In relation to the government, the *yezhu* had independent rights which were alienable and perpetual. *Yezhu* had rights similar to ownership, but once they granted development and cultivation rights to development tenants, they only retained rights to collect rents and passed other property rights to development tenants. The diagram below depicts the relationships between various parties in land grants.

60 For example, see Chen Peigui (ed) *Danshui tingzi* [Gazetteer of Danshui sub-prefecture, 1870] (TWWX 172), at 88. Also see two land development deeds of 1872 (Tongzhi 11), collected in *Dazu diaocha*, above n 41, at 162-164.

61 For example, see deeds for sale or mortgage of land and deeds for sale or mortgage of large rent in *Dazu diaocha*, above n 41, at 185-266, and 282-316, respectively.

62 See *Taiwan sifa*, above n 2, at 176-186. Also see Tai, above n 55, at 26.



But for the traditional concept that the king owned all land within his reign, the scholars who insisted private land title holders only had user rights would have agreed that their rights were ownership.⁶³ Therefore close examination of the government's powers and rights over all land within its domain, the nature of the government's title, is warranted.

IV GOVERNMENT'S RIGHTS AND POWERS

Having granted lands to *yezhu*, the government did not have a right to use the land, take profits out of the land, alienate the land, or dispossess the title holders or tenants. The rights it had were tax collection and forfeiture in cases of rebellion or other criminal cases. These were the government's administrative functions, and were distinct from the situation where the government was a private land owner.

A Taxation

It had always been the Chinese tradition that land title holders should pay tax. Before the Eastern Jin period (317-420AD), tax was levied according to the actual produce of the land rather than on the land itself. But after Eastern Jin, tax was levied according to the area of land regardless of how much it produced.⁶⁴ That

63 See *Taiwan sifa*, *ibid*, at 92. Also see Azuma, above n 46, at 95.

64 See Zhao and Chen, above n 1, at 180.

said, in Qing Taiwan, the government did consider the quality and productivity of land, and different categories of land attracted different tax rates. Some commentators, based on the notion that the government was the owner of all land, suggested that land taxes were in fact the government's share of profits, but others believed that it was in the public law nature of tax rather than of private law rent.⁶⁵

This section argues that tax collection was part of the government's administrative functions. The government established complicated registration systems for tax collection, made tax policies including tax exemption and grace period policies, used coercive power to collect tax, prescribed arbitrary tax rates, and even decided on who should or should not pay tax. This will be illustrated below.

As mentioned above, once a parcel of land was fully developed, the *yezhu* was required to register it for taxation according to law. The government kept land registers for taxation and other administration purposes.⁶⁶ A "fish scale register" (*yulin ce* 魚鱗冊), devised during the Southern Song dynasty (1127-1279AD), recorded the location of each piece of land, the total area, boundaries, *yezhu*'s name, tenant's name and the *yezhu* of adjacent lands.⁶⁷ This register was prima facie proof of title. Another register, the "yellow register" (*huang ce* 黃冊), recorded each household's land holding and functioned as the basis for tax collection. Because these registers were not always updated when transactions or subdivision occurred, during the Qing dynasty a transaction register (*tuishui ce* 推收冊) was created to record sales and purchases of land. These registers were supposed to reconcile with and complement each other, so as to provide the government correct information for taxation as well as for land dispute adjudication purposes.⁶⁸

The government made tax policies to suit its administrative purposes. To encourage land development for agriculture, the government made regulations allowing tax exemption for a few years before developed land was subject to

65 See Azuma, above n 46, at 95.

66 For detailed accounts of the registers mentioned in this paragraph, see Zhao and Chen, above n 1, at 81-86.

67 Ibid, at 81. Pictures of land as drawn on the register often resembled the shape of fish scales, hence the name.

68 Unfortunately because of the desire of *yezhu* to evade tax and also because of the difficulties of compiling the registers, which needed extensive survey of land, the registers became inaccurate over time.

taxation, and such regulations applied to Taiwan as it was a part of the formal administration. Soon after the Qing court was established in Beijing, the law allowed a tax exemption period of one year or three years, depending on whether the land being developed had been farm land (which became waste due to the war) or waste land (which had never been developed) before the change of dynasty.⁶⁹ The exemption period was extended several times in the early years of the Kangxi reign, until in 1673 it was extended to 10 years.⁷⁰ The Yongzheng government further changed the law and allowed six years for paddy land and 10 years for dry land.⁷¹ During bad years of harvest, the government might also write off the tax.⁷² Other than by the government's exemption, it was illegal to develop land without registering it for taxation.⁷³ Local officials who did not accomplish the task of collecting full amount of tax could be, and were often, personally punished.⁷⁴

Tax rates were prescribed by the government. Unlike the rents between *yezhu* and development tenants, or the rents between small rent holders and cultivating tenants, tax rates were not negotiable. Land was categorised as paddy land (*tian* 田) or dry land (*yuán* 園), each was classified into upper, middle and lower levels. Tax rates were fixed by the government according to the categories and classes of land.⁷⁵ Tax rates changed over time, depending on the government's policy intention. For example, the Yongzheng government lowered tax rates for Taiwan in 1731 to encourage land registration.⁷⁶

At times, in considering tax rates, there might appear to be an element of taking a share of the profit, but the confusion was usually clarified later on. One such case was the tax rates for Gamalan. After the government established administration

69 Zhang Tingyu (ed) *Huangchao wenxian tongkao* [A comprehensive survey of documents of the imperial dynasty, 1787], vol 1, at 16. Land in Taiwan that was developed soon after the annexation was often registered for taxation in the next year. See *Taiwan xianzhi*, above n 17, at 182-184. The permit application of 1685, quoted in Part IIIA of this paper, suggests that a three-year grace period might have applied in some circumstances.

70 *Ibid*, vol 2, at 13.

71 *Ibid*, vol 3, at 1.

72 For examples, see documents collected in *Tai'an huilu bingji* [Collection of Taiwan document series C] (TWWX 176), vol 1.

73 See *Qingding hubu zeli*, above n 40, vol 8, at 37.

74 Many examples of officials being punished for not collecting the full amount of tax were recorded in *Tai'an huilu yiji* [Taiwan documents collection series B] (TWWX 173).

75 See tables of tax rates in Lian Heng *Taiwan Tongshi* [A comprehensive history of Taiwan, 1908] (TWWX 128), at 191-194.

76 See *Chongxiu Taiwan fuzhi*, above n 30, at 167.

over Gamalan, the local government designed to eliminate the class of *yezhu*, by limiting land grants to five *jia* per permit holder, so that developers could develop land themselves rather than re-granting it to development tenants. This meant that the stratum of large rent collectors disappeared, and more profits were left for either the developers or the government. The Ministry of Revenue recommended drawing an analogy with forfeited property and charged the rate of rent for tax, which implied that the government could take profit from the land and somehow confused rent with tax.⁷⁷ Local officials argued that the land was newly developed and the farmers were under pressure and that the tax rates were a lot higher than other parts of Taiwan. More importantly, forfeited land was government property, while the land in Gamalan was private property.⁷⁸ Thus the confusion between rent and tax was clarified through distinguishing between land that was owned by the government and land over which the government only had ultimate title.

The government could also make policies to adjust rents between *yezhu* and their tenants, and shift the tax burden from one to the other. In the late Qing years, the first Taiwan governor Liu Mingchuan initiated a tax reform in Taiwan. Because most *yezhu* had become absentee landlords, it was often difficult to collect tax from these landlords who lost control over land and suffered from rent arrears by small rent holders. Liu intended to eradicate the class of *yezhu* from the system, but only partly succeeded. Tax payment responsibility was shifted from *yezhu* to small rent holders, but the *yezhu*'s large rent was reduced by 40% of the original rent, to subsidise the small rent holders' payment of tax.⁷⁹

Therefore it was the government's prerogative as to when, how, how much and from whom to collect tax. The government collected tax as part of its public function rather than as a private land owner.

B Forfeiture

As in the English system where the king had the right to forfeiture,⁸⁰ it was the Chinese legal tradition that the government retained rights to forfeit property. In

77 See discussion in Yao Ying *Dongcha jilue* [Records on my appointment to the east, 1729] (TWWX 7), at 41-43.

78 Ibid.

79 See the decrees issued by Liu Mingchuan, collected in *Taiwan sifa* Appendix 1A, above n 2, at 190-192. For discussion on Liu Mingchuan's tax reform, see Hui Tsun "Qingdai Taiwan de zufu" ("Taxation in Ching Dynasty Formosa") [1959] 10(2) *Taiwan Wen Hsien* 91, at 137-147.

80 See Simpson, above n 4, at 19-20 for a brief introduction to forfeiture under the English land tenure. Forfeiture was abolished in England in 1870.

Taiwan as in elsewhere in China, forfeiture of lands could be triggered by rebellion, other criminal activities or even civil disputes.⁸¹

Usually if the offender was the *yezhu*, after forfeiture the government stepped in as *yezhu*, and small rent holders and tenants remained unaffected.⁸² However if the offender was a small rent holder, then all rights to land, including *yezhu* rights and small rent rights, were forfeited.⁸³ This principle was established after the forfeiture of large areas of land during the 1786-1788 (Qianlong 51-53) Lin Shuangwen uprising in Taiwan. By 1788, the government obtained over 1870 *jia* of paddy land and over 1210 *jia* of dry land by forfeiture.⁸⁴ The land was forfeited mostly because of the small rent holders' involvement in the rebellion.⁸⁵ A memorial by the Grand Secretary A Gui reasoned that forfeiture of land in such cases was justified in three aspects. Firstly the *yezhu* had the obligation to ensure the proper conduct of the tenants;⁸⁶ secondly since *yezhu* usually received the sub-soil money when leasing the land to small rent holders, it was in essence a sale of land and thus the *yezhu* had already lost most rights to land;⁸⁷ and lastly if the land was forfeited, it was not appropriate that the government should still pay large rent to the *yezhu*. Thus all rights in land were forfeited to the government, and the land became government property (*guanchan* 官产), from which the government received rents directly from cultivating tenants. The government became the private owner of the land, and paid land tax as a private land owner would.⁸⁸

Thus, the government could invoke its public power to forfeit land. The act of forfeiture changed the land from private property to government property, and the government shifted its position from a pure ultimate owner to a private land owner in regards to the forfeited land.

81 See Hui, above n 79, at 117-123.

82 Ibid, 118. Also see *Taiwan sifa*, above n 2, at 238.

83 Ibid.

84 See *Tai'an huilu jiaji*, above n 23, at 182.

85 In a few cases both the *yezhu* and small rent holders were involved.

86 In reality it was very difficult for *yezhu* to control the small rent holders' conduct. In the early years, land development deeds usually stipulated that tenants should abide by the law and should not be engaged in any unruly conduct, otherwise the *yezhu* had the right to claim the land back. Later on even this condition disappeared. See Tai, above n 55, at 16.

87 This appears to be the earliest statement that suggested the *yezhu's* lease was transfer of ownership of land.

88 See *Tai'an huilu jiaji*, above n 23, at 187.

C Government as *Yezhu*

Apart from forfeited land, there were other types of land where the government stood in the position of *yezhu*. The most significant types were official estates (*guan Zhuang* 官庄), aboriginal camps (*tuntian* 屯田) and soldier-welfare estates (*long'en Zhuang* 隆恩庄).

Official estates in Taiwan were first developed by local officials who then leased them out and collected large rent.⁸⁹ In 1725 (Yongzheng 3) rental income from official estates was incorporated into the formal fiscal system and became part of the government income.⁹⁰ After land tax was duly deducted, the rent remained in the hands of the local government for official use. A famous example of official estate was the *Lanxing* estate, developed by the Fujian maritime commander Lan Tingzhen, who led the pacification of the Zhu Yigui uprising in 1722 (Kangxi 61). The estate had 491 *jia* developed land, and in 1727 Lan was pressurised to surrender it to the government, which received the six *shi* per *jia* of large rent in Lan's stead.

Aboriginal camps were established in 1788 (Qianlong 53) after the Lin Shuangwen uprising was suppressed. To reward the submitted aborigines' assistance in the suppression, and to strengthen the guards between the government domain and the territories of the non-submitted aborigines, 12 aboriginal camps with 4000 aboriginal strongmen were set up along the mountain ranges.⁹¹ Apart from appropriating some waste land for the aboriginal strongmen to develop and cultivate, the government also paid monthly allowances to them. The source of the allowances came from over 3700 *jia* of land that the government found had been illegally developed by settlers and had not been registered for tax.⁹² The government set six classes of rent to each of paddy land and dry land, according to the quality of the land. In this case the rent included large rent and small rent, which meant that the government was not only *yezhu* but also *tianzhu* and had complete ownership of the land.

89 See Hui, above n 79, at 109-112 for detailed accounts of official estates.

90 See a memorial by the then Fujian governor Zhong Yin in 1756 (Qianlong 21), collected in *Tai'an huilu bingji*, above n 72, at 19.

91 It has been argued that this was the Qing government's design to govern through manipulation of ethnic relationships. See Ka Chih-ming *Fan toujia: Qingdai Taiwan zuqun zhengzhi yu shufan diquan* (*The Aborigine Landlord: Ethnic Politics and Aborigine Land Rights in Qing Taiwan*) (Academia Sinica, Taipei, 2003).

92 As they were outside the aboriginal boundaries and without government permission.

Soldier-welfare estates started in 1730 (Yongzheng 8), when the government decided to purchase some estates, and used the rental to provide for soldiers and their families in cases of sickness, death or other unusual occurrence.⁹³ The government, or at times the military units, collected large rent and stood in the position of *yezhu*.

Thus the contrast between the government granting land to private *yezhu* and the government acting as *yezhu* illustrates the administrative nature and public power of the government in cases where land titles were granted to private *yezhu*. Forfeiture of land illustrates the change of land ownership and the government's shift from one role to another. Although the concept that "all land belongs to the king" still existed, it did not necessarily mean that the government was a private owner. The next part examines land titles from a comparative perspective.

V LAND TITLES: A COMPARATIVE PERSPECTIVE

In the early Chinese history, during the Western Zhou period (1059-771BC), the land system of "*jingtian*" (井田, 井-shaped land) was practised.⁹⁴ The king or the lord divided land into 9-plot pieces as shown in the character 井, and appropriated one piece to eight households. Each household occupied and cultivated one plot, and the plot in the middle was common land which yielded produce for the lord or the king. The households usually rotated the occupation of the lands. Land tenure in China during this period was feudal grants, the households did not have rights beyond possessing, using and taking produce from the land.⁹⁵ From here the concept that "all land under the heaven belongs to the king" became known.⁹⁶

Ancient China was not alone in having this concept. That the king owned all land within his reign was the characteristic of the feudal world. In England the Norman Conquest saw the introduction of feudal tenure, and it became "a fundamental maxim" of English tenures that "the king is the universal lord and

93 See *Dazu diaocha*, above n 41, at 991. Also see Hui, above n 79, at 112-117, for accounts on soldier-welfare estates.

94 There exist ancient records about the system, but as mentioned in Zhao and Chen, above n 1, and Chen, above n 1, there are some doubts as to whether it was a record of practice or a suggestion of design. Both argue for existence of the tenure.

95 See Zhao and Chen, above n 1, ch 1.

96 This is a verse in the *Book of Songs* (*shijing* 诗经), dated in the Western Zhou period (1059-771BC).

original proprietor of all the lands in his kingdom".⁹⁷ Therefore all lands in England were "held mediately or immediately of the king".⁹⁸ In the early stages the land so held was not alienable, and the tenants could not exchange, mortgage or devise it by will without the consent of the lord.⁹⁹ It is not surprising that a commentator even suggests that the early Chinese system was similar to the English manorial system.¹⁰⁰

A similar system of land tenure was practised in feudal Germany between the 13th and the 19th centuries. Under this system, the overlords granted land to the peasants, and retained rights to demand tithes and labour from the peasants/vassals. The peasants had the direct right to use the land, but had the obligation to work for the overlords or to make payments as required. This was seen as a divided ownership, where the overlords had the *obereigentum* (dominium directum), and the peasants had the *untereigentum* (dominium util). The respective holders of the *obereigentum* and the *untereigentum* were not free to alienate their rights. There could be a chain of proprietary tenancy in a hierarchy, with the monarch at the top of the hierarchy and having the ultimate title to all land.¹⁰¹

The Japanese school of thought draws an analogy between the "large rent" and "small rent" system in Taiwan on the one hand, and the *obereigentum* and *untereigentum* system in Germany on the other.¹⁰² What they do not consider is that, *obereigentum* and *untereigentum* was a feudal arrangement, which did not

97 Wayne Morrison (ed) *Blackstone's Commentaries on the Laws of England* (Cavendish, London, 2001) vol 2, at 42 ("*Blackstone*"). For a recent discussion of theories of land tenure in English law, see the judgment of Brennan J in *Mabo v Queensland*, above n 8.

98 *Blackstone*, *ibid*, at 86. Also see Simpson, above n 4, at 1.

99 See *Blackstone*, *ibid*, at 47.

100 Chen, above n 1, at 327. For the position of manorial tenants under the English feudal system, see *Blackstone*, above n 97, at 74-75; John H Baker *An Introduction to English Legal History* (4ed, Butterworths, London, 2002), at 226.

101 See Judith Schacherreiter *Das Landeigentum als Legal Transplant in Mexiko: Rechtsvergleichende Analysen unter Einbezug postkolonialer Perspektiven* [The land ownership as a legal transplant in Mexico: Comparative legal analysis with the inclusion of postcolonial perspectives] (Mohr Siebeck, 2014), in particular, at 134-139 for the concepts of *obereigentum* and *untereigentum*. I am indebted to Professor Muayy Raff (University of Canberra) for referring me to this work, to Professor Raff and Professor Judith Schacherreiter for sharing their knowledge and insights on this topic in e-mail discussions, and to my colleague Ann Heimbrodt for translating the relevant pages in the book for me.

102 See *Taiwan sifa*, above n 2, at 160. Tai, above n 55, at 20-21, also draws a comparison with the *obereigentum* and *untereigentum*, although notes that the Taiwan practice did not have the feudal characteristic.

permit alienation of relevant rights; in contrast, the "large rent" and "small rent" system was contractual arrangement, which had free markets for the large rent rights and small rent rights. Long before the "dual ownership" system was practised, Chinese land tenure had moved on from feudal tenure. The Chinese feudal system of land tenure broke down during the Warring States period (476-221BC), when the state of Qin abolished the *jingtian* system. The unification of the warring states in China by the Qin dynasty (221-207BC) saw the formal establishment of a new administration and land system.¹⁰³ Feudal lords were replaced by appointed administrative officials, and common people were given private proprietary interests over land. The government appropriated land to households who then had their land registered and paid land tax. Land became inheritable and alienable. The system fluctuated and evolved over the millennia, but for most of the time land rights were alienable, and certainly inheritable.

Because of the alienability and inheritability, most scholars view such land holding as private land ownership.¹⁰⁴ In contrast, the Japanese school of thought focuses on the concept of the king's ownership, and argues that what was alienable was the cultivation right over land, not land itself.¹⁰⁵ The Japanese school of thought confuses the king's ultimate title with ordinary land ownership. The feudal tenure was different from ownership. English legal scholars draw distinctions between holding land and owning land.¹⁰⁶ Despite this, they do not regard the king "as being in any meaningful sense owner of all the land in England".¹⁰⁷ At most the king had an ultimate property right, in the sense that "the lord had once had the land, and might have it again if the tenant's interest ceased".¹⁰⁸

Furthermore, given that property is a bundle of rights,¹⁰⁹ there is in fact no difference between saying land was alienable or rights over land were alienable. The key issue is whether title holders' rights over land amounted to ownership. This is best illustrated through the development of fee simple estates in the English

103 See Zhao and Chen, above n 1, ch 1, for the development of land system since the Qin dynasty.

104 Zhao and Chen, above n 1, at 19. Also see Zhang Jinfan *Qingchao fazhishi* [Legal history of the Qing dynasty] (Zhonghua shuju, Beijing, 1998), at 245.

105 *Taiwan shiho*, above n 2, 145.

106 Baker, above n 100, at 229 and 223.

107 *Ibid*, at 230.

108 *Ibid*, at 229.

109 See Denise R Johnson "Reflection on the Bundle of Rights" (2007) 32 Vermont Law Review 247-272 for a good discussion on property as a bundle of rights.

tenure. In England, estates also became inheritable over time and by 1130 it was common to stipulate inheritance terms in charters of grant.¹¹⁰ By the middle of the 13th century, tenants' interests were freely alienable.¹¹¹ Eventually a tenant's interests "became a full property right ... subject to the lord's right to services and incidents".¹¹² The estate that a tenant enjoyed "was called 'fee simple', and it was the totality of ownership".¹¹³

The land rights of private title holders in China at this stage possessed the key features of fee simple: perpetuity and alienability, and "the whole interest" of the estate.¹¹⁴ As can be seen from the case in Taiwan, the title holders had perpetual rights over the land, could alienate their title, and could exercise their rights without any restriction. This was regardless of the fact that the concept that all land belonged to the king remained, which was "in reality a mere fiction", as the English notion of the king being the original proprietor became.¹¹⁵

VI CONCLUSION

The path of development and many detailed features of the English tenure and the traditional Chinese tenure differ. However there exists a parallel between the Common Law concept of the king being the owner of all land and the origin of all land titles, and the Chinese concept of all land belonging to the king. In the English feudal tradition the king owned all land within his domain. Therefore in English legal theory everyone holds land of the Crown, and the estate of fee simple is as close to allodial ownership as can be.

The Chinese legal tradition had the principle that the emperor owned all land within the empire, in the sense that he had the ultimate, universal and absolute ownership. After Taiwan was annexed by the Qing dynasty in 1684, the government gradually incorporated areas of land that were previously under aboriginal control. Once a territory entered the imperial domain, the government assumed ultimate ownership over the land. The Qing government then granted land titles to *yezhu*, who might re-grant the title through commercial arrangements. The

110 Ibid, at 260.

111 Ibid, at 261.

112 Ibid, at 259.

113 Ibid, at 263.

114 Simpson, above n 4, at 89.

115 *Blackstone*, above n 97, at 42.

government did not have private ownership unless it acted as *yezhu*, but it retained its public function of taxation and the prerogative of forfeiture for rebellion or serious criminal offences. The title that was granted or re-granted had the key features of English fee simple, namely perpetuity, alienability, and wholeness of interest. The right of a private title holder on Taiwan during the Qing Dynasty was beyond a mere user right and, just like fee simple, "it is not improper to call it ownership".¹¹⁶

VI CHARACTER LIST

Personal and places names are not listed

dazu hu 大租户 (large rent owner)

geiken pi 给垦批 (land development deed)

guanchan 官产 (government property)

guandi 官地 (government land)

guantian 官田 (government field)

guanzhuang 官庄 (government estate)

huang ce 黄册 (yellow register)

huangwu 荒芜 (wild and vacant)

jia 甲 (measurement of area. One *jia* = 0.97 hectares)

jingtian 井田 (井-shaped field, an ancient Chinese land distribution system)

kenhu 垦户 (developer)

kuangdi 旷地 (vacant land)

liangtian 良田 (fine farms)

long'en zhuang 隆恩庄 (soldier-welfare estate)

ru bantu 入版图 (enter the domain)

shi 石 (measurement of capacity. One *shi* = 103.6 litres)

shiyong quan 使用权 (user right)

tian 田 (field)

tianzhu 田主 (field owner)

¹¹⁶Baker, above n 100, at 263.

- tuishou ce 推收册(transaction register)
 tuntian 屯田 (military camp)
 wangtu 王土(king's land)
 wenwu guantian 文武官田(official land)
 worang 沃壤(fertile land)
 xiaozu hu 小租户(small rent holder)
 yehu 业户(land title holder)
 yezhu 业主 (land title owner)
 yongwei jiye 永为己业(as own perpetual property)
 yongwei shiye 永为世业(as inheritable property for ever)
 yuan 园(dry land)
 yulin ce 鱼鳞册(fish scale register)

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