

**How the Law May Create Poverty:
The Rent Prepayment Custom in Modern North China and Its Social Consequences**

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法律如何制造贫困——近代华北地区预租制的法律地位及其社会后果
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Abstract

The custom of prepaying land rent, a widespread practice in North China stretching from the Ming dynasty to the Republic, has not been fully discussed in the scholarship. This article addresses two issues surrounding this custom from the perspectives of legal history and the social and economic history of North China. The first issue is the custom itself. The article explores how the Guomindang government institutionalized and legitimized the custom at the normative and empirical levels through the Civil Code of the Republic of China and other laws. The second issue is the institutional consequences. Through historical analysis, this article points out that the rent prepayment custom brought about fluctuations in the grain market in rural North China, plunging peasants into a situation of selling grain at low prices in order to prepay the land rent, which in turn led them into a cycle of poverty.

Keywords

customs, state law, rent prepayment, North China, rural areas, poverty, market

论文题目:习惯的贫困——近代华北地区预租制的法律地位及其社会后果

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摘要

“预租制”作为近代华北地区广泛存在的租佃习惯，在学界尚未得到充分讨论。本文试图从法律史与既有的华北地区社会经济史的角度出发，解决预租制的两个问题。第一是制度本身问题，本文将分析民国国民政府如何通过中华民国《民法》以及其他特别法律，使该习惯在事实与规范层面得以制度化并具备合法性的。第二是制度后果问题，本文将通过史料分析，指出“预租制”这一制度化了的习惯，会带来华北农村粮食市场的波动，让农民陷入低价售粮以缴纳预租的局面，进而让农民进入贫困的循环之中。

关键词

习惯、国家法、预租制、华北、农村、贫困、市场

This article explores the conflicts and compromises between the Civil Code and other related laws of the Republic of China and the then-existing land tenancy customs in North China in the 1920s and 1930s, and analyzes how state law institutionalized and legitimized preexisting tenancy customs—specifically, the custom of “rent prepayment” 预租制, which required

peasants to pay rent in advance of cultivation—at the grassroots level and thus contributed to the impoverishment of peasants in modern North China.

In using the word “poverty” I refer to two phenomena: first, that the tenancy customs in modern North China had become unsustainable and clashed with the institutions established in the process of national modernization, and second, that the preservation and acceptance of the custom of prepaying rent by the relevant laws of the Republic of China worsened the destitution of the peasants to a certain extent. The article moves beyond traditional analyses of capitalism (imperialism), market economy, and class conflict (Bernhardt, 1992: 1–4; Huang Zongzhi, 1986: 1–7) by seeking to explain how China’s legal system—especially the relationship between state laws and customary laws—contributed to the impoverishment of China’s peasants in modern times. In addition, from the perspective of legal history and law and society, the article seeks to expand and refine the understanding in the broader legal scholarship of the relationship between state law and customs.

An analysis of the laws of the Republic of China (ROC) in the 1920s and 1930s and the tenancy customs in North China shows that the ROC’s laws, at both the normative and empirical levels, adopted a compromising attitude toward tenancy customs, which legitimized the custom of “rent prepayment” *de jure* and made it *de facto* widespread in North China. The ROC’s laws thus did not restrict much less abolish the custom of rent prepayment, which was widely practiced in rural North China. This provided an important institutional support for the impoverishment of the peasantry.

The article relies on the official archives of the ROC government and courts as well as a combination of rural surveys conducted by Chinese and Japanese researchers in the first half of the twentieth century. The surveys conducted by John Lossing Buck (1941), Li Jinghan (1933),

and the ROC government provide particularly useful data and reflect the conditions of rural North China in a relatively objective way. As for the Japanese side, the various surveys conducted by the South Manchuria Railway Company (Minami Manshū Tetsudō Kabushiki Kaisha), mainly in the form of interviews, provide a more direct picture of how economic, institutional, and customary changes might have affected the rural areas and peasants (Huang Zongzhi, 1986: 31–50). These two kinds of materials complement each other.

Customs in the Civil Code of the Republic of China

The modernization of Chinese law has, to a certain extent, amounted to a process of transplanting Western legal systems and dealing with traditional customary norms (Matsubara, 2018: 776–80; Xu Lizhi, 2000: 46–47). In 1904, near the end of the Qing dynasty, a Law Revision Bureau 修订法律馆, established to revise the law and enact modern civil codes, became mired in the controversy over *li* 礼 (“rites” or “rituals”) and *fa* 法 (“law”), which turned on the question of whether the new laws should include traditional Chinese ethics (Li Guilian, 1982). Although two drafts of civil codes had been prepared in 1911 and 1926, respectively, neither was fully implemented due to the chaos and wars in which China was embroiled. After the Guomindang (GMD) reunited China and established a Legal Bureau 法制局 in 1927, it launched a third civil codification project, and issued a number of civil laws from 1928 to 1931 (hereinafter referred to as the “Civil Code”) (Xie Zhenmin, 1948: 895). The codified laws that this article examines are the Civil Code and other related laws promulgated, and actually implemented, by the GMD government.

Although, unlike the late Qing government, the ROC government was not buffeted by the controversy over *li* and *fa*, it also placed considerable importance on the harmonization of

Western laws and domestic customs. The Civil Code transplanted provisions from German, Swiss, and Japanese civil laws, and at the same time absorbed the legal reforms implemented late in the Qing dynasty, in some cases preserving and in others abolishing traditional customs (Zhu Yong, 1999: 640).

The greatest number of customs abolished by the Civil Code were those in the Book of Family and the Book of Succession. The legislature recognized that customs concerning the family and succession had been “inherited from thousands of years of patriarchal law,” but at the same time it noted that “the world trend is contrary to it, and considering our party’s political program, [these customs] are especially contradictory.” The principle that succession is only a matter of property ownership, not a matter of status—a fundamental departure from the tradition of patrilineal succession 宗祧继承—was confirmed (Xie Zhenmin, 1948: 905–8).

Although the Books of Family and Succession eliminated many old customs, a large number were retained in the Book of General Principles, Book of Contract, and Book of Property. In addition to Article 1 of the General Principles, which stipulates that “in civil matters, those not provided for by law shall be governed by custom, and those not governed by custom shall be governed by jurisprudence,” some specific customs were also promulgated. These mainly included the preservation of customary rights in Chapter 4 (Articles 842–850) and Chapter 8 (Articles 911–927) of the Civil Code on the right of permanent tenancy and *dian* 典, a type of conditional sale (Yu Shengfeng, 2014: 239; Zhong Naike, 1937: 77).

In general, the Civil Code combined traditional customs and Western legislative thought. It was relatively conservative on issues such as property and contract, although it broke with the past on issues such as kinship and patriarchy. We now turn to an analysis of this preservation of customs and argue that it is because of the Civil Code’s preservation of property and contract

customs that the custom of rent prepayment in rural North China survived, and that the continuation of this custom increased the impoverishment of peasants.

The Rent Prepayment Custom in North China and Its Legal Status

The Rent Prepayment Custom

Land tenancy practices in modern North China made for weak contractual and status relations. Departing from the traditional permanent tenancy system with its strict written contracts, permanent right to cultivation, and payment of rent in kind, the tenancy system in modern North China underwent a crucial transformation. First, the custom of tenancy contracts moved from formal contracts to informal contracts. In the traditional tenancy relationship, it was the default custom between most landlords and tenant peasants to formalize their relationship by drawing up a lease. Such written contracts from the Ming and Qing dynasties are well attested to in the archives. In the early Republic the custom of recording land lease agreements in writing, with the landlord and tenant peasant each retaining a copy of the lease, continued (Shi Peisheng, 2002: 1.3, 3, 8–10, 21). Thereafter, however, in North China tenancy contracts became mainly oral. Moreover, the traditional roles of intermediaries and introducers were rendered superfluous.

Second, there was also a change in the status of the parties. The tenant peasant no longer cultivated the land permanently, but in most instances rented it for just one year. At the end of the one-year term, if the parties agreed, the lease could be renewed for another, and so on, year after year. Hence, permanent tenancy gave way to periodic tenancy (Li Sanmou and Li Zhen, 2000: 149–50). When the landlord and the tenant could not agree on renewing the lease, the latter had little alternative but to try to rent land from someone else. Thus, periodic tenancy not

only meant that the term of leases was drastically shortened, and that many tenant peasants cultivated the land of different landlords for a short time, but also that the tenant-landlord relationship became a purely economic contractual one, without a strong personal attachment.

Third, the form of rent payment also changed. Whereas rent had previously been paid in kind, it came to be paid in cash. Furthermore, and crucially, in most areas of North China there was a shift from paying rent in kind *proportionally* after the annual harvest—with the landlord and the tenant sharing the risks/benefits—to paying rent in cash annually before the land was even cultivated. That is, the rent was prepaid.¹ The documentary record of the rent prepayment custom can be traced back to the Wanli period of the Ming dynasty (1572–1620). The custom spread in the Qing dynasty and became prevalent during the Republican era (Jiang Taixin, 1988: 39). To some extent, the rent prepayment custom was the inevitable result of the aforementioned two transformations. That is to say, as oral contracts became prevalent and personal relations were weakened, landlords naturally were not willing to bear the risk of rent default. Most landlords in North China turned to the rent prepayment custom as a guarantee, thus transferring the risks arising from the harvest to the tenant peasants, and also avoiding the possibility that their tenants might default (Investigation Department, 1939: 129–30)

The rent prepayment custom involved the tenant peasant entering into a oral tenancy contract with the landlord after the autumn harvest and before planting, that is, between October

¹ In some places in North China prepaying rent was known as *shang jiaozu* 上交租, and in some places in Northeast China it was called *shang dazhu* 上打租. On the various terms for the rent prepayment custom, see Tian Qiuliu, 1936.

and December of each year according to the lunar calendar, and paying the rent for one year before starting to cultivate the land. As for who was responsible for providing farming implements, water resources, and livestock, each village had different customs.

All these various changes are reflected in an abundance of historical materials. For example, a survey conducted by the Ministry of Industry of the Republic of China and Jinling University in the 1930s found that the most common form of land rent in Hebei was cash rent (29.1 percent of the sample cases), followed by fixed rent in kind (26.1 percent), and some form of sharecropping 35.4 percent (Wu Tingyu, 1991: 93). Specifically, statistics from nine counties in Hebei reveal that in eight cash land rent was more common than share rent in kind, with cash rent accounting for 96 percent for all forms of land rent in Zhengding county and 100 percent in Xushui county. In the province of Shandong, 95 percent of all rental agreements in Jimo county involved cash rent while in En county cash rent was the sole system (Ministry of Industry, 1935: 47–48). Statistics of the Central Agricultural Experiment Institute of the Republic of China also confirmed that of all the provinces of China Hebei had the largest proportion of cash land rent.² Surveys of various places in Hebei below the county level also show that cash rent predominated. According to a survey of twenty-five villages in Hebei conducted by the Japanese in 1937, only three villages—Lujiazhai village in Zunhua county, Huzhuang village in Ninghe county, and Wanggezhuang village in Fanning county—did not observe the cash rent prepayment custom (Rural Survey Group, 1936a: 280–81; 1936b: 95–97, 331). At the same time, there were

² See “廿二省纳租方法” (Methods of collecting rent in 24 provinces), *Qiongya minguo ribao* 《琼崖民国日报》 [海口], June 18, 1935.

also some landlords who allowed tenants to pay the current year's rent after the harvest, but in these cases the rent was often higher than the rent under the rent prepayment system, and so most tenants chose to pay the rent in advance (Publication Committee, 1954: 147). Finally, very few villages practiced rent prepayment in kind (Rural Survey Group, 1936b: 150).

In short, the tenancy practices in modern North China can be summarized as follows: (1) most land tenancy contracts were oral, erasing the need for the intermediaries and guarantors of traditional times; (2) most of the land tenancy periods were one year; (3) land tenancy had basically been transformed from rent in kind to cash rent, and rent prepayment had become a custom.

Legitimacy of Tenancy Customs in the Civil Code

Although the Civil Code provided for the right of permanent tenancy in Chapter 4 of the Book of Property, most of the areas in Hebei, for example, had by that time entered the stage of periodic tenancy and no longer followed the tradition of permanent tenancy. This periodic tenancy was also clarified in Article 842 of the Civil Code: "The right of permanent tenancy means the right to pay tenancy rent to permanently cultivate or raise livestock on another's land. If the right of tenancy is created for a fixed period of time, it is considered a lease and the provisions on lease shall apply." The definition of permanent tenancy in this article is "the right to permanently cultivate or raise livestock on another person's land by paying rent." In judicial practice, the ROC Supreme Court also considered that the basis for determining if a tenancy relationship was

a permanent tenancy or a lease was whether the right to cultivate was “forever” or not.³ As far as fixed-period tenancy in North China is concerned, the term of leases was mostly one year, with the lease for the new year to be executed after the annual harvest, and thus what was involved was a “fixed period.” According to this article, periodic tenancy fell within the scope of the provisions of the Book of Contract of the Civil Code, and therefore was subject to the relevant laws and regulations on leases.

Chapter 2, Section 5 of the Book of Debt of the Civil Code sets forth the provisions related to “leases,” more specifically, Articles 457 to 463, which enunciate the provisions on the lease of cultivated land. For example, Article 457 stipulates that “a lessee of farming land whose income is reduced or eliminated due to force majeure may request a reduction or exemption of rent; the right to request a reduction or exemption of rent shall not be waived in advance.” The purpose of this article was obviously to protect the tenant peasant who was unable to pay the rent due to a poor harvest. Furthermore, the stipulation that “the right to request a reduction or exemption [. . .] shall not be abandoned in advance” recognized that as a rule the lessor occupied a relatively advantageous position, and thus the lessee’s right to a rent reduction had to be protected.

But on the other hand, this section, while providing for a certain degree of indefinite tenancy, also leaves room for customary practices as well. Article 439 provides that “the lessee shall pay the rent on the agreed date; if there is no agreement, it shall be paid according to

³ See Appeal 268, 1949 民国三十八年穗上字二六八号; also see, Judicial Interpretation 739 of 1932 民国司法院 21 年院字第 738 号司法解释.

custom; if there is no agreement and no custom, it shall be paid at the end of the lease term. If the rent is to be paid in installments, it shall be paid at the end of each installment term. If there is a season for the [collection of] income from the leased property, it shall be paid at the end of the income season.” In my view, the GMD government endorsed the customs surrounding rent payment in Article 439 and, at the same time, did not treat different lease customs differently in practice, thus providing legal space for the rent prepayment custom.

Article 439 stipulates that the manner of rent payment shall be determined by the parties on the basis of “freedom of contract.” The last sentence of the article is related to the lease of agricultural land, which requires that payment be made after the income is generated. However, the first section of the article gives priority to the autonomy of the parties and to customs. Accordingly, only when there is “no agreement and no custom,” the payment should be made “at the end of the lease term.” The stipulations in the next two sections—“The rent shall be paid in installments at the end of each installment term” and “at the end of the income season”—are a response to the preceding section regarding “no agreement and no custom.” This is a specific description of payment at the end of the lease term, not a valid provision of the lease contract. Legal academics of the time also pointed out that rent “shall be paid on the date agreed upon. If there is no agreement, custom should be followed. If there is no agreement or custom, the rent shall be paid on the date determined by law (cf. Article 439)” (Dai Xiuzan, 1948: 115; Zheng Aizou, 1931: 58). Accordingly, even if the agreement between the parties and the customs they followed did not conform to this provision, that did not directly affect the contractual validity of the payment of rent in the case of seasonal income.

Bearing in mind the notion of autonomy and compliance with custom, we now return to tenancy relationships in North China. As mentioned above, the rent prepayment custom in North

China meant that peasant tenants were required to pay the rent for the next year in advance before starting the tenancy, not after the harvest, as stipulated in the Article 439. According to my interpretation of this article, the Civil Code protected the prepayment of cash rent custom. First, most of the landlords and peasant tenants in North China had oral tenancy contracts, and according to the principle of freedom of contract in Article 439, if there was agreement between the parties, the agreement should be upheld, and thus rent prepayment would be protected. Second, Article 439 took a conservative position on customs: if there was a custom, the custom should be followed. And, as we have seen, in North China, rent prepayment was the main customary form of tenancy. Indeed, rent prepayment had become a custom with a very wide scope of application.

Legitimacy of Tenancy Customs According to Other Specific Laws

In addition to the Civil Code, which clearly regulated tenancy and customs, there were three other special laws related to tenancy customs: the Tenant Peasant Protection Law 佃农保护法, published in 1927, the Land Law 土地法, published in 1930 and implemented in 1936, and the Provisional Regulations on Tenancy 租佃暂行条例 of 1932. The core of my argument in this section is that the rent prepayment custom was legal before the Land Law came into effect in 1936. Neither the Tenant Peasant Protection Law nor the Provisional Regulations on Tenancy placed any de facto or normative restrictions on the rent prepayment custom. In fact, some provinces and cities did not enact regulations to restrict the rent prepayment custom, and hence the custom continued to prevail in North China. In terms of norms, the Land Law did not have a binding effect before 1936, and the Tenant Peasant Protection Law, although promulgated in 1927, never formally took effect in the official discourse of the GMD government.

Although the GMD government repeatedly acclaimed Sun Yat-sen's ideals of "equal land rights" and "land to the tiller" and regarded peasants and land issues as one of the government's very highest priorities, in practice it was compromising and hesitant about protecting peasants' rights. There was, in short, a gap between legal concepts at the top and de facto operations at the bottom. This left space for the continued existence of traditional rural customary tenancy practices. Although Article 5 of the Tenant Peasant Protection Law promulgated by the GMD government in 1927 stipulated that "all deposits or payment of all or part of rent in advance shall be prohibited," this stipulation had no practical effect since the law was actually implemented in only one province.

First of all, in practice the Tenant Peasant Protection Law was an important part of the GMD government's "twenty-five percent rent reduction" 二五减租 campaign (Miner, 1980). Relevant regulations were enacted in Hubei, Hubei, and Jiangsu, but only Zhejiang implemented the Tenant Peasant Protection Law. It did so by applying the Zhejiang Interim Measures for Rent Reduction 浙江省二五减租暂行办法 (Yang Tianshi, 2009: 39).

Although no legally binding regulations were issued in other provinces to implement the Tenant Peasant Protection Law, looking at the process by which the Zhejiang Interim Measures were revised from 1928 to 1932 regarding "rent prepayment," it is clear that the GMD government was hesitant and compromising in dealing with rural customs. When the Zhejiang Interim Measures were first proposed in 1926, they provided that "advance rent shall be prohibited in principle, [however,] when unavoidable, one-third of it shall be removed first 得先去三分之一." This provision prohibited the rent prepayment custom, but also made some compromises. It allowed the custom to exist in unavoidable situations on the condition that the advance rent be reduced by one-third of the original amount. However, the first amendment,

made in 1927, strengthened the restriction on “withdrawal of tenancy,” but did not follow the intent of the Tenant Peasant Protection Law by completely prohibiting “rent prepayment.” The second amendment, in August 1929, paradoxically completely removed the restriction on “rent prepayment” and allowed the rent prepayment system to continue unfettered. The third amendment, in July 1932, and the amended Article 13 of the Zhejiang Interim Measures, reinstated the prohibition on “rent prepayment”: “rent prepayment shall be prohibited, but if the amount of prepaid rent is actually lower than the usual local rent, it may be temporarily handled in accordance with custom” (Xu Shirong, 1990: 13–16). Although the Tenant Peasant Protection Law placed clear restrictions on the rent prepayment system, Zhejiang eventually chose to emphasize the “importance of custom” as the way forward in revising the Zhejiang Interim Measures in order to ensure that they were effectively implemented (Hu Jianzhong, 1932: 61–62).

Therefore, although the Tenant Peasant Protection Law proposed restricting the rent prepayment custom, in fact, as we have noted, only one province, Zhejiang, implemented the law, and even there the application of the law wavered, with the position on the rent prepayment system moving from “being prohibited,” to “not prohibited,” and finally to “to be handled in accordance with custom.”

In 1932 the GMD government promulgated the Provisional Regulations on Tenancy, Article 7 of which also prohibited “rent prepayment.” However, the Hebei government made it clear that “rent prepayment” was a common custom in the province and therefore should be allowed (Li Deying, 2006: 238–39). Thus, the regulation failed to achieve its original purpose, and the rent prepayment custom in North China continued.

From a normative perspective, judging whether the restriction on “rent prepayment” in the Tenant Peasant Protection Law had a normative effect or not requires understanding it in conjunction with the Land Law. Although the Land Law was made public in 1930, it was not formally implemented until 1936. Article 112 (or Article 177 when it was published in 1930) stated that “the lessor shall not charge or collect rent in advance.” The legislative purpose of this article was also to limit the prepayment of cash rent and to protect the interests of tenant peasants. According to legal theory at that time, the purpose of the article was to relieve the risk borne by the tenant peasants due to the prepayment of rent. In other words, under the proportional payment of rent in kind, the landlord and the peasant shared the risk, so that in the event of a disaster, both the landlord’s and the peasant’s income would be reduced. In contrast, under fixed monetary rent, the peasant tenant alone bore the risk of a poor harvest. And when the harvest was in fact poor, the tenant had to borrow in order to pay the rent (Li Zhiping, 1936: 132; Wang Xiaowen, 1934: 36–37). There is no doubt that the ROC enacted this article for the purpose of protecting tenant peasants. Moreover, the government had already granted tenant peasants the right to request rent relief in Article 457 of the Book of Contract of the Civil Code. Since the Land Law was a national law with formal normative effect, its prohibition of rent in advance reflected the attitude of the GMD government. Yet, because of the way Article 112 of the Land Law was interpreted, I argue, the Tenant Peasant Protection Law and the Provisional Regulations on Tenancy did not have the effect of restricting rent prepayment.

Although Article 112 of the Land Law conflicted with the priority of agreement and custom regarding the date of paying rent, it was superior in the case of leases of farmland because it was a specific law (Huang Youchang, 1947: 246). However, this superior status could only be realized when both the Land Law and other laws were enforced. The Tenant Peasant

Protection Law was introduced in 1927, the Civil Code was formally implemented in 1930, the Provisional Regulations on Tenancy were introduced in 1932, and the Land Law was implemented in 1936. Therefore, we must ask: Before the Land Law was formally implemented in 1936, was the rent prepayment custom recognized as legal by Article 439 of the Civil Code? Before the Land Law came into effect, the only possible restrictions on the rent prepayment custom were Article 5 of the Tenant Peasant Protection Law and Article 7 of the Provisional Regulations on Tenancy. Therefore, we only need to resolve the issue of the effects of these two laws. In my view, the Tenant Peasant Protection Law and the Provisional Regulations were documents that merely served as political discourse and did not have a legal normative effect.

I say this because, first, in the official discourses of the GMD government, the Tenant Peasant Protection Law was still a law that needed to be discussed and amended, not a law that had been put into effect by being officially issued. Furthermore, each province was free to make separate regulations based on the content of the law and local conditions. Evidence of this is Order 875 of 1929 of the Ministry of Judicial Administration. This order, issued in response to the Shandong High Court's inquiry as to whether the Tenant Peasant Protection Law should be applied, stated that "the application of the Tenant Peasant Protection Law shall be handled separately in accordance with the ROC government's Order 435 of August 15, 1928." According to the latter, "(a) The issue of rent reduction shall be governed by the provisions of Article 2 of the Tenant Peasant Protection Law. [. . .] The actual amount to be paid shall be determined by each local government in cooperation with the local peasants association in accordance with the local situation; (b) The Tenant Peasant Protection Law needs to be amended and supplemented in

detail. [. . .] Amendments will be proposed in the near future and approved by the central government for promulgation by the central government.”⁴ The law left it up to the local governments to enact specific regulations on rent reduction, but, as we have seen, only Zhejiang did so, and that effort ended in failure. From the normative point of view, this order stated that the law still needed to be revised and supplemented, and had to be officially promulgated by the national government, and so it was not yet a formal law, but only a draft to be discussed. As a result, the Tenant Peasant Protection Law was de facto replaced by the Land Law.

Second, according to the interpretation of the Judicial Yuan, all “rent deposits” 押租 before the implementation of the Land Law remained valid, and the same should have been true of rent prepayments. The evidence comes from Interpretation 1752 of Article 112 of the Land Law issued by the Judicial Yuan in 1938. Although this interpretation was initially aimed at addressing the issue of “rent deposits,” the “rent prepayment” mentioned in the same section can naturally be interpreted in the same way. The interpretation stated that “[when] the lessor of arable land [. . .] has received a rent deposit prior to the enforcement of the Land Law, the Land Law does not provide for the return of such a deposit” (Wu Jingxiong, 1948: 30). Therefore, although Article 5 of the Tenant Peasant Protection Law of 1927 prohibited “rent deposits” and “rent prepayment,” this interpretation held that before the Land Law came into effect in 1936, rent deposits were still legally valid and did not need to be refunded. That is to say, before the Land Law of 1936 came into force, a leasehold was still legally valid and did not have to be

⁴ See “山东高等法院民事解释” (The interpretation of civil issues from the Shandong High Court), 山东民国日报, Oct. 23, 1929.

returned. From my perspective, the same interpretation can be applied to “rent prepayment” provision. In other words, only after the Land Law came into effect in 1936 was “rent prepayment” officially prohibited and no longer legal. Thus, neither the Tenant Peasant Protection Law nor the Provisional Regulations had any regulatory effect restricting “rent prepayment” and “rent deposits.”

The Tenant Peasant Protection Law of 1927 and the Provisional Regulations on Tenancy of 1932, based on the above analysis, functioned merely as political discourse and had no practical effect. To reiterate, only one province, Zhejiang, implemented the Tenant Peasant Protection Law, but it took the conservative position that rent prepayment should be handled “in accordance with custom.” The continued prevalence of the rent prepayment system rent in the 1930s also revealed the impotence of the Tenant Peasant Protection Law. As a consequence, the impoverishment of tenant peasants deepened before the Land Law formally placed restrictions on the custom of tenancy, and after the Land Law was formally promulgated in 1936, China entered into a long period of total war with Japan, which objectively almost denied the possibility of the Land Law protecting tenant peasants.

How Legitimizing a Custom Impoverished Peasants

The literature on the relationship between customs and state law emphasizes the normative force of custom and its influence on judicial practice. In China studies, the former focuses on the binding force of custom in the social sphere and then turns to the concept of “customary law” in traditional China (Niida Noboru, 1963: 50; Terada Hiroaki, 2012: 90–112; Bourgon, 2002). The latter focuses on the level of judicial practice and whether customary law entered the system of state law (Huang Zongzhi, 2003: 121–26). This article explores how the relationship between

customs and state law worked in a broader context by looking more closely at the connections between legal practice and social and economic life. The compromise or conflict between customs and state law was not necessarily limited to one or the other. For example, “rural lending” has been compared with “legal interest” and “permanent tenancy” with “legal ownership” to show the contradiction between customs and state law. However, this contradiction is clearest perhaps precisely in institutions that are taken for granted. This can be seen, for example in how tenancy customs, protected by state law, clashed with the emerging modern market and became irrational and increased peasant poverty; how commerce and industry, which operated according to local customs, were influenced by the modern revision of state laws on foreign trade, which in turn affected the rural economy; and even how specific customs, such as the *dian*, led China to lag behind the West (Zhang, 2017). The practice of law is not the same as the practice of the courts, but rather involves how law and normative customs relate to and influence, or even shape, many areas of society (Calavita, 2010: 35–45).

In this section, I take up the negative impact of the practice of the rent prepayment system on the socioeconomic life of peasants in North China (Wang Pengxiang and Zhang Yongjian, 2015). By investigating how the rent prepayment custom caused fluctuations in the rural grain market in North China, I will show that the GMD government’s legal preservation of the custom in fact facilitated, rather than curbed, the trend toward increasing impoverishment of the peasantry. Simply speaking, since the rent prepayment custom required peasants to pay the next year’s land rent before they could continue farming, they had to market their crops as quickly as possible after the annual harvest, which in turn led to a drop in the price of local agricultural products and a loss of personal income.

Selling Food Grain at Low Prices

Although the history of cash land rent in China can be traced back to the Tang dynasty (Zhao Gang and Chen Zhongyi, 2006: 268), rent in kind still accounted for a considerable proportion of all types of land rent until the early twentieth century. It was not until the 1920s and 1930s that cash rent became mainstream. Even though the agricultural crisis brought about by the Great Depression led to a short-lived revival of in-kind land rent (Hou Jianxin, 2006: 67–68), tenancy relationships based on cash rent were already firmly established. Many scholars have recognized that the rise of cash land rent in China was closely related to the emergence of modern capitalism and the development of industry and commerce. Both the need of landlords and rich peasants for emerging investments and the strengthening of economic ties with urban areas were linked to cash land rent (Huang Zongzhi, 1986: 219–25; Chen Tingxuan, 1991: 47–49; Wang Qian, 2012; Wang Jian'ge, 1998). Although the birth of cash rent was more closely connected with changes in the state and the rural upper classes, cash rent was ultimately a form of rent payment for farming land, and the main bearers of this rent burden were by and large tenant peasants. Before cash rent, under the in-kind rent system, peasants simply cultivated the land and, at harvest time, they would deliver the fixed amount of rent in kind they owed to the landlords. After the introduction of cash rent, tenant peasants no longer shared the harvest with landlords in this fashion, but sold the crop themselves in exchange for money which they then used to pay rent.

Although the rise of cash land rent in North China was a result of the development of the commercial economy, it also contributed to the development of markets, especially those in key counties. Most scholars have viewed this development positively, considering it as part of a transition to capitalist agriculture or a manifestation of modernization (Skinner, 1998: 5–55; Ci Hongfei, 1998: 98–105; Guo Jinchao, 2003; Wen Rui and Chen Tao, 2016: 106–8; Gong Guan,

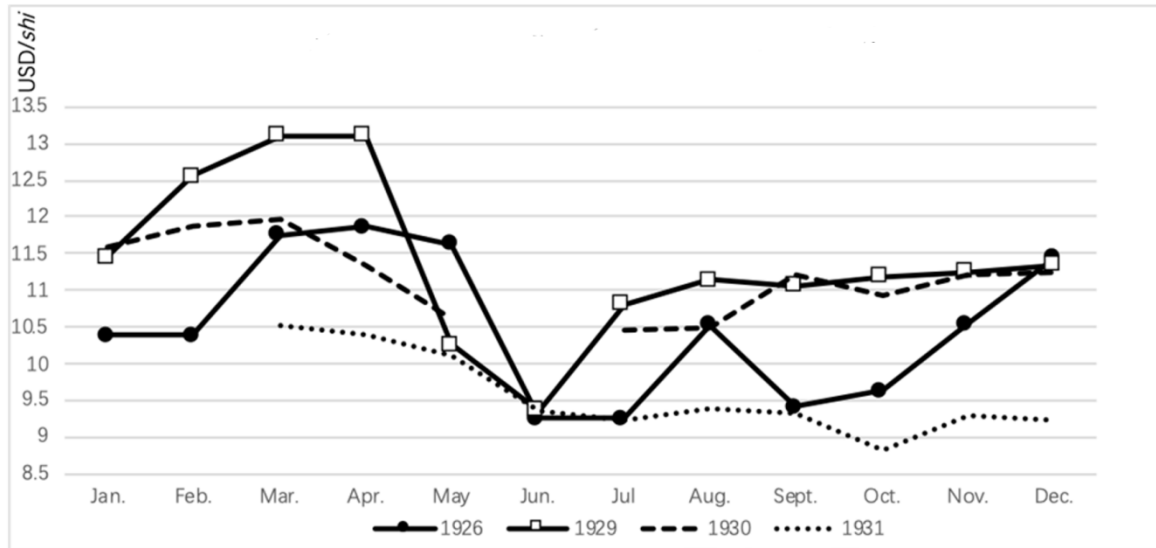
2001). In any case, the development of a commercial economy bolstered the rent prepayment custom. Moreover, this custom simplified everything: instead of written contracts, introducers, etc., tenant peasants could choose and directly negotiate with landlords, and instead of permanently farming for the same landlord, tenants could change landlords almost every year (Publication Committee, 1954: 20, 32). But on the other hand, this simplification in fact meant that tenant peasants became embroiled in complicated market transactions (Rural Survey Group, 1936a: 128). In areas where the rent prepayment custom was widespread, tenant peasants had to market their crops at the same time during the harvest season in order to raise money to prepay the rent for the following year. Of course, after the harvest, the supply of crops exceeded the demand, and the price fell. Some scholars have analyzed the consequences of the rent prepayment custom and pointed out that the prosperity of the agricultural market in North China was an illusion. In fact, they argue, peasants did not enter the market in search of profit, but were forced to sell their crops at a low price in order to survive, to get cash to prepay the rent for the coming year, and to pay off their debts. This kind of market was, in the words of Hou Jianxin, nothing less than a “starvation market” (Hou Jianxin, 2001: 67). Uchiyama Masao has further pointed out that although peasants in North China would adjust their crops to the market under conditions of poverty, they did not go to the market to “sell their surplus” but to “sell for survival” (Uchiyama, 2001: 42; Myers, 1970: 207–11).

Although previous studies have pointed out the problem of false markets in North China and have discussed the agrarian crisis caused by the region’s high population density, high land rents, and usurious loans (Huang Zongzhi, 1986: 304–8), few have explored the legal system in detail. The market discussed in this article was also a market formed by peasants who struggled to survive. However, it must be emphasized that peasants struggled to survive by navigating

between state law and rural customs. Market fluctuations, in turn, exacerbated peasants' poverty and compelled them to continue to expand their market participation in an attempt to compensate for their losses, thus creating a vicious cycle of poverty.

We begin with the price changes in the market for crops in areas where the rent prepayment custom existed. The seasonal fluctuations of rural markets in North China in the 1920s and 1930s are clearly reflected in survey data. Figure 1 shows the price fluctuations of wheat, the main grain crop in North China.

Figure 1. Average Price of Wheat in North China, Selected Years

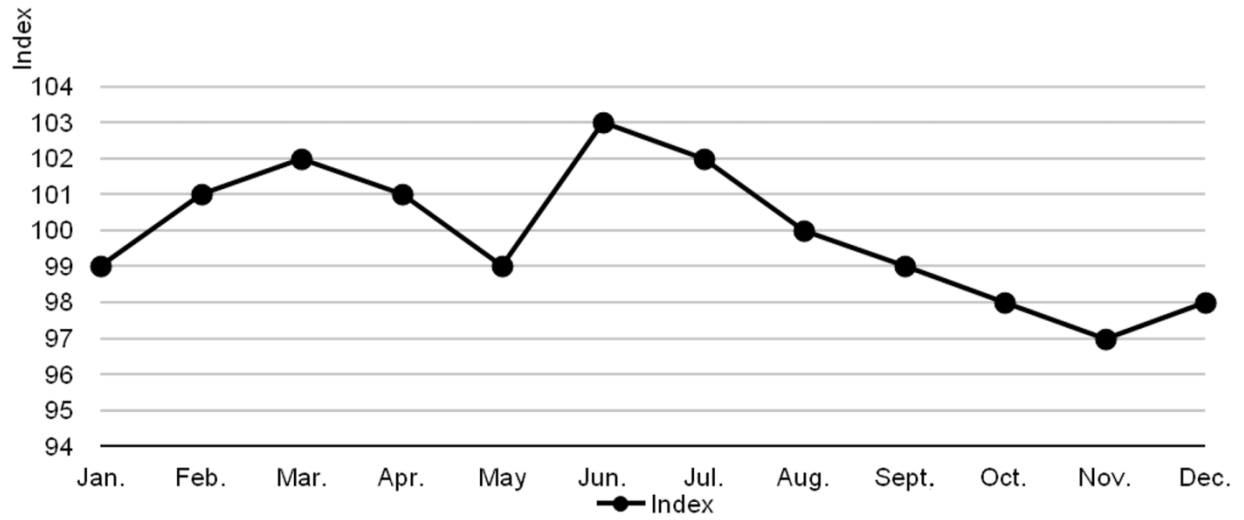


Data Source: Economics Research Institute, 1934: 23–24.

Buck's survey shows the seasonal changes in the price of millet, another important grain crop, in China's wheat region from 1929 to 1933 (see Figure 2).

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Figure 2. Index of Seasonal Changes in the Price of Millet in North China's Wheat Region, 1929–1933

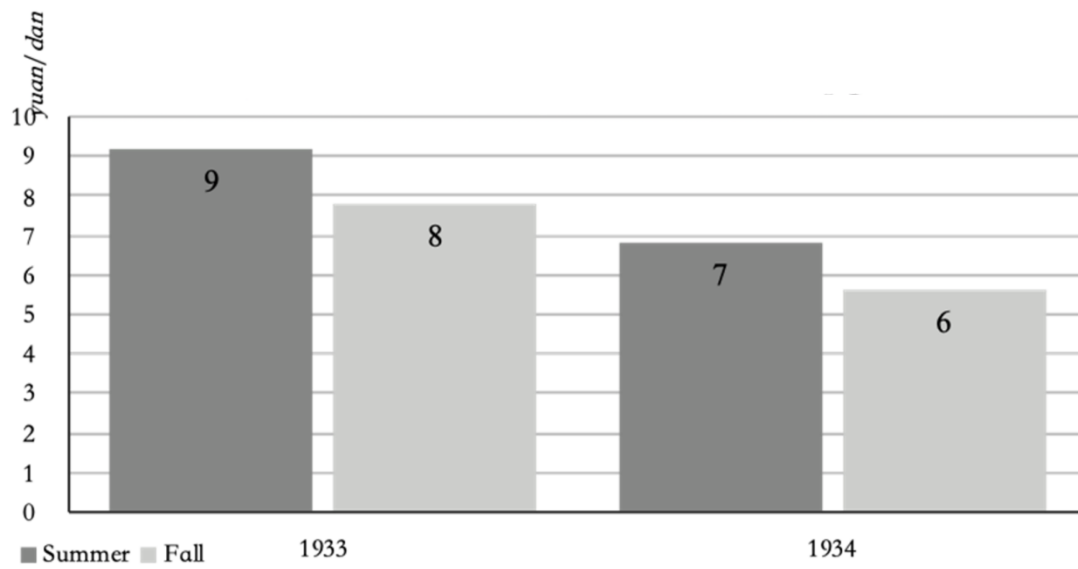


Data Source: Buck, 1941: 462–63.

In brief, Figures 1 and 2 show that a first price decline extended from April to June, a period associated with the winter harvest, and a second, sustained decline stretched from July to November, when the spring crop was harvested and marketed. Under the rent prepayment system, peasants mostly paid the forthcoming year's rent sometime between October and December, which means they needed to sell their grain between July and September. This was when most grain prices were falling.

In addition to market fluctuations, two other bits of data make it easier to visualize the impact of prices on peasants before and after the harvest. The Ministry of Industry's statistics for wheat prices in North China in summer and fall of 1933–1934, for example, show that the average selling price of wheat in autumn was lower than in the summer. In particular, the autumn price fell 15.03 percent compared to the summer price in 1933, and 17.53 percent in 1934.

Figure 3. Average Price of Wheat in North China, 1933–1934



Data source: Ministry of Industry, 1935: 3.

More specifically, in a survey of three villages in Qingyuan county in Hebei, for example, among the sixty-four families who rented in farmland, two forms of rent were found: cash rent (fixed rent) and rent in kind. Forty-five (or 70 percent) of the tenant households prepaid rent in cash. Tenant peasants were required to pay rent immediately after signing the contract, mostly in October of the lunar calendar, in order to be able to cultivate (Zhang Peigang, 1936: 25–26).⁵ Under the rent prepayment system, tenant peasants brought their grain to the local market (the final market was Baoding) in the fall after the harvest, where it was often sold for less than the pre-harvest price, as shown in Table 1.

⁵ The Qingyuan county survey covered the 500 farming households of three villages. Among them, there were 6 families of pure landlords 纯出租地主, 4 families of landlords/self-cultivators 自耕兼租主, 409 families of pure self-cultivators 纯自耕农, 58 families of self-cultivators/tenant peasants 自耕兼佃农, 7 families of pure tenant peasants 纯佃农, and 16 families who were complicated and did not fall into any of above categories (Zhang Peigang, 1936: 23).

Table 1. Price Comparison Before and After Harvest in Qingyuan County, Hebei, 1930

Crop	Before harvest	After harvest	Decline
Wheat	0.87	0.41	52.87%
Black beans	0.76	0.60	21.05%
Corn	0.65	0.57	12.30%
Millet	1.03	0.81	21.35%

Units: yinyuan 银元/dou 斗

Data sources: Zhang Peigang, 1936: 259; Hou Jianxin, 2002: 241.

After the harvest, the price of wheat, the main crop grown and sold by Qingyuan tenant peasants, fell by more than half. Peasant households that sold wheat accounted for 32 percent of all peasant households in the Qingyuan survey. Among them were 120 poor peasant households and 103 middle peasant households, of which 61 poor peasant households and 71 middle peasant households mainly sold wheat, accounting for 50.83 percent and 68.93 percent of their cohort, respectively (Zhang Peigang, 1936: 253–54). Poor peasants (who were mainly tenants) and middle peasants (who were both owner-cultivators and tenants) were the majority of those who farmed rented land.

Although this market was not built around profit-seeking, it cannot be seen as an unavoidable survival option based on ecological or demographic pressures, because not all poor and hired peasants necessarily entered the market. For example, only 49 percent of poor peasant households and 15 percent of hired peasant households in the three villages surveyed in Qingyuan county sold their crops (Zhang Peigang, 1936: 254).⁶ Rather, peasants who entered the market were those who needed cash to prepay the rent for the forthcoming year and thus were forced to sell their harvest at a low price. Therefore, I argue that, in addition to the objective problems of production technology and demographic pressure, the prevalence of the rent prepayment custom and the compromising attitude of the upper-level state in the civil legal system were important sources of peasant impoverishment.

⁶ Although only three villages were included in this survey, the author asserted that they were representative of Qingyuan county as a whole (Zhang Peigang, 1936: 5).

A survey from Shandong also reveals the cruciality of the timing of selling one's crops. According to the survey, published in 1942, the eight richest households in a village in southwest Shandong accounted for 2 percent of the population of the village, yet they earned more than all the others because they were in a position to sell their grain several months after the harvest (Pomeranz, 2005: 36).

Buying Food Grain at High Prices

Under the rent prepayment custom, aside from the impact on peasants' income due to the rush to sell grain, which led to lower prices for grain in general, another factor that affected peasants' income was that the majority of them did not use the harvest to feed the family, but sold most of it cheaply to pay rent and then bought inferior grain. Since the harvested crop was bought by grain merchants, for the most part, after paying the rent, peasants bought the food grain which they themselves consumed (Investigation Department, 1939: 178–83). However, at that time, the price would have risen again, putting peasants in the position of “selling grain at a low price and buying grain at a high price.” Under the cash land rent system, even if the contracted land rent rate was low, peasants still needed to use their surplus income to buy food grain, which came at a high price.

Let us start by looking at the prices at which peasants sold their crops and compare them with retail prices in a typical market. Again, using Qingyuan county as an example, peasants sold their crops in the fall at very low market prices. At the same time, in addition to the lower prices brought about by the buyer's market, the wholesale prices of bulk sales were significantly lower than the retail prices. After selling their crops at wholesale prices, the tenant peasants then bought their own food grain at the higher retail prices (see Table 2).

Table 2. Wholesale and Retail Prices of Crops in Qingyuan County, 1930

Crop	Wholesale price	Retail price	Difference
Wheat	0.44	0.78	77.27%
Black beans	0.47	0.61	29.79%

Units: yinyuan/dou

Data source: Zhang Peigang, 1936: 259–60.

As Table 2 shows, after the harvest, retail prices were much higher than wholesale prices—the retail price of wheat, for example, a staple food, was 77.27 percent higher than the wholesale price. This suggests that tenant peasants spent much more on food grain than did the typical owner-cultivator.

A more detailed comparison of the proportion of food expenses between tenant peasants and owner-cultivators under the rent prepayment custom is useful. In the case of Hetingzhuang village in Linyu county, Hebei, for example, tenancy was more common than in other villages in eastern Hebei. The village had a total of eighty households, of which four were landlords. Thirty-eight of the households (47.5 percent) were purely tenants, and twenty (25 percent) were both tenants and owner-cultivators. Thus, tenant relationships existed in 72.5 percent of the village's farming households. In terms of the land ownership structure, the largest landholding in the village was 47 mu, while the rest of the land was little concentrated (Rural Survey Group, 1936b: 359–60). The land tenancy practices in the village were based on a rent prepayment system, with very little rent in kind, and in the few cases where rent in kind was paid, the income was distributed 50:50 between tenant peasants and landlords, with the tenants entitled to the agricultural by-products (Rural Survey Group, 1936b: 362). Even under such conditions, the difference in living standards between tenant peasants and owner-cultivator peasants was enormous due to the market fluctuations brought about by the rent prepayment system.

Table 3. Comparison of Food Costs in Hetingzhuang Village, Linyu County, Hebei, ca. 1935

Type	Tenant peasant household No. 1	Tenant peasant household No. 2	Tenant and owner-cultivator peasant household No.1	Tenant and owner-cultivator peasant household No. 2
Total cost of living	78.09	141.35	12.42	37.12
Food expenses	50.29	87.72	8.66	19.96
Engel coefficient (%)	64.4	62.0	69.7	53.0

Units: yinyuan

Data source: Rural Survey Group, 1936b: 356, 391–92.

As Table 3 shows, three of four surveyed households were in the poverty range (with an Engel coefficient above 59 percent), with the fourth household barely within the range (50–59 percent) of meeting daily needs. Tenant and owner-cultivator peasants, however, differed significantly in terms of absolute total expenditures, this because of the rent prepayment system. It is also important to note that the two owner-cultivator households also rented in farmland, for which they paid cash. It can be assumed that owner-cultivator households that did not rent in land spent less on food grain, which is of course in line with the logic of “self-sufficiency” in owner-cultivator farming.

If tenant peasant households had some of their harvest left over after paying the land rent, they could avoid buying food at high prices by using the surplus to feed themselves rather than sell it. For example, a survey in Xiyu village, Tai’an, Shandong, shows that owner-cultivators generated a cash income by selling 31.6 percent of their crop, tenant/owner-cultivator households sold 26.2 percent of their crop, and peasants who were purely tenants paid 39.6 percent of their annual income as rent, while using the remaining 60.4 percent exclusively for feeding the family. In other words, after pure tenants marketed their crop and deducted rent from their cash income, they had no economic return (Investigation Department, 1940: 155).

I do not deny that the move from rent in kind to cash rent was a manifestation of modern economic development. However, one must also recognize that in modern China, the negative institutional impact of market fluctuations brought about by the coexistence of cash land rent and the rent prepayment custom was much more significant. This was mainly reflected in the fact that tenant peasants were periodically caught in the situation of selling grain at low prices and

buying grain at high prices. This was common in most areas of North China and was recognized, and protected, by the national government through state law.

Conclusion

This article has explored the customary tenancy system in North China in the 1930s and, using the state's response through law to the custom as the starting point, it traces how the legal system was arranged in such a way that peasants were forced into poverty during the process of legal modernization. The poor peasants of North China did not emphasize "moral economy" as the primary basis for collective survival, contrary to James Scott's argument (Scott, 1976: 4–12). In contrast, they entered the market, competed with each other, and fought for tenancy rights. Furthermore, Samuel Popkin's "rational peasants" model (Popkin, 1979: 29) is also not applicable since, as many studies have pointed out, peasants in North China did not enter the market in search of profit, but only in search of survival. Even though the peasants of North China may have chosen their farming strategies based on a variety of factors, there was no way for them to escape market fluctuations and improve their economic status (Myers, 1970). A more traditional view would see the greed and exploitation of landlords as the root cause of peasant poverty (Liu Shaoqi, 1946). Although the landlord class played a considerable role, scholars from the 1980s to today have continued to reevaluate the issue of landlords and the peasant class. From the examination of the structure of land rights, the investigation of tenancy relations, or the measurement of usurious interest rates with modern econometric tools, researchers have reached conclusions that depart from received wisdom (Zhang Youyi, 1988: 3–10; Qin Hui, 1993; Hu Yingzi, 2013; Liu Zhi, 2020; Zhao Gang, 1997; Zhao Gang and Long Denggao, 2012; Zhao

Gang, 2000; Qin Hui and Peng Bo, 2011; Gao Wangling, 2005: 77–130; Lin Zhan and Chen Zhiwu, 2015).

According to Joel Migdal (1974: 229), the emergence of revolutionaries is only the final link to the outbreak of revolution. However, the high rate of participation of tenant peasants in an unstable market was the real trigger of the revolution in North China. One of the major sources of this unstable market was that the GMD government accepted and, through law, legitimized the rent prepayment system. Studies of poverty have argued that institutions can be constructed in such a way that the poor do not have access to information needed for informed choices, thereby leading to decisions that are detrimental to their welfare (Banerjee and Duflo, 2012: 267–74). As we have seen in the example of the tenant peasants of North China, the poor were not only unable to make choices that furthered their interests, but in some ways even acted against their own interests within the institutional framework of state law and private custom.

In sum, contradictions could arise between traditional customs and modernized Chinese laws, and these contradictions could exacerbate peasant poverty. Perhaps the best way to approach this conundrum is to break free from the stereotype that “the economic belongs to the economic and the political belongs to the political.” In this article, I argue that, in addition to general ecological and demographic changes and the solidification of class relations, the negative attitude of the GMD government toward customs and its active construction of formal legal institutions, together with the preservation of anachronistic rural customs, constituted a closed loop that locked the peasants in poverty and forced them into a cyclical struggle for survival. At the level of state law, the GMD government preserved many economic customs, including those surrounding tenancy and property, both in legislation and practice. Yet at the same time, it pursued modern state building, promoted a commodity economy, and implemented codes. The

customs surrounding tenancy, such as the rent prepayment system, were preserved, a step incompatible with the consequences of modern state building. The result was that the self-sufficient village economy was devastated, pushing peasants into new social areas, such as monetary markets and interregional trade, and making them subject to market fluctuations. All of these worked together and increased peasant poverty.

From the perspective of the modernization of law, the entire modern legal history of China, and even the whole of East Asia, can be described as a process of transplanting Western law and adapting it to the local context. The conflict between law and custom has traditionally been an important point of departure for legal scholars to reflect on modernization. However, in the vast literature, we see more sympathy for and understanding of custom, and so much so that some scholars even argue that contemporary law still does not support the customary system enough and that customs should be more widely accepted (Xie Hongfei, 1998; Chen Wei and Bai Yu, 2019). While the Civil Code of the ROC may indeed have paid insufficient attention to custom, this lack of attention only means that the Civil Code incorporated too many general and specific customs without consideration, not that it did not incorporate enough customs. The Civil Code of the ROC, on the one hand, specifically provided for traditional Chinese institutions such as *dian* and permanent tenancy, and on the other hand, in general terms, it—without careful consideration—allowed the application of corresponding customs everywhere. By allowing these customs to persist, the Civil Code fail to reflect China's *Volksgeist*, and even allowed so-called “reasonable and legitimate” customs to limit modern development.

To recapitulate, the rent prepayment custom in North China and the GMD government's recognition of established civil customs constituted the legal institutional dimension that impoverished the peasants in North China. This anachronistic coexistence drew the peasants into

modern economic development and state building because of their need for money to prepay land rent, but at the same time, the custom itself led to fluctuations in the local food grain market in North China, and along with the turmoil brought about by modernization, tenant peasants under this tenancy custom could only remain in the rural areas, working scattered plots of land.

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Acknowledgments:

The author would like to thank Professors Taisu Zhang 张泰苏, Takamizawa Osamu 高見澤磨, Meng Hou 侯猛, and Peng Ling 凌鹏 for their guidance and advice. All mistakes are my own.

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